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UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

THE PROHIBITION OF TERRORISM UNDER INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

by

KYLA ANNANCIA MÜLLER
U17071365

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Supervisor : Professor Stuart Casey-Maslen

Summary of the Research

Terrorism is a widely spoken word globally, with not many people understanding its true meaning or its place within international law. The idea of terrorism usually involves suicide bombings, mass shootings and/or murders in everyday life. The realm of terrorism within the context of International Humanitarian Law, that is during armed conflicts, shows a lack of research and action. Despite the lack of a universal definition of terrorism, the existence of this crime is not in dispute. The international legal community have several conventions related to terrorism, which will be discussed in this paper, however, the lack of accountability, investigations and prosecutions for the crimes committed during armed conflicts show a clear lacuna in both International Humanitarian Law and International Criminal Law.

This gap in the law brings doubt about whether civilians truly are protected by International Humanitarian Law and whether International Criminal Law suffices to protect civilians through the criminalisation of terrorism during armed conflicts.

This research paper intends to explore the legal prohibitions and protections provided under International Humanitarian law and International Criminal Law, specifically related to terrorism and acts of terror in the context of armed conflicts. Several treaties and case law examples will be discussed and interpreted in an attempt to determine whether there is indeed a prohibition on terrorism in armed conflicts and what protection is afforded against it for civilians, specifically in detention. And if this is answered in the affirmative, we may be a very small step closer to bringing justice to victims of terrorism.

Declaration of originality¹ for a research output²

Biographical information of student	
Student #	U17071365
Title	Ms
Surname	MÜLLER
Initial(s)	KA
Registered for the:	LLM / MPhil (coursework) <input checked="" type="radio"/> : or LLM / MPhil <input type="radio"/> : or LLD / PhD <input type="radio"/>
Email	u17071365@tuks.co.za / kylamuller@gmail.com
Mobile phone #	0782906474
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² Research output, in this context, is defined as a mini-dissertation, dissertation or thesis.

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Chapter One: Introduction

1.1. Introduction

The term 'terrorism' has somewhat overtaken the vocabulary of global politics and law to describe many crimes and acts committed by groups classified as 'terrorists' and individuals alike. These groups and persons range in size, location, ideology, religions, and purpose.¹ For the period between 2007 and 2022, almost 66 000 terrorist attacks were recorded.² Despite the high number of attacks classified as terrorism, only a handful of persons have been charged with the crime of terrorism under International Humanitarian Law and International Criminal Law and even when charged, a very small number of persons have been successfully convicted.

Perhaps one of the most recognised events of terrorism globally, is the attacks of 11 September 2001 in the United States of America by the terror group Al-Qaeda.³ Terrorism, however, has been in existence for hundreds of years before the world came to know of Al-Qaeda. The term 'terrorism' was used as a description of the Reign of Terror during the French Revolution from 1793 to 1794, when the Revolutionary Government used violence and cruel measures against its citizens who were suspected enemies of the Revolution.⁴

During armed conflicts, to which the world is no stranger, many acts are committed in contravention of International Humanitarian Law and International Criminal Law. The occurrence of terrorism in the context of armed conflicts, specifically against detainees, is an under researched field of law.⁵ Consequently, many crimes and atrocities that are committed during armed conflicts, go without investigation, unpunished and unprosecuted, with victims never seeing their day in Court and justice never being served.

This Research, therefore, aspires to contribute in a small manner in encouraging the international legal community to notice the gap in the law, to investigate terrorism, acts of terror and start working towards an international community aimed at enabling successful convictions for the act of terrorism.

In Part 2 below, I will discuss the background of this research. In Part 3, I will lay out the research questions, whereafter I will expand on the methodology used. I will touch on the limitations of this research in Part 5 and lay out the chapters in Part 6.

¹ 'Foreign Terrorist Organisations' (U.S. *Bureau of Counterterrorism*) <<https://www.state.gov/foreign-terrorist-organizations/>> accessed 9 September 2023.

² Institute for Economics and Peace, 'Global Terrorism Index 2023' (14 March 2023) <<https://reliefweb.int/report/world/global-terrorism-index-2023>> 2.

³ Peter L Bergen, 'September 11 attacks' (*Encyclopaedia Britannica*, 18 Oct. 2023) <<https://www.britannica.com/event/September-11-attacks>> accessed 27 October 2023.

⁴ United Nations Office on Drugs and Crime 'Education for Justice University Module Series Counter-Terrorism Module 1 Introduction to International Terrorism' (*United Nations*, 2018) <https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINALpdf.pdf> accessed 13 September 2023.

⁵ Alex P Schmid, '50 Un- and Under-Researched Topics in the Field of (Counter-) Terrorism Studies' (2011) 5 *JSTOR* 76, 76-77.

1.2. Background to the Research

Despite the lack of a universal definition of terrorism, the existence of this crime is not in dispute.⁶ The international legal community have several conventions related to terrorism, which will be discussed in this paper, however, the lack of accountability, investigations and prosecutions for the crimes committed during armed conflicts show a clear lacuna in both International Humanitarian Law and International Criminal Law.

During 2023, two armed conflicts, between Russia and Ukraine as well as Israel and Hamas of Palestine, have grabbed the world's attention and opened the door to the first-hand witnessing of war crimes, crimes against humanity and other atrocities which take place every day. Although there is no lack of acknowledging the atrocities being committed and of classifying certain attacks as 'terrorism', there is still much confusion on whether any person will be held liable for such a crime.

This research paper intends to explore the legal prohibitions and protections provided for under International Humanitarian law and International Criminal Law, specifically for terrorism in the context of armed conflicts. Several treaties and case law examples will be researched and interpreted in an attempt to determine whether there is indeed a prohibition on terrorism in armed conflicts and what protection is afforded against it for civilians, specifically in detention.

1.3. Research Questions

In order to determine whether there is a prohibition of terrorism under International Humanitarian Law and International Criminal Law, the following questions will be considered:

- a. How is terrorism defined in the context of peacetime and armed conflicts?
- b. Is there a prohibition of terrorism in the context of civilian detainees during armed conflict and what protection is afforded to them?
- c. Is there a prohibition of Acts of Terror in the context of hostilities and how have courts approached it?

The research questions are linked to one another in that without first attempting to define terrorism in some form during both peacetime and situations of armed conflict, it will be difficult to determine whether any protection is afforded to persons against terrorism in these circumstances. The defining of terrorism, therefore, plays an important role in establishing protection afforded to civilian detainees and in connecting the definition of acts of terror with that of terrorism.

1.4. Methodology

This research is academic desk-based research, based on the sources of International Humanitarian Law and International Criminal Law.

⁶ ICRC 'Terrorism' <<https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/terrorism>> accessed 20 October 2023.

1.5. Limitation

This research is limited to determining whether a prohibition of terrorism exists in the field of International Humanitarian Law and International Criminal Law, based on Conventions and Case Law of International Courts and Tribunals. It will not consider the national laws or cases of various States, unless same has been made applicable to the international community through precedent or Customary International Law.

1.6. Chapter Overview

Chapter 1 lays out the introduction to the research and includes relevant background thereto. The research questions to be answered through this research is also set out.

Chapter 2 attempts to lay a foundational background to the subsequent chapters by showcasing the lack of definition of terrorism in international law, while interpreting various Conventions in an attempt to show common elements which could be used to define terrorism.

Chapter 3 focuses on whether there is a prohibition of terrorism in the context of civilian detainees during armed conflicts. This chapter defines detention, acts of terrorism, acts of violence and its relationship to acts of terrorism. It also determines what protection is afforded to civilians during hostilities.

Chapter 4 finally asks the question of whether there is a prohibition of acts of terror in the context of hostilities as a whole and investigates how different international Courts and Tribunals have approached this topic.

Chapter 5 concludes this research and provides a summary of the answers to each research question in this paper. Some recommendations are also given in response to the outcome of the research questions.

1.7. Conclusion

This Chapter served to introduce the topic of this research and lay out the research questions which are to be answered. I will now explore this topic in the hopes of coming to a conclusion which favours peace, justice, and international security.

Chapter Two: How is Terrorism defined in the context of peacetime and armed conflicts?

2.1 Introduction

Although the term ‘terrorism’ is used often across the globe to describe a variety of acts and crimes committed, one of the legal realm’s lacunas is the absence of a universally accepted definition of terrorism.⁷ In a case heard by the Special Tribunal for Lebanon, it was held that there is a customary definition of terrorism which encompasses the perpetration of a criminal act which involves a transnational element, or the threat thereof, coupled with the intention to spread fear amongst the population or which would have national or international authorities feel compelled to act in a certain manner, either directly or indirectly, alternatively to refrain from acting.⁸ The Tribunal specifically stated that a customary rule existed at least in peacetime and that it is emerging in the context of armed conflicts.⁹ This case was, however, highly criticised and its definition is not universally accepted, nor is it accepted that this definition is of customary nature.¹⁰ Considering the criticism on this judgment and the fact that there is still no universally accepted definition of terrorism, it will be useful to look at various international conventions related to terrorism, terrorists and acts of terror to have a better understanding of the term terrorism.

Although it is limited, there are several conventions which endeavour to address the prohibition of specific acts of terrorism,¹¹ and activities related to terrorism: the financing of terrorism, the taking of hostages and terrorist bombings. Many international governments recognised that identifying and targeting specific areas could enable better action against international terrorism.¹² Unfortunately, these conventions fail to define terrorism and acts of terror and only provide broad overviews of the specific acts related to terrorism. Some of these conventions apply to both peacetime and in the context of armed conflicts. The reason for mentioning specifically the application within peacetime, is both for thoroughness and to determine whether there is a prohibition of terrorism under International Criminal Law, when there is no armed conflict regulated by International Humanitarian Law. Despite the lack of a definition, it is still helpful to interpret these Conventions in such a way to have some idea of what could be defined as terrorism.

⁷ Boaz Ganor ‘Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?’ (2002) 3:4 Police Practice and Research 287.

⁸ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, [2011] STL-11-01/1 (Special Tribunal for Lebanon) para 85.

⁹ *ibid* para 110.

¹⁰ Lukáš Mareček ‘Terrorism as a crime under international customary law introduced by Special Tribunal for Lebanon’ (2017) 73,85.

¹¹ Michael Lawless ‘Terrorism: An International Crime’ (2007/2008) 63 1 International Journal Winter 139, 147.

¹² ‘Progress Report on the United Nations’ Attempt to Draft an International Convention Against the Taking of Hostages’ (1979) 6 Oxio N.U.L. REv 89, 89.

2.2. Conventions and Organisations Prohibiting Specific Acts of Terrorism

i. The International Convention Against the Taking of Hostages

The International Convention Against the Taking of Hostages¹³ (Hostage Convention) provides for the prohibition of the taking of hostages as ‘manifestations of international terrorism’.¹⁴ Without defining what would constitute international terrorism, it describes the ‘taking of hostages’ as a person seizing, detaining, threatening to kill, to injure or continuing to detain another person (a hostage) for the purpose of compelling another party, such as a State, international intergovernmental organisation, natural or juristic persons or groups of persons to act or refrain from acting as a condition, be it implied or explicitly, to releasing the hostage.¹⁵ This provision, therefore, requires that the perpetrator takes a hostage, with the intent to compel action or inactivity from a third-party and that this would be a manifestation of international terrorism.

Article 12 of the Hostage Convention, specifically excludes the applicability of the Hostage Convention to war victims and victims of hostage-taking during armed conflicts, insofar as they are protected specifically by the Geneva Conventions and the Additional Protocols thereto and insofar as States are required to prosecute or hand over the persons who took hostages.¹⁶ The definition in the Hostage Convention, therefore, does not relate to the taking of hostages in the context of peacetime and armed conflicts.

In line with the Hostage Convention, terrorism would then require an element of intention to compel action or inactivity from a third-party.

ii. The Declaration on Measures to Eliminate International Terrorism and the United Nations Office on Drugs and Crime

In the now recalled Declaration on Measures to Eliminate International Terrorism,¹⁷ States agreed that acts committed with the intention to provoke terror in the general population, particular persons, or groups of persons for political purposes are unjustifiable.¹⁸ This implies a political purpose along with an intention to provoke terror is required to classify a criminal act as an act of international terrorism. The Declaration, however, did not define what would constitute terror or a political purpose.

The United Nations Office on Drugs and Crime (UNODC) understands the term ‘terrorism’ to encompass a certain coercion through utilizing or threatening to utilize violence with the purpose of spreading fear and attaining a political or ideological goal.¹⁹ The UNODC further explains that terrorism includes an aspect of trying to coerce a third party to act or refrain from acting in a certain

¹³ International Convention against the Taking of Hostages (adopted 17 November 1979, entered into force 3 June 1983) 21931 UNTS.

¹⁴ (n 13) 206.

¹⁵ (n 13) art 1.

¹⁶ (n 13) art 12.

¹⁷ Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly Resolution 49/60 (9 December 1994).

¹⁸ (n 17) art 3.

¹⁹ (n 4).

manner, in reaction to the acts committed by the perpetrator.²⁰ This definition coincides with both provisions above in that it includes the intent of coercing a third party to act or not to act, it confirms the need for a political or ideological goal and for the intention of provoking fear to be present.

iii. The International Convention for the Suppression of Terrorist Bombings

In the International Convention for the Suppression of Terrorist Bombings (Bombing Convention),²¹ acts of terrorism with all its forms and manifestations, which include attacks by means of explosives or other lethal devices are addressed, without defining ‘terrorism’, ‘acts of terrorism’ or expanding on the meaning of ‘manifestations’. The Bombing Convention, excludes the acts of military forces during armed conflicts as far as it is governed by International Humanitarian Law (IHL).²² This Convention, focuses specifically on the delivery, placement, discharging or detonation of an explosive or other lethal device in, into or against a place of public use, a State or government facility, public transportation systems or infrastructure with the intention to cause death or serious bodily injury or with the intention to cause such extensive destruction which will likely result in major economic loss.²³ Despite the fact that the Bombing Convention speaks to terrorist bombings, it fails to define the term and the description that it does give does not include an intention of spreading fear or terror amongst the general population, nor does it imply a certain coercion of a party to act or refrain from acting in a certain way, as with the other treaties. It does however highlight an intention to cause destruction with the effect of major economic loss.

The Bombing Convention only applies to situations where acts have an international element attached to it and if these acts occur within a single State and the offender and victims are nationals of that State, it will not apply.²⁴ Therefore, this Convention could extend to armed conflict, but only if or when IHL does not govern it, or when another State has a basis to exercise jurisdiction.²⁵

iv. The International Convention for the Suppression of the Financing of Terrorism

The International Convention for the Suppression of the Financing of Terrorism (Financing Convention),²⁶ aims to suppress the financing of international terrorism upon which such terrorism is dependent on. The Financing Convention does not define terrorism nor acts of terrorism specifically, but states that the funding of certain acts which have the intention to cause death or serious bodily injuries to civilians or persons not taking part in the hostilities during an armed conflict, when the purpose of such acts is to intimidate the general population, or to coerce a State or international organisation to act or refrain from acting in a certain manner.²⁷ Due to the fact that this treaty is applicable to acts which are offences in terms of various other treaties as listed in its

²⁰ (n 4).

²¹ International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 37517 UNTS.

²² *ibid.*

²³ (n 21) art 2(1).

²⁴ (n 21) art 3.

²⁵ (n21) art 6.

²⁶ International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 38349 UNTS.

²⁷ (n 26) art 2(1)(b).

Annex,²⁸ the Financing treaty applies in both peacetime and in the context of armed conflicts. The Financing Convention concurs with the Hostage Convention, the Declaration on Measures to Eliminate International Terrorism and the UNODC that terrorism involves the intent of intimidation of the civilian population and of coercing a third party to act or to remain inactive.

2.3. Conclusion

There are common elements that must be present, according to the above Conventions and Institutions, to define terrorism and to classify certain acts as acts of terrorism during peacetime and in times of hostilities. The act perpetrated, must include the intention to invoke fear or terror amongst the general population, or serve the purpose of coercing a third-party to act or refrain from acting in a certain manner, because of the act committed and/or being threatened to be committed. These third-parties are not limited to States and can include other persons, natural or juristic and national and international organisations.

Although some treaties and interpretations require or suggest the need for a political or ideological goal or purpose behind the intent to spread fear,²⁹ it could lead to complications in creating a universal definition as it would require an insight into the psyche of every individual perpetrator and organisation's political, religious, or ideological views, which seems to this author unnecessary and extremely difficult to establish. The element of coercing a third-party to act or to remain inactive, seems to be a very specific element, which to writer hereof makes sense during hostage situations, however, in the bigger scheme of armed conflicts, I believe this element to be unnecessary. Due to the fact that the general consensus seems to be that an intention to spread fear or terror is the main purpose behind terrorism, the coercion of a third-party does not seem to be a primary intention, except in the case of taking a hostage. As mentioned, terrorism is not prohibited against valid military targets and, therefore, the element of spreading terror amongst civilians seems more appropriate to determine whether an act is terrorism or not.

The lack of a universal definition of terrorism and specific legal regimes or specific organs to deal with terrorism, contributes to the increasing amount of terrorist activities globally.³⁰ Such a lack can be ascribed to the doubt amongst many jurists and specialist on the 'role and effectiveness of law and legal systems' in combatting terrorism.³¹

From the above, it is clear that several conventions and organisations prohibit certain acts as a manifestation of terrorism, without defining terrorism or acts of terrorism. It is, however, not the intention of this research to attempt to a definition of these terms or to convince readers of a universal definition, but through highlighting the lack of a definition thereof, it leads us to the next question to be answered: if no universal definition of terrorism exists, is it in fact prohibited under IHL and International Criminal Law (ICL)?

In the next chapter, it will be explored whether there is a prohibition of terrorism specifically in the context of civilian detainees during an armed conflict and what protection is afforded to these civilian detainees against terrorism during hostilities.

²⁸ (n 26) art 2(1)(a).

²⁹ (n 11) 150.

³⁰ (n 11) 147.

³¹ (n 11) 149.

Chapter Three: Is there a Prohibition of Terrorism in the context of Civilian Detainees during armed conflicts and what protection is afforded to them?

3.1. Introduction

This chapter aims to address the protection afforded to detainees against acts of terror during an armed conflict. The terms 'acts of terror' and 'acts of terrorism' will be used interchangeably. Armed conflicts will be more clearly defined and how it relates to Acts of Terror in Chapter Four. For this chapter it will suffice to state that armed conflicts are divided into either International Armed Conflicts (IACs) or Non-International Armed Conflicts (NIACs).

As mere background to the protection of civilians during armed conflicts, Additional Protocol I³² states that parties to an armed conflict must always distinguish between civilians and combatants.³³ In armed conflicts, whether it is an IAC or NIAC, it is always important to differentiate between combatants and civilians. Under IHL, this is known as the principle of distinction which has been depicted as a 'cardinal' principle of IHL.³⁴

For the purposes of this research, the focus will be on acts of terrorism within the context of detained civilians in an armed conflict. The Fourth Geneva Convention specifically excludes Prisoners of War (POW) from its protection and focuses on civilians and their status as protected persons.³⁵ In the context of NIACs, Common Article 3 of the Geneva Conventions and Additional Protocol II protect persons who are detained.

3.2. The Protection of Civilians during Armed Conflicts

Civilians who directly participate in hostilities are lawful, valid targets and lose their protection as civilians.³⁶ Civilians who are indirectly involved or nonparticipants in hostilities are not valid targets during an armed conflict.³⁷ Direct participation involves a causal relationship between the activity of the civilian and the harm inflicted to the enemy at the time and place of such activity.³⁸ Persons merely within the proximity of armed forces or who are financial contributors, informants, collaborators or service providers but who do not have a fighting function are not directly involved under IHL even if their actions support an opposition movement or insurgency.³⁹

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I).

³³ Protocol I (n 32) art 48.

³⁴ *Threat of Use of Nuclear Weapons* (Advisory Opinion) I.C.J. Rep (1996) 78.

³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 4.

³⁶ Protocol I (n 32); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non international Armed Conflicts (adopted June 8 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art. 13(3).

³⁷ Ryan Goodman 'The Detention of Civilians in Armed Conflict' (2009) 103,1 *The American Journal of International Law* 48, 52.

³⁸ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols*, (1987) 516.

³⁹ (n 37) 53.

Civilians who are not involved in any sense in hostilities may not be detained purely because they form part of the enemy power's population and may only be detained if they pose a threat to the State's security.⁴⁰ Such a threat can be due to direct participation in the hostilities or if their activity falls short of direct participation, which means that civilians may be detained even if they did not directly participate in hostilities.⁴¹

Indirect participation relates to the activities of civilians that do not have a direct causal link between the activity and the damage to the enemy.⁴² However, even if the activity does not occur on the battlefield, any activity happening in the territory of either party to the hostilities or that is directly assisting enemy powers is construed as being indirect participation.⁴³ Persons, including civilians, who accompany armed forces but are not members thereof themselves as described in Article 4(A)(4) of the Third Geneva Convention,⁴⁴ are able to be detained.

In the context of NIACs, civilians are subject to domestic legislation if they support armed forces in the form of labour, transportation of supplies, as messengers or distributing propaganda, though this does not make them direct participants.⁴⁵ Indirect participation also includes persons whose purpose is to cause a disturbance during the hostilities and clearly includes civilians and not only members of armed forces.⁴⁶ The overarching factor which determines whether action such as detention is justified, is that the person must be a participant in the hostilities and that such person must pose a security threat.⁴⁷ At the very least, it must be established that a person is an indirect participant in the hostilities and if this is the case, detention is only justified when it is 'absolutely necessary' in that it will stop the threat posed by the person.⁴⁸ It is clear that nonparticipants in the armed conflict, civilians, are protected during armed conflicts and may not be targeted or detained without justification under IHL. Although detention of civilians as direct indirect participants is permitted, it is a severe measure.⁴⁹ It is clear that there is protection of civilians during armed conflicts under IHL.

Civilians who are captured by the enemy party, may be eligible for POW status under specific circumstances, as is explained in the Third Geneva Convention and Additional Protocol I.⁵⁰ This chapter focuses specifically on civilians who are detained, who are not eligible for POW status, and who are protected under the Fourth Geneva Convention and the Additional Protocols.

3.3. What is Detention and Internment during Armed Conflicts?

⁴⁰ Jean Pictet (ed), *Commentary: IV Geneva Convention Persons in Time of War* (1958) 254.

⁴¹ (n 37) 54.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art 4(A)(4).

⁴⁵ Michael Bothe, Karl Josef Partsch & Waldemar A Solf, *New Rules for Victims Conflicts: Commentary on The Two 1977 Protocols Additional to The Geneva Of 1949* (1982) 672.

⁴⁶ (n 37) 55.

⁴⁷ (n 37) 56.

⁴⁸ Fourth Geneva Convention (n 35) art 42.

⁴⁹ (n 40) 207.

⁵⁰ Third Geneva Convention (n 44) art 4; Protocol I (n 32) art 44.

During an IAC, the law distinguishes between detention and internment, whereas in NIACs, the terms are not separated and 'detention' is used as an overarching term.⁵¹ For thoroughness, the two terms will be separately defined and it will thereafter be used interchangeably to avoid confusion. In terms of IACs, detention is adequately and extensively addressed by the Four Geneva Conventions, along with Additional Protocol I. The Four Geneva Conventions specifically cover the varying instances of detention and various persons being detained during IACs, and Additional Protocol I, which is widely ratified, along with Customary International Law further protect detainees within the context of IACs.⁵²

Detention is the deprivation of a person's liberty and is lawful under IHL during armed conflicts.⁵³ Two categories of persons, combatants and civilians, may be detained if the reason for detention relates to the armed conflict.⁵⁴

During detention, the person is confined and detained under the control of either a State in an IAC or a Non-State party in a NIAC.⁵⁵ Detention of civilians is permitted under the Fourth Geneva Convention, however, justification is based on whether a person poses a security threat.⁵⁶ Members of armed forces who are taken into the hands of the adverse party are given the status of POW and this status is only applicable in an IAC.⁵⁷

The detention of combatants has the purpose of preventing the person from further participation in the armed conflict.⁵⁸ There are different, yet overlapping, rules governing the detention of combatants and civilians during an armed conflict. The Fourth Geneva Convention specifically regulates the treatment of civilians who are detained by the Detaining Power, along with Additional Protocol I, which regulates the treatment of detainees not categorised as protected persons.

Internment can be defined as a specific type of deprivation of one's liberty, specifically deprivation ordered by the executive branch of a State.⁵⁹ This action is also done without the person being charged for any criminal activity and the primary purpose thereof, is to control the movements of the person for security reasons.⁶⁰ Internment under IACs are regulated explicitly and allowed within the limits of the treaties regulating it, whereas IHL is not clear on the regulation of internment in the context of NIACs.⁶¹ Under Common Article 3 of the Geneva Conventions, protection is given to persons being detained, which includes any form of detention during hostilities, encapsulating internment as well.⁶² Further, Additional Protocol II makes provision for the protection of persons

51 Doctors Without Borders 'The Practical Guide to Humanitarian Law' <<https://guide-humanitarian-law.org/content/article/3/detention-1/>> accessed 21 October 2023.

52 ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, October 2016, 32IC/15/11 <https://www.refworld.org/docid/58047a764.html> accessed 29 October 2023 37.

53 (n 51).

54 *ibid.*

55 ICRC IHL Databases Definitions <https://casebook.icrc.org/a_to_z/glossary/detention> accessed 13 October 2023.

56 Fourth Geneva Convention (n 35) arts 5, 27, 41-43 and 78.

57 ICRC 'Prisoners of war and detainees protected under international humanitarian law' (29 October 2010) <<https://www.icrc.org/en/document/protected-persons/prisoners-war>> accessed 9 October 2023.

58 (n 57).

59 ICRC Database Glossary <https://casebook.icrc.org/a_to_z/glossary/internment> accessed 12 October 2023.

60 *ibid.*

61 *ibid.*

62 *ibid.*

being deprived of their liberty in NIACs,⁶³ specifically protecting their rights during internment or detention.⁶⁴

Now that these terms have been defined, it must be determined whether civilians are afforded protection during detention and internment specifically against terrorism and against other crimes such as torture, ill treatment.

3.4. Protection during Internment

During internment, if a person does not warrant POW status, they will be classified as a civilian and are then protected under the Fourth Geneva Convention.⁶⁵ The Fourth Geneva Convention has a general prohibition against the internment of civilian persons,⁶⁶ unless they are interned for imperative security reasons,⁶⁷ or if for the sake of the detaining State's security it is absolutely necessary.⁶⁸ If such a civilian is interned based on the suspicion that they were involved in committing a crime, they must be charged accordingly, failing which, they must be released without delay.⁶⁹ The use of the words 'imperative security reasons' and 'absolutely necessary' indicate that the internment must be a last resort and may not be done without reason.

Civilians are protected from torture, ill-treatment and any forms of brutality during hostilities, whether they are being interned or detained or not.⁷⁰ Article 32 of the Fourth Geneva Convention clearly protects civilians from 'physical suffering or extermination' at the hands of the detaining party.⁷¹ This provides for protection against murder, torture, corporal punishment, mutilation, medical or scientific experiments, along with other measures of brutality.⁷² This provision applies for both civilian and military agents of the Detaining party.⁷³

Civilians who are being detained or interned are protected against inhumane treatment as a fundamental guarantee.⁷⁴ The humane treatment of civilians and persons *hors de combat* is also a rule of Customary International Law.⁷⁵ The physical and mental health of persons in the hands of the enemy power, who are interned or detained or whose liberty is deprived, along with their integrity must always be protected.⁷⁶

⁶³ Protocol II (n 36) art 4.

⁶⁴ Protocol II (n 36) art 5.

⁶⁵ Fourth Geneva Convention (n 35).

⁶⁶ Fourth Geneva Convention (n 35) art 79.

⁶⁷ Fourth Geneva Convention (n 35) art 78.

⁶⁸ Fourth Geneva Convention (n 35) art 42.

⁶⁹ Protocol I (n 32) art 77(3).

⁷⁰ Protocol II (n 36) art 4(1).

⁷¹ Fourth Geneva Convention (n 35) art 32.

⁷² Fourth Geneva Convention (n 35) art 32.

⁷³ *ibid.*

⁷⁴ ICRC Rules of Customary IHL Database Rule 87 <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule87>> accessed 12 October 2023.

⁷⁵ *ibid.*

⁷⁶ Protocol I (n 32) art 11(1).

Under Article 4(2) of Additional Protocol II, these persons are also protected against being subjected to specific acts at any time or place,⁷⁷ which will clearly include detention as a ‘time or place’. This protection is extended to any person encapsulated by Article 4(1) of Additional Protocol II, namely . This is to be distinguished from the protection afforded under Article 33 of the Fourth Geneva Convention during IACs

Civilians are specifically protected against acts of terrorism and threats to commit acts of terrorism and this is irrespective of whether or not they are deprived of their liberty.⁷⁸ Civilians are, as is accepted in IHL, protected against being the object of attack, this includes a prohibition of acts or threats of violence which have the primary purpose of spreading terror amongst the civilian population.⁷⁹ This provision has also attained customary status,⁸⁰ and is further supported by the prohibition of all measures of intimidation or of terrorism including the protection of protected persons during IACs.⁸¹ This confirms the interpretation in Chapter 1 on the element of intent to spread terror which is a deciding factor on whether an act constitutes terrorism.

In the Commentary on the Additional Protocols,⁸² Article 51(2) of Additional Protocol I is understood to encapsulate the kind of terror against civilian populations which does not bring forth any military advantage.⁸³ Under Additional Protocol II, an identical provision is found as in Additional Protocol I, in that any acts or threats of violence which has the primary purpose of spreading terror amongst civilian populations, are prohibited.⁸⁴ Acts of terrorism are also classified as a war crime under the Statutes of various International Tribunals and Courts.⁸⁵

There is no definition within any of the Additional Protocols or the Four Geneva Conventions for ‘terrorism’, ‘acts of terrorism’ or ‘acts of terror’. In accordance with the provision in Additional Protocol I, it is not the actual terror that is prohibited, but rather attacks or threats thereof that have the purpose of resulting in the terror of the civilian population.⁸⁶ The perpetrator must have the purpose and intent of deliberately causing terror amongst civilians through their acts or threats thereof, as it is almost guaranteed that some fear and terror will be experienced by civilians during an armed conflict.⁸⁷ It is clear from the above provisions that a mere threat of such acts, will also constitute a violation of the laws and customs of war. The act of warning against impending attacks

⁷⁷ Protocol II (n 36) art 4(2) “a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishments; c) taking of hostages; d) acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; h) threats to commit any of the foregoing acts.”

⁷⁸ Protocol II (n 36) art 4(2)(d), art 4(1) and art 4(2)(h).

⁷⁹ Protocol I (n 32) art 51(2).

⁸⁰ ICRC IHL Database Customary IHL Rule 2 <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule2>> accessed 12 October 2023.

⁸¹ Fourth Geneva Convention (n 35) art 33.

⁸² (n 40).

⁸³ (n 40) 618, para 1940.

⁸⁴ Protocol II (n 36) art 13(2).

⁸⁵ The Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, last amended 13 October 2006) art 4(d); The Statute of the Special Court for Sierra Leone (adopted 16 January 2000) art 3(d).

⁸⁶ (n 45) 342 para 2.3.1.

⁸⁷ (n 45) 342 para 2.3.2.

to allow civilians to evacuate, could also constitute a threat intended to spread terror.⁸⁸ The Fourth Geneva Convention further prohibits all measures of terrorism.⁸⁹

It is a basic principle that all persons in detention must be treated humanely, that their dignity must always be respected,⁹⁰ and that they shall not be subjected to torture, cruel, inhuman, degrading treatment or punishment.⁹¹ The use of violence, threats or methods of interrogation which impairs a person in detention's capacity for decision making or judgment is also prohibited.⁹² 'Cruel, inhuman or degrading treatment or punishment' includes physical or mental abuse, such as being held in conditions that deprive a person from his natural senses, either temporarily or permanently.⁹³

Article 75 of Additional Protocol I gives fundamental guarantees to persons in the hands of a party to the conflict by providing that these persons shall be treated humanely in 'all circumstances',⁹⁴ which by mere deduction also includes circumstances of detention. This provision does not provide for the specific prohibition of acts of terrorism as above, however, there are clear prohibitions of 'violence to the life, health, or physical or mental well-being of persons', murder, torture of all kinds including physical and mental torture, amongst others.⁹⁵ It can be argued that any acts implying violence to the life, health, physical or mental well-being of persons constitute acts of terrorism,⁹⁶ but as it was not specifically stated as such in this provision, it can contrarily be argued that not all acts of terrorism are specifically covered by Article 75.⁹⁷

It is clear from the above provisions and Customary International law that any acts of ill-treatment, cruel treatment, torture, acts of violence and acts of terrorism against civilian detainees are prohibited under IHL and any breach of these provisions constitutes violations against the laws and customs of war.⁹⁸ However, as the two Additional Protocols and the Four Geneva Conventions fail to define 'acts of terrorism', 'terror' or 'terrorism' even when a prohibition thereof is provided for, it would be best to turn to case law to determine what would constitute acts of terrorism in detention.

3.5. Acts of Terrorism against Civilian Detainees

i. Defining Acts of Terrorism

In IHL and ICL, the terms 'terror', 'acts of terror' and 'terrorism' are not universally defined nor accepted. There have been ample examples of case law across the globe and across history,

⁸⁸ *ibid.*

⁸⁹ Fourth Geneva Convention (n 35) art 33.

⁹⁰ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988
<<https://www.ohchr.org/sites/default/files/bodyprinciples.pdf>> accessed 15 October 2023 principle 1.

⁹¹ (n90) principle 6.

⁹² (n90) principle 21.

⁹³ (n 90) general principle.

⁹⁴ Protocol I (n 32) art 75(1).

⁹⁵ Protocol I (n 32) art 75(2)(a).

⁹⁶ (n 45) 519 para 2.11.

⁹⁷ (n 45) 519 para 2.11.

⁹⁸ Protocol I (n 32) art 51; Protocol II (n 36) art 13.

where persons have been accused of terrorism and/or of committing acts of terror, without much of a definition in what would constitute such.⁹⁹ The ordinary dictionary meaning of terror is ‘great fear, an object or person inspiring fear or dread’, whereas terrorism is defined as ‘the use of terror and violence to intimidate’.¹⁰⁰ In the case of *Prosecutor v Galić* (hereafter *Galić*),¹⁰¹ the International Criminal Tribunal for the former Yugoslavia (ICTY) defined ‘terror’ as extreme fear.¹⁰²

Some acts that have been included within and understood as amounting to ‘acts of terrorism’ are indiscriminate bombardment, attacks against the civilian population or civilian objects, persecutions, acts of violence designed to spread terror among the population, rape, extrajudicial executions, enforced disappearances.¹⁰³ The specific wording of ‘designed to spread terror among the population’ is in line with the provisions described in Chapter 1 and with the idea that terrorism involves a certain intent of the perpetrator to terrorise civilians.

The Netherlands Temporary Court-Martial at Macassar in the *Trial of Shigeki Motomura and 15 Others*¹⁰⁴ held that the ill-treatment and torture of interned civilians were particular forms of ‘systematic terrorism’ in that these acts were committed to various members in the same manner and the object thereof was to force a confession.¹⁰⁵ The court did not express a need for the intent of the perpetrators to be that of spreading terror amongst the detainees, however, it can be argued that it was in fact extreme fear which led to their confessions. From this specific case, it seems to writer hereof that systematic terrorism could be differentiated from the term terrorism in that ‘systematic’ refers to the way in which acts of violence, in this case ill-treatment and torture’ were used (repeatedly, in the same manner to various persons), whereas the term ‘terrorism’ alone refers to the purpose behind the acts of violence, which is to terrorise civilians, rather than the specific way the acts are committed. This would then mean that systematic terrorism would entail the repeated manner in which acts of violence are used in order to instil extreme fears in civilian detainees.

In *Galić*, the ICTY held that the indiscriminate shooting of civilians had the objective of causing terror among civilians, which classifies it as an act of terror.¹⁰⁶ Further, the ICTY rejected the notion that there must be actual terror inflicted and did not accept this as an element of the crime of terror as a war crime.¹⁰⁷ The ICTY determined that the following are the elements of the war crime of terror:

1. Acts or threats of violence were directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

⁹⁹ The Special Court for Sierra Leone; The International Criminal Tribunal for the Former Yugoslavia.

¹⁰⁰ The New Choice English Dictionary Peter Haddock Publishing 1999.

¹⁰¹ *The Prosecutor v. Galić* International Criminal Tribunal for the former Yugoslavia (ICTY) Judgment and Opinion (Trial Chamber) Case No. IT- 98- 29- T (5 December 2003) (Galic).

¹⁰² Galic (n101) para 137.

¹⁰³ Doctors Without Borders ‘The Practical Guide to Humanitarian Law ‘Terror’ <<https://guide-humanitarian-law.org/content/article/3/terror/>> accessed 20 October 2023.

¹⁰⁴ *Trial Of Shigeki Motomura and 15 Others* Netherlands Temporary Court-Martial at Macassar (18 July 1947).

¹⁰⁵ The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals XIII* (1949) 138, 144 <https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-13/Law-Reports_Vol-13.pdf> accessed 15 October 2023.

¹⁰⁶ Galic (n101) paras 591 and 573.

¹⁰⁷ Galic (n101) para 134.

2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.¹⁰⁸

It is, therefore, clear that the acts must be perpetrated against civilians who are not part of the armed conflict and the primary purpose must be that of spreading terror among the civilian population. The adding of 'threats' of violence to the elements, broadens the scope of acts of terror. Writer hereof interprets this as that if such threat never comes into fruition, it is enough to be punishable as an act of terror under IHL if such threat was intended to spread terror amongst civilians. There is no set, universal definition of what constitutes a threat under IHL, however, the ordinary meaning of 'threat' is a declaration of an intention to inflict harm or punishment,¹⁰⁹ and the threats of violence in the mentioned context is explicitly prohibited.

In the context of this research, this definition implies that the act or threat which is directed at civilian detainees, who are not taking direct part in the armed conflict, must be violent in nature, while the intention of the perpetrator must be to specifically target such persons with the purpose of spreading terror amongst them in order to be classified as an act of terrorism.¹¹⁰

If 'acts or threats of violence' can be defined, it can be determined what acts would constitute a breach of the prohibition thereof and if the element of the purpose of the perpetrator to spread terror is fulfilled, it can be assumed that these acts would then amount to an act of terror.

The term 'acts of terrorism' under Article 4(2)(d) of Additional Protocol II allows a broader interpretation of the prohibition in that it includes acts that are directed against installations which would cause victims as a side-effect.¹¹¹ The original drafters provided for a prohibition of 'acts of terrorism in the form of acts of violence',¹¹² which reiterates that an act of violence will be construed as an act of terror if, as mentioned, the act was intended to terrorise the civilian population. The addition of the words 'at any time and in any place whatsoever' confirm the absolute obligation on parties to an armed conflict to treat persons who are not directly part of the conflict humanely irrespective of any other circumstance.¹¹³

ii. Acts of Violence and its relationship to Acts of Terrorism

Under Additional Protocol II, the fundamental guarantee of humane treatment is codified.¹¹⁴ Various acts are prohibited under this Additional Protocol which is a clear violation of the requirement to treat persons humanely, such as 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of

¹⁰⁸ *Prosecutor v. Galić* Judgment (Appeals Chamber) paras 100-101.

¹⁰⁹ (n 100).

¹¹⁰ *Galic* (n 108) paras 100-101.

¹¹¹ (n 40) 1375, para 4538.

¹¹² *ibid.*

¹¹³ (n 40) 1372, para 4528.

¹¹⁴ Protocol II (n 36) art 4.

corporal punishment.¹¹⁵ Writer hereof interprets this provision as accepting that these listed acts would constitute 'violence' under IHL and that if a person commits any of the acts listed under inhumane or cruel treatment, or murder against detainees, it would constitute acts of violence and if the perpetrator's intent is to terrorise the civilians through their acts, it would constitute acts of terror.

The term violence is ordinarily defined as being 'physical force intended to cause injury or destruction',¹¹⁶ or 'the use of physical force or power, threatened or actual, that either results in or has a high likelihood of resulting in injury, death, psychological harm, or property damage.'¹¹⁷ The previously mentioned acts or threats thereof would clearly fall within these definitions of violence. One could also construe 'psychological harm' as including extreme fear (terror).

In the case of *The Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (The *Celebici Case*),¹¹⁸ the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) convicted one of the accused of rape as torture.¹¹⁹ Rape is considered an act of violence due to the physical and psychological pain and suffering of the victim.¹²⁰

In the *Celebici Case*,¹²¹ the charges brought against the accused parties involved the following acts against detainees in the Celebici prison-camp: murder, torture, sexual assault, beatings, and other cruel and inhuman treatment.¹²² These acts were committed in the context of an armed conflict and all victims were detainees.¹²³ In this matter, Mr. Landzo was found guilty by the Trial Chamber of torture due to his cruel treatment with the intent of causing severe pain and suffering, for the purposes of punishing and intimidating the victim and to contribute to the 'atmosphere of terror reigning in the camp and designed to intimidate all of the detainees.'¹²⁴ Considering the above interpretation, it could be argued that Mr. Landzo could have been charged with acts of terror, due to his actions falling within the definition as given in *Galic*:¹²⁵ he committed an act of violence (torture) against a person who did not take part in the hostilities, intentionally targeting such a person for the purpose of contributing to an infliction of terror amongst the civilian detainees.

In another case before the ICTY which dealt with acts of violence which could have been construed as acts of terror, *The Prosecutor v Radoslav Brdjanin*,¹²⁶ the Trial Chamber held that an atmosphere of fear and terror was created by paramilitaries through the acts of murder, rape, plunder, and destruction of property.¹²⁷ This supports the previously mentioned view that acts of terror can construe acts perpetrated against installations (property) which could cause victims as a

¹¹⁵ Protocol II (n 36) art 4(2)(a).

¹¹⁶ (n 100).

¹¹⁷ Law Insider 'Act of Violence' <<https://www.lawinsider.com/dictionary/act-of-violence>> accessed 12 October 2023.

¹¹⁸ *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnir Delalic* (Trial Judgement) IT-96-21-T, ICTY (16 November 1998).

¹¹⁹ (n 118) para 1262.

¹²⁰ Annual Report of the Inter-American Commission on Human Rights 5/96 10.970, (1 March 1996) 186.

¹²¹ (n 118).

¹²² *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnir Delalic* (Indictment) IT-96-21-T, ICTY (20 March 1996) paras 16-35.

¹²³ (n 122) paras 9 and 13.

¹²⁴ (n 118) para 923.

¹²⁵ *Galic* (n 108) paras 100-101.

¹²⁶ *Prosecutor v Radoslav Brdjanin* (Trial Judgement) IT-99-36-T ICTY (1 September 2004).

¹²⁷ (n 126) para 97.

side effect.¹²⁸ Many of these acts were perpetrated against detainees in the context of the ongoing armed conflict, which could constitute acts of terrorism under IHL, in accordance with the interpretation above.

The term ‘terrorism’, while falling short of being defined, was mentioned to be an act designed for the principal purpose of instilling terror in a target population in the case of *The Prosecutor v Tihomir Blaskic (Blaskic)*.¹²⁹ In the same matter, the accused was charged with inhuman and cruel treatment, which constitutes acts of violence and can be described as acts of terror if the final element of the *Galic* case is present. The detainees in *Blaskic* were subjected to being used as human shields, physical and mental violence, deprivation of food and water, while others were killed or wounded in the process of digging trenches under duress.¹³⁰ Although the accused was not charged, nor convicted of acts of terrorism, one could argue that he could have been, considering the *Galic* definition and the clear intention of terrorising the civilian detainees through his acts of violence (inhuman and cruel treatment).

3.6. Conclusion

If the case law is interpreted considering the three elements of the *Galic* case,¹³¹ it can be argued that acts of terror involve acts or threats of violence against persons who are not directly participating in armed conflicts, with the perpetrators specifically targeting such persons with the purpose of terrorising the civilian population. In the interpretation of various provisions of IHL and ICL documents, as discussed, cruel and inhuman treatment fall within the ambit of acts of violence for the purposes of defining acts of terror. Civilians and civilian detainees are heavily protected by IHL and ICL from acts of terror, either directly through specific prohibitions of acts of terrorism or ‘indirectly’ through the prohibitions against cruel and inhuman treatment and acts of violence, should they comply with the elements stated in the *Galic* case. These protected persons are also protected whether the armed conflict is an IAC or NIAC.

There is certainly no shortage of protection against acts of terrorism for civilian detainees or internees, however, it seems that the prohibition of terrorism does not protect in reality, as without a universally defined definition for terrorism, prosecutions of this crime will remain far and few in between.

The next chapter will determine whether terrorism is prohibited in the context of armed conflicts as a whole.

¹²⁸ (n 40) 1375, para 4538.

¹²⁹ *The Prosecutor v. Tihomir Blaskic (Trial Judgement)* IT-95-14-T ICTY (3 March 2000) para 505.

¹³⁰ (n 129) para 681.

¹³¹ *Galic* (n 101).

Chapter Four: Is there a prohibition of Acts of Terror in the context of hostilities and how have courts approached it?

4.1. Introduction

It has now been ascertained that civilians are afforded protection under IHL and ICL against acts of terror, with specific focus on civilians in detention. It will now be determined which specific acts of terror are prohibited under IHL and have been criminalised, investigated and/or prosecuted under ICL in the context of hostilities through examples found in case law. It must be noted that acts of terrorism against civilians are always unlawful, whereas acts of terror against combatants are not prohibited under IHL, as they are valid targets during an armed conflict.¹³²

What is already clear, is that acts or threats of violence of which the principal purpose is to spread terror among civilian populations will equate to acts of terrorism and is strictly prohibited by IHL.¹³³ Under ICL, these acts have also been criminalised during peacetime, and the overlap between IHL (armed conflicts) and ICL (criminalisation of acts of terror under IHL) will be discussed in this chapter. Firstly, the term armed conflict will be defined, whereafter terrorism in the context of armed conflict will be discussed through case law, to determine the extent that terrorism is both prohibited and prosecuted.

4.2. Defining Armed Conflicts

Armed conflicts are governed by IHL and can be divided into two categories, namely: IACs and NIACs. IACs involve at least two different States as parties, whereas NIACs involve a conflict between States and non-State actors or armed groups or between non-State armed groups.¹³⁴ IACs come into existence without a requirement for reasons or a certain level of intensity of the conflict.¹³⁵ Even if a party does not recognise the situation as an armed conflict, there is no obligation for any formal declaration of war for an IAC to exist.¹³⁶ Additional Protocol I also allows for fights against colonial domination, alien occupation or racist regimes to be included in IACs.¹³⁷ The ICTY defined an IAC as 'whenever there is a resort to armed force between States'.¹³⁸

NIACs are governed by Common Article 3 to the Geneva Conventions and Article 1 of Additional Protocol II. Common Article 3 covers armed conflicts where at least one non-State armed group is involved, and the armed conflict exists between either a State and a non-State armed group or

¹³² Galic (n101) para 135.

¹³³ Galic (n101).

¹³⁴ ICRC 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' Opinion Paper, (March 2008) <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> > accessed 10 October 2023.

¹³⁵ (n 134).

¹³⁶ ICRC 'International Armed Conflict' <https://casebook.icrc.org/a_to_z/glossary/international-armed-conflict > accessed 10 October 2023.

¹³⁷ Protocol I (n 32) art 1(4).

¹³⁸ *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY IT-94-1-A, (2 October 1995) para. 70.

between multiple non-State armed groups.¹³⁹ NIACs must reach a certain intensity to be distinguished from mere internal disturbances or riots.¹⁴⁰ Once the armed conflict reaches the minimum level of intensity, it must be determined that the non-State actors are in fact parties to the conflict and have organised armed forces which are organised under a command structure and enjoys the capacity to uphold military operations.¹⁴¹ Additional Protocol II supplements Common Article 3 and is applicable to armed conflicts between a High Contracting Party's 'armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory' which enables them to 'carry out sustained and concerted military operations and to implement this Protocol.'¹⁴² An Armed conflict will, therefore, be classified as a NIAC if it fulfils these requirements.

For the purposes of this research, these short explanations will suffice to provide a background in which the prohibition of terrorism in armed conflicts will be determined.

4.3. The Prohibition of Terrorism in Armed Conflicts

Irrespective of whether an armed conflict is IAC or NIAC, there is always a prohibition against acts of terror against civilians.¹⁴³ The United Nations (UN) has been clear on its stance against terrorism, as is evident from the various conventions against various acts of terrorism, as described in Chapter 1. The UN, in the Financing Convention, declared terrorism to be an international concern and declared universal jurisdiction over the crime of terrorism.¹⁴⁴ This means that, at least on paper, persons who commit acts of terror is to be criminally sanctioned irrespective of where or when they are captured by national authorities, even if such offence was not committed in that State's territory.¹⁴⁵

The UN Security Council (UNSC) declared acts of terrorism in the international realm as 'one of the most serious threats to international peace and security' and it remains unjustifiable, irrespective of the motivation behind the acts 'wherever and by whomever committed'.¹⁴⁶ This same sentiment was also consequently reaffirmed by the UNSC.¹⁴⁷ With regard to prohibiting acts of terrorism, under IHL and ICL, specific acts have been prohibited and prosecuted as acts of terror by various conventions and international Courts and Tribunals respectively, rather than accused persons being prosecuted for an overarching crime of terrorism. Before exploring case law examples of acts of terror, it must be reiterated that acts of terrorism must be committed against civilians as targets

¹³⁹ (n 134).

¹⁴⁰ *ibid.*

¹⁴¹ (n 138) para 84.

¹⁴² Protocol II (n 36) art 1.

¹⁴³ Protocol I (n 32) art 51(2) and Protocol II (n 36) art 13 (2).

¹⁴⁴ (n26) 143.

¹⁴⁵ *ibid.*

¹⁴⁶ United Nations Security Council 'Declaration on the global effort to combat terrorism' S/RES/1377 (2001) Resolution 1373 (2001).

¹⁴⁷ United Nations security council, "Declaration on the issue of combating terrorism," Resolution 1456, S/RES/1456 (2003).

to be prohibited under IHL in the context of armed conflicts and to be criminalised and prosecuted under ICL.¹⁴⁸

4.4. Case law related to Acts of Terror

In the case of *The Prosecutor v Dragomir Milosevic*¹⁴⁹ (*Milosevic*) the ICTY preserved the definition of acts of terror in customary IHL by finding that both acts and threats of violence against civilians can be construed as acts of terror.¹⁵⁰ In this matter, the accused was charged with Acts of Terror for the sniping and shelling of civilians with the specific purpose of terrorising the civilian population.¹⁵¹ The ICTY held that the intent of the perpetrator is important and that the crimes committed must have been directed at civilians and done with the intent of spreading terror amongst civilians.¹⁵² It also reiterated that with the crime of terror, the attacks against civilians need not be direct and may include 'indiscriminate or disproportionate attacks or threats thereof.'¹⁵³

The Special Court for Sierra Leone prosecuted Mr. Charles Taylor (*Taylor case*) for crimes committed as part of a 'campaign of terror and punishment' against the civilian population of Sierra Leone.¹⁵⁴ The accused was charged with and convicted on a count of Acts of Terrorism as a violation of Common Article 3 and Additional Protocol II.¹⁵⁵ The Trial Chamber found that the campaign of terror was the 'common purpose' in this matter.¹⁵⁶

The Prosecution in the *Taylor case* held that the crimes committed were committed as part of a campaign of terror against the civilians of Sierra Leone.¹⁵⁷ The Court agreed with the elements of the crime of terrorism that was put forward by the ICTY in the *Galic case*,¹⁵⁸ and thereby confirmed that the crimes committed with the purpose of terrorising the civilian population would then amount to acts of terrorism.¹⁵⁹ The Court also denied that actual infliction of death or serious bodily harm is a required element of acts of terror and that it is sufficient to show that grave consequences were suffered by victims as a result of the acts of violence.¹⁶⁰

It has been established by various Courts and Tribunals that the three elements of acts of terrorism in the context of armed conflicts have acquired customary status,¹⁶¹ and that additional elements related to the acts having to involve a transnational element, to spread fear (usually through the

¹⁴⁸ Galic (n 101) para 135; (n11) 150.

¹⁴⁹ *The Prosecutor v. Dragomir Milosevic (Appeal Judgment)*, IT-98-29/1-A ICTY (12 November 2009) (*Milosevic*).

¹⁵⁰ *Milosevic (n 149)* para 32.

¹⁵¹ *Prosecutor v. Dragomir Milosevic (Indictment)*, IT-98-29/1-PT ICTY (ICTY (22 November 2001) para 22.

¹⁵² (*n 149*) para 37; *The Prosecutor v. Dragomir Milosevic (Trial Judgment)*, IT-98-29/1-T ICTY (12 December 2007) para 877.

¹⁵³ (*n 152*) para 877.

¹⁵⁴ *The Prosecutor v. Charles Ghankay Taylor* SCSL-03-1-T, Special Court for Sierra Leone (18 May 2012).

¹⁵⁵ (*n 154*) 7 para 32.

¹⁵⁶ (*n 154*) para 139.

¹⁵⁷ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-0001 (Indictment), Special Court for Sierra Leone para 5.

¹⁵⁸ Galic (n 108) paras 100-101.

¹⁵⁹ (*n 154*) para 403.

¹⁶⁰ (*n 154*) para 407.

¹⁶¹ (*n 154*) para 409; *Galić* (n 108) para 86.

creation of public danger) or to attempt to coerce national or international authorities into action or inactivity are applicable to acts of terrorism during peacetime and not in the context of armed conflicts.¹⁶²

Confirming the three already mentioned elements of the crime of Acts of Terror, the Special Court for Sierra Leone in *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*¹⁶³ (*Sesay*) held that the prohibition of acts of terrorism under Article 4(2)(d) of Additional Protocol II is broader than Article 13(2) of the same Additional Protocol and that the count of Acts of Terrorism that the accused persons were charged with, was done so in line with Article 13(2) of Additional Protocol II.¹⁶⁴ By way of reminder, this provision states that any acts or threats of violence which has the primary purpose of spreading terror amongst civilian populations, are prohibited and is in line with the elements of the act of terrorism as already discussed. Article 4(2)(d) prohibits acts of terrorism as a violation of humane treatment and is not as specific as Article 13(2) and does not encapsulate the intent of the perpetrator.

In *Sesay*, all three accused persons were found guilty of acts of terrorism based on their intention to terrorise the civilian population through their crimes of extermination, murder, violence to life, health and physical or mental well-being of persons (murder and mutilation), rape, sexual slavery, other inhumane acts (forced marriage and physical violence), outrages upon personal dignity and enslavement.¹⁶⁵

The Court in *Taylor* convicted the accused of acts of terrorism for the perpetration of murder, violence to life, health and physical or mental well-being of persons (particularly murder and cruel treatment), rape, sexual slavery, outrages upon personal dignity, inhumane acts, conscripting or enlisting children as soldiers, enslavement, and pillage,¹⁶⁶ since these acts were committed with the purpose of inflicting terror on the civilian population.

The *Taylor* case once more cements the idea that any acts of violence committed with the specific intent to terrorise civilians, will constitute acts of terrorism in the context of armed conflicts, which is prohibited under IHL and criminalised under ICL.

4.5. Conclusion

From the various examples of case law and the prohibitions in international treaties mentioned above, there is a clear and absolute prohibition of terrorism within the context of armed conflicts. It is also clear that when acts or threats of violence are committed against civilians with the purpose of spreading terror amongst civilians, it amounts to acts of terrorism. IHL sufficiently prohibits terrorism and ICL consequently criminalises acts of terror and has led to the successful prosecution of various persons for acts of terror.

¹⁶² *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Appeal Decision) STL-11-01/I/AC/R176bis (16 February 2011) paras 85, 102.

¹⁶³ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)* SCSL-04-15-T Special Court for Sierra Leone (2 March 2009).

¹⁶⁴ (*n 163*) para 111.

¹⁶⁵ (*n 163*) 677-687.

¹⁶⁶ (*n 154*) para 6994.

Chapter 5: Conclusion and Recommendations

This research set out to determine whether a prohibition of terrorism exists under International Humanitarian Law and International Criminal Law. With the occurrence of more than one armed conflict in 2023 between Russia and Ukraine, as well as between Israel and the terror group Hamas in Palestine, this topic seems even more relevant. This research sets out only a few examples of Conventions and case law related to terrorism, acts of terror and the laws surrounding detainees during hostilities in an attempt to encapsulate the scope of IHL and ICL related to terrorism.

In Chapter 2, it was determined how terrorism is defined during peacetime and armed conflicts. It was established that no universal definition exists, however, based on the Conventions interpreted in this research, a few common elements are clear in assisting international lawyers and scholars in determining what terrorism entails. The most important factor, it seems, are that the acts perpetrated, must include the intention to invoke fear or terror amongst the general population. This was a good basis for determining how terrorism fits into the realm of armed conflicts and to set up the rest of the chapters of this research.

Chapter 3 set out to expand on the possible prohibition of terrorism specifically related to the detention of civilians during armed conflicts and whether they are afforded protection under IHL and ICL. The chapter defined detention, acts of terrorism, and acts of violence in relation to acts of terrorism. It was determined that acts of violence when committed with the intention to terrorise civilians in armed conflicts and within detention, are classified as acts of terrorism and are clearly prohibited under IHL. Various examples of case law also confirmed the criminalisation of these acts of terrorism against detainees in the context of armed conflicts.

In the final substantive chapter, Chapter Four, acts of terror committed during armed conflicts were explored and it was questioned whether these acts are prohibited under IHL. This question was answered in the affirmative, as various examples of case law proved. There are many acts of violence committed during armed conflicts, however, International Courts and Tribunals confirmed that these acts can be prosecuted as acts of terror if they fulfil the requirement of terrorising the civilian population.

This research confirms that there is indeed a prohibition of terrorism under both IHL and ICL and despite the lack of many investigations and prosecutions for the crime of terrorism it is not impossible to do so. The lacuna in the international law of a lack of definition for terrorism will continue to hinder progress in the prosecution of persons who commit the crime of terrorism and it will continue to have the effect that may persons never see their day in Court to account for their crimes.

The most important takeaway from this research is that despite a universally accepted definition of terrorism, acts of terror has been established in International Law as having three specific elements, the most important being the intention to terrorise civilians. There is, therefore, not a lack of want to prosecute the crime of terrorism, but rather a lack of universal agreement on how to define it.

A recommendation to mention is that by establishing specific international courts or tribunals to deal with terrorism and define it for this purpose, it could help in investigating more crimes

specifically with the intention to prosecute for the crime of terrorism. Until such time, many of the crimes committed during armed conflicts fall within the ambit of other international crimes such as war crimes or crimes against humanity. Universal jurisdiction has already been established over the crime of terrorism, but without a universally accepted definition, many perpetrators will remain free.

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