

# Order from Chaos: The Optimal Relationship between International Counter-Terrorism Law and International Humanitarian Law

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## Abstract

This article clarifies the ongoing conceptual confusion about the interaction of international counter-terrorism law (CTL) and international humanitarian law (IHL) in armed conflict. It discusses the advantages and disadvantage of the co-application of CTL with IHL, before considering a variety of techniques for mutually accommodating the interests of both regimes, particularly through exclusion clauses in CTL 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.

## 1 Introduction

International counter-terrorism 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 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. Nor does CTL clearly, explicitly, and uniformly spell out the required or desirable legal relationships where specific rules of the two branches interact. Rather, some international counter-terrorism conventions (ICTCs)<sup>1</sup> since 1963 variously 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, as does decentralized national implementation of United Nations Security Council CTL obligations (particularly resolution 1373 (2001)) in the absence of meaningful Council guidance on IHL.

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<sup>1</sup> For a list see <[www.un.org/counterterrorism/international-legal-instruments](http://www.un.org/counterterrorism/international-legal-instruments)>.

This article aims to clarify the conceptual debate<sup>2</sup> – and ongoing confusion – about the interaction of CTL and IHL. It first charts potential advantages of co-applying CTL. It secondly considers key disadvantages of CTL intruding on IHL’s traditional domain. Whether the interests of each regime can be adequately accommodated through co-application largely depends on the precise scope of particular CTL rules, including the existence and extent of any IHL exceptions. The third part of the article explores how IHL is addressed in some ICTCs, while the fourth part examines diverse approaches to IHL in national implementation of Security Council CTL norms, all reflecting different balancing of CTL and IHL interests.

The issues are pressing because all states are now required to suppress terrorist acts and even if a state is not involved in armed conflict (as most states are not), all states must still cooperate in the prevention and suppression of terrorism affecting other states. Further, the UN Draft Comprehensive Terrorism Convention (under negotiation since 2000) is still struggling to demarcate its approach to IHL. The article concludes by suggesting what might be an optimal approach to the CTL-IHL interface, reconciling IHL and counter-terrorism imperatives as far as possible and minimizing one field playing ‘trumps’ at the expense of the other.

## **2 Advantages of Co-Application**

It is well known that much terrorist-type conduct is already addressed by IHL. These include specific IHL prohibitions on terrorism (and the related war crime of intending to spread terror amongst civilians) to the numerous IHL rules and war crimes addressing attacks on civilians and civilian objects. An overarching policy question is whether these are enough, or whether CTL adds different and valuable tools for suppressing undesirable violence. A number of potential contributions of CTL may be identified from a CTL standpoint.

*First, CTL substantively criminalizes certain undesirable conduct which is not prohibited by IHL.* Numerous examples may be briefly given. IHL does not address the *nuclear material* offences of embezzling or fraudulently obtaining nuclear material, demanding nuclear material

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<sup>2</sup> See eg Daniel O’Donnell, ‘International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces’ (2006) 88 IRRC 653; Alejandro Sanchez Frias, ‘Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction between International Humanitarian Law and the UN Conventions against Terrorism’ (2020) 53 Israel Law Review 71; Ben Saul, ‘Terrorism, Counter-terrorism, and International Humanitarian Law’ in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP 2020) 403; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011).

by force or intimidation, unlawfully dealing with nuclear material, or nuclear smuggling;<sup>3</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>4</sup> 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>5</sup> or unlawfully transporting explosives or biological, chemical, or nuclear weapons.<sup>6</sup>

As regards more general terrorism offences, the UN Draft 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>7</sup> IHL does not prohibit, let alone criminalize, it. More controversially, national CTL offences may criminalize civilian direct participation in hostilities (DPH) (whether by members of organized armed groups 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 IAC, such persons are simply not entitled to combatant immunity; and in both IAC and NIAC such persons may be targeted for the duration of their participation, detained on security grounds, and prosecuted for any applicable national offences (including terrorism) (as well as 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, whereas national terrorism offences may make it an offence to recklessly endanger life or the public. CTL may criminalize attacks on the environment,<sup>8</sup> whereas IHL only does so under the Rome Statute in IAC (not under the Geneva Conventions, API or APII, or the ENMOD Convention 1977) and only if very high thresholds are met.<sup>9</sup>

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<sup>3</sup> Nuclear Material Convention 1980 (as amended 2005) art 7(1).

<sup>4</sup> Nuclear Terrorism Convention 2005 art 2(1).

<sup>5</sup> Montreal Convention 1971 art 1(e).

<sup>6</sup> Beijing Convention 2020 art 1(1)(i).

<sup>7</sup> See eg *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017) rules 92 and 100.

<sup>8</sup> Organization of African Union Convention on the Prevention and Combating of Terrorism 1999 art 1(3)(a).

<sup>9</sup> ICC Statute 1988 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 API art 35(3)).

*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>10</sup> and emplacing a bomb on an aircraft,<sup>11</sup> compared with the more general IHL rules against attacking or attempting to attack a civilian object. 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.* On the one hand, the extended modes of criminal responsibility under the ICTCs<sup>12</sup> and IHL<sup>13</sup> are not dissimilar. But in implementing resolution 1373, many states have enacted more precautionary offences which criminalize conduct well before criminal intent has crystallized into an attempt, or where a person acts alone and there is thus no (group) conspiracy prior to 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; and inciting, advocating, praising or glorifying terrorism. There are also numerous offences relating to terrorist organizations, such as acts of finance, recruitment, membership, association, support, training, and so on.

In contrast, IHL does not prohibit groups or criminalize their members; and limits modes of liability to more traditional ones which bear a more proximate relationship to the eventual commission of a crime. Even where a terrorist act is also a war crime, their prosecution for a terrorism offence may be easier and more fruitful for law enforcement – particularly group-based offences with low bars based on membership, association, or indirect or peripheral support for the group, proved by self-incriminating social media records. It may avoid the complexities of 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.

*Fifthly, CTL imposes more specific obligations on states to suppress offences than IHL.* On the one hand, war crimes are subject to universal jurisdiction, while CTL offences are subject to a

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<sup>10</sup> Hague Convention 1970 art 1(a).

<sup>11</sup> Montreal Convention 1971 art 1(c).

<sup>12</sup> The latest ICTCs require states to criminalize commission, attempt, complicity, conspiracy, and organizing or directing; a few also address threats and concealment.

<sup>13</sup> ICRC Customary IHL Rule 195 (commission, attempt, assistance, facilitating, aiding or abetting, and planning or instigating).

narrower quasi-universal treaty-based jurisdiction predicated on the presence of a suspect who committed an offence abroad in the custodial state's territory. On the other hand, only 'grave breaches' in IAC are subject to a duty to 'extradite or prosecute' and to provide mutual legal assistance, whereas other violations of the laws and customs of war, in IAC or NIAC, or violations of CA3 in NIAC, are not subject to such obligations. In contrast, states must extradite or prosecute, and provide mutual assistance, in relation all ICTC offences, as well as in relation to terrorist acts (including preparatory offences) under resolution 1373.<sup>14</sup>

*Sixthly, CTL imposes more specific duties of prevention of offences than IHL.* Under the ICTCs, states must take 'all practicable measures to prevent 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. In addition, states must exchange information and coordinate administrative and other measures to prevent offences. Detailed preventive obligations are also set out in resolution 1373<sup>15</sup> and in other resolutions on preventing related threats such as foreign fighters. A whole national and inter-state machinery of prevention is thus in motion to address terrorist offences, in contrast to the sparser aspiration in common article 1 of the Geneva Conventions to 'respect' and 'ensure respect' for IHL.

*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; 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.

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<sup>14</sup> UNSC res 1373 (2001) requires states to 'bring to justice' such persons, which the UNSC later interpreted to impose an 'extradite or prosecute' obligation: UNSC res 1456 (2003) para 3 and res 1566 (2004) para 2.

<sup>15</sup> UNSC res 1373 (2001) para 2(a) (refrain from supporting terrorism), (b) prevent terrorist acts, (c) deny safe haven), (d) (prevent use of territory for terrorism), and (g) prevent the movement of terrorists).

*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 in the public imagination; it conjures up a particular kind of grave criminality – not necessarily worse than a war crime, but reflecting different injured interests. The General Assembly and Security Council have routinely condemned terrorism as a threat to international security, human rights, and stable governance.<sup>16</sup> To be sure, war crimes may also injure some or many of these; but the special character of terrorism is still thought to justify special measures even – indeed particularly – in armed conflict.*

### **3 Disadvantages of Co-Application**

What are the disadvantages of the co-application of CTL? There are legal and policy considerations. First, 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 and their manifest gravity is much longer and firmly established than newer, more indeterminate national terrorism offences (particularly those arising from undefined Security Council standards, and which often raise human rights objections).

Further, labelling conduct as a war crime has a unique expressive power of its own – more universal and less political than terrorism, and widely understood as entailing grave criminality. Certainly where a war crime has an element additional to a terrorist offence, it must be prosecuted as a war crime. War crimes attract universal jurisdiction, unlike the possibly more limited extraterritorial ambit of terrorism offences. There is rich body of common international jurisprudence on war crimes, unlike the much more jurisdiction-specific case law and parochial national and regional practices on terrorism. Unlike terrorism, war crimes also potentially engage international jurisdiction (of the International Criminal Court), as well as special IHL mechanisms (such as the International Fact Finding Commission).

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

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<sup>16</sup> See Ben Saul, *Defining Terrorism in International Law* (OUP 2006) ch 2.

protection. Interposing extraneous bodies of law, without due regard for the carefully negotiated balancing within IHL, has the potential to undermine essential interests of the belligerents and thus compliance with IHL.

For example, CTL would collide with IHL if it criminalized lawful attacks by state forces in IAC, thereby overriding combatant immunity. Likewise there would be conflict if CTL criminalized or impeded the impartial provision humanitarian relief to civilians.<sup>17</sup> If CTL offences prime facie apply to such conduct, some means is needed to satisfactorily resolve the conflict, whether through (i) harmonious interpretation of the two rules; (ii) regarding one or other rule as *lex specialis*; (iii) incorporating an exception into the CTL norm; or (iv) (unsatisfactorily) relying on informal means such as prosecutorial discretion. These techniques are considered further below.

Thirdly, even where there is no direct, formal legal conflict between CTL and IHL rules, CTL measures may undermine policy interests inherent in IHL. For example, IHL neither authorizes nor prohibits civilian DPH (including CCF by members of armed groups), but regulates its consequences. CTL may, however, criminalize such conduct regardless whether it otherwise complies with IHL on the conduct of hostilities, as where armed groups 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, whether under the occupier's security laws in occupied territory,<sup>18</sup> or under national law in NIAC. At most, IHL encourages states to confer the widest possible amnesty at the end of a conflict for acts which did not violate IHL. In this sense, the incentives for armed groups 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*. There is certainly no general international law rule prohibiting it, as long as the definition of terrorist offences complies with

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<sup>17</sup> See eg *Holder v Humanitarian Law Project*, 561 US (2010), Nos 08-1498 and 09-89 (21 June 2010); Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* (2018).

<sup>18</sup> GCIV arts 65-67.

international human rights law, for instance, as regards the principle of legality (precision and foreseeability in offences) or non-discrimination. Moreover, on numerous occasions the Security Council and General Assembly (and through them, states collectively) have clearly depicted certain non-state armed groups in armed conflicts as terrorist at various points, such as Islamic State, Al Nusra, or Boko Haram. Both Security Council resolutions and the ICTCs envisage at least some co-application of CTL and IHL.

A number of policy counter-arguments may nonetheless be summoned. The ICRC warns precisely against criminalizing acts that are not already unlawful under IHL.<sup>19</sup> The ICRC Commentary (2016) to CA3 asserts that labelling a group as terrorist ‘carries the risk that the non-State armed group loses an incentive to abide by that body of law’, particularly the duty to distinguish between civilians and military objectives.<sup>20</sup> Its claim is intuitive and common sense, rather than being empirically substantiated by whether the application of CTL does, in fact, push armed groups to be less IHL-compliant.

Clearly, however, if one will be classified as a terrorist regardless whether one respects IHL, the perceived advantages of complying with IHL may be reduced. Further, if a group has been internationally stigmatized as a terrorist, it may be stimulate it to distrust the international community and refuse or limit engagement on humanitarian relief, or willingness to negotiate for peace =.

This is not to say that labelling as terrorist decimates *all* incentives to comply, since there are many other reasons why groups may still wish to comply: their moral identity or other values; appealing to civilian hearts and minds; gaining support from diasporas or foreign state sponsors; political legitimacy; facilitating humanitarian relief to their people; demonstrating they are not war criminals like state forces; or to show that they are not, in truth, terrorists. This is also not to say that all armed groups are amenable to IHL socialization or responsive its faint incentives for compliance. Violating IHL is the core mission of some ‘terrorist’ groups, which

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<sup>19</sup> ICRC, ‘Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law’ (2002).

<sup>20</sup> ICRC Commentary to GCI art 3 (2016) para 895. See also ICRC, *ibid*; ICRC, ‘The Applicability of IHL to Terrorism and Counterterrorism’ (2015); Jelena Pejic, ‘Armed Conflict and Terrorism’ in Ana Maria Salinas de Frias, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (OUP 2012) 171, 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.



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 whether they are criminals to national law.

Nonetheless, given that legal incentives for armed groups to comply with IHL in NIAC are already so tenuous, the intrusive transnational criminalization of terrorism further weakens them. That may not seem like much, but when the stakes are so high – more violence against civilians, against an already high background level – minimizing such intrusion is worth it. That is true even of the most asocial terrorist groups, since experience suggests that, at some point in a conflict, some members of such groups may be willing to engage with external values and interlocutors, and group behaviour may eventually respond to the right signals.

A second broad reason to be circumspect about CTL is that it may impede post-conflict reconciliation.<sup>21</sup> IHL encourages states to confer the widest possible amnesty for (IHL-compliant) acts during conflict.<sup>22</sup> If an armed group has been labelled or its members criminalized as terrorist, it may complicate the political and legal 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’. Relatedly, it can complicate eligibility of persons for disarmament, demobilization and reintegration (DDR).<sup>23</sup> It can further hinder the willingness or ability of governments to enter into peace negotiations at all. Again, experience shows that that peace and reconciliation with ‘terrorist’ groups, from Northern Ireland to Colombia, is possible, but the extra hurdles raised by a CTL framework may not be helpful.

A third broad reason to be cautious relates to the relation between sovereignty and IHL in NIAC. As mentioned, in NIAC the affected state has long been entitled to criminalize members of armed groups for offences against national security or other interests, whether labelled terrorism or otherwise. However, the transnational criminalization of terrorism in conflict is distinguishable from prior practice for a number of reasons. The right of a state to criminalize the conduct of armed groups arose when NIACs were traditionally civil wars fought by citizens in a state’s own territory, not more complex transnational NIACs as can occur today. The right to criminalize conduct was thus closely linked to the state’s sovereign territorial jurisdiction

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<sup>21</sup> ICRC, ‘The Applicability of IHL’, *ibid*; Pejic, *ibid*; ICRC, ‘Terrorism and International Law’ (above n 19).

<sup>22</sup> APII art 6(5).

<sup>23</sup> ICRC, ‘The Applicability of IHL’ (above n 20); Pejic, *ibid*; ICRC, ‘Terrorism and International Law’ (above n 19).

over its own territory and population. The exercise of extraterritorial criminal jurisdiction by one state over the conduct of armed groups 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 war crimes law under IHL treaties and customary IHL. In the absence of such a basis, other states tended to refuse to cooperate in the suppression of another state's domestic political opponents, by upholding the political offence exception for typical civil war 'crimes' such as rebellion, revolution, sedition and so on.

The expansive jurisdiction now asserted over terrorism offences has broken the historical nexus with the territorial sovereign's rights. 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 offences are limited in subject matter, carefully defined, often subject to armed conflict exclusion clauses, and result from the mutual consent of states parties.

In contrast, more general terrorism offences pursuant to resolution 1373 are not guided by any agreed international definition; do not accommodate IHL through an exclusion formula; and are imposed by a 15-member state Security Council on all states without their specific consent. For these reasons, states should be very cautious before criminalizing the conduct of hostilities in NIACs in foreign states. Even where a state's own forces are involved the foreign conflict, that state is not the territorial sovereign with a general competence to prescribe the criminal law applicable there; and they do not enjoy any equivalent of the powers of an occupier in IAC, which would allow them to enact security offences in foreign territory. 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 political violence (not violating IHL) in another state's territory. The latter interferes, on the side of the foreign government, in foreign domestic political struggles – which historically was avoided by the application of the political offence exception in extradition law and treaties.

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 is capable of optimally balancing CTL and IHL interests.

## 4 International Counter-Terrorism Conventions 1963-2020

Of the 19 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 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 a UN Draft Convention.

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 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.

### 4.1 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>24</sup> military air bases,<sup>25</sup> or (by implication) military maritime platforms.<sup>26</sup> The Nuclear Material Convention 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 ICAO, IMO, and IAEA).<sup>27</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

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<sup>24</sup> Tokyo Convention 1963 art 1(4); Hague Convention 1970 art 3(2); Montreal Convention 1971 art 4; Maritime Safety Convention 1988 art 2.

<sup>25</sup> Airports Protocol 1988 art II.

<sup>26</sup> Fixed Platforms Protocol 1988 art 1(3) (fixed platforms on the continental shelf are defined as those for resource-related or economic purposes).

<sup>27</sup> See eg Chicago Convention 1944 art 3, which applies the Convention only to 'civil' aircraft and excludes 'state aircraft' (defined to include those used in military, customs, and police services).

state or non-state armed forces, 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 is minimal.

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>28</sup> Collateral damage to the civilian aircraft is still 'intentional' in that the military aircraft was attacked with knowledge that the civilian aircraft would be damaged.

The two regimes thus impose potentially incompatible obligations. One answer is to invoke one or other regime as the 'hard' *lex specialis* to trump the other. The difficulty is that it is 'it is often hard to distinguish what is "general" and what is "particular"':<sup>29</sup> IHL because it is adapted to armed conflict, or the aviation or maritime safety conventions because they are tailored to protect civilian aircraft or ships?

A different answer is found in the ICTCs themselves. The aviation and maritime safety conventions, like many ICTCs, define conduct as offences where it is not only 'intentional' but 'unlawful'. During the drafting, 'unlawful' was primarily 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, however, little attention to whether international law, including IHL, could be used as a standard. It is arguable that these ICTCs may 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. Such approach applies the 'soft' version of *lex specialis* as in the *Nuclear Weapons Advisory Opinion* (where a flexible human rights standard was interpreted in light of an IHL rule).

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<sup>28</sup> Art 1(b).

<sup>29</sup> ILC Study Group, Report on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (13 April 2006) para 58; see also para 111.

The Internationally Protected Persons Convention 1973 does not address armed conflict and raises other conflicts 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>30</sup> The Convention deliberately corresponds with the strict inviolability of diplomats and diplomatic premises under the Vienna Convention on Diplomatic Relations 1961 (VCDR).<sup>31</sup>

In most situations, there will be no conflict. 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. Problems arise, however, if a diplomat takes a direct part in hostilities; or an embassy becomes a military objective by hosting military or other personnel taking a direct part in hostilities; or an embassy suffers proportionate collateral damage from a lawful 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 for the aviation and maritime conventions, the 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, because it is adapted to armed conflict,<sup>32</sup> or the Protected Persons Convention because it is tailored to the protection of diplomats and embassies? On balance, international law tends to suggest the latter, rather than IHL, is the special law.

Under international law, inviolability of diplomats and embassies is strict, admitting no exceptions even for serious violations of local law, abuses of diplomatic functions<sup>33</sup> (including

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<sup>30</sup> VCDR 1961 art 2(1).

<sup>31</sup> VCDR 1961 arts 29 and 22 respectively.

<sup>32</sup> As argued by Laurie Blank, ‘The Limits of Inviolability: The Parameters for Protection of United Nations Facilities during Armed Conflict’ (2017) 93 ILS 45, 62.

<sup>33</sup> The Protected Persons Convention 1973 applies to state officials who are entitled to special protection from attack under international law (that is, particularly under the VCDR 1961) 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* (4<sup>th</sup> edn OUP 2016) 123.

espionage or political interference), or emergencies.<sup>34</sup> The appropriate remedy within the purposefully self-contained regime of diplomatic relations law is a declaration of *persona non grata* or termination of relations.<sup>35</sup> There is no clear authority that even national self-defence, or IHL, would justify or excuse breach of inviolability. In state practice, attacks on diplomats or embassies in armed conflict have not normally been addressed by recourse to IHL standards, but instead by through the VCDR and/or the Convention.<sup>36</sup>

Whether such approach is desirable, from a policy standpoint, is debateable. A strict approach deliberately 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 of inter-state diplomatic communication. On the other hand, it is precisely in conflict that states may be tempted to abuse diplomatic inviolability to further their war aims. The remedies of diplomatic relations law – *persona non grata* – may not be timely against military threats which necessitate a military response against ordinarily normally protected persons or objects.

## 4.2 ICTCs addressing IHL

The Hostages Convention 1979 was the first Convention to address IHL. It does not apply to hostage taking where it is a grave breach in IAC<sup>37</sup> and states are obliged to ‘extradite or prosecute’ the suspect under the Geneva Conventions of 1949 or Protocol I of 1977.<sup>38</sup> It still applies in IAC where hostages are not protected under those instruments<sup>39</sup> and to all hostage

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<sup>34</sup> *Tehran Hostages Case* (1980) ICJ Reports 3 at paras 83–87.

<sup>35</sup> Denza (above n 33) 123.

<sup>36</sup> See eg *Eritrea-Ethiopia Claims Commission – Partial Award: Diplomatic Claim, Eritrea’s Claim 20*, Partial Award of 19 December 2005, XXVI RIAA 381, paras 45-46 (absolute inviolability of embassy, even if it had been used to stockpile weapons for the war effort in an IAC); *Von Dardel v Union of Soviet Socialist Republics*, 623 F Supp 246 (DDC 1985) 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); UNSC Debate concerning Letter dated 7 May 1999 from China to the SC President (S/1999/523), 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); Sanchez Frias (above n 2) 74 (US extradition under the Protected Persons Convention of a suspected murderer of a US diplomat in an armed conflict in Mali).

<sup>37</sup> GCIV arts 34 and 146-147.

<sup>38</sup> Hostages Convention 1979 art 12.

<sup>39</sup> Specifically, where a hostage is not (i) a protected person under GCIV art 4, including nationals of the state party, a co-belligerent state, or a neutral state, or (ii) within the expanded categories protected by API art 85(2) (including prisoners of war, other captured persons who took part in hostilities, stateless persons and refugees, and the wounded, sick and ship wrecked of the other party).

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>40</sup>).

Accordingly, in IAC IHL is largely, but not exclusively, accorded priority as the *lex specialis*, whereas the Hostages Convention 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 peace time.<sup>41</sup> The deference to IHL was a compromise solution to calls by some states during the drafting to exclude self-determination movements,<sup>42</sup> and was facilitated by the recent adoption of Protocol I in 1977 and its relative depoliticisation of the issue. The issue also arose because the Hostages Convention was negotiated through the General Assembly (not the more technical, apolitical specialised agencies, as for many earlier ICTCs), which had recently concluded a bitter debate (from 1973-79) 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 Protocol I does not apply, hostage taking by self-determination movements is still a Convention offence.

The Terrorist Financing Convention 1999 also addresses IHL. It prohibits the financing of terrorist acts against ‘a civilian, or... any other person not taking an active part in the hostilities in a situation of armed conflict’.<sup>43</sup> In addition to civilians the latter include prisoners of war, captured fighters in NIAC, or military personnel who are sick or wounded. It is thus an offence to finance attacks by state or non-state armed forces or non-combatants, but not an offence to finance attacks (even by armed groups) on combatants, fighters, or civilians taking a direct part in hostilities. The Convention may still, however, apply where an attack is directed against military objective but civilians are knowingly harmed contrary to IHL.<sup>44</sup>

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<sup>40</sup> Four Geneva Conventions 1949, Common Article 3(1)(b); APII article 4(2)(c); Rome Statute article 8(2)(c)(iii) (NIAC); Jean Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005) (CIHL) rule 96.

<sup>41</sup> Verwey 85.

<sup>42</sup> See generally Wil Verwey, ‘The International Hostages Convention and National Liberation Movements’ (1981) 75 AJIL 69; Joseph Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Grotius 1990) 266-273.

<sup>43</sup> Terrorist Financing Convention 1999 art 2(1)(b).

<sup>44</sup> *Bouyahia Maher Ben Abdelaziz et al*, Italian Court of Cassation (Penal Section), No 1072, 17 January 2007.

The Financing Convention addresses the financing of both offences from other listed ICTCs as well as of more generally defined ‘terrorist acts’.<sup>45</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.

### **4.3 A Common Exclusion: Activities of Armed Forces during Armed Conflict**

Apart from the Financing Convention, since 1997 an increasingly common IHL exclusion clause has emerged. As mentioned, six ICTCs (addressing terrorist bombings, nuclear terrorism, nuclear material, and aviation and maritime safety) 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>46</sup>

Whereas the Financing Convention excludes only attacks *on* fighters, these other ICTCs more broadly exclude all activities of armed forces – whether attacks on fighters or civilians – and regardless whether they comply with IHL. This approach pays more deference to IHL as the governing regime,<sup>47</sup> but there are still areas of co-application (discussed below).

The scope of the exclusion is defined by *renvoi* to IHL, meaning customary IHL and IHL treaties binding on states parties to the ICTCs. In brief, ‘armed conflict’ means IAC (of all types, including occupation and Protocol I self-determination conflicts) and NIAC (under CA3 and APII). In IAC, ‘armed forces’ include regular state forces;<sup>48</sup> irregular forces belonging to a state;<sup>49</sup> paramilitary or law enforcement agencies incorporated into the armed forces;<sup>50</sup> other

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<sup>45</sup> Terrorist Financing Convention 1999 art 2(1)(a) and (b) respectively.

<sup>46</sup> Terrorist Bombings Convention 1997 art 19(2); Nuclear Terrorism Convention 2005 art 4(2); Nuclear Material Convention 1980 (as amended by the Amendment 2005) art 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010) art 3 *bis*; Rome Convention 1988 (as amended by the Protocol 2005) art 2 *bis* (2); Beijing Convention 2010 art 6(2).

<sup>47</sup> As under the Canadian Criminal Code s 83.01(1): see *R v Khawaja*, [2012] 3 SCR 555 (‘since the armed conflict exception functions as a defence, the accused must raise it and make a *prima facie* case that it applies’).

<sup>48</sup> GCIII art 4A(1).

<sup>49</sup> GCIII art 4A(2) and API art 43(1).

<sup>50</sup> API art 43(3).



resistance forces;<sup>51</sup> and self-determination forces.<sup>52</sup> While they are not strictly ‘armed forces’, a purposive interpretation would also exclude civilians *levée en masse*.<sup>53</sup>

In NIAC, ‘armed forces’ is used in CA3 of the four Geneva Conventions<sup>54</sup> and refers to both state armed forces and (what are more commonly known as) non-state *organized armed groups*.<sup>55</sup> The exclusion clause is thus not limited to ‘state’ forces, in clear contrast to a second exclusion clause in the same ICTCs for the activities of state military forces in the exercise of their official duties (that is, in peacetime). Protocol II refers to (state) ‘armed forces’ and ‘dissident armed forces’, along with ‘other organized armed groups’,<sup>56</sup> indicating that ‘armed forces’ can also mean non-state actors.

‘Activities’ excluded from the ICTCs are not limited to military ‘attacks’ (whether offensive under IHL, or to acts against the adversary’s armed forces. They could include acts in relation to civilians, from the administration of occupied territory to war crimes and repression of the population, or indirect DPH (including non-violent activities such as espionage or propaganda). Even though the ICTCs largely protect civilians, the exclusion is 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.

The exclusion nonetheless applies to activities even if they are not in conformity with IHL,<sup>57</sup> international law, or national law. It thus also excludes even deliberate attacks on civilians by armed forces from the ICTCs, 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>58</sup> In serious cases, terrorist-type conduct

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<sup>51</sup> API art 44(3).

<sup>52</sup> API art 1(4).

<sup>53</sup> GCIII art 4A(6). Such persons are neither regular nor irregular forces under GCIII, 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 1907 art 2.

<sup>54</sup> Pejic (above n 20) 189.

<sup>55</sup> O’Donnell (above n 2) 866.

<sup>56</sup> APII art 1.

<sup>57</sup> Pejic (above n 20) 189.

<sup>58</sup> As in the drafting of the Terrorist Bombings Convention (see Ad Hoc Committee established by UNGA res 51/210 (17 December 1996), Report, A/52/37 (1997) 32 (Netherlands), 43 (Switzerland), 53); Working Group, Report on Measures to Eliminate International Terrorism, A/C.6/52/L.3 (10 October 1997) 31 and 40 (Belgium))

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.

Both IHL and the ICTCs *co-apply* to the activities of: (i) irregular forces not belonging to state but acting in support of it in IAC; (ii) civilians taking a direct part in hostilities, whether in IAC or NIAC (who are not members of organized armed groups performing a CCF; and including members of disorganized armed groups); and (iii) civilians taking an indirect part in hostilities in support of any state or non-state party in IAC or NIAC.

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>59</sup> to it – for example by engaging in or preparing for hostilities; or where an act serves the ultimate goal of a party’s campaign.<sup>60</sup> It could also include where private, off-duty soldiers secretly aid the enemy or engage in ‘blue on blue attacks; or where the work of on-duty soldiers has no nexus to the conflict (as where some forces are deployed in a limited foreign conflict but others remain stationed at home, performing ordinary peacetime duties).

## 5 The UN Draft Comprehensive Terrorism Convention

Despite being agreed in the six ICTCs in 1997, 2005, and 2010, the exclusion clause was reopened during the negotiations for the UN Draft Convention. The Organisation of Islamic Cooperation (OIC) proposed excluding the activities of the ‘parties’—rather than ‘armed

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and the Beijing Protocol 2010 and Beijing Convention 2010 (see Damien van der Toorn, ‘September 11 Inspired Aviation Counter-terrorism Convention and Protocol Adopted’ (2010) 15(3) ASIL Insights). 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: Working Group Report, *infra* 31.

<sup>59</sup> *Prosecutor v Tadić*, IT-, Appeal Chamber Decision (Interlocutory Appeal on Jurisdiction) (2 October 1995) para 70.

<sup>60</sup> *Prosecutor v Kunarac*, IT-96-23 and IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) para 59.

forces’—during armed conflict, ‘including in situations of foreign occupation’.<sup>61</sup> The proposal is partly a technical difference over the proper terminology but also 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>62</sup> which regulate not only their ‘armed forces’<sup>63</sup> but impose wider obligations on the wider entity of the state. In NIAC, CA3 separately refers to ‘each Party to the conflict’ to denote state and non-state parties; the latter are not, however, High Contracting Parties since only states are parties to treaties.<sup>64</sup> CA3 then guarantees protections for, inter alia, ‘members of armed forces’ no longer taking an active part in hostilities, necessarily meaning of both state and non-state forces (the latter being assimilable to *organized armed groups* in the prevailing legal parlance of NIAC). To the extent that OIC’s reference to the ‘parties’ aims to counter those states which narrowly interpret ‘armed forces’ as only state militaries,<sup>65</sup> it is redundant on a proper interpretation of ‘armed forces’ under CA3.

However, the OIC also intends the term ‘parties’ to exclude actors other than members of organized armed groups, such as disorganized armed groups,<sup>66</sup> sporadic civilian DPH (without performing a CCF and thereby being members of an organized armed group), or civilians indirectly participating in hostilities. Self-determination movements and non-state armed groups, for example, typically comprise not only armed wings but wider (and often larger) political and social organizations, some of whom may also engage in violence with 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>67</sup>

It is highly doubtful, however, whether replacing ‘armed forces’ with ‘parties’ would make any difference. A non-state ‘party’ to a NIAC is exclusively constituted by an organized armed

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<sup>61</sup> Ad Hoc Committee established by UNGA res 51/210 (17 December 1996), Report, A/57/37 (2002) annex IV, 17 and A/58/37 (2003) 11-12.

<sup>62</sup> See eg Hague Regulations 1907, four Geneva Conventions 1949, API and APII; as well as the ICRC customary IHL study.

<sup>63</sup> See eg GCIII art 4(2) and API art 43.

<sup>64</sup> In contrast, APII refers only to (state) High Contracting Parties, not also parties to the conflict; art 1 then refers to conflicts between (state) ‘armed forces’ and ‘dissident armed forces’ or ‘other organized armed groups’.

<sup>65</sup> Pejic (above n 20) 192.

<sup>66</sup> Ibid 193.

<sup>67</sup> See eg Christian Walter, ‘Defining Terrorism in National and International Law’ in Christian Walter et al (eds), *Terrorism as a Challenge for National and International Law* (Springer 2003) 23, 39-40.

group. There is no equivalent recognition under IHL of any components of a non-state party other than the organized armed group, such as 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 a police or intelligence agencies), and other persons or entities for whom the state is internationally legally responsible. The OIC proposal makes a distinction without difference because a non-state ‘party’ to a NIAC is the same entity as the organized armed group, 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’ / ‘organized armed group’. On a narrow view, it 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 by 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 take neither a direct *nor* indirect part in hostilities. These could include, for instance, 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 complex totality of certain non-state movements.

There was little discussion of the precise scope of non-state ‘armed forces’ during the drafting of the ICTCs, largely because its meaning was left to IHL. Yet the concept defining such forces, ‘organized armed group’, is open to some debate. 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>68</sup> (even if there may be humanitarian costs to this approach.<sup>69</sup>) That means that any exclusion of the activities of non-state ‘armed forces’ / ‘parties’ would only exclude fighters (CCF) or, a slightly wider approach, other members integrated into the armed group and taking an indirect part in hostilities.

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<sup>68</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 180.

<sup>69</sup> 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 CA3.

IHL already stipulates consequences for such conduct, including targeting, security detention, and 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 establish additional liabilities or confer wider law enforcement powers that are not present in IHL/ICL, the disagreement is also a legal one about the desirable extent of liability and legal powers.

Civilians sporadically taking a direct part, or taking an indirect part, in hostilities 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 armed group.

The OIC’s further proposed exclusion ‘foreign occupation’ is legally redundant in that an occupation is by definition an IAC under Common Article 2 of the four Geneva Conventions 1949, regardless whether there are also hostilities between state forces.<sup>70</sup> The wording of the OIC’s proposal (conflict ‘including’ occupation) recognizes as much. Organized armed groups 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 excluded from the ICTCs.

## **6 Security Council Obligations on States to Criminalize Terrorist Acts**

Beyond the ICTCs, Security Council resolution 1373 (2001) 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’. The Council has not, however, provide a common international definition of such acts, or prescribed the relationship of offences to IHL (such as through exclusion clauses as in the ICTCs). Although its non-binding ‘working definition’ of 2004 addresses IHL in limited ways (by *renvoi* to predicate ICTC offences, and applying only to acts against ‘civilians’, thus excluding acts against fighters),<sup>71</sup> it has had little influence in practice.

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<sup>70</sup> Pejic (above n 20) 189, 193.

<sup>71</sup> UNSC res 1566 (2004) para 3 is predicated on ICTC offences combined with additional general elements but it does not deal with conduct beyond ICTC offences.

The Council's CTL monitoring bodies (the Counter-Terrorism Committee and Counter-terrorism Executive Directorate) have also not publicly disclosed any clear public position.

At most, the Council has repeatedly emphasized in abstract terms that states 'must comply with all their obligations under international law', including IHL, when implementing CTL obligations.<sup>72</sup> As such, the Council has not expressed any intention for CTL to displace any inconsistent IHL treaty rules by virtue of its 'override' power under article 103 of the UN Charter; that power could not, in any event, displace customary IHL. To the contrary, the Council has affirmed the continued, full applicability of IHL, implying that it is CTL that must give way to IHL in the event of a conflict.

However, as the UN Special Rapporteur on human rights and counterterrorism observes, in the comparable context of human rights compliance, 'the actual impact of such generic mentions, without clear and explicit... guidance contained in the text, is questionable'.<sup>73</sup> At a minimum, it must mean that it is prohibited for CTL to criminalize conduct that is lawful under IHL, such as acts covered by combatant immunity in IAC; mandated activities of the ICRC or other neutral actors; or the provision of humanitarian relief and medical care, among others.

Only in one particular area has the Council (belatedly, since 2019) more specifically urged (but not required) states to 'take into account' the effect of potential CTL measures on 'exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with' IHL.<sup>74</sup> The weak suggestion to merely 'take into account' humanitarian impacts is insufficient to ensure that IHL obligations are stringently upheld, including: the duty to allow and facilitate rapid and unimpeded passage of impartial and non-discriminatory humanitarian relief (subject to a right of control); freedom of movement of humanitarian personnel (subject to temporary restriction for imperative military reasons); respect and protection for humanitarian personnel and objects;<sup>75</sup> medical care for the wounded and sick; and protection for medical personnel, units and activities.<sup>76</sup>

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<sup>72</sup> See eg UNSC resolutions 2178 (2014), 2396 (2017) and 2462 (2019).

<sup>73</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Fionnuala Ní Aoláin), A/73/45453 (3 September 2018) para 37.

<sup>74</sup> UNSC resolutions 2462 (2019) para 24 and 2482 (2019) para 16. See also Report of the UN Secretary-General on the Protection of Civilians in Armed Conflict', S/2010/579 (11 November 2010) para 57.

<sup>75</sup> ICRC Customary IHL Rules 55, 56, 31-32 respectively.

<sup>76</sup> ICRC Customary IHL Rules 110 and 25-30 respectively.

More difficult is whether the duty to comply with IHL precludes criminalization of conduct which is (i) unlawful under IHL or (ii) neither lawful nor prohibited under IHL (such as participation in hostilities by members of organized armed groups in NIAC, civilian DPH in IAC or NIAC, or indirect participation in hostilities). Some such conduct may separately constitute war crimes or other international crimes. IHL itself recognizes states' rights to criminalize security-related conduct in occupied territory as well as *any* conduct in its own territory in NIAC. As a result, a state can still formally comply with its IHL obligations by criminalizing such conduct under CTL, even if, as mentioned earlier, there may be countervailing IHL policy interests.

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

## **7 Relationships between CTL and IHL in National Practice**

### **7.1 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 counter-terrorism laws of the 27-member European Union<sup>77</sup> and the 47 member Council of Europe<sup>78</sup> – almost a quarter of all states – and in corresponding national law.<sup>79</sup>

The same result has been reached in Italy by a more circuitous route. Italian law 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

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<sup>77</sup> EU Directive of 15 March 2017 on Combating Terrorism, recital 37; see also the superseded EU Framework Decision on Combating Terrorism of 13 June 2002, recital 11.

<sup>78</sup> Council of Europe Convention on the Prevention of Terrorism 2005 art 26(5).

<sup>79</sup> See eg Chamber of Indictments of the Court of Appeal of Brussels, 8 March 2019 (applying the Belgian Criminal Code art 141bis, implementing the EU law, to acquit Kurdistan Workers' Party members on the basis that the PKK was a party to a NIAC and was not engaged in terrorist offences outside of it); see also *Republic of Italy v TJ (aka Kumar) and 29 Others*, Court of Naples, 23 June 2011; District Court of The Hague, Judgement of 21 October 2011 (ECLI: NL: RBSGR: 2011: BU2066 and BT8829).

law as reflected in the Terrorist Financing Convention 1999.<sup>80</sup> That 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 Financing Convention which precludes the Convention affecting other international law rights, including IHL.<sup>81</sup> Acts by the LTTE in the NIAC in Sri Lanka were thus excluded from terrorist offences.

In theory, narrower versions of the armed forces exclusion are possible. As mentioned earlier, narrower variants were considered in the negotiations for the Draft UN Comprehensive Terrorism Convention, by excluding only: (i) *IHL compliant* activities; (ii) activities of the *parties* rather than armed forces; (iii) 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<sup>82</sup> and Terrorist Financing Conventions.<sup>83</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 it is *governed* by IHL. In addition, by excluding any ‘acts’, not only those by armed forces, it would also prevent the criminalization of humanitarian funding or relief.<sup>84</sup> One disadvantage is that precludes the application of CTL (including its preparatory offences and machinery of prevention and cooperation) to (i) persons who are not members of state or non-state armed forces (such as disorganized armed groups or sporadic civilian DPH) and (ii) even conduct that is a war crime or other violation of IHL. This approach does not appear to have influenced national practice.

Thirdly, a narrower version of the above approach has, however, been adopted in some laws. Canadian (and similarly New Zealand) law excludes from terrorist offences ‘an act or omission

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<sup>80</sup> *Italy v TJ* *ibid*.

<sup>81</sup> Terrorist Financing Convention 1999 art 21; see similarly Terrorist Bombings Convention 1997 art 19(1); Nuclear Terrorism Convention 2005 art 4(3); Protocol 2005 to the Maritime Safety Convention 1988 art 3; Beijing Protocol 2010 art 6 (amending the Hague Convention 1970); Beijing Convention 2010 art 6(1) (consolidating the Montreal Convention 1971 and the Airports Protocol 1988).

<sup>82</sup> Working Group Report 1997 (above n 58) 31 (South Africa and Switzerland).

<sup>83</sup> Ad Hoc Committee established by UNGA res 51/210 (17 December 1996), Report, A/54/37 (1999) 15, 42, 47 (France, Lebanon, Belgium).

<sup>84</sup> Working Group, Report on Measures to Eliminate International Terrorism, A/C.6/54/L.2 (26 October 1999) 54 (Kuwait).



that is committed during an armed conflict’ *and in accordance with* international law.<sup>85</sup> In a more limited fashion, Swiss law excludes terrorist financing that ‘is intended to support acts that do not violate’ IHL.<sup>86</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 against 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>87</sup> A disadvantage is that, in practice, CTL offences are only likely to be applied (by state authorities) to members of non-state armed groups 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 either terrorism offences generally<sup>88</sup> or from specific offences.<sup>89</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>90</sup> More tangentially, a few states exclude acts intended to create or restore democracy, the constitutional, or human rights,<sup>91</sup> which could be relevant in some rebel conflicts.

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<sup>85</sup> Criminal Code (RSC 1985 c C-46) (Canada) s 83.01(1); see also Terrorism Suppression Act 2002 (NZ) s 5(4).

<sup>86</sup> Swiss Criminal Code 1937 art 260<sup>quinquies</sup>1 (4).

<sup>87</sup> *R v Khawaja*, [2012] 3 SCR 555 paras 100-103.

<sup>88</sup> EU Directive 2017 (above n 77) recital 38; Law No 3 on the Repression of Acts of Terrorism in the Republic of Chad (28 April 2020) art 1(4).

<sup>89</sup> Such as being present in a prohibited terrorist area (see Counter-Terrorism and Border Security Act 2009 (UK) s 4; Criminal Code (Australia) s 119.2(3)(a)); Criminal Code (Denmark) s 114(j)), or associating with a terrorist organization, treasonously aiding the enemy, hostile foreign incursions, or foreign military training (Criminal Code (Australia) ss 102.8, 83.3, s 80.1AA(1), and 119.5 respectively).

<sup>90</sup> EU Council, EU Best Practices for the Effective Implementation of Restrictive Measures (Sanctions), 8519/18 (4 May 2018) para 76.

<sup>91</sup> Austrian Criminal Code art 278c (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 2004-2010) and repealed Terrorism Suppression Act 2002 (NZ) s 8(2) (from 2002-2007).

At the international level, by contrast, there has been a reticence to recognize clear humanitarian exemptions from CTL. A Swiss proposal during the drafting of the Terrorist Financing Convention to exclude funds for humanitarian purposes was not accepted,<sup>92</sup> due to concerns about fungibility of funds and their potential diversion for terrorist purposes. While some Security Council country sanctions recognize humanitarian exemptions,<sup>93</sup> the same benefit has not been extended to CTL sanctions. At most, as mentioned, since 2019 Council resolutions have urged states to ‘take into account’ the impacts of CTL on humanitarian and medical activities that are consistent with IHL.<sup>94</sup>

## 7.2 No Accommodation of IHL

A final approach to the relationship with IHL is the most common in national law<sup>95</sup> and certain regional<sup>96</sup> laws: no explicit exclusion or accommodation of IHL at all, and thus potentially full co-application of CTL. National<sup>97</sup> and regional<sup>98</sup> courts have upheld CTL offences in armed conflict on the basis that, inter alia: 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>99</sup> the application of IHL and war crimes does not preclude the concurrent application of CTL;<sup>100</sup> there are no exceptions for resistance to oppression;<sup>101</sup> and Security Council resolution 1373 does not exempt armed forces in armed conflict.<sup>102</sup>

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<sup>92</sup> Proposal of Switzerland, A/AC.252/1999/WP.1 (15 March 1999) proposed art 1(1); see also Ad Hoc Committee Report 1999 (above n 83) 57.

<sup>93</sup> UNSC res 2385 (2017) para 33; see also UNSC res 2397 (2017) para 25 (North Korea).

<sup>94</sup> UNSC resolutions 2462 (28 March 2019) para 24 and 2482 (2019) para 16; see also Report of the UN Secretary-General on the Protection of Civilians in Armed Conflict’, S/2010/579 (11 November 2010) para 57.

<sup>95</sup> See eg Terrorism Act 2000 (UK) s 1, applied in *R v Mohammed Gul* [2013] UK SC 64; Criminal Code 1995 (Australia) s 100.1; Dutch Supreme Court, Judgment (7 May 2004), ECLI: NL: HR: AF6988, paras 3.3.7-3.3.8; *Prosecutor v Maher H*, Case No 09/767116-14, District Court of The Hague, Judgment (1 December 2014) para 3; *Prosecutor v Imane B et al*, District Court of The Hague, Judgment (10 December 2015) paras 7.23-7.29;

<sup>96</sup> EU Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism (OJ 2001 L 344, 93) (concerning terrorist financing), applied in *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union*, T-208/11, CJEU, Judgment of the General Court (Sixth Chamber) (16 October 2014) paras 54-83; *A, B, C and D v Minister van Buitenlandse Zaken*, CJEU, Case C-158/14, Judgment (14 March 2017) ECLI:EU:C:2017:202. Most regional treaties do not mention IHL.

<sup>97</sup> *R v Gul* (above n 95) paras 48-51; Dutch Supreme Court (7 May 2004) paras 3.3.7-3.3.8; *Prosecutor v Maher H* (above n 95) para 3; cf District Court of The Hague (2011) (above n 79).

<sup>98</sup> *LTTE v EU Council* (above n 96) paras 54-83; *A, B, C and D v Minister* (above n 96).

<sup>99</sup> *R v Gul* (above n 95) paras 48-51; *Prosecutor v Maher H* (above n 95) para 3.

<sup>100</sup> Dutch Supreme Court (2004) (above n 95) paras 3.3.7-3.3.8; *LTTE v Council* *ibid*; *Prosecutor v Maher H* *ibid*, para 3.

<sup>101</sup> *LTTE v EU Council* *ibid*.

<sup>102</sup> *LTTE v EU Council* *ibid* para 74.

Such laws criminalize acts by armed forces and other actors alike, as well as acts in conformity with IHL or not. In some states, they reflect a deliberate choice to maximise the reach of CTL, for instance, to criminalize the making of improvised explosive devices in NIAC, or incitement to commit hostilities. In other 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. 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.

Where laws do not generally accommodate IHL, there can still be some flexibility in them. States will inevitably exempt their own military forces from CTL laws since there will be positive legal authority in national law for their military operations, providing a lawful or reasonable excuse to CTL charges. In addition, the functional immunity of one's state's military personnel would shield them from CTL laws before another state's courts, as would combatant immunity under IHL.

The burden of CTL laws will thus fall asymmetrically on non-state groups in NIAC. At most, persons in NIAC can hope that prosecutorial discretion will be exercised not to lay CTL charges where they do not violate IHL. That is, however, unlikely in many states, 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, ISIL but not Kurdish forces in Syria), abdicates the legislature's responsibility to clearly identify the scope of liability, and compromises the rule of law.<sup>103</sup>

## **8 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,

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<sup>103</sup> *R v Gul* (above n 95) para 36.

proposed in the UN Draft 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.

That approach preserves the freedom of action of belligerents in IAC and NIAC under IHL, including non-state armed groups not entitled to combatant immunity, and minimizes adverse impacts on incentives to comply with IHL and prospects for post-conflict reconciliation. It comes at the expense, however, of preventing CTL (including its preparatory offences and machinery of prevention and cooperation) from co-regulating *violations of IHL* – 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 armed groups (who are likely to be subject to an internal disciplinary system) but anyone who directly participates in hostilities.

A preferable approach is to confine an armed forces exception to activities which are not unlawful under IHL, thus buttressing IHL without unduly detracting from it (for instance, by criminalizing mere participation in hostilities). There are still drawbacks: in practice, states are unlikely to criminalize their own military forces as terrorists; and the stigmatization of non-state groups as terrorists may still undermine compliance and impede 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.