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Counterterrorism, International Humanitarian Law, and Non-International Armed Conflict

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Agnieszka Szafranowska

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List of Abbreviations

AP	Additional Protocols to the Geneva Conventions
CA3	Common Article 3 of the Geneva Conventions
CCT	Comprehensive Convention Against International Terrorism
CTC	Counter Terrorism Committee
FARC	Revolutionary Armed Forces of Colombia
GC	Geneva Conventions
GWOT	Global War on Terror
IAC	International Armed Conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ISIS	Islamic State of Iraq and Levant (ISIL, IS, and various names)
LTTE	Liberation Tigers of Tamil Eelam
MSF	Médécins Sans Frontières
NAM	Non-Aligned Movement
NIAC	Non-International Armed Conflict
NSAG	Non-State Armed Groups
OAS	Organisation of American States
OUA	Organisation of African Union
OIC	Organisation of Islamic Cooperation
PKK	Kurdistan Worker's Party
POW	Prisoner of War
SC	Security Council
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions

Counterterrorism, International Humanitarian Law and Non-International Armed Conflict

I. Introduction

Terrorism's long history shows how easily the term falls prey to political manipulation 'one man's terrorist is another man's freedom fighter,'¹ and the one who holds the power determines the narrative. Yet it is impossible to write a critical paper about counterterrorism without referring to terrorism a multitude of times, different definitions that can be envisaged based on previous assumptions, perhaps we are speaking of the plurality of 'terrorisms'.² Thus, it may be useful to keep the following in mind:

Terrorism can be understood at a basic level as the public use of violence to inspire terror [...] The profusion of more narrow definitions that have emerged in the twentieth and the twenty first centuries reflect a need to create legal and moral categories that delegitimise particular uses of terror in order to justify action against them. These definitions of terrorism are fluid and unstable. They depend on who is formulating them, what their interests are, and whom they are talking about.³

It is important to note that despite of the ubiquitous use of the term terrorism, it can be argued that it has 'no legal significance'⁴ in the absence of a single internationally agreed definition.⁵ As will be established, terrorism is a political construction that is unable to find its place in law, perhaps for very good reasons. Putting in question the term of terrorism does not condone acts and/or violence, which cause fear through intention or actions. Such acts are unacceptable in peace and in war.

The terrorist label, however, as the construction of the exceptional 'other,'⁶ that then is claimed to fall out of existing legal regimes, can be politically expedient and counterproductive, especially in war, as it further polarises the conflict and makes reconciliation more difficult.⁷ In spite of this, the international

¹ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2009) 18.

² As quoted in Ben Saul, 'Definition of Terrorism in the UN Security Council: 1985-2004' (2005) 4 CHINESE J INT'L L 161.

³ The definition offered by Brown includes 'inspire terror in order to influence the actions of third parties.' However, the latter can be also contentious so it was omitted to keep it to the core element. Warren C. Brown 'The Pre-History of Terrorism' in Erica Chenoweth, Richard English, Andreas Gofas and Stathis N. Kalyvas (eds) *The Oxford Handbook of Terrorism* (Oxford 2019) 87.

⁴ Rosalyn Higgins as quoted in Andrea Bianchi 'Counterterrorism and International Law' in Erica Chenoweth, Richard English, Andreas Gofas and Stathis N. Kalyvas (eds) *The Oxford Handbook of Terrorism* (Oxford 2019) 661.

⁵ Michael J. Boyle 'Introduction' in Michael J. Boyle (ed) *Non-Western Responses to terrorism* (Manchester University Press 2019) 3.

⁶ Nicole Detraz, *International Security and Gender* (Polity Press 2012) 114.

⁷ Detraz (n6) 100.

community, through conventions and more recently through the United Nations (UN) Security Council (SC) Resolutions (UNSCR) acting under Chapter VII, push States to respond, to what some see as an exceptional phenomenon,⁸ with criminalisation of terrorism through domestic legislation. From the international perspective, this drive for domestic counterterrorist laws is deemed necessary to increase cooperation among States, deny safe havens and confront the transnational terrorist threat.⁹ On the domestic level, these laws have been criticised from a human rights perspective for suppressing dissent and prioritising security over, for example, the right to privacy or due process and for challenging *jus cogens* principles such as torture.¹⁰ Although, the counterterrorist laws are intended to suppress transnational terrorist acts committed during times of peace, they usually apply to domestic acts of violence which are increasingly labelled terrorism. Gradually, one can observe the blurring of the lines between peace and war, politically if not yet legally. For example, in 2015 the Canadian Prime Minister, 'conflated war and crime when he defended a counter-terrorism bill ... on the basis that 'violent Jihadism is not a human right, it is an act of war...' [which] is politically popular, but it ignores...[that] [e]ven in war, there are laws.'¹¹ Beyond politics, the domestic legislation could take form of sanctioning a military response to counter terrorism. For example, the US Authorization to Use Military Force (AUMF) approves targeted killings outside of conflict, and maintains that it is consistent with the laws of war.¹² For instance, the UK did not classify the ongoing violence from the Irish Republican Army (IRA) during the 1970s and 1980s, however it did enact emergency legislation, which some have said had been enacted to 'circumvent the Geneva Conventions and other bodies of humanitarian law regulating conduct in war.'¹³ There may have been multiple reasons why the UK did not wish to declare it an armed conflict, one could be to not legitimise the IRA, and by instead labelling them 'terrorists' it could justify

⁸ Carla Ferstman, 'Human Security and Extraordinary Rendition' in Alice Edward and Carla Ferstman (eds) *Human Security and Non-Citizens* (Cambridge University Press 2010) 535.

⁹ The Special Tribunal for Lebanon explained transnational terrorist threat as: 'connection of perpetrators, victims, or means used across two or more countries, but it may also be significant impact that a terrorist act in one country has on another – in other words, when it is foreseeable that a terrorist attack that is planned and executed in one country will threaten international peace and security, at least for neighbouring countries.'

Special Tribunal for Lebanon, 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,' (16 February 2011) STL-11-01/1 para 90. [From herein STL Interlocutory Decision]

¹⁰ The most poignant example of this has been extraordinary rendition and the use of detention and treatment of detainees in Guantanamo Bay in the Global War on Terror. For example, see Duffy (n1)

¹¹ Kent Roach 'Thematic Conclusions and Future Challenges' in Kent Roach ed. *Comparative Counterterrorism Law* (Cambridge University 2015) 740.

¹² Roach (*ibid*) 738.

¹³ Juliana van Hoeven, 'Counter-Terrorism Measures and International Humanitarian Law: A Case Study of the Troubles in Northern Ireland' (2016) 37 U PA J INT'L L 1109.

its own domestic law to protect national security with special powers and courts ultimately leading to many allegations of human rights abuses.¹⁴ Outside of conflict, law enforcement and International Human Rights Law (IHRL) should apply unless it is replaced by another mechanism, which should be consistent with international law.¹⁵ The laws of war, as codified in the Geneva Conventions (GC) and their Additional Protocols (AP), known as International Humanitarian Law (IHL) were developed to provide rules on the conduct of hostilities balancing military necessity while safeguarding the minimum of humanity, even to one's enemy, even if considered a 'terrorist.'

Much has been written about distinguishing the terrorist framework from IHL, first clarifying the law of *jus ad bellum* particularly refuting the concept of the Global War on Terror.¹⁶ Then in reasserting that IHL is different to terrorism and sufficient to regulate *jus in bello* in so far as it prohibits and criminalises acts of terrorism.¹⁷ Less has been written about how States use domestic counterterrorist legislation in civil wars, otherwise known as Non-international Armed Conflicts (NIAC). One of the reasons for this may be the challenge in surrounding the classification of NIACs. Another may be that IHL in NIAC recognised the primacy of State sovereignty and provides a role for domestic legislation to criminalise armed opposition groups, which has resulted in asymmetrical rules. Given the increased internationalisation of NIACs and the proliferation of counterterrorist legislation this should be re-examined.

The aim of this paper is to understand how this internationally undefined terrorist label, albeit with a counterterrorist framework that inspired the proliferation of domestic counterterrorist laws, intersects with IHL and then understand the effect of this relationship on NIAC. As such, the first part will chart the main evolution of the international response to terrorism through an overview of conventions,

¹⁴ Ibid.

¹⁵ Françoise Hampson, F 'The conduct of hostilities versus the law enforcement paradigm' in ICRC-COE Terrorism, Counter-Terrorism and International Humanitarian Law 17th Bruges Colloquium 20-21 October 2016, 47.7 (Collegium, Autumn 2017) Available <www.coe-icrc.eu> accessed 20 August 2019, 85. Derogations of certain rights in times of emergencies may be permitted, however this should be specific, declared and limited to the necessity of the limitation and states cannot derogate from *jus cogens* rights (ex. freedom from torture) Daragh Murray *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press, 2016) page 59

¹⁶ See for example, Helen Duffy *The War on Terror* (n1)

¹⁷ See for example, Jelena Pejic 'Armed Conflict and Terrorism: There is a (Big) Difference' in Ana-Maria Salinas de Frias, Katja L.H. Samuel and Nigel D. White (eds.) *Counter-terrorism: international law and practice* (Oxford University Press 2012)

resolutions and the accompanied difficulties in coming to consensus on defining terrorism. The second part will look at how terrorism is understood in IHL, particularly in NIAC. The third part will examine, through a number of examples, how this counterterrorist framework and the domestic legislations interacts with IHL, and understand whether it undermines and/or impedes its application in NIAC.

II. The International Responses to Terrorism: Conventions, Resolutions and Domestic Counterterrorist Law

It is first useful to look at the historical evolution of the international community's attempts at defining terrorism, and its response to terrorist actions through various mechanisms. Debates continue on whether there is a universally agreed definition; meanwhile, sectoral conventions, UN Security Council Resolutions (UNSCR) issued under Chapter VII, and the subsequent domestic counterterrorist legislation could be interpreted as forming a counterterrorist normative framework, which is contested by some for not adding anything beyond the existing domestic and international law mechanisms.¹⁸ In spite of the criticism it is clear that States continue to insist on terrorism in 'their statements and increasingly in international instruments.'¹⁹ As such, it is impossible to deny that there is a normative framework, but, it needs to be stressed that it is not a 'unified field of international law, but comprises of disparate norms emanating from multiple sources,' and as a minimum it aims to 'establish extensive jurisdiction over the offences, and investigate, apprehend and 'prosecute or extradite offenders."²⁰

The following will give an overview of the international community's historical evolution and main developments, and underline points of contention, and analyse its relationship with IHL with the aim to determine whether this framework clashes with existing international law or exacerbates some of the ongoing debates, before proceeding to identifying and analysing its effects in and on NIAC.

¹⁸ Bianchi (n 4) 660.

¹⁹ Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, (Elgar 2019) para 10.22.

²⁰ Ben Saul 'Terrorism, Counter-Terrorism and International Humanitarian Law' (2016) Sydney Law School Legal Studies Research Paper No. 16/37 Available at <<http://ssrn.com/abstract=2778893>> Last accessed 20 August 2019, 8.

A. Evolution of the International Response to Terrorism

One of the earliest attempts at creating an international treaty against terrorism dates back to 1937. Following the assassination of the Yugoslavian king and French Foreign Minister, the League of Nations proposed a *Convention on the Prevention and Punishment of Terrorism*, which would not be adopted as States could not agree on terrorism ‘as a means to a political end.’²¹ Between 1936 and 1981 there were 109 different proposed definitions.²² In spite, of a continuous push for an international instrument to criminalise terrorism, there would be an equally consistent resistance. After the Second World War, there was concern, especially from the Non-Aligned Movement (NAM) of developing States (this would later be taken up by the Organisation of Islamic States (OIC)), that defining terrorism as a political crime would criminalise and/or suppress struggles of self-determination opposing colonialism, and insistence to include State terrorism in the definition.²³ Unable to move forward with a definition for a comprehensive convention, the international community started to criminalise acts, such as hostage taking and hijacking of planes, through sectoral conventions.

Overall, since 1963 to date, 19 Conventions including their Protocols were adopted.²⁴ These treaties ensured each country could establish jurisdiction over grave transnational acts, and normally excluded acts of violence committed domestically.²⁵ Progressively they include clauses to either prosecute or

²¹ Ben Saul ‘Defining Terrorism’ in Erica Chenoweth, Richard English, Andreas Gofas and Stathis N. Kalyvas (eds.) *The Oxford Handbook of Terrorism* (Oxford 2019) 36.

²² Duffy (n1) 18.

²³ Duffy (n1) 19. For a chronology of events, different struggles and terrorist acts See Ben Saul and Naomi Hart ‘Chronology of Events’ Ben Saul (ed.) *Documents in International Law* (Hart Publishing 2012).

²⁴ Convention on Offences and Certain other Acts Committed on Board Aircraft 1963; Convention for the Suppression of Unlawful Seizure of Aircraft 1971; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973; International Convention against the Taking of Hostages 1979; Convention on the Physical Protection of Nuclear Material 1980; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991; International Convention for the Suppression of Terrorist Bombings 1997; International Convention for the Suppression of the Financing of Terrorism 1999; Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf 2005; Protocol to Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft 2010; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010; Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft 2014

²⁵ Saul ‘Saul ‘Terrorism, Counter-Terrorism ...’ (n 20) 9.

extradite the perpetrator eliminating the political exception, which would prevent extradition if the crime was proven to be political.²⁶ Only six include exclusion clauses, which makes the specific acts inapplicable during armed conflict, due to the application of IHL.²⁷ Three explicitly mention terrorism,²⁸ and only the *1999 Convention for the Suppression of Financing of Terrorism* is heralded for stipulating what it means by terrorism,²⁹ and since it has been widely ratified,³⁰ its definition has become a point of reference. Saul goes as far as claiming that its consistent provisions, supported with subsequent UNSCR and State practice, could be interpreted as an ‘international anti-terrorism law’ coming from different sources but ‘sufficiently universal and rule like so as to establish genuinely new customary international law rules.’³¹ Although it does not exclude itself from application in conflict, some of its language blurs the language between peace with conflict when it refers to ‘any other person not taking an active part in hostilities’.³² As will be shown later this law has had some, perhaps unintended consequences, specifically on humanitarian action.

In contrast, efforts to design a Comprehensive Convention Against International Terrorism (CCT) that started in 2000 have so far been unsuccessful. The intention is not to exhaustively analyse the different proposals and the intricacies of the language surrounding the negotiations, as this has been covered elsewhere.³³ It is, however useful to note that the three ongoing points of contention can be summarised

²⁶ Saul ‘Defining Terrorism’ (n 21) 39. Extradition law traditionally allowed for an exception to be argued for a political offence, however, this has been removed in certain treaties. Duffy (n 1) 24.

²⁷ Van Poecke, T. ‘The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences’ (EJIL Talk, 20 March 2019) Available from: <<https://www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/>> accessed 28 August 2019.

²⁸ Namely, the 1997 International Convention for the Suppression of Terrorist Bombing; 1999 International Convention for the Suppression of the Financing of Terrorism and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

²⁹ Article 2 first refers to crimes stipulated in the preceding conventions and then expands to the following:

‘2 (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.’ International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999; entered into force 10 April 2002) No. 38349 [From herein 1999 Terrorist Financing Convention]

³⁰ Refer to UN Treaty Collection, available <<https://treaties.un.org/>>

³¹ Ben Saul ‘The Emerging International Law of Terrorism’ in Ben Saul (ed.) *Documents in International Law* (Hart Publishing 2012) Lxxvii.

³² Daniel O’Donnel ‘International treaties against terrorism and the use of terrorism during armed conflict and by armed forces’ (December 2006) 88.864 IRRC 869.

³³ For example, see, Mahmoud Hamoud ‘Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention’ (2006) 4 Journal of International Criminal Justice

as the fear of political abuse of a definition of terrorism, its scope of application, and relationship to the other Conventions.³⁴ The first two relate to whether struggles of liberation would be excluded from the definition of terrorism, and thereby perceived as ‘legitimate’ causes that oppose the State either in armed conflict or occupation. For this reason, the NAM/OIC advocated for a definition to include State terrorism.³⁵ And as such the other outstanding question related to excluding the convention from these situations and if then it would exclude armed forces and if this interpretation would include non-state armed groups.³⁶ One interesting observation likens these debates to the

historic and seemingly everlasting divide over who has the right to use force without being described as a terrorist...The dominant military power approach versus the ‘patriotic’ power approach appeared once again as it had during the negotiations of the 1907 Hague Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions.³⁷

The outstanding questions centre around the legitimacy, or rather the right to use force, with Western States arguing that violence could only be used by the State and rendering everything outside of this as terrorist. This viewpoint denies that conflict is inevitable, an underlying assumption of IHL which aims to apply the rules of war equally without entering into questions of legitimacy. For this reason, counterterrorist laws should include specific exclusion clauses to distinguish situations of conflict and/or occupation regulated by IHL from counterterrorist laws which aim to outlaw any violence not used by the government.³⁸

In the absence of a Comprehensive Convention, there are 25 regional conventions and their protocols.³⁹ Some have produced ‘generic definitions’, which have not added much to the definition of terrorist, while, others, such as the Organisation of American States (OAS) referred to existing conventions which list specific acts of terrorism.⁴⁰ It could be argued that together with the sectoral conventions they contribute to a normative framework, in which terrorism is criminalised, yet the absence of a

³⁴ Ibid 1031.

³⁵ UNGA, ‘Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly’ (12 August 2005) UN Doc A/59/894

³⁶ Ibid.

³⁷ Hamoud (n 33) 1033.

³⁸ Pejic ‘Big Difference’ (n 17) 191.

³⁹ For reference: UN, *International Instruments Related to the Prevention and Suppression of International Terrorism* (UN NY, 2019)

⁴⁰ Duffy (n1) 27.

comprehensive definition puts into question what is meant by terrorism. In spite of the seriousness that the international community ascribes to terrorism, it is worth noting that the Rome Conference leading to the establishment of the International Criminal Court (ICC) was unable to define terrorism and therefore could not include it as crime in its statute due to the different positions and subsequent fears that any adaptation would politicise the ICC.⁴¹ It is interesting to note that even guidance for States, such as, the Commonwealth Secretariat Model Law notes the absence of consensus and gives two options in how to define terrorist act and advises, but does not instruct, that '[c]ountries may also wish to include specific exclusion clauses such as those relating self-determination or national liberation movements.'⁴² States were pushed by the UN Security Council to react to the threat of terrorism on peace and security by enacting domestic laws, however, the push lacked a consistent and uniform approach which may have created a common understanding and approach. Unfortunately, as the different mechanisms have shown there are differing approaches, which underlines the difficult of speaking of one 'terrorism.'

B. UNSC Resolutions and Proliferation of Domestic Counterterrorist legislation

Nevertheless, while the debates over terrorism's definition continued, the international community when confronted with sensational transnational bombing by groups such as Al Qaeda,⁴³ through the UN Security Council Resolutions took a proactive approach and branded terrorism as 'threat of peace and security' and under Chapter VII mandate passed resolutions obligating member States to 'prevent, suppress and punish terrorism'.⁴⁴

As such, two main approaches in countering terrorism ensued; UNSCR 1267 (1999) established the sanctions regime against the Taliban for ' harbouring and training terrorist in the territory of Afghanistan as well as their refusal to surrender Osama Bin Laden.'⁴⁵ Following September 11, 2001 (from herein

⁴¹ Ben Saul 'Defining Terrorism' (n 21) 38.

⁴² Commonwealth Secretariat 'Model Legislative Provisions on Measures to Combat Terrorism' (September 2002) available

<https://www.unodc.org/pdf/crime/terrorism/commonwealth_model_english.pdf> accessed 20 August 2019. 4-5.

⁴³ First, the 1998 bombing of the US embassy in Nairobi, Kenya and Dar es Salam, Tanzania, which resulted in UNSCR 1267 and then the attack on the US twin towers in September 11, 2001, after which UNSCR 1373 was issued. UNSC, Resolution 1267 (15 October 1999) UN Doc S/Res/1267

⁴⁴ The Security council acting under Chapter VII in its functions to restore peace and security can pass resolutions that all UN member States are obligated to implement. Bianchi (n 4) 667.

⁴⁵ UNSC, Resolution 1267 (15 October 1999) UN Doc S/Res/1267

9/11), UNSCR 1373, reaffirmed the approach of classifying terrorism as a ‘threat to international peace and security,’ and under Chapter VII, instructed States to become party to relevant conventions and strengthen their laws to counter terrorism. It had a strong focus on stopping the ‘financing, supporting and promoting terrorism.’ The Counter Terrorism Committee (CTC) was to oversee the implementation of UNSCR 1373,⁴⁶ and provide technical support.⁴⁷ Yet, both resolutions, and subsequent ones, lacked a definition of terrorism and referred to the previous sectoral conventions, most of which do not define terrorism. After much criticism, UNSCR 1566 (2004), also acting under Chapter VII, provided what could be understood as the UNSC political working definition:

Recalls that criminal acts, including against civilians, 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, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature...⁴⁸

However, it does not obligate States to adopt it as such.⁴⁹ It can be argued that it does not add anything beyond what was already existing.⁵⁰ Normally the aforementioned acts are either punishable by criminal law, or even by IHL considering it has identified civilians as a specific category begetting the question, from an IHL perspective, as opposed to armed forces. So, aside from proscribing States to enact laws, the Security Council has not offered an undisputed meaning of terrorism at an international level.⁵¹ Moreover, UNSC Resolutions emphasised that domestic counterterrorist legislation must be in line with international law, yet there is no ‘general rule of international law specifying the relationship’ between the two and even *lex specialis* could not be useful as each norm could be seen as ‘best adapted to the overlapping, exceptional violence that they address.⁵² The exclusion clause is an instructive tool to

⁴⁶ UNSC, Resolution 1373 (28 September 2001) UN Doc S/Res/1373

⁴⁷ Duffy (n1) 31.

⁴⁸ UNSC, Resolution 1566 (08 October 2004) UN Doc S/Res/1566 para 3.

⁴⁹ Saul ‘The Emerging International Law of Terrorism’ Lxxiii.

⁵⁰ Ibid. Lxxv.

⁵¹ Ibid. Lxxvi.

⁵² Saul ‘Terrorism, Counter-Terrorism...’ (n 20) 8 – 9.

guide courts to which law is at play at any given time since there is nothing else that stipulates this. In its absence transnational terrorist acts could be crimes under both IHL and counterterrorist legislation.⁵³ Debates about whether or not to include an exclusion clause are more about ‘political struggle over labelling and the stigmatisation and delegitimization it brings.’⁵⁴ For this reason, the exclusion clause is imperative to ensure the distinction between the two regimes and encourages compliance and ‘the effectiveness of IHL and its humanitarian purpose’⁵⁵

The listing and sanctions regime started with UNSCR 1267, which ordered travel bans, arms embargo and freezing of assets of the Taliban, a NSAG in Afghanistan that was accused of harbouring the terrorist Al Qaeda,⁵⁶ and established a sanctions committee to monitor its implementation by States.⁵⁷ Subsequent resolutions would continue in a similar manner and the more recent, UNSCR 2249 (2015), expanded the committee’s remit to oversee the listing and delisting of the ‘ISIL (Da’esh) and Al-Qaeda Sanctions List.’⁵⁸ In this resolution States were instructed to take ‘all necessary measures’ [a term used for the authorization of the use of force] and to ‘redouble and coordinate their efforts to prevent and suppress terrorist acts committed by ISIS.’⁵⁹ The use of such harsh language conflates war and terrorism, which is not the purpose of this resolution, and given that States are left to their own interpretation is careless. Following the directives of the UNSCR 1373 the sanctions and listing mechanism appears in regional mechanisms such as the EU Council Regulation⁶⁰ and has been translated into domestic legislation. For example, the UK enacted the Terrorist Asset-Freezing Act (2010) and publishes a ‘Proscribed Terrorist Organisation’ list, which in addition to 14 previously proscribed Northern Irish Organisations enumerates 76 international organisations this includes groups

⁵³ Ibid 10.

⁵⁴ Ibid 11.

⁵⁵ Ibid 12.

⁵⁶ The Taliban was instructed to “cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps” UNSCR 1267, (n 45) 2.

⁵⁷ Ibid. (n 45) 3.

⁵⁸ Bianchi (n 4) 668.

⁵⁹ Ibid 664.

⁶⁰ Council of European Union ‘Factsheet: The EU list of persons, groups and entities subject to specific measures to combat terrorism’ (14 January 2015) available at

<<https://www.gov.se/4ad8f7/contentassets/29f8d11a200f413c89cb6ef398562cd6/eu-fact-sheet-on-terrorism.pdf>> accessed 30 August 2019.

such as Boko Haram, Al Shabab and the Kurdistan Worker's Party (PKK).⁶¹ These groups are also recognised as parties to a NIAC.⁶² It is also interesting to note that the UK list is much wider than the EU List which only identifies 21 groups which does not include Boko Haram and Al Shabab.⁶³ It is instructive to compare also to the 'UN Consolidated List,' which includes Al Shabab, but not Boko Haram or the PKK.⁶⁴ Indeed States are complying with the UNSCR, but the discrepancies between the lists underlines different interpretations of what constitutes terrorism and/or a terrorist group. Furthermore, it can reflect political interpretation, alliances and differing security concerns.⁶⁵ In general, the listing process has been criticised for lack of transparency, due process and questioned for its effectiveness.⁶⁶

In the absence of an authoritative international definition of terrorism, the 2011 Special Tribunal Lebanon (STL) attempted to ascertain whether there is an international crime of terrorism. In order to establish its own jurisdiction it based itself on the Arab Convention Against Terrorism, Lebanese domestic law and measured these against UNSC and United Nations General Assembly (UNGA) Resolutions.⁶⁷ It interpreted that terrorism as a customary crime 'exists in peacetime and not in armed conflict.'⁶⁸ Since the aforementioned laws had various interpretations of terrorism, the STL looked for common elements that could satisfy a customary rule.⁶⁹ The STL proceeded to show how this crime has been recognized and interpreted by other courts, which base themselves on the Conventions and

⁶¹ UK Home Office 'Proscribed Terrorist Organisations' (12 April 2019) available <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795457/Proscription_website.pdf> accessed 30 August 2019.

⁶² Anyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva Academy, April 2019) 32. Also, can refer to the Uppsala University Classification project, available <<https://ucdp.uu.se/#/encyclopedia>>

⁶³ Council Decision (CFSP) 2019/25 of 8 January 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084 [2019] OJ L.6.6 [From herein EU Sanctions List]

⁶⁴ UN Security Council Consolidated Sanctions list (01 September 2019) available <<https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xsl=htdocs/resources/xsl/en/consolidated.xsl>> accessed 02 September 2019.

⁶⁵ In 2010, a more thorough comparison was made, which demonstrated there 'is less overlap than one can expect.' Benjamin Freedman 'Officially Blacklisted Extremist/Terrorist (Support) Organizations a Comparison of Lists from six Countries and two International Organisations' (May 2010) 4.2 Perspectives on Terrorism 46.

⁶⁶ Roach (n 11) 752

⁶⁷ STL Interlocutory Decision (n 9) 3.

⁶⁸ Saul 'Terrorism, Counter-Terrorism ...' (n 20)

⁶⁹ 'The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some actions, or to refrain from taking it; iii) when the act involves a transnational element.' STL Interlocutory Decision (n 9) para 85.

the UNSC resolutions, and the behaviour in States in prosecuting perpetrators as well as adapting own laws.⁷⁰ Criticism of this conclusion has pointed out that state practice of domestic counterterrorist legislation showed differences across 160 countries and identified that some of the laws ‘patently violate international human rights law, such as being too vague to satisfy the principle of legality and freedom from retroactive criminal punishment under article 15 of the *International Covenant on Civil and Political Rights*.’⁷¹ As such, the STL contributes to the attempt at criminalising terrorism in international law in times of peace, however, the criticism suggests that it is far from being accepted. As will be shown below, in times of war, acts of terrorism, or ‘international crime of terrorism in times of armed conflict is indeed defined in [IHL].’⁷²

As the above establishes, attempts in defining terrorism have been inconclusive. Sectoral treaties outlawing specific transnational terrorist acts are the groundwork of a normative counterterrorist network by extending jurisdiction to either prosecute or extradite. The UNSC Resolutions have contributed to this, but aside from obligating adoption of domestic counterterrorist legislations, its response has been irresponsible, or perhaps just political, in not offering a concrete definition and guidance in how States should proceed creating an incoherent approach. In spite of the plethora of legislation at international, regional and domestic level, even STL’s attempt to identify a customary norm has due to criticism been inconclusive. Yet this has not impeded the use of the term, which undoubtedly gives emphasis to the severity of a crime, but for this reason can also be easily manipulated politically.

Post 9/11 and particularly following UNSCR 1373, 155 new laws were adopted by 109 States in comparison to 36 laws in 31 States pre-9/11.⁷³ For those that have not had many prosecutions ‘there is a sense that new terrorism laws have been enacted primarily to comply with supra-national

⁷⁰ STL Interlocutory Decision (n 9) para 86-90.

⁷¹ Saul ‘Emerging International Law of Terrorism’ (n 31) Lxxiv.

⁷² 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 Gui’ (2013) 11 Journal of International Criminal Justice 428.

⁷³ Elena Pokalova ‘Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation? Terrorism and Political Violence’ (2015) Terrorism and Political Violence, 478.

demands.⁷⁴ For example, in 2002 Nigeria ‘jumped on board and criminalise terrorism and adopted the OAU [Organisation of African Union] definition word for word’ without an internal debate.⁷⁵

On the whole, domestic counterterrorist legislations are meant to facilitate cooperation, prosecution and extradition of those responsible for transnational terrorist acts, most prominently the financing, supporting and promoting terrorism, and in accordance of international law.⁷⁶ The legislation usually addresses domestic acts, which in the past would have been ‘prosecuted as ordinary crime or offences against public order or state security’.⁷⁷ Although the international framework to counter terrorism was intended to cover the gap of legislation during peace time, what is interesting to note is that these laws have been readily used in countries experiencing internal conflict. For example, a study of 35,000 terrorism related prosecutions found that half of them were in Turkey and China, ‘with Turkey accounting for a third of these convictions and Turkey and China accounting for more than half of them’.⁷⁸ A more detailed study would be required to understand specifically the specific crimes and convictions, but both countries are not known for their open media and information especially when it comes to security matters, however, both have internal resistance movements. Already, the statistics are suggestive. In some cases, States have incorporated terrorist offences in their penal code as opposed to having separate terrorist laws.⁷⁹

It is also possible that States ‘diverse historical and political national contexts’⁸⁰ influence own interpretation and in conceptualising what is terrorism or who is a terrorist.⁸¹ For example, the ‘UK approach can make a terrorist out of nothing’.⁸² This can be politically convenient, however, the implied lack of precision could put in question whether the law satisfies the principle of legality.⁸³ At both an international, and domestic levels, laws need to be ‘sufficiently clear and accessible that individuals are

⁷⁴ Roach (n 11) 686.

⁷⁵ Jennifer Giroux and Michael Nwankpa ‘A vicious cycle: The growth of terrorism and counterterrorism in Nigeria, 1999-2016’ in Michael J. Boyle (ed) *Non-Western Responses to terrorism* (Manchester University Press 2019) 418.

⁷⁶ Duffy (n1) 43.

⁷⁷ Saul ‘Defining Terrorism’ (n 21) 35.

⁷⁸ Roach (n 11) 685.

⁷⁹ Pokalova (n 73) 477.

⁸⁰ Duffy (n1) 30.

⁸¹ Ibid.

⁸² Roach (n 11) 679.

⁸³ Duffy (n1) 30.

able to conform their behaviour to the limits of the law.⁸⁴ For this reason, the sectoral conventions with clear prohibitions of acts were more readily agreed than a vague, yet disputed, and political concept of terrorism. It is also worth interrogating whether these different broad laws would ‘satisfy the requirement of ‘double criminality,’ which often represents a hurdle in terrorism-related extradition case.⁸⁵ Again, this raises questions whether the proliferation of domestic counterterrorist laws have added anything new or have been effective.⁸⁶ The international push for domestic legislation was to facilitate interstate cooperation, and yet in reality the focus on legislating without a unified understanding of what is to be criminalised may have a counterproductive effect.

Whilst during times of peace, in a functioning democracy, this may not seem as an immediate concern due to presumed checks and balances.⁸⁷ In other political systems and during times of war these approaches can have adverse effects. Especially if there is already internal opposition and the counterterrorist laws take form as administrative or military legislation. For example, Russia since the early 1990s faced an internal opposition from Chechnyan separatist movement. It first confronted this opposition with legislation entitled ‘Suppression of Terrorism’ (1998), which ‘in a way Russia bombed Chechnya into Radical Islam.’⁸⁸ When the resurgence of radical Islam came in early 2000, in response Russia changed its approach and made concessions with a ‘Chechenization’ geared towards the re-integration of fighters, accompanied by formal amnesties, and massive reconstruction programmes, which answered some of the underlying grievances of the population.⁸⁹ This also demonstrates an approach to contain the violence, rather a policy of ‘wiping out,’⁹⁰ which is often implied in counterterrorist rhetoric.

⁸⁴ Duffy (n 1) 40.

⁸⁵ Bianchi (n 4) 662.

⁸⁶ Bianchi (n 4) 660.

⁸⁷ Roach (n 11) 672; Perhaps one of the reasons for the division between the democratic states adherence to the use of terrorism is due to the insistence that any challenge to the government has to be done through the democratic process, which may not be available in other political systems and the use of force against the government may seem more legitimate. Mariona Llobet Anglí ‘What does terrorism mean?’ in Aniceto Masferrer and Clive Walker (eds) *Counter-terrorism, Human Rights and the Rule of Law* (Edward Elgar, 2013) 34. This also relates to the concept of legitimacy, and as far back as the 17C, it was accepted that if the sovereign was not protecting the people then it would be legitimate to stand up against him. Noam Zamir *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign* (Edward Elgar Publishing 2017) 15.

⁸⁸ Ekaterina Stepanova ‘Russia’s Response to terrorism in the twenty-first century’ in Michael J. Boyle *Non-Western Responses to terrorism* Manchester (Manchester University Press 2019) 34.

⁸⁹ Ibid.

⁹⁰ Ibid.

Often these military legislations allow special powers or exceptional regimes, which have been criticised for being secretive and not follow due process, and thus prone to abuse.⁹¹ If in fact the situation is one of NIAC, then IHL should apply, however not all countries have enacted exclusion clauses. Some, like Canada clearly excludes both international and non-international armed conflict from the terrorism related offences clearly giving way to IHL application. In contrast, neither Australia or the United Kingdom share this view.⁹² This may indicate that if outside of scope IHL, then any other situation should be compliant with International Human Rights Law (IHRL) and actions should be conducted through police and law enforcement.⁹³

It is interesting to note that in Russia one of its counterterrorist operations was deemed to contravene the right to life because of disproportionate use of force. The European Court of Human Rights (ECHR) did held that Russia did not derogate its obligations during the operations: '[n]o state of emergency or martial law has been declared in Chechnya. No federal law has been enacted to restrict the rights of the population of the area. No derogation under Article 15 of the Convention has been made.⁹⁴ The government referred to its legislation on the Suppression of Terrorism, which was upheld at the highest level and cited praise from the President for the said operation, one of the reasons why he did not allow for proper investigation and prosecution of those involved.⁹⁵ This illustrates the use of domestic legislation in lieu of derogations, or application of IHL, possibly due to the fact that the State was confronted with what it called a terrorist group and for this reason was more easily able to invoke internal powers. Also, it highlights the role of an outside mechanism, in this case, regional able to make a judgement on the application of domestic laws in pursuing terrorism, and it would be interesting to make a survey of all counterterrorist laws to see if they are compatible with international law, or if in the urgency of responding to the terrorist threat they would have similar gaps. Such jurisprudence is necessary to hold State's accountable for their actions, however, it seems to be the exception rather than the rule.

⁹¹ Pokalova (n 73) 492.

⁹² Saul 'Terrorism, Counter-Terrorism ...' (n 20) 13.

⁹³ Hampson (n 15) 85. This has a more protective framework than IHL because use of force is regulated by the proportionality of the threat posed and not in relation to the military objective.

⁹⁴ *Isayeva v. Russia* App no. 57950/00 (ECHR, 24 February 2005) para 133.

⁹⁵ Ibid para 143.

III. Current Counterterrorist Framework in NIAC

The previous section established the international community's challenge in coming to an agreed definition of terrorism and the surrounding debate of whether, or not, it should apply in conflict. These issues have been transposed onto States after the progressive push, through UNSC Resolutions, to criminalise terrorism in domestic legislations. This section will explore first the interplay between IHL and terrorism, and then see how they interact in NIAC.

A. IHL and Terrorism

Since 9/11 and the US Global War on Terror (GWOT), a widely disputed and legally incorrect term, there is a tendency to conflate terrorism and armed conflict.⁹⁶ This as well perpetuates the rendering of the terrorist as the 'other' and 'non-citizen,' and facilitating harsh policies in response to terrorist acts. Although both terrorism and conflict imply the use of violence, there are important differences between the two. Acts of terrorism do not automatically trigger an armed conflict.⁹⁷ If a conflict is determined, even if one of the parties are so called terrorist groups, then it could trigger the application of IHL (the Four Geneva Conventions (GCI-IV) and the two Additional Protocols (API/APII)), which recognises that there may be lawful attacks on appropriate targets so long as there is a military objective and it follows the rules of distinction and proportionality. Furthermore, IHL in its essence recognises the equality of belligerents and advocates for the protection of prisoners, sick and wounded and civilians and ensures provision of humanitarian aid. In contrast, counterterrorism aims to criminalise all violence by non-state actors. As such, if not separated then domestic counterterrorism laws challenge the logic of IHL and can impede its application leading to adverse effects for the victims of conflict.

⁹⁶ Identified as one of the main challenges in 2011. ICRC, 'International Humanitarian Law and the challenges of contemporary armed conflicts' 31st International Conference of the Red Cross and Red Crescent (October 2011) Geneva 31IC/11/5.1.2 page 48.

⁹⁷ It is a factual consideration when an armed conflict is triggered. IAC are wars between States and an armed attack can trigger the application of IHL. NIAC are essentially civil wars, although a much more complicated classification can be determined, and are between a State and a non-state armed group, or can be between two non-state armed groups. They can be internationalised (i.e. outside of the borders of one state) It can be determined based on the level of violence reaching a certain threshold, which has to be beyond an internal disturbance or riot, and a minimum organisation of the armed group usually said that need to follow orders. Noam Zamir *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention* (Edward Elgar Publishing 2017) 57, 61.

Distinction between the two regimes does not mean that there would be impunity for terrorist acts during war. IHL adequately covers the prohibition of acts that cause terror, even during war. First of all, through the basic rules of distinction and proportionality.⁹⁸ Moreover, explicitly Article 33 of GCIV, States that 'all measures of intimidation or of terrorism are prohibited.'⁹⁹ Similarly, API Article 51.2 calls for the distinction of civilians and prohibits 'acts or threats of violence the primary purpose of which is to spread terror.'¹⁰⁰ The same is found in APII under Article 13.2, additionally APII Article 4.2 lists acts, such as taking of hostages, degrading treatment, rape and acts of terrorism which are at all times prohibited.¹⁰¹ These interpretations have been confirmed in International Court for the Former Yugoslavia (ICTY) with the prosecution of Galić, the Commander responsible for the bombing of Sarajevo.¹⁰² The court examined the 'nature, manner, timing and duration of the [bombing] campaign'¹⁰³ in order to establish intent to cause terror and deduced that from the acts no civilian was made to feel safe and so its purpose could be no other than to 'instil in the civilian population a state of extreme fear.'¹⁰⁴ The court confirmed that this crime incurred individual criminal responsibility customarily applied also in NIAC. In a similar manner, the Special Court for Sierra Leone (SCSL) established in a number of cases (Brima et al. (2008), Sesay et al (2009), and Taylor (2012)) that acts such as burning of property, sexual violence and violence, such as amputations and mutilations, were found to have had the intent to spread terror and were successful in their prosecution on this basis.¹⁰⁵ Although, IHL does not define terrorism as such, it does ensure that any terrorist acts are prohibited. In fact, its focus on acts and behaviour can be easier to discern and punish than an intent to cause terror, which presumably would need to form part of a pure crime of terrorism.

⁹⁸ O'Donnell (n 31) 863.

The relevant articles for distinction and proportionality: Article 48 (distinction), Article 51 (protection of civilians from, for example, indiscriminate attacks) and Article 57 (to take all feasible precautions) in the Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2 (adopted 12 Aug. 1949, entered into force 21 October 1950) 75 UNTS 287 [hereinafter GC IV]

⁹⁹ GC IV (*ibid*) Article 33.

¹⁰⁰ Other relevant articles are Art 37.1 which prohibits perfidy and Art 75.2 which prohibits the taking of hostages. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 [hereinafter API]

¹⁰¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609 [hereinafter APII]

¹⁰² Bianchi (n 4) 666.

¹⁰³ Saul 'Terrorism, Counter-Terrorism ...' (n 20) 4.

¹⁰⁴ *Ibid* 5.

¹⁰⁵ *Ibid* 5.

B. NIAC, IHL and Counterterrorism

IHL was codified after decades of international armed conflict, and so its provision in this context is extensive and clear. Since, then the majority of conflicts are NIAC and it is important to note that it is increasingly internationalised. Since, it is technically an internal conflict, States generally may not wish involvement from the international community and there is no international body that can authoritatively classify it as such and apply IHL.¹⁰⁶ Yet, given the internationalisation of NIAC this should be considered along with a reinforcement of IHL, which in NIAC is less protective ‘its rules accord much consideration for the concerned State’s sovereignty.’¹⁰⁷ This becomes more important with the proliferation of domestic counterterrorist legislation, especially if they do not exclude themselves from situations governed by IHL .

IHL in NIAC is governed by either Common Article 3 (CA3) to all Four Geneva Conventions or Additional Protocol II, both proclaim only the most basic rules as compared to IAC. However, CA3 has increasingly become known as a mini convention and its application covers a lot of the same rules, and although technically there can be a difference of application between CA3 and APII, the ICRC Customary Study does not distinguish because in practice States do not make the distinction.¹⁰⁸ Moreover, has shown that through State practice many of the rules of IAC are also applicable in NIAC.¹⁰⁹ In fact, the ICRC Customary Study found that ‘148 out of a total of 161 rules formulated are applicable regardless of whether international or non-international conflict is involved.’¹¹⁰ However, important differences remain. The most significant is that, unlike in IAC, in NIAC, there is no combatant status and therefore no equality of belligerency between States and non-state armed groups (NSAG). States can and do

¹⁰⁶ ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press, 2016) para 865. ‘Furthermore, it serves to underline that, as international humanitarian law applies based on the facts, regardless of whether a State qualifies the members of a non-State armed group as ‘terrorists’ or its actions as ‘terrorism’, humanitarian law applies if and when the conditions for its applicability are met.’ Ibid para 867. ICRC classifies conflicts for their perusal and discussions with States, this, however is rarely shared with the public.

¹⁰⁷ Sassòli ‘International Humanitarian Law’ (n 19) Sassòli suggest that it would make sense for development of a ‘law specific to such transnational armed conflicts,’ however it is doubtful that this would result in a protective framework as States are still reluctant to give any recognition to non-state armed groups, and ultimately any such law would need to determine whether it would reinforce the equality of belligerent. (para 10.30)

¹⁰⁸ Jelena Pejic ‘The protective scope of Common Article 3: more than meets the eye’ (March 2011) 93.811 IRRC 2.

¹⁰⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge 2005) [From herein ICRC Customary Study] xxxv

¹¹⁰ Pejic ‘Protective scope...’ (n 108) 17.

criminalise the participation in NSAG. Arguably this has been made worse with NSAG being labelled as terrorist, although this label does not ‘preclude that they are also armed groups for the purpose of IHL. While terrorist acts may be committed in a NIAC and may even trigger a NIAC, they neither necessarily trigger a NIAC or preclude the applicability of IHL of NIACs.’¹¹¹ However, it does mean that with the domestic counterterrorist laws the terrorist labelled NSAG can, and do fall, under their provisions.

It is interesting to note that the State’s ability to criminalise opposition under domestic law in NIAC mirrors the questions of legitimacy and right to use violence, which were brought out during the discussions to define terrorism during the Drafting of the CCT. As previously mentioned, the NAM/OIC position insisted that any definition of terrorism should not criminalise national liberation struggles, and there should be no difference in application between State and non-state armed forces underlining the importance of the exclusion clause. These arguments were put forward for the legitimate struggles post colonialism. In that same vein, IHL in IAC recognises that a national liberation movement (NIAC) can fall under its provision, Article 1.4 extends to ‘include armed 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.’¹¹² This extension is accompanied with combatant privileges which does not criminalise participation, and affords prisoner of war (POW) status if captured, in order to ensure humane treatment and enable exchanges to facilitate peace negotiations. And, prosecutions would be reserved for those who had violated IHL. This allowance under API, for some, was seen as legitimising terrorism.¹¹³ It seems that the modern State is sensitive to any opposition to its power, even though history shows that conflict is inevitable and one of the reasons for developing rules that need to be applied during the war.

Equality of belligerency is one of IHL’s main principles and there are interesting historical examples that show that in internal conflicts States would make ad hoc agreements to abide by laws during conflict, or for the duration of the conflict States would recognise the insurgent as belligerent and later prosecute

¹¹¹ Sassòli (n 19) para 10.28.

¹¹² Article 1.4 API (n 100)

¹¹³ Sassòli (n 19) para 10.25.

them as traitors.¹¹⁴ Unfortunately, States fear that extending equality would award legitimacy, although IHL is clear that its application ‘has no bearing on the legitimacy in the law.’¹¹⁵ In APII, once it was decided that States could criminalise participation, and the implication on equality, as a recourse APII Art 6.5 advocated for States to afford ‘the broadest possible amnesties.’¹¹⁶ Amnesties could be interpreted as an exemption from prosecution, but they were considered in order to ‘encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.’¹¹⁷ This demonstrates IHL’s long term intention is preserving a sense of humanity in war to allow for reconciliation, which is more difficult the more a conflict is polarised, something that the terrorism term successfully feeds.

Yet ,considering that terrorism and armed conflict are often conflated and the international law is not sufficiently authoritative much is still left to State interpretation. For instance, the UK in *R v Gul* (2012) prosecuted a law student for disseminating videos that ‘showed attacks by Al Qaeda, the Taliban and other proscribed groups on *military targets*, including those in Chechnya and Coalition forces in Iraq and Afghanistan, [and] the use of IEDs against Coalition forces [...].’¹¹⁸ The jury then sought clarification if these attacks would be considered terrorist if they in fact they hit a legitimate target, such as the armed forces, in a NIAC. The judge accepted that in an international armed conflict they would not, but claimed the UK’s right to criminalise such acts under its domestic laws, which would render any attack by a so-called terrorist group to constitute an act of terrorism.¹¹⁹ This decision has been criticised for failing to recognise the exclusion clause and wrongly claiming that “there is nothing in *international law* which would exempt those engaged in attacks on the military during the course of an insurgency from the definition of terrorism.”¹²⁰ This completely ignores the exclusion clause of certain conventions, including the Terrorist Bombing Convention, which does not cover acts perpetuated in times conflict

¹¹⁴ ICRC Commentary 2016 (n 106) para 359.

¹¹⁵ Article 3 GCIV (n 98)

¹¹⁶ APII (n 101)

¹¹⁷ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff Publishers 1987) para 4618

¹¹⁸ R v Gul as quoted in Kimberly Trapp ‘R v Mohammed Gul: Are you a Terrorist if You Support the Syrian Insurgency?’ (EJIL Talk, March 14 2012) Available at <https://www.ejiltalk.org/r-v-mohammed-gul-are-you-a-terrorist-if-you-support-the-syrian-insurgency/#_edn7> accessed 25 August 2019

¹¹⁹ Coco (n 72) 428-9.

¹²⁰ Trapp (n 118).

from its application.¹²¹ Although, it should be noted as well that the different conventions have different scope of application for the exclusion.¹²² Moreover, as was seen, IHL sufficiently addresses acts of terrorism in conflict and can be relied upon to make appropriate interpretations as has been done by various courts; for instance, the Italian Court deferred to it in the *Bouyahia Maher Ben Abdelaziz* (2007) case, and the US Courts referred to IHL to interpret domestic legislation in the *Yunis* (1999) case.¹²³

More recently, based on its exclusion clause the Belgian court dropped prosecution of the PKK with a complex yet detailed consideration of the different laws and jurisdictions at play. Although it accepted that the PKK ‘could fit the Belgian Criminal Code’s definition of a terrorist group’ it opted to accept their actions in Turkey and ‘their nexus to the conflict and benefit from the application of the exclusion clause, [concluding that] the PKK is not a terrorist group [...] and participating in its activities is not a terrorist offence.’¹²⁴ The Belgian decision looked beyond the ‘terrorist’ label awarded to the PKK by Turkey, the US and the European Union and instead judged it based on the context and relevant considerations of the laws at play facilitated by the exclusion clause.

The debates, for example for the discussions on the draft CCT regarding the exclusion clause included questions of what constituted armed forces. The Western position advocate that only State armed forces can be excluded from any counterterrorist legislation.¹²⁵ Such a conclusion would disregard the notion that States can also be held responsible for terrorism and result in an unequal application of the law. When it concerns NIAC, the readings of CA3 have interpreted armed forces to include NSAG so long as they are sufficiently organised to follow orders.¹²⁶ This can be easily disputed as domestic legislation allows for the criminalisation of armed groups, however, it is also true that that ‘States have

¹²¹ Trapp (n 118) makes the point that the court should have referred to this as the UK is also a signatory

¹²² O'Donnell (n 31) 868. For example, the Bombing Convention only excludes acts in armed conflict but to no other situations, such as occupation governed by IHL.

¹²³ Coco (n 72) 431.

¹²⁴ The EU framework has an exclusion clause, but according to the author only Belgium and Ireland have incorporated it into their domestic legislations. Van Poecke (n 27).

¹²⁵ Hamoud (n 33) 1036.

¹²⁶ The ICRC Customary Study has qualified Art 43 of API as reaching customary status and being applied in NIAC and IAC alike. Art 43 states that ‘organized armed forces, groups and units which are under a command responsible to [a party to the conflict] for the conduct of its subordinates’. This definition is not dependent on state organ or agent status and therefore applies to non-state armed groups as long as they are organized and operate on the basis of command responsibility.’ Trapp (n 118).

accepted that killing persons taking part in hostilities of non-international character should not necessarily be criminalised and punished.¹²⁷ If this is the case, then this recognition suggests that States still wish to make a distinction which requires identifying the armed group as such, whether as an identifiable organised group or as directly participating in hostilities. Inadvertently, this recognises the principle of distinction, suggesting that States recognise that there are lawful targets, even in NIAC, even if attacked by NSAG. This is important because one of the major concerns with the inequality of NSAG, and the criminalisation of acts that could be considered lawful under IHL, is that it de-incentivises them from respecting the rules of war since they will be punished regardless if they abide by them or not.¹²⁸ This is already a challenge in NIAC and is exacerbated by counterterrorist legislations that do not exclude themselves from contexts, such as conflict and occupation that should be governed by IHL, and even criminalise beyond participation and look at association, material support, financing, etc..

The preceding section showed that IHL sufficiently prohibits and criminalises terrorist acts committed in conflict. It also explained the constraints of IHL application in NIAC, namely the criminalisation of NSAG, which already challenges IHL application. At the same time, customary and State practice when it concerns distinction, for example, show that even in NIAC the core IHL principles apply. However, these are challenged by counterterrorist legislation.

IV. Counterterrorism and IHL in NIAC

In view of the aforementioned challenges, this section will highlight what happens when the counterterrorism framework and IHL intersect in non-international armed conflict. The aim is to demonstrate how domestic counterterrorist legislations, inspired by international framework, impede IHL application. For this reason, the following will assume that IHL is the normative framework applied in times of conflict, including NIAC, with the focus on three core principles; equality of the parties, distinction between civilian and fighter and provision of medical and humanitarian aid. Indeed, as was described in the previous section equality of the parties is not accepted in NIAC, however, the below examples aim to put into question the concerns of States in legitimising the opposition by recognising them as equal from the start. In practice, States end up negotiating and even award amnesties to the

¹²⁷ Coco (n 72) 153.

¹²⁸ Olivier Bangerter ‘Reasons why armed groups choose to respect international humanitarian law or not’ (June 2011) 93.882 IRRC 377.

designated terrorist groups. By not extending this equality, and by criminalising beyond participation to those who ‘support, associate and finance,’ the distinction between who is a fighter and who is a civilian are blurred. This has many adverse effects and challenges the application of IHL including the provision of medical and humanitarian aid. A comprehensive survey of all NIAC affected countries and practices is outside the scope of this study, however, the examples below bring to light some of these effects and challenges.

A. Equality and Distinction

As has been shown, whether through rhetoric, policy or laws the ill-defined, yet highly emotive terrorist label, is politically convenient, as it ‘...publicly defines them as immoral and evokes fear and moral disgust against them...denies that they have any serious political context or legitimacy ... dehumanizes and demonises them, and is used to morally legitimise state violence against them...’¹²⁹ This, in the short term allows the State to take hard line approaches with the publics support and conflicts can end in capitulation of the opposition, and often through peace negotiations. Although, States are reluctant to award legitimacy at the start of the conflict, negotiating with the so-called terrorists at the end undoubtedly has an important legitimizing effect. It is noteworthy to underline that the US is in continued peace negotiations with, the UNSCR 1267 blacklisted, Taliban, and in spite of its continued use terrorist tactics. In order to enter in negotiations, the UN had to adjust the Sanctions regime and lift travel bans so that the parties could meet.¹³⁰ Years of delegitimizing the group have not stopped the natural outcome of the conflict, which would be either through military defeat or peace negotiation. For this reason, it could be seen as a missed opportunity to not recognize them as equal parties to the conflict and thereby expect compliance with IHL and foresee the prosecution of war crimes. Instead, in practice there is greater emphasis on prosecuting membership, association, material support and limited prosecutions of war crimes.

It is also instructive to look at Colombia where the forty-year internal conflict between the FARC and the government was increasingly framed within the GWOT as a fight against terrorism; this conveniently

¹²⁹ Jeffrey Sluka ‘Terrorism and taboo: an anthropological perspective on political violence against civilians’ (August 2008) 1.2 Critical Studies on Terrorism 174.

¹³⁰ UN ‘Security Council Adopts Text Extending, Adjusting Sanctions Regime against Taliban Affiliates ahead of Debate on Afghanistan’ (21 December 2015) SC/1275.

facilitated US military support, and enabled strong military response.¹³¹ However, when it came to negotiate a peace deal there was a sizeable public campaign opposing any negotiation '[g]iven their perspective of FARC as a terrorist organization, they [did] not conceive a negotiated solution as a proper way out of the conflict.'¹³² This illustrates how a political delegitimization of the opposition with the terrorist label is not useful in long run to facilitate 'peace and security.'

In contrast, IHL does not concern itself with why a conflict started and it focuses on trying to minimize the effects of the conflict on those not and/or no longer participating, which is in the long run in the interest of peace. For this, it requires that both parties abide by the rules. In NIAC, NSAG have little incentive to abide by the rules because their participation is criminalized. And by '[t]aking a solely repressive approach to armed groups amounts to encouraging them to violate the law.'¹³³ The terrorist label, now accompanied with counterterrorist laws, which exacerbate this repressive approach.

For instance, it is interesting to note how the US Courts responded to an NGO who sought clarification of the terrorist material support laws, which included criminalising the 'training, expert advice, or assistance' to a terrorist designated group. The Humanitarian Law Project intended to give, amongst other activities, legal training in IHL to political supporters of the Tamil independent movement (since the armed wing, the LTTE had been militarily defeated) and the PKK (whose aim is to establish an independent Kurdish state in Southern Turkey).¹³⁴ However, the court upheld the constitutionality of the material support provision saying that training the 'PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader

¹³¹ Oscar Palma 'The changing meaning of 'terrorism' in Colombia: A matter of discourse' in Michael J. Boyle (ed) *Non-Western Responses to terrorism* (Manchester University Press 2019) 246.

¹³² Palma (n 131) 265.

¹³³ Bangerter (n 128) 377. Bangerter explores various reasons why NSAG may not respect the rules of war. For this paper it is useful to highlight that one of them may be that the NSAG may not know the rules. Admittedly, some may reject the rules as a western concept, however, he highlights that there have been various initiatives done to demonstrate the universality of the rules. For example, ICRC did a study on the Birimaygedo rules of war in customary Somalian law and highlighted that these even go beyond current IHL. Ibid 367. Other studies have compared Islam and IHL finding commonalities. See for example, Dr. Ahmed Al-Dawoody 'IHL and Islam: An overview' (ICRC Humanitarian Law & Policy Blog, March 14, 2017) available: <<https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>> accessed 01 September 2019. For this reason, engagement with groups should be seen as important.

¹³⁴ Holder Attorney General et al v. Humanitarian Law Project No.08-1498 (US Supreme Court Syllabus, October Term 2009) 9.

strategy to promote terrorism, and to threaten, manipulate, and disrupt.'¹³⁵ Given the labelling of the organization as terrorist the court could not conceive it in any other light than having a destructive impact on the system, while it could provide an alternative to the use of violence. The Court went on to say that,

[t]he majority justifies the criminalization of this activity in significant part on the ground that "peaceful negotiation[s]" might just "bu[y] time..., lulling opponents into complacency." Ante, at 32. And the PKK might use its new information about "the structures of the international legal system . . . to threaten, manipulate, and disrupt.¹³⁶

This reading suggests that the Court is concerned more that the material support would somehow serve to legitimise the NSAG, as opposed to being concerned that the material support would facilitate acts of terrorism, since the teaching of IHL would presumably decrease such acts. Its reading is contrary to the principle of IHL as it ostensibly does not take into consideration, for example the effect of violence on civilians during conflict. Second of all, it makes a presumption that NSAG cannot change, perhaps politically prefers to keep them criminal in order to facilitate their repression; however, there are many examples of NSAG restraining behaviour once the rules are made clear.¹³⁷ This is an example of how counterterrorist laws usurp humanitarian space that IHL has, through the years, attempted to safeguard in a conflict with the pure intention of minimising the adverse effects on those who are not or no longer participating in hostilities.

In contrast, on the local level it is almost surprising to learn that States consider, and allow for, amnesties for members of some of the most notorious terrorist NSAG, such as Boko Haram, al Shabaab and to lesser extent ISIS in Iraq. The following examples will be drawn from these three NSAG that continually steal headlines for their terrorist tactics and therefore have been sanctioned by the international community. It is also important to at least consider that these groups have evolved or are rooted in complicated local contexts that cannot be adequately explained in this paper.¹³⁸ Acknowledging these realities does not justify their tactics, however, reducing them to terrorists may in the short term facilitate

¹³⁵ Ibid 6

¹³⁶ Ibid 6

¹³⁷ See for example, ICRC 'The Roots of Restraint in War' (ICRC, December 2018)

¹³⁸ For a brief overview of the groups see the relevant articles in Ronald Slye and Mark Freeman, *The Limits of Punishment: transitional justice and violent extremism* (Institute for Integrated Transitions, May 2018) Also, Stathis N. Kalyvas 'Is ISIS a Revolutionary Group and if Yes, What Are the Implications?' (August 2015) 9.4 Perspectives on Terrorism 42.

a heavy-handed approach, but in the long run will not address the underlying issues driving the continued use of violence. Regardless, of the reasons for the conflict, inevitably States will need to consider how to end it in a way that can facilitate a longer peace, and this may be particularly difficult if a lot of violations have happened and if it is difficult to distinguish between the NSAG and the community.

It should not be surprising that amnesties would be considered as they are normal mechanism in transitional justice processes. The surprise comes because of the sustained polarising rhetoric against terrorists, which through ‘othering’ and ‘dehumanising’ detracts from a vision on if ever they may be re-integrated. Less surprising are stories that insinuate the only way to eradicate the terrorist threat is to ‘kill them all’ as one Iraqi security officer suggested as the way to quell the re-emergence of ISIS.¹³⁹ Or stories about ISIS commanders being unable to negotiate withdrawal or surrender with the opposing Iraqi forces, and therefore would prefer to turn themselves in to Kurdish forces ‘who had a reputation for taking prisoners rather than executing them.’¹⁴⁰ Such behaviour suggests serious violations of IHL. Undeniably, ISIS has committed a multitude of IHRL and IHL violations,¹⁴¹ however, the respect of IHL is not incumbent on reciprocity.¹⁴² There is a fine balance and the more a conflict is polarised the more difficult it is to achieve respect for any rules by anyone. This polarisation will also hinder peace and security.

Unfortunately, on an international level, the UNSC resolutions play into this rhetoric by perpetuating an inadequately defined term. Moreover, it is interesting to note that the UNSC approach may differ based on groups, for example the UNSCR 2349 (2017) advocates for comprehensive approaches for Boko Haram, which includes human rights compliant de-radicalisation. In contrast the UNSCR 2379 (2017)

¹³⁹ Mara Redlich Revkin ‘After the Islamic State: Balancing Accountability and Reconciliation in Iraq’ (May 2018) in Ronald Slye and Mark Freeman, *The Limits of Punishment: transitional justice and violent extremism* (Institute for Integrated Transitions, May 2018) 60.

¹⁴⁰ Redlich Revkin (*ibid*) 60.

¹⁴¹ For example, see Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq* (Human Rights Watch, December 2017) and lists abuses by ISIS and forces in opposition to ISIS.

¹⁴² The ICRC Customary Study lists it as a rule in both NIAC and IAC based on Article 1 and Article 3 common to the Geneva Conventions and additional protocols, which emphasise that rules must be respected in ‘all circumstances.’ (n 109) 499.

on ISIS is less comprehensive and focuses on prosecutions of war crimes committed by ISIS,¹⁴³ and without addressing the prosecution of war crimes committed by forces fighting ISIS.¹⁴⁴ It is not clear, if this suggests that on the list of terrorists there are better or worse terrorist, and how this would be determined, or this further demonstrates the different terrorisms at play. Different approaches would be more comprehensible, if for example, one NSAG would be complying more with IHL, than the other, and therefore able to receive different treatment. For this, the State would need to acknowledge the NSAG as such and be open to more equal treatment in conflict, for example allow IHL training, or enter into an agreement to respect the rules, rather than focusing on mere delegitimization. On this point, it is also interesting to note that the Nigerian government intervened with UN against listing Boko Haram as a terrorist organisation as it would make it more complicated to negotiate with them,¹⁴⁵ showing the potential effect of the international counterterrorist framework and its effects on local context that need a pragmatic engagement with NSAG.

On the question of amnesties, IHL foresees this even in NIAC, especially for those who participated in the conflict, but did not commit crimes.¹⁴⁶ Admittedly, one of the challenges of present-day conflicts is the NSAG groups rejection of governments or international institutions. For instance, Boko Haram outright rejects negotiation and prospect of amnesty from the Nigerian government demonstrating the highly polarised nature of the conflict.¹⁴⁷ Nevertheless, as a measure to counter recruitment and encourage defection the government adopted ‘Operation Safe Corridor,’ which is a policy not enshrined into law, but one which includes a de-radicalisation and amnesty programme because the military campaign ‘frequently conflated perpetrators with victims.’¹⁴⁸ Likewise in Somalia, since it is becoming increasingly likely that a military solution may not be possible, the government has started to explore

¹⁴³ Ronald Slye and Mark Freeman, *The Limits of Punishment: transitional justice and violent extremism* (Institute for Integrated Transitions, May 2018) 30.

¹⁴⁴ Human Rights Watch, ‘Iraq: Impartial Justice Effort Needed’ (HRW, May 31, 2018) available <<https://www.hrw.org/news/2018/05/31/iraq-impartial-justice-effort-needed>> accessed 31 August 2019.

¹⁴⁵ Vana Felbab-Brown ‘In Nigeria, we don’t want them back’ (May 2018) in Ronald Slye and Mark Freeman, *The Limits of Punishment: transitional justice and violent extremism* (Institute for Integrated Transitions, May 2018) 102.

¹⁴⁶ Article 6.5 states: ‘At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’ APII (n 101) 317.

¹⁴⁷ Felbab-Brown ‘In Nigeria...’ (n 145) 101.

¹⁴⁸ Ibid 86.

programmes to weaken al Shabaab through low- and high-level defections through a de-radicalization and reintegration programme for low level members of the group. Higher ranking commanders are able to benefit from ‘ad hoc political deals …, who, in exchange for defecting along with their followers, receive protection and red-carpet treatment from the Somali government and face no accountability or scrutiny for their past behaviour.¹⁴⁹ This, in spite of, the UN and other countries that have a formal policy to not negotiate with al Shabaab.¹⁵⁰ The practicalities of war need pragmatism, however, this should not also be accompanied by impunity and should be held responsible for their actions, which does not appear to be the current case.

In Iraq, the initial General Amnesty Law (No. 27/2016) allowed the use of pardons for those who joined IS ‘against their will and did not commit any serious crimes’, however, due to reports of corruption and abuse the law was amended and now ‘preclude[s] pardons for anyone convicted of terrorism, regardless of mitigating circumstances.’¹⁵¹ And, in practice, reportedly the judges are reluctant to offer pardons.¹⁵² First, it is interesting to note the use of amnesties even against those sanctioned to be international terrorists. This shows that in spite of the counterterrorist rhetoric, eventually the State will need to engage in looking for peaceful solutions to the conflict. Second, the fact that amnesties are used, even if through defection programmes, puts into question States’ initial reluctance to reinforce IHL in NIAC for fears of legitimising the group. By criminalising the membership, as will be seen below, misses the point of holding NSAG accountable for war crimes and other violations of IHL. The aforementioned amnesty processes have been criticised for allowing impunity. In addition to this, they can be seen as a missed opportunity in using amnesties influence the NSAG behaviour during the conduct of hostilities. If there is a real interest, in peace and security then IHL should be reinforced in a way that NSAG can be incentivised to follow. If there is a real interest, in cooperating and punishing those responsible for terrorist acts then there should be more focus on the crimes committed not membership, or, the wider interpretation of association, material support, financing, etc.

¹⁴⁹ Ibid 129.

¹⁵⁰ Ibid 138.

¹⁵¹ Redlich Revkin (n 139) 64.

¹⁵² Redlich Revkin (n 139) 65.

Admittedly, in conflict it may be hard to collect evidence to properly prosecute, nevertheless it is important to underline that providing justice through criminal prosecutions serves to

address legacies of mass abuse and conflict by removing particularly violent individuals from society (specific deterrence); signalling that such activity has consequences (general deterrence); reinforcing the moral repudiation of such activity (expressive function); and fulfilling retributive expectations, particularly of persons and communities most affected.¹⁵³

Already the aforementioned practices suggested a culture of impunity in allowing for defections and even high-level amnesties without prosecutions of war crimes. For example, in the absence of justice in Nigeria, the ICC has opened a preliminary investigation against the war crimes and crimes against humanity perpetrated by Boko Haram and Nigerian military under its complementary jurisdiction when a country is unwilling or unable to proceed with its own prosecution.¹⁵⁴

Nigerian counterterrorism laws criminalises ‘any person who commits, attempts to, threatens to, or assists an act of terrorism,’ which has been criticised for the ‘expansive definition and of material and non-violent support’¹⁵⁵ The prosecution for these crimes saturates the system and criminalises large sections of the population who may have been associated, without delivering justice.¹⁵⁶ Some statistics show the gravity of the problem, ‘[i]n October, 2017, the Nigerian government announced mass trials of some 2,540 Boko Haram suspects [...] a further 5,000 would be prosecuted in the coming years.’¹⁵⁷ The trials are held in secret and the offences are not disclosed only convictions.¹⁵⁸ Despite many allegations against the military, not one has been tried publicly, the government maintains that hundreds of soldier have been court marshalled after violations during the campaigns against Boko Haram.¹⁵⁹ As such the prosecutions are for simple association charges and do not serious violations such as war crimes or crimes against humanity.¹⁶⁰

¹⁵³ Sly and Freeman (n 143) 23.

¹⁵⁴ Felbab-Brown ‘In Nigeria...’ (n 145) 103.

¹⁵⁵ Ibid 102.

¹⁵⁶ Ibid 104.

¹⁵⁷ Ibid 105. However, there are concerns that many cases may be inadmissible due to mistreatment and violations during detention.

¹⁵⁸ Ibid 105.

¹⁵⁹ Ibid 111.

¹⁶⁰ Amnesty International, ‘Willingly Unable: ICC Preliminary Examination and Nigeria’s Failure to Address Impunity for International Crimes’ (10 December 2018) AFR44/9481/2018. 5.;

Iraq's 2005 counterterrorist legislation only has six articles and two penalties, either death or life imprisonment, which can 'be applied to a wide range of actions, from simple affiliation and causing damage to property to using explosives and seeking to overthrow the government'.¹⁶¹ It is currently being used to prosecute over 19,000 people on terrorism-related charges since 2013 and convicted at least 8,861, with at least 3,130 sentenced to death.¹⁶² Most are being prosecuted for association, for example the recommendation for someone who cooked for ISIS was a death penalty, similar severe penalties for those who worked in administrative functions. Moreover, there is no prioritisation of serious crimes, and it is interesting to note that Iraq has not criminalised war crimes, crimes against humanity and genocide.¹⁶³

Unlike Nigeria and Iraq, Somalia has not enacted recent counterterrorist legislation, and its criminal code dates back to the 1962 Penal Code, so it is unclear under which laws that suspects are sentenced.¹⁶⁴ Of note is the approaches in neighbouring Kenya that became involved in the fight against al Shabaab in 2011 and in retaliation 'al Shabaab and its affiliates launched a retaliatory campaign that included over ninety attacks [...] to target security installations, particularly military garrisons and police posts in proximity to the border with Somalia. They also carried out attack on bars, transportation hubs...,'¹⁶⁵ In the period after, Kenya took a concerted counterterrorist campaign which in certain instances could be likened to collective punishment of ethnic Somali communities. For example, after one terrorist attack the Police launched 'Operation Usalama Watch' in which they 'rounded up more than a thousand ethnic Somalis in Nairobi and held them at Kasarani Stations.'¹⁶⁶ Moreover, apparently the county commissioner of Mombassa was quoted as saying 'if we find any of them, we will finish them

ICC, 'Report on Preliminary Examination Activities' (12 November 2015) available <<https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>> accessed 29 August 2019. para 192.

¹⁶¹ Hanny Megally 'Iraq: Heavy-handed Counterterrorism Approach Risks Undermining Success against ISIS' (Centre for International Cooperation, March 12, 2019) available <<https://cic.nyu.edu/blog/iraq-heavy-handed-counterterrorism-approach-risks-undermining-success-against-isis>> accessed 30 August 2019.

¹⁶² Ibid.

¹⁶³ HRW (n 141) 30-31.

¹⁶⁴ Vanda Felbab-Brown 'The Hard, Hot, Dusty Road to Accountability, Reconciliation and Peace in Somalia' (May 2018) in Ronald Slye and Mark Freeman, *The Limits of Punishment: transitional justice and violent extremism* (Institute for Integrated Transitions, May 2018) 138.

¹⁶⁵ Jeremy Prestholdt 'Counterterrorism in Kenya: Security aid, impunity and muslim alienation' in Michael J. Boyle (ed.) *Non-Western Responses to terrorism* (Manchester University Press 2019) 388.

¹⁶⁶ Ibid 398.

on the spot. They are not people to take to court.¹⁶⁷ It is an interesting example of a transnationalised NIAC which clearly the security forces were not acting within the IHRL framework on their home territory with such heavy-handed responses that have been on the one hand facilitated by external pressures and even funding. And on the other hand, criticised for not being effective, since their lack of distinction of who is the perpetrator from the wider community contributes to the isolation of Kenyan Muslims, who are caught up in the massive campaigns, and have little success in delivering justice for the victims.

There are a number of issues that emerge from the above examples. One, is an observation that despite the reluctance of States to recognize NSAG as equal parties to an armed conflict, the practice is to consider amnesties and re-integration programmes. This however, is rendered difficult if there is very stark polarization and if the community has experienced grave violations. On the one hand, the proliferation of prosecution can be seen as a means to deliver justice, but given that the focus is on membership or association it misses the gravity of the crimes and does not respond to the populations need for justice. As such, the terrorist label and the criminalization of the membership of the group does not facilitate justice for terrorist acts in any meaningful or signal that the crimes committed are wrong. Instead, there are fears that the overboard prosecutions will actually mean a resurgence of groups, such as ISIS 2.0.¹⁶⁸ In addition to the above, it should be mentioned that communities affiliated with these terrorist NSAG that have committed very serious crimes are often unable to easily integrate back into communities. In the case of Iraq, for example, women prefer to stay in camps with their children because they fear retaliation and revenge if they go back to their home towns. There is a distinction between those who stayed in the ISIS administered territory and those who fled, the former seen as complicit in the crimes, even if they had no other choice.¹⁶⁹ This is very similar in Nigeria where the wider population ‘make little distinction between populations who had to endure Boko Haram rule and actual Boko Haram members.’¹⁷⁰ More research would be needed to understand what is eroding this distinction, an initial suggestion would be counterterrorist laws that focus on membership, participation, financing, etc. and the assumption that anyone who associates is then deemed a terrorist. It would be interesting to test this if this and see if it has an impact on the security forces perception. Although

¹⁶⁷ Ibid 399.

¹⁶⁸ Redlich Revkin (n 139) 70.

¹⁶⁹ Redlich Revkin (n 139) 52.

¹⁷⁰ Felbab-Brown (n 145) 92.

stigmatization and polarisation are often a by-product of war, the fact that the justice system enforces such broad interpretations challenges the IHL principle of distinction and lack of proper prosecutions for war crimes undermines the rules of war.

B. Access to Medical and Humanitarian Aid

Building on these examples, it is imperative to see how the broad interpretations and criminalisation of material support, association, financing, etc. affect the IHL principles of providing medical and humanitarian aid to those affected by the conflict. These principles are firmly embedded in IHL in both treaty and customary law in both IAC and NIAC with the protection of the wounded, medical personnel and medical establishments.¹⁷¹ Similarly, IHL upholds that civilians should have access to humanitarian aid.¹⁷² These principles date as far back as 1648 have continued to be applied.¹⁷³ Contemporary broad counterterrorist laws are challenging this humanitarian space. If they have not been directly challenged, they may suffer a ‘chilling effect,’ which means that those who would have previously been providing either medical care or humanitarian aid may now refrain in doing so for fear of prosecution.

Most recently, the Security Council through UNSCR 2462, under Chapter VII, obligated States ‘to criminalise financial transactions carried out with the intention that they are to be used for the benefit of terrorist organisations or individuals.’¹⁷⁴ Although the resolution underlines that this has to be done in compliance with States obligations in international law, including IHL, which holds firmly that wounded and civilians should have access to both medical and humanitarian aid the emphasis is on the prohibition of facilitating terrorism, rather than the provision of medical or humanitarian aid.

¹⁷¹ Rule 35 prohibits to direct an attack against protected zones including shelters of the wounded, the sick and civilian. Rule 25 and 26 protect medical personnel and their activities. Rule 47 protects persons *hors de combat* i.e. wounded. These rules apply in both international and non-international conflicts and according to the study have been affirmed by state practice. Henckaerts and Doswald-Beck (n 109).

¹⁷² Rule 55 obligates parties to the conflict in both IAC and NIAC to grant access for Humanitarian Relief to Civilians in Need. Henckaerts and Doswald-Beck (n 109) 194.

¹⁷³ Zamir (n 97) 15.

¹⁷⁴Natalie Weizmann ‘Painting within the Lines: The UN’s Newest Resolution Criminalizing Financing for Terrorists – without imperilling humanitarian activities’ (Just Security, March 29, 2019) available <<https://www.justsecurity.org/63442/painting-within-the-lines-the-uns-newest-resolution-criminalizing-financing-for-terrorists-without-imperiling-humanitarian-activities/>> accessed 27 August 2019.

It is interesting to look at Somalia, which, although lacks domestic counterterrorist laws, has been negatively affected by the international counterterrorist framework and its sanctions against al Shabaab. For example, in 2008 when the US blacklisted al Shabab, US AID stopped all new funding. By 2010 this had a chilling effect and impeded adequate funding to respond to the 2010 famine.¹⁷⁵ In response, the UN had to put a specific exemption in order to ensure that people in need would receive aid:

[Operative paragraph 48] *Decides that until 15 November 2019 and without prejudice to humanitarian assistance programmes conducted elsewhere, the measures imposed by paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialised agencies or programmes, humanitarian organisations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organisations participating in the United Nations Humanitarian Response Plan for Somalia.*¹⁷⁶

This is one of the only examples where the UN tried to unequivocally instructed states to make an exemption. Normally, the UNSCR do not include explicit exemptions in their resolutions, which can have an adverse effect in how State's implement the resolutions in their domestic legislations.¹⁷⁷

In practice, these international provisions and subsequent domestic counterterrorist laws undermine these principles. For instance, Médecins Sans Frontières (MSF/Doctors Without Borders) confirmed that '[i]t is indeed the intersection of IHL and domestic criminal and counterterrorist legislation that we are encountering the greatest difficulty in securing the neutrality and safety of the medical mission and the protection of our staff and patients.'¹⁷⁸ This was made clear in a recently published report that found

¹⁷⁵ NRC 'Principles under pressure: the impact of counterterrorism measures and preventing/countering violent extremism on principled humanitarian action' (2018) available <<https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles-under-pressure-report-screen.pdf>> accessed 04 September 2019. 23.

¹⁷⁶ As quoted in Weizman (n 174).

¹⁷⁷ Patrick Duplat 'Impact of Counter-Terrorism Measures on Humanitarian Action' in ICRC-COE Terrorism, Counter-Terrorism and International Humanitarian Law 17th Bruges Colloquium 20-21 October 2016, 47.7 (Collegium, Autumn 2017) 84. Available <www.coe-icrc.eu> accessed 20 August 2019. 147.

¹⁷⁸ As quoted Weizman (n 174).

out of 16 countries surveyed '10 countries appear to suggest that the authorities interpret support to terrorism to include the provision of healthcare [...] what is new is not the criminalization of healthcare per se, but how the counterterrorism framework has purportedly strengthened the legal and moral basis to justify such actions.'¹⁷⁹ For instance, in both Iraq and Nigeria during the conflict doctors have been arrested for providing care to the NSAG.¹⁸⁰ This in spite of IHL prohibition and protection of medical aid, however, in these cases where there is a NIAC domestic legislation plays an important role. Moreover, the counterterrorist legislations are left to State's interpretation and there is no legally binding document that authoritatively instructs the interaction between international law and counterterrorist legislation, as discussed above, both could be interpreted as the *lex specialis*.¹⁸¹ Only a few countries in addition to the EU Directive explicitly make an exception in their counterterrorist legislations to medical and humanitarian relief.¹⁸² As with the exclusion clause, this exception should be clearly elucidated in domestic legislations and in UNSCR. The UN has included in its Global Counterterrorism Strategy a provision that laws should not 'impede humanitarian and medical activities'.¹⁸³ However, it is not clear if all the UN organs that work on counterterrorism encourage the respect for IHL while developing their policies and guiding States in implementing the binding UNSCR resolutions.¹⁸⁴

In a similar way, the proliferation of broad counterterrorist laws has had an adverse impact on the provision of neutral and impartial humanitarian aid to populations affected by the conflict. The counterterrorist legislations responsible are ones that criminalise giving material support, financial assistance, etc. to terrorist organisations. Increasingly organisations are required to respond to donor requirements to show that sufficient risk assessment has been taken in order to not be implicated for providing aid to a designated terrorist organization. There have been cases when donors have suspended funding after allegations of aid diversion, for example, a programme run by World Vision in

¹⁷⁹ Marina Buissonniere, Sarah Wozniak and Leonard Rubenstein 'The Criminalization of Healthcare' (June 2018) available <<https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>> accessed 29 August 2019, 18.

¹⁸⁰ Ibid 19.

¹⁸¹ Saul 'Terrorism, Counter-Terrorism...' (n 20) 8 – 9

¹⁸² Weizman (n 174).

¹⁸³ Weizman (n 174).

¹⁸⁴ As opposed to non-binding ones like UNSCR 2286 urging states to comply with IHL including the protection of the medical mission. Alice Debarre 'Safeguarding Medical Care and Humanitarian Action' (September 2018) International Peace Institute available <www.ipinst.org> accessed 04 September 2019. 3.

Palestine.¹⁸⁵ The reporting may be burdensome especially for smaller NGOs, and as a result, organisations may limit their own engagement with communities, which may put in question a neutral and impartial approach because actions will not be based on the needs of the population rather on mitigating own risks.¹⁸⁶ Usually, the population who are most at need are the ones who are caught in between the government and the opposing forces and neutral space is difficult to maintain even without more pressures put on the organisations by either side.

On top of the donor requirements, organisations also have to confront host governments who may use counterterrorist rhetoric or laws to influence where they can or cannot work. For example, in Nigeria the military banned UNICEF from working accusing it for spying for Boko Haram.¹⁸⁷ In general, organisations have had a hard time working in Nigeria because the government restricts them from working in certain areas and therefore their programmes potentially exclude those most in need.¹⁸⁸ Organisations working in Iraq were not allowed by the government to work in ISIS areas or in special cases needed specific permission. This meant that aid was concentrated in certain areas, while absent in others and therefore again not implemented based on impartial humanitarian needs.¹⁸⁹ This can also feed into the polarisation of the conflict and the division, stigmatisation and further separation of people.

This section has illustrated how both medical and humanitarian aid, which are protected by IHL, are currently challenged by the international and domestic counterterrorist framework. This can be remedied with clear exemptions to medical and humanitarian aid in the UNSCR provisions and instructions to States to make adequate distinctions and exemption. This, however, would still need to be detached from the terrorist label, which delegitimises and therefore stigmatises to the extent that those accused of terrorism find themselves outside of the legal system. IHL is better suited for conflict situations and it envisages protection for those who are not, or are no longer fighting without making a distinction.

¹⁸⁵ Ibid 17.

¹⁸⁶ NRC (n 175) available <https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles_under_pressure-report-screen.pdf> accessed 04 September 2019. 16.

¹⁸⁷ Yomi Kazeem 'Nigeria's army is accusing international bodies of working with Boko Haram and undermining soldiers' (Quartz Africa, December 17, 2018) available <<https://qz.com/africa/1498149/nigerian-army-says-unicef-amnesty-intl-aid-boko-haram/>> accessed 01 September 2019.

¹⁸⁸ NRC (n 175) 21.

¹⁸⁹ Duplat (m 177) 139.

V. Conclusion

The aim of this paper has been to show that the internationally disputed term of terrorism and the international counterterrorist framework, with the proliferation of domestic legislation, has challenged IHL particularly in NIAC. The threat of terrorist acts in times of peace is undeniably real and States are confronted with a difficult challenge in trying to prevent, suppress and ultimately punish those who commit abhorrent violations of human rights and humanitarian law. It is questionable, however, if the focus on outlawing ‘terrorists’ and ‘terrorism’ is possible given the ambiguity and broadness of the terms, and how the absence of specificity in law is then open to interpretations by the courts as well as the public. Given the international counterterrorist framework, and its accompanying bureaucracy, there is a question if it is too late to come to a common definition, or if precisely because of this, the international community has no choice but to define terrorism. Underlying the divergent opinions on terrorism is the question of legitimacy. On the one hand, there are those who do not think that anyone outside of the democratic state has the right to use force. On the other hand, there are those who want to ensure that struggles for national liberation will not be labelled terrorist, a term that is derogatory and indeed seeps the legitimacy out of any fight.

Although, the counter terrorist framework was intended to apply during times of peace, the violence of terrorism and that of war are increasingly being blurred. As such, the international community needs to, in the least, authoritatively clarify the relationship of the counterterrorist framework to other international normative frameworks, namely IHL. This has been done in some conventions and domestic laws, but they are in few and not consistently applied. Contemporary conflicts are non-international, yet increasingly internationalised, armed conflicts in which the State is able to criminalise mere participation in a NSAG. This criminalisation now falls under domestic counterterrorist legislations which have broad interpretations of who is a terrorist and target not only NSAG members, but anyone who is associated or provides material support. This results in harsh punishment of anyone who can conveniently be made to fit the loose-fitting terms. It also results in impunity for war crimes and other serious violations as ‘terrorists’ are punished for who they are and not what they have done.

The separation of the two is imperative in order to safeguard the humanitarian space that IHL has constructed and preserved. IHL makes a distinction between the different types of violence with its underlying logic embedded in the unfortunate reality that there will always be struggles. For this reason, it advocates that while they are ongoing there should be a space for preserving humanity, in the way that they are fought and, and in the way, that those who are not or no longer participating are treated. IHL is clear in prohibiting and punishing those who do not follow the rules, but for this the rules must be known and this space maintained even when threatened by atrocious violence. There is a larger question of how IHL can be reinforced in NIAC without eroding principles, but enforcing the protections of those who do not, or no longer take part in hostilities. The counterterrorist logic of blindly outlawing any violence and criminalising anyone who may be associated, does not make a distinction on the context and the acts, and focuses itself solely on who has the legitimacy. Ultimately, this challenges the application of IHL and the preservation of humanitarian space in situations that rise to the level of a conflict. And, this in the long run has an adverse impact on peace and reconciliation.

There is a question of the internationalisation of conflicts and how it ties into the above discussion, not adequately covered in this paper, but an important factor that needs to be considered because 'international problems need international solutions.' Framing the terrorist threat as international and then outsourcing them to domestic counterterrorist legislation may give the appearance of providing solutions, however, as the above discussion shows this has created a multitude of unintended consequences that will sooner or later need to be addressed in the interest of peace and security.

VI. Bibliography

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