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Terrorism, Counter-Terrorism and International Humanitarian Law

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1. Introduction

Despite much debate about the coverage, adequacy and effectiveness of IHL in regulating 'terrorism', IHL does not recognise any specific legal categories for, or special regime governing, terrorists and terrorist groups. Rather, the general norms of IHL, discussed in previous chapters, apply to terrorists according to their conduct. IHL was precisely developed as a kind of exceptional or emergency law comprehensively addressing all forms of violence in armed conflict; international law on terrorism has meanwhile remained somewhat ill-defined and diffuse, rendering its relation to armed conflict often unclear. Particularly relevant to terrorism are the IHL rules on the classification of violence as armed conflict, the categorisation of persons during conflict, direct participation in hostilities by members of armed groups or civilians, detention, criminal liability, and fair trial.[1]

Thus, at the threshold of application of IHL (see chapter 2), violence that is labeled as 'terrorist' (whether politically or by legal norms outside IHL) may contribute to constituting an 'armed conflict' in a number of ways. Armed groups may qualify as irregular forces belonging to a state if they meet the pre-conditions of combatancy,[2] including if they satisfy the more lenient conditions of guerilla combat,[3] and thus be part of an international armed conflict ('IAC') against another state. Civilians spontaneously resisting an invading state (a *levee en masse*) could also be combatants in an IAC.[4] A liberation movement fighting a state party to Protocol I 1977 could comprise a further type of IAC.[5]

A so-called terrorist group could also be a party to a non-international armed conflict ('NIAC'), under common article 3 of the four Geneva Conventions 1949, if its military hostilities engaging a state or another armed group are *intense* and the group is *organised*.[6] The violence must rise above mere internal disturbances and tensions, such as riots or isolated and sporadic terrorist acts. Protocol II 1977 may additionally apply if a non-state armed group controls territory. A NIAC involving a terrorist group can have a transnational aspect where hostilities against one state take place in the territory of a second state.[7]

The classification of a conflict involving a terrorist group has important implications for the legal categorisation of individuals within the conflict (see chapter 5). In IACs, 'terrorists' could potentially be combatants, civilians taking a direct part in hostilities, or other civilians endangering a state's security. In NIACs, 'terrorists' could be members of armed groups performing a continuous combat function, civilians otherwise taking a direct part in

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[1] See generally Ben Saul, 'Terrorism and International Humanitarian Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 208-231; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011).
[2] GCIII article 4(2).
[3] API article 44(3).
[4] GCIII article 4(A)(6).
[5] API article 1(4).
[6] Four Geneva Conventions 1949, common article 3, as interpreted by the ICTY in *Prosecutor v Tadic (Interlocutory Appeal on Jurisdiction)* (Appeal Chamber) IT-94-1 (2 October 1995) para 70.
[7] *Hamdan v Rumsfeld* 548 US 557 (2006).

hostilities, or other dangerous civilians.

In turn, the categorisation of individuals determines their legal treatment and rights during conflict. Combatants (in IACs), and civilians currently taking a direct part in hostilities (in IACs and NIACs), can be militarily targeted (see chapter 7). Those who otherwise endanger state security (including civilians no longer taking a direct part in hostilities ('DPH'), and civilians indirectly supporting hostilities) may be administratively detained for as long as they remain dangerous (chapter 12), while combatants can be detained as prisoners of war until the end of the conflict. Those who commit war crimes (or other international crimes), or crimes under national law in a NIAC, may be prosecuted in a fair trial (chapters 15 and 16).

The application of these general rules has sometimes been controversial in relation to terrorists and stimulated long-running debates (before and after 9/11) about the adequacy of IHL. Overall these debates have not produced fundamental normative changes in IHL, or exceptions to its application, even if they have sharpened – or divided – the interpretation of the existing rules, including on the classification of 'transnational' NIACs (and their geographical and temporal scope), the meaning of DPH, the grounds and procedures of detention in NIACs, and the substantive and procedural dimensions of criminal trials. In addition, sometimes the ICRC has led 'soft law' processes to encourage consensus on interpretation, as with DPH,[8] or sought ways to strengthen existing protection without creating new law, as with persons deprived of liberty.[9] Where normative change has ensued, thus far it has tended not to stiffen the law against perceived 'terrorists' but to relax constraints in their favour, as in the looser conditions of guerilla combatancy and the right to combatant status of liberation movements under Additional Protocol I 1977.[10]

This chapter does not reiterate or particularise the general rules, discussed in previous chapters (often including in the context of terrorism) as they apply to terrorism or terrorists. Instead, it focuses on three key legal issues of particular relevance and specificity to terrorism in armed conflict. First, it examines IHL's specific, narrow prohibitions on 'terrorism' in armed conflict and the connected war crime of intending to spread terror amongst a civilian population, which is distinct from peacetime legal notions of terrorism. The war crimes jurisprudence has been developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone, and has implications for criminal jurisdiction under customary IHL and before the International Criminal Court.

Secondly, the chapter analyses the varied and complicated relationships between IHL and different international counter-terrorism law ('CTL') norms and instruments. Depending on the norm and context, CTL can apply, not apply, or partially apply in armed conflict, and there is no general international rule determining whether CTL or IHL is the more special law (*lex specialis*). Often CTL complements and extends IHL's focus on preventing and criminalising attacks on civilians. Further, CTL often does not directly conflict with IHL. However, some aspects of CTL interfere with IHL's delicate balance between humanitarian protection and military necessity, by 'taking sides', undermining the equality of the parties,

[8] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, 2009).
[9] 32nd International Conference of the Red Cross and Red Crescent, Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty (32IC/15/R1), 8-10 December 2015. The outcome of an ICRC study and consultation from 2012-15 was a directive to pursue further work to produce 'concrete and implementable outcomes' of a 'non-legally binding nature': para 8.
[10] API articles 44(3) and 1(4) respectively.

and ultimately reducing incentives for non-state armed groups to comply with IHL.

Thirdly, this chapter concludes by exploring the related, adverse effects of CTL on humanitarian relief operations in armed conflict. National implementation of CTL has variously chilled, restricted, prohibited and even criminalised humanitarian engagement by external actors with armed 'terrorist' groups. These measures have both inhibited effective humanitarian assistance to vulnerable civilian populations and undermined the confidence of non-state armed groups in humanitarian cooperation with the international community.

2. Prohibitions on and Criminal Liabilities for Terrorism in Armed Conflict

A. Prohibitions on Terrorist-Type Conduct

Most terrorist-type conduct committed in any type of armed conflict is already criminalized as various war crimes.[11] This is because IHL prohibits and criminalizes deliberate attacks on civilians or civilian objects, including by indiscriminate attacks; reprisals; the use of prohibited weapons (including incendiaries, cluster munitions, or chemical or biological weapons); attacks on cultural property, objects indispensible to civilian survival (such as food and water supplies), or works containing dangerous forces (including dams, dykes and nuclear facilities); or through illegal detention, torture or inhuman treatment (see chapters 6-8 and 11). In addition, the suite of crimes against humanity also applies concurrently in armed conflict to protect civilian populations against widespread or systematic attack.

In addition to such protections for civilians, IHL specifically prohibits terrorism. Article 33(1) of the Fourth Geneva Convention 1949 prohibits 'collective penalties and likewise all measures of intimidation or of terrorism' against protected persons 'in the hands of a Party' (as in detention or occupied territory) to an international conflict.[12] The provision was a response to the mass intimidation of civilians in occupied territory in the Second World War.

All civilians in international conflict (including those not 'in the hands of' a party) are protected by Article 51(2) of Protocol I of 1977, which prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. The same acts are prohibited in non-international conflict by Article 13(2) of Protocol II. Both provisions are part of wider prohibitions on attacking civilians.[13] Article 4(2)(d) of Protocol II further prohibits 'acts of terrorism' in non-international conflicts.

B. The War Crime of Intending to Spread Terror Amongst a Civilian Population

In the *Galić* case (2003), the ICTY was the first international tribunal to recognise 'the crime of terror as a violation of the laws or customs of war', based on a violation of Article 51(2) of Protocol I.[14] The elements of the crime are as follows:

[11] See Hans Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 Intl Rev Red Cross 547.
[12] GCIV article 4.
[13] API article 51(2) and APII article 13(2).
[14] *Prosecutor v Galic* (Trial Chamber Judgment and Opinion) ICTY-98-29-T (5 December 2003) paras [65]-[66], 138; affirmed in *Prosecutor v Galic* (Appeal Chamber Judgment) IT-98-29-, (30 November 2006) paras [87]-[90].

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[15]

The ICTY clarified that 'acts of violence' do not include legitimate attacks against combatants but only unlawful attacks against civilians.[16] On appeal it found that the crime encompasses both attacks and threats of attacks against civilians; and that it is not limited to direct attacks or threats but includes indiscriminate or disproportionate ones.[17] Further, 'extensive trauma and psychological damage form part of the acts or threats of violence'.[18]

The distinctive feature of the war crime of terror is its mental elements. There must first be a general intent to wilfully make civilians the object of acts or threats of violence.[19] In addition, there must be a 'specific intent', that is, the primary purpose to spread terror amongst civilians, which necessarily excludes '*dolus eventualis* or recklessness'.[20] The accused must specifically intend terror to result and not merely be aware of its likelihood. The actual infliction of terror is not required.[21]

Terror was defined simply as 'extreme fear'.[22] The Appeals Chamber clarified that the offence is not concerned with the incidental fear civilians experience in war as a result of legitimate military actions, but rather with acts or threats that are specifically undertaken to spread terror.[23] Further, it observed that the intent to spread terror need not be the only purpose of the act or threat, as long as the intent to spread terror 'was principal among the aims'.[24] It noted that 'intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration'.[25]

On the facts in *Galić,* the war crime of spreading terror was found to have been committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, as a result of the 'the nature of the civilian activities targeted, the manner in which the attacks on civilians were carried out and the timing and duration of the attacks on civilians'.[26] The ICTY found that civilians were targeted 'while engaged in typical civilian activities or where expected to be found' throughout the city,[27] such as during funerals; in ambulances and hospitals; on trams and buses; when driving, cycling or walking; at home or in school; while shopping; when gardening, tending fires, clearing rubbish, or collective water or firewood; at

[15] *Galić* (Trial Chamber Judgment) ibid para 133.
[16] ibid para 135.
[17] *Galić* (Appeal Chamber Judgment) (above n 14) para 102.
[18] ibid.
[19] *Galić* (Trial Chamber Judgment) (above n 14) para 136.
[20] ibid.
[21] ibid para 134; *Galić* (Appeal Chamber Judgment) (above n 14) paras [103]-[104].
[22] *Galić* (Trial Chamber Judgment) ibid para 137.
[23] *Galić* (Appeal Chamber Judgment) (above n 14) para 103.
[24] ibid para 104.
[25] ibid.
[26] *Galić* (Trial Chamber Judgment) (above n 14) paras 592, [596]-[597].
[27] ibid para 593.

suppertime; and at public festivals and funerals.[28] The vulnerable were especially targeted, including women, children and the elderly.[29] Hundreds of civilians were killed and thousands injured.[30]

The attacks were found to have no military significance and could not be accounted for by targeting errors or cross-fire.[31] They were also not designed to exterminate or deplete the population.[32] Rather, the pattern of fire was random and indiscriminate, at unexpected places and times, calculated to achieve surprise and maximise the psychological effects.[33] Civilians responded by closing schools, hiding by day and living at night, rarely moving around, and creating barricades.[34] The ICTY concluded that the aim was to 'very clearly' send the message 'that no Sarajevo civilian was safe anywhere, at any time of day or night'.[35] It found that 'the only reasonable conclusion in light of the evidence … is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear'.[36]

The charges in the *Galic* case were based on the terrorism prohibitions in Protocol I, which applied by agreement between the parties in that conflict, and normally only applies to international conflicts. However, the ICTY also recognised that the prohibition on terror was a specific prohibition within IHL's general prohibition on attacks on civilians, which constitutes customary international law.[37] It further held that there is individual criminal responsibility for violations of the rule under customary international law,[38] including in NIACs.

In *Milošević* (2007),[39] the ICTY found another Bosnian Serb commander responsible for the war crime of spreading terror during the Sarajevo siege, again for a campaign of sniping and shelling of civilians, including by the use of inaccurate and indiscriminate modified air bombs. The Special Court for Sierra Leone ('SCSL') has also followed the *Galić* jurisprudence to also find numerous convictions for the war crime of spreading terror.[40]

In *Brima et al* (2007),[41] the SCSL found that the war crime of terror was committed by violent attacks on civilians, including amputation and mutilation. Such acts constituted terrorism because they were committed against unarmed civilians repeatedly, brutally, and not for military advantage; they were often accompanied by perpetrator statements that they were done to cause fear; and they aimed to intimidate civilians not to support the adversary.

[28] ibid paras 569, [584]-[585].
[29] ibid paras 584, 593.
[30] ibid para 591.
[31] ibid paras 593, 598, 567.
[32] ibid para 593.
[33] ibid paras 563, 568, 570, 573, 589.
[34] ibid para 586.
[35] ibid paras [592]-[593].
[36] ibid para 593.
[37] *Galić* (Appeal Chamber Judgment) (above n 14) paras [87]-[90].
[38] ibid paras [91]-[98].
[39] *Prosecutor v Milošević* (Trial Chamber Judgment)IT-98-29/1-T (12 December 2007).
[40] The crime of 'acts of terrorism' in NIAC is expressly included in Article 3(d) of the Statute of the Special Court for Sierra Leone ('SCSL').
[41] *Prosecutor v Brima et al* (Trial Chamber Judgment) SCSL-0416-T (20 June 2007) paras 662, 666; also *Prosecutor v Taylor* (Trial Chamber Judgment) SCSL-03-1-T (26 April 2012) paras 112, [1430]-[1633].

In *Sesay et al* (2009),[42] the SCSL found that terrorism was constituted by unlawful killings, rape, sexual violence and forced marriage, physical violence, abductions, enslavement and forced labour, threats, and looting and burning of property. Indications of the intent to spread terror included: the lack of a military or other legitimate objective; brutality (such as mutilations and amputations); the location of attacks (such as at public places, protests, homes and schools); mass attacks to compel obedience; the scale of property destruction out of proportion or the effects of hostilities; the targeting of public officials or collaborators; public demonstration killings and publicising attacks to intimidate others; indiscriminate attacks; threats, insults or statements by perpetrators as to their intent; punishment to warn civilians not to support the adversary; evidence of a policy (*gori-gori*) to target and subdue, and seek revenge against, civilians; and civilian efforts to hide from fighters.

Importantly, the SCSL found that rape, sexual slavery, 'forced marriages' and other outrages on personal dignity can constitute acts of terrorism.[43] It held that 'the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror'. The 'deliberate and concerted campaign to rape women' constituted 'an extension of the battlefield to the women's bodies, a degrading treatment that inflicts physical, mental and sexual suffering to the victims and to their community'. Terror was evidenced by perverse methods of violence (including gang rape, rape of pregnant women, forced intercourse, and violence in front of family members); an intent beyond mere personal gratification; the targeting of the most vulnerable; the attendant destruction of the family nucleus, cultural values, and social relationships; the purposeful infliction of psychological injury; the atmosphere of terror, helplessness and insecurity in the face of attacks and domination; and the shame and stigma resulting from forced marriages and sexual slavery.

In *Taylor* (2012),[44] the SCSL found that acts of terrorism had been committed through the burning of civilian property, unlawful killings, sexual violence (including rape and sexual slavery), and physical violence (including amputations and mutilations), with the intent to spread terror.[45] Such acts were typically done to intimidate civilians into leaving the area; warn them not to resist; demonstrate the repercussions of supporting the enemy; and, in the case of sexual violence, destroy the traditional family nucleus, thus undermining the cultural values and relationships which held society together.[46] The intent to spread terror was inferred where there was no direct evidence of it but the acts followed a similar pattern.[47]

In a number of these cases, the SCSL found that certain acts of violence did not evidence an intent to spread terror, because the purpose of violence was utilitarian, military, punitive or disciplinary, for personal gain, or isolated.[48]

The Rome Statute of the ICC does not explicitly include a war crime of terrorism within its jurisdiction. However, as noted by the ICTY in *Galić*, such acts may be regarded as specific

[42] *Prosecutor v Sesay et al* (Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) paras [1032]-[1036], [1124]-[1130], [1347]-[1352], 1357, 1361, 1491, [1596]-[1604].
[43] ibid paras [1347]-[1352], 1602.
[44] *Taylor* (above n 41) paras [402]-[410], [1964]-[2192].
[45] ibid paras 2048, 2055, 2192.
[46] ibid, respectively paras 2006, 2017; 2040; 2021, 2041; 2035.
[47] ibid para 2026.
[48] *Sesay* (above n 42) paras 1034, 1363; 1494; 1126, [1358]-[1359], 1362; 1128; *Taylor* (above n 41) paras 1969; 1971; [1975]-[1977]; 2047.

instances of the general prohibition of attacks on civilians, breaches of which are within the ICC's jurisdiction.[49] As noted, the war crime of terrorism is also part of customary IHL.

The war crime of terror is not, however, the same as certain peace-time legal conceptions of terrorism, namely violence committed to compel a government to do or refrain from doing something, or do advance a political, religious or ideological cause.[50] The meaning of terrorism in IHL is thus more limited than definitions of terrorism outside of armed conflict. Certain terrorism offences within the jurisdiction of post-9/11 US military commissions were not IHL offences as the US asserted, but were peacetime terrorism offences retroactively applied to a particular armed conflict.[51]

In addition to IHL offences, domestic criminal (and/or military) law may apply to certain terrorist acts in armed conflict. In international conflicts, the criminal law of the occupied territory still applies to civilians, subject to any necessary modifications to ensure the security of the occupying power.[52] In NIAC, the state party's domestic criminal law remains applicable, such that non-state actors may find themselves liable for terrorism, rebellion, revolution, treason, treachery, sedition, or other extant national security offences. One qualification is that IHL encourages states to confer amnesties at the end of a conflict for participation in hostilities[53] (but not for war crimes and the like).

In 'transnational' NIAC, two (or more) domestic legal systems potentially apply: that of the (non-belligerent) territorial state (which may not be able to practically enforce it), as well as the state(s) whose forces are fighting extraterritorially. In the latter case, the state's domestic criminal law will only lawfully apply if two conditions are met. First, it must have been given prospective extraterritorial effect (by reference to the accepted grounds of extraterritorial jurisdiction under international law; particularly important may be the protective, nationality, and passive personality principles). Secondly, the offences must be defined with sufficient precision, and effectively publicised, so as to give fair advance notice of the scope of the liability in question. (In this respect, the residents of foreign territory are hardly likely to be immediately *au fait* with their liabilities under the law of an interloping foreign state.) Both conditions are required so as to comply with the international human rights principles of legality and non-retrospective punishment.[54]

3. Relationship between IHL and Counter-Terrorism Law

[49] See, eg Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) articles 8(2)(b)(i)-(v) (IACs) and 8(2)(e)(i)-(v) (NIACs).
[50] See Ben Saul, *Defining Terrorism in International Law* (OUP 2006) ch 3-4.
[51] US Department of Defence, 'Military Commission Instruction No 2: Crimes and Elements for Trials by Military Commission' (30 April 2003) clause 18 (terrorism as 'intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion'); s 950v(25)(A) Military Commission Act 2006 (US); see also 'Military Commission Manual' (2007) Part IV-18-19, 261-262 ('material support for terrorism'). The latter offence was found to be unlawfully retrospective in *Hamdan v United States* US Court of Appeals (DC Circuit) (16 October 2012) and *Hicks v Australia*, UN Human Rights Committee Communication No 2005/2010 (5 November 2015), 4.8.
[52] GCIV article 64; Hague Convention (IV) Respecting the Customs of War on Land and its Annex: Regulations Concerning the Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (Hague Regulations) article 43.
[53] Four Geneva Conventions 1949, common article 3.
[54] ICCPR article 15.

The interaction between IHL and international counter-terrorism law (CTL) is complex and varies according to the context. CTL is not a unified field of international law[55] but comprises disparate norms emanating from multiple sources. Foremost are the 18 'sectoral' counter-terrorism treaties adopted since 1963,[56] which require states parties to criminalise particular methods of transnational violence commonly used by terrorists, establish extensive jurisdiction over the offences, and investigate, apprehend and 'prosecute or extradite' offenders. In addition, Security Council resolutions adopted since 1999 have imposed sanctions regimes on specific terrorist actors, while resolutions since 2001 have required broader legislative and enforcement measures to be taken by states against terrorist threats in general. There are also numerous 'soft law' norms on terrorism, including those in UN General Assembly resolutions[57] and its Global Counter-Terrorism Strategy 2006.[58]

It is clear that CTL does not simply extinguish IHL or vice versa. UN Security Council and General Assembly resolutions have repeatedly emphasised that states must respect their obligations under IHL when countering terrorism.[59] There is, however, no further guidance from the UN organs on the precise relationship between CTL and IHL, nor any general rule of international law specifying the relationship.

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[55] Ben Saul, 'The Emerging International Law of Terrorism' in Ben Saul (ed), *Terrorism: Documents in International Law* (Hart 2012) 67.

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

[57] See Saul (above n 50) ch 4.

[58] UNGA Res 60/288 (20 September 2006), A/RES/60/288.

[59] ibid para 3; UNSC Res 1456 (20 January 2003), S/RES/1456 annex para 6, and 1624 (14 September 2005), S/RES/1624 para 4.

The international law principle of *lex specialis* does not readily provide a definitive answer to potential conflicts of norms between the two areas, since each of CTL and IHL could be viewed as the more specific norms addressing the same subject matter. CTL addresses the sub-set of violence described as terrorism, potentially whether within or outside of armed conflict. IHL addresses the sub-set of violence known as armed conflict, whether also qualifying as terrorism or not. Each could therefore be seen as best adapted to the overlapping, exceptional violence that they address.

In place of a general rule, different CTL norms specify varying relationships to IHL. In the first place, individuals and entities listed, under Security Council sanctions resolutions, as associated with Al Qaeda or the Taliban are subject to those restrictive financial measures even if they are also non-state armed groups that are parties to a non-international armed conflict, or individual members of such armed groups. The implications of such designation for compliance with IHL is considered later below.

Secondly, the sectoral CTL treaties are generally limited to transnational offences and thus exclude purely domestic acts of violence.[60] In consequence, violence in non-international armed conflicts that are purely domestic – such as classic civil wars involving nationals of a single state within the state's territory – will not be covered by the sectoral CTL treaties and instead will be solely regulated by IHL (as well as applicable international criminal law and international human rights law).

Thirdly, one sectoral CTL treaty can potentially be entirely inapplicable in armed conflict. The Hostages Convention 1979 provides that it does not apply to hostage taking in armed conflict where states parties are bound to prosecute or extradite a hostage-taker under the Geneva Conventions of 1949 and Additional Protocols of 1977.[61] IHL is thus accorded precedence as the *lex specialis*. IHL prohibits and criminalises hostage taking in international and non-international conflicts.[62] The definition of hostage taking in peacetime and during armed conflict is similar.[63]

The exclusion of hostage taking in armed conflict from the Hostages Convention is, however, limited to where there exists an IHL treaty obligation to prosecute or extradite it. No such obligation arises in non-international armed conflicts, whether under common Article 3 of the four Geneva Conventions 1949 or Additional Protocol II 1977, since neither of those treaties

[60] Specifically, the treaties typically do not apply where an offence is committed in a single state, the offender and victims are nationals of that state, the offender is found in the state's territory and no other state has jurisdiction under those treaties: Tokyo Convention 1963 article 5(1); Hague Convention 1970 article 3(3)-(4); Hague Convention 1970 article 3(5) as amended by the Beijing Protocol 2010; Montreal Convention 1971 articles 4(2)-(5); Rome Convention 1988 article 4(1)-(2); Rome Protocol 1988 article 1(2); Hostages Convention 1979 article 13; Vienna Convention 1980 article 14; Nuclear Terrorism Convention 2005 article 3; Terrorist Bombings Convention 1997 article 3; Terrorist Financing Convention 1999 article 3.

[61] Hostages Convention 1979 article 12.

[62] Four Geneva Conventions 1949, common article 3(1)(b); GCIV article 34; APII article 4(2)(c); Rome Statute article 8(2)(a)(viii) (IACs) and article 8(2)(c)(iii) (NIACs); Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: Rules (ICRC 2005) (CIHL) rule 96.

[63] While IHL treaties do not define it, the Elements of Crimes of the Rome Statute of the International Criminal Court follows the definition of the Hostages Convention 1979 in requiring an intent 'to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons': Rome Statute: Elements of Crimes (2002): common element 3, article 8(2)(a)(viii) and (c)(iii).

recognises hostage taking as a 'grave breach' war crime subject to prosecution or extradition. This is the case notwithstanding that hostage taking in non-international conflict is a war crime under customary IHL and under the Rome Statute of the ICC. As such, the Hostages Convention applies to hostage taking in non-international armed conflict, criminalising it and thereby supplementing the IHL treaty provisions that prohibit but do not criminalise it.

Fourthly, some of the sectoral CTL treaties applying to transnational aviation and maritime safety do not apply to military, customs or police aircraft or ships,[64] or do not apply to military air bases (instead only applying to civilian airports).[65] As a result, attacks on such targets during armed conflict are not covered by the CTL instruments and are instead exclusively regulated by IHL. On the other hand, transnational attacks on civilian aircraft, ships or airports during armed conflict, whether by state military forces, non-state armed groups, or civilians taking a direct part in hostilities, fall within both the CTL treaties and IHL and could simultaneously constitute crimes under both regimes.

In a similar vein, the Terrorist Financing Convention 1999 prohibits the financing of terrorist acts, in peace or war, against civilians or others out of combat (such as prisoners of war), but not against persons taking an active part in hostilities.[66] There is no exclusion for acts by armed forces, such that it is a crime to finance attacks on civilians by state forces, non-state armed groups, disorganised groups, or individual civilians taking part in hostilities). By contrast, the Terrorist Bombings Convention prohibits bombings against civilian or military objectives alike,[67] whether in peace or war, but excludes the activities of armed forces (see below). In conflict it thus makes criminal isolated terrorist attacks on the military where not committed by organised armed groups.

Fifthly, recent CTL treaties (addressing nuclear terrorism, terrorist bombings, and aviation 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'.[68] 'Armed forces' under IHL – an expression used in common Article 3 of the four Geneva Conventions concerning NIACs[69] – refers to both state military forces and organised non-state armed groups (the criterion of organisation was discussed earlier).[70] Military attacks by such forces in international or non-international conflicts are thus excluded from these CTL treaties. On the other hand, violence by disorganised armed groups or civilians sporadically taking a direct part in hostilities will still be covered; even their conduct is also regulated by IHL's prohibitions and criminal liabilities.

[64] Tokyo Convention 1963 article 1(4); Hague Convention 1970 article 3(2); Montreal Convention 1971 article 4; Rome Convention 1988 article 2.
[65] Montreal Protocol 1988 article II.
[66] Terrorist Financing Convention 1999 article 2(1)(b).
[67] Daniel O'Donnell, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) 88 Intl Rev Red Cross 653, 684.
[68] Nuclear Terrorism Convention 2005 article 4(2); Terrorist Bombings Convention 1997 article 19(2); Terrorist Financing Convention 1999 article 2(1)(b); Vienna Convention 1980 (as amended by the Amendment 2005) article 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010) article 3 bis; Rome Convention 1988 (as amended by the Protocol 2005) article 2 *bis* (2); Plastic Explosives Convention 1991 articles 3-4.
[69] 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, 189.
[70] O'Donnell (above n 67) 866.

Moreover, the exclusion applies to any 'activities' of armed forces, not just violent acts in the course of (offensive or defensive) hostilities. Consequently, it exempts not only non-violent activities connected to the conflict (such as espionage) but also repressive measures of intimidation taken, for instance, by a state against a civilian population. While such repression is not 'terrorism', it remains governed by IHL.

The UN Draft Comprehensive Terrorism Convention, under negotiation since 2000, initially proposed to replicate the above exclusionary provision, based on the consensus reflected in the Terrorist Bombings Convention 1997. The proposal was challenged by alternative proposals sponsored by the Organisation of Islamic Cooperation (OIC), which led to an impasse in the drafting from 2002 to the present (2016). The OIC proposed that a convention should exclude the activities of the 'parties'—rather than 'armed forces'—during armed conflict[71] and 'including in situations of foreign occupation'.[72] The alternative proposals reflect semantic, legal and political considerations.

The OIC reference to the 'parties', a technical IHL term for both state and non-state forces, may be designed to counter those states that interpret 'armed forces' as only encompassing state militaries.[73] In that sense, it is unobjectionable and indeed preferable, in order that belligerent parties are equally exempted and so that states are not placed in a more favourable position. As already noted, however, properly interpreted 'armed forces' also means state and non-state forces, so the competition between the two formulations is more semantic than substantive.

On the other hand, some states fear that the OIC intends the term 'parties' to embrace a wider array of actors, such as disorganised armed groups[74] or occasional violence by civilians loosely affiliated with such groups (including those sporadically supporting terrorism). Self-determination movements, for example, typically comprise not only armed wings but wider (and larger) political memberships, whether the Palestine Liberation Organisation, Hamas or Polisario. On the flipside, a wider range of state actors might also be excluded under the rubric of the 'parties' to a conflict, such as civilian police and intelligence agencies. On that approach, most violence during a conflict, with the exception of unaffiliated civilians committing isolated acts, would be excluded from a convention, not just acts by armed forces.

To some extent, the distinction is one without difference, since IHL applies to violence whether by armed forces or other actors (including individual civilians). Exempting conduct from a terrorism convention would not confer impunity, but leave liability to war crimes law. The exclusion debate is thus partly a political struggle over labelling and the stigmatisation and delegitimisation it brings, rather than a push to evade liability whatsoever.

[71] UNGA Sixth Committee (59th Session) 'Report of the Working Group on Measures to Eliminate International Terrorism' (8 October 2004) UN Doc A/C.6/59/L.10; UNGA 'Report of the Ad Hoc Committee Established by UNGA Res 51/210' (17 December 1996) 8th Session (2004) UN Doc Supp No 37 (A/59/37) 11, para 6; see also UNGA 'Report of the Ad Hoc Committee Established by UNGA Res 51/210' (17 December 1996) 7th Session (2003) UN Doc Supp No 37 (A/58/37) 11-12.

[72] OIC proposal, in UNGA 'Report of the Ad Hoc Committee Established by UNGA Res 51/210' (17 December 1996) 6th Session (2002) UN Doc Supp No (A/57/37) annex IV, 17.

[73] Pejic (above n 69) 192.

[74] ibid 193.

As discussed further below, there are sound policy arguments for leaving armed conflict to be exclusively regulated by IHL, and for reserving crimes of terrorism for peacetime. As noted earlier, however, existing CTL treaties do not preserve a neat separation, but endorse co-regulation of certain acts in conflict. There are also real questions of liability at stake. From a law enforcement standpoint, sweeping preventive offences and special powers may accompany terrorism but not war crimes. The dual criminalisation of attacks on civilians as a war crime or the crime of terrorism is largely unobjectionable, even if hostilities between armed forces ought to be properly left to the exclusive domain of IHL.

The OIC's proposed exclusion of 'foreign occupation' is redundant in that an occupation is by definition an international armed conflict under common Article 2 of the four Geneva Conventions 1949, regardless whether there are also hostilities involving state forces.[75] The view that occupation is not international conflict[76] is legally incorrect. In addition, organised non-state armed groups involved in hostilities in occupied territory would still be 'armed forces' in a NIAC that are also excluded from the convention.

Notably, the OIC has not formally sought a wider exclusion of all self-determination violence, including that committed outside of armed conflict. In contrast, three recent regional counter-terrorism conventions, of the OIC, African Union, and Arab League, exempt altogether struggles for national liberation or self-determination. Pakistan also lodged a reservation purporting to exclude self-determination struggles from the application of the Terrorist Bombings Convention 1997, triggering formal objections from many states on the basis that it was contrary to the treaty's object and purpose.[77] UN General Assembly and Security Council resolutions have repeatedly affirmed that all acts of terrorism are 'criminal and unjustifiable, wherever and by whomever committed'.[78]

Sixthly, some CTL instruments have a different kind of partial application in armed conflict. The Nuclear Material Convention 1980 establishes offences relating to interference in 'nuclear material used for peaceful purposes while in international nuclear transport'. It thus has no application to attacks (whether lawful or unlawful under IHL) on a military's nuclear weapons facilities during conflict. However, the offences of dealings with peaceful nuclear materials in ways that cause death or injury or substantial property damage (Article 7) could still be committed during armed conflict, for instance by stealing nuclear material and dispersing them against civilian or military targets.[79]

Seventhly, the decentralised national implementation of the Security Council's CTL norms has generated normative and policy-oriented friction between CTL and IHL. In resolution 1373 (2001), the Security Council required states to criminalise terrorist acts in domestic law but failed to provide a common international definition of such acts or to stipulate the relationship of such offences to IHL. Many states duly enacted their own terrorism offences and unilaterally proscribed terrorist organisations.

[75] ibid 189, 193.
[76] O'Donnell (above n 67) 868.
[77] Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Spain, Sweden, UK, US.
[78] UNGA Res 49/60 (9 December 1994) A/RES/49/60 annex: Declaration on Measures to Elimination International Terrorism para 1.
[79] O'Donnell (above n 67) 862.

National approaches to the relationship between terrorism and IHL vary. Canada, for example, excludes 'an act or omission that is committed during an armed conflict' and that is in accordance with applicable international or customary or treaty law.[80] Violence consistent with IHL and committed by state or non-state forces could thus be excluded, whereas state or non-state violence in breach of IHL could be terrorism. Little difficulty arises where national laws duplicate or complement war crimes against civilians under IHL, or are otherwise limited to protecting civilians (such as by criminalising the financing of attacks on civilians). International criminal law already enables certain underlying conduct to be qualified as different but overlapping crimes, whether war crimes, crimes against humanity or genocide.

More problematically, some national laws have also criminalised violence in armed conflict without any exception to accommodate armed conflict and the special regime of IHL, as in the UK and Australia.[81] Such laws may criminalise acts which are not prohibited or criminalised by IHL, such as proportionate attacks on state military forces or military objectives by non-state armed groups, or direct participation in hostilities by civilians. National laws may then trigger exceptional domestic powers of search, seizure, and surveillance; extend inchoate or preparatory criminal liability; or modify criminal procedure in favour of national security. They may also serve as a basis for transnational criminal cooperation with other states to suppress terrorism.

In *R v Gul* [2013],[82] the UK Supreme Court found that international law does not prohibit the national criminalization as terrorism of hostile acts in NIACs, even those confined to targeting military objectives. It found that the international counter-terrorism instruments, and national laws, were inconsistent in regard to the existence and scope of exclusionary provisions, and did not establish a general exclusionary rule applicable to national terrorism offences.[83] It further noted that no combatant immunity exists in NIACs.[84] While international law may not prohibit such hostilities, nor does it positively authorise them.

An adverse impact of this approach may be to undermine the effectiveness of IHL and its humanitarian purposes. The ICRC warns against criminalizing acts that are not already unlawful under IHL.[85] IHL does not prohibit attacks on military objectives.[86] Criminalizing fighting by non-state armed groups as terrorism undermines their incentive to comply with IHL, for there is no longer any difference in legal consequence between proportionately attacking the military or indiscriminately targeting civilians. All armed resistance to state forces becomes 'terrorism', regardless of how one fights or whether one respects IHL.

Admittedly, in NIACs the state has long been entitled to criminalise members of non-state armed forces for offences against national security, whether labelled terrorism or otherwise. There is no combatant immunity in NIACs and at most IHL encourages states to grant the widest possible amnesty at the end of the conflict for hostile acts that did not violate IHL.[87] The incentives for armed groups to comply with IHL have always been rather limited,

[80] Criminal Code (RSC, 1985, c. C-46) (Canada) s. 83.01(1).
[81] Terrorism Act 2000 (UK) s 1; Criminal Code 1995 (Commonwealth) s 100.1.
[82] *R v Gul (Appellant)* [2013] UKSC 64 (affirming *R v Gul* [2012] EWCA Crim 280).
[83] *R v Gul (Appellant)* [2013] UKSC 64 paras 48 and 50.
[84] ibid para 51.
[85] ICRC, 'Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law' (Geneva, 2002).
[86] Pejic (above n 69) 177.
[87] APII article 6(5).

resulting from state's concerns to protect their sovereign right to restore law and order within their territories.

However, the additional criminalisation of non-state hostilities as terrorism accentuates the existing disincentives for armed groups to comply with IHL.[88] First, current national legislative efforts carry the imprimatur of implementing UN Security Council obligations, according them a greater legal authority than ordinary offences. Secondly, such measures are intended to enable transnational criminal cooperation on terrorism, whereas hostile acts in NIAC (which are not war crimes) were hitherto typically treated as non-extraditable, quintessentially 'political' offences. Foreign states are thereby encouraged to cooperate in the repression of domestic political rebellion. Thirdly, the labelling of hostilities as terrorism carries a special stigma which widens political and social divisions between the parties and dampens the prospects for peace and reconciliation. Fourthly, the criminalisation or proscription of terrorists may stimulate armed groups to distrust the international community and discourage them from engaging on humanitarian assistance to civilians, discussed below.

A seventh issue is penumbrally but significantly related to IHL. Recent CTL treaties exclude the [peacetime] activities of state military forces exercising their official duties 'inasmuch as they are governed by other rules of international law'.[89] Official duties could include law enforcement and counter-terrorism operations (including hostage rescue), evacuation operations, peace operations, UN peacekeeping operations, or humanitarian relief. The exclusion only extends to state military forces and not other state entities (such as police) that might be similarly deployed and may also need to use coercive force (for instance, to control a riot at a food distribution centre or disorder within a displaced persons camp). While the exemption concerns peacetime duties of state forces, situations such as peacekeeping can involve the application of intense military force approaching armed conflict. Violence outside of 'official duties' will still come within these conventions.

In the Draft Comprehensive Terrorism Convention, the OIC has sought to further restrict the exemption to state military forces that are 'in conformity' with, and not merely 'governed by', international law. The proposal thus aims to qualify excessive state violence as 'terrorism', notwithstanding the application of existing international law to state breaches. Again, political labelling is at stake, but also real legal consequences. Presently, state violations of international law (including human rights and state responsibility), does not always bring criminal liability, whereas non-state actors would be asymmetrically liable under a terrorism convention. At the same time, states enjoy special legal personality and are lawfully entitled to utilise force in various circumstances in which non-state actors enjoy no such rights. States and non-state actors are therefore not similarly situated when it comes to the qualification of violence as terrorism, even if it is desirable, from a rule of law standpoint, to equally criminalise state and non-state conduct that can be sensibly equated.

An eighth issue relating to IHL does not strictly involve a CTL instrument but a treaty modelled on a CTL convention and serving a comparable counter-terrorism purpose. The

[88] Pejic (above n 69) 185.

[89] Nuclear Terrorism Convention 2005 article 4(2); Terrorist Bombings Convention 1997 article 19(2); Terrorist Financing Convention 1999 article 2(1)(b); Vienna Convention 1980 (as amended by the Amendment 2005) article 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010) article 3 bis; Rome Convention 1988 (as amended by the Protocol 2005) article 2 *bis* (2); Plastic Explosives Convention 1991 articles 3-4.

Convention on the Safety of United Nations and Associated Personnel 1994 is based on the Protected Persons Convention 1973 and similarly requires states to criminalise 'kidnapping or other attack on the person or liberty' of UN and associated personnel.[90] It explicitly excludes UN enforcement actions where UN personnel are 'engaged as combatants against organised armed forces and to which the law of international armed conflict applies' (Article 2(2)). This clause thus excludes attacks on UN combatants by state forces in international conflict, but the Convention still covers attacks on UN personnel in NIACs by non-state armed groups, disorganised groups, or individual civilians, even where UN personnel are taking part in hostilities. It thereby criminalises such hostile acts directed against UN personnel as combatants.

Finally, CTL norms in customary international law also relate to IHL. In identifying a customary international law crime of transnational terrorism, the Special Tribunal for Lebanon held that such crime only exists in peacetime and not in armed conflict.[91] As such, there can be no overlap between IHL and this CTL norm. The STL indicated, however, that 'a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging'.[92] The STL's decision that there exists a customary crime of terrorism at all is controversial and arguably unsupported by state practice.[93]

4. Impact of Counter-Terrorism on Humanitarian Relief Operations

Counter-terrorism laws, policies and practices have had serious adverse impacts on humanitarian assistance in armed conflict. Under IHL, parties to a conflict must allow and facilitate the rapid and unimpeded passage of impartial humanitarian relief for civilians in need,[94] subject to reasonable measures of control. International law does not permit states to override this fundamental humanitarian obligation in order to counter terrorism. To the contrary, the UN Secretary General has urged states 'to consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for… humanitarian purposes'.[95]

International and national counter-terrorism laws generally do not prohibit mere contact or engagement with non-state actors for humanitarian purposes,[96] such as securing access for humanitarian personnel or safe passage and distribution of food or medical supplies.

[90] Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, article 9(1).
[91] *Prosecutor v Ayyash et al*, STL Appeal Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para 85.
[92] ibid para 107.
[93] Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 677.
[94] CIHL rule 55; see, eg, GCIV article 23; API article 70(2); APII article 18; Rome Statute article 8(2)(b)(xxv).
[95] Report of the Secretary-General, 'The Protection of Civilians in Armed Conflict' (2010) UN Doc S/2010/579para [57].
[96] See Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (Commissioned by UN Office of the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, July 2013).

However, since 9/11, some national laws and policies have restricted or even prohibited engagement with 'terrorist' groups in various ways.[97]

Firstly, even purely humanitarian dealings with terrorist groups have been criminalised. For example, it is an offence under United States law to provide 'material support or resources to a foreign terrorist organization',[98] which is defined to include training and expert advice or assistance. In *Holder v Humanitarian Law Project* (2010),[99] the US Supreme Court strictly interpreted this to include training groups such as the Kurdistan Workers' Party (PKK) on how to use IHL and international law to peacefully resolve disputes and how to petition UN bodies for relief. Any support was thought to facilitate the terrorist activity of the group, even if it does not contribute to a specific attack. For instance, international law training could lend a group legitimacy, strain the US' relationship with its allies, or enable the group to use the international legal system to buy time, 'threaten, manipulate, and disrupt', or seek humanitarian financial aid that could be diverted to terrorism.

Secondly, some donors have adopted 'no contact' policies, which prohibit humanitarian actors (such as aid agencies or NGOs) from dealing with certain groups (such as Hamas in Gaza), even to secure access or safety for humanitarian personnel, or the passage of relief supplies. Thirdly, some donors have imposed restrictive conditions on funding, which require humanitarian actors, and their partners and contractors, to exercise due diligence in their operations, or which impose vetting and monitoring requirements, to prevent diversion of funds to terrorist activities.

Restrictive laws and policies have adversely impacted on humanitarian operations, for instance by limiting funding to particular places, populations, partners or programs. For example, after Al-Shabaab was labelled as a terrorist group, US aid to southern Somalia was reduced by almost 90% between 2008 and 2010[100] – in the midst of a famine that killed 260,000 people by 2012.[101] Islamic charities have been particularly hard hit by restrictions.[102]

In addition to increasing the administrative burdens on humanitarian actors, restrictive laws and policies have led to self-limitation because of uncertainty about legal liabilities and the chilling effect of restrictive policies. It can result in actors refusing funding from some donors, ceasing operations in some places or to some populations, or passing on risk to partners and contractors. It can also impede information sharing, cooperation and coordination between actors.

Some humanitarian actors, such as the ICRC and UN, enjoy international immunities from national legal liabilities,[103] but NGOs and contractors do not. Informal engagement is often tolerated in practice, although this can still leave organisations facing legal uncertainty or

[97] Kate Mackintosh and Ingrid Macdonald, 'Counter-terrorism and Humanitarian Action' (2013) *Humanitarian Exchange Magazine*, Issue 58, 23, 24.
[98] Under para 2339B of Title 18, Part I, Chapter 113B of the United States Code.
[99] *Holder v Humanitarian Law Project*, 561 US (2010) Nos 08-1498 and 09-89 (21 June 2010) (US Supreme Court).
[100] Mackintosh and Duplat (above n 96).
[101] BBC News, 'Somalia famine "killed 260,000 people"' (2 May 2013) < www.bbc.com/news/world-africa-22380352> accessed 22 April 2016.
[102] Mackintosh and Duplat (above n 96).
[103] Mackintosh and Macdonald (above n 97) 25.

self-restriction.[104] In some cases, specific UN mandates enable limited engagement, as with Hamas in Gaza or Al Shabaab in Somalia,[105] but this does not necessarily immunize NGOs from their home states' laws.

The designation of some armed groups as 'terrorist' challenges the principles of humanitarianism.[106] The four principles of humanitarian action are humanity (addressing suffering wherever it is found); neutrality (not taking sides in hostilities or preferring some political, racial, religious or ideological causes over others); impartiality (acting on the basis of need and without discrimination); and independence (remaining autonomous from the political, economic, military or other agendas of other actors).[107] Counter-terrorism laws 'take sides' by criminalizing and/or ostracizing some groups. Neutrality and independence can also be compromised by humanitarian actors being pressured to participate in multinational stabilization or counter-insurgency efforts,[108] in which humanitarian assistance is co-opted and militarized as part of strategies to win civilian 'hearts and minds'. Humanity and impartiality are further undermined by restrictive policies which discourage aid to certain populations or places even if they are in most need.

5. Conclusion

IHL has proved capable of accommodating the historical and contemporary challenges presented by terrorism and counter-terrorism. In part this is because IHL focuses on regulating objectively harmful conduct rather than being preoccupied by the pejorative and contested labelling of actors. IHL thus prefers neutral terminology like 'armed groups' or 'parties' over politically loaded and stigmatising terms such as 'terrorist' or 'terrorist organisation'. Many of its proscriptions apply equally to both parties to a conflict and in principle it aims to avoid 'taking sides', even if the regulation of NIACs undoubtedly favours states and reduces incentives for any armed group, including 'terrorists' to comply with IHL.

Further, the generality and ambiguity in some IHL rules – such as the threshold of a NIAC or the meaning of DPH – have also enabled it to be flexibly, constructively and dynamically interpreted to accommodate emerging concerns. Sometimes the cost of generality has been claims by certain states that there are gaps in IHL or that it is otherwise inadequate; it has also brought prolonged uncertainty about the precise content of norms and difficulty in achieving consensus. Proposals to ratchet down IHL's protections for 'terrorists' have not, however, gained serious currency and the 15 years after 9/11 broadly affirmed IHL's applicability – despite serious non-compliance – and later course correction – by some powerful states.

Where IHL has developed terrorism-specific rules, these have been tightly focused on IHL's core business of protecting civilians, rather than taking sides with states against non-state

[104] Naz Modirzadeh, Dustin Lewis and Claude Bruderlein, 'Humanitarian engagement under counter-terrorism: A conflict of norms and the emerging policy landscape' (2011) 93 Intl Rev Red Cross 1, 19-20.
[105] UNGA Res 46/182 (19 December 1991) A/RES/46/182, para 35(d) mandated UN humanitarian actors to negotiate with relevant parties. On Somalia, see UNSC Res 1916 (19 March 2010) S/RES 1916 para 5 (creating a temporary humanitarian exception to counter-terrorism financing sanctions).
[106] Ashley Jackson and Eleanor Davey, 'From the Spanish civil war to Afghanistan: Historical and contemporary reflections on humanitarian engagement with non-state armed groups', Humanitarian Policy Group Working Paper (Overseas Development Institute, May 2014) 1, 2.
[107] UNGA Res 46/182 and Res 58/114 (17 December 2003) A/RES/58/114.
[108] Jackson and Davey (above n 106) 17; Ashley Jackson, 'Talking to the other side: Humanitarian engagement with armed non-state actors', Humanitarian Policy Group Brief 47 (Overseas Development Institute, June 2012) 3.

adversaries. Thus IHL's prohibitions on terrorism, acts of terror and intending to spread terror amongst a civilian population target state and non-state conduct alike. The war crime of spreading terror recognises the additional wrongfulness of attacking civilians for the ulterior purpose of psychologically intimidating or terrorizing them.

More problematic has been the overlaying of CTL instruments and norms on armed conflict, which take varied approaches to their interaction with IHL. While CTL instruments and norms often reinforce or complement or IHL's protections for civilians, some have interfered in IHL's regulation of violence by prohibiting or criminalising conduct that is not unlawful under IHL. The problem is most acute in those national laws, implementing Security Council obligations, that criminalise all war fighting by armed groups in NIACs. When CTL takes sides in this way, it can undermine the already weak incentives for armed groups to respect IHL. It can also inhibit humanitarian engagement and cooperation by external actors with armed groups – and thereby undermine IHL's guarantees of civilian protection in conflict.