

# From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law

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## Abstract

*This article clarifies the ongoing confusion in doctrine and practice about both the actual and optimal interaction between international counterterrorism law (CTL) and international humanitarian law (IHL) in armed conflict. It discusses the advantages and disadvantages of the co-application of CTL with IHL, before considering a variety of techniques for mutually accommodating the interests of both regimes, particularly through partial exclusion clauses in counterterrorism instruments or laws. It concludes by identifying the optimal approach to the relationship between CTL and IHL, which recognizes the legitimate interests of both fields of law while minimizing the adverse impacts of each on the other.*

**Keywords:** international humanitarian law, counterterrorism law, *lex specialis*, armed forces, UN Security Council, humanitarian relief, medical activities, exclusion clauses.

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## Introduction

International counterterrorism law (CTL) frequently applies to conduct in armed conflict regulated by international humanitarian law (IHL). Depending on one's perspective, this brings advantages or disadvantages. On the one hand, CTL can play a valuable role in complementing IHL in the suppression of undesirable violence, while avoiding the political difficulties of amending IHL itself. On the other hand, the co-application of CTL has the potential to conflict with long-standing and sometimes sensitive IHL rules or undermine IHL policy interests.

Neither CTL nor IHL purports to be *lex specialis* or self-contained *at the regime level* so as to wholly exclude the other; CTL applies in armed conflict just as do international human rights law, international criminal law, international environmental law and so on. Nor does CTL clearly, explicitly and uniformly spell out the legal relationships where specific rules of the two branches interact. Rather, some international counter-terrorism conventions (ICTCs)<sup>1</sup> since 1963 exclude certain conduct, actors or targets in armed conflict from their scope, while otherwise co-applying with IHL. Other ICTCs are silent on the relationship but raise potential conflicts with IHL. So too does decentralized national implementation of binding United Nations (UN) Security Council counterterrorism resolutions since 2001, some of which vaguely affirm that national CTL measures must comply with IHL but do not identify all specific relevant IHL rules which must be respected.

This article aims to clarify the conceptual, policy and interpretive debates<sup>2</sup> about the interaction of CTL and IHL. It considers firstly the potential advantages of co-applying CTL, and secondly the key disadvantages of CTL intruding on IHL's domain. Whether the interests of each regime can be adequately accommodated through co-application largely depends on the scope of particular CTL and IHL rules, including the existence and extent of any CTL provisions deferring to IHL. The subsequent part of the article accordingly explores how IHL is diversely addressed in the ICTCs (from implicit and explicit partial exclusions to silence). This is followed by consideration of the Security Council's limited, albeit growing, attention to IHL, and the potentially adverse impacts on IHL of national implementation of CTL measures.

The issues discussed in this article are pressing not only because the UN General Assembly's Draft Convention for the Prevention and Suppression of International Terrorism (Draft UN Convention), formally under negotiation since 1999, is still struggling to demarcate its approach to IHL, but also because (by

1 For a full list, see: [www.un.org/counterterrorism/international-legal-instruments](http://www.un.org/counterterrorism/international-legal-instruments) (all internet references were accessed in August 2021).

2 See, for example, Daniel O'Donnell, "International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces", *International Review of the Red Cross*, Vol. 88, No. 864, 2006; Alejandro Sanchez Frias, "Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions against Terrorism", *Israel Law Review*, Vol. 53, No. 1, 2020; Ben Saul, "Terrorism, Counter-Terrorism, and International Humanitarian Law", in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford and New York, 2020, p. 403; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford, 2011.

virtue of Security Council CTL obligations) all States are already required to suppress terrorist acts—in the absence of a universal definition of them or any agreed approach to their interaction with IHL. Even if a State is not involved in armed conflict (as most States are not), it must still cooperate in the prevention and suppression of terrorism affecting another State. States can thus be required to assist foreign States in suppressing non-State organized armed groups (OAGs) in non-international armed conflict (NIAC), including by criminalizing insurgent fighting in foreign civil wars and removing the “political offence exception” to extradition. CTL and IHL may co-apply in many contemporary conflicts, including Afghanistan, Colombia, Iraq, Mali, Nigeria, Palestine, Somalia, Syria and Yemen,<sup>3</sup> as well as in relation to “foreign fighters” from other States. These developments have not only produced legal incoherence—due to the divergence in national approaches—but also discourage compliance with IHL by OAGs, undermine prospects for peace and reconciliation, and may displace accountability for war crimes—and justice for victims—through an emphasis on prosecuting less grave national terrorism offences.

The article concludes by proposing the optimal approach to the CTL–IHL interface, reconciling IHL and counterterrorism imperatives as far as possible and minimizing one field playing “trumps” at the expense of the other. It makes two concrete suggestions. Firstly, the Draft UN Convention, Security Council resolutions, and regional and national laws should exempt from CTL all activities of armed forces during armed conflict which are not unlawful under IHL, following the “best practice” approach in Canadian and New Zealand law. Secondly, the Security Council should require all of its CTL measures to be implemented in conformity with relevant, specific IHL rules, including on medical and humanitarian activities.

## Advantages of co-application

It is well known that much terrorist conduct—namely, violence against civilians designed to intimidate a population or compel a government<sup>4</sup>—is already addressed by IHL. This foremost includes the numerous IHL rules (some of which entail criminal responsibility) prohibiting deliberate, indiscriminate or disproportionate attacks on civilians and civilian objects (including medical and humanitarian relief personnel, transports and objects, as well as cultural property and religious places), hostage-taking, perfidy, the use of certain weapons, and reprisals against civilians. In addition, there are specific IHL prohibitions on terrorism (and the related war crime of intending to spread terror amongst civilians). An overarching policy question is whether these are enough to

3 Dustin A. Lewis, “‘Criminalization’ of Humanitarian Action under Counterterrorism Frameworks: Key Elements and Concerns”, *Proceedings of the ASIL Annual Meeting*, Vol. 112, 2018, p. 269.

4 See, for example, International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 107, 9 December 1999 (entered into force 10 April 2002) (Terrorist Financing Convention), Art. 2(1)(b).

suppress terrorist-type violence in armed conflict, or whether CTL adds different and valuable tools. A number of potential contributions of CTL may be identified from a counterterrorism standpoint.<sup>5</sup>

First, CTL substantively criminalizes certain undesirable conduct which is not prohibited by IHL. Numerous examples may briefly be given, though most are highly specialized and are not common in armed conflicts. For example, IHL does not address the nuclear material offences of embezzling or fraudulently obtaining nuclear material, demanding nuclear material by force or intimidation, unlawfully dealing with nuclear material, or nuclear smuggling;<sup>6</sup> nor does it address the nuclear terrorism offences of unlawful possession of radioactive material, or making a radioactive device, with intent to harm.<sup>7</sup> Further, there are no comparable IHL prohibitions or war crimes in relation to various aviation and maritime safety offences, such as communicating false information and thereby endangering aircraft safety,<sup>8</sup> or unlawfully transporting explosives or biological, chemical or nuclear weapons<sup>9</sup> (although weapons treaties more narrowly prohibit and criminalize the “transfer” of some of these weapons<sup>10</sup>).

As regards more general terrorism offences, the Draft UN Convention would criminalize attacks on communication systems which are likely to result in major economic loss, but under IHL, if civilian data is not an “object” which can be kinetically “attacked”,<sup>11</sup> IHL does not prohibit attacks upon it, let alone criminalize them. More controversially, national CTL offences may criminalize civilian direct participation in hostilities (DPH) (whether by members of OAGs performing a continuous combat function (CCF), or more sporadic participation), for instance by resort to offences such as membership of a terrorist organization or foreign fighter offences. In international armed conflict (IAC), such persons are simply not entitled to the combatant’s immunity from national criminal prosecution for hostile acts that are in conformity with IHL. Further, in

- 5 See also Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020, para. 22 (accepting the author’s submissions on some of the following points).
- 6 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101, 3 March 1980 (entered into force 8 February 1987) as amended by the Amendment to the Convention on the Physical Protection of Nuclear Material 1980, 8 July 2005 (entered into force 8 May 2016) (Amended Nuclear Material Convention), Art. 7(1).
- 7 International Convention for the Suppression of Acts of Nuclear Terrorism, 2445 UNTS 89, 13 April 2005 (entered into force 7 July 2007) (Nuclear Terrorism Convention), Art. 2(1).
- 8 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 178, 23 September 1971 (entered into force 26 January 1973) (Montreal Convention), Art. 1(e).
- 9 Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 10 September 2010 (entered into force 1 July 2018) (Beijing Convention), Art. 1(1)(i).
- 10 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163, 10 April 1972 (entered into force 26 March 1975), Art. 3 (prohibition only); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1975 UNTS 45, 3 September 1992 (entered into force 29 April 1997), Arts 1(a), 7(1)(a), 7(1)(c); Treaty on the Prohibition of Nuclear Weapons, UN Reg. No. 56487, 7 July 2017 (entered into force 22 January 2021), Art. 1(b)–(c), 5(2).
- 11 See, for example, Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017, Rules 92, 100.

both IAC and NIAC such persons may be targeted for the duration of their participation, detained on security grounds, and prosecuted for any national offences (including terrorism) as well as for any consequential harm constituting war crimes (such as perfidy or physical injury).

Secondly, CTL may criminalize conduct which is prohibited under IHL but not a war crime. For example, a failure to take adequate precautions in targeting is not a war crime in any conflict, whereas national terrorism offences may make it an offence to recklessly endanger life or the public, thus enhancing civilian protection. In NIAC—at least under the Rome Statute of the International Criminal Court (ICC)—there is also no crime of launching an attack on civilian objects (as opposed to persons), an indiscriminate attack, an attack which would cause disproportionate civilian casualties, illegal detention, or using human shields. CTL may criminalize these. CTL may also criminalize attacks on the environment,<sup>12</sup> whereas IHL only does so in IAC and then only under the Rome Statute and if very high thresholds are met.<sup>13</sup> Even where such conduct already constitutes ordinary national crimes, CTL liability can enable wider international cooperation and bring additional investigative tools.

Thirdly, where CTL and war crimes apply to the same conduct, elements of CTL offences may be more specific. Examples include the CTL offences of aircraft hijacking<sup>14</sup> and emplacing a bomb on an aircraft,<sup>15</sup> compared with the more general IHL rules against attacking or attempting to attack a civilian object or hostage-taking. CTL can thus expand the armoury of charges available and more accurately reflect what is precisely wrongful about an act.

Fourthly, CTL often criminalizes early preparatory conduct which is not covered by war crimes or IHL prohibitions. On the one hand, the extended modes of criminal responsibility under the ICTCs<sup>16</sup> and IHL<sup>17</sup> are not dissimilar. But in implementing UN Security Council Resolution 1373, many States have

12 Organization of African Unity Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, 1 July 1999 (entered into force 6 December 2002) (OAU Convention), Art. 1(3)(a).

13 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(b)(iv) (“widespread, long-term, and severe damage to the natural environment which would be clearly excessive” to the military advantage anticipated, reflecting the test in 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), Art. 35(3)). Attacks on the environment are not crimes under the four 1949 Geneva Conventions, AP I, 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), or the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978).

14 Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, 16 December 1970 (entered into force 14 October 1971) (Hague Convention), Art. 1(a).

15 Montreal Convention, Art. 1(c).

16 The latest ICTCs require States to criminalize commission, attempt, complicity, conspiracy, and organizing or directing; a few also address threats and concealment.

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 195 (commission, attempt, assistance, facilitating, aiding or abetting, and planning or instigating), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

enacted more precautionary offences which criminalize preparatory conduct well before criminal intent has crystallized into an attempt, or conduct where a person acts alone and there is thus no (group) conspiracy prior to the attempt. Such offences include the mere possession of a weapon, explosive, vehicle, document or object which could be used in a future attack, before any overt act is initiated. They also include offences of providing or receiving terrorist training (for instance, on weapons, tactics or targets) and inciting, advocating, praising or glorifying terrorism (including to radicalize or recruit others). There are also numerous offences relating to various forms of support to terrorist organizations, such as acts of finance, recruitment, membership, association, support or training.

In contrast, IHL does not prohibit groups from, or criminalize their members for, direct or indirect participation in hostilities, but focuses on unlawfully harmful conduct (such as wilful killing or perfidy). It also limits modes of liability to more traditional ones whereby an act must bear a more proximate relationship to the eventual commission of a crime in order to attract criminal liability. For instance, whereas financing a specific attack on civilians could constitute the *accessorial* offence of aiding and abetting a war crime, the stand-alone, *principal* CTL offence of giving funds to a person involved in terrorism or a terrorist organization – for purposes other than a contemplated terrorist act – would not constitute complicity in a war crime.

Even where a terrorist act is also a war crime, prosecution for a terrorism offence may be tactically easier and more fruitful for law enforcement, particularly for group-based offences with low bars of membership, association, or indirect or peripheral support for the group, proved by self-incriminating social media records. It may avoid the technical complexities, security challenges and resource burdens (particularly in weak, fragile or developing States affected by conflict) of forensically collecting battlefield evidence of war crimes in remote, dangerous conflict zones, while still achieving the criminological goal of incapacitating the offender through equally lengthy (if not lengthier) terms of imprisonment for terrorism offences. In Europe and the United States, for example, most prosecutions of returning “terrorist fighters”, or foreign immigrant fighters, from Syria and Iraq have involved either terrorist or ordinary criminal offences, not international crimes.<sup>18</sup> As discussed below, however, some support or organization-based offences may conflict with IHL guarantees for medical and humanitarian personnel and their activities, while some have also raised international human rights law issues, such as by infringing on the principle of legality.<sup>19</sup>

18 See, for example, Beth Van Schaack, *Imagining Justice for Syria*, Oxford University Press, Oxford, 2019, Ch. 7; Emma Broches and Julia Solomon-Strauss, “International Terrorism Prosecutions during Winter 2019”, *Lawfare*, 21 March 2019.

19 UN Counter-Terrorism Implementation Task Force (Working Group on Protecting Human Rights while Countering Terrorism), *Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights Law*, October 2014, Principles and Guidelines 3 and paras 39–44.

Fifthly, CTL imposes distinctive obligations on States concerning jurisdiction and cooperation. On the one hand, all war crimes (in IAC or NIAC) are subject to a *right* of universal jurisdiction under customary IHL, and an implied *duty* under the Geneva Conventions of 1949 to establish such jurisdiction over “grave breaches” in IAC<sup>20</sup> (but there is no treaty or customary law duty to establish universal jurisdiction over war crimes in NIAC). The jurisdictional picture is similarly both fragmented yet fairly extensive for terrorism offences. The ICTCs specify various grounds of jurisdiction (such as territoriality and nationality) but also residually require a State to establish quasi-universal jurisdiction where a (non-national) suspect who has committed an offence abroad is present in the State’s territory.<sup>21</sup> Such jurisdiction is more limited than under the Geneva Conventions, which do not require the presence of an offender,<sup>22</sup> but more expansive in that jurisdiction *must* be established over offences, including in NIAC (unlike in IHL, which confers a customary right but imposes no duty).

Some specific CTL offences under Security Council resolutions are, however, subject only to territoriality or nationality jurisdiction (as for certain financing and foreign terrorist fighter offences,<sup>23</sup> and this also implicitly the position for more extensive suite of general CTL offences in paragraph 2(e) of Resolution 1373.<sup>24</sup> In practice, jurisdictional grounds in disparate national laws are often limited rather than asserting universal jurisdiction, thereby reducing the potential for accountability (although national war crimes jurisdiction can be similarly limited in practice).

Another difference between IHL and CTL concerns the exercise of jurisdiction and cooperation. Only “grave breaches” in IAC are subject to a treaty duty to investigate offences, “extradite or prosecute” and provide mutual legal assistance, but not other violations of the laws and customs of war (in IAC or NIAC) or violations of Article 3 common to the Geneva Conventions in NIAC. In contrast, States must extradite or prosecute, and provide mutual assistance, in relation to all ICTC offences, as well as in relation to all terrorist acts (including preparatory offences) under Resolution 1373.<sup>25</sup> Such obligations of transnational cooperation are essential to combating impunity where fugitives cross borders.

20 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), Art. 49, para. 2846.

21 See, for example, International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, 15 December 1997 (entered into force 23 May 2001) (Terrorist Bombings Convention), Art. 6(4).

22 ICRC Commentary on GC I, above note 20, Art. 49, para. 2866.

23 See, for example, UNSC Res. 1373, 28 September 2001, paras 1(b), 1(d) (financing); UNSC Res. 2178, 24 September 2014, paras 6(a)–(c) (foreign terrorist fighters). See also David McKeever, “International Humanitarian Law and Counter-terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 69, No. 1, 2020, p. 51.

24 Counter-Terrorism Executive Directorate (CTED), *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, 2019, para. 274 (jurisdiction based on nationality and territoriality, and quasi-universal custody-based jurisdiction only if the act is an ICTC offence; para. 2(e) itself is silent on jurisdiction but requires States to “bring to justice” all offenders, which in turn requires the State to “prosecute or extradite”: UNSC Res. 1456, 20 January 2003, para. 3; UNSC Res. 1566, 8 October 2004, para. 2).

25 See above note 24 on para. 2(e).

However, there is arguably a customary IHL duty to investigate, “prosecute or extradite”, and cooperate (including mutual assistance in investigations, arrests and prosecutions, and through extradition).<sup>26</sup>

Sixthly, CTL imposes its own specific duties to prevent offences which differ from those in IHL, although IHL contains its own preventive measures covering some of the same ground. Under the ICTCs, States must take all practicable measures to prevent, and counter preparations in their territories for, the commission of offences within or outside their territories, including “measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of” offences.<sup>27</sup> In addition, States must cooperate by exchanging information and coordinating administrative and other measures to prevent offences,<sup>28</sup> including those prepared abroad and directed against other States. Detailed preventive obligations are also set out in Resolution 1373<sup>29</sup> and in other resolutions on preventing related threats such as foreign fighters. A national and inter-State machinery of prevention is thus in motion to address terrorist offences.

IHL’s measures of prevention are both narrower and more comprehensive than CTL’s. Many are limited to a party’s own conduct (unlike CTL), for instance through measures to execute obligations; orders and instructions; repression of breaches; command responsibility; commanders’ duties; dissemination; and legal advisers.<sup>30</sup> More generally, the national criminalization of war crimes—like terrorist offences—aims to deter and thus prevent crimes by any person. The obligation in Article 1 common to the Geneva Conventions to “ensure respect” for IHL requires a duty not only to stop violations but also “to prevent violations where there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred”.<sup>31</sup> It applies not only to a party’s own forces but also to populations under its control;<sup>32</sup> in this respect it covers similar ground to the CTL measures targeting terrorist preparations in the State’s territory. Common Article 1 arguably also extends to the ensuring of respect by other parties to a conflict,<sup>33</sup> in which case it partly coincides with the CTL duty to exchange information and coordinate measures where, for instance, a State suspects that a crime is being prepared abroad against another State.

Seventhly, CTL may entail stronger or special investigative or other law enforcement powers compared with IHL. The presumed extraordinary menace of terrorism is frequently invoked to justify exceptional powers for police and intelligence agencies in relation to surveillance; stop, search and seizure;

26 ICRC Customary Law Study, above note 17, Rules 158, 161.

27 See, for example, Terrorist Bombings Convention, Art. 15(a); Terrorist Financing Convention, Art. 18(1).

28 See, for example, Terrorist Financing Convention, Art. 18(3).

29 UNSC Res. 1373, 28 September 2001, paras 2(a) (refrain from supporting terrorism), 2(b) (prevent terrorist acts), 2(c) (deny safe haven), 2(d) (prevent use of territory for terrorism), 2(g) (prevent movement of terrorists).

30 See, for example, AP I, Arts 80, 82, 83, 86, 87.

31 ICRC Commentary on GC I, above note 20, Art. 1, para. 164.

32 *Ibid.*, paras 130–152.

33 *Ibid.*, para. 153.

preventive freezing and confiscation of assets; lesser judicial controls (such as warrants); extended periods of pre-charge detention; modifications to bail procedures; preventive security detention; restrictive “control orders”; or lower standards of proof. At trial, suspects may face modified procedures to accommodate security concerns, such as closure of courts or limited disclosure of classified information. Upon conviction, terrorists may receive unusually lengthy sentences of imprisonment due to sentencing policies. All of this may make CTL more attractive than IHL as a way of dealing with offenders, assuming such laws and procedures are consistent with human rights law. Violations of human rights may undermine accountability for terrorism if, for example, evidence is tainted or trials are unfair.

Finally, there may be an important expressive dimension to labelling conduct as terrorist rather than as a (mere) IHL violation or even a war crime. The term “terrorism” has a powerful stigmatizing and denunciatory effect of its own. It conjures up a particular kind of grave criminality – not necessarily worse than a war crime, but reflecting different injured interests that justify distinctive suppression. The UN General Assembly and Security Council have routinely condemned terrorism as a threat to international security, human rights and stable governance<sup>34</sup> (interests which war crimes can also threaten). They have frequently condemned terrorist acts by OAGs in armed conflict (whether in NIAC or IAC involving occupation), for example in Afghanistan, Iraq, Syria, Nigeria, Mali, Yemen and Israel/Palestine. They have sometimes called for the prosecution of those involved in terrorist acts in conflicts,<sup>35</sup> albeit without indicating which acts should be prosecuted specifically as terrorism, international crimes or ordinary crimes. While States are not required (either by most of the ICTCs or by Security Council resolutions) to explicitly qualify terrorist acts as specifically terrorist offences in national law<sup>36</sup> (the same is strictly true of war crimes under IHL<sup>37</sup>), this is the predominant approach.

Separately, one pragmatic reason for pursuing terrorism charges is that some States simply lack relevant war crimes legislation. In Syria, for example, there is no such law applicable to NIACs;<sup>38</sup> Afghanistan only implemented international crimes into domestic law in 2018;<sup>39</sup> and proposed international crimes laws in Iraq (including the Kurdistan Region) and Nigeria are yet to be adopted (as of mid-2021). In these States, terrorism prosecutions have

34 See Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, Ch. 2.

35 Especially in relation to “foreign terrorist fighters”: see UNSC Res. 2178, 24 September 2014, para. 4; UNSC Res. 2396, 21 December 2017, paras 19 (“Reaffirms that those responsible for committing or otherwise responsible for terrorist acts, and violations of international humanitarian law or violations or abuses of human rights in this context, must be held accountable”), 29–41.

36 D. McKeever, above note 23, p. 51.

37 ICRC Commentary on GC I, above note 20, Art. 49, paras 2847–2851 (discussing options for criminalizing grave breaches, from the use of ordinary offences to specific war crimes laws).

38 War crimes are not recognized under either the Syrian Penal Code, Legislative Decree No. 148, 22 June 1949; or the Military Penal Code, Legislative Decree No. 61, 27 February 1950.

39 Afghanistan Penal Code 2017, Official Gazette No. 1260, 15 May 2017 (entered into force 14 February 2018).

predominated by default (including prosecutions by some OAGs<sup>40</sup>). Other States, meanwhile, lack both CTL and war crimes offences. Somalia has relied on military law offences and courts (as well as detention, disarmament, demobilization and reintegration) to deal with Al-Shabaab;<sup>41</sup> a CTL bill endorsed by the cabinet in 2013 is yet to be passed, after its sponsor was killed in the conflict, and there is no bill at all on international crimes.

## Disadvantages of co-application

What are the disadvantages of the co-application of CTL? There are legal and policy considerations. Firstly, where CTL and war crimes prohibit the same conduct, CTL may seem unobjectionable because it simply reinforces IHL, as where both criminalize attacks on civilians. Even in this best case, however, war crimes may be a preferable paradigm precisely because they are crimes under customary international law. They are universally and well defined,<sup>42</sup> and much longer and more firmly established, than newer, more divergent national terrorism offences (particularly those arising from Security Council standards which do not define terrorist acts, and which often raise human rights concerns). Labelling conduct as a war crime has a unique denunciatory power of its own – it is more universal and less political than terrorism, and widely understood as entailing the gravest international criminality. Certainly where a war crime has an element additional to a terrorist offence, and there is sufficient evidence to prosecute, it should be prosecuted as a war crime in order to recognize the full nature and scope of the criminality involved and to do justice to victims of international crimes.<sup>43</sup> Where the elements of crimes differ, attention should be given to cumulative charging.

Further, war crimes attract universal jurisdiction, unlike the possibly more limited extraterritorial ambit of some States' terrorism offences implementing Security Council resolutions (in contrast to ICTC offences, which require quasi-universal jurisdiction). There are long-established modalities of cooperation (such as extradition and mutual assistance) between many States in relation to war crimes. There is also a rich body of international jurisprudence on war crimes,<sup>44</sup> unlike the much more jurisdiction-specific case law and parochial national and regional practices on terrorism. Unlike terrorism, allegations of war crimes also potentially engage international jurisdiction (of the ICC),<sup>45</sup> special IHL

40 Anti-Terrorism Act, Legislative Council Decree No. 20, 27 September 2014, under the Charter of the Social Contract, 29 January 2019 (the interim constitution of the then Democratic Autonomous Regions of Afriin, Jazira and Kobane).

41 See, for example, Bahame Tom Nyanduga, *Report of the Independent Expert on the Situation of Human Rights in Somalia*, UN Doc. A/HRC/30/57, 29 September 2015, para 28–32.

42 D. McKeever, above note 23, p. 51.

43 See also F. Ní Aoláin, above note 5, para. 21. On cumulative charging, see Genocide Network, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences*, May 2020.

44 See also D. McKeever, above note 23, p. 51.

45 *Ibid.*

mechanisms (such as the International Fact-Finding Commission) and international human rights mechanisms (such as commissions of inquiry) with a mandate to investigate IHL or international criminal law violations (but not normally “terrorism” offences).

Secondly, IHL was developed as a (largely) self-contained regime based on the best attainable (albeit not necessarily the best) compromises between military necessity and humanitarian protection. Interposing extraneous bodies of law, without due regard for the carefully negotiated balancing within IHL, has the potential to undermine the essential interests of the belligerents and thus compliance with IHL (including protection of civilians and fighters alike).

For example, CTL would directly collide with IHL if it criminalized lawful attacks by State forces in IAC, overriding combatant immunity. Likewise, there would be a conflict if CTL offences such as terrorist financing or providing “support” criminalized or impeded the impartial provision of medical or humanitarian relief.<sup>46</sup> If CTL offences *prime facie* apply to such conduct, some means is needed to resolve the conflict, whether through (1) harmonious interpretation of the two rules, (2) regarding one rule as *lex specialis* to “trump” the other, (3) incorporating an exception into the CTL norm, or (4) relying on informal means such as prosecutorial discretion (an undesirable option<sup>47</sup>). These techniques are considered below.

Indirect or implicit conflicts are more difficult: to use earlier examples, do CTL offences interfere in IHL if IHL deliberately chooses – for reasons of military exigency or otherwise – not to criminalize attacks on the environment, or a failure to take precautions, in IAC; or to prohibit, but not criminalize, indiscriminate or disproportionate attacks in NIAC; or not to prohibit or criminalize direct participation in hostilities in NIAC? Such acts may be criminal under CTL in NIAC, or even in IAC to the extent that combatant immunity only covers acts that are lawful under IHL, not war crimes or other violations of IHL prohibitions<sup>48</sup> (such as the failure to take precautions, or attacking the environment).

Thirdly then, even where there is no direct, formal legal conflict between CTL and IHL rules, CTL measures may undermine policy interests inherent in IHL. The risk is particularly acute in the following area. IHL neither authorizes nor prohibits civilian DPH (including CCF by members of OAGs), but regulates its consequences. CTL may, however, criminalize such conduct regardless of

46 See, for example, US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US (2010), Nos 08-1498, 09-89, 21 June 2010 (concerning the expansive scope of the US material support for terrorism offence in 18 USC §2339A, which has an exception for medicines and religious materials but not for medical care or humanitarian relief); Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action*, 2018.

47 UK Supreme Court (UKSC), *R v. Gul*, [2013] UKSC 64, 23 October 2013, para. 36 (undermines rule of law, separation of powers, and legality where wide discretion is left to prosecutors as to whether lawful hostilities under IHL are criminal under domestic law).

48 See, for example, US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, 2007, para. 5.4.1.1 (“cannot be prosecuted for their lawful military actions”).

whether it otherwise complies with IHL on the conduct of hostilities, as where OAGs attack only military objectives, avoid excessive civilian casualties, and use lawful means and methods of war. Such CTL offences cannot technically conflict with IHL, since the conduct is not authorized under IHL. To the contrary, IHL permits States Parties to criminalize civilian DPH, for instance under the occupier's security laws in occupied territory;<sup>49</sup> while national law may criminalize it in a State's own territory in IAC or NIAC.

At most, IHL encourages States to confer the widest possible amnesty at the end of a NIAC (under Additional Protocol II (AP II) only, not also under common Article 3) for acts which did not violate IHL.<sup>50</sup> In this sense, the incentives for OAGs to comply with IHL have always been very limited, resulting from States' concerns to protect their sovereign right to restore law and order in their territories.

The question, then, is not whether such conduct cannot be criminalized at all, so much as whether it is appropriate to *transnationally* criminalize it as *terrorism*—that is, to establish extraterritorial criminal jurisdiction over such conduct in a foreign State's territory, and to either prosecute fugitive offenders or extradite them back to the territory of the conflict. There is certainly no general international law rule prohibiting this, as long as the definition of terrorist offences complies with international human rights law, for instance as regards the principle of legality (precision and foreseeability in offences) or of non-discrimination. Moreover, on numerous occasions the Security Council and General Assembly (and through them, States collectively) have clearly depicted certain OAGs in armed conflicts as terrorist—such as Al-Qaeda, the so-called Islamic State (IS), Al-Nusra and Boko Haram—because of the nature of the acts committed by their members. Such identification has not only been for the purpose of imposing sanctions but also to encourage States to bring to justice the perpetrators. Both Security Council resolutions addressing terrorism and the ICTCs thus envisage at least some co-application of CTL and IHL.

A number of policy counter-arguments may nonetheless be made. The International Committee of the Red Cross (ICRC) warns precisely against criminalizing “any act of violence” by an OAG as unlawful terrorism when it is not unlawful under IHL, since doing so “is likely to diminish any incentive to comply with IHL”.<sup>51</sup> It makes a similar point in relation to labelling groups as terrorist (which often triggers the criminal liability of members), since this too “carries the risk that the OAG loses an incentive to abide by that body of law”, particularly the duty to distinguish between civilians and military objectives.<sup>52</sup>

49 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 64–67.

50 AP II, Art. 6(5).

51 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 58 (ICRC 2019 Challenges Report). See also F. Ní Aoláin, above note 5, para. 26; ICRC, *Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law*, Geneva, 2002; Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 970.

52 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017

Clearly, if one will be criminalized as a terrorist – whether because of one’s conduct, or for membership or support of a terrorist group – regardless of whether one respects IHL, the perceived advantages of complying with IHL may be reduced.

The ICRC’s claims are intuitive and common-sense, rather than being empirically substantiated by whether the application of CTL does, in fact, push OAGs to be less IHL-compliant, but they are nonetheless grounded in the ICRC’s operational experience in conflicts. This is not to say that labelling individuals or groups as terrorist decimates *all* incentives to comply, since there are many other reasons why groups in particular may still wish to comply: their moral identity or religious values; appealing to civilian hearts and minds; gaining support from diasporas or foreign State sponsors; political legitimacy; facilitating humanitarian relief to “their” people; demonstrating that they are not war criminals, unlike State forces; or to show that they are not, in truth, terrorists.<sup>53</sup> This is also not to say that all OAGs are amenable to IHL socialization or responsive to its faint incentives for compliance. Violating IHL is the mission or core business of some “terrorist” groups (such as IS, Al-Qaeda, Boko Haram and Abu Sayyaf), which are not deterred by war crimes law, let alone the nuance that IHL does them the favour of neither prohibiting nor authorizing combat, and leaves the issue of whether they are criminals to national law.

Nonetheless, given that legal incentives for OAGs to comply with IHL in NIAC are already so tenuous, the intrusive transnational criminalization of terrorism further weakens them. This may not seem like much, but when the stakes are so high – more violence against civilians, against an already high background level – minimizing intrusion is worth it. This is true even of many “terrorist” groups, whether Al-Shabaab, Hamas, the Taliban, the Kurdistan Workers’ Party (Partiya Karkerên Kurdistanê, PKK) or the Liberation Tigers of Tamil Eelam (LTTE) (or even exterminatory groups such as the Khmer Rouge), since experience suggests that, at some point in a conflict, some group members may be willing to engage directly or through back-channels with external interlocutors and values,<sup>54</sup> and group behaviour may eventually respond.

A second, related reason to be cautious about criminalizing OAG hostilities as terrorism relates to the relationship between sovereignty and IHL in NIAC. As mentioned, in NIAC the affected State has long enjoyed the sovereign right under national law to criminalize members of OAGs for offences against national security or other interests, whether labelled as terrorism or otherwise. However, the transnational criminalization of terrorism in conflict is distinguishable from prior practice. NIACs were traditionally civil wars fought by citizens in a State’s

(ICRC Commentary on GC II), Art. 3, para. 895. See also ICRC, *The Applicability of IHL to Terrorism and Counterterrorism*, Geneva, 2015; Jelena Pejic, “Armed Conflict and Terrorism”, in Ana María Salinas de Frias, Katja Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 177; Tristan Ferraro, “Interaction and Overlap between Counter-Terrorism Legislation and International Humanitarian Law”, in *Terrorism, Counter-Terrorism and International Humanitarian Law*, Proceedings of the Bruges Colloquium, 20–21 October 2016.

53 See, generally, Ben Saul, “Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 22, No. 1, 2017.

54 *Ibid.*, pp. 25–26.

own territory, not the more complex transnational NIACs of today. The right to criminalize conduct was thus closely linked to the State's sovereign territorial jurisdiction over its own territory and population. The exercise of extraterritorial criminal jurisdiction by one State over the conduct of OAGs in another State was a rarity, limited by the necessity of identifying an acceptable basis for extraterritorial prescriptive jurisdiction under international law. One such basis was universal jurisdiction over war crimes under IHL treaties and customary IHL. In the absence of a jurisdictional basis, States generally did not criminalize foreign civil wars, and they refused to cooperate with the territorial State in suppressing its domestic political opponents (by upholding the political offence exception to extradition for classic civil war "crimes" such as rebellion, revolution and sedition). Foreign civil wars will usually not affect a State's own security or involve its nationals as perpetrators or victims, so as to attract other jurisdictional grounds.

The expansive jurisdiction now asserted over terrorism offences has broken the historical nexus with a sovereign's presumptively territorial rights.<sup>55</sup> It has also been accompanied by the depoliticization of terrorism offences in extradition, prompted by the later ICTCs and UN standard-setting since the late 1990s. Under the ICTCs, this is less problematic, because their carefully defined offences are limited in subject matter (they largely do not criminalize conduct not already prohibited by IHL, and do not criminalize civilian DPH or "material support" to terrorist groups), and because they are often subject to armed conflict exclusion clauses (discussed below). Treaty-making processes, open to all States, ensured that IHL was taken into account.

In contrast, more general terrorism offences under Resolution 1373 are not guided by any agreed international definition but are creatures of unilateral national implementation; they do not accommodate IHL through any exclusion formula at all; and they are imposed on all States by a fifteen-member-State Security Council (the Permanent Five of whom matter), without the opportunity for all States to participate or to ventilate their concerns about IHL. For these reasons, States should be very cautious before defining terrorism to encompass participation in hostilities in foreign NIACs. Even where a State's own forces are involved in the foreign conflict, that State is not the territorial sovereign with a general competence to prescribe the criminal law applicable there, and it does not enjoy any equivalent of the powers of an occupier in IAC, which would allow it to enact security offences in foreign territory.<sup>56</sup> At most, it may potentially (and controversially) assert expansive security/protective jurisdiction.

It is one thing for a State to suppress non-State violence which challenges its own political authority in its own territory, but quite a different proposition for it to suppress – by choice, or even by obligation – political violence (not violating IHL) in another State's territory. The latter would interfere, on the side of the foreign government, in foreign domestic political struggles – this was historically avoided

55 See also F. Ní Aoláin, above note 5, para. 26 (accepting the author's position on this point).

56 GC IV, Art. 64.

by applying the political offence exception in extradition law and treaties (itself now increasingly eliminated), and was even celebrated, as in the case of foreign volunteers in the Spanish Civil War. Foreign suppression of non-State violence abroad further undermines incentives for OAGs to comply with IHL, who are painted into a corner as “terrorists” everywhere. This does not, of course, detract from the right of States to criminalize “foreign recruitment” or enlistment offences – now recast as “foreign fighter” travel offences – in order to prevent their own nationals or residents from travelling to participate in conflict abroad.

A third broad reason to be circumspect about CTL is that it may impede other IHL-related interests during a conflict. In extreme cases, some States may deny that IHL applies at all to “terrorists”, whether because they do not wish to legitimize “terrorist” groups by admitting the existence of an armed conflict,<sup>57</sup> or because they claim that IHL rules in conflicts they do recognize do not apply to individual “terrorists”, or apply in “overly permissive” ways.<sup>58</sup> The legal and political polarization of relations with “terrorist” groups may also make such groups suspicious of engaging with humanitarian actors, particularly if the latter are seen as part of the international community’s counterterrorism apparatus – this may be because of their perceived closeness to major counterterrorism powers (including through co-option in the service of militarized stabilization, or development-oriented civilian “hearts and minds” campaigns); because of their contractual or other legal requirements to report suspicious behaviour to governments; or because UN agencies are part of the “whole of UN” approach to counterterrorism under the UN Global Counter-Terrorism Coordination Compact of 2018 and its Coordinating Committee, and under the sweeping “Pillars” of the UN Global Counter-Terrorism Strategy of 2006.

A fourth broad reason for caution about overlaying CTL onto IHL relates to cessation of conflict. The “extreme vilification” of classifying OAGs as terrorists can seriously hinder the political willingness or legal ability of governments to enter into peace negotiations in order to end conflicts, as occurred with the FARC-EP in Colombia.<sup>59</sup> These hurdles to “negotiating with terrorists” can add to the usual barriers encountered in armed conflicts. They can also affect the scope of negotiations and the nature of the post-conflict settlement or reconciliation,<sup>60</sup> particularly regarding the treatment of “terrorist” fighters. IHL encourages States to confer the widest possible amnesty for (IHL-compliant) acts during conflict.<sup>61</sup> If an OAG has been labelled or its members criminalized as terrorist, it may complicate the willingness of governments to issue amnesties, as well as the acceptability of such amnesties to socially divided populations that have been hardened to fear “terrorists”.

57 ICRC 2019 Challenges Report, above note 51, p. 58.

58 *Ibid.*, p. 59.

59 Sophie Haspeslagh, “The ‘Linguistic Ceasefire’: Negotiating in an Age of Proscription”, *Security Dialogue*, Vol. 52, No. 4, 2021.

60 ICRC, *The Applicability of IHL*, above note 52; J. Pejic, above note 52; ICRC, *Terrorism and International Law*, above note 51. See also F. Ní Aoláin, above note 5, para. 26.

61 AP II, Art. 6(5); ICRC Customary Law Study, above note 17, Rule 159.

Relatedly, CTL can complicate or frustrate the eligibility of persons for disarmament, demobilization and reintegration (DDR),<sup>62</sup> which may be necessary for a lasting peace. UN DDR standards emphasize that neither those suspected of terrorist acts nor individuals or groups listed by the Security Council can be eligible for DDR, as is the case for those suspected of international crimes.<sup>63</sup> However, the standards operate by *renvoi* to the definition of terrorism not only in the ICTCs but also in Security Council resolutions, which do not define terrorism and allow States to decide the issue, including whether to criminalize mere membership in or support for an OAG, or participation in hostilities, even when not prohibited by IHL. Exclusion from DDR can thus be over-broad: terrorist offences in national law are not necessarily of equivalent gravity to international crimes warranting exclusion from DDR. The same is true of excluding anyone associated with a Security Council listed group, which in itself does not reveal anything about any harmful conduct of individuals. The UN standards note, however, that DDR knowledge may be relevant to implementing the “prosecution, rehabilitation and reintegration” measures which the Security Council has indicated should be used in relation to foreign terrorist fighters.<sup>64</sup>

Whether, and the extent to which, CTL adversely impacts on IHL in armed conflict depends on the definition and scope of particular CTL rules, including any exceptions for IHL. The next section reviews the pros and cons of various exceptions and considers which approaches are capable of optimally balancing CTL and IHL interests.

## International counterterrorism conventions, 1963–2020

Of the nineteen ICTCs adopted since 1963, only one (on hostage-taking) prior to 1997 expressly addressed IHL, whereas since 1997 IHL has been addressed in all instruments: a limited exception in the Terrorist Financing Convention of 1999, and a common exclusion of armed forces in armed conflict in six other instruments (discussed below). The latter exclusion is also the basis of negotiations for the Draft UN Convention since 1999.

Most ICTCs only apply where an offence has a transnational element, thereby excluding purely domestic acts in a NIAC. However, the transnational element under most ICTCs includes situations where an offender is present in another State or, depending on the instrument, where victims or perpetrators are nationals of States other than the place of commission, a foreign aircraft or ship is affected, or another State is subject to compulsion. As such, conduct in an otherwise localized NIAC may still come within the ICTCs.

62 ICRC, *The Applicability of IHL*, above note 52; J. Pejic, above note 52; ICRC, *Terrorism and International Law*, above note 51.

63 UN, *Integrated Disarmament, Demobilization and Reintegration Standards*, 2020, Module 2.11, Sec. 4.2.6.

64 *Ibid.* See, for example, UNSC Res. 2178, 24 September 2014, para. 4; UNSC Res. 2396, 21 December 2017, paras 18, 29–30 (“prosecution, rehabilitation, and reintegration” measures for “foreign terrorist fighters”).

## Silence on IHL

The earlier ICTCs do not address armed conflict but often have implications for IHL. Six ICTCs adopted between 1963 and 1988 addressing aviation and maritime safety do not apply to aircraft or ships used for military, customs or police services,<sup>65</sup> military air bases,<sup>66</sup> or (by implication) military maritime platforms.<sup>67</sup> The Nuclear Material Convention of 1980 likewise applies only to peaceful uses of civilian material, thus excluding attacks on military nuclear material. The exceptions were not designed to accommodate IHL but reflect the civilian mandates of the fora within which they were negotiated (the International Civil Aviation Organization, International Maritime Organization, and International Atomic Energy Agency).<sup>68</sup>

The effect of the exceptions is that attacks on military aircraft, ships, airports, platforms or nuclear material during armed conflict are not covered by the ICTCs and are instead regulated by IHL. Such acts are excluded regardless of the status of the attacker (whether State forces or OAGs, or civilian DPH) and whatever the means or methods used (whether IHL-compliant or not). Conversely, attacks on civilian objects are co-regulated by the ICTCs and IHL (including any war crimes). Where attacks are unlawful under both regimes (as where a civilian aircraft is deliberately targeted), conflict of laws is negligible.

In contrast, there may be a *prima facie* conflict of obligations where an act is lawful under IHL but unlawful under an ICTC. For example, it could be lawful to target a civilian cargo vessel also carrying military munitions or personnel for a party to a conflict, whereas it is an ICTC offence to destroy a ship or damage it or its cargo if likely to endanger the ship's safe navigation. Similarly, it could be lawful under IHL to target military aircraft parked at a civilian airport where proportionate damage to a nearby civilian aircraft may be expected, whereas it is an ICTC offence to intentionally destroy a civilian aircraft or damage it and thereby render it incapable of flight.<sup>69</sup> Collateral damage to the civilian aircraft is still "intentional" in that the military aircraft was attacked with knowledge or

65 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 UNTS 219, 14 September 1963 (entered into force 4 December 1969) (Tokyo Convention), Art. 1(4); Hague Convention, Art. 3(2); Montreal Convention, Art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 221, 10 March 1988 (entered into force 1 March 1992) (Maritime Safety Convention), Art. 2.

66 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 974 UNTS 177, 24 February 1988 (entered into force 6 August 1989) (Airports Protocol), Art. II.

67 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 304, 10 March 1988 (entered into force 1 March 1992) (Fixed Platforms Protocol), Art. 1(3) (fixed platforms on the continental shelf are defined as those for resource-related or economic purposes).

68 See, for example, Convention on International Civil Aviation, 15 UNTS 295, 7 December 1944 (entered into force 4 April 1947) (Chicago Convention), Art. 3, which applies the Convention only to "civil" aircraft and excludes "state aircraft" (defined to include those used for military, customs and police services).

69 Montreal Convention, Art. 1(b).

awareness that the civilian aircraft would be damaged and the attacker also meant to bring about that result.

The two regimes thus impose potentially incompatible obligations. One answer is to invoke one or the other regime as the “hard” *lex specialis* to trump the other. The difficulty is that “it is often hard to distinguish what is [relatively] ‘general’ and what is ‘particular’”:<sup>70</sup> the particular IHL rules because they are adapted to armed conflict, or the aviation or maritime safety convention offences because they are tailored to protect civilian aircraft or ships?

A possible solution to this question is found in the ICTCs themselves. The aviation and maritime safety conventions, like many ICTCs, define conduct as offences where the conduct is not only “intentional” but also “unlawful”. During the drafting, “unlawful” was intended to refer to grounds under national law which could justify or excuse offences, such as in legitimate law enforcement operations or personal self-defence. There was little attention to whether international law, including IHL, could also be used as a standard; it certainly could be if incorporated into national law. It is arguable that the ICTCs should be harmoniously interpreted with IHL by applying the IHL rules to define whether an act is “unlawful” under the ICTC; if not, no CTL offence is committed. This approach applies the “soft” version of *lex specialis*, as in the Nuclear Weapons Advisory Opinion (where a flexible human rights standard – the meaning of an “arbitrary” deprivation of life – was interpreted in light of an IHL rule). Such an approach is also preferable because the drafters of the aviation and maritime safety conventions did not intend to displace IHL; they simply did not consider it (whereas later revisions of those instruments explicitly defer in part to IHL).

The Protected Persons Convention of 1973 does not address armed conflict and is the one ICTC which potentially raises a direct and irreconcilable conflict with IHL. It requires States to criminalize the murder, kidnapping, or “other attack” on the person or liberty of an internationally protected person (such as a diplomat), as well as any “violent attack” on their official premises, private accommodation or means of transport.<sup>71</sup> The Convention deliberately corresponds with the strict inviolability of diplomats and diplomatic premises under the Vienna Convention on Diplomatic Relations (VCDR) of 1961.<sup>72</sup>

In most situations, there will be no conflict under the Protected Persons Convention. In principle, diplomats are civilians, not combatants or fighters, and diplomatic premises and vehicles are civilian objects, and are all immune from attack under IHL. There are examples in practice where breaches of inviolability

70 International Law Commission Study Group, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 58; see also para. 111.

71 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167, 14 December 1973 (entered into force 20 February 1977) (Protected Persons Convention), Art. 2(1).

72 Vienna Convention on Diplomatic Relations, 500 UNTS 95, 18 April 1961 (entered into force 24 April 1964), Arts 29 and 22 respectively.

were also likely IHL violations.<sup>73</sup> Problems arise, however, if a diplomat takes a direct part in hostilities; or an embassy becomes a military objective by hosting combatants or persons taking a direct part in hostilities; or an embassy suffers proportionate collateral damage from a strike on a nearby military objective. All such intentional attacks would be offences which States Parties must prosecute under the Convention, whereas IHL may permit targeting (and confer combatant immunity in IAC). Unlike the aviation and maritime conventions, the 1973 Convention does not refer to “unlawful” acts and thus provides no avenue to harmoniously apply IHL rules. In addition, the difficulty with taking a hard *lex specialis* approach is again deciding which regime is special: IHL, as adapted to armed conflict, or the 1973 Convention, because it is tailored to protect diplomats and embassies?

Under international law, the inviolability of diplomats and embassies is strict, admitting no exceptions even for serious violations of local law, abuses of diplomatic functions<sup>74</sup> (including espionage or political interference), or emergencies.<sup>75</sup> The appropriate remedy within the purposefully self-contained regime of diplomatic relations law is a declaration of *persona non-grata*, expulsion of the mission, or suspension/termination of diplomatic relations in general.<sup>76</sup> There is no clear authority that even personal or national self-defence would excuse a breach of inviolability. There is thus little room to accommodate IHL. IHL equally signals its own comprehensiveness. Even where IHL accords special protection to certain persons or objects (medical, humanitarian, cultural or religious; works containing dangerous forces; or objects indispensable to civilian survival), it never accords *absolute* immunity from attack or precludes proportionate casualties. There is thus no room in IHL for absolute diplomatic inviolability.

73 As where the US failed to take necessary precautions and mistakenly targeted the Chinese embassy in Belgrade in 1999: see UN Security Council, *Agenda: Letter Dated 7 May 1999 from China to the Security Council President (S/1999/523)*, UN Doc. S/PV.4000, 8 May 1999 (China argued that a mistaken attack by NATO forces on its Yugoslav embassy violated the Protected Persons Convention, in addition to being a war crime, and the United States paid *ex gratia* compensation to China and voluntary humanitarian payments to victims; since payments were without admission of liability, this is not evidence, as suggested by the commentary to the ICRC Customary Law Study, above note 17, Rule 150, of a duty to compensate for IHL violations). See also A. Sanchez Frias, above note 2, p. 74 (US extradition under the Protected Persons Convention of a suspected murderer of a US diplomat in an armed conflict in Mali); US District Court for the District of Columbia, *Von Dardel v. Union of Soviet Socialist Republics*, 623 F Supp 246, 15 October 1985, para. 262 (US awarded damages in an alien tort claim to for the kidnapping and possible murder of the Swedish diplomat Raoul Wallenberg by Soviet forces in occupied Hungary in 1945, in contravention of a domestic statute implementing the Protected Persons Convention).

74 The Protected Persons Convention applies to State officials who are entitled to special protection from attack under international law (that is, particularly under the VCDR) at the time of the crime; as per the VCDR, a person abusing their diplomatic functions is still entitled to inviolability. It is unsettled whether personal self-defence (or defence of others) may justify interference: Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed., Oxford University Press, Oxford, 2016, p. 123.

75 International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, 1980, *ICJ Reports* 3, paras 83–87.

76 E. Denza, above note 74, p. 123.

Thus far the sparse State practice has not provided an answer on resolving conflicts, although some practice suggests that inviolability prevails over IHL,<sup>77</sup> consistent with its absolute character in other areas. Israel defended attacks on inviolable UN Relief and Works Agency premises in Gaza (for instance, in 2008–09 and 2014) on IHL grounds (either as military objectives used by Palestinian fighters, or as proportionate casualties of strikes on nearby military objectives). In response, UN Boards of Inquiry insisted on the inviolability of UN premises,<sup>78</sup> which “could not be overridden by demands of military expediency”,<sup>79</sup> while emphasizing that IHL co-applies to protect civilians inside UN premises.<sup>80</sup> The Eritrea-Ethiopia Claims Commission likewise upheld the absolute inviolability of an embassy, even if it had been used to “criminally” stockpile weapons for the war effort;<sup>81</sup> while it did not specifically address IHL, its reference to “absolute” inviolability was emphatic, in a context where it was mandated to apply IHL in an IAC between two States and was thus aware of IHL’s possible relevance. While the Convention on the Safety of United Nations and Associated Personnel of 1994 excludes certain UN “combatants” from its offences concerning attacks on UN personnel, this does not imply an IHL exception to inviolability since only very senior UN personnel (equivalent to diplomats or above), not UN peacekeepers, are entitled to inviolability in the first place.<sup>82</sup>

Whether such an approach is desirable, from a policy standpoint, is debateable. A strict approach minimizes the risks of States abusing IHL (or other legal) rights and thereby endangering not only the person or premises of diplomats or other protected persons but, through them, the all-important channels—especially in war—of inter-State diplomatic communication. On the other hand, it is precisely in conflict that States could be tempted to abuse inviolability in order to further their war aims (for instance, to relay military information or coordinate local subversives)—although an embassy in the adversary’s territory makes an easy target for a military response, rendering such misuse both unwise and unlikely. The remedies of diplomatic relations law—*persona non grata*, expulsion of a mission, or suspension/termination of relations—may not be timely against threats which necessitate an immediate

77 Cf. Laurie R. Blank, “The Limits of Inviolability: The Parameters for Protection of United Nations Facilities during Armed Conflict”, *International Legal Studies*, Vol. 93, No. 1, 2017, p. 62.

78 Under the Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946 (entered into force 17 September 1946) (Convention on UN Privileges and Immunities). See UN Security Council, *Summary by the Secretary-General of the Report of the UN Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014*, UN Doc. S/2015/286, 27 April 2015, Annex, para. 13; UN General Assembly and Security Council, *Summary by the Secretary-General of the Report of the UN Headquarters Board of Inquiry into Certain Incidents in the Gaza Strip between 27 December 2008 and 19 January 2009*, UN Doc. A/63/855–S/2009/250, 15 May 2009, para. 16.

79 UN General Assembly and Security Council, above note 78, para. 16.

80 *Ibid.*, para. 92.

81 See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Diplomatic Claim – Eritrea’s Claim 20*, XXVI RIAA 381, 19 December 2005, paras 45–46.

82 Convention on UN Privileges and Immunities, Art. 5(19); Convention on Privileges and Immunities of the Specialized Agencies, 33 UNTS 261, 21 November 1947 (entered into force 2 December 1948), Art. 6(21).

military response (although a law enforcement approach may often suffice). Clarity could be provided by an amendment to the Protected Persons Convention (whether prioritizing inviolability over IHL or vice versa), but this is unlikely precisely because the Convention is predicated on diplomatic relations law and seeking an amendment would reopen controversies over exceptions to inviolability in general.

## ICTCs addressing IHL

The Hostages Convention of 1979 was the first convention to address IHL. It does not apply to hostage-taking where it is a grave breach in IAC<sup>83</sup> and States are obliged to “extradite or prosecute” the suspect under the Geneva Conventions or Additional Protocol I (AP I).<sup>84</sup> It still applies in IAC where hostages are not protected under those instruments,<sup>85</sup> and to all hostage-taking in NIAC (where there is no “extradite or prosecute” obligation, even though hostage-taking in NIAC is prohibited by treaty and is a war crime under customary law<sup>86</sup>).

Accordingly, in IAC the Hostages Convention largely, but not exclusively, accords priority to IHL as the *lex specialis*, whereas it fully co-applies with IHL in NIAC. The drafters rejected proposals for a stricter separation, whereby IHL would exclusively apply to armed conflict and the Hostages Convention would exclusively govern peacetime.<sup>87</sup> The deference to IHL was a compromise solution to calls by some States during the drafting to exclude self-determination movements,<sup>88</sup> and was facilitated by the adoption of AP I in 1977 and its relative depoliticization of the issue. The issue also arose because the Hostages Convention was negotiated through the General Assembly (not the more technical, apolitical, specialized agencies, as for many earlier ICTCs), which had recently concluded a bitter debate (from 1973 to 1979) about the definition of and response to terrorism. The Convention does not, however, imply that hostage-taking by liberation movements is permitted, but only that it is dealt with by IHL (and war crimes law) in IAC rather than the Convention. Where AP I does not apply, hostage-taking by self-determination movements is still a Convention offence.

The Terrorist Financing Convention of 1999 also addresses IHL. It prohibits the financing of terrorist acts against “a civilian, or ... any other person

83 GC IV, Arts 34, 146–147.

84 International Convention against the Taking of Hostages, 1316 UNTS 205, 17 December 1979 (entered into force 3 June 1983) (Hostages Convention), Art. 12.

85 Specifically, where a hostage is not (1) a protected person under GC IV Article 4, including nationals of the State party, a co-belligerent State or a neutral State, or (2) within the expanded categories protected by AP I Article 85(2), including prisoners of war, other captured persons who took part in hostilities, stateless persons and refugees, and the wounded, sick and shipwrecked of the other party.

86 Common Art. 3(1)(b); AP II, Art. 4(2)(c); Rome Statute, Art. 8(2)(c)(iii) (NIAC); ICRC Customary Law Study, above note 17, Rule 96.

87 Wil Verwey, “The International Hostages Convention and National Liberation Movements”, *American Journal of International Law*, Vol. 75, No. 1 1981, p. 85.

88 See, generally, *ibid.*; Joseph Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979*, Grotius, Cambridge, 1990, pp. 266–273.

not taking an active part in the hostilities in a situation of armed conflict”.<sup>89</sup> In addition to civilians, the latter include prisoners of war, captured fighters in NIAC, and military personnel who are sick or wounded. It is thus an offence to finance attacks by State or non-State armed forces on non-combatants, but not an offence to finance attacks (even by OAGs) on combatants, fighters, or civilians taking a direct part in hostilities. The Convention may still apply, however, where an attack is directed against a military objective but civilians are knowingly harmed contrary to IHL.<sup>90</sup>

The Terrorist Financing Convention addresses the financing both of offences from other listed ICTCs and of more generally defined “terrorist acts”.<sup>91</sup> Where a financing offence is predicated on an ICTC offence, it necessarily imports the latter’s exceptions. For example, it is not an offence to finance acts endangering the safety of *military* aircraft or ships under the aviation and maritime safety conventions, or to finance the hostage-taking of protected persons in IAC.

### A common exclusion: Activities of armed forces during armed conflict

Apart from the Terrorist Financing Convention, since 1997 (starting with the Terrorist Bombings Convention) an increasingly common IHL exclusion clause has emerged. As mentioned above, six ICTCs (addressing terrorist bombings, nuclear terrorism, radioactive material, and aviation and maritime safety) identically exclude the “activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”.<sup>92</sup> Whereas the Terrorist Financing Convention excludes only attacks *on* fighters, these other ICTCs more broadly exclude all activities of armed forces – whether attacks on fighters or civilians – regardless of whether they comply with IHL. This approach pays more deference to IHL as the governing regime,<sup>93</sup> but there are still areas of co-application (discussed below).

The scope of the exclusion is exclusively defined by *renvoi* to IHL, which necessarily means customary IHL and IHL treaties binding on States party to the ICTCs. In brief, “armed conflict” means IACs (of all types, including occupation, and self-determination conflicts where AP I applies) and NIACs (under common

89 Terrorist Financing Convention, Art. 2(1)(b).

90 Italian Court of Cassation (Penal Section), *Bouyahia Maher Ben Abdelaziz et al.*, No. 1072, 17 January 2007.

91 Terrorist Financing Convention, Arts 2(1)(a) and 2(1)(b) respectively.

92 Terrorist Bombings Convention, Art. 19(2); Nuclear Terrorism Convention, Art. 4(2); Amended Nuclear Material Convention, Art. 2(4)(b); Hague Convention (as amended by the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Beijing, 10 September 2010 (entered into force 1 January 2018)), Art. 3*bis*; Maritime Safety Convention, as amended by the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005 (entered into force 28 July 2010) (Maritime Safety Protocol), Art. 2*bis* (2); Beijing Convention, Art. 6(2).

93 As under the Canadian Criminal Code, Sec. 83.01(1): see Supreme Court of Canada, *R v. Khawaja*, [2012] 3 SCR 555, 14 December 2012 (“since the armed conflict exception functions as a defence, the accused must raise it and make a *prima facie* case that it applies”).

Article 3 and, where it applies, AP II). In IAC, “armed forces” include (depending on the applicable treaties) regular State forces;<sup>94</sup> irregular forces belonging to a State;<sup>95</sup> paramilitary or law enforcement agencies incorporated into the armed forces;<sup>96</sup> “guerrilla” resistance forces;<sup>97</sup> and self-determination forces.<sup>98</sup> While they are not strictly “armed forces”, a purposive interpretation would also include civilians taking part in a *levée en masse*.<sup>99</sup> In IAC, State forces already enjoy combatant immunity under IHL; while stating the obvious,<sup>100</sup> this clause is nonetheless vital to affirm that CTL treaties do not intend to override IHL.

There was some ambiguity during the drafting of the six ICTCs containing the exclusion clause—and there remains controversy—over whether the term “armed forces” includes OAGs in NIAC. Some authors suggest that the “majority” or even universal view is that it means only State forces.<sup>101</sup> The better view is that—“as understood under” IHL, and in light of the drafting—it includes both State and non-State forces, a position supported by most jurists.<sup>102</sup> In NIAC, the single term “armed forces” is used in common Article 3(1)<sup>103</sup> to refer to both State forces and (what are also known in the jurisprudence and practice as) OAGs;<sup>104</sup> otherwise common Article 3 would (self-defeatingly) apply asymmetrically by protecting only State forces. Common Article 3 does not refer to “the” armed forces so as to be impliedly limited to those of the State party alone.<sup>105</sup>

94 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. 4(A)(1).

95 *Ibid.*, Art. 4(A)(2); AP I, Art. 43(1).

96 AP I, Art. 43(3).

97 *Ibid.*, Art. 44(3).

98 *Ibid.*, Art. 1(4).

99 GC III, Art 4(A)(6). Such persons are neither regular nor irregular forces under GC III, and do not qualify as armed forces under AP I because they are neither under a command responsible to the State nor subject to an internal disciplinary system. They are, however, “belligerents” under the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, USTS 539, 18 October 1907 (entered into force 26 January 1910), Art. 2.

100 Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 24, No. 3, 2019, p. 553.

101 See, respectively, Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the Sending State”, *International Legal Studies*, Vol. 92, No. 1, 2016, pp. 216–217; 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. 1036.

102 See, for example, Samuel Witten, “The International Convention for the Suppression of Terrorist Bombings”, *American Journal of International Law*, Vol. 92, No. 4, 1998, p. 780; J. Pejic, above note 52, p. 189; D. O’Donnell, above note 2, p. 866; M. Sassòli, above note 51, p. 977; Commonwealth Secretariat, *Implementation Kits for the International Counter-terrorism Conventions*, 2002, p. 243; Antonio Coco, “The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v Mohammed Gul*”, *Journal of International Criminal Justice*, Vol. 11, No. 2, 2013, p. 434.

103 J. Pejic, above note 52, p. 189.

104 ICRC Commentary on GC II, above note 52, Art. 3, para. 552; D. O’Donnell, above note 2, p. 866; M. Sassòli, above note 51, p. 977. The ICRC Commentary on GC I, above note 20, para. 429, also refers to the “organized armed forces” of non-State parties.

105 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), Art. 3, para. 564.

Admittedly, AP II refers to (State) “armed forces”, “dissident armed forces” and “other organized armed groups”,<sup>106</sup> implying that the only non-State “armed forces” are dissident (that is, former) State forces. A Dutch court invoked AP II in finding that a comparable exclusion clause in EU terrorism offences is confined to State forces, also because armed groups are “usually” referred to as OAGs.<sup>107</sup> This approach is erroneous. The Geneva Conventions have been universally ratified and all States are bound by the established, more extensive meaning of “armed forces” under common Article 3, which also reflects customary IHL. In contrast, AP II has fewer ratifications, and its territorial control requirement limits it to a narrower range of NIACs. As such, common Article 3 must be preferred as being determinative of the baseline meaning of “armed forces” for NIACs under IHL. The fact that such forces may *also* be described as “OAGs”—whether under AP II or in jurisprudence—does not limit common Article 3 (and the customary IHL that it reflects). Under AP I, “armed forces” include non-State self-determination movements, further indicating that “armed forces” are not exclusively State forces.<sup>108</sup>

The drafting of the ICTCs supports this approach. The original French draft of the Terrorist Bombings Convention—where the clause was born—excluded only bombings by the organized military forces of a State<sup>109</sup> (implicitly in peace or war). The negotiations produced two separate exceptions in the six ICTCs: one for armed forces in armed conflict, and another for “activities undertaken by the military forces of a State in the exercise of their official duties” (that is, implicitly in situations other than conflict, including lesser situations of violence and peacetime). Unlike the French draft, and the eventual second exception for peacetime, the first exception deliberately does not qualify “armed forces” with the adjective “State”. The original exclusion clause was divided into two on the United States’ initiative<sup>110</sup> precisely to differentiate between the two situations (peace and war) and thereby to accommodate IHL concerns. The clause also does not limit “armed conflict” to “international” conflict (between State forces) but was clearly understood to include NIACs.<sup>111</sup>

Furthermore, there is no explicit evidence in the drafting record that the exception was intended to asymmetrically privilege State forces by excluding only them in NIACs. Tellingly, the exception for armed forces in armed conflict would serve no purpose in the ICTCs if it were limited to State forces, because the

106 AP II, Art. 1.

107 District Court of The Hague, *Prosecutor v. Imane B et al.*, Judgment, 10 December 2015 (*Context Case*), paras 7.38, 7.40.

108 AP I, Art. 43; A. Coco, above note 102, p. 434.

109 UN General Assembly, *Preliminary Working Document Submitted by France on behalf of the Group of Seven Major Industrialized Countries and the Russian Federation*, UN Doc. A/AC.252/L.2, 11 February 1997, Art. 3(1).

110 Carlos Díaz-Paniagua, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997–2005*, City University of New York, 2008, pp. 317, 323.

111 See, for example, the US understandings to the ICTCs indicating, influenced by AP II, that the term “armed conflict” does not include internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature: *Suppression of Terrorist Bombings Implementation Act, 2002*, in 18 USC §2332f(e)(11).

second exception for “military forces of a State” exercising their official duties would already cover it, since that clause is not explicitly limited to peacetime. While that clause was certainly intended to be confined to peacetime, this was precisely to differentiate it from the wider scope of the first clause excluding all, not only “State”, forces in armed conflict. It was not intended to implicitly import the “State” forces limitation from the second clause into the first, contrary to what a Dutch court, accepting the view of the Dutch foreign minister, later suggested.<sup>112</sup>

No State has lodged declarations or reservations to any of the six ICTCs to the effect that “armed forces” means only State forces. To the contrary, in presenting the Terrorist Bombings Convention and the 2005 Protocol to the Maritime Safety Convention of 1988 to the US Senate for ratification, the US president explained that armed forces “include both armed forces of States *and subnational armed forces*”.<sup>113</sup> The US approach to the Nuclear Terrorism Convention of 2005 is arguably similar.<sup>114</sup> US law duly implements the exclusion clauses in full,<sup>115</sup> as do some other States.<sup>116</sup> In implementing the ICTCs, some States have excluded only State forces from, for example, the Terrorist Bombings Convention,<sup>117</sup> but that does not necessarily reflect the State’s view on the scope of the treaty exclusion clause itself so much as a (permissible) choice to narrow it in domestic implementation.

In practice, national courts implementing a comparable “armed forces in armed conflict” exception under regional law (as in the EU, influenced by the ICTCs) have interpreted them as extending to non-State forces.<sup>118</sup> Even where the Dutch courts departed from this approach (partly on policy grounds), they acknowledged the Dutch government’s view that there is “ambiguity” in the term

112 District Court of The Hague, *Context Case*, above note 107, para. 7.40.

113 US President, letter of transmittal of the Terrorist Bombings Convention to the US Senate, 8 September 1999, IX–X (emphasis added); see, similarly, US President, message transmitting Protocols of 2005 to the Convention concerning Safety of Maritime Navigation and to the Protocol concerning Safety of Fixed Platforms on the Continental Shelf, 17 February 2006. Cf. the contradicting statement of William Taft IV, US State Department Legal Adviser, on anti-terrorism conventions to the US Senate, 27 November 2001 (only regular State forces are excluded from the Bombings Convention, not irregular non-State groups). This statement was relied upon in part to deny the benefit of the “armed forces” clause in the Terrorist Bombings Convention to an Al-Qaeda militant in Afghanistan after 9/11: US District Court for the Eastern District of New York, *US v. Hausa*, 258 F.Supp.3d 265, 27 June 2017, pp. 272–276. However, *Hausa* does not interpret the clause foremost by reference to IHL (as the US statute requires (“law of war”)), but instead by US law on statutory interpretation, the pre-9/11 context of the Terrorist Bombings Convention’s adoption (when there was no armed conflict with Al-Qaeda and IHL did not apply), post-9/11 views of the US government, and the incorrect view that “armed forces” is coterminous with scope of combatant immunity (that is, solely available in international conflict).

114 While the point was not expressly reiterated when the US president presented the Nuclear Terrorism Convention (explained as containing an “identical” exclusion clause) to the Senate in 2007, nor was there any departure from the earlier position—despite the preceding seven years of debate over its meaning in the Draft UN Convention (discussed below), and the US being a leading State engaged in counter-terrorism in armed conflict: US President, letter of transmittal of the Nuclear Terrorism Convention to the US Senate, 12 July 2007.

115 18 USC § 2332f(d) (terrorist bombings); 18 USC § 2332i(d) (nuclear terrorism).

116 See, for example, Criminal Justice (Terrorist Offences) Act, 2005, Revised (Ireland), Sec. 10(6)(a) (bombings).

117 Australian Criminal Code, Sec. 72.2.

118 See the section entitled “Variants of Accommodation of IHL” below.

“armed forces” which could produce “different interpretations”, and that the clause “will be interpreted in a manner that may best serve the interest of the state in question”.<sup>119</sup> As treaties establishing criminal liability and facilitating cooperation, however, it is obvious that “armed forces” “under IHL” must bear the same meaning for all States Parties, at least in respect of its meaning under the universally ratified common Article 3 and customary IHL.

The Dutch courts also relied on other IHL principles to confine the EU law exclusion clause to State forces. The undoubted lack of combatant immunity in NIAC, and the right of States to domestically criminalize any insurgent violence, was said to show that there is no inconsistency between IHL and criminalizing terrorism by members of OAGs.<sup>120</sup> However, this misses the point: the exclusion clause delimits the scope of crimes in an international or regional instrument – and thence in implementation in domestic law – as well as for transnational cooperation purposes (jurisdiction, “prosecute or extradite”, cooperation, and prevention). The clause does not purport to prohibit “gold-plating”<sup>121</sup> – that is, adopting national legislation going further than the international instrument, whether to criminalize purely domestic terrorism, or to criminalize terrorism extraterritorially under some other jurisdictional basis (that is, other than the CTL treaty in question) under international law (such as the protective, nationality or passive personality principles).<sup>122</sup> Even so, the exclusion clause may signal that there are good policy reasons – even when gold-plating – for clearly differentiating IHL from CTL and leaving hostilities to be regulated by IHL as the *lex specialis* (as discussed above).

The Dutch courts further suggested that excluding non-State violence would undermine the objectives of international counterterrorism instruments in bringing terrorists to justice, and perversely enable the same acts in peace but not war to be prosecuted.<sup>123</sup> However, those claims are nonsensical in respect of the six ICTCs which deliberately exclude such violence. Admittedly, Security Council resolutions do not exclude “armed forces in armed conflict” – but nor do they define terrorism, such that they cannot be interpreted as requiring States to criminalize all insurgent violence as terrorism. Finally, the Dutch court indicated that its view is consistent with the EU’s lack of exceptions in its terrorist asset freezing laws,<sup>124</sup> but those laws do not have any exclusion clause at all, so the comparison is false and unhelpful.

In the negotiations on the Draft UN Convention (discussed below), some States appeared to interpret an identical proposed “armed forces” exclusion as confined to State forces, so as to enable the prosecution or extradition of members of OAGs for terrorist offences in NIAC. The new context was conflict

119 District Court of The Hague, *Context Case*, above note 107, para. 7.40.

120 *Ibid.*, para. 7.41.

121 UKSC, *Gul*, above note 47, para. 53.

122 An issue left undecided in *ibid.*, paras 56–58.

123 District Court of The Hague, *Context Case*, above note 107, para. 7.42.

124 *Ibid.*, para. 7.43.

with Al-Qaeda after 9/11<sup>125</sup> and IS in Syria and Iraq from 2011,<sup>126</sup> and the desire to prosecute foreign insurgents as terrorists. Such views are not evident in the written *travaux* (nor in the records of the five other ICTCs containing the exception since 2001), but have been expressed largely in informal, unrecorded negotiations. Some authors present at the negotiations recall that Such states included, for example, the United States and the EU<sup>127</sup> (which would be a repudiation of their earlier positions, and be at odds with US and EU legislation and case law), plus France and Russia,<sup>128</sup> whereas others recall that the United States and EU reiterated that the exclusion covers non-State forces,<sup>129</sup> as did other States.<sup>130</sup>

An ICRC proposal was not accepted to expressly define “armed forces” to cover both State forces and those of OAGs,<sup>131</sup> perhaps signalling that some States prefer deliberate ambiguity.<sup>132</sup> Claims that “armed forces” do not include non-State forces cannot, however, affect the objective scope of the term “armed forces” under IHL outlined above, even if in practice certain States might interpret and apply it differently; other States would not be required to cooperate with them under the ICTCs. The ambiguity nonetheless raises the real prospect of different interpretations of the same ICTC, or the same clause in different ICTCs, as well as some States changing their earlier interpretation of the clause.

On the basis that “armed forces” include OAGs, under the six ICTCs in force, both IHL and the ICTCs accordingly *co-apply* to the activities of: (1) irregular forces not belonging to the State (that is, not under its overall control<sup>133</sup>) but acting in support of it in IAC; (2) civilians taking a direct part in hostilities, whether in IAC or NIAC (who are not members of OAGs with a CCF, and including members of disorganized armed groups); and (3) civilians who support hostilities by any State or non-State party in IAC or NIAC (without taking a “direct” part therein). Such persons may thus be liable for offences under any of the six ICTCs (addressing terrorist bombings, certain aviation and maritime safety offences, radioactive material, and nuclear terrorism). Proposals to exclude all activities or situations of armed conflict, regardless of the actor, were not accepted.<sup>134</sup> In addition, the clause does not exclude activities of persons in States which are not parties to the conflict who sympathize with one party to the conflict and commit terrorist acts in support

125 J. Pejic, above note 52, pp. 191–192.

126 Author interview with a former coordinator of informal discussions on the Draft UN Convention, December 2019.

127 J. Pejic, above note 52, p. 192.

128 Author interview, above note 126.

129 C. Díaz-Paniagua, above note 110, p. 599 (delegate for Costa Rica, based on contemporaneous notes).

130 *Ibid.*, p. 600 (Belgium).

131 ICRC, *Terrorism and International Law*, above note 51, p. 5.

132 See also M. Hmoud, above note 101, p. 1038.

133 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Tadić*, Case No. IT-94-1-AR72, Appeal Chamber Decision (Interlocutory Appeal on Jurisdiction), 2 October 1995, paras 115–145.

134 UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/60/37, 28 March–1 April 2005, p. 28; C. Díaz-Paniagua, above note 110, p. 661 (Tunisia).

of that party.<sup>135</sup> Such persons are neither part of the “armed forces” nor present in territories to which IHL applies.

Even though the ICTCs largely protect civilians, the exclusion clauses are necessary, for example, to prevent the criminalization of military bombings (under the Terrorist Bombings Convention) of public places, State facilities, or public transport or infrastructure where those normally civilian objects are military objectives at the time of targeting, civilian casualties would not be excessive, and the means and methods comply with IHL. “Activities” of armed forces excluded from the ICTCs are not, however, limited to military “attacks” (whether offensive or defensive) under IHL, or to acts against the adversary’s armed forces. Excluded activities could also include preparations for attacks, which would otherwise constitute offences such as attempt, conspiracy or threats under the ICTCs. Further, certain principal offences under the ICTCs, which would not be attacks under IHL, are also excluded “activities”, such as unlawful dealings with nuclear material,<sup>136</sup> possession of a radioactive material with intent to harm,<sup>137</sup> nuclear smuggling,<sup>138</sup> and unlawful transport on aircraft or ships of radioactive or nuclear material.<sup>139</sup>

The exclusion applies to all activities even if they are not in conformity with IHL,<sup>140</sup> international law or national law. It thus also excludes even deliberate attacks on civilians by armed forces, which are left to IHL, international criminal law, international human rights law and the law on the use of force. Drafting proposals to limit the exclusion to activities in accordance with IHL were not accepted.<sup>141</sup> In serious cases, terrorist-type conduct excluded under the ICTCs will constitute war crimes, such as the intentional bombing of civilians in IAC or NIAC, so the exclusive application of IHL will still ensure criminal accountability. As mentioned earlier, however, there may be gaps where ICTC offences are not war crimes, or CTL offers other law enforcement advantages.

135 See, for example, Antwerp Court of First Instance, *Prosecutor v. BF et al.*, FD35.98.47-12, AN35.F1.1809-12, Matter I, Judgment, 11 February 2015 (*Sharia4Belgium*), pp. 31, 33 (affirmed by the Antwerp Court of Appeal, 2015/FP/1-7, FD35.98.47-12, Judgment, 26 January 2016, and by the Belgian Court of Cassation, P.16.0244.N, Judgment, 24 May 2016); Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, Case No. 2017/2911, 14 December 2017 (regarding the PKK).

136 Amended Nuclear Material Convention, Art. 7(1).

137 Nuclear Terrorism Convention, Art. 2(1)(a).

138 Amended Nuclear Material Convention, Art. 7(1)(d).

139 Maritime Safety Protocol, Art. 3bis (1)(b)(i)–(ii); Beijing Convention, Art. 1(1)(i)1–(4).

140 J. Pejic, above note 52, p. 189.

141 As in the drafting of the Terrorist Bombings Convention (see UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/52/37, 1997, pp. 32 (Netherlands), 43 (Switzerland), 53; UN General Assembly, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/52/L.3, 10 October 1997, pp. 31, 40 (Belgium)) and the Beijing Protocol and Beijing Convention (see Damien van der Toorn, “September 11 Inspired Aviation Counter-Terrorism Convention and Protocol Adopted”, *American Society of International Law Insights*, Vol. 15, No. 3, 2010). Belgium proposed a bifurcated approach by which State armed forces would be excluded but other (non-State) forces would only be excluded if “acting in accordance with” IHL: *ibid.*, p. 31. Jordan proposed not to exclude attacks by armed forces against protected civilians: UN General Assembly, “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, p. 5; C. Díaz-Paniagua, above note 111, p. 664 (Pakistan).

Two further qualifications are arguably implied by the exclusion clause. One is that it applies to the “activities of armed forces” *as such*—that is, in the exercise of their military functions and not to purely private activities of off-duty military personnel. Another, related qualification is that since the exclusion applies to activities “during” armed conflict, such activities must have a nexus to the conflict, meaning that they are “closely related”<sup>142</sup> to it—for example, by engaging in or preparing for hostilities, or where an act serves the ultimate goals of a party’s campaign.<sup>143</sup> This could include cases where private, off-duty soldiers secretly aid the enemy or engage in “blue-on-blue” attacks. In contrast, the work of some on-duty soldiers of a party to a conflict may not be considered activity “during” that conflict where it is unrelated to the conflict. An example is where some forces are deployed in a limited foreign conflict but others remain stationed at home, performing ordinary peacetime duties. Since IHL also applies to the territory of the home State, however, activities at home with a nexus to the foreign conflict would be excluded.

The 2005 Nuclear Terrorism Convention and the 2010 Beijing Convention (on aviation safety) augment the exclusion clause in the four other ICTCs by adding a “no prejudice” clause, providing that these instruments “shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws”.<sup>144</sup> A provision to that effect had been unsuccessfully proposed during the drafting of the Terrorist Bombings Convention,<sup>145</sup> as a compromise to avoid conditioning the exclusion of military activities on conformity with international law. Strictly, the provision is unnecessary given that the exclusion of armed forces in armed conflict does not in any way confer on those forces any positive authority to commit (for example) nuclear terrorism or endangerment of civilian aircraft, or any immunity from any other applicable law, including IHL, the law on the use of force, human rights law, or national law. Its sole effect is to preclude the application of the ICTCs to such acts. Politically, however, the “no prejudice” clause reflects the sensitivity of some States to excluding armed forces, lest this be perceived as condoning “terrorism” by State militaries.

## The Draft UN Convention

Despite being agreed in the six ICTCs in 1997, 2005 and 2010, the exclusion clause has remained controversial during the negotiations for the Draft UN Convention since 1999. The Organisation of Islamic Cooperation (OIC) proposed excluding the activities of the “parties”—rather than “armed forces”—during armed

142 ICTY, *Tadić*, above note 133, para. 70.

143 ICTY, *Prosecutor v Kunarac*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 59.

144 Nuclear Terrorism Convention, Art. 4(3); Beijing Convention, Art. 6(3).

145 C. Díaz-Paniagua, above note 110, p. 320 (South Korea).

conflict, “including in situations of foreign occupation”.<sup>146</sup> This proposal is partly the result a technical difference over the proper terminology – “parties” aims to include OAGs, given the disagreement over the meaning of “armed forces” – but it also stems from a political disagreement about the desirable scope of the exception.

Both “armed forces” and “parties” are IHL terms of art. Only States are referred to as (high contracting) “parties” to IHL treaties,<sup>147</sup> which not only regulate their “armed forces”<sup>148</sup> but also impose obligations on the wider entity of the State (to legislate, disseminate, prosecute, cooperate and so forth). In NIAC, common Article 3 separately refers to “each Party to the conflict” in order to denote State and non-State parties; the latter are not also High Contracting Parties, however, since only States are parties to treaties.<sup>149</sup> Common Article 3 then guarantees protections for, *inter alia*, “members of armed forces” no longer taking an active part in hostilities, necessarily meaning both State and non-State forces. To the extent that the OIC’s reference to “parties” aims to counter those States which narrowly interpret “armed forces” as only State militaries,<sup>150</sup> it is redundant on a proper interpretation of “armed forces” under common Article 3.

However, the OIC also intends the term “parties” to exclude actors other than members of OAGs. These could conceivably include disorganized armed groups,<sup>151</sup> sporadic civilian DPH (without performing a CCF and thereby being members of an OAG), or civilians supporting hostilities without taking a direct part therein. Self-determination movements and OAGs, for example, typically comprise not only armed wings but also wider (and often larger) political and social organizations, some of which may also engage in violence with a nexus to the conflict. In practical terms, reference to the “parties” is aimed at exempting entities such as the Palestine Liberation Organisation, Hamas, Islamic Jihad and Hezbollah.<sup>152</sup> The EU was concerned about the implications of excluding activities of the “parties” in Northern Ireland and Basque Spain,<sup>153</sup> mirroring concerns that India had about Kashmir, although some of these concerns presuppose an expansive understanding of self-determination beyond colonial situations and to which AP I may not extend.

It is highly doubtful, however, that replacing “armed forces” with “parties” would make any difference (unless “armed forces” are limited to those of the State,

146 UN General Assembly, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/57/37, 2002, Annex IV, p. 17, and UN Doc. A/58/37, 2003, pp. 11–12.

147 See, for example, the Hague Regulations of 1907, the four Geneva Conventions, AP I and AP II.

148 See, for example, GC III, Art. 4(2); AP I, Art. 43.

149 In contrast, AP II refers only to (State) High Contracting Parties, not also to parties to the conflict; Article 1 then refers to conflicts between (State) “armed forces” and “dissident armed forces” or “other organized armed groups”.

150 J. Pejic, above note 52, p. 192.

151 *Ibid.*, p. 193.

152 See, for example, Christian Walter, “Defining Terrorism in National and International Law”, in Christian Walter, Silja Vöneky, Volker Röben and Frank Schorkopf (eds), *Terrorism as a Challenge for National and International Law*, Springer, Berlin, 2003, pp. 39–40.

153 C. Díaz-Paniagua, above note 110, p. 605.

as Jordan believed<sup>154</sup>). A non-State “party” to a NIAC is exclusively constituted by an OAG. There is no equivalent recognition under IHL of any other components of a non-State party, such as the political, civil or administrative arms of a wider anti-government movement. In contrast, as mentioned, “States Parties” mean not only their armed forces (including irregular forces) but also other State organs (such as police and intelligence agencies) and other persons or entities attributable to States under the law of State responsibility. The OIC proposal makes a distinction without a difference because a non-State “party” to a NIAC is the same entity as an OAG – that is, the non-State “armed forces”.

The more difficult question – pertinent also to the six prior ICTCs with the exclusion clause – is who or what comes within the scope of the non-State “party”/OAG/“armed forces”. There was little discussion of the precise scope of non-State “armed forces” during the drafting of the ICTCs, largely because the meaning of this term was left to IHL. Yet the concept defining who comprises such forces (OAGs), under IHL itself, is open to debate. On a narrow view, the category includes only members of the group performing a CCF. On a middle view, it includes any member of the group, whether performing a CCF, persons otherwise (sporadically) taking a direct part in hostilities, or persons taking an indirect part in hostilities via support for the group (such as “police” or intelligence elements which may facilitate military operations without taking a direct part in them). On the widest view, it includes all of the preceding actors as well as others associated with the group who neither take a direct part in hostilities nor otherwise support hostilities (without taking a direct part therein). These could include the purely civil or administrative components of an armed movement which controls territory and governs a population, such as birth registrars, bureaucrats, police or judges. A narrow focus on fighters evidently does not account for the complex totality of certain non-State movements.

The dominant (and correct) approach is that “in respect of armed groups with multiple wings and/or divisions, reference to the armed group is usually to the military wing of the armed group”<sup>155</sup> (even if there may be humanitarian costs to this approach<sup>156</sup>). This means that any exclusion of the activities of non-State “armed forces”/“parties” would only exclude fighters (CCF) or, on a slightly wider approach, other members integrated into the OAG and supporting hostilities but without taking a direct part therein.

IHL already stipulates consequences for such conduct, including targeting and security detention, and does not preclude liability for national crimes. The exclusion debate is thus partly a political struggle over what should be labelled as terrorism or not, rather than an attempt to confer impunity on “terrorists”. However, to the extent that ICTC offences differ from IHL or international

154 *Ibid.*, p. 600.

155 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 180.

156 For example, persons detained by the separate civil components of an armed group, or treated in its hospitals, or prosecuted in its courts, may not be protected by common Article 3.

criminal law in establishing additional liabilities, conferring wider powers or requiring distinctive international cooperation, the disagreement is also a legal one.

Civilians sporadically taking a direct part in hostilities, or who otherwise support hostilities (without taking a direct part therein), are still covered by ICTC offences, even if they are associated with the wider civil or administrative structures of a non-State movement. Importantly, these could include civilian policing or intelligence elements which use violence with a nexus to the conflict, without being members of the OAG.

The OIC's further proposed exclusion of "foreign occupation" is legally redundant in that an occupation is, by definition, an IAC under Article 2 common to the four Geneva Conventions, regardless of whether there are also hostilities between State forces.<sup>157</sup> The wording of the OIC's proposal (conflict "including" occupation) recognizes as much. OAGs involved in concurrent hostilities in occupied territory, and which do not "belong" to the occupied State, may separately be "armed forces" in a NIAC and also be excluded from the ICTCs. Since the OIC formulation is limited to "armed conflict, *including* ... foreign occupation", strictly speaking the provision does not appear to address a wider, non-IHL notion of "occupation", for instance relating to non-self-governing territories or incomplete or contested decolonization.

## **Security Council obligations on States to criminalize terrorist acts**

Beyond the ICTCs, Security Council Resolution 1373 requires all States to criminalize "terrorist acts" and various preparatory acts (including terrorist financing), while subsequent resolutions have required criminalization of other conduct relating to, for example, so-called "foreign terrorist fighters".<sup>158</sup> The Council has not, however, provided a common international definition of such acts, and nor has it unequivocally prescribed the relationship of offences to IHL (such as through exclusion clauses, as in the ICTCs). Although its non-binding 2004 "working definition" addresses IHL in limited ways (by *renvoi* to predicate ICTC offences, and applying only to acts against "civilians", thus excluding acts against fighters),<sup>159</sup> it has had little influence on State practice. The Council's CTL monitoring bodies (the Counter-Terrorism Committee and Counter-Terrorism Executive Directorate) have also not publicly disclosed any clear position.

The risk is that national implementation of the Security Council's CTL offences (as well as terrorist financing measures) may violate IHL (particularly by undue restriction, prohibition or criminalization of medical and humanitarian activities, including contact or dialogue with OAGs) or infringe on IHL policy

157 J. Pejic, above note 52, pp. 189, 193.

158 UNSC Res. 2178, 24 September 2014, para. 6.

159 UNSC Res. 1566, 8 October 2004, para. 3 is predicated on ICTC offences combined with additional general elements but it does not deal with conduct beyond ICTC offences.

values (by criminalizing direct participation in hostilities or membership of OAGs). While the Council has not expressly required States to criminalize such activities, the risk of States doing so is heightened by factors such as<sup>160</sup> the Council's lack of definition of terrorist acts, the potentially wide ambit of offences such as "support" for terrorist acts, and direction from the Council to criminalize the financing of "terrorist" individuals or groups "for any purpose"<sup>161</sup> (not only for the commission of terrorism, as under the Terrorist Financing Convention), in conjunction with a vague definition of "funds" as "any assets" (tangible or intangible, moveable or non-moveable, and thus not limited to pecuniary funds).<sup>162</sup> A further risk lies in the requirement to criminalize the travel of "foreign fighters", which, while limited to travel *for the purpose of participating in terrorist acts* (not merely to participate in hostilities), was nonetheless adopted in the context of armed conflicts<sup>163</sup> in Syria and Iraq and in the absence of any limiting definition of terrorism.

Positively, the Security Council has gradually become more attuned to IHL. In Resolution 1373, the Council did not insist on State compliance with international law when implementing CTL obligations, other than in the context of refugees.<sup>164</sup> However, since 2005 the Council has routinely reminded States of their duty to comply with all of their obligations under international law, specifically including (among others) IHL, when implementing CTL obligations.<sup>165</sup> Admittedly, many references have been preambular, or in operative but non-binding paragraphs, or confined to measures in a particular resolution.<sup>166</sup> Since 2019 one resolution has made IHL compliance binding ("decides"),<sup>167</sup> following a trend pioneered in respect of human rights in 2017.<sup>168</sup>

These limitations should not, however, be understood as indicating that the Council's binding CTL measures may override IHL *unless IHL consistency is expressly affirmed*, whether in relation to the criminalization of terrorist acts or asset freezing under Resolution 1373 (where IHL is not mentioned). There is a presumption against normative conflict under international law, including in the context of the Security Council's power under Article 103 of the UN Charter to "override" inconsistent international agreements<sup>169</sup> (and there is doubt as to

160 See D. McKeever, above note 23, p. 61.

161 UNSC Res. 2253, 17 December 2015, para. 19.

162 Following the Terrorist Financing Convention, Art. 1(1).

163 UNSC Res. 2178, 24 September 2014, para. 1 ("demands that all foreign terrorist fighters disarm and cease all terrorist acts *and participation in armed conflicts*") (emphasis added).

164 UNSC Res. 1371, 26 September 2001, paras 3(f)–(g) (conformity with international law, including human rights).

165 See, for example, UNSC Res. 1624, 14 September 2005, para. 4; UNSC Res. 2178, 24 September 2014, para. 5; UNSC Res. 2253, 17 December 2015, Preamble; UNSC Res. 2368, 20 July 2017, Preamble; UNSC Res. 2396, 21 December 2017, Preamble and paras 4, 18, 34, 40; UNSC Res. 2462, 28 March 2019, para. 5.

166 UNSC Res. 2462, 28 March 2019, para. 5. See D. McKeever, above note 23, p. 61.

167 UNSC Res. 2462, 28 March 2019, paras 5 (financing offences), 6 (all counterterrorism measures).

168 UNSC Res. 2396, 21 December 2017, paras 11–13; D. McKeever, above note 23, p. 63.

169 Johann Ruben Leiß and Andreas Paulus, "Article 103", in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd ed., Oxford University Press, Oxford, 2012, para. 17.

whether Article 103 can override custom at all<sup>170</sup>). In an analogous human rights context, in *Al-Jedda v. UK* (2011), the European Court of Human Rights held that, in interpreting Security Council resolutions, there is “a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights”; the interpretation must be chosen “which is most in harmony with the requirements of the [other obligation] and which avoids any conflict of obligations”; and the Council must use “clear and explicit language” to override another obligation.<sup>171</sup> The same applies to IHL,<sup>172</sup> which also comes within the UN’s purpose of respect for “human rights” (writ large) under Article 1(3) of the UN Charter.<sup>173</sup>

The Security Council has not indicated a clear intention to override IHL.<sup>174</sup> To consider pertinent examples, when criminalizing “support” for or “financing” of terrorist acts under Resolution 1373, the Council did not specify that this must encompass medical or humanitarian personnel, or activities or assets protected by IHL (including medical care for injured “terrorists”)—just as the Council’s authorization of security detention in *Al-Jedda* did not indicate that due process need not be observed. Indeed, the IHL implications of Resolution 1373 simply did not occur to the Council at the time. The Council has not criminalized contact, engagement, dialogue or association with terrorist groups for humanitarian, IHL, human rights or peace-making purposes. When later criminalizing financing “for any purpose”, the Security Council resolution expressly “decided” that IHL must be respected. Criminalization of foreign terrorist fighters focuses on their travel to participate in terrorist acts, but the Council did not criminalize mere participation in hostilities, let alone humanitarian or medical activities.

The listing of two persons and two entities by the Security Council under the Resolution 1267 regime seemingly (in part) for medical activities<sup>175</sup> also does not indicate a clear intent to override IHL<sup>176</sup> (in that context of terrorist financing sanctions). Those listings were based mainly on serious terrorist activity: for example, Redendo Cain Dellosa led the *SuperFerry 14* attack by Abu

170 Article 103 applies only to inconsistent “agreements” and, on its ordinary meaning, it would not permit the Council to override customary IHL. This is confirmed by the *travaux*: see *ibid.*, para. 66. While the same source concludes that “the prevailing view” subsequently supports a broader view extending to custom (*ibid.*, para. 68), such certainty is not supported by the authorities cited, nor do the post-1945 authorities constitute (under the principles of treaty interpretation) a subsequent agreement amongst the parties which could alter the ordinary meaning confirmed by the *travaux*. See also F. Ní Aoláin, above note 5, para. 24.

171 European Court of Human Rights, *Al-Jedda v. United Kingdom*, Appl. No. 27021/08 (Grand Chamber), 7 July 2011, para. 102.

172 The reasoning in *Al-Jedda* was based on the special position of human rights as “purposes” of the UN under Article 2 of the UN Charter.

173 See, for example, UNGA Res. 2444 (XXIII), 19 December 1968; Hans-Peter Gasser, “The United Nations and International Humanitarian Law”, International Symposium on the 50th Anniversary of the United Nations, 19–21 October 1995 (“there is no doubt that the Charter’s notion of ‘human rights ...’ also includes ... ‘international humanitarian law’”).

174 Cf. D. McKeever, above note 23, pp. 68–71.

175 See, for example, F. Ní Aoláin, above note 5, para. 31.

176 Cf. D. McKeever, above note 23, p. 71.

Sayyaf in the Philippines which killed 100 people; Zafar Iqbal was a senior leader and co-founder of Lashkar-e-Tayyiba; and the Global Relief Foundation raised large sums for Al-Qaeda operations. No conclusions can be drawn from the reasons for listing as to whether the very briefly mentioned medical activities were, on the facts, of a kind even protected by IHL; and there is no evidence that the sanctions committee considered, and chose to override, IHL before mentioning those activities. Further, as discussed in the next section, the omission of an express medical or humanitarian relief exception to CTL measures also does not support an implication that the Council clearly intended to override IHL.

The better view is that States must implement CTL obligations in conformity with IHL, which the Security Council increasingly appears to recognize as the *lex specialis*—and not vice versa. Moreover, as the next section indicates, IHL itself accommodates many of the security-related concerns which CTL seeks to address, further reducing any potential for conflicts. It is, rather, the legislative choices made by States, often with purported reliance on Security Council resolutions, which collide with IHL, rather than the measures adopted by the Council itself.

## Relation to medical and humanitarian activities

The Council's CTL measures cannot be interpreted as overriding IHL obligations concerning medical<sup>177</sup> and humanitarian<sup>178</sup> assistance in particular (discussed in detail in other articles in this issue of the *Review*). Such assistance is also “the sine qua non ... for the exercise of essential social and economic rights”;<sup>179</sup> in that respect, too, it is not evident that the Council intends to override human rights.

Crucially, close attention to IHL indicates that it can harmoniously apply with *strictly necessary* CTL measures precisely because IHL, and related practitioner norms, already safeguard against the abuse of medical or humanitarian assistance. First, not being protected civilians or *hors de combat*, active members of terrorist OAGs are not entitled to humanitarian relief and, by definition (not being *hors de combat*), will not normally need medical care/medicines; if they are wounded but still in combat, they are not entitled to the latter.

Overbroad CTL offences would, however, conflict with IHL if they criminalized the provision of medical<sup>180</sup> or humanitarian assistance to detained terrorists, wounded terrorists *hors de combat*, “terrorists” who previously participated directly in hostilities but are no longer so involved (whether because their participation was sporadic or they have disengaged from performing a CCF

177 See ICRC Customary Law Study, above note 17, Rules 25–30, 110; AP I, Arts 8–31; AP II, Arts 7–12.

178 See ICRC Customary Law Study, above note 17, Rules 31–32, 55–56; Oxford Institute for Ethics, Law and Armed Conflict, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), paras 11–15, 21–24.

179 F. Ní Aoláin, above note 5, para. 26.

180 For examples, see Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School, September 2015, p. iii.

in an OAG), sympathizers or supporters of a terrorist OAG who are not directly participating in hostilities, or members of a “terrorist organization” which is present in a conflict area but is not a party to the conflict and whose members’ activities do not otherwise involve DPH with a nexus to the conflict. Assistance to such persons is legitimate under IHL, even if it inevitably entails helping individual “terrorists” directly, and may risk diversion of aid to terrorist OAGs intermingled with civilians. It is not a sufficient answer for some States to suggest that humanitarian actors would rarely be prosecuted in practice:<sup>181</sup> their conduct is still “criminal”, they face indefinite uncertainty as to enforcement, and they are likely to avoid engaging in humanitarian activities that are protected under IHL and are essential, on an impartial basis, to beneficiaries in need.

Secondly, once a State has agreed to relief operations, both sides must allow and facilitate their passage, but importantly, both sides are also entitled to impose technical control measures, such as inspections or prescribed routes, or distribution under the supervision of an impartial organization, to ensure that relief is exclusively humanitarian or that it reaches its intended beneficiaries and is not diverted.<sup>182</sup> IHL thus already allows for security measures to prevent assistance to OAGs.

Thirdly, the parties themselves (including terrorist OAGs) have a duty not to divert medical or humanitarian supplies.<sup>183</sup> Additionally, pillage is a war crime, although this only covers appropriation for private or personal use. Further, unless aid is the property of the adverse party (as opposed to a humanitarian actor or neutral State), it is not a war crime for an OAG to seize it. Such seizure is nonetheless prohibited by IHL<sup>184</sup> and would almost certainly constitute the ordinary domestic crime of theft.

Fourthly, in policy and practice humanitarian actors are diligent about the risks of diversion and take extensive measures to avoid it, including because of their international and domestic obligations, their humanitarian professional ethics, and their goals of maximizing scarce resources for genuine beneficiaries and maintaining the confidence of the parties in their neutrality and impartiality. If unintended diversion occurs—as is inevitable in some conflicts—humanitarian actors should not be criminally liable (whether strictly, or based on a lower fault standard of recklessness), except if assistance is intentionally given to benefit active fighters.

In good humanitarian practice, actors normally deliver medical and humanitarian relief directly to beneficiaries, thereby precluding liability for directly supporting “terrorist” fighters. It is rare to help an OAG (including its civil administration) to itself deliver humanitarian or medical aid to populations under its control (by providing it with food, medicines, skills, services,

181 Naz K. Modirzadeh, “Comment”, in Jessica Burniske and Naz K. Modirzadeh (eds.), *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School, March 2017, p. 74.

182 Oxford Guidance, above note 178, paras 66–67, 70. See, for example, AP I, Art. 70(3)(b).

183 Oxford Guidance, above note 178, paras 82, 87–88. See, for example, GC IV, Art. 60; AP I, Art. 70(3)(c).

184 ICRC Customary Law Study, above note 17, Rule 32. See also GC IV, Art. 59; AP I, Arts 48, 70(4) (duty to protect).

infrastructure or funds), but instances exceptionally arise – and humanitarian actors should not be criminalized for justifiable activities. The ICRC, for example, indicates that humanitarian “protection” – inextricable from assistance<sup>185</sup> – includes first-aid training and war surgery seminars for OAGs.<sup>186</sup> (A related example is where a humanitarian actor pays (through a third party) for the travel or accommodation expenses of fighters to attend IHL training,<sup>187</sup> which could constitute “indirectly” financing or supporting a “terrorist” individual or group.) Material assistance intended for detainees in OAG custody, and which may need to be distributed by the OAG, is another example.<sup>188</sup> International actors could also be involved in supporting public health or sanitation infrastructure operated by a *de facto* State authority.

More common examples include where a humanitarian actor pays, to an OAG in control of territory, a border “entry fee” (as one must to enter Gaza), or an import or transport fee (whether a “facilitation fee”, “port charge”, “road toll”, “customs levy”, tax or the like) to secure the passage of relief (as occurred in Somalia). Paying such fees may “finance terrorism”, stimulate demand for more fees, reward domestic crimes of extortion, and be perceived as legitimating OAG governance functions (regulation and taxation). But such payments also acknowledge realities on the ground, including that some OAGs are *de facto* State authorities and that, like States, they need to charge for administrative services in order to facilitate the proper functioning of civilian life. By analogy, while IHL discourages States from taxing humanitarian relief, it is not absolutely prohibited.<sup>189</sup>

Finally, IHL protects “impartial” humanitarian relief but not sympathizers of a terrorist OAG who provide funds or services to it, which may constitute terrorist offences. However, it must be emphasized that *medical* personnel or activities are protected even when partisan, as where a doctor sympathetic to an OAG volunteers to treat wounded fighters. Moreover, some terrorism offences excessively criminalizing humanitarian activities of sympathizers could still be unnecessary or disproportionate restrictions on donors’ freedoms of association and expression, and impair the socio-economic rights of the intended beneficiaries.

## Indeterminacy of the Security Council’s approach to IHL

Two other problems remain with the Security Council’s approach to IHL. First, as a UN Special Rapporteur has observed with regard to Security Council resolutions, mirroring her earlier concerns in the context of human rights compliance in

185 ICRC Commentary on GC III, above note 105, Art. 3, para. 847.

186 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 52.

187 See, for example, ICRC Commentary on GC III, above note 105, Art. 3, paras 853–854 (ICRC protection activities).

188 *Ibid.*

189 GC IV, Art. 61 (in occupation, exemption from all charges, taxes or customs unless these are necessary in the interests of the economy). The same principle is arguably encouraged for the parties in other situations (including NIAC): Oxford Guidance, above note 178, pp. 27, 44.

CTL,<sup>190</sup> “most references to the [IHL] legal regimes are generic and lack the specificity required to ensure their observance”.<sup>191</sup> This stands in stark contrast to the detailed specificity of many CTL measures. On the one hand, it may be seen as unnecessary for the Council to more specifically address IHL precisely because IHL already supplies the (right) answers, and it may be undesirable for the Council to “rule” on IHL questions<sup>192</sup> and to potentially get them wrong, controversially resolve ambiguities in IHL, or feel emboldened to override IHL. On the other hand, it could be beneficial for the Council to affirm the applicability of settled, specific IHL rules (by reference to authoritative IHL sources and bodies such as the ICRC) in relation to particular CTL measures, in order to remove doubts sown by States whose laws contest their applicability.

Only in one particular area has the Council, in Resolution 2462, more specifically urged (but not required) States to “take into account” the effect of CTL *financing* measures on “exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with” IHL.<sup>193</sup> Resolution 2482 extended the same language to all CTL measures.<sup>194</sup> Both clauses are, however, non-binding and merely suggest that States procedurally “take into account” humanitarian impacts, rather than also substantively respecting IHL rules. In principle this limitation is offset by Resolution 2462 requiring States to comply with IHL generally in all CTL measures,<sup>195</sup> but this resolution does not specifically emphasize humanitarian and medical activities.

It does not, however, indicate a clear intention to override IHL that the Security Council has explicitly provided for automatic humanitarian assistance exceptions to Somalia country sanctions,<sup>196</sup> but has only indicated that humanitarian activities should be “taken into account” in a CTL context, and has made no mention of these issues at all in Resolution 1267 (for Al-Qaeda *et al.* listings, apart from a different “basic expenses” exception) or Resolution 1373 (whether for national asset freezing regimes or terrorism offences).<sup>197</sup> Such omissions could alternatively suggest that political dynamics in the Council have made explicit exceptions more difficult in relation to terrorism than to individual countries; or that a “global” exception—for all actors, conflicts and contexts—is harder to craft than a targeted one for a single country, with a particular

190 Fiona Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/73/45453, 3 September 2018, para. 37.

191 F. Ní Aoláin, above note 5, para. 24.

192 For an overview of some of these issues, see Dustin A. Lewis, Naz K. Modirzadeh and Jessica Burniske, *The Counter-Terrorism Committee Executive Directorate and International Humanitarian Law*, Harvard Law School, March 2020.

193 UNSC Res. 2462, 28 March 2019, para. 24 (financing measures).

194 UNSC Res. 2482, 19 July 2019, para. 16.

195 UNSC Res. 2462, 28 March 2019, para. 6. UNSC Res. 2482, 19 July 2019, para. 16 only “urges” States to do so.

196 Starting with UNSC Res. 1916, 19 March 2010, para. 5; the current exemption is in UNSC Res. 2551, 12 November 2020, para. 22. A more limited approach is a procedure for applying for the grant of humanitarian exemptions: see, for example, UNSC Res. 2397, 22 December 2017, para. 25 (North Korea).

197 Cf. D. McKeever, above note 23, pp. 69–71.

vulnerable population or looming famine in mind; or that the Council believes reiterating the need for IHL compliance in general is sufficient to prevent CTL undermining humanitarian assistance. It does not follow that the Council intended to override IHL by implication from such omissions. The recent CTL resolutions (and a thematic debate on IHL<sup>198</sup>) suggest that, over time, the Council has become more sensitized to the adverse impacts of its CTL measures on IHL and the need to explicitly affirm IHL and humanitarian exceptions. Given the Council's starting point—complete inattention to IHL (far from trumping it)—that “learning curve” may be expected to continue.

It is desirable that the Security Council should unambiguously affirm, in a binding paragraph, that States must comply with IHL obligations concerning medical and humanitarian assistance.<sup>199</sup> Outside a CTL context, the Council has already demanded that all parties to an armed conflict respect and protect “all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport, and equipment, as well as hospitals and other medical facilities”.<sup>200</sup> While a new clause cannot immediately cure two decades of inattention to IHL since Resolution 1373,<sup>201</sup> it could certainly require States to conform all CTL measures adopted under past resolutions to it, just as the Council has often “amended” earlier CTL resolutions on, for example, terrorist financing offences or foreign terrorist fighters. It is also not sufficient to devolve the drafting of such clauses to the regional<sup>202</sup> or national level: universal CTL measures require universal IHL red lines, and sufficient specificity is possible as long as the Council takes sufficient care, and involves the appropriate expertise, in the drafting.

A second issue unresolved by the Council, even if IHL compliance is expected, is the treatment of acts which are not unlawful under IHL. As discussed earlier, criminalizing direct participation in hostilities, or support for hostilities, is not unlawful under IHL, but it arguably undermines important IHL policy interests concerning compliance by OAGs, incentives for peace, and prospects for reconciliation. It would consequently be beneficial for the Council to formulate an explicit “armed forces in armed conflict” exclusion of the kind found in the six recent ICTCs (or an enhanced version thereof, discussed below), and to clarify that “armed forces” definitely include OAGs.

198 UN Security Council, *Agenda: The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, UN Doc. S/PV.8499, 1 April 2019.

199 F. Ní Aoláin, above note 5, para. 34. D. McKeever, above note 23, pp. 74–75, emphasizes the need for any clauses to acknowledge the differentiated contours of protection for different forms of medical and humanitarian assistance under IHL. The Security Council could even, of course, impose higher levels of protection for medical or humanitarian activities in relation to its CTL measures than IHL provides—for instance, by explicitly requiring non-punishment of humanitarian activities in NIAC, although that could upset the balance agreed under IHL; or by ensuring that non-parties to a conflict also respect medical and humanitarian personnel and do not extraterritorially criminalize them in foreign conflicts.

200 UNSC Res. 2286, 3 May 2016, para. 3.

201 A problem identified by D. McKeever, above note 23, p. 76.

202 Cf. *ibid.*, p. 76.

## Relationships between CTL and IHL in national practice

Given the decentralized nature of implementation of Security Council CTL obligations, which are both undefined and not subject to unambiguous IHL clauses, it is no surprise that national and regional practice is highly variable as regards the relationship between CTL and IHL.

### Variants of accommodation of IHL

First, some laws apply to terrorism offences *generally* a version of the armed forces exclusion clause applying more narrowly under the six later ICTCs. Among all explicit relationships with IHL in national practice, this is the predominant approach, evident, for example, in the regional counterterrorism laws of the twenty-seven-member European Union<sup>203</sup> and the forty-seven-member Council of Europe<sup>204</sup> – almost a quarter of all States – and in some corresponding national laws.<sup>205</sup> (EU law also only excludes armed forces in armed conflict from terrorism offences, but not asset freezing measures.<sup>206</sup>) The regional conventions of the OIC and the Organisation of African Unity more narrowly exclude “armed struggle” only by self-determination movements.<sup>207</sup>

The EU’s exclusion clause is, however, located in a non-binding preambular “recital”,<sup>208</sup> producing divergence in national implementation. An EU review of implementation drew no attention to the recital,<sup>209</sup> despite its frequent omission in implementation. As mentioned earlier, in applying the recital in interpretation (in the absence of legislation implementation), the Dutch courts have interpreted “armed forces” as being confined to State forces. Where the clause has been directly applied, it has not necessarily produced decisions which

203 Directive (EU) 2017/541 of the European Parliament and of the Council on Combating Terrorism, 15 March 2017, Recital 37, replacing Council Framework Decision 2002/475/JHA, 13 June 2002, Recital 11.

204 Council of Europe Convention on the Prevention of Terrorism, 2005, Art. 26(5). This convention’s 2015 Additional Protocol on foreign terrorist fighters is qualified by *renvoi* to the same provision: D. McKeever, above note 23, p. 60.

205 See, for example, Criminal Justice (Terrorist Offences) Act, 2005, Revised (Ireland), Sec. 6(4)(a); Belgian Criminal Code, Art. 141*bis*, applied in Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, Decision No. 2019/939, 8 March 2019 (acquitting PKK members on the basis that the PKK are armed forces in a NIAC and were not engaged in terrorist offences outside of it). Earlier, see Brussels Court of Appeal (Chamber of Indictment), *Prosecutor v. U and 40 Others*, 3 November 2016 and 14 September 2017; Antwerp Court of First Instance, *Sharia4Belgium*, above note 135 (Al-Nusra and IS in Syria); see also Court of Naples (Judge for Preliminary Investigations), *Republic of Italy v. TJ (aka Kumar) and 29 Others*, 23 June 2011; District Court of The Hague, *Prosecutor v. Selliaha*, Case No. BU7200 (09/748801-09), Judgment, 21 October 2011.

206 EU, Council Common Position on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 27 December 2001; EU, Council Regulation (EC) 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, 27 December 2001.

207 OIC Convention on Combating International Terrorism, 1 July 1999 (entered into force 7 November 2002), Art. 2(a); OAU Convention, Art. 3(1).

208 District Court of The Hague, *Context Case*, above note 107, para. 7.35.

209 European Commission, *Report from the Commission to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism*, COM(2020) 619 final, 30 September 2020.

accurately apply IHL, as where a Belgian court restrictively found that Jabhat Al-Nusra and another group were not armed forces in a NIAC in Syria because they were both insufficiently “organized” and were unwilling *and* unable to comply with IHL;<sup>210</sup> the Court also seemed adversely influenced by the groups’ extremist motives.<sup>211</sup>

Italian law, on the other hand, has widened the application of IHL exclusions. It incorporates EU terrorism offences, including the armed forces exception. However, the Italian courts have also held that Italian law encompasses other terrorist offences under customary international law as reflected in the Terrorist Financing Convention of 1999.<sup>212</sup> The Convention excludes attacks on persons taking a direct part in hostilities, but the Italian courts have further excluded the acts of armed forces, based separately on a “no prejudice” clause in the Convention which precludes it from affecting other international law rights, including IHL.<sup>213</sup> Acts by the LTTE in the NIAC in Sri Lanka were thus excluded from terrorist offences.

In principle, narrower versions of the armed forces exclusion are possible. As mentioned earlier, narrower variants were considered in the negotiations for the UN Draft Convention, by excluding only IHL-compliant activities; activities of the *parties* rather than armed forces; and activities of State armed forces, not also non-State forces. However, none of these options has seemingly influenced national laws.

Secondly, it was unsuccessfully proposed to exclude any acts committed in and/or governed by armed conflict during the drafting of the Terrorist Bombings Convention<sup>214</sup> and Terrorist Financing Convention.<sup>215</sup> This approach maintains the strictest separation between IHL and CTL, since it excludes any act (lawful or unlawful) against any target (civilian or military), or by any actor (armed forces or otherwise), regardless of IHL conformity, as long as the act is *governed* by IHL. In addition, by excluding any “acts”, not only those by armed forces, this approach would also prevent the criminalization of humanitarian funding or relief.<sup>216</sup> One disadvantage is that it precludes the application of CTL (including its preparatory offences and machinery of prevention and cooperation) to persons who are not members of State or non-State armed forces (such as disorganized armed groups or sporadic civilian DPH), and even conduct that is a war crime or

210 Antwerp Court of First Instance, *Sharia4Belgium*, above note 135, p. 33.

211 See Rogier Bartels, “When Do Terrorist Organisations Qualify as ‘Parties to an Armed Conflict’ under International Humanitarian Law?”, *Military Law and Law of War Review*, Vol. 56, No. 2, 2018; H. Cuyckens and C. Paulussen, above note 100, p. 556.

212 Court of Naples, *TJ*, above note 205.

213 Terrorist Financing Convention, Art. 21; see, similarly, Terrorist Bombings Convention, Art. 19(1); Nuclear Terrorism Convention, Art. 4(3); Maritime Safety Protocol, Art. 3; Beijing Protocol, Art. 6; Beijing Convention, Art. 6(1).

214 UN General Assembly, *Report of the Working Group*, above note 142, p. 31 (South Africa and Switzerland).

215 UN General Assembly, *Report of the Ad Hoc Committee Established by UNGA Res. 51/210 of 17 December 1996*, UN Doc. A/54/37, 1999, pp. 15, 42, 47 (France, Lebanon, Belgium).

216 UN General Assembly, *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc. A/C.6/54/L.2, 26 October 1999, p. 54 (Kuwait).

other violation of IHL. This approach does not appear to have influenced national practice.

Thirdly, a narrower approach, found in Canadian (and similarly New Zealand) law, excludes from terrorist offences “an act or omission that is committed during an armed conflict” *and in accordance with* international law.<sup>217</sup> In a more limited fashion, Swiss law excludes terrorist financing that “is intended to support acts that do not violate” IHL.<sup>218</sup> One advantage is that mere participation in hostilities, without harm to civilians or use of unlawful means or methods, is not criminalized, thereby respecting IHL’s equilibrium; IHL itself does not regard civilian DPH (including CCF) as unlawful, but leaves its legality to national law.

Further, CTL offences will still apply to conduct that violates IHL (whether a war crime or not), thereby reinforcing IHL’s protection of civilians (and combatants, for instance with regard to the use of prohibited weapons or means of war)—just as crimes against humanity and genocide co-apply in conflict. In the Canadian case of *Khawaja*, for instance, the exclusion clause did not apply to conduct that involved the war crime of spreading terror and suicide attacks against civilians in a NIAC in Afghanistan.<sup>219</sup> A disadvantage is that, in practice, CTL offences are only likely to be used (by State authorities) to prosecute members of OAGs who violate IHL, accentuating the asymmetrical treatment of the belligerents in NIAC and the drawbacks (mentioned earlier) of transnationally stigmatizing such groups as “terrorist”.

A fourth approach in some national laws is a narrower exclusion for humanitarian activities from terrorism offences generally,<sup>220</sup> or from specific offences,<sup>221</sup> some of these are very limited, however, such as the exclusion of “medicine” but not medical care, food, or humanitarian relief generally.<sup>222</sup> In the separate context of terrorist asset freezing, EU law exempts certain activities for “humanitarian purposes, such as ... delivering or facilitating the delivery of assistance, including medical supplies, food, or the transfer of humanitarian workers and related assistance or for evacuations”.<sup>223</sup> More tangentially, a few

217 Canadian Criminal Code, Sec. 83.01(1); see also New Zealand Terrorism Suppression Act, 2002, Sec. 5(4).

218 Swiss Criminal Code, 1937, Art. 260<sup>quinquies</sup>1(4).

219 Supreme Court of Canada, *R v. Khawaja*, [2012] 3 SCR 555, 2012, paras 100–103.

220 Directive (EU) 2017/541, above note 203, Recital 38 (in implementation, see laws in Austria, Belgium, Italy and Lithuania: European Commission, above note 209, pp. 6–7); Republic of Chad, Law No. 3 on the Repression of Acts of Terrorism in the Republic of Chad, 28 April 2020, Art. 1(4) (this law also includes a general clause on “no prejudice” to IHL or human rights: Art. 1(3)); Ethiopia, Proclamation No. 1176/2020 on Prevention and Suppression of Terrorist Crimes, 25 March 2020, Art. 9(5).

221 Such as being present in a prohibited terrorist area (see UK Counter-Terrorism and Border Security Act, 2009, Sec. 4; Australian Criminal Code, Sec. 119.2(3)(a)); Denmark Criminal Code, Sec. 114(j)); associating with a terrorist organization, treasonously aiding the enemy, hostile foreign incursions, or foreign military training (Australian Criminal Code, Secs 102.8, 83.3, 80.1AA(1) and 119.5 respectively); and providing material support (Philippines Anti-Terrorism Act, 2020, Art. 13).

222 18 USC §2339A(b)(1) (material support for terrorism, excluding medicine or religious materials; medicine is interpreted as substances only: US Court of Appeals for the Second Circuit, *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir 2011), 4 February 2011).

223 EU Council, *EU Best Practices for the Effective Implementation of Restrictive Measures (Sanctions)*, 8519/18, 4 May 2018, para. 76.

States exclude acts intended to create or restore democracy, the constitution or human rights,<sup>224</sup> which could be relevant in some conflicts.

At the international level, by contrast, there has been a reticence to recognize clear humanitarian exceptions from CTL. A Swiss proposal during the drafting of the Terrorist Financing Convention to exclude funds for humanitarian purposes was not accepted.<sup>225</sup> A person who donates funds for a humanitarian purpose may thus be criminally liable for financing terrorism where the person knows that part of the funds are to be used for terrorism, even if that is not intended. From a strict CTL standpoint, there are concerns about the fungibility of funds and their diversion for terrorist purposes. While one Security Council sanctions regime, concerning Somalia, recognizes a specific, automatic humanitarian exception,<sup>226</sup> the same benefit has not been extended to CTL sanctions. At most, as mentioned, Security Council resolutions since 2019 have urged States to “take into account” the impacts of CTL on humanitarian and medical activities that are consistent with IHL,<sup>227</sup> and terrorist financing offences must comply with IHL.

## No accommodation of IHL

A final approach to the relationship with IHL is the most common in national law<sup>228</sup> and certain regional laws:<sup>229</sup> no explicit exclusion or accommodation of IHL at all, and thus potentially full co-application of CTL. Some national<sup>230</sup> and regional<sup>231</sup> courts have upheld CTL offences (as well as terrorist financing measures) in armed conflict on the various bases that (1) international law (including the ICTCs) does not prohibit the criminalization of hostilities in NIAC (even if not prohibited by IHL) and no combatant immunity exists in NIAC,<sup>232</sup> (2) the application of IHL and war crimes law does not preclude the concurrent

224 Austrian Criminal Code, Art. 278(c)(3); Swiss Criminal Code, 1937, Art. 260<sup>quinquies</sup> 1 (3) (concerning terrorist financing offences only). See also the repealed Greek Penal Code, Art. 187A(8) (from 2004 to 2010) and repealed New Zealand Terrorism Suppression Act, 2002, Sec. 8(2) (from 2002 to 2007).

225 UN, “Proposal Submitted by Switzerland”, UN Doc. A/AC.252/1999/WP.1, 15 March 1999, proposed Art. 1(1); see also UN General Assembly, above note 215, p. 57.

226 UNSC Res. 2385, 14 November 2017, para. 33.

227 UNSC Res. 2462, 28 March 2019, para. 24; UNSC Res. 2482, 19 July 2019, para. 16.

228 See, for example, UK Terrorism Act, 2000, Sec. 1, applied in UKSC, *Gul*, above note 47; Australian Criminal Code, 1995, Sec. 100.1; Dutch Supreme Court, *Opinion on Extradition of Requested Person to Republic of Turkey*, ECLI:NL:HR:AF6988, Judgment, 7 May 2004, paras 3.3.7–3.3.8; District Court of The Hague, *Prosecutor v. Maher H*, Case No. 09/767116-14, Judgment, 1 December 2014, para. 3; District Court of The Hague, *Context Case*, above note 107, paras 7.23–7.29.

229 EU Common Position 2001/931/CFSP, above note 206 (concerning terrorist financing), applied in Court of Justice of the European Union (CJEU), *Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union*, Case No. T-208/11, Judgment of the General Court (Sixth Chamber), 16 October 2014, paras 54–83; CJEU, *A, B, C and D v. Minister van Buitenlandse Zaken*, Case No. C-158/14, Judgment, 14 March 2017. Most regional treaties do not mention IHL.

230 UKSC, *Gul*, above note 47, paras 48–51; Dutch Supreme Court, *Opinion on Extradition*, above note 228, paras 3.3.7–3.3.8; District Court of The Hague, *Maher H*, above note 228, para. 3; cf. District Court of The Hague, *Selliaha*, above note 205.

231 CJEU, *LTTE*, above note 229, paras 54–83; CJEU, *Minister*, above note 229.

232 UKSC, *Gul*, above note 47, paras 48–51; District Court of The Hague, *Maher H*, above note 228, para. 3.

application of CTL;<sup>233</sup> (3) there is no common international law approach to exclusion, including under the ICTCs or in national laws,<sup>234</sup> and Resolution 1373 does not exempt armed forces in armed conflict;<sup>235</sup> (4) States may still “gold-plate” treaties with exclusion clauses by going beyond them, since the treaties do not prohibit this;<sup>236</sup> (5) there is no exception for resistance to oppression;<sup>237</sup> and (6) attacks specifically on UN-authorized military forces (such as in Afghanistan) could be contrary to UN principles and purposes.<sup>238</sup>

Such laws criminalize acts by armed forces and other actors alike, as well as acts in conformity with IHL or not. In many States, as in the drafting of most criminal offences, interaction of CTL with IHL may not be front of mind, since most States are not engaged in armed conflicts involving terrorist organizations, let alone extraterritorial conflicts. However, given Security Council obligations to cooperate with other States in the suppression of terrorist offences, even States not embroiled in conflict may encounter requests from other States for extradition or mutual assistance in relation to offences in foreign armed conflicts. The issue is thus relevant for all States. In other States, such laws may reflect a deliberate choice to maximize the reach of CTL, for instance to criminalize the making of improvised explosive devices in NIAC or incitement to commit hostilities. The drawbacks of such an approach were addressed earlier in this article.

Where laws do not generally accommodate IHL, there can still be some flexibility in them. States will inevitably exempt their own military forces from counterterrorism laws since there will be positive legal authority in national law for the military operations of these forces, providing a lawful or reasonable excuse for CTL charges. In addition, the functional immunity of one State’s military personnel would shield them from counterterrorism laws before another State’s courts (since neither the ICTCs nor Security Council measures lift immunities), as would combatant immunity under IHL if a case proceeded to the merits.

The burden of counterterrorism laws will thus fall asymmetrically on OAGs in NIAC. At most, persons in NIAC can hope that prosecutorial discretion (and related devices such as consent to prosecute from an attorney-general or justice minister) will be exercised not to lay counterterrorism charges where they do not violate IHL. This is unlikely in many States, however, given that CTL is often precisely designed to target rebels. It is also undesirable from a rule of law standpoint, since it politicizes prosecutors by inviting them to selectively determine who should be regarded as a terrorist (say, IS but not Kurdish forces

233 Dutch Supreme Court, *Opinion on Extradition*, above note 228, paras 3.3.7–3.3.8; CJEU, *LTTE*, above note 229; District Court of The Hague, *Maher H*, para. 3.

234 UKSC, *Gul*, above note 47, paras 47–48, 51; Court of Appeal of England and Wales, *R v. Gul*, [2012] EWCA Crim 280, 22 February 2012, paras 37–41.

235 CJEU, *LTTE*, above note 229, para. 74 (here in the context of asset freezing, but the same point applies to criminal measures under UNSC Res. 1373).

236 UKSC, *Gul*, above note 47, para. 53.

237 *Ibid.*, paras 29, 33; CJEU, *LTTE*, above note 229.

238 UKSC, *Gul*, above note 47, para. 49 (approving UKSC, *Al-Sirri v. Secretary of State for the Home Department*, [2013] 1 AC 745, 2013, para. 68).

in Syria), abdicates the legislature's responsibility to clearly identify the scope of liability, and compromises the rule of law.<sup>239</sup>

## Conclusion

There is clearly little support in State practice for entirely quarantining armed conflict from CTL and exclusively applying IHL; to the contrary, the thrust of CTL since the 1970s, accelerating after 2001 and promoted by the Security Council, has been a story of co-application (sometimes) with diverse exceptions. Amongst the exceptions, support is strongest for the exclusion of the activities of armed forces in armed conflict, evident in six ICTCs, proposed in the Draft UN Convention, and generalized in EU law across all terrorism offences. The Security Council is, regrettably, missing in action in this regard, despite being the progenitor of much contemporary national CTL offences and other measures.

An exception for “armed forces” in armed conflict should therefore be adopted in the Draft UN Convention, by the Security Council to delimit its CTL measures, and in regional and national laws. This would minimize adverse impacts on incentives for OAGs to comply with IHL and on prospects for peace and post-conflict reconciliation. It may come at the expense, however, of preventing CTL (including its preparatory offences and machinery of prevention and cooperation) from co-regulating violations of IHL by armed forces, whether to strengthen protection of civilians or fighters, including where war crimes laws are too limited. For the same reason, excluding any acts (by whomever) governed by IHL goes too far, additionally because it exempts not only members of OAGs (who are usually subject to an internal disciplinary system) but anyone who sporadically participates directly in hostilities.

A preferable approach is to confine an armed forces exception to activities which are not unlawful under IHL—as the ICRC proposed for the Draft UN Convention, and as reflected in “best practice” Canadian and New Zealand law—thus buttressing IHL without unduly detracting from it (for instance, by criminalizing mere participation in hostilities). There are still drawbacks to this approach: in practice, States are unlikely to criminalize their own military forces as terrorists even when violating IHL, and the asymmetric stigmatization of OAGs as terrorists may still undermine compliance and impede peace and reconciliation. Even so, if a group is already systematically violating IHL, at that point IHL's weak incentives to comply are already likely to be ineffective, and the application of CTL may then enhance, not detract from, civilian protection and overall respect for IHL's core purposes.

Finally, it is essential that the Security Council unambiguously “decide” that all of its mandatory CTL offences and other measures adopted since 2001 must be implemented in conformity with IHL obligations concerning medical

<sup>239</sup> UKSC, *Gul*, above note 47, para. 36.

and humanitarian personnel and activities, as well as any other specific IHL rules especially impacted by CTL. Such guidance must, however, faithfully reflect IHL and not deliberately or inadvertently trump “true” IHL with the Council’s own restrictive interpretation of it favouring CTL.