

Better a war criminal or a terrorist? A comparative study of war crimes and counterterrorism legislation

Kelisiana Thynne*

Kelisiana Thynne is a Legal Adviser at the International Committee of the Red Cross (ICRC), Geneva.

Email: kethynne@icrc.org.

Abstract

This article poses the question as to whether and why States overlook the prosecution of people for war crimes rather than terrorist offences, where war crimes would be preferred. It looks at whether a diverse range of States (Afghanistan, Australia, Mali, the Netherlands and the Russian Federation) are able through their domestic legislation to prosecute people for war crimes or for terrorist offences. It considers what the value of prosecutions is theoretically and legally, and what the impact of prosecutions is practically in a State. It proposes that prosecutors, police and judges should ask the question whether an alleged offender should be prosecuted for war crimes and/or terrorist offences with war crimes being the preferred option where there is evidence that they have been committed.

Keywords: war crimes, counterterrorism, terrorists, terrorism, foreign fighters, legislation, prosecution, comparative studies.

⋮⋮⋮⋮⋮⋮

* The views expressed in this article do not necessarily represent those of the ICRC. Many thanks to research assistance from Harriet Macey, Geneva Academy, and from colleagues, particularly Nele Verlinden, Nailia Mirsaitova, Pelagie Manzan Dekou and Yari Yar Mohammed.

Introduction

Over the last twenty years there has been an increase in laws related to terrorism. Since the war in Syria in 2011, and the creation of the Islamic State (IS) group encouraging young people to join their fight by leaving their own countries to go primarily to Syria and Iraq, there has been a wave of legislation which cancels citizenship, prohibits association with terrorists and terrorist organizations, designates certain parts of the world as prohibited for citizens to travel to, and expands extra-territorial jurisdiction. While counterterrorism legislation potentially presents concerns for international human rights law,¹ it also poses a significant problem for the continued respect for international humanitarian law (IHL) because so many of the offences occur in times of armed conflict or associated with armed conflict.

Tristan Ferraro, in his article in this edition of the *International Review of the Red Cross*, addresses the IHL issues around counterterrorism legislation and the need for IHL savings clauses (whereby legislation must be read in accordance with existing IHL obligations of the State) and humanitarian exemptions (for humanitarian workers to continue to work in so-called terrorist-controlled areas).² This article does not replicate the IHL definitions and discussions from Ferraro's article. In complement to his article, it looks at the risk, when States adopt a raft of legislative measures around terrorism and start to prosecute people for terrorist offences, that war crimes which normally should be the law applied (as the enforcement mechanism of IHL) are being overlooked.

Those who go to fight in Syria and Iraq (foreign fighters) and then return to their home countries (wherever they are allowed to do so) are sometimes (not often) prosecuted under counterterrorism legislation, where they are suspected of having fought for an armed group or organization labelled as terrorist by their home country. However, they have probably fought as a member of or alongside a party that is usually known for using unlawful means and methods of warfare as part of its strategy.³ They may have committed war crimes. There is talk of establishing a war crimes court in Syria and Iraq for such foreign fighters,⁴ but nothing has come of this idea yet. Prosecutions remain a matter for domestic law: in this context why is prosecution for terrorist offences favoured over war crimes?

- 1 See, e.g., the work of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, available at: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx> (all internet references were accessed in September 2021).
- 2 For a more detailed analysis, refer to Tristan Ferraro's article, "Counterterrorism, Sanctions and International Humanitarian Law: ICRC Perspectives on Finding the Right Balance", *International Review of the Red Cross*, 2021, this edition.
- 3 Lydia Khalil and Rodger Shanahan, "Foreign Fighters in Syria and Iraq: The Day After", *Lowy Institute for International Policy*, 2016, pp. 2 and 3, available at: <https://www.lowyinstitute.org/publications/foreign-fighters-syria-and-iraq-day-after>.
- 4 See, e.g., Peter Cephas Dahabreh, "The International Tribunal for the Prosecution of Foreign Fighters Responsible for Serious Violations of International Humanitarian Law and International Human Rights Law Committed in the Territory of the Syrian Arab Republic since 2011", SSRN, 11 March 2019, available at: <https://ssrn.com/abstract=3350683> or <http://dx.doi.org/10.2139/ssrn.3350683>.

Kaikobad has pointed out that “war crimes ... are offences against the law and customs of war, However, acts of terrorism ... are not violations of international law. They are violations essentially of domestic laws which have their geneses in international treaties to which States may or may not in principle adhere.”⁵ He continues that if a person has committed a grave breach of the Geneva Conventions⁶ and also an offence of terrorism, a State has an obligation under international law to prosecute for war crimes rather than terrorist offences.⁷ Nowadays we would extend the obligation to prosecute war crimes under Article 3 common to the four Geneva Conventions, Additional Protocol II and customary international law as serious international crimes which should be investigated and, where there is evidence, prosecuted and punished.⁸

However, as Special Rapporteur, Fionnuala D. Ní Aoláin, says in her interview in this edition of the *International Review of the Red Cross*:

It is highly comfortable for States, especially in the context of non-international armed conflicts, to address actors and their acts as terrorist in nature rather than to make the harder and complicated questions of assessment on what the applicability of common article 3 to the GCs, and Additional Protocol II might mean.⁹

Taking a comparative approach, this article looks at whether States have the ability to prosecute for war crimes and terrorist offences in five States – Afghanistan, Australia, Mali, the Netherlands and the Russian Federation – and if they are equipped to deal with both counterterrorism offences and war crimes, should they preference war crimes? These States have been chosen because they represent diverse regions; they all have citizens who have joined armed conflict through terrorist organizations in other States; and have been or are currently in or involved in armed conflict. These States have all ratified most of the relevant IHL treaties, so they have the corresponding obligations to prosecute persons for war crimes, in addition to those arising out of customary international law.¹⁰

5 Kaiyan Homi Kaikobad, “Crimes against International Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap”, *International Criminal Law Review*, Vol. 7, No. 2–3, 2007, p. 213.

6 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 51; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 147.

7 K. H. Kaikobad, above note 5, p. 214.

8 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC CIL Study), Rule 158, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

9 “Interview with Fionnuala D. Ní Aoláin”, available at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/interview-with-fionnuala-d-ni-aolain/747258EE107B2FF85708C62649907C8C>.

10 The United Kingdom and the United States which have well-developed counterterrorism laws and have also prosecuted a considerable number of individuals with terrorism offences in relation to Islamic State in

This article considers what the value and impact of prosecutions is, both theoretically and legally. Ultimately, the question will be posed as to whether war crimes prosecutions should be preferred over terrorist prosecutions and what impedes such prosecutions.¹¹

Setting the scene: can terrorism and war crimes occur at the same time?

What war crimes have been documented?

A war crime is a serious violation of IHL.¹² War crimes are grave breaches of the Geneva Conventions and Additional Protocol I (international armed conflict), serious violations of common Article 3 and Additional Protocol II (non-international armed conflict),¹³ and other serious violations of the laws of war such as attacking civilians or civilian objects (in both international and non-international armed conflict).¹⁴ The Geneva Conventions are universally ratified; all five of the States considered here are party to Additional Protocol I; and four are party to the Rome Statute. Therefore, they all have the obligation to prosecute and punish persons for grave breaches of the Geneva Conventions and Additional Protocol I, as well as serious violations of common Article 3. In addition, customary IHL, which is of course applicable to all States, requires investigation, prosecution and punishment for all serious violations of IHL as outlined above.¹⁵

Of particular note, “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population” is a war crime in both international and non-international armed conflict.¹⁶ The International Criminal

Iraq and Syria before their courts are not considered here as they have been well covered elsewhere: see, e.g., Todd Landman, “Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism”, *California Western International Law Journal*, Vol. 38, No. 1, 2007; K. N. Trapp, “The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience”, in D. Jinks, J. Maogoto and S. Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, T.M.C. Asser Press, The Hague, 2014.

- 11 The Genocide Network—a network of prosecutors in Europe—has produced a report discussing opportunities for investigating and prosecuting foreign terrorist fighters and other members of terrorist organizations not only for terrorist offences but also for war crimes, crimes against humanity and the crime of genocide: “Cumulative Prosecution Of Foreign Terrorist Fighters For Core International Crimes And Terrorism-Related Offences”, *Eurojust*, May 2020, available at: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF.
- 12 ICRC CIL Study, above note 8, Rule 156.
- 13 GC I, Arts 3 and 50; GC II, Arts 3 and 51; GC III, Arts 3 and 130; GC IV, Arts 3 and 147; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 11 and 85; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).
- 14 ICRC CIL Study, above note 8.
- 15 *Ibid.*, Rule 158.
- 16 PAP I, Art. 51(2); AP II, Art. 13(2); ICRC CIL Study, above note 8, rule 2.

Tribunal for the former Yugoslavia (ICTY) has said in *Galic*,¹⁷ that while they took no view of the customary nature of the crime, that under conventional law in 1992, there existed a crime of spreading terror among the civilian population with the following elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.¹⁸

The Rome Statute of the ICC (Rome Statute)¹⁹ presents a large (but not exhaustive) list of war crimes in Article 8 which deals with (separately) both international and non-international armed conflicts and divides grave breaches of the Geneva Conventions and Additional Protocol I from common Article 3 violations and other serious violations of IHL. Tellingly, the Rome Statute does not cover “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”, although such acts might be partly covered by intentionally directing attacks against the civilian population.²⁰ This is an interesting development considering that the Tribunal in *Galic* was able to consider both attacks on the civilian population and acts of terror as separate charges as they found they both constituted existing war crimes.

It is well documented that recent armed conflicts in Iraq and Syria, where foreign fighters have gone, have been fought with acts of terror on the civilian population, including mass killing of civilians, rape, and in addition in two of our focus-States, Mali and Afghanistan, death, torture and cruel and inhuman treatment of detainees, among other war crimes.²¹ Some examples can be given to demonstrate the point that it would be possible to convict persons for both terrorist offences and war crimes in each of these jurisdictions. Citizens of Australia, Afghanistan, Mali, the Netherlands and the Russian Federation have gone to Syria and Iraq to fight for designated terrorist organizations, whether IS

17 ICTY, *Prosecutor v. Stanislav Galic*, Case No.: IT-98-29-T, Judgement and Opinion, Trial Chamber, 5 December 2003.

18 *Ibid.*, para. 133.

19 Rome Statute of the ICC, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

20 *Ibid.*, Arts 8(2)(b)(i) and 8(2)(e)(i).

21 For the war crimes, see, for the possibility of them having been committed in these contexts, ICC, *Situation in the Republic of Mali*, ICC-01/12, available at: <https://www.icc-cpi.int/mali>; ICC, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>; for Syria, see Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/45/31, available at: <https://undocs.org/A/HRC/45/31>; for Iraq, see Letter Dated 17 May 2019 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, UN Doc. S/2019/407*, 17 May 2019, available at: https://www.unitad.un.org/sites/www.unitad.un.org/files/general/17.05.2019_0.pdf.

group or their foes. The United Nations (UN) Independent International Commission of Inquiry on the Syrian Arab Republic has found the following violations by all sides to the conflict: massacres and other unlawful killing, arbitrary arrest and unlawful detention, hostage-taking, enforced disappearance, torture and ill-treatment, sexual and gender-based violence, unlawful attack, use of illegal weapons, sieges, and arbitrary and forcible displacement.²² In Iraq, crimes were committed by Islamic State in Iraq and the Levant (ISIL) in Mosul between 2014 and 2016, including the execution of religious minorities, crimes involving sexual and gender-based violence, and crimes against children.²³ It has been reported that foreign fighters are more likely to be disproportionately involved in extreme acts of violence than nationals of Syria and Iraq.²⁴

The International Criminal Court (ICC) is investigating Mali and Afghanistan. In Mali, the ICC Prosecutor alleged there is a reasonable basis to believe that the following crimes have been committed in Mali: war crimes, including murder; mutilation, cruel treatment and torture; intentionally directing attacks against protected objects; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court; pillaging; and rape.²⁵ In Afghanistan, the Office of the Prosecutor considers that “war crimes of murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant”²⁶ had been committed.

Not all terrorist offences will be committed as part of, or concurrently with, war crimes or an armed conflict. In many cases, those convicted of terrorist offences have not committed any physical acts, but rather have done acts preparatory to a crime; moreover, many convicted of domestic offences will not have committed any act in times of armed conflict. War crimes are only applicable when there is an international or non-international armed conflict. Therefore, the situation which this article considers relates only to where persons have travelled to, or have been based, where there is an armed conflict. Moreover, as Ferraro has pointed out in this edition of the *International Review of the Red Cross*,²⁷ some acts which could be charged as terrorist offences if committed in peacetime might not be war crimes if they are legitimate acts of war. Conversely, not all war

22 UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/25/65, 14 February 2014, available at: <https://undocs.org/A/HRC/25/65>, p. 1.

23 Letter Dated 17 May, above note 21.

24 L. Khalil and R. Shanahan, above note 3, pp. 2 and 3.

25 ICC, Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 16 January 2013, available at: https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf.

26 ICC, *The Prosecutor of International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, 20 November 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>; ICC, *Afghanistan: Situation in the Islamic Republic of Afghanistan, ICC-02/17*, available at: <https://www.icc-cpi.int/afghanistan>.

27 See T. Ferraro, above note 2.

crimes will be committed with terrorist intent or by members of terrorist organizations,²⁸ and these crimes are not considered here.

Can acts committed by those classified as terrorists be prosecuted as war crimes domestically?

As outlined above, war crimes are serious violations of IHL and are crimes which are of concern to the international community as a whole. However, while international, practically, and as a matter of the principle of legality, States cannot prosecute persons for war crimes unless their domestic legislation has relevant powers for judges to sentence, and prosecutors and police to investigate. While all States have the obligation to enact legislation to prosecute for all serious violations of IHL, not all of the five States have relevant war crimes domestic legislation, giving them the actual ability to prosecute for all war crimes. The Afghanistan Penal Code (2017), the Australian Criminal Code Act 1995 Schedule Criminal Code and the Russian Federation Criminal Code 1996 allow for both war crimes and terrorist offences to be prosecuted (the terrorist offences are considered below for all the focus-States) and cumulatively (that is, multiple charges can be brought at the same time for the judge to adjudicate on). The inclusion of both war crimes and terrorist offences in the same law would presumably facilitate the ability to prosecute for both offences. In Australia, however, the Attorney-General must approve the launching of a prosecution for a war crime offence in writing,²⁹ and not for a terrorist offence, which potentially adds a political dimension to the consideration of the prosecution³⁰ which seems an odd distinction, given that terrorist offences are generally considered more political.

Mali and the Netherlands have different pieces of legislation for terrorist offences.³¹ They can both prosecute cumulatively. The Netherlands has done so as will be explained below, which demonstrates that even if laws are in different locations, as long as prosecutors are aware of them, they can be prosecuted at the same time.

Four of the focus-States are party to the Rome Statute and therefore have some legislation to ensure that they are able to prosecute in their own State

28 A Dutch technical report found: “The preoccupation with and the limited focus on one specific organization (IS), during one period (2013–present), in one geographic area (the caliphate) and for only one of the international crimes (genocide) leaves a wide range of possible international crimes untouched and potentially with impunity.” Thijs B. Bouwknegt, *Investigation, Prosecution and Trial of International Crimes in the Netherlands*, 26 August 2019, p. 8. Australia has also launched a war crimes investigation into actions of its Special Forces in Afghanistan, and it would be impossible to charge such offences as terrorist offences: Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, 2020, available at: <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

29 Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268, section 268.121.

30 Anna Hood and Monique Cormier, “Prosecuting International Crimes in Australia: The Case of the Sri Lankan President”, *Melbourne Journal of International Law*, Vol. 13, No. 1, 2012, p. 7.

31 Mali: Law n°08-025 of 23 July 2008; Law n°2016-008 of 17 March 2016; Netherlands: Criminal Code of the Kingdom of Netherlands (1881, amended 2012) and war crimes (Mali: Mali Penal Code (2001); Netherlands: Netherlands International Crimes Act (2003)).

according to the principle of complementarity, including the Article 17 Rome Statute requirements of admissibility.³² Australia and the Netherlands include all of the Rome Statute crimes and make the same distinction between international and non-international armed conflicts. Afghanistan and Mali include most of the Rome Statute crimes. Afghanistan does not make a distinction between international and non-international armed conflicts, except to include a special article dedicated essentially to common Article 3 violations. Mali prohibits mostly crimes in international armed conflicts, although the way it is phrased would suggest that in non-international armed conflicts some crimes are the same as in international armed conflicts.

However, because of their adherence to the Rome Statute crimes, they are unable to prosecute “acts of terror against the civilian population”; none of them have this crime in their domestic law. This is particularly odd for Australia, because one of the pieces of legislation that the Tribunal in *Galic* considered when deciding whether acts of terror were an existing crime under international law was Australia’s War Crimes Act of 1945 which pre-dated the Criminal Code inclusion of war crimes and was superseded by it, and included “systematic terrorism” in its category of war crimes.³³

These States therefore would have to rely on, for example, rape and other sexual violence,³⁴ mutilation,³⁵ attacking civilians,³⁶ attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission,³⁷ or

32 Mali ratified the Rome Statute on 16 August 2000 and referred the situation in its territory since January 2012 to the ICC. The ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Mali or by its nationals from 1 July 2002 onwards: ICC, *Mali: Situation in the Republic of Mali*, ICC-01/12, available at: <https://www.icc-cpi.int/mali>; on 5 March 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan: ICC, *Afghanistan: Situation in the Islamic Republic of Afghanistan*, ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>.

33 ICTY, above note 17, para. 118.

34 Afghanistan Penal Code (2017): in an international armed conflict, Art. 339(22) and also arguably in a non-international armed conflict, Art. 340(1)(1) or (2). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, sections 268.59–268.64; in a non-international armed conflict, section 268.71. Mali Penal Code 2001: in an international armed conflict, Art. 31(i)(19); in a non-international armed conflict, Art. 31(i)(29). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(3)(a); in a non-international armed conflict, section 6(2)(a).

35 Afghanistan Penal Code (2017): in an international armed conflict, Art. 339(10); in a non-international armed conflict, Art. 340(1)(1). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.47; in a non-international armed conflict, section 268.71. Mali Penal Code 2001: in an international armed conflict, Art. 31(i)(8). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(2)(b)(ii); in a non-international armed conflict, section 6(1)(a).

36 Afghanistan Penal Code (2017): in both an international and non-international armed conflict, Art. 339(1)(1). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.35; in a non-international armed conflict, section 268.77. Mali Penal Code 2001, Art. 31(i)(1). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(5)(a); in a non-international armed conflict, section 6(3)(a).

37 Afghanistan Penal Code (2017): in both an international and non-international armed conflict, Art. 339(1)(4). Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.3; in a non-international armed conflict, section 268.79. Mali

torture,³⁸ to commit so-called terrorists to account as war criminals. To a certain extent these States are equipped to deal with offences in which so-called terrorists might participate, but despite the seemingly long lists of war crimes in these four pieces of legislation, there are significant gaps.

The Russian Federation is not a party to the Rome Statute³⁹ and its Criminal Code⁴⁰ does not replicate the war crimes from either the Geneva Conventions or Additional Protocols (to which it is a party). Article 356 of the Criminal Code prohibits ill-treatment of prisoners of war and of the civilian population, the deportation of the civilian population, the looting of national property in occupied territory, and the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation (which includes all those weapons under the Convention on Certain Conventional Weapons and its Protocols, the Chemical Weapons Convention and the Biological Weapons Convention, as well of course the conduct of hostilities provisions of Additional Protocol I and grave breaches of the Geneva Conventions and of common Article 3). This final clause ensures that an important range of crimes related to attacking civilians and use of certain weapons (arguably improvised explosive devices, for example) are included under Russian law. The Russian Federation is also a party to the International Covenant on Civil and Political Rights⁴¹ and the Convention against Torture⁴² which would seem to provide for a range of offences.

Taking the examples of alleged war crimes potentially committed in Syria, Iraq, Mali and Afghanistan, all five focus-States have the ability to prosecute in some way the violations of IHL. Hostage taking, rape, torture, mutilation, attacks on civilians, use of certain types of weapons and attacks on humanitarian workers (among the many other crimes that have been committed and have been legislated for) can all be prosecuted and punished.⁴³ It remains striking that none of the States addressed have the ability to prosecute for specific acts of terror in

Penal Code 2001: Art. 31(i)(2). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(5)(o); in a non-international armed conflict, section 6(3)(c).

38 Afghanistan Penal Code (2017): in an international armed conflict, Art. 337(2); in a non-international armed conflict, Art. 340. Australian Criminal Code Act 1995 (as amended) Schedule Criminal Code, Division 268: in an international armed conflict, section 268.25; in a non-international armed conflict, section 268.73. Mali Penal Code 2001: Art. 31(b). Netherlands International Crimes Act 2003: in an international armed conflict, section 5(1)(b); in a non-international armed conflict, section 6(1)(a).

39 Decree on the Intention not to Become a Party to the Rome Statute of the International Criminal Court, 16 November 2016, Russian Federation, *ICC Legal Tools Database*, available at: <https://www.legal-tools.org/doc/02c22f-1/>.

40 Available at: <https://base.garant.ru/10108000/>.

41 International Covenant on Civil and Political Rights, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976).

42 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85, adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 (entered into force 26 June 1987).

43 See footnotes 34–38 and discussion on Russian Federation above.

armed conflict, which is possibly why war crimes might be overlooked in some cases of terrorist offences in armed conflict. Then next section addresses whether these five States can also prosecute for relevant terrorist offences.

Can so-called terrorist acts be prosecuted as terrorist offences under the legislation of the five focus-States?

While it is arguable that in fact terrorist offences are international crimes because they are found in international conventions and UN Security Council (UNSC) resolutions,⁴⁴ war crimes are distinguishable by being crimes which have universal definitions. Terrorist offences are notoriously subject to different definitions and political interpretations.⁴⁵ The international community has been trying for decades to adopt a Convention on Terrorism⁴⁶ but has so far failed. Article 2 of that Convention provides:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

This definition in the modern context seems very restrictive to particular acts of violence. Nowadays, the extent of terrorist offences goes well beyond the acts of violence to the preparation, training, travelling for the purposes of and other acts or omissions as are partially seen in the examples of the five focus-States below. Nonetheless, the traditional notion of terrorism related to violence in fact would accord more naturally with the kinds of war crimes which so-called terrorists perpetrate in armed conflict as addressed above. It is the new versions of terrorist offences, such as designated areas legislation (restricting travel to certain areas controlled by those designated as terrorists on domestic or UN lists) which pose other problems related to IHL including access by and activities of humanitarian organizations.

44 See, e.g., UNSC Letter and Annexes, Guiding Principles on Foreign Terrorist Fighters, UN Doc. S/2015/939, 23 December 2015; UNSC Letter and Annex, Addendum to the Guiding Principles on Foreign Terrorist Fighters, UN Doc. S/2018/1177, 28 December 2018.

45 TRIAL International, *Universal Jurisdiction Annual Review 2020: Terrorism and International Crimes: Prosecuting Atrocities for What They Are*, 30 March 2020, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf, p. 14.

46 Draft Comprehensive Convention against International Terrorism, Appendix II, Letter Dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc. A/59/894, 12 August 2005 (Draft Comprehensive Convention).

Interestingly, the most contentious aspects of the Draft Comprehensive Convention seem to be around the applicability of the treaty to armed conflict.⁴⁷ Draft Article 20⁴⁸ posed the issue of whether people acting in pursuit of a political goal against occupiers exercise self-determination and whether if they engage in terrorist-like activities they should be prosecuted under the international criminal law regime of this treaty. The Chair's text represented an attempt to find a balance between the use of terrorism during armed conflict and peace. It reads:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention.

The Organisation of the Islamic Conference proposed that the text be reworded as follows:

The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.⁴⁹

The challenge was that agreement on a definition of "armed forces" could not be reached. Another issue was whether "armed forces" can also be prosecuted for so-called "state terrorism", when their belligerent attacks on civilians amount to terrorism in peace time as defined under the treaty.⁵⁰ Likewise, a decision on an IHL "savings clause" which would require prosecutors to prosecute perpetrators for war crimes rather than terrorist offences remains a difficulty.

Another example of international processes related to terrorism is the Special Tribunal for Lebanon, established for offences outside of armed conflict, which has determined, controversially,⁵¹ that there is a transnational crime of terrorism that is now customary international law.⁵² The Appeals Court of the Tribunal provided that a customary definition of a terrorist offence would require three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. The

47 Mahmoud Hmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism Major Bones of Contention", *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1035.

48 See Draft Comprehensive Convention, above note 46, Art. 20.

49 Measures to Eliminate International Terrorism, Report of the Working Group, Sixth Committee of the General Assembly, UN Doc. A/C.6/60/L.6, 14 October 2005, available at: <https://undocs.org/en/A/C.6/60/L.6>, p. 6.

50 Antonio Cassese, "The Multifaceted Criminal Notion of Terrorism in International Law", *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 944.

51 See, e.g., Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?", *Leiden Journal of International Law*, Vol. 24, 2011.

52 Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/II/AC/R176bis, 16 February 2011, para. 85.

Tribunal was keen to emphasize that their definition of a customary international crime only applies in peace time and not armed conflict. They referred to national courts which had also defined a customary international crime in peace time.⁵³ Aside from the controversy around whether there is a customary crime in peace time, this definition adheres strongly to the traditional notion of a terrorist offence related to violence and a specific terrorist intent. The addition of a transnational element, whereby there should be an international aspect, or action in two or more States⁵⁴ seems incongruous to the need to prosecute home-grown terrorism on occasion. Indeed, the purpose of the Tribunal is to address domestic crimes in Lebanon.

Terrorist offences are usually offences which relate to the security of the individual State and each State determines how they wish to frame the offences. This is true of the five focus-States. While the majority of the situations where people would be prosecuted for terrorist offences addressed by this article are committed outside the territory of the State that may be prosecuting, they all have the ability to prosecute for terrorist offences which occur solely on their territory and solely against their government, without the international or transnational dimension necessary. They all also have the ability to prosecute for terrorist offences committed in both peace and armed conflict, so the distinction made by the Special Tribunal for example is not applicable.

There are in fact a broad range of offences which could be classified as “terrorist”. While the violence-related offences accord more to the types of war crimes which have been discussed above, the large range of offences would, it is arguable, make it easier to prosecute for terrorist offences. Terrorist offences can range from membership of a terrorist organization, through to assistance, material support, training, and financial support to a terrorist organization or associated person. Terrorist offences can also encompass legislation designating areas which are allegedly controlled by terrorist organizations to which persons cannot travel. There is usually a requirement for particular terrorist intent.

The Australian Criminal Code section 100.1 defines a terrorist offence as action which:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person’s death; or
- (d) endangers a person’s life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or

53 *Ibid.*, para. 86.

54 *Ibid.*, para. 89.

- (iii) a financial system; or
- (iv) a system used for the delivery of essential government services; or
- (v) a system used for, or by, an essential public utility; or
- (vi) a system used for, or by, a transport system.

With the particular intention:

of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of: coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public.

Division 101 of the Australian Criminal Code goes well beyond the traditional notion of acts pertaining to violence by providing for a range of terrorist acts such as: providing or receiving training for a terrorist act, or owning or creating documents for the purpose of a terrorist act. Division 102 provides for offences associated with a terrorist organization (prescribed under the Act and associated regulations), including membership, recruitment, training, funding, and providing support. Division 119 provides for incursions on to foreign territory, which is where the transnational element comes in and includes the offence of entering an area declared by the Minister, if “he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country”. Australia does have a number of “humanitarian exemptions” which allow the activities of humanitarian organizations, but no IHL savings clause.

The Netherlands Penal Code, Section 83a, likewise provides:

“Terrorist intent” shall be understood to mean the intention of causing fear in the population or a part of the population of a country, or unlawfully compelling a public authority or international organisation to act or to refrain from certain acts or to tolerate certain acts, or of seriously disrupting or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The Netherlands legislation addresses “terrorist intent” as a sentencing tool for increasing the sentence for crimes such as incitement to violence or criminal action (sections 131 and 132), recruitment (section 205), forgery (section 225), threat of public violence (section 285), theft with intent to cause a terrorist offence (section 311(1)(6)), theft and violence (section 312(2)(5)), extortion or blackmail (sections 317 and 318), embezzlement (section 322), deception (326) and destruction of property, data, telecommunication networks, water supplies, vehicles and cargo (sections 350–352). In this regard, the legislation largely remains dedicated to the tradition offences of violence and some aspects of financing of terrorism.

In Mali, the law reflects the international terrorism conventions to which Mali is a party. Mali Law n°2016-008/of 17 March 2016 (which prescribes a uniform law on the fight against money laundering and terrorist financing) provides in Article 1 that a terrorist act is:

any act intended to kill or wound a civilian or any other person not taking a direct part in hostilities in a situation of armed conflict when, by its nature or context, it is intended to intimidate a population or to compel a Government or an international organisation to do or to abstain from doing any act.

This particular law adheres strongly to the traditional definition of terrorism as defined by the Draft Comprehensive Convention and the Special Tribunal, but there is no IHL savings clause or humanitarian exemption which would otherwise allow the law to be read in accordance with IHL and therefore require prosecution for war crimes (as applicable) rather than terrorist offences.

Law n°08-025 of 23 July 2008 on the suppression of terrorism in Mali provides for a range of offences such as compromising the safety of aircraft, committing violence on an aircraft, sabotaging vehicles, on sea and land, stealing nuclear material, and attacking infrastructure or information services, among other crimes. These are extraterritorial offences as well as applicable on the territory of Mali.

The Afghanistan Penal Code 2017 provides for the following terrorist offences (in order to influence the political affairs of the Government of Afghanistan or a foreign government or national or international organizations or to destabilize the government system of Afghanistan or of a foreign government (Article 263) inside or outside Afghanistan): hostage taking (Article 270), kidnapping (Article 267), suicide bombing (Article 265), use of explosives (Article 266), destruction of infrastructure (Article 269), use or transfer of nuclear materials (Article 268), killing and attacking international protected persons (Article 271), crimes against aviation (Articles 272–276), membership of and cooperating with a terrorist organization (Article 277) and financing terrorist activities (Article 279). Once again, these offences tend towards the traditional definitions of terrorist activities related to violence with no IHL savings clause.

The Russian Federation Criminal Code is broader than some of the other examples above and criminalizes terrorist acts (Article 205): facilitation of terrorist activities (Article 205.1), public incitement, justification and propaganda of terrorism (Article 205.2), training for terrorist activities (Article 205.3), organization of and participation in terrorist groups and terrorist activities (Articles 205.4 and 205.5), non-reporting or false reporting on terrorism (Articles 205.6 and 207), taking hostages (Article 206), hijacking of an aircraft, water transport or railway rolling stock (Article 211), armed rebellion (Article 279), public calls for extremism (Article 280), attacks on persons and entities entitled to international protection (Article 360) and international terrorist acts (Article 361). The transnational or international element is clearly not an issue for the other offences. There is no IHL savings clause and there are some aspects which are rather political in nature, such as the non-reporting of terrorist offences which seems dedicated to ensuring the media report a particular narrative of persons potentially engaged in armed conflict as terrorist rather than combatants.

In the more traditional sense, according to Article 205 of the Russian Federation Criminal Code, terrorism is the commission of an explosion, arson or other actions that frighten the population and create the risks of death, significant

property damage or other grave consequences in order to destabilize the activities of government bodies or international organizations or influence their decision-making; and the threat of committing these actions to influence government or international organization decision-making.

A number of these crimes relate to physical acts which correlate with the war crimes outlined above, but it is the ability to charge someone for membership of, or association with, a terrorist organization that would enable the prosecution of a large number of people with little examination of the activities in which they were engaged. While the legislation for counterterrorism is less uniform than that of war crimes, all five States have the ability to prosecute anyone returning from Syria or Iraq for a range of counterterrorism offences. In the following section, the article will address whether in fact anyone has been prosecuted for war crimes or terrorist offences, and the section after that will consider whether there are some political, philosophical and moral issues related to such prosecutions.

Have there been instances of prosecution for war crimes and terrorism?

Having established that war crimes have been committed in Syria, Iraq, Mali and Afghanistan, as well as terrorist offences in each of the five States considered, it is pertinent to next ask: has anyone been prosecuted under the existing laws?

In the period 2015–2020, globally there were over 100⁵⁵ convictions for terrorist offences recorded. There were twenty-five⁵⁶ people prosecuted domestically for war crimes. This figure is probably more accurate because of the limited nature of the prosecution of such offences. If the number of international tribunal prosecutions is added, the number increases to twenty-seven.⁵⁷ For the purposes of comparison, [Table 1](#) demonstrates the number of convictions for terrorist offences compared with war crimes offences.⁵⁸

55 According to the International Crimes Database, there were twenty-five terrorism convictions between 2015 and 2020, available at: <http://www.internationalcrimesdatabase.org/SearchResults/?q=&cat=10&fy=2015&ty=2020&p=5&a=1#results>; however, [Table 1](#) demonstrates many more from individual country sources.

56 Sources: TRIAL International Database, available at: <https://trialinternational.org/resources/universal-jurisdiction-database>; International Crimes Databases, available at: <http://www.internationalcrimesdatabase.org/>; TRIAL International Universal Jurisdiction Annual Review, available at: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf, https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf, <https://trialinternational.org/latest-post/make-way-for-justice-4-momentum-towards-accountability/>, https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf, https://trialinternational.org/wp-content/uploads/2016/05/UJAR_2016.pdf.

57 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, Trial Chamber, Doc No. ICC-01/12/-01/15-171, available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF; Extraordinary Chambers in the Courts of Cambodia, Case 002/02, Judgement, Trial Chamber, 16 November 2018, Doc. No. 002/19-09-2007/ECCC/TC, available at: <https://www.eccc.gov.kh/en/document/court/case-00202-judgement>.

58 Sources: Russian Federation Statistical databases, available at: <http://eng.rosstat.gov.ru/>.

Table 1. *Number of prosecutions in the five focus-States*⁵⁹

State	Number of convictions for terrorist offences	Number of convictions for war crimes	Time period
Afghanistan ⁶⁰	(At least) 6 ⁶¹	Unknown – presume 0? ⁶²	2016–2017
Australia ⁶³	39 ⁶⁴	0	2015–2020
Mali ⁶⁵	(At least) 19 ⁶⁶	Unknown – presume 0? ⁶⁷	2015–2019
Netherlands ⁶⁸	106 ⁶⁹	4 ⁷⁰	2015–2020
Russian Federation	Between 1500 to 2400 terrorist crimes are registered every year	0	2015–2020

The approach initially by most States was to encourage persons not to leave their countries in the first place, and this is where several prosecutions have taken place. Australia, for example, has restrictions in place (citizenship requirements,

⁵⁹ Based on research on file with the author.

⁶⁰ It was challenging to find any comprehensive information of court judgements from Mali and Afghanistan, other than in the US country report. NGO reports also make reference to efforts by the courts but do not provide any specific statistics that would be worth including. Hence, these numbers are not complete.

⁶¹ Based on US Country Reports on Terrorism. For 2016, see https://www.state.gov/wp-content/uploads/2019/04/crt_2016.pdf, pp. 39–41, for 2017, see https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf, p. 29; for 2018, see <https://www.state.gov/wp-content/uploads/2019/11/Country-Reports-on-Terrorism-2018-FINAL.pdf>, p. 30; for 2019, see <https://www.state.gov/wp-content/uploads/2020/06/Country-Reports-on-Terrorism-2019-2.pdf>. The 2016 (p. 238) and 2017 (p. 169) reports note that the Attorney-General’s office prosecutes a number of terrorist offences and highlights six particular cases in total; the subsequent reports do not mention specific cases, but imply there are numerous cases (2019 report, p. 152).

⁶² On the basis of field experience of the author in Afghanistan specifically working on criminal processes.

⁶³ For Australia and The Netherlands (the two countries for which there were the most accurate court reports) the prosecutions were for conduct related to an armed conflict situation, i.e. as an alleged member of a “terrorist” organization in territory where an armed conflict was taking place. Other prosecutions not included are prosecutions such as financing of terrorism, conspiracy to commit domestic terror attacks or actual participation in a domestic terrorist attack.

⁶⁴ Cases from October 2017 to 2020, available at: https://csd.njca.com.au/recent-cases/#PID_8118; cases from 2015 to 2017 from search of all Australian case law, available at: http://www.austlii.edu.au/advanced_search.shtml.

⁶⁵ See above note 60.

⁶⁶ Based on US Country Reports on Terrorism, 2016, 2017, 2018 and 2019, above note 61. In 2017, it was reported that “[i]n 2017, the government opened 69 terrorism-related cases and detained 30 people for terrorism-related crimes. Resource constraints, a lack of training in investigative techniques, and inexperience with trying terrorism cases plagued a weak judicial system. The Malian government has never investigated, prosecuted, and sentenced any terrorists from start to finish.” (p. 29)

⁶⁷ On the basis that all the other instances covered are 0 and that the ICC is investigating Mali, and no domestic cases have been reported in that context which is otherwise public.

⁶⁸ See above note 63.

for example)⁷¹ which prevent citizens or former citizens from returning home. It has been reported that although Russia has a disproportionately high number of persons who have travelled to Syria and Iraq for fighting, they have accepted a small number home, and have so far only prosecuted a few of them.⁷² In the early days of the Syrian armed conflict, it was reported that mostly Chechnyan soldiers were prosecuted on return for mercenary crimes.⁷³ Slightly more recently, another source suggested that prosecutions were more about preventing people from leaving Russia.⁷⁴

In the Netherlands, the first person to be convicted of terrorist offences after returning from Syria where he was found to have trained and fought with a terrorist organization was also convicted of murder and manslaughter.⁷⁵ Those convictions for murder and manslaughter could have been considered in the light of the situation in Syria and upgraded to war crimes. The Netherlands is starting to add charges related to war crimes. In 2019, a Dutch foreign terrorist fighter posed laughing next to a deceased man hanging on a cross. He was prosecuted and convicted for membership in a terrorist organization and the war crime of

- 69 Statistics from January 2015 to April 2018 from declarations made by the Netherlands to Eurojust Terrorism Convictions Monitor (issues 22–32). These stopped being published after this date. For Issue 22, January–April 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2015-06_TCM-22_EN.pdf (six convictions); for Issue 23, May–August 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2015-10_TCM-23_EN.pdf (two convictions); for Issue 24, September–December 2015, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-02_TCM-24_EN.pdf (nine convictions); for Issue 25, January–April 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-06_TCM-25_EN.pdf (six convictions); for Issue 26, May–August 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016-10_TCM-26_EN.pdf (fifteen convictions); for Issue 27, September–December 2016, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-03_TCM-27_EN.pdf (twelve convictions); for Issue 28, January–April 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-05_TCM-28_EN.pdf (six convictions); for Issue 29, May–August 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2017-10_TCM-29_EN.pdf (eight convictions); for Issue 30, September–December 2017, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-04_TCM-30_EN.pdf (twelve convictions); for Issue 31, January–April 2018, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-07_TCM-31_EN.pdf (six convictions); for Issue 32, May–August 2018, see https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-12_TCM-32_EN.pdf (twenty-two convictions).
- 70 Tjitske Lingsma, “First Dutch Islamic State Fighter Convicted For War Crimes”, *Justice Info Net*, 25 July 2019, available at: <https://www.justiceinfo.net/en/42008-first-dutch-islamic-state-fighter-convicted-for-war-crimes.html>; *Oussama Aehraf Akhlaifa*, Guus K Court of Appeal, 21 April 2017; *Eshetu Alam*, District Court of the Hague 2 March 2018, Case No. 09/748003-18v.
- 71 Indeed, the Australian Prime Minister Scott Morrison has declared that persons will not be able to return: see Prime Minister of Australia, *Transcript - Radio Interview with Oliver Peterson*, 6PR, Media Release, 22 October 2019, available at: <https://www.pm.gov.au/media/transcript-radio-interview-oliver-peterson-6pr>.
- 72 Carl Lampe, “Russia’s Repatriation of ISIS Members”, *Foreign Policy Research Institute*, 12 April 2019, available at: <https://www.fpri.org/article/2019/04/russias-repatriation-of-isis-members/>.
- 73 Muslim Ibragimov and Alexander Ivanov, “Chechen Fighters Enter Syria through Azerbaijan, Interior Ministry Spokesman Says”, *Caucasian Knot*, 20 September 2013, available at: <https://www.kavkaz-uzel.eu/articles/230371?redirected=www.kavkaz-uzel.ru>.
- 74 Center for Security Studies, *Foreign Fighters: An Overview of Responses in Eleven Countries*, Zurich, March 2014, available at: https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Foreign_Fighters_2014.pdf, p. 14.
- 75 *Prosecutor v. Maher H.*, District Court of The Hague, The Netherlands, 09/767116-14, 12 December 2014.

outrage upon personal dignity (inhumane and degrading treatment of dead bodies).⁷⁶ The Netherlands is considering a number of other such cases.

The US Library of Congress reports that “a Russian national who returned home after being wounded while fighting [in Syria] was apprehended and sentenced by a court in Southern Russia in October 2014 [and] three criminal cases were launched in absentia against people who are thought to be fighting in Syria while another provincial court ordered the name of a local resident to be placed on the international wanted list”.⁷⁷ It is unclear whether there were war crimes involved too.

In Australia, the approach has also rather been to prevent people from leaving the country and funding activities in Syria and Iraq rather than prosecutions on return.⁷⁸ The statistics quoted in that reference are from 2014, but indeed since 2015 the numbers of persons going overseas has reduced.⁷⁹ Moreover, by 2018, Braun reports that “none of the around 30 returned FTFs [foreign terrorist fighters] had been convicted in Australia for offences relating to travelling abroad to support terrorist organisations”.⁸⁰

In Mali, while the *pôle judiciaire spécialisé* (competent for all terrorist related crimes in the Office of the Prosecutor) has recently been granted the power given to prosecute for war crimes, no prosecutions for war crimes have taken place. In Afghanistan, while many prosecutions have taken place for terrorist offences within the country, there are no statistics on prosecutions of foreign fighters, although one recent news article suggests that there are 408 IS group members from foreign countries in Afghan custody.⁸¹

The legislation for all five States considered indicates that persons can be prosecuted for both war crimes and terrorist offences, whether committed in their territory or overseas. It is of course more difficult and there might be other reasons why a State may wish to prosecute acts that are committed in their own territory more than those committed overseas, which are explored below. It appears that they are not being prosecuted for war crimes, while some are being prosecuted for terrorist offences. There are reasons to account for the fact that few prosecutions have taken place. If they can be prosecuted for war crimes and are not, this leads to two further questions. First, what would be the benefit of prosecutions for war crimes as opposed to terrorist offences, and second, what are the challenges for such prosecutions? The following two sections deal with these questions.

76 District Court of The Hague, 23 July 2019, reference 09/748003-18 and 09/748003-19.

77 Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys, available at: <https://www.loc.gov/law/help/foreign-fighters/country-surveys.php>.

78 Center for Security Studies, above note 74, p. 18.

79 Kerstin Braun, “‘Home, Sweet Home’: Managing Returning Foreign Terrorist Fighters in Germany, The United Kingdom and Australia”, *International Community Law Review*, Vol. 20, No. 3–4, 2018, p. 318.

80 *Ibid.*, p. 328.

81 Roshan Noorzai, “Afghanistan to Discuss Fate of Foreign IS Prisoners with Their Countries”, *VOA News*, 3 May 2021, available at: <https://www.voanews.com/extremism-watch/afghanistan-discuss-fate-foreign-prisoners-their-countries>.

Why prosecute at all?

It is pertinent to ask: why would a State engage in prosecution for war crimes or prosecution for terrorist offences? As Drumbl notes, there is little scholarship on why States (and international tribunals) engage in prosecution and punishment for mass atrocity crimes such as war crimes.⁸² He considers historical and contemporary approaches to punishment and sentencing particularly based on his work with victims of mass atrocities.

In relation to war crimes, Drumbl outlines the challenges of opposing views at the end of the Second World War – those of the victims and those of the victors. The framing was eventually around addressing “evil” which was felt to be achievable under international criminal law.⁸³ The Statutes of the Nuremberg and Tokyo Tribunals emphasized retribution as a reason for sentencing those prosecuted for war crimes after the Second World War.⁸⁴ As Nemitz has said, “the implicit purpose of the sentencing judgments was a repressive one: the major war criminals ... committed heinous crimes, therefore they would be punished and get what they deserved.”⁸⁵ He notes that the trials were only dealing with the most senior offenders and any hope of rehabilitation or other reason for the trials was not applicable.⁸⁶ He goes on to examine the Statutes of the ICTY and ICTR whose constitutive resolutions indicate, he says, “a rather repressive approach to sentencing”.⁸⁷

Hafetz notes in relation to the treatment of Guantanamo Bay inmates (which he argues should have been prosecuted for war crimes rather than domestic war crimes or terrorist (or specially created) offences) that “the harsh, often brutal treatment of detainees was premised on the theory that they fell outside the Geneva Conventions because they were members or supporters of a non-state terrorist organization”.⁸⁸ In this regard, an editorial in the *Harvard Law Review* written in the aftermath of the 11 September 2001 attacks suggests that the response of war by the US government to those attacks was because the criminal process was not viewed as “satisfactory” (the authors of the article do not agree with this approach, but use it as a basis for an analysis of historical responses to terrorism).⁸⁹ The argument was that some terrorist attacks are seen as so grave that they require a substantial retribution. This might be particularly

82 Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 2.

83 *Ibid.*, p. 3.

84 Jan Christoph Nemitz, “The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method of Determining the Sentence”, *Yearbook of International Law*, Vol. 4, 2001, p. 89.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*, p. 91.

88 Jonathan Hafetz, “Diminishing the Value of War Crimes Prosecutions: A View of the Guantanamo Military Commissions from the Perspective of International Criminal Law”, *Cambridge Journal of International and Comparative Law*, Vol. 2, No. 4, 2013, p. 808.

89 Editorial, “Responding to Terrorism: Crime, Punishment, and War”, *Harvard Law Review*, Vol. 115, No. 4, 2002, p. 1229.

relevant where the terrorist attacks occur on the territory of the State in question where the effects are more immediate.⁹⁰

Retributive justice is linked with the idea of “just deserts”, based on the belief that a criminal “deserves” to be punished for their wrongs, and that the harshness of the punishment imposed should be proportionate to the severity of the crimes they committed.⁹¹ Most theories of punishment are characterized by an emphasis on crime prevention, driven by a combination of theories of deterrence, rehabilitation and incapacitation, as outlined below.⁹² Retribution (or the retributive theory of justice) is based on the core premise that punishment is a form of retribution, and that if you commit a wrongful act (especially a serious crime), you should be punished, even if this punishment will not have any other benefit or produce any other good.⁹³ Drumbl outlines the challenges for prosecuting child soldiers in this regard. On Ongwen, he notes that some think he was punished enough by being subject to the same treatment as he meted out; others claim he should suffer for the violence he perpetrated himself.⁹⁴ Clark and Cave go further and reject retribution as a reason for punishment of war crimes perpetrators on the basis that it would “be impossible to retaliate proportionately”.⁹⁵

Clark and Cave rather prefer deterrence as a reason for prosecution of war crimes.⁹⁶ Nemitz points out that the ICTY and International Criminal Tribunal for Rwanda Statutes refer to deterrence as a purpose of punishment,⁹⁷ and the early jurisprudence also indicates this reason for punishing war crimes perpetrators.⁹⁸ Deterrence is frequently invoked as a motivation for punishment, based on the idea that imposing a punishment on someone who has committed a crime will prevent or discourage others from committing offences in the future.⁹⁹ It is framed as a preventative motivation; knowing that punishment and a legal penalty is attached to criminal activity will supposedly act as a disincentive for those who might be considering committing a crime. It is the fear of the legal

90 *Ibid.*, p. 1231.

91 Gerhard Werle and Aziz Epik, “Theories of Punishment in Sentencing Decisions of the International Criminal Court”, in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, pp. 326–327; Michael Moore, *Placing Blame: A Theory of Criminal Law*, Oxford University Press, Oxford, 1997, p. 8; J. G. Murphy, “Legal Moralism and Retribution Revisited”, *Criminal Law and Philosophy*, Vol. 1, No. 1, 2007, p. 11.

92 Frank Neubacher, “Criminology of International Crimes”, in F. Jeßberger and J. Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, p. 28.

93 Mark Tunick, *Punishment: Theory and Practice*, University of California Press, Berkeley, 1992, p. 95.

94 Mark A. Drumbl, “Victims who Victimise”, *London Review of International Law*, Vol. 4, No. 2, 2016, p. 240.

95 Michael Clark and Peter Cave, “Nowhere to Run?: Punishing War Crimes”, *Res Publica*, Vol. 16, No. 2, 2010, p. 200.

96 *Ibid.*, p. 201.

97 J. C. Nemitz, above note 84, p. 91.

98 *Ibid.*, p. 92.

99 Claire Finkelstein, “A Contractarian Approach to Punishment”, in Martin P. Golding and William A. Edmundson (eds), *Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell Publishing, London, 2005, p. 208.

penalty that potentially leads to avoidance of the prohibited conduct. Similarly, in relation to prosecuting counterterrorism offences, Braun has said:

The underlying aim of introducing and amending criminal laws in this area lies mainly in the deterrence of the individual from future terrorist conduct as well as the deterrence of others contemplating supporting terrorist organization by demonstrating that their actions will have (severe) legal consequences including incarceration.¹⁰⁰

Another possible reason for prosecution is incapacitation, which Clark and Cave also favour as a reason for war crime prosecutions.¹⁰¹ This is linked with the duty of the State to ensure the protection of the public. The reasoning is that imprisonment (or other forms of punishment such as house arrest or control orders) will incapacitate offenders and make them incapable of offending for periods of time, therefore preventing future crime.¹⁰² This is also notable with counterterrorism offences being linked to the security of the nation and its citizens. The UN Office of Drugs and Crimes has said:

Unsurprisingly, [foreign fighters] are perceived to be a major threat to their home countries. ...the fear is that once they return they will utilize their terrorist training in order to plan and carry out attacks, set up new terrorist cells, or otherwise facilitate future terrorist acts. ... United Nations resolution 2178 calls upon Member States to bring to justice their nationals who travel (or attempt to travel) to other States for the purpose of engaging in the planning or perpetration of terrorist acts. Therefore, immediate coordinated action is required upon the return of an FTF, to secure any retrievable evidence, and if possible, file charges for prosecution.¹⁰³

If incarceration is the goal, the penalties might have an impact on the decision to prosecute for war crimes or terrorist offences. In Afghanistan, a person convicted of membership of a terrorist organization under Article 277 of the Penal Code receives a sentence of “long imprisonment (more than 5 years to 16 years)”. War crimes of direct attacks receive capital punishment or grade one continued imprisonment punishment (more than twenty to thirty years); using certain weapons receive grade two continued imprisonment punishment (more than sixteen to twenty years); and a “long imprisonment sentence” of more than five to sixteen years is applied to rape, other sexual violence, starvation and child recruitment.¹⁰⁴ In Russia, the penalty for terrorist offences is life imprisonment; for war crimes it is twenty years. Article 32 of the Mali Penal Code provides for

100 K. Braun, above note 79, p. 329.

101 M. Clark and P. Cave, above note 95, p. 201.

102 Andrew Ashworth, *Sentencing and Criminal Justice*, Cambridge University Press, Cambridge, 2010, p. 84.

103 UN Office of Drugs and Crime, *Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia*, 2018, available at: https://www.unodc.org/documents/terrorism/Publications/FTF%20SSEA/Foreign_Terrorist_Fighters_Asia_Ebook.pdf, p. 31.

104 Rape and sexual violence victimizing women are also regulated by the Special Law for Women, the 2009 *Law on Elimination of Violence against Women*, and the sentence is more severe: more than twenty to thirty years of imprisonment or death sentence.

capital punishment for all war crimes. Terrorist offences leading to death of persons entail capital punishment, and other terrorist offences a sentence of up to ten years. In the Netherlands, grave breaches of the Geneva Conventions and Additional Protocol I and sexual violence and perfidy have a sentence of up to thirty years. Other war crimes have a penalty of up to fifteen years. Similarly, terrorist offences entail fifteen to thirty years' imprisonment. In Australia, war crimes entail imprisonment from between ten years to life depending on each specific offence; for terrorist offences, the same range applies. In essence, there is little difference between penalties for war crimes and terrorist offences, so this is probably not a large consideration in deciding with which offence to charge an offender.

The Netherlands has said that their main concern with returning foreign fighters is “to contain this threat and prevent any new upsurge in the phenomenon” through a diverse set of measures.¹⁰⁵ Australia has called returning foreign fighters the “number one national security priority”.¹⁰⁶ Højfeldt similarly says that “[d]omestic criminal law is increasingly being applied to conduct [of foreign fighters] committed in times of armed conflict. The policy aim is no longer to repress war crimes, but to safeguard national security”.¹⁰⁷

Another reason for prosecution is to end impunity. Ending impunity is generally expressed in relation to international crimes, such as war crimes. For example, it is presented as a fundamental tenet of the ICC's prosecution goals that “the most serious crimes of concern to the international community as a whole must not go unpunished”, and that the States Parties are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention.”¹⁰⁸ Lloyd also suggests that failing to prosecute foreign fighters (among other actions by States against their nationals) is “potentially detrimental to ensuring respect for IHL in terms of avoiding impunity for war crimes”.¹⁰⁹

There is a fundamental obligation under IHL that those having committed the most serious violations must be prosecuted. The Geneva Conventions require that States prosecute and punish those who have violated the grave breaches provisions. Universal jurisdiction applies. Thus, every State in the world should be able to prosecute anyone suspected of having committed a grave breach of the Geneva Conventions: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” If they cannot prosecute persons suspected of war crimes, they shall extradite them where they can be prosecuted for war crimes. The idea is that war crimes are so serious that they are crimes which

105 Center for Security Studies, above note 74, p. 12.

106 K. Braun, above note 79, p. 326.

107 H. Højfeldt, “Prohibiting Participation in Armed Conflict”, *Military Law & Law of War Review*, Vol. 54, 2015, p. 30.

108 Rome Statute, above note 19, Preamble.

109 Marnie Lloyd, “Challenges in the Application of the Obligation to Ensure Respect for IHL – Foreign Fighting as an Example”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, London, 2020, p. 241.

affect the whole of the international community which should be responsible to ensure that such crimes are never committed again.

The enactment of terrorist offences is advocated by the UN through numerous Security Council resolutions. In 2014, the UNSC Resolution 2178, for example, decided that Member States “shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offence” for “financing, planning, preparation or perpetration of terrorist acts”. However, the crimes essentially remain a domestic matter: each State deals with the crimes differently, and indeed there has never been consensus on the development of an International Counter-terrorism Convention. There is not the same fundamental urge to prosecute to end impunity and to recognize that these are crimes which affect the international community as a whole. Thus, in seeking to distinguish the Guantanamo Military Commissions from international war crimes prosecutions, Hafetz has said:

The magnitude of the crimes, the multiple communities served, and the resource and political constraints on the number of prosecutions that can feasibly be brought, differentiate international criminal justice from domestic prosecutions. The crimes that are prosecuted and the sentences imposed upon conviction are laden with symbolic value. Sanctions imposed under the rubric of war crimes and other international law violations help craft historical narratives and embed normative values across borders. Those sanctions also communicate the outrage of the international community.¹¹⁰

His contention is that the Military Commissions should not have used domestic crimes to prosecute people in Guantanamo Bay for the serious offences that they had committed, but rather should have had regard to war crimes under IHL. There is not the same symbolic and international value in prosecuting for terrorist offences rather than war crimes, he argues.

An end to impunity is also closely linked to the goals of retribution and deterrence as discussed above. The ICTY in *Delalic* considered “Punishment of high-ranking political officials and military officers will demonstrate that such officers cannot flout the designs and injunctions of the international community with impunity.” They framed this under the heading of deterrence.¹¹¹ The ICC’s *Katanga* Chamber reflected such intentions when recognizing:

the legitimate need for truth and justice voiced by the victims and their family members...play a two-fold role: (i) punitive, as “the expression of society’s condemnation of the criminal act and of the person who committed it” and “a way of acknowledging the harm and suffering caused to the victims” that would restrain any desire to exact vengeance; and (ii) deterrent, aiming to “deflect those planning to commit similar crimes from their purpose”.¹¹²

110 J. Hafetz, above note 88, pp. 816–817.

111 ICTY, *Prosecutor v. Delalic et al.*, Case No.: IT-96-21-T, Trial Chamber Judgment of 16 November 1998, para. 1234.

There is also a desire in prosecuting people for war crimes to see the stories of the victims reflected in public, for the truth to be expressed as to what happened, and for victims to be recognized. Indeed, as the Head of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant has said to the UN:

This call for accountability is not one of retribution, but one of justice. Those who have spoken to the Investigative Team wish for the crimes of ISIL to be exposed, openly and objectively, so that the world can see the true nature of those acts and so that we can, together, honour the victims. In providing their accounts, witnesses and survivors have consistently emphasized that they do not seek revenge, but assistance in obtaining recognition for what they have suffered and in bringing those responsible to justice.¹¹³

This approach is often referred to as preventive justice and seen as restoring peace. As the ICTY in *Delalic* also said, punishment is a “useful measure to return the area to peace. Although long prison sentences are not the ideal, there may be situations which will necessitate sentencing an accused to long terms of imprisonment to ensure continued stability in the area.”¹¹⁴

Overall, there are a number of theories of prosecutions which are applicable to war crimes and terrorist offences. Retribution, deterrence and incapacitation are all used as justifications for the prosecution of war crimes and terrorist offences, with perhaps retribution being stronger where there were direct attacks either from war crimes or terrorist attacks on the territory of the prosecuting State. Additional theories of prosecution related to prevention and ending impunity appear to be more relevant to war crimes. There might indeed be arguments against prosecuting for war crimes. In that regard, Nastevski has suggested that “[t]he Australian experience of undertaking war crimes trials since the end of World War II has been largely unsatisfactory”.¹¹⁵ He attributes this to a lack of desire or political will to prosecute war criminals resident in Australia, while noting Australia’s “appropriate moral rhetoric when participating in the various international efforts to introduce accountability for international crimes”.¹¹⁶

In the end, the decision to prosecute for war crimes or terrorist offences may well be decided based on which theory holds more weight politically. Lloyd suggests that:

in addition to complying with legal duties, a range of policy reasons draw States to respond to foreign fighting. Those reasons might include upholding the State’s claimed monopoly on the legitimate use of force, supporting positions of

112 ICC, *Prosecutor v. Katanga* Art. 76 Decision ICC-01/04-01/07-3484, 25 May 2014, para. 38; Sergey Vasilev, “Punishment Rationales in International Criminal Jurisprudence”, in F. Jeßberger and J. Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge University Press, Cambridge, 2020, p. 70.

113 Letter Dated 17 May 2019, above note 21, p. 4.

114 ICTY, above note 111.

115 *Ibid.*, p. 241.

116 *Ibid.*

abstention from the intensification of violence, wanting to protect nationals from possible harm, or avoiding foreign policy discomfiture or consular headaches caused by nationals becoming involved in a foreign armed conflict. Relatedly, it can be observed in diplomatic positioning and domestic debate that the predominant concern of States is often security at home, i.e. from the actions of would-be and returning foreign fighters, rather than necessarily the fighter's conduct in a destination State and the respect for IHL more generally.¹¹⁷

In conclusion for this section, war crimes prosecutions have the added moral dimension of ending impunity and seeing justice done. It has been suggested that war crimes also should not be punished if it is not in the interests of justice, in which case a reconciliation approach might be better suited. Restorative justice and reconciliation may be appropriate in the territory of a State at war; Mali and Afghanistan would be candidates for this, although with the armed conflicts on-going there is little chance of a formal process at the moment. A reconciliation approach also does not lend itself well to current situations of so-called terrorist activities in Syria and Iraq in the case of foreign fighters. Restorative justice also is not appropriate where serious violations of IHL have been committed which should be investigated and prosecuted under IHL.

What are the challenges for prosecutions?

Aside from the moral and political considerations considered in the previous sections, there may be legal and practical challenges for prosecutions which would lead a government to consider prosecuting for war crimes or terrorist offences. One practical consideration is how accessible the law is to prosecutors and judges, although this does not seem to be an issue with the five States this article considers. In three of the five States, the offences are in the Penal or Criminal Code and therefore accessible to prosecutors and judges alike. In the Netherlands, the one State with convictions for both types of offences, the crimes are located in different pieces of legislation, but this does not seem to make a difference in the accessibility of the offences. In Mali, there are also two separate pieces of legislation, but the same prosecutor office has responsibility for prosecutions under both pieces of legislation.

Other practical considerations may include the types of evidence required to carry out a prosecution. Practically, the evidence could be challenging to gather for both war crimes and terrorist offences. Braun suggests for terrorist offences “the evidence relied upon to establish any of the ... offences in national criminal courts will be evidence gathered by international intelligence agencies.... intelligence information may be gathered from unknown or illegal sources and is frequently censored and not provided in full to the defendant due to security risks”.¹¹⁸ There are non-governmental organizations (NGOs) which collect

117 M. Lloyd, above note 109, pp. 233–234.

evidence for the purposes of prosecution, but often “reports from these types of human rights organizations belong to a specific genre: ... they are written for activist purposes, while the methodology is the most comparable with a specialized form of investigative journalism”.¹¹⁹ The Centre for Civilian Justice has said:

Apprehending suspects is not the only challenge to carrying out prosecutions during war. Interviewing victims and witnesses still living in Syria is also problematic. Moreover, a prosecutor would need access to documentary and physical evidence, which may also be beyond the reach of expert investigators and forensic analysts.¹²⁰

Bouwknegt, who has conducted research for the Dutch government, agrees that it is challenging to collect evidence for both war crimes and terrorist offences overseas where there are “different political systems and structures; other safety systems and structures; other legal systems, structures and traditions; other economic systems and structures; and other infrastructures”.¹²¹ He adds: “forensic and direct eyewitness evidence is often largely no longer available”.¹²² In this vein, in relation to foreign fighters, Braun quotes an Australia Federal Police officer who says:

the arrests were carried out so long after the alleged offenders’ return from Syria, ... due to difficulties with gathering evidence. ... gathering evidence from Syria, which has been a war zone for more than five years, was almost impossible and police also had to wait to get electronic evidence from social media companies in America.¹²³

Australia attempted to prosecute persons for war crimes allegedly committed in the Second World War and the Balkans armed conflict. In two notable cases, the witnesses were required under the law of evidence at the time to travel to Australia to give evidence in court, but they were too old or ill to travel; the cases were unable to proceed on the basis of a lack of evidence.¹²⁴

Currently, Australia is engaging in war crimes investigations as a result of a report that brought forward allegations of serious violations of IHL by special forces in Afghanistan.¹²⁵ Challenges include the fact that witnesses might be subject to retaliation by the non-State armed group.¹²⁶ Witness protection has also been

118 K. Braun, above note 79, p. 327.

119 T. B. Bouwknegt, above note 28, p. 20.

120 Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, Ceasefire Centre for Civilian Rights and Syria Justice and Accountability Centre, May 2015, p. 24.

121 T. B. Bouwknegt, above note 28, p. 39.

122 *Ibid.*

123 K. Braun, above note 79, pp. 328–329.

124 Vasko Nasteovski, “The Australian Experience of Conducting War Crimes Trials”, in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, Routledge, London, 2016, p. 222.

125 Inspector-General of the Australian Defence Force, above note 28.

flagged by the Centre for Civilian Rights as a concern for the prosecution of fighters in and returning from Syria around the world.¹²⁷

Simple terrorist offences such as membership of a terrorist organization may be easier to gather evidence on than war crimes or more complex terrorist attacks. TRIAL International has said, “Proving terror charges, especially membership in a terrorist organization, is remarkably straightforward. Convictions have been secured by as few elements as a connection with a known terrorist or traveling to a zone controlled by a terrorist organization.”¹²⁸

Nonetheless, the specific nature of war crimes and the value placed on them¹²⁹ should be acknowledged and prosecuted as such where possible. It is suggested that war crimes charges can “complement and expand the charges” and indeed in the Netherlands this is starting to occur with the practice of cumulative charging.¹³⁰ Ferraro in this edition of the *International Review of the Red Cross* recommends that States enact an “IHL savings clause” in legislation which would both enable terrorist offences to be applied in accordance with IHL.¹³¹ Such clauses require legislation to be read in accordance with IHL and therefore could enable prosecutors to preference war crimes as the *lex specialis* in armed conflict when they have been committed alongside a terrorist offence. Equally, Van Poeke *et al.*, reviewing relevant case law, consider that if there is an exclusion clause in legislation, which “limits the extent to which activities committed in relation to armed conflicts can constitute terrorist offences”, any acts committed by members of a non-State armed group should not be considered “terrorist” but be assessed under war crimes legislation.¹³² Along with the desire to end impunity and uphold laws that all States have adhered to, IHL should be preferred because it provides the correct definitions and understanding of the context in which the crimes were committed. IHL also requires that there are no statutes of limitations and no amnesties which means that crimes can be prosecuted a long time after they were committed, in line with their serious nature. Lloyd suggests that failing to prosecute foreign fighters (among other actions by States against their nationals) is “potentially detrimental to ensuring respect for IHL in terms of avoiding impunity for war crimes”.¹³³

War crimes prosecutions require a certain knowledge of IHL and international criminal law in order to prove the nexus to the armed conflict which

126 Adam Cooper, “Safety Fear for Afghan Villagers Raised in Ben Roberts-Smith Case”, *Sydney Morning Herald*, 7 May 2021, available at: <https://www.smh.com.au/national/safety-fear-for-afghan-villagers-raised-in-ben-roberts-smith-case-20210507-p57pv6.html>.

127 M. Lattimer, S. Mojtahedi and L. A. Tucker, above note 120.

128 TRIAL International, above note 45, p. 14.

129 Ben Saul, “Crimes and Prohibitions of ‘Terror’ and ‘Terrorism’ in Armed Conflict: 1919–2005”, *Humanitäres Völkerrecht – Informationsschriften / Journal of International Law of Peace and Armed Conflict*, Vol. 4, 2005, p. 276.

130 TRIAL International, above note 45, p. 14.

131 See T. Ferraro, above note 2.

132 See Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and the International Humanitarian Law Exclusion Clause: Belgium as the Odd One Out”, *International Review of the Red Cross*, 2021, in this edition.

133 M. Lloyd, above note 109, p. 241.

of course is irrelevant in the prosecution of terrorist offences. Kaikobad has suggested that both alleged war criminals and terrorists would seek to use this nexus to their advantage in defence: that they were legitimate fighters in the case of terrorist prosecutions or that there was no nexus to the armed conflict in the case of war crimes prosecutions.¹³⁴ However, it seems from relevant State practice and the criminal law enacted that there is no combatant immunity for current terrorist offences. Thus, when persons are charged with terrorist offences it appears that the State does so in the belief that they are not legitimate fighters. Deeks has suggested as much in relation to the hesitancy of States to engage in negotiations of new terrorist treaties requiring implementation: “IHL traditionally has been undergirded by symmetrical legal obligation between the conflict’s participants and an expectation of roughly reciprocal treatment between the warring parties. [Now] States—reasonably—do not expect to receive reciprocal treatment by those non-state armed groups.”¹³⁵ There is a linked concern that terrorist offences are not connected to State agents who might themselves have committed war crimes.¹³⁶ If you start to investigate war crimes, there might need to be a reckoning for both or all sides of a conflict.

Perhaps this approach is another reason why States are wanting to prosecute for terrorist offences rather than war crimes; they do not see the fighters as legitimate, so they are unwilling to give them war crimes trials and thereby perceived legitimacy. With this approach, they can call persons who are members of terrorist organizations “terrorists” and therefore “other” and not consider the actual activities in which they have engaged.

A connected potential concern by States is that war crimes sit alongside judicial guarantees which ensure the right to a fair trial in such a strict way that it is a war crime not to confer a legitimate trial on someone who is prosecuted. While human rights and constitutional law will accord the right to a fair trial, there are exemptions and national security concerns that can be invoked for terrorist prosecutions;¹³⁷ indeed, another reason to be concerned about the higher number of terrorist prosecutions to war crimes.

Conclusion

This article has posed a central question of whether and why war crimes and IHL implementing legislation are being overlooked as a result of counterterrorism

134 K. H. Kaikobad, above note 5, p. 228.

135 Ashley Deeks, “Domestic Humanitarian Law: Developing the Law of War in Domestic Courts”, in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, Springer, London, 2014, p. 138.

136 TRIAL International, above note 45, p. 13.

137 See, e.g., Anthony Whealy, “A Judicial Perspective: Surveillance Evidence and the Right to a Fair Trial”, in Fergal Davis, Nicola McGarrity and George Williams (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism*, Routledge, London, 2013; Clive Walker, “Terrorism Prosecutions and the Right to a Fair Trial”, in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, Cheltenham, 2020.

legislation in the context of both foreign fighters and existing armed conflicts in the territory of some States. The legislation of Australia, Afghanistan, Mali, the Netherlands and the Russian Federation is particularly well equipped to deal with a range of terrorist offences, and particularly those which would apply in times of armed conflict, such as violent acts. More broadly they are all equipped to prosecute and punish those who are members of a banned terrorist organization. They are less well equipped to prosecute and punish those who have committed relevant war crimes—none can address the war crime of terrorizing the civilian population for example. Nonetheless, they all have quite comprehensive war crimes legislation which could fit the relevant crimes which appear to be committed by designated terrorist organizations. One recommendation would be for States to review their war crimes legislation to ensure that they have effective crimes in place to address offences committed by designated terrorist organization members in armed conflict which would otherwise be war crimes.

Having recommended that, it is worth highlighting again the paucity of data and where there is data of prosecutions for either terrorist offences or war crimes. The challenges of prosecuting in an armed conflict (for Mali and Afghanistan) and where evidence must be gathered from overseas (in all five cases potentially) exist for both terrorist offences and war crimes. That said, the vast majority of cases are terrorist cases rather than war crimes. Kaikobad has said “in many situations acts of terrorism will in fact be a species of war crimes, a fact which will entail the application of the laws and customs of war as opposed to domestic laws incorporating sectoral conventions”.¹³⁸ This approach does not seem to be followed by many States nowadays.

TRIAL International has suggested of the preference of prosecution of terrorist offences over war crimes “What is in appearance a procedural detail actually reflects a deep—and alarming—legal trend which bears multiple consequences.”¹³⁹ In many cases there are equal procedural, moral and theoretical claims for both types of prosecutions; both lend themselves to theories of retribution, deterrence and incapacitation. Penalties in all five States examined are comparable between the two types of offences, so there is a strong argument that both types of offences can result in punishment, deterrence and imprisonment of offenders.

So why, are States choosing to prosecute for terrorist offences? It must be the subtle policy, legal and moral differences which make the distinction: the expediency, the greater emphasis on retribution and incapacitation, and the value add of UNSC resolutions emphasizing terrorist prosecutions. Nonetheless, if States do not want to see an erosion of IHL and the continuing importance of ending impunity for the most serious violations of IHL, they should seriously consider the situation each time they have the choice: would it be better to prosecute for war crimes or terrorist offences? War crimes represent crimes that

138 K. H. Kaikobad, above note 5, p. 276.

139 TRIAL International, above note 45, p. 13.

the international community, all States, have agreed to and have fundamental obligations to uphold. Therefore, while taking into account the challenges of prosecution, the preference should be to prosecute for war crimes to ensure that this important body of law applicable in armed conflict is respected and upheld. This article has demonstrated that for a broad range of States, war crimes prosecutions for terrorist-related activities in armed conflict prosecution is possible and the challenges for prosecutions are almost the same as those for terrorist offences. Now is the time for States to seriously consider prosecuting for war crimes to end impunity.