BRINGING TERRORISTS TO JUSTICE IN THE CONTEXT OF ARMED CONFLICTS: THE INTERACTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND THE UN CONVENTIONS AGAINST TERRORISM

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The participation of foreign fighters on the side of terrorist groups has raised many questions about the legal basis for the criminal prosecution of acts of terror during armed conflicts. In cases regarding the commission of terrorist crimes with transnational elements, such as the foreign nationality of the alleged perpetrator, cooperation with other states in matters such as extradition or mutual legal assistance can be crucial. This study will analyse two of the regimes that may constitute a legal basis for cooperation in criminal matters acts of terror committed during armed conflicts: the rules on criminal responsibility under IHL and the UN framework of anti-terrorist conventions. IHL has been seen by many as the only framework applicable to acts committed during armed conflicts. In contrast, the position adopted in this paper is that IHL does not necessarily exclude the application of other regimes to acts committed during armed conflicts, which can serve as a complementary tool in international efforts for the prevention and suppression of terrorism.

Keywords: foreign terrorist fighters, cooperation in criminal matters, International humanitarian law, sectorial conventions against terrorism, simultaneous application.

1. INTRODUCTION

The rise of the non-state armed group and terrorist organization known as Daesh is a serious challenge to international law. Among other challenges, the terrorist attacks of November 2015 in Paris were considered by the French president at the time, François Hollande, as an 'act of war'.[1] The intense violence exercised by the members of this

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[1] Reuters, 'Hollande says Paris attacks 'an act of war' by Islamic State', 14 November 2017,

terrorist group, their level of organisation and their occupation of broad territories in countries such as Iraq, Syria or the Philippines can easily justify the inclusion of their activities under the status of armed conflict.[2] This situation has raised many concerns in the scholarship in relation to one of the traditional branches of international law: the right to self-defence and the prohibition of use of force.[3]

However, the use of military force cannot be the only response to the threat of terrorist organizations such as Daesh. Military power must be combined with other responses, including the 'legitimate use of violence' represented by criminal law.[4] The United Nations Security Council (UNSC) recognizes that military force must be complemented with law enforcement measures and intelligence cooperation, especially after the increasing security threat posed by the high number of nationals from western countries that have joined the ranks of Daesh and other terrorist groups in the Middle East and North Africa.[5]

Although foreign fighters are not a new phenomenon,[6] the rise of Daesh has resulted in a turning point in the evolution of their numbers, origins, motivations and methods.[7] Currently, Daesh has lost nearly all the territories it once held. The current problem is

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https://www.reuters.com/article/us-france-shooting-hollande/hollande-says-paris-attacks-an-act-of-war-by-islamic-state-idUSKCN0T30JG20151114

[2] For analyses of these conflicts see, among others, Vaios Koutroulis, 'The Fight Against the Islamic State and *Jus in Bello*' (2016) 29 *Leiden Journal of International Law* 827; Rohan Gunaratna, 'Marawi: a Game Changer in Terrorism in Asia', (2017) 9 *Counter Terrorist Trends and Analyses* 4; Bilveer Singh and Kumar Ramakrishna, 'Islamic State's Wilayah Philippines: Implications for Southeast Asia', (2016) 187 *RSIS Commentary*.

[3] For this matter see, among others, Kimberley N Trapp, 'Can Non-State actors mount an Armed Attack?' in Marc Weller (ed), *The Use of Force in International Law* (Oxford University Press 2015) 679-96; Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors', (2012) 106 *American Journal of International Law* 770-77; Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law', (2010) 57 *Netherlands International Law Review*, 531-50.

[4] Max Weber, 'Politics as a vocation', in Hans Heinrich Gerth and Charles Wright Mills, (eds and transl) from Max Weber, *Essays in sociology* (Oxford University Press 1948) 77, 78.

[5] UNSC Res 2178(2014), 24 September 2014, UN Doc S/RES/2178, para 2.

[6] See, among others, David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts*, (Oxford University Press 2017); Verle Bryant Johnston, *Legions of Babel: The International Brigades in the Spanish Civil War*, (Penn State University Press 1967); Marcello Flores, 'Foreign Fighters Involvement in National and International War: A Historical Survey', in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016) 27.

[7] For analyses on the European case see, for instance, Lasse Lindekilde, Preben Bertelsen and Michael Stohl, 'Who Goes, Why, and With What Effects: The Problem of Foreign Fighters from Europe', (2016) 27 *Small Wards & Insurgencies* 858; Alastair Reed, Jeanine de Roy van Zuijdewijn and Edwin Bakker, 'Pathways of Foreign Terrorist Fighters: Policy Options and Their (Un)Intended Consequences' (International Centre for Counter-Terrorism 2015), https://www.icct.nl/download/file/ICCT-Reed-De-Roy-Van-Zuijdewijn-Bakker-Pathways-Of-Foreign-Fighters-Policy-Options-And-Their-Un-Intended-Consequences-April2015(1).pdf

what to do with the 'diaspora' of foreign fighters.[8] The defeat of Daesh has left in countries such as Syria or Iraq many individuals whose prosecution depends on the effective criminal cooperation between several States, as well many others who have managed to return to their countries of origin after participating in conflicts abroad.[9]

The President of the United States has urged the countries of origin, mainly European states, to take all necessary measures to guarantee the extradition and prosecution of their own nationals.[10] On the one hand, countries such as the United States, Russia, Indonesia or Kazakhstan have been in favour of the detention and extradition of their nationals.[11]. On the other hand, Canada, the UK, and most European countries do not have a clear position on whether they will accept their nationals for prosecution and what legal procedures they would apply in such cases.[12] The question is, essentially, what is the legal basis to detain, prosecute and extradite them.[13] Or, in other words, what is the legal basis for bringing terrorists to justice in the context of armed conflicts, foreign fighters included?

The domestic legal order of the countries where the armed conflict takes place do not usually offer a definitive response to this question and, when they do, such response

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[8] Colin P Clarke, 'The Terrorist Diaspora: After the Fall of the Caliphate', (2017) The RAND Corporation, Testimony before the Committee of Homeland Security of the United States, https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT480/RAND_CT480.pdf

[9] Agnes Callamard, UN special rapporteur on extrajudicial, summary or arbitrary executions, interestingly considers that States have a legal obligation to repatriate citizens who left to fight for Daesh, if they are held by non-state actors. "Canada has 'a legal obligation' to repatriate citizens who left to fight for ISIS, says UN rapporteur" *CBC* (30 October 2018) www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.4884043/canada-has-a-legal-obligation-to-repatriate-citizens-who-left-to-fight-for-isis-says-un-rapporteur-1.4884562.

[10] 'Trump tells European countries to take back IS fighters' *BBC* (17 February 2019) www.bbc.com/news/world-middle-east-47269887.

[11] 'Defeated in Syria, ISIS Fighters Held in Camps Still Pose a Threat' *The New York Times* (24 January 2018) www.nytimes.com/2018/01/24/world/middleeast/isis-syria-militants-kurds.html.

[12] 'U.S. and Britain are divided over what to do with captured ISIS fighters' The Washington Post (14 April 2018) www.washingtonpost.com/world/national-security/us-and-britain-are-divided-over-what-to-do-with-captured-isis-fighters/2018/02/14/8ad4786e-0f7f-11e8-827c-5150c6f3dc79_story.html; 'The captured ISIS fighters that nobody wants' CNN 12 February2018) www.washingtonpost.com/world/national-security/us-and-britain-are-divided-over-what-to-do-with-captured-isis-fighters/2018/02/14/8ad4786e-0f7f-11e8-827c-5150c6f3dc79_story.html; 'What to do with foreign militants captured in Iraq and Syria? Their fates greatly vary' *The Straits Times* (23 February 2018) www.straitstimes.com/world/middle-east/what-to-do-with-foreign-militants-captured-in-iraq-and-syria-their-fates-greatly In a report prepared for the UN Special Rapporteur on Counter Terrorism and Human Rights, Dr. Sharon Weill even suggests that States have the obligation to repatriate alleged jihadists of French nationality, following the obligations under art 3 of the Geneva Conventions to treat the prisoners humanely. See Sharon Weill, *Terror in Courts: French-counter-terrorism, Administrative and Penal Avenues*, (The Capstone Course on Counter-Terrorism and International Crimes 2018) 37. hwww.sciencespo.fr/psia/sites/sciencespo.fr.psia/files/Terror%20in%20Courts.pdf

[13] This issue has already been highlighted in a report presented to the European Parliament. European Parliamentary Research Service, 'The return of foreign fighters to EU soil' (2018) 52, www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf

usually relies on the international instruments ratified by that State. According to the reports prepared by the Middle East and North Africa Financial Action Task Force (MENAFTF), both Iraqi and Syrian laws, for instance, establish that extradition and mutual legal assistance are governed by bilateral and multilateral treaties and, only when such treaties are inexistent or not applicable, cooperation can be provided on the basis of reciprocity[14]. The United States, for example, has recently relied on the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons for the extradition of a suspect who allegedly killed a US diplomat during the armed conflict in Mali[15].

However, as we shall see in more detail in this study,[16] there is great confusion about the application of the UN conventions against terrorism to scenarios of armed conflict. The United Nations Office on Drugs and Crime (UNODC), in its handbook on international cooperation in criminal matters against terrorism, developed for trainers on this topic, declares that:[17]

> The universal counter-terrorism conventions and protocols do not apply in situations of armed conflict. The International Convention for the Suppression of Terrorist Bombings (1997) and subsequent instruments specify that they are not applicable to acts committed by armed forces during an armed conflict. The branch of international law that is applicable when a situation of armed violence escalates into an armed conflict is that of international humanitarian law, whether the conflict is international or not.

The UNODC relies on the few provisions of cooperation in criminal matters contained in the Geneva instruments only. By contrast, in its handbook on criminal justice responses against terrorism, the UNODC considers that[18]

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[14] MENAFATF, 'Anti-Money Laundering and Combating the Financing of Terrorism, 'Mutual Evaluation Report 9th Follow-Up Report for Iraq"' 2 May 2018, http://www.menafatf.org/sites/default/files/Newsletter/Iraq%20Exit%20FUR_En.pdf.

[15] United States Department of Justice, 'Malian National Indicted for Murder of U.S. Diplomat to be Arraigned Today in Brooklyn Federal Court', 13 March 2014, www.justice.gov/usao-edny/pr/malian-national-indicted-murder-us-diplomat-be-arraigned-today-brooklyn-federal-court.

[16] s 5 below.

[17] UNODC, 'International Cooperation in Criminal Matters: Counter-Terrorism' 28 www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf For a similar approach in the scholarship see, among others, Antonio Coco, 'The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R* v. *Mohammed Gul*' (2013) 11 *Journal of International Criminal Justice* 425.

[18] UNODC, *Handbook on Criminal Justice Responses to* Terrorism(2009) 28.

> [i]t should be understood that the application of international humanitarian law does not in any way prevent or obstruct a criminal justice response to terrorist acts, including the criminalization of incitement, conspiracy and the financing of terrorist acts. It does not prevent offenders from being held accountable by the criminal justice system.

Then, can the UN Conventions against terrorism, as part of the criminal justice response, be applied to situations of armed conflict or not? Confusion as to available legal bases is an obstacle to effective cooperation. The predominance of chaos in the system of cooperation in criminal matters benefits actions such as the programme of 'extraordinary renditions' of suspects of terrorism, and the subsequent violation of basic fundamental rights.[19] With the aim of finding a framework that does not lead to the violation of the fundamental rights of terrorist suspects, but does not facilitate the impunity for the commission of such crimes either, I will analyse the regimes that may constitute a legal basis for cooperation in criminal matters against acts of terror committed during armed conflicts, paying specific attention to those committed by foreign terrorist fighters: the rules on criminal responsibility under International humanitarian law (IHL), the UN framework of anti-terrorist conventions and the UNSC Resolutions against foreign terrorist fighters. After analysing the specific content of these different sets of rules, I will conclude that IHL does not necessarily exclude the application of other regimes to acts committed during armed conflicts, which can serve as a complementary tool in international efforts for the prevention and suppression of terrorism.[20]

2. BACKGROUND: UNSC RESOLUTION 2178

[19] Juan Santos Vara, 'Extraordinary renditions: the interstate transfer of terrorist suspects without human rights limits' in Michael J Glennon and Serge Sur (eds), *Terrorisme et droit international* (Martinus Nijhoff, 2008) 551; John A E Vervaele, 'Extraordinary rendition and the security paradigm' (2013) 3 *International Law Review* 1; Stephen J Toope and Julien Cantegreil, 'Disparitions, prisons secrètes et restitutions extraordinaires: comment perdre la "guerre contre le terrorisme"' (2007) 10 *Esprit* 41; Hellen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2015) 557.

[20] This article focuses on inter-state cooperation, so it does not address aspects related to detention, prosecution and extradition by non-state actors, and it does not address the cooperation between states and non-state actors in criminal matters, which could be the object of an independent analysis. See, among other, Ezequiel Heffes, 'Detentions by Armed Opposition Groups: Towards a New Characterization of International Humanitarian Law' (2015) 20 *Journal of Conflict and Security Law* 229; Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 *Leiden Journal of International Law* 435; David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action, (2011) 93 *International Review of the Red Cross* 759.

The most quoted international instrument against foreign terrorist fighters is UNSC Resolution 2178. In 2014, this resolution provided the first legal definition of the term 'foreign terrorist fighter':[21]

> Nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training, *including in connection with armed conflicts*.

First, there is one important element missing in the definition offered by Resolution 2178: the definition of 'terrorism' itself.[22] The Resolution does not give a definition of the crime, and it does not refer to the acts of terror mentioned by UNSC Resolution 1566 either[23]. Instead, it leaves the definition of the crime up to each UN member state, an option that has been criticised because the term 'terrorism' is commonly used by many states to combat political position[24]. Therefore, Resolution 2178 could even be read as an 'infamous strategy of authoritarian states to have their repression of internal opposition rubber-stamped at the highest level of international law'.[25]

Second, the last sentence of the definition given by the UNSC mentions terrorist acts, 'including in connection with armed conflicts'. These six words have been the target of strong attacks by scholarship because the phrase 'blurs the lines between terrorism and armed conflicts, not just rhetorically, but by creating legal consequences for 'foreign

[21] UNSC Res 2178(2014) (n 5).
[22] The obstacles to the definition of the crime of terrorism in international law are explained in more detail in s 3.2 below.
[23] UNSC Res 1566(2004), 8 October 2004, UN Doc. S/RES/1566, para 2 defines terrorist acts as acts 'committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.
[24] Martin Scheinin, 'Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters', *Just Security*, 23 September 2014, https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/.
[25] Kai Ambos, 'Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters", but does not define "terrorism"', *EJIL: Talk!* 2 October 2014, www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism

terrorist fighters' who intend to travel abroad'.[26] For these authors, UNSC Resolution 2178 leads to the wrong conclusion that every foreign fighter is terrorist.[27] The logic of this criticism is undeniable because foreign fighters, as individuals coming from foreign states to participate in an armed conflict, do not necessarily have to participate in terrorist acts but can just conduct themselves according to the rules of IHL.

I also share the conclusion that 'foreign fighters' and 'terrorists' are not interchangeable terms, and that acts of violence committed by foreign fighters according to the rules of IHL should not be criminalised. However, I also think that we should not read UNSC Resolution 2178 as an instrument written in direct contradiction with the rules of IHL. If we accept the position that will be defended further by this study, in favour of a parallel application of IHL with other regimes such as the universal framework against terrorism, we will see that UNSC Resolution 2178 is not necessarily in conflict with IHL.

Apart from this original definition of 'foreign terrorist fighters' and its deficiencies regarding the term 'terrorism', UNSC Resolution 2178 imposes on States a wide range of obligations. The existence of effective criminal law measures is among these obligations. Paragraph 6 establishes that all States have the responsibility of ensuring that their criminal legislation is sufficient to properly prosecute and penalise the following conduct: travel or attempt to travel to a State other than a perpetrators State of residence or nationality for the purpose of terrorism; the wilful provision or collection of funds for terrorist purposes; and the wilful organisation, or other facilitation, of the previous acts.[28] In addition, UNSC Resolution 2178, recalling UNSC Resolution 1373, reiterates that member states shall[29]

> afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and underlines the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters.

[26] Geneva Academy, 'Foreign Fighters under International Law', Academic Briefing No 7, October 2014, 2, www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf.
[27] ibid 43.
[28] These obligations have been recently confirmed by UNSC Res 2396(2017), 21 December 2017, UN Doc S/RES/2396; UNSC Res 2354 (2017), 24 May 2017, UN Doc S/RES/2354.
[29] UNSC Res 2178(2014) (n 5) para 12.

Hence, the use of criminal law measures against terrorism, including the duty to cooperate, is imposed by the UNSC in another example of its role as a 'universal legislator'.[30] It is true that these obligations have received many criticisms, mainly because of the impact that 'pre-emptive criminalisation' has on the rights of the individual.[31] However, I will focus only on the impact that UNSC Resolution 2178 has on the link between anti-terrorism criminal law cooperation and IHL.

The wording of UNSC Resolution 2178 repeats that all measures adopted under this instrument must be 'consistent with international human rights law, international refugee law, and international humanitarian law'[32]. How can the definition of foreign terrorist fighter, which includes activities during armed conflicts, be consistent with IHL? One could adopt the criticism against UNSC Resolution 2178 and declare the intrinsic inconsistency of criminal measures against foreign terrorist fighters with IHL. By contrast, I consider that the work of the UNSC can be consistent with IHL if the proposition that I will develop during this study is applied.

3. PROHIBITION AND CRIMINALISATION OF ACTS OF TERRORISM

3.1 The International Humanitarian Law Framework

IHL does not have the same rationale as other legal branches of international law. This regime is 'based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy's armed forces'.[33] In

[30] For this concept see, among others, Myriam Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organizations* (Brill 2016) 55; Ben Emmerson, 'New counter-terrorism measures: Continuing Challenges for Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism*, (Edward Elgar 2018) 139; Luis Miguel Hinojosa Martínez, 'The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits' (2008) 57 *International and Comparative Law Quarterly* 333; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 193.

[31] See, among others, Francesca Capone, 'Countering 'Foreign Terrorist Fighters': A Critical Appraisal of the Framework Established by the UN Security Council Resolutions', (2016) 25 *The Italian Yearbook of International Law* 228; Letta Tayler, 'Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178', (2016) 18 *International Community Law Review* 455.

[32] UNSC Res 2178(2014) (n 5) para 5.

[33] ICRC, Expert Meeting, 'The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigm' (2013) 6.

fact, article 43 (2) of Additional Protocol I expressly recognises combatants' right to participate directly in hostilities'.[34]

However, we should not forget that IHL is also constructed on the basis of core principles that seek to protect the life and properties of civilians, such as the principle of distinction and the prohibition of methods of warfare that can cause superfluous injury or unnecessary suffering.[35] Therefore, some authors consider that, at first sight, almost every act of terrorism violates these principles and many others.[36]

Correspondingly, the concept of 'terror' is mentioned in several IHL instruments. After the atrocities that took place during World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented its 1919 report. The first act that all states had the duty to criminalise was 'systematic terrorism'.[37] Similarly, article 22 of The Hague Rules of Air Warfare establishes that 'aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited'.[38]

The term 'terrorism' appears again in the Geneva instruments after World War II. In international armed conflict (IAC), the IV Geneva Convention prohibits 'collective penalties and likewise all measures of intimidation or of terrorism'.[39] Article 51(2) of Additional Protocol I also prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[40]

In non-international armed conflict (NIAC), Additional Protocol I prohibits acts of terrorism against all persons who do not take part or who have ceased to take part in hostilities at any time and in any place whatsoever.[41] Finally, article 13(2) of the same

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[34] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 43(2).
[35] Andrea Bianchi, 'Terrorism and Armed Conflict' (2011) 24 *Leiden Journal of International* Law 1.
[36] Hans-Peter Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 *International Review of the Red Cross* 547.
[37] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report presented to the preliminary peace conference, March 29, 1919' (1920) 14 *American Journal of International Law* 95, 114.
[38] The Hague Rules of Air Warfare (December 1922 February 1923) wwi.lib.byu.edu/index.php/The_Hague_Rules_of_Air_Warfare.
[39] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV) art 33.
[40] In addition, the ICRC has prepared a list of military codes and domestic legislations which criminalise acts the primary purpose of which is to spread terror among the civilian population. Jean-Marie Henckaerts and Louise Doswald.Beck, (eds) *Customary International Humanitarian Law*, Vol II: Practice – Part 1 (International Committee of the Red Cross 2005) 68.
[41] AP I (n 43) art 4(2)(d).

instrument establishes that 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. Therefore, IHL prohibits acts of terrorism both in IAC and in NIAC.

However, the prohibition of a conduct under IHL does not automatically generate individual criminal responsibility. In this sense, Cassese points out that 'international humanitarian law proscribes terrorism both in international and internal armed conflicts. The question, however, arises of whether, in addition to addressing its prohibition to states, international customary and treaty law also criminalize terrorism in armed conflict'.[42] This distinction was the basis of many critics against the inclusion of the crime of aggression in the Nuremberg Trials, thought it was an act prohibited by international law since the Kellogg-Briand Pact of 1928.[43] Correspondingly, Tomuschat considers that '[i]t is one thing to declare war unlawful with regard to inter-state relationships, but a totally different thing to acknowledge it as an offence entailing individual criminal responsibility'.[44] The establishment of individual criminal responsibility requires to overcome completely different obstacles indeed, as the delay in the 'activation' of the crime of aggression in the Rome Statute has proven.[45]

Whereas the activation of the crime of aggression was delayed, but successful in the end,[46] all efforts to include the crime of terrorism in the Rome Statue in the category of war crimes have failed.[47] Nevertheless, other international instruments give a legal basis for the criminalisation of terrorism during armed conflicts. The Statute of the International Tribunal for Rwanda established its power to prosecute persons committing or ordering to be committed acts of terrorism, as violations of article 3 Common to the

[42] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', (2006) 4 *Journal of International Criminal Justice* 945.
[43] Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (entered into force 24 July 1929) LNTS 796
[44] Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 833.
[45] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.See, among other, Jennifer Trahan, 'From Kampala to New York – The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression' (2018) 18 *International Criminal Law Review*, 197; Claus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 *Journal of International Criminal Justice* 1.
[46] ICC, Resolution of the Assembly of States Parties 'Activation of the jurisdiction of the Court over the crime of aggression' 14 December 2017, ICC-ASP/16/Res.5.
[47] See, among others, Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, (Transnational Publishers 2004); Aviv Cohen, 'Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused legal Tool to Combat Terrorism' (2012) 20 *Michigan State International Law* Review 219.

Geneva Conventions and Additional Protocol II.[48] Article 20(f)(iv) of the Draft Code of Crimes against the Peace and Security of Mankind also includes acts of terrorism as war crimes.[49]

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[50] does not include the crime of terrorism specifically. However, this absence has not precluded the tribunal from interpreting that acts of terrorism are included in article 3 of its Statute as a violation of the laws and uses of war.[51] This interpretation allowed the tribunal to condemn Stanislav Galic, commander of the Serbian troops during the siege of Sarajevo, for acts of terrorism. The Trial Chamber found that three elements define the crime of terrorism in armed conflicts:

> (a) 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; (b) the offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; (c)the above offence was committed with the primary purpose of spreading terror among the civilian population.[52]

Considering the Geneva instruments and the case law regarding terrorism and war crimes, Cassese reduces the crime of terrorism in armed conflicts to two constitutive elements: 'the prohibited conduct arguably consists of any violent action or threat of such action against civilians or other persons not taking a direct part in armed hostilities' (objective element or *actus reus*); which is 'calculated to 'spread terror' among the civilian population or other protected persons' (subjective element or *mens rea*).[53] Following the *Galic* case, Cassese acknowledges that 'the purpose of coercing a public (or private) authority to take a certain course of action disappears or, at least, wanes'.[54]

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[48] UNSC Res 955(1994), 8 November 1994, UN Doc S/RES/955 (1994), adopting the Statute of the International Criminal Court for Rwanda.
[49] International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) 2 *Yearbook of the International Law Commission* 53.
[50] UNSC Res 827(1993), 25 May 1993, UN Doc S/RES/827(1993), adopting the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.
[51] *Prosecutor v Galic*, Case No IT-98-29-T, Trial Chamber, ICTY, (5 December 2003) 91-138; *Prosecutor v Galic*, Case No. IT-98-29-A, Appeals Chamber, ICTY, (30 November 2006).
[52] *Prosecutor v Galic*, Trial Chamber Judgment, ibid 133.
[53] Cassese (n 42) 946-47.
[54] ibid 947. In this line, the ICTY concluded that 'primary purpose signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific

3.2 The UN Conventions against terrorism

The failure to define the crime of 'terrorism' by the international community is a 'familiar crux of international law',[55] a failure which has been the reason why 'international law concerning terrorism has developed haphazardly and now consists of an unsystematic hodge-podge of treaties concerning specific modes of terrorism'.[56] These failed efforts survived after the fall of the League of Nations[57] and persist in the eternal project for a comprehensive convention against terrorism.[58]

As a result of this failure, most UN conventions do not have a definition of the crime of terrorism. These instruments just contain a list of acts usually linked with terrorism that must be criminalised and prosecuted by the State parties, without further references to any specific intent or motivation. The instruments regarding civil aviation, from the Tokyo Convention of 1963 to the Beijing Protocol of 2014,[59] criminalise acts of violence against a person on board an aircraft in flight (also in airports serving civil aviation); to

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to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime' *Prosecutor v Galic* Trial Chamber Judgment (n 51) 136.

[55] Richard J Goldstone and Janine Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism', (2003) 16 *Harvard Human Rights Journal* 13.

[56] ibid. For doctrinal approaches to the definition of terrorism see, among others, Ben Saul, 'Attempts to Define Terrorism in International Law' (2005) 52 *Netherlands International Law Review* 57; Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 23; Matthew Gillet and Matthias Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 *Journal of International Criminal Justice* 989.

[57] Henri Donnedieu de Vabres, 'La répression internationale du terrorisme: Les conventions de Gèneve (16 novembre 1937)', (1938) 19 *Revue de Droit International et de Législation Comparé*e 37; Antoine Sottile, 'Le Terrorisme International' (1938) 65 *Collected Courses of the Hague Academy of International Law* 91, 120; Mégalos A Caloyanni, 'The proposals of M. Laval to the League of Nations for the Establishment of an International Permanent Tribunal in Criminal Matters' (1935) 77 *Transactions of the Grotius Society* 77, 78.

[58] Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention' (2006) 4 *Journal of International Criminal Justice* 1031; Amrith Rohan Perera, 'The Draft United Nations Comprehensive Convention on International Terrorism' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2016) 151.

[59] Convention on Offences and Certain Other Acts Committed on Board Aircraft (entered into force 4 December 1969) 704 UNTS 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) (entered into force 14 October 1971) 860 UNTS 105; Convention for the Suppression of Unlawful Acts Against the Safety of civil Aviation (entered into force 26 January 1973) UNTS 974 ???; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24 February 1988) UNTS 1589 (entered into force 6 June 1988) UNTS; 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation) entry UNTS; 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft (Montreal, 26 March 2014). UNTS

attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts; the act of using civil aircraft as a weapon to cause death, injury or damage; the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to attack civil aircraft; as well as the threat or conspiracy to commit such offences. Similar provisions can be found in the instruments regarding maritime navigation.[60]

In the same line, the Convention for the Suppression of Terrorist Bombings[61] calls upon States to criminalise the use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.[62] The Convention for the Protection of International Staff[63] also criminalises the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act constituting participation as an accomplice.[64]

Only two instruments of the UN conventional framework against terrorism include a specific-intent element regarding terrorism. First, the Convention Against the Taking of Hostages provides that commits an offence 'any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person' (objective element), 'in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage' (subjective element).[65]

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[60] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (entered into force 1 March 1992) 1678 UNTS 221; 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (14 October 2005) UNTS; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (entered into force 1 March 1992) 1678 UNTS page; 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (entered into force ???) UNTS.

[61] International Convention for the Suppression of Terrorist Bombings (entered into force 23 May 2001) 2149 UNTS 256 (Terrorist Bombings Convention).

[62] ibid art 2.

[63] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (entered into force 20 February 1977) 1035 UNTS 167.

[64] ibid, art 2.

[65] International Convention Against the Taking of Hostages (entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention) art 1.

Second, the Convention for the Suppression of the Financing of Terrorism gives the first full definition of a crime of terrorism when it criminalises the financing of any act 'intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict' (objective element), 'when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act' (subjective element), including the participation and organization of such financing.[66]

In short, both the Geneva instruments and the UN conventions against terrorism criminalise acts of terror. However, there are some differences between these two systems. The Geneva instruments and its case law define acts of terror according to a wide objective element and a specific subjective element of 'spreading terror'. Aside from some exceptions, the UN conventions just focus on the objective element with a list of acts to be criminalised by the contracting states. In the next two sections I will study how these two definitions can be compatible in order to facilitate the application of the mechanisms of cooperation on criminal matters of the UN conventions against terrorism to situations of armed conflict.

4. INTERNATIONAL COOPERATION AGAINST TERRORISM

4.1 General remarks

According to Wolfrum, the term international cooperation describes 'the voluntary coordinated action of two or more States which takes place under a legal regime and serves a specific objective. To this extent it marks the effort of States to accomplish an objective by joint action, where the activity of a single State cannot achieve the same result'.[67] Adapting this definition to the object of this study, international cooperation against terrorism may be defined as the voluntary coordinated action of two or more States which takes place under a legal regime to accomplish the prevention and suppression of terrorism.

[66] International Convention for the Suppression of the Financing of Terrorism (entered into force 10 April 2002) 2178 UNTS 197 (Terrorism Financing Convention) art 2.
[67] Rüdiger Wolfrum, 'International Law of Cooperation' *Max Planck Encyclopedia of Public International Law* (2010).

Among the different forms of international cooperation, such as diplomatic or military cooperation, this study focuses on cooperation in criminal matters. Bassiouni identifies six modalities within this category: 'extradition, legal assistance, transfer of criminal proceedings, recognition of foreign penal judgments, transfer of sentenced persons, and freezing and seizing of assets'.[68] Taking into account the content of the IHL framework and the UN conventions against terrorism, the next sections will focus on the first two modalities: mutual legal assistance and extradition.

On the one hand, mutual legal assistance is defined by Prost as 'a process by which states seek and provide assistance in gathering evidence for use in criminal cases or in the restrain and confiscation of the proceeds of crime'.[69] A more exhaustive definition is proposed in the Commentaries on the Additional Protocols: 'mutual assistance involves the compilation and exchange of information and, in general, any assistance with a view to the tracing, arrest and trial of suspects'.[70] Cooperation with foreign authorities is particularly important because the authorities of one State cannot, without previous authorization of the foreign territorial State, conduct any of the previous activities.[71] In addition, the existence of mechanisms of mutual assistance facilitates the collection of admissible evidences for the purpose of using them in procedures before domestic courts.

On the other hand, extradition designates 'the official surrender of an alleged offender from justice, regardless of his or her consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence'.[72] Both IHL and the UN Conventions include, linked to extradition, articles related to the principle *aut dedere aut judicare* (the obligation to extradite or prosecute), the modern expression of the Grotian principle known as *aut dedere aut punire* (the obligation to extradite or punish):[73]

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[68] Mahmoud Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy Oriented Assessment' (2002) 43 *Harvard International Law Journal* 94.
[69] Kimberly Prost, 'The need for a multilateral cooperative framework for mutual legal assistance', in Larissa Van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented Legal Order* (Cambridge University Press 2013) 93.
[70] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 3571.
[71] Heinrich Grtuzner, 'International Judicial Assistance and Cooperation in Criminal Matters', in Mahmoud Cherif Bassiouni and Ved P Nanda (eds), *A Treatise on International Criminal Law: Jurisdiction and Cooperation*, vol II, (Charles C Thomas Publisher 1973) 189.
[72] Torsten Stein, 'Extradition' (2011) *Max Planck Encyclopedia of Public International Law*.
[73] Hugo Grotius, *The Rights of War and Peace* (edited by Richard Tuck and Knud Haakonssen, Liberty Fund 2005) 1062.

> But since for one State to admit within its Territories another foreign Power upon the Score of exacting Punishment is never practised, nor indeed convenient, it seems reasonable, that that State where the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demanded Person according to his Demerits, or else deliver him up to be treated at the Discretion of the injured Party. This is that delivering up so commonly to be met with in History.

Modern terminology replaces 'punishment' with 'prosecution' as the alternative to extradition in order to reflect the possibility that an alleged offender may be found innocent. In its final report on the topic 'the obligation to extradite or prosecute (*aut dedere aut judicare*)', the ILC acknowledged the importance of this principle in the fight against terrorism: 'The view that the obligation to extradite or prosecute plays a crucial role in the fight against impunity is widely shared by States; the obligation applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970'.[74]

4.2 The International Humanitarian Law Framework

For IAC, the Geneva Conventions include several provisions for cooperation in criminal matters. Paragraphs 1 and 2 of Article 49 of the First Geneva Convention establish that[75]

> 1. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, *any of the grave breaches* of the present Convention defined in the following Article.

[74] International Law Commission, 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', (2014) II *Yearbook of the International Law Commission*, 153. See also Gilber Guillaume, 'Terrorisme et droit international', (1989) 215 *Recueil des Cours de l'Académie de droit international de La Haye*, 354-73.

[75] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I). See also Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II) art 50; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III) art 129; GC IV (n 39) art 146. It also includes the obligation to prevent and prosecute grave breaches of IHL, as well as that 'the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Art 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949'.

2. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, *such grave breaches*, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case.

Therefore, this provision asks both for the criminalisation of grave breaches of the Conventions and for the introduction of some sort of *aut dedere aut judicare* principle, which has also been referred to as *primo prosequi, secondo dedere* (first to prosecute, second to deliver[76]). Article 88 of Additional Protocol I also includes the heading 'mutual assistance in criminal matters':

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of *grave breaches* of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

The first paragraph of this article does not give any details on the meaning of the obligation of affording 'the greatest measure of assistance'. The Commentaries of this Protocol suggest that, according to UNGA Resolution 3074, this 'assistance' includes, among other activities, 'compilation and exchange of information, and in general, any assistance with a view to the tracing, arrest and trial of suspects'.[77] The second paragraph introduces the mechanism of extradition, although it is not entirely clear whether this provision could also serve as a legal basis for extradition in practice between state parties.[78]

[76] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *Commentary of 2017*, art 50: penal sanctions, 2969.
[77] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949*, (Martinus Nijhoff 1987) 3571-73.
[78] During the preparatory works, the delegate of Belgium declared that 'the relevant articles of the four Geneva Conventions of 1949 -in particular Article 146 of the fourth Convention relative to the Protection of Civilian Persons in Time of War- made it obligatory on the Contracting Parties to prosecute and try any person alleged to have committed or to have ordered to be committed~ grave breaches of the Conventions,

In any case, the main question is whether these provisions are applicable to acts of terrorism committed during armed conflicts, as defined by the Geneva instruments. Each one of the articles mentioned above establishes its applicability only to 'grave breaches' of the Conventions or the Protocol. The concept of 'grave breaches' is defined by articles 50 of the I Geneva Convention,[79] 51 of the II Geneva Convention,[80] 130 of the III Geneva Convention[81] and 147 of the IV Geneva Convention:[82]

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Acts of terror are not specifically mentioned in the list of grave offences. Although it is undeniable that acts of terror can include killing or causing serious injuries, the specific-intent of 'spreading terror' required by IHL is still missing. Therefore, a literal interpretation[83] of the Geneva instruments leads to the inapplicability of IHL's provisions regarding cooperation in criminal matters.[84]

Of course, we can ask ourselves whether it would not be better to consider every act of terror within the category of 'grave breaches' taking into account just the objective element. In this case, it would be possible to apply the IHL's regime of cooperation in criminal matters. Although there is no major difference between 'acts of terror' and 'grave breaches' at first sight, Cassese points out a two-fold difference that justifies our position in favour of the application of the UN conventions against terrorism to scenarios of armed conflict:[85]

> First, the extent of the powers of investigation and collection of evidence granted to criminal investigators is different. In the event of those offences being classified as acts of terrorism,

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or, should they prefer it, to extradite such person. The purpose of the ICRC's article 78 was to specify the conditions for extradition, largely on the basis of The Hague Convention of 1970 and the Montreal Convention of 1971». Official records of the diplomatic conference, Doc CCDH/I/SR.70,149.

[79] GC I (n 75).

[80] GC II (n 75).

[81] GC III (n 75).

[82] GC IV (n 39).

[83] Vienna Convention on the Law of Treaties (entered into force 27 January 1980, 1155 UNTS 331 (VCLT) art 31.

[84] Cassese (n 42) 946.

[85] ibid 956.

those powers are much broader. Secondly, preparatory acts may be criminalized in the case of terrorism, which normally are not, if the actual offence amounts to a war crime.

The legal framework regulating NIAC is much more limited than that for IAC: just common article 3 to the Geneva Conventions and its Additional Protocol II. This framework does not include any provision for cooperation in criminal matters. The reason can be the following: provisions for NIAC regulate purely internal situations, and they do not take into account the presence of international elements (such as foreign fighters) that would make international cooperation necessary in this field.[86]

4.3 The UN Conventions against terrorism

Since the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, every UN Convention for the prevention and suppression of terrorism has included provisions regarding extradition. The Hague Convention introduces for the first time the obligation to extradite or prosecute suspects of terrorism, also known as 'The Hague formula':

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[87]

This article has been replicated, in very similar terms, along the entire UN conventional framework against terrorism.[88] Following a literal interpretation of the catalogue of these articles, and those included in later conventions, the Secretariat of the

[86] For a comprehensive study about the legal gaps in NIAC see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012).
[87] Convention for the Suppression of unlawful seizure of aircraft (n 59) art 7. For general study of this clause see, among others, Claire Mitchell, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law* (Graduate Institute Publications 2009).
[88] Convention for the Suppression of Unlawful Acts Against the Safety Of Civil Aviation (n 59) art 7; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (n 60) art 10; Hostages Convention (n 65) art 8; Terrorist Bombings Convention (n 61) art 8; Financing of Terrorism Convention (n 66) art 10.

ILC the concludes that the 'Hague formula' imposes an obligation to prosecute *ipso facto* (by the very fact), with the possible alternative of extradition:[89]

> This obligation to prosecute may be said to exist *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. It is only when such a request is made that an alternative course of action becomes available to the State, namely the surrender of the alleged offender to another State for prosecution.

This provision is completed with two more articles. First, article 8(2) activates the possibility of using the Hague Convention as a legal basis for extradition:

> If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence.

Therefore, in the absence of a bilateral extradition treaty between the contracting states, any of the UN sectorial conventions against terrorism could be used as a legal basis to extradite suspects of committing any of the terrorist acts enlisted in such conventions. Once the legal basis for extradition has been established between both states thanks to the UN sectorial conventions, the exact details of the procedure shall follow 'the procedural provisions and other conditions of the law of the requested State'.[90]

Second, all UN conventions against terrorism include a list of principles of jurisdiction which allows the contracting states to establish their jurisdiction for the prosecution, punishment or extradition of those responsible for acts of terror.[91] While some of these principles are optional (passive nationality and protection), others are mandatory and oblige States to exercise jurisdiction (territoriality and active nationality).[92] Thanks to these principles, contracting states such as the state of nationality of the suspected terrorist

[89] Secretariat of the International Law Commission, 'Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"', 18 June 2010, UN Doc A/CN.4/630, 352.
[90] Hostages Convention (n 65) art 8(2).
[91] See, among othersm Hague Convention (n 59) art 4, Hostages Convention (n 65) art 5, Terrorist Bombings Convention (n 61) art 6.
[92] Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing international law norms against terrorism* (Hart 2004) 248; AlexMills, 'Rethinking jurisdiction in international law', (2014) 84 *British Yearbook of International Law* 187.

or the state of nationality of the victim will be able to establish their jurisdiction over such crimes.[93]

Whereas the extradition formula and the principles of jurisdiction have not substantially changed since the first instruments, provisions regarding mutual legal assistance have evolved to confront the mutations of the terrorist threat. In the Hague Convention, article 10 just stated the obligation to 'afford one another the greatest measure of assistance in connection with criminal proceedings'. One year later, the Montreal Convention introduced the obligation to furnish any relevant information when a Contracting State has reasons to believe that a terrorist act will be committed in another State.[94] The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons includes the assistance in the collection of evidence, a modality that was not expressly mentioned in previous instruments.[95] The Convention against terrorist bombings specifies that mutual assistance shall be provided not only to prosecute terrorist acts, but also in the coordination of criminal and administrative measures to prevent the commission of such offences.[96] Finally, the Convention for the Suppression of the Financing of Terrorism requires cooperation against the financing of terrorism, including not only domestic authorities but also financial institutions, and eliminating bank for this purpose.[97]

To sum up, the IHL's instruments for cooperation in criminal matters have been created for IAC only and, even in this case, these instruments are only applicable to 'grave breaches' of IHL, a category that does not specifically includes acts of terror. The UN conventions against terrorism have a wider catalogue of instruments of cooperation which are applicable to any act of terror criminalised by such conventions. Taking into account that IHL system of cooperation in criminal matters does not exist in NIAC, and it is not applicable to acts of terror as such in IAC, in the next chapter I will examine how the UN conventions against terrorism can be used to fill the criminal cooperation lacuna in situations of armed conflict.

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[93] The principle of passive nationality or the nationality of the victim was used by the United States in the *Achille Lauro* case to establish its jurisdiction over the crime of hostage-taking committed by a terrorist group. See Samuel Pyeatt Menefee 'Piracy, Terrorism and the Insurgent Passenger: A Historical and Legal Perspective' in Natalino Ronzitti, (ed) *Maritime Terrorism and International Law* (Martinus Nijohff 1990) 43.

[94] Montreal Convention (n 59) art 12.

[95] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (n 63) art 10.

[96] Terrorist Bombings Convention (n 61) art 15.

[97] Financing of Terrorism Convention (n 66) arts 12, 18.

5. THE INTERPLAY BETWEEN IHL AND THE UN CONVENTIONS AGAINST TERRORISM

The IHL's provisions for cooperation in criminal matters are not applicable to the acts of terror committed during IAC because such acts are not included in the category of 'serious breaches' of the Geneva instruments. In the case of crimes committed during NIAC, criminal law provisions are inexistent. A literal interpretation[98] of article 88(3) of Additional Protocol I seems to support our claim that other legal regimes for cooperation in criminal matters may be applied to situations of armed conflict:[99]

> The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

As some commentators have highlighted, 'States remain free to draft such legislation and to conclude such treaties as they wish, within the limits imposed by the obligation to repress by penal measures grave breaches of the Conventions and of the Protocol'.[100] Although it is not a primary method of interpretation,[101] the preparatory work also seems to support the conclusion that the IHL welcomes the application of other regimes of cooperation in criminal matters: 'the Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted into the national penal laws'.[102]

In the case of terrorism, states wished to develop a framework of universal treaties to combat specific forms of terrorism. This framework could be of great assistance for the

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[98] Vienna Convention on the Law of Treaties (n 83) art 31.

[99] For a comprehensive study of the rules of interpretation of the treaties see, among others, Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 301-92. The preceding paragraphs include the general obligation of assistance in criminal matters and the obligation to extradite.

[100] Yves Sandoz, Christophe Swinarski and Bruno Zimmerann (eds), *Commentary on the Additional Protocols of 8 June 1977 the Geneva Conventions of 2 August 1949* (Martinus Nijohff 1987) 1030.

[101] VCLT (n 83) art 32. Orakhelashvili (n 99) 382-92.

[102] Fourth Report drawn up by the Special Committee of the Joint Committee, 12 July 1949 (Report on Penal Sanctions in case of violations of the Conventions), Final Record of the Diplomatic Conference of Geneva of 1949, vol II, s B, 116.
www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf.

prosecution of acts of terror that, as analysed above, are expressly prohibited by IHL. However, there is a tendency to reject this approach. In its handbook for international cooperation against terrorism, the UNODC considers that:[103]

> The universal counter-terrorism conventions and protocols do not apply in situations of armed conflict. The International Convention for the Suppression of Terrorist Bombings (1997) and subsequent instruments specify that they are not applicable to acts committed by armed forces during an armed conflict. The branch of international law that is applicable when a situation of armed violence escalates into an armed conflict is that of international humanitarian law, whether the conflict is international or not.

In a very similar way, Pejic argues that 'there are several important distinctions between the legal framework governing armed conflict and terrorism, based primarily on the different reality that each seeks to govern. The main divergence is that, in legal terms, armed conflict is a situation in which certain acts of violence are allowed (lawful) and others are prohibited (unlawful), while any act of violence designated as terrorist is always unlawful'.[104] For this reason, this same author concludes that 'with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term "act of terrorism" should be reserved for acts of violence committed outside armed conflict'.[105]

In the next pages, I will defend the applicability of several anti-terrorism conventions to acts of terror committed during armed conflicts. From my point of view, the existence of legal bases for cooperation in criminal matters is key for the prevention and suppression of terrorism both in times of peace and of armed conflict. Ferdinandusse points out that 'a review of international practice in the investigation and prosecution of core crimes shows that this lack of adequate treaty provisions regarding judicial cooperation has indeed often provided an obstacle in practice, contributing to delays or

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[103] UNODC, 'International cooperation in criminal matters: counter-terrorism', 28 www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf
For a similar approach in the scholarship see, among others, Antonio Coco, 'The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in R v. *Mohammed Gul*' (2013) 11 *Journal of International Criminal Justice* 425.
[104] Jelena Pejic, 'Armed conflict and terrorism: there is a (big) difference', in Ana Salinas de Frías, Katja Samuel and Nigel D White (eds), *Counter-terrorism: international law and practice* (Oxford University Press 2012) 172.
[105] ibid 185.

even failure to prosecute core crimes suspects'.[106] In relation to terrorism, Blakesley and Stigall consider that 'the treaties, which comprise the major components of transnational criminal law, therefore, serve to enable much needed international cooperation. If muted, the legal bases for that cooperation are lost and cooperative efforts among states can fail, permitting criminals and terrorists to operate with impunity'.[107]

This perspective has been defended by a limited sector of the scholarship[108] and by the Court of Justice of the European Union (CJEU). In *LTTE*[109] and *A. and others*,[110] it was asked whether counter-terrorism law could be applicable in times of armed conflict. In both cases, the CJEU accepted that counter-terrorism law may apply in conjunction with IHL: 'the applicability of international humanitarian law to a situation of armed conflict and to acts committed in that context does not imply that legislation on terrorism does not apply to those acts'.[111] In reaching these conclusions, the CJEU relied on the sources of international law previously mentioned in this study: the UNSC Resolution 1373, article 33 of the IV Geneva Convention, article 51(2) of Protocol I, articles 4(2) and 13(2) of Additional Protocol II, as well as article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism.[112]

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[106] Ward Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?', (2014) 18(15) *ASIL Insights*.

[107] Christopher L Blakesley and Dan E Stigall, 'Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflict', (2015) 48 *George Washington International Law Review* 11.

[108] Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed., *International Humanitarian Law and International human Rights Law* (Oxford University Press 2011) 13; Montserrat Abad Castelos, 'Terrorismo, Derecho Internacional Humanitario y Conflictos Armados Actuales' (2009) *Cursos de Derecho Internacionl y Relaciones Internacionales de Vitoria-Gasteiz*, 315; Daniel O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces' (2006) 88 International Review of the Red Cross 853; Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *European Journal of International Law* 161, 182; Fionnuala Ni Aoláin, 'The No-Gaps Approach to Parallel Application in the Context of the War on Terror' (2007) 40 *Israel Law Review*,563.

[109] Case T-208/11, *Liberation Tigers o Tamil Eelam*, [2014] OJ C 421/28. For a study of this case see, among others, Luca Pantaleo, 'Of Terrorists and Combatants: The Application of EU Anti-terrorist Measures to Situations of Armed Conflict in the General Court's Ruling Concerning the Liberation Tigers of Tamil Eelam', (2015) 4 *European Law Review* 598.

[110] Case C-158/14, *A, B, C and D v Minister van Buitenlandse Zaken*, [2017] OJ C 151/2. For a study of this case see, among others, Luca Pantaleo, 'To be or not to be (a terrorist): understanding the interplay between EU anti-terrorism legislation and international humanitarian law in light of recent EU case law', (2018) 44 *Revista General de Derecho Europeo* 156.

[111] Case T-208/11 (n 109) 56.

[112] Case C-158/14 (n 110) [88], Case T-208/11 (n 10) [59]-[64]. However, we should acknowledge that the CJEU draws a distinction between criminal law and CFSP sanctions, and that in both judgments it accepts only the applicability of this second regime. However, some author considers that 'by distinguishing it from other EU counter-terrorism instruments, the ECJ misses a chance to increase coherence in the area of EU counter-terrorism law as a whole. It would have been more appropriate for the Court to opt for a single definition of terrorist acts, regardless of whether a preventive or punitive instrument is used. The Court

In addition, the UK Supreme Court has backed up the application of criminal law paradigms to acts of terror committed during armed conflicts. In the case of Mohammed Gul, against the defence's argument that qualifying as 'acts of terrorism' the acts of non-state groups during NIAC violates the norms of IHL and of the UN Conventions against terrorism, the UK Supreme Court considered that 'It is true that there are UN Conventions and Council of Europe Conventions concerned with counter-terrorism, which define terrorism as excluding "activities of armed forces during an armed conflict", but there is room for argument as to their precise effect, and, more importantly, it is quite impossible to suggest that there is a plain or consistent approach in UN Conventions on this issue'.[113]

The following sections seek to examine how the UN Conventions against terrorism can be applied to situations of armed conflict while respecting the norms and principles of IHL. Following the structure and content of the previous sections of this study, I will propose how the material scope of both regimes can be compatible in relation to the 'acts of terror' and, afterwards, how can we interpret several UN conventions against terrorism to conclude that their criminal law clauses are applicable to acts of terror committed during armed conflicts.

5.1 Acts of terror in IHL and the UN Conventions

In order to apply the UN Conventions to the 'acts of terror' committed during armed conflicts, it is necessary to have a clear image of what can constitute an 'act of terror' in both the UN and the IHL framework.

Starting with the 'objective element', we have pointed out that sectorial conventions focus on the criminalisation of specific terrorist acts, which includes acts of violence against civil and maritime transport, internationally protected persons, the taking of

could have done so by concluding that despite Recital 11 of the Framework Decision, acts committed in the course of armed conflicts fall under the definition of terrorist acts both from a criminal law and a CFSP sanctions perspective. As Advocate General Sharpston observes, preventing terrorism by cutting it off from its financial resources is as important when acts are committed during armed conflicts as in other circumstances. That assessment is no less valid for measures of a criminal nature than for restrictive measures. There is no reason why Member States could consider that certain actions are sufficiently threatening to adopt preventive measures, but cannot criminalize and prosecute those actions later on'. See M Wimmer, 'Counter-terrorism sanctions, non-international armed conflicts and Tamil Tigers: A and others', (2018) 55 *Common Market Law Review* 1587.

[113] *R v Gul* [2013], UKSC 64 [17].

hostages or attacks with bombs. The duty to criminalise includes the aiding and abetting of such acts, and also its financing. In the Geneva instruments, the objective element is not limited to specific acts, but includes any violent action or threat of such action against civilians or other persons not taking a direct part in armed hostilities.

Most of UN Conventions against terrorism do not include a specific 'subjective element' for the crime of terrorism. The first exception is the UN Convention against the taking of hostages, which includes the specific intent of compelling 'a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage'.[114] In addition to this element, the UN Convention for the Suppression of the Financing of Terrorism includes the specific intent of intimidating a population.[115] In IHL, taking into account that the very nature of an armed conflict implies the imposition of a conduct to an enemy, the intent of "compelling" a State or an international organization disappears. The only 'subjective element' in IHL is, therefore, the intent of spreading terror among the civilian population or other protected persons.

Following the two previous elements, I consider that the UN Conventions against terrorism are applicable, in the context of armed conflicts, to: acts of violence committed by non-state groups against civilians or other persons not taking direct part in armed hostilities (objective element), with the specific intent of spreading terror among the civilian population or other protected persons.

5.2 The IHL exclusion clauses in the UN Conventions against terrorism

We can see that there is an overlap between the field of application of IHL and the UN Conventions against terrorism. However, in order to respect the special features of the IHL's regime, which permits certain acts of violence considered unlawful under other regimes, it is important to have clear clauses regulating the interplay between IHL and the UN Conventions against terrorism. The importance of this task is pointed out by

[114] Hostages Convention (n 65) art 1.
[115] Financing of Terrorism Convention (n 66) art 2.

Ferraro in relation to the UN Draft Comprehensive Convention on International Terrorism:[116]

> Because of these overlaps and because international conventions addressing terrorism generally apply in situations of armed conflict, it is essential to have in counterterrorism instruments clauses regulating the relationship between IHL and international conventions addressing terrorism. This would be the only way to avoid, as far as possible, the overlaps and contradictions between the two bodies of law. The issue is complex, as exemplified by the discussions surrounding the UN Draft Comprehensive Convention on International Terrorism whose IHL saving clause is one of the main stumbling blocks for completing the drafting process of this instrument. The formulation of such a clause will be critical in order to maintain IHL integrity and rationale, but also to avoid ambiguity and misinterpretation detrimental to IHL. From the ICRC's perspective, any political agreement on the UN Draft Comprehensive Convention on International Terrorism should be translated into a legally correct IHL clause and should not be concluded to the detriment of IHL underlying principles. Such a clause should notably exclude from the scope of the UN Draft Comprehensive Convention on International Terrorism lawful acts of war carried out by parties to armed conflicts.

In the next sub-chapters, I will analyse the exclusion clauses in the UN Conventions against terrorism to determine whether and in which situations can each of the conventions be applied to scenarios of armed conflicts. I will divide the analysis on the sectorial conventions according to the typology of acts they seek to criminalise as well as the wording of the exclusion clauses: aviation security, maritime security and terrorist bombings; the taking of hostages; and the financing of terrorism.

5.2.1 Aviation and maritime security

The international conventions on air security of Tokyo (1963),[117] The Hague (1970)[118] and Montreal (1971),[119] as well as the Rome Convention on maritime security (1988),[120]

[116] 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) 30.
[117] Convention on Offences and Certain Other Acts Committed on Board Aircraft (n 59).
[118] Convention for the Suppression of Unlawful Seizure of Aircraft (n 59).
[119] Convention for the suppression of Unlawful Acts Against the Safety of Civil Aviation (n 59).
[120] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (n 60).

do not have any exclusion clause regarding acts of terrorism during armed conflicts. The only relevant provision for our topic establishes that the conventions 'shall not apply to aircraft used in military, customs or police services'.[121] This provision has two impacts. First, to apply any of these conventions in times of armed conflict, there must be a civilian target. Second, no attack against a military target in times of NIAC, which can be considered terrorism under certain circumstances under IHL, comes into the field of application of these conventions.

Recent instruments in the field of aviation security, namely, the Beijing Convention (2010)[122] and the Protocol to the Hague Convention (2010),[123] include an exclusion clause regarding their application to armed conflicts. Article 6(2) of the Beijing Convention establishes that:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

The International Convention for the Suppression of Terrorist Bombings contains in article 19(2), the original exclusion clause, which was subsequently transposed into modern maritime and air security conventions. While the Hostages Convention, as we shall see below, makes express references to the Geneva Conventions and their Protocols, the Convention against terrorist bombings refers generally to IHL, which includes both conventional and customary rules. Leaving aside conventions against the use of certain explosive materials, we already know that attacks against civil populations are specifically prohibited in the IHL regime, both in IAC and NIAC.

Although the wording is the same as in the maritime and air security conventions, the logic and consequences of this provision in the Convention against terrorist bombings are quite different. The maritime and air security conventions include in their field of application only attacks against civilian targets. This means that acts against military forces, both in IAC and NIAC, are completely outside of the field of application of these instruments.

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[121] arts 1(4), 3(2), 4(1) and 2(2) of these conventions, respectively.
[122] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (n 59).
[123] Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (n 59).

The Convention against terrorist bombings, on the contrary, does not distinguish between attacks against civilian and military targets when requiring State parties to criminalise such acts. Considering that bombs are common weapons in any armed conflict, at first sight it would be impossible to conciliate the IHL regime with the obligation to criminalise such acts. However, a more thoughtful approach to its wording can lead us to a different conclusion.

If an explosive device is used against civilians or other internationally protected persons with the intention of spreading terror among the civilian population, such act undoubtedly fulfils the requirements to be considered an 'act of terror' under both IHL and the UN Convention. And, as I have mentioned above, IHL does not govern cooperation in criminal matters against acts of terror either in IAC or NIAC because they are not included in the list of 'serious breaches' of the Geneva instruments. Under these conditions, therefore, the Terrorist Bombings Convention could serve as a legal basis to cooperate against acts of terrorism involving explosive devices in the context of armed conflicts. In the same line, the Beijing Convention and its Protocol can be applied to situations of armed conflict, considering that the target of the terrorist attack is a civilian aircraft.

5.2.2 Hostages

The Hostages Convention establishes that[124]

> [i]n so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions *are applicable to a particular act* of hostage-taking, and in so far as States Parties to this Convention *are bound under those conventions to prosecute or hand over* the hostage-taker, the present *Convention shall not apply* to an act of hostage-taking committed *in the course of armed conflicts* as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[124] Hostages Convention (n 65) art 12.

The preparatory works[125] of this instrument highlight the legal and political complexity in applying criminal justice measures to situations of armed conflict, especially because of the debate about the legitimacy of national liberation movements.[126] However, the length of this provision should not lead to confusion. The provision opens a wide range of possibilities to apply the Hostages Convention to acts committed by terrorist groups during armed conflicts.

How can we interpret, for the purpose of this study, the wording of article 12 of the Hostages Convention? First, there are two conditions that must be fulfilled to apply this exclusion clause: the Geneva Conventions or their Protocols are applicable to the specific acts of hostage-taking (i), and these instruments bound the State parties involved to prosecute or hand-over the hostage-taker (ii). However, as Lambert correctly points out,[127]

> The reference to the instruments being "applicable" to the particular act is in fact superfluous since they could hardly require the Parties to extradite or prosecute that offender if they were not "applicable" to that act. Thus, upon closer scrutiny it may be discerned that only one condition must exist in order to make this Convention inapplicable to a particular act of hostage-taking: the Geneva instruments must impose the obligation *aut dedere aut judicare* with respect to that act.

Therefore, if the Conventions and Protocols are not applicable, States cannot be required to comply with the obligation to extradite or prosecute, at least under the IHL regime. The opposite situation, however, is quite possible: the Geneva instruments would be applicable, but they do not impose an *aut dedere aut judicare* obligation for the specific act of hostage-taking. We have already pointed out that the IHL regime of cooperation for criminal matters is not applicable in relation to acts of terror as such committed during IAC. In the case of NIAC there is not any kind of obligation to extradite or prosecute suspects of acts of terrorism, including hostage-taking. Neither common article 3 to the Geneva Conventions nor Additional Protocol II contain provisions regarding cooperation

[125] VCLT (n 83) art 32.
[126] For a comprehensive study of the preparatory works and historical context see, among others, Wil D Verwey, 'The International Hostages Convention and National Liberation Movements', (1981) 75 *American Journal of International Law* 69; Bernhard Blumenau, *The United Nations and Terrorism: Germany, Multilateralism, and Antiterrorism Efforts in the 1970s* (Palgrave Macmillan 2014) 164; Ben Saul 'International Convention Against the Taking of Hostages'; Note for the United Nations Audiovisual Library of International Law, Historical Archives, 2014, http://legal.un.org/avl/pdf/ha/icath/icath_e.pdf
[127] Joseph J Lambert, *Terrorism and Hostages in International Law* (Grotious Publications 1990) 274.

in criminal matters. Despite of the confusing wording, I consider that the ordinary meaning [128] of article 12 should lead to the application of the Hostages Convention.

The object and purpose of the treaty[129] can also support this statement. It seems that the aim of article 12 is to exclude its applicability to conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. Considering that the object and purpose of an individual provision can reflect the general purpose of the treaty,[130] we could say that one of the purposes of the Hostages Convention is to facilitate criminal cooperation against acts of hostage-taking in armed conflicts while respecting the right of self-determination.

One could argue, however, that article 13 of the Hostages Convention would exclude its application to internal conflicts: 'This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offenders are nationals of that State and the alleged offender is found in the territory of that State'.

Because it is fundamentally based on the principle of territoriality, the exclusion of article 13 is not difficult to overcome. The Hostages Convention would be applicable, for example, in cases in which the alleged offender is found in a State other than the State in which the criminal act took place or when either the victim or the alleged offender is not a national of the State in which the crimes were committed. In this sense, I believe that the Hostages Convention can be a useful tool against acts of hostage-taking committed by foreign terrorist fighters. Such fighters are, by definition, nationals who travel or attempt to travel to a State other than their State of residence or nationality for the purpose of perpetrating terrorist acts[131]. In such circumstances, the Hostages Convention opens the possibility of extradition, prosecution and mutual legal assistance[132].

5.2.3 Terrorist financing

[128] VCLT (n 83) art 31.
[129] ibid.
[130] Orakhelashvili (n 99) 353.
[131] The legal definition of 'foreign terrorist fighters' was analysed in the section related to the UN Security Council above.
[132] See, for example, the case of the British foreign fighters (known as 'The Beatles') who allegedly kidnaped and killed several American journalists. The US established its jurisdiction based on the nationality of the victims in a procedure that can lead to capital punishment. The UK has been criticised for not opposing the use of the death penalty if the two alleged Daesh members were extradited to the US.
'Islamic State 'Beatles' duo: UK 'will not block death penalty' *BBC* (23 July 2018) www.bbc.com/news/uk-44921910.

The Convention for the Suppression of the financing of terrorism does not have a specific clause excluding its application to situations of armed conflict. Hence, following the same line of reasoning as in the air and maritime security conventions from the 1970s and the 1980s, it should not be difficult to conclude that this convention is applicable to armed conflicts. However, two articles of this impede this intuitive solution.

First, article 2 establishes the field of application over the offence of providing or collecting funds with the intention that they be used or in the knowledge that they are to be used, in full or in part, to carry out terrorist acts. For the concept of 'terrorist act', the second section of article 2 is divided into two parts:[133]

> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other *person not taking an active part in the hostilities in a situation of armed conflict*, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Therefore, the drafters of this clause followed a method similar to the third methodological option for defining terrorism that was proposed by Bassiouni some years prior to the conference: 'a mixed formula which combines a general (generic) statement and some illustrative applications phrased with specificity of content as to the proscribed conduct'.[134] It is possible to draw some conclusions from the wording of this provision.

First, the Financing Convention criminalises the financing of any act included in previous anti-terrorism conventions, from the air and maritime security conventions to the Hostages Convention and the Bombings Convention. Whether the financing of one of the enlisted acts committed during armed conflicts comes into the field of application of the Financing Convention will depend on the specific relationship with IHL, previously studied, of the applicable instrument.

Second, financing of any other acts against armed forces in the context of an armed conflict, with the purpose of intimidating a population or compelling a government or an

[133] Emphasis added.

[134] Mahmoud Cherif Bassiouni, 'Methodological Options for International Legal Control of Terrorism', (1974) 7 *Akron Law Review* 388. For different analysis of the definition of 'terrorist act' In the Hostages Convention see, among others, Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 121; Mark A Drumbl, 'Transnational Terrorist Financing: Criminal and Civil Perspectives' (2008) 9 *German Law Journal* 933.

international organisation to do or to abstain from doing any act (*dolus specialis*), is not included in the field of application of this instrument. Regardless of whether the means and methods employed can be considered terrorist acts under IHL or regardless of the status of the aggressor. In contrast, article 2.1(b) clarifies that the financing of any terrorist act against civilians comes within the field of application of this convention, as do attacks against persons not taking an active part in the hostilities in a situation of armed conflict.

The wording of article 21 of the Financing Convention also affects our research object: 'nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions'. For some authors, the effect of this provision is that 'the conduct, which is considered lawful under IHL, cannot be prohibited under *ICSFT* [International Convention for the Suppression of Terrorist Financing]'.[135]

Are the acts listed by the Financing Convention considered lawful under IHL? It has already been noted that IHL prohibits acts of terrorism. Considering the fact that certain acts of terror are unlawful (or, at least, not lawful) under IHL, we should accept the application of the Financing Convention the financing of such acts. For Akande, the purpose of article 21 of the Financing Contention is precisely to 'ensure that the act is nevertheless not prohibited by the Convention where it is consistent with IHL'.[136] I completely support this statement, and it is the reason why I have used what I consider a compatible approach regarding the objective and subjective elements of 'acts of terror' in both IHL and the UN Conventions.The application of the Financing Convention would not only respect the content of IHL, but, in words of Trapp, 'it would be its jurisdictional champion – upholding prohibitions under IHL'.[137]

6. CONCLUSION

The participation of foreign fighters on the side of terrorist groups during armed conflicts has raised many questions about the legal basis for the criminal prosecution of acts of terror during armed conflicts. In cases regarding the commission of terrorist crimes

[135] Iryna Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)' (2017) 18 *Melbourne Journal of International Law* 436, 452.
[136] ibid.
[137] Kimberley Trapp, 'Ukraine v Russia (Provisional Measures): State 'Terrorism' and IHL', *EJIL: Talk!*, 2 May 2017, http://www.ejiltalk.org/ukraine-v-russia-provisional-measures-state-terrorism-and-ihl/.

with transnational elements, such as the foreign nationality of the alleged perpetrator, cooperation with other states in matters such as extradition or mutual legal assistance can be crucial.

When the terrorist attack takes place during an armed conflict, the task of finding legal bases for cooperation becomes particularly complex. Many of the domestic criminal laws of countries involved in armed conflicts relies on the international instruments ratified by the State, including the Geneva instruments. However, IHL has a limited set of rules regarding cooperation in criminal matters in scenarios of IAC, which is not applicable to 'acts of terror' as such, and there are no rules of criminal cooperation in the field of NIAC.

IHL has been seen by many as the only framework applicable to acts committed during armed conflict. In contrast, the position adopted in this paper is that IHL does not exclude the simultaneous application of other legal regimes when it does not lead to the criminalization of acts not prohibited by IHL. Some provisions of the Geneva instruments expressly recognise the applicability of obligations of mutual assistance in criminal matters arising from any other bilateral or multilateral treaty. We should also remember that IHL does not authorise the commission of acts of terrorism; in fact, the opposite is true.

When the UNSC says the 'preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training, including in connection with armed conflicts', the main purpose is to avoid impunity by filling existing gaps in the fight against terrorism with transnational elements, such as in the case of foreign terrorist fighters. In the context of NIAC, it is not inconsistent with IHL to criminalise terrorist acts committed by non-state groups, nor is the use of sectorial conventions to cooperate in the prosecution of those crimes inconsistent. In the context of IAC, this parallel application will be limited by the conditions explained in the sections regarding air security, maritime security, terrorist bombings, the financing of terrorism and hostage-taking.

The UN framework of sectorial conventions against terrorism can compensate for the lack of provisions on cooperation in criminal matters in IHL. Although some of these conventions have clauses that reduce their applicability to armed conflicts, those limits are not absolute: most of the air and maritime security conventions can be applied to acts committed by foreign terrorist fighters in situations of armed conflict, as can the Hostages Convention, the Bombings Convention and the Financing Convention under the conditions analysed in this paper. In addition, all UN Conventions may be used, in the absence of an extradition treaty between the contracting states, as a legal basis for the

extradition of suspects of terrorism during armed conflicts, an extradition which will subsequently follow the procedural provisions and other conditions of the law of the requested state.

In summary, the simultaneous application of different legal regimes should not be excluded without further reflection. The interaction between IHL and counter-terrorism law proposed by this paper explains why several UNSC Resolutions have included acts committed during armed conflict as potential terrorist acts. For those states that truly intend to strengthen criminal cooperation against foreign terrorist fighters and against any other act of terrorism committed during an armed conflict, this interpretation also reduces the number of problems associated with the lack of a legal basis for cooperation in criminal matters.