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Terrorism in War and Peace: between IHL and law enforcement

Focus on the detention of terrorists in NIACs

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INTRODUCTION

As Gasser puts it, "terrorism is a social phenomenon with many aspects which vary from case to case"[1]. Although the definition of terrorism has always been controversial, there is at least a consensus that the term "always refers to unlawful behaviour"[2]. While this study will not discuss the definition of terrorism, it will examine its prohibition in two different contexts, i.e. war and peace.

While terrorist acts committed in wartime are prohibited by international humanitarian law (IHL), those that take place in peacetime are prohibited not only by national legislations, but also by a number of international conventions. We will first examine the extent of the prohibition under each setting (PART. 1). Having found that counter-terrorism conventions cover some acts which, by their nature, could take place in a situation governed by IHL, we will then study the interaction between these two branches of law. We will see that such interaction is governed by counter-terrorism conventions since, unlike IHL, they have the potential of being applied to situations of war or peace alike. Because this interaction depends on the scope of application of IHL, we will also have to study which situations of a terrorist nature are governed by that law (PART. 2). We will then examine the issue of the detention of suspected terrorists in the context of a non-international armed conflict (NIAC). While NIACs are governed by IHL, the issue of detention is particular in that it may be based on two different models. While the first model, that of security detention, falls exactly within the wartime paradigm, the second, criminal detention model, is a matter of law enforcement. If the law enforcement paradigm is typical of peacetime, it also applies once the decision is made to prosecute an individual having fought in the context of a NIAC. We will therefore study each of these models in order to determine which one should be preferred, in light of the objective to fight terrorism while preserving the right to liberty (PART. 3).

[1] H.P. GASSER, "Acts of terror, "terrorism" and international humanitarian law", *International Review of the Red Cross*, vol. 84, 2002, p. 552.
[2] M. SASSÒLI, "Terrorism and War", *Journal of International Criminal Justice*, vol. 4, 2006, p. 959.

PART I. THE REGULATION OF TERRORISM IN WAR AND PEACE

As de Roy van Zuijdewijn puts it, terrorism has [traditionally] been seen as "something that takes place in peacetime"[3]. In her work on "Terrorism in Asymmetrical Conflict"[4] Stepanova identified three types of terrorism. The first type is "classic terrorism of peacetime"[5]. This form of terrorism "is separate from any wider armed conflict, and includes 'stand-alone' left- and right-wing terrorism"[6]. The use of the term "classic" shows this traditional perception of terrorism as a form of violence which takes place in a situation of peace. The second category, "conflict-related terrorism"[7], "is defined as an 'embedded' tactic incorporated into asymmetric armed conflict"[8]. The third category is called "superterrorism"[9], and it designates "groups with a global agenda and existential and non-negotiable aims"[10]. This term applies to groups such as Al-Qaeda "and some other parts of the Salafist-jihadist movement"[11], such as the Islamic State. As De Roy van Zuijdewijn observes, "although the latter category is of a somewhat different nature – describing the aims rather than the context of terrorism – this categorization is rather unique in distinguishing between "peacetime" and "conflict-related" terrorism"[12].

If terrorism was traditionally seen as linked to a situation of peace, today, it is rather the opposite. Indeed, "against the backdrop of the Islamic State (IS) fighters slaughtering civilians in Syria and Iraq, it is hard to see how terrorism could be connected to a situation of peace"[13].

According to Tigroudja, this "change of paradigm" was truly operated in the wake of the 9/11 terrorist attacks[14]. The author considers that "two kinds of causes, one being empirical and the

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[3] J. DE ROY VAN ZUIJDEWIJN, « Peace, Terrorism, Armed Conflict and War Crimes", *Security and Human Rights*, vol. 26, 2015, p. 211. See, in the same sense, H. TIGROUDJA, « Quel(s) droit(s) applicable(s) à la "guerre au terrorisme" », *Annuaire français de droit international*, vol. 48, 2002, p. 83.
[4] E. STEPANOVA, *Terrorism in Asymmetrical Conflict: Ideological and Structural Aspects. SIPRI Research report no. 23*. Oxford, Oxford University Press, 2008.
[5] STEPANOVA (E.), *op. cit.*, p. 9.
[6] S. V. MARDSEN and A.P. SCHMID, "Typologies of terrorism and political violence", in A. P. Schmid (ed.), *The Routledge Handbook of Terrorism Research*, Routledge, London, 2011, p. 161-162; quoted by J. DE ROY VAN ZUIJDEWIJN, *op. cit.*, p. 211.
[7] E. STEPANOVA, *op. cit.*, p. 10.
[8] S.V. MARDSEN and A.P. SCHMID, *op. cit.*, p. 162.
[9] E. STEPANOVA, *op. cit.*, p. 10.
[10] J. DE ROY VAN ZUIJDEWIJN, *op. cit.*, p. 211.
[11] S.V. MARDSEN and A.P. SCHMID, *op. cit.*, p. 162.
[12] J. DE ROY VAN ZUIJDEWIJN, *op. cit.*, p. 211-212.
[13] J. DE ROY VAN ZUIJDEWIJN, *op. cit.*, p. 207.
[14] H. TIGROUDJA, « Quel(s) droit(s) applicable(s) à la "guerre au terrorisme" », *Annuaire français de droit international*, vol. 48, 2002, p. 82.

other being legal, explain the evolution of how the relationship between war and terrorism is perceived"[15]. The first, empirical cause relates to the "unprecedented scope" of the 9/11 attacks, "which we try to understand by applying the concept of war"[16].

The other, legal cause can be found in the realization that international terrorism law and the law of armed conflict share a cardinal principle, which is that of civilian inviolability[17]. As Slaughter and Burke-White put it, this principle "sits at the heart of several different categories of law: law of war, international criminal law and the law of terrorism"[18]. According to that argument, therefore, "terrorism or any other international crime having similar effects are acts which no longer differ – from the point of view of the applicable law – from those committed in times of war, considering that both are capable of making civilians suffer to the same extent"[19]. Therefore, "the principle of civilian inviolability would serve as the basis for a body increasingly similar rules, whose condition for application would no longer reside in the context in which the attacks against civilians were committed (…), but in their effects on civilians"[20].

To these causes, we may add the fact that, as Gasser wrote in 2002, "acts of terrorism are usually part of or indirectly linked in some way to an armed conflict (…)"[21]. Indeed, we will see when we examine the scope of application of IHL that, on the one hand, acts of terrorism in peacetime might trigger an armed conflict and that, on the other hand, such acts may be committed in a context which appears to be peaceful but which is in fact linked to an armed conflict taking place somewhere else.

However, as Tigroudja observes, these elements "still seem insufficient to question the existing legal categories"[22]. When committed in armed conflict, terrorist acts are prohibited by IHL (chapter 1) – but possibly also by domestic law and international counter-terrorism instruments (cf. part. 2). When committed in peacetime, only the latter branches of law will apply (chapter 2).

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[15] Free translation from H. TIGROUDJA, *ibidem*, p. 86.
[16] Free translation from H. TIGROUDJA, *op. cit.*, pp. 86-87. See also R. WEDGWOOD, « Al Qaeda, Terrorism and Military Commissions », American Journal of International Law, vol. 96, 2002, p. 328 : « The psychological sense that this was an act of war is founded on the extraordinary destructiveness of the act ».
[17] H. TIGROUDJA, *op. cit.*, p. 87.
[18] A.-M. SLAUGHTER and W. BURKE-WHITE, "An international Constitutional Moment", *Harvard International Law Journal*, vol. 43, 2002, p. 5, quoted by H. TIGROUDJA, *op. cit.*, p. 87.
[19] Free translation from H. TIGROUDJA, *op. cit.*, p. 87.
[20] Free translation from H. TIGROUDJA, *op. cit.*, p. 87
[21] H.P. GASSER, *op. cit.*, p. 548.
[22] Free translation from H. TIGROUDJA, *op. cit.*, p.87.

Chapter 1. The prohibition of terrorist acts under IHL

IHL doesn't define terrorism. However, it prohibits terrorism as a tactic of warfare. In this chapter, we examine the provisions which prohibit acts that might be qualified as terrorism (section 1) and address the issue of whether terrorism is also prohibited in the context of wars of national liberation (section 2).

Section 1. General rules

As Jodoin observes, "neither the Geneva Conventions nor the Additional Protocols explicitly define the concept of terrorism. It would thus appear that the definitional problem which plagues the whole of international law also afflicts the law of armed conflict"[23]. According to the author, conventional IHL contains "both direct and indirect prohibitions on the commission of acts of terrorism in an armed conflict"[24]. In fact, the category of "indirect prohibitions" of terrorism may be seen as such only if one adopts a broad definition of terrorism, i.e. one that does not require the intent to spread terror.

A. Acts against civilians

First, two provisions prohibit acts expressly qualified as "terrorism": Article 33 of Geneva Convention IV[25], which concerns "measures of intimidation or of terrorism" against protected civilians in international armed conflicts, and Article 4(2)(d) of Additional Protocol II[26], based on the former provision, which prohibits "acts of terrorism" against "all persons not or no longer taking a direct part in hostilities in non-international armed conflicts"[27].

[23] S. JODOIN, "Terrorism as a War Crime", *International Criminal Law Review*, vol. 7, 2007, p. 80.
[24] S. JODOIN, *ibidem*, p. 80.
[25] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (heirenafter "GC IV")
[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977 (heirenafter 'AP II")
[27] M. SASSÒLI, *op. cit*., p. 967.

Article 33 of Geneva Convention IV only applies to protected persons, which, from Article 4 of the same Convention, can be defined as "civilians or combatants *hors de combat*"[28] who "find themselves in the hands of [a state] of which they are not nationals". Therefore, the purpose of the provision is "to ensure that a party to an armed conflict is prohibited from terrorising civilians [or combatants *hors de combat*] *under its control* [emphasis added]"[29]. Sassoli notes that "this is not the typical situation of terrorist acts"[30]. Indeed, "most terrorist acts are committed against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants"[31].

As for Article 4(2)(d) of Additional Protocol II, as Bianchi and Naqvi observe, "the persons protected by [this provision] are all those not taking part in hostilities, not merely those in the power of another state"[32]. According to the authors, the provision thus has a scope of application which is broader than Article 33 of Geneva Convention IV[33]. According to the Commentary to Additional Protocol II, the protection is even broader in that it "covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect"[34]. The Commentary bases on the fact that, "while the ICRC draft prohibited "acts of terrorism in the form of acts of violence committed against those persons" (i.e., against protected persons)"[35], the formula adopted simply retained the terms "acts of terrorism", "and therefore extends the scope of the prohibition (…) [to] acts directed against installations which would cause victims as a side-effect"[36]. We believe, however, that this interpretation overlooks the terms of the provision, since paragraph 2 provides that the acts it enumerates are prohibited when they are committed "against the persons referred to in paragraph 1", i.e. all persons not

[28] A. BIANCHI and Y. NAQVI, *International Humanitarian Law and Terrorism*, Oxford, Hart Publishing, 2011, p.196.
[29] T. FERRARO, "Interaction and overlap between counter-terrorism legislation and international humanitarian law", *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law (17th Bruges Colloquium: 20-21 October 2016)*, College of Europe, n°47, 2017, p. 27; see also M. SASSÒLI, *op. cit*., p. 967.
[30] M. SASSÒLI, *op. cit*., p. 967.
[31] M. SASSÒLI, *op. cit*., p. 967.
[32] A. BIANCHI and Y. NAQVI, *op. cit*., p. 198
[33] Contra: Sassòli, who considers that Article 4(2)(d) of Additional Protocol II "simply extends this prohibition [of Article 33, GC IV] to non-international armed conflicts": M. SASSÒLI, *op. cit*., p. 967. Both positions can be defended. On the one hand, the Commentary of Article 4(2)(d) makes clear that the provision is based on Article 33 of GC IV, which suggests some idea of control. On the other hand, Article 4 is named "Fundamental guarantees"; moreover, the Commentary provides that Article 13(2) of the same Protocol covers a more specific situation of terrorism. See Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, Martinus Nijhoff Publishers, 1987, p. 1375, para. 4538.
[34] Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *ibidem*, p. 1375, para. 4538.
[35] Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *ibidem*, p. 1375, para. 4538.
[36] Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *ibidem*, p. 1375, para. 4538.

taking a direct part in hostilities. Therefore, in our opinion, only acts directed against persons are covered.

The situation of "terrorist acts […] committed against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants"[37] is also covered by the rules on the conduct of hostilities applicable to both international and non-international armed conflicts. Indeed, Article 51(2) of Additional Protocol I[38] and Article 13(2) of Additional Protocol II both provide that "the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". As confirmed by the ICRC, this prohibition also has customary status[39].

In the Galić case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) defined the crime of terror against the civilian population as comprising the following specific elements:

"1. Acts of violence[40] directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

2. the offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

3. the above offence was committed with the primary purpose of spreading terror among the civilian population"[41].

Although the text of both provisions is clear in that regard, and although it is confirmed by the definition given by the ICTY, it must be emphasized that only those acts of violence which have the *primary purpose of spreading terror* among the civilian population are covered by this provision. As the ICRC observed in the Commentary of Article 51 (2) of Additional Protocol

[37] M. SASSÒLI, *op. cit*., p. 967.
[38] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977 (hereinafter "AP I").
[39] See Rules 1 and 2 of the ICRC Study on Customary International Humanitarian law: J.-M. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law*, vol. 1, Cambridge, Cambridge University Press, 2009, p. 3-11. While Rule 1 enshrines the general principle of distinction, Rule 2 is concerned with the specific case of terrorist acts.
[40] Note that the threat of acts of violence is absent from the definition, "given that it was not part of the indictment": A. BIANCHI and Y. NAQVI, *op. cit*., p. 216; see ICTY, *Prosecutor v. Galić* (IT-98-29-T), Judgment of the Trial Chamber, 5 December 2003, para. 110 and note 179.
[41] ICTY, *Prosecutor v. Galić* (IT-98-29-T), Judgment of the Trial Chamber, 5 December 2003, para. 133.

I, "there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces (…) [but] this is not the sort of terror envisaged here"[42].

The ICTY Trial Chamber also specified that only acts against civilians are covered by the crime of terror against civilians. As Sassòli observes, "an attack directed at combatants or military objectives was not considered as prohibited, even if the primary purpose of the attack was to spread terror among the civilian population"[43]. However, as specified by the Appeals Chamber, not only direct attacks against civilians, but also indiscriminate or disproportionate attacks - as well as threats of such attacks[44] – can constitute the offence[45].

It appears from the texts of Additional Protocol I and Additional Protocol II that the author of the acts is irrelevant. As van der Wilt and Braber put it, "Articles 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II are addressing all persons – belligerents, civilians and organized groups alike – imploring them to renounce from acts of terrorism in the territory of the parties to an armed conflict"[46].

Besides these "direct prohibitions" of terrorism, IHL prohibits other acts which could be qualified as terrorist. These "indirect prohibitions" include those that protect civilians from attacks – such as the prohibition of direct attacks against civilians or indiscriminate attacks, or the taking of hostages – , but also those that protect civilian objects – such as the prohibition of attacks on places of worship, or on works and installations containing dangerous forces[47]. IHL doesn't qualify the violation of these prohibitions as "terrorist", nor does it require a specific intention to spread terror. It is therefore difficult to argue that such violations could be qualified as acts of terrorism from the perspective of IHL. In any event, the commission of such acts is prohibited by IHL and may constitute war crimes[48].

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[42] Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *op. cit.*, p. 618, para. 1940; the similar observation is made in the Commentary of Article 13 (2) of Additional Protocol II : "Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror (…)": p. 1453, para. 4786.
[43] M. SASSÒLI, *op. cit.*, p. 968.
[44] As observed by the ICRC in its Commentary of Art. 51(2) of Additional Protocol I: Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *op. cit.*, p. 618, para. 1940.
[45] ICTY, *Prosecutor v. Galić* (IT-98-29-A), Judgment of the Appeals Chamber, 30 November 2006, para. 102.
[46] H. VAN DER WILT and I. BRABER, "The Case for the Inclusion of Terrorism in the Jurisdiction of the International Criminal Court", *Amsterdam Center for International Law*, Research Paper 2014-13, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410232, p. 5.
[47] S. JODOIN, *op. cit.*, p. 80-81.
[48] Cf. infra.

B. Acts against combatants

Articles 51(2) API and 13(2) of Additional Protocol II only prohibit the act of terrorising the civilian population. As the ICRC noted in its Commentary of Additional Protocol I, "it also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender"[49]. In IHL, however, there is nothing to suggest that such brutal attacks aiming to spread terror would be prohibited *as such*. Rather, IHL only prohibits such attacks if they consist in a violation of the rules on the means and methods of warfare. That will be the case, for instance, if they cause superfluous injury or unnecessary suffering[50], or if they resort to perfidy[51]. As Sassòli observes, resorting to perfidy "is precisely what terrorists do most of the time when they attack combatants"[52]. These rules might, once again, be considered as "indirect prohibitions" of terrorism. However, the commentary made above concerning prohibitions on attacks against civilians (or civilian objects) applies here as well: these violations do not require the specific intention to spread terror among enemy combatants, and IHL doesn't retain the "terrorist" qualification. Once again, this makes it difficult to consider that IHL would qualify such violations as acts of terrorism. However, such acts may constitute terrorism from the point of view of counter-terrorism conventions. Moreover, acts of violence committed against combatants in armed conflict and which do not violate the laws of war may nevertheless be qualified as a terrorist offence under domestic law or under international counter-terrorism instruments, which is even more problematic[53]. We will study these issues in the next chapter.

C. Sanctions

Finally, it is important to examine the consequences of the commission of terrorist acts in the context of an armed conflict. As Crawford and Pert observe, "it was the Nuremburg Tribunals that acknowledged that "[c]rimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions

[49] Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *op. cit.*, p. 618, para. 1940.
[50] Article 35(2) of Additional Protocol I; Rule 70 of the ICRC Study on Customary IHL: J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit.*, p. 237.
[51] Article 37(1)(c) of Additional Protocol I ; Rule 65 of the ICRC Study on Customary IHL: J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit.*, p. 221.
[52] M. SASSÒLI, *op. cit.*, p. 969.
[53] Cf. infra.

of International Law be enforced"[54]"[55]. International criminal law is now "a large, complex and distinct field of international law"[56], which notably sanctions certain violations of international humanitarian law, i.e. those that amount to war crimes.

War crimes are defined as "serious violations of international humanitarian law"[57]. As Crawford and Pert explain, "the qualifier "serious" is intentional; not all violations of IHL are war crimes"[58]. However, as the ICRC points out, "there is also practice which does not contain the adjective "serious" with respect to violations and which defines war crimes as any violation of the laws or customs of war. The military manuals and legislation of a number of States similarly do not require violations of international humanitarian law to be serious in order to amount to war crimes. However, most of this practice illustrates such violations in the form of lists of war crimes, typically referring to acts such as theft, wanton destruction, murder and ill-treatment, which indicates that these States in fact limit war crimes to the more serious violations of international humanitarian law"[59].

Unlike those which apply to international armed conflicts, treaty provisions applicable to non-international armed conflicts "do not contain any provisions on the criminalization of serious IHL violations"[60]. However, "nowadays it is recognized that the notion of war crimes under customary international law also covers serious violations committed in non-international armed conflicts"[61].

Although a number of international tribunals have been established to sanction their violation, the prosecution of war crimes is first and foremost the responsibility of states. Treaty provision applicable to international armed conflicts impose on states an obligation to search for and

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[54] INTERNATIONAL MILITARY TRIBUNAL, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, p. 447.
[55] E. CRAWFORD and A. PERT, *International Humanitarian Law*, Cambridge, Cambridge University Press, 2015, p. 245.
[56] E. CRAWFORD and A. PERT, *ibidem*, p. 245.
[57] Rule 156 of the ICRC Study on Customary IHL: HENCKAERTS and L. DOSWALD-BECK, *op. cit.*, p. 568.
[58] E. CRAWFORD and A. PERT, *op. cit*., p. 246. The Rome Statute of the International Criminal Court, for instance, establishes different categories of war crimes, which are, in international armed conflict, "grave breaches of the Geneva Conventions" and "other serious violations of the laws and customs applicable in international armed conflict" and, in non-international armed conflicts, "serious violations of [Common Article 3]" or "other serious violations of the laws and customs applicable in armed conflicts not of an international character": see Rome Statute of the International Criminal Court, Rome, 17 July 1998, Article 8(2) (a), (b), (c) and (e), respectively.
[59] Rule 156 of the ICRC Study on Customary IHL: J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit*., p. 569.
[60] ICRC, "How are suspected war criminals prosecuted under international law?", 2017, available at http://blogs.icrc.org/ilot/2017/08/14/how-are-suspected-war-criminals-prosecuted-under-international-law/
[61] ICRC, "How are suspected war criminals…", *ibidem* ; See Rule 156 of the ICRC Study on Customary IHL.

prosecute or extradite individuals suspected of having committed grave breaches of the Geneva Conventions[62]. Besides, the relevant provisions also state that "Each High Contracting Party *shall take measures* necessary for the suppression of all acts contrary to the provisions of the present Convention *other than the grave breaches* defined in the following Article [emphasis added]"[63]. On the other hand, under the treaty provisions applicable to non-international armed conflicts, "there simply is no obligation to prosecute"[64]. However, according to Rule 158 of the ICRC Study on Customary IHL, which is applicable to both international and non-international armed conflicts, "states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects"[65]. In addition, Rule 157 provides that "States have the right to vest universal jurisdiction in their national courts over war crimes"[66].

Obviously, the commission of terrorist acts within the meaning of IHL amount to war crimes. Depending on the legal basis under domestic law or under the statute of the competent international court, the terrorist act can be prosecuted either *as such*[67] or as a "common" war crime, such as intentional direct attacks on civilians. In the latter scenario, however, the indictment will not grab the specificity of the crime, which is the intent to spread terror.

Section 2. Terrorism and wars of national liberation

[62] See Art. 49 of GC I; Article 50 of GC II; Article 129 of GC III and 146 of GC IV; J. WOUTERS, "The Obligation to Prosecute International Law Crimes », 2005, *Proceedings of the Bruges Colloquium: The Need for Justice and Requirements for Peace and Security (9th-10th September 2004)*, College of Europe, n°32, 2005, p. 23.
[63] On the interpretation of the terms "shall take measures", see J. WOUTERS, *ibidem*, p. 24.
[64] J. WOUTERS, *op. cit.*, p. 25.
[65] J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit.*, p. 607.
[66] J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit.*, p. 604. See, on the issue of universal jurisdiction, ICRC, *Universal jurisdiction over war crimes* – Factsheet, 2013, available at https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet

[67] For instance, The Statute of the International Criminal Tribunal for Rwanda (ICTR) includes "acts of terrorism" in the list of war crimes (Article 4(d)); This is not the case of the Statute of the ICTY. However, Article 3 of the Statute explicitly mentions that the list of war crimes it provides is not exhaustive. Therefore, it did not prevent the ICTY from considering terrorism as a war crime in the Galic case (ICTY, *Prosecutor v. Galić* (IT-98-29-T), Judgment of the Trial Chamber, 5 December 2003, para. 138); just like for the ICTY, the ICC Statute does not include acts of terrorism in its list of war crimes. Because of its exhaustive character, the ICC does not have jurisdiction over the crime of terrorism. See H. VAN DER WILT and I. BRABER, *op. cit.*, p. 4-6.

What is known as "wars of national liberation" is defined in Article 1(4) of Additional Protocol I as "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". This provision assimilates those wars of national liberation to international armed conflicts, and therefore makes the law of international armed conflicts applicable to such situations.

National liberation movements are those fighting "in the exercise of their right of self-determination" against "colonial domination", "alien occupation" or "racist regimes". As Van Steenberghe and de Hemptinne point out, "the drafting history of Article 1(4) makes it clear that its scope of application is limited to these three situations"[68].

An additional condition can be found in Article 96(3) of the same Protocol. It consists in a declaration, made by the authority representing the people concerned and addressed to the depositary of the Protocol (the Swiss government), according to which they undertake to apply the four Geneva Conventions and Additional Protocol I in their conflict. Such declaration can only be made if "the State against which the armed conflict is being waged [is] a party to the Protocol"[69]. If these conditions are not fulfilled, the applicable law will remain the law of non-international armed conflict[70].

As Van Steenberghe and de Hemptinne observe, "it is not clear whether a liberation movement must meet other criteria, such as being recognized by the General Assembly of the United Nations or organised in such a manner that they can apply the detailed rules governing international armed conflicts. While reasons of 'effectivity' militate in favour of requiring from these movements a certain level of organization, the text of Article 1(4) does not impose any further conditions"[71].

Finally, the authors note, Article 1(4) "does not determine the level of intensity of the hostilities that must be satisfied in order for an outbreak of violence to be qualified as a war of national liberation"[72]. Scholars are divided on this issue. While some scholars consider that a certain level of intensity is required, others base on the text of the provision which doesn't require such

[68] R. VAN STEENBERGHE and J. DE HEMPTINNE, "In-depth Introduction to International Humanitarian Law", *LouvainX*, available at https://edge.edx.org, chapter 3, p. 11.
[69] E. CRAWFORD and A. PERT, *op. cit*., p. 56.
[70] Although a declaration which is made by a national liberation movement operating against a state which has not ratified the Protocol might be considered as a unilateral commitment which would bind the group, but this is controversial: see E. CRAWFORD and A. PERT, *op. cit*., p. 56 and note 39.
[71] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 11.
[72] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 11.

a condition[73]. Moreover, "they also argue that wars of national liberation must be assimilated to international armed conflicts, [and] therefore are triggered by a minimal level of violence"[74].

When an armed group qualifies as a national liberation movement, the whole body of the law of international armed conflicts will be applicable to them, including the prisoner of war status and the related combatant privilege. The concern of the US regarding the adoption of Additional Protocol I was precisely that this provision would protect groups "that often use terrorist tactics"[75]. This was one of the reasons they didn't ratify Additional Protocol I. However, the combatant privilege is the immunity from prosecution for all acts of war that do not violate IHL, and IHL does prohibit terrorism in both international and non-international armed conflicts. Terrorists are thus not protected by Additional Protocol I.

Chapter 2. Counter-terrorism legal instruments

For decades, there have been efforts in the framework of the UN to produce a comprehensive convention on international terrorism[76]. While several drafts have been presented, none has resulted in the adoption of such a convention so far.

On the other hand, the international community has been active in adopting conventions covering specific forms of terrorism. As we can see from the website of the United Nations Office of counter-terrorism, there are now 19 universal instruments on the fight against terrorism, which were adopted within the framework of the United Nations and the International Atomic Energy Agency (IAEA)[77]. There are also numerous treaties adopted at the regional level[78].

These treaties cover specific types of terrorist acts. O'Donnell counted "nearly fifty offences" defined in universal counter-terrorist instruments[79]. The author observed "a tendency to

[73] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 11.
[74] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 11.
[75] G.H. ALDRICH, « Why the United States of America Should Ratify Additional Protocol I », *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, A.J.M. Delissen and G. Tanja (eds), Dordrecht, Martinus Nijhof, 1991, p. 134, quoted by A. BIANCHI and Y. NAQVI, *op. cit*., p. 62.
[76] See H. DUFFY, *The "War on Terror" and the Framework of International Law*, 2nd ed., Cambridge, Cambridge University Press, 2015, p. 33-38.
[77] United Nations Office of Counter-terrorism: http://www.un.org/en/counterterrorism/legal-instruments.shtml
[78] D. O'DONNELL, "International treaties against terrorism and the use of terrorism during armed conflict and by armed forces", *International Review of the Red Cross*, vol. 88, 2006, p. 853.
[79] D. O'DONNELL, *ibidem*, p. 855.

consider these treaties as establishing a sort of evolving code of terrorist offences"[80]. O'Donnell identifies the type of obligations contained in these treaties which, obviously, are binding upon states. The primary obligation concerns "[the incorporation of] the crimes defined in the treaty in question into domestic criminal law"[81]. The member states "also agree to participate in the construction of "universal jurisdiction" over these offences"[82] and "to extradite any suspected offenders found in their territory or to begin criminal proceedings against them"[83]; finally, "these treaties require various types of co-operation among the states parties, ranging from co-operation in preventing terrorist acts to co-operation in the investigation and prosecution of the relevant offences"[84]. It should also be pointed out that "most of these treaties also contain dispositions concerning the protection of human rights"[85]. O'Donnell notes that "such dispositions are of three kinds: general provisions indicating that the obligations set forth in the treaty are without prejudice to other international obligations of the state party; provisions concerning the right of accused or detained persons to due process, and provisions establishing conditions regarding extradition and the transfer of prisoners"[86].

The scope of application of these instruments varies. As O'Donnell observes, "since [they] have been elaborated mainly in order to combat international terrorism, their scope is generally limited to acts that have "an international dimension"[87].

A first constitutive element of the crime of terrorism relates to the intent with which the act is committed. In that regard, there is a great discrepancy between the various treaties. Some treaties criminalize certain acts without requiring any specific intent[88], while others require such a specific intent[89]. Finally, some treaties "criminalize certain acts regardless of the intent with which they are committed, and criminalize other acts, in particular those that do not involve an act of violence, only if they are committed with the requisite intent"[90]. With regard to the

[80] D. O'DONNELL, *op. cit.*, p. 855.
[81] D. O'DONNELL, *op. cit.*, p. 856.
[82] D. O'DONNELL, *op. cit.*, p. 856
[83] D. O'DONNELL, *op. cit.*, p. 857.
[84] D. O'DONNELL, *op. cit.*, p. 857-858.
[85] D. O'DONNELL, *op. cit.*, p. 858.
[86] D. O'DONNELL, *op. cit.*, p. 858.
[87] D. O'DONNELL, *op. cit.*, p. 860.
[88] D. O'DONNELL, *op. cit.*, p. 861. The author refers to « the treaties on the safety of civil aviation and the 1988 Convention on maritime navigation »: see United Nations Office of Counter-terrorism: http://www.un.org/en/counterterrorism/legal-instruments.shtml
[89] D. O'DONNELL, *op. cit.*, p. 861. The author gives the example of the 1979 Convention against the Taking of Hostages.
[90] D. O'DONNELL, *op. cit.*, p. 861. The author refers to the 1979 Convention on the Physical Protection of Nuclear Material, to the 1988 Convention on Maritime navigation and to the Protocols on Platforms on the

content of the specific intent requirement, O'Donnell observes that the 1999 Convention for the Suppression of the Financing of Terrorism "represents a milestone in the development of international law on terrorism"[91]. This treaty "criminalizes the provision or donation of funds to support 'Any other act intended to cause death or serious bodily injury… *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* [emphasis added]'[92]"[93]. As the author observes, this is the first treaty which includes the intent to terrorize the population which, O'Donnell notes, is "the purpose of terrorism as recognized by international humanitarian law"[94]. This formulation can also be found in the Draft Comprehensive Convention against International Terrorism[95]. The difference with IHL is that these conventions add the intent "to compel a government or an international organization to do or to abstain from doing any act". As Van Steenberghe observes, « it is clear that this objective is in principle pursued by any armed group fighting against a government in the context of a non-international armed conflict. Therefore, [if the convention is applicable in this context,] hostile acts committed by the members of such a group will necessarily be qualified as terrorist acts, even if they do not violate international humanitarian law and whatever the cause, even legitimate, that the group seeks to defend"[96]. This is true of conventions which do not distinguish between acts against civilian or military targets.

We thus turn to this second constitutive element, i.e. the targets of terrorist acts. As O'Donnell observes, "most acts of terrorism recognized by existing treaties involve crimes against the person"[97], even if the danger to human life is indirect. For instance, the1980 Convention on the Physical Protection of Nuclear Material also criminalizes the theft of nuclear materials[98], "but

Continental Shelf, which all criminalize certain acts without any intent requirement, but criminalize the threat of such acts only when it is made with a specific intent.

[91] D. O'DONNELL, *op. cit.*, p. 862.

[92] Article 2(1)(b) of the 1999 Convention for the Suppression of the Financing of Terrorism.

[93] D. O'DONNELL, *op. cit.*, p. 862.

[94] D. O'DONNELL, *op. cit.*, p. 862.

[95] UNITED NATIONS, *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixteenth session (8 to 12 April 2013)*, A/68/37, 2013, available at https://www.legal-tools.org/doc/09d6fd/pdf/, p. 6 (Article 2).

[96] Free translation from R. VAN STEENBERGHE, « Les interventions militaires étrangères récentes contre le terrorisme international. Seconde partie : droit applicable (*jus in bello*), *Annuaire français de droit international*, vol. 63, 2018, p. 55 of the contribution.

[97] D. O'DONNELL, *op. cit.*, p. 861.

[98] Article 7 of the 1980 Convention on the Physical Protection of Nuclear Material.

the dangers inherent in misuse of nuclear materials is such that one may presume that a threat to life is inherent in all the acts criminalized by this treaty"[99].

More important for our study is the nature of such targets. O'Donnell observes that while the tendency of "older treaties" was to "protect primarily civilians and civilian property"[100], "the most recent conventions against terrorism […] mark a departure from this trend, and provide some protection to military as well as civilian personnel and installations"[101]. For example, the 1997 Convention against terrorist bombings "[does] not distinguish between acts affecting civilian or military targets"[102]. The same is true of the Draft Comprehensive Convention. Under IHL, as we observed in the previous chapter, acts of violence against military targets cannot be qualified as terrorist even if they are aimed primarily at spreading terror among combatants or civilians. In fact, these acts of violence such as bombings are "an intrinsic part of warfare"[103]. As we said earlier, they will only violate IHL if they use prohibited means and methods of warfare.

As Sassòli observes, "the more broadly the acts criminalized by a given anti-terrorism instrument are defined (in particular if they include the death, injury and damage that is inherent in all armed conflicts), combined with the simple purpose of compelling a state to do or not to do something (which is the purpose of all armed conflicts), the more necessary it becomes to clarify to what extent the crimes thus defined apply in armed conflict"[104].

Indeed, as we will see, it would be problematic if counter-terrorism instruments criminalized acts of violence committed against military targets in armed conflicts which are not prohibited under IHL and perhaps, but to a lesser extent, if they added "another layer of criminalisation"[105] to acts which are already criminalised by IHL. We thus turn to examine whether these counter-terrorism conventions regulate acts committed in armed conflicts.

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[99] D. O'DONNELL, *op. cit.,* p. 861.
[100] D. O'DONNELL, *op. cit.,* p. 862. The author notably mentions the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its Protocol, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol. He nevertheless notes one exception concerning the 1979 Convention on the Physical Protection of Nuclear Material, which "makes no distinction as to the civilian or military nature of the persons or installations targeted or threatened".
[101] D. O'DONNELL, *op. cit.,* p. 863.
[102] D. O'DONNELL, *op. cit.,* p. 864.
[103] D. O'DONNELL, *op. cit.,* p. 864.
[104] M. SASSÒLI, *op. cit.*, p. 975.
[105] T. FERRARO, "Interaction and overlap between counter-terrorism legislation and international humanitarian law", *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law (17th Bruges Colloquium: 20-21 October 2016)*, College of Europe, n°47, 2017, p. 29.

PART II. THE RELATIONSHIP BETWEEN IHL AND COUNTER-TERRORISM INSTRUMENTS

As we have seen in the previous part, terrorism is prohibited under IHL but also under counter-terrorism conventions – and therefore, under domestic law. There are important differences in the definition of the acts which may constitute terrorism under each body of rules. Indeed, even though the term "terrorism" is not defined under IHL, we have seen that the acts which can be qualified as such are much more limited than under counter-terrorism conventions. This led us to the issue of whether the latter applied to situations covered by IHL. This issue is regulated by exclusionary clauses inserted in counter-terrorism conventions. We will therefore examine the different types of exclusionary clauses and their impact on compliance with IHL (chapter 1). Because the application of counter-terrorism conventions depends on the scope of application of IHL, this will lead us to examine which situations of a terrorist nature are covered by IHL (chapter 2).

Chapter 1. Exclusionary clauses and acts committed in armed conflict

As we have just noted, the relationship between counter-terrorism instruments and international humanitarian law is determined by exclusionary clauses inserted in the former instruments. These clauses exclude some situations which are regulated by IHL from the scope of application of the convention. In the first section, we will examine the different formulations adopted from one convention to another, and conclude as to which is the most appropriate (section 1). Then, we will examine two specific issues, i.e. the difference between clauses that exclude acts which are regulated by IHL and acts which are lawful under IHL (section 2) and the issue of the acts committed by national liberation movements in the absence of an armed conflict (section 3).

Section 1. The different formulations of exclusionary clauses

A. The acts of armed forces in armed conflict

A first option is to exclude "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law". This is the wording adopted in the first exclusionary clause of the 1997 International Convention for the Suppression of Terrorist Bombings[106], and of the proposal made by the Friends of the Chair in the Draft Comprehensive Convention[107]. This exclusionary clause begs the question of how international humanitarian law defines the term "armed forces". As Sassòli notes, "IHL does not contain a singular definition of the term 'armed forces'"[108].

For international armed conflicts[109], the author observes, Article 4(A) of Geneva Convention III uses the term "armed forces" in paragraph (1), as opposed to paragraph (2) which covers irregular armed forces[110]. However, Article 43 of Additional Protocol I defines the "armed forces of a Party to the conflict" as consisting of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates (…)". According to the ICRC, this definition reflects customary international law[111]. It appears that the definition only contains three conditions to qualify as an armed force, i.e. that of belonging to a Party to the conflict, that of being organized, and that of being under responsible command[112]. The question nevertheless arises of whether additional conditions relating to compliance with IHL and, in particular, with the principle of distinction, should be fulfilled in order to qualify as an "armed force". Such conditions are indeed imposed in order to be granted prisoner of war status[113]. According to O'Donnell, however, they are "not an element of the definition of an armed force"[114]. The author notably bases on "the structure of [Article 43 (1)] and the content of the second sentence"[115], which reads: "Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".

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[106] Article 19 (2) of the 1997 International Convention for the Suppression of Terrorist Bombings.
[107] UNITED NATIONS, *Report of the Ad Hoc Committee…, op.cit.,* p. 18.
[108] M. SASSÒLI, *op. cit.*, p. 977.
[109] As a reminder, « only states and, under Article 1(4) of Protocol I, national liberation movements, can be parties to an international armed conflict »: M. SASSÒLI, *op. cit*., p. 977.
[110] M. SASSÒLI, *op. cit.*, p. 977.
[111] Rule 4 of the ICRC Study on Customary IHL: J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit*., p. 14.
[112] BOTHE (M.) et al., *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Martinus Nijhoff, 1982, p. 672, quoted by MELZER (N.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, ICRC, 2009, p. 31.
[113] See article 4(A)(2) GC III.
[114] D. O'DONNELL, *op. cit.,* p. 867.
[115] D. O'DONNELL, *op. cit.,* p. 867.

Therefore, this type of exclusionary clause should be interpreted as covering the acts committed by irregular forces[116] – or, in the context of wars of national liberation, by national liberation movements – , provided that the group is organized, under responsible command, and belongs to a Party to the conflict[117].

In non-international armed conflicts, does this term comprehend non-state armed forces, so that the activities of such forces would be excluded from the scope of application of the Convention? As Sassòli observes, this is open to controversies[118]. Common Article 3 of the Geneva Conventions protects "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms". There is no definition of the term "armed forces" in this provision, nor in Additional Protocol II. Article I of Additional Protocol II, when defining non-international armed conflicts to which it applies, makes a distinction between armed forces of a state, dissident armed forces and "other organized armed groups".

At least for the purpose of exclusionary clauses, "this term must include members of both governmental and of anti-governmental armed forces"[119], as Sassòli argues. Indeed, the author explains, "if only the activities of 'armed forces' are excluded [from the scope of application of anti-terrorism conventions], states could well argue that their opponents are covered by [these] instruments, while the members of their forces are not. This, in turn, would weaken the willingness of rebels to comply with IHL and be contrary to the […] rule of IHL on non-international armed conflicts that encourages, at the end of the conflict, the broadest possible amnesty for rebels who did not violate IHL"[120]. The latter rule was introduced in Article 6(5) of Additional Protocol II precisely in view of the consideration that the threat for members of armed groups of being prosecuted for the simple fact of taking up the arms would not induce their compliance with IHL. As Sassòli explains, "most national criminal laws will qualify the killing of a government soldier during an armed rebellion and the killing of a peaceful civilian in the same way: as murder. Any additional violations of IHL will not considerably increase the punishment. It is, therefore, difficult to motivate a member of an armed group to comply with IHL if his treatment by the government will not be affected by such compliance"[121]. In

[116] D. O'DONNELL, *op. cit.,* p. 866.
[117] Note that since the adoption of Additional Protocol I, national liberation movements may be « Parties to the conflict », as recognized by the Commentary. The Commentary adds: "however, the authority which represents them must have certain characteristics of a government, at least in relation to its armed forces": Y. SANDOZ, C. SWINARSKI and B. ZIMMERMANN, *op. cit*., p.. 507, para. 1661.
[118] M. SASSÒLI, *op. cit.*, p. 977.
[119] M. SASSÒLI, *op. cit.*, p. 977.
[120] M. SASSÒLI, *op. cit.*, p. 978.
[121] M. SASSÒLI, *op. cit.*, p. 970.

this regard, we must admit that the penalties faced by members of groups such as the Islamic States do not have the effect of inducing their compliance with IHL, since attacks on civilians is part of their modus operandi. However, it would be too subjective and thus dangerous to exclude the terrorist qualification for some armed groups while applying such qualification to other groups.

Just like for irregular forces in IACS, we should observe that compliance with IHL is not a condition for armed groups in NIACS to qualify as an armed force. Indeed, while it is also an obligation binding on these groups, it is not among the conditions to qualify as an organized armed group which can be involved in a non-international armed conflict. The only criteria imposed for that purpose are that of being armed and organized in such a way as to be able to comply with IHL[122], with the additional condition of exercising control over a part of the territory in the context of high-intensity NIACS[123]. This reinforces the view that in IACS, the condition of compliance with IHL is only required for the purpose of being granted POW status, since such status doesn't exist in NIACS.

On the other hand, the convention "would be applicable to acts of terrorism committed by individuals who do not [belong to a state or non-state armed force], either because they do not form part of an armed group, or because the armed group of which they are members does not satisfy the criteria of an "armed force"[124]. These individuals who will fall under the scope of the convention are therefore civilians who take part in hostilities[125]. Under international humanitarian law, there is no right for civilians to participate in hostilities and, as a result, no combatant immunity. That is why IHL doesn't prohibit national legislation punishing civilians who have taken up the arms[126]. However, as Sassòli stresses, "direct participation in hostilities by civilians is not a violation of IHL and, contrary to what is affirmed in some military manuals, not a war crime […]"[127]. Therefore, these civilians will fall under the scope of anti-terrorism conventions even if they have not violated IHL, which might again not induce compliance with IHL.

[122] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 12-13.
[123] Article 1 AP II.
[124] D. O'DONNELL, *op. cit.,* p. 869.
[125] Note that in NIACS, it is not certain whether members of organized armed groups should be considered as civilians or not. Here, however, we follow the view according to which the term « civilian » covers only those who are not part of either state armed forces or of organized armed groups. see ICRC Study on Customary IHL Rule 5, part. "NIACS": J.-M.HENCKAERTS and L.DOSWALD-BECK, *op. cit*., p. 19.
[126] M. SASSÒLI, *op. cit.*, p. 969.
[127] M. SASSÒLI, *op. cit.*, p. 969-970.

To sum up, this type of exclusionary clause must be understood as excluding from the scope of the convention in question the activities of the members of a state regular or irregular armed forces and of non-state armed forces – including national liberation movements –, within the meaning defined above.

As noted above, the wording of this clause raises two problems. First, we must recognize the risk that the term "armed force" be interpreted as covering only state armed forces. Second, the convention will be applicable to civilians who take part in hostilities.

Another shortcoming of the exclusionary clause that we are examining is that, although the term "armed forces" covers "a resistance movement belonging to a state and fighting against an occupying power"[128], the exclusionary clause "applies only to acts committed during an armed conflict, and not to other situations in which international humanitarian law is applicable, [in particular] occupation"[129]. Therefore, the acts committed by resistance movements will escape the application of the convention only if resistance "rise[s] to the level of an armed conflict"[130]. In the absence of an armed conflict, the problem of applying a counter-terrorism convention to the acts committed by resistance movements is that the convention would not only criminalize acts which are unlawful under IHL, but "would criminalize as terrorist even the deliberate attack on soldiers or facilities of the occupying power to compel the latter to retreat, even though such behaviour is the very essence of resistance against occupation and is lawful under IHL (…)"[131]. Once again, this would decrease the willingness of resistance movements to comply with IHL. This risk is even higher if this clause is combined with a second clause excluding acts committed by state forces absent an armed conflict[132], because then the resistance movement and the occupying power would be treated differently. Moreover, excluding the acts committed during occupation from the scope of the convention would not leave terrorist acts unpunished since these acts are prohibited under IHL.

B. The acts of the parties during an armed conflict or occupation

[128] M. SASSÒLI, *op. cit.*, p. 977. This results from Article 43 of Additional Protocol I. Under Article 4(A) GCIII, resistance movements are mentioned in paragraph (2), as opposed to "armed forces" which are mentioned in paragraph (1). However, we repeat the commentary made above: the latter provision must be placed in its context, i.e., the conditions to be granted POW status.
[129] D. O'DONNELL, *op. cit.*, p. 868.
[130] D. O'DONNELL, *op. cit.*, p. 868.
[131] M. SASSÒLI, *op. cit.*, p. 978.
[132] Cf infra.

A second formulation, which would remedy the problems raised in the previous sub-section, can be found in the proposal made by the Organization of Islamic Countries in the context of the Draft Comprehensive Convention. Under this proposal, the exclusionary clause would cover "the activities of the parties during an armed conflict, including in situations of foreign occupation"[133].

The notion of "the parties during an armed conflict" is broader than the notion of "armed forces". First, it clearly covers state as well as non-state parties. Second, according to the ICRC, it "comprise[s] both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings"[134]. Therefore, not only individuals who are members of state or non-state armed forces, but also civilians who take part in hostilities, will be excluded from the scope of application of the anti-terrorism convention in question.

This proposal also remedies the issue relating to situations of occupation, since it excludes "the activities of the parties during an armed conflict, *including in situations of foreign occupation* (…) [emphasis added]"[135] from the scope of the draft comprehensive convention. As O'Donnell points out, the wording of this clause is unfortunate: "interpreted literally, the language simply indicates that acts are excluded if they take place in any armed conflict, including those that occur during an occupation"[136]. However, the author explains, "if one assumes that any clause included in a treaty is intended to have some specific meaning, the intent would seem to be to assimilate occupation to armed conflict so that the same consequence flows from both"[137]. As O'Donnell points out, "the concern expressed by these states to distinguish the struggle for self-determination from terrorism supports this interpretation"[138].

C. The acts covered by IHL

Another formulation that would remedy the problems we just mentioned would be to exclude all acts that are covered by IHL from the scope of application of counter-terrorist conventions. Indeed, the phrase "all acts covered by IHL" entails that all acts that take place in armed conflicts – and with a nexus to the conflict –[139] or during occupation, regardless of the author

[133] UNITED NATIONS, *Report of the Ad Hoc Committee…, op. cit*., p. 19.
[134] ICRC Interpretive Guidance: MELZER (N.), *op. cit*., p. 32.
[135] UNITED NATIONS, *Report of the Ad Hoc Committee…, op. cit*., p. 19.
[136] D. O'DONNELL, *op. cit.,* p. 876.
[137] D. O'DONNELL, *op. cit.,* p. 876.
[138] D. O'DONNELL, *op. cit.,* p. 876.
[139] M. SASSÒLI, *op. cit.,* p. 976.

of such acts, would be excluded from the scope of application of counter-terrorism conventions. This is probably the formulation which permits the most straightforward interpretation. Indeed, the only issue that will remain is to determine whether IHL applies to a particular situation.

An example of such approach can be found in the 1979 International Convention Against the Taking of Hostages, which excludes from its scope of application all acts of hostage-taking to which the Geneva Conventions and their Additional Protocols are applicable[140]. According to O'Donnell, "the language of [the provision] suggests that the drafters were particularly interested in excluding the application of the Convention to movements involved in the struggle for self-determination or against foreign occupation"[141]. This broad exclusion nevertheless has two limits. First, only acts which are covered by these instruments, as opposed to customary IHL, are excluded from the scope of the hostage-taking Convention. Second, only acts for which "States Parties to this Convention are bound under those conventions to prosecute or [extradite] the hostage-taker"[142] are excluded.

To conclude, a clause excluding from the scope of an anti-terrorism convention the acts committed by armed forces during an armed conflict raises a number of problems, which are all related to the issue of ensuring compliance with IHL. These problems may be solved by modifying the terms of the clause, so that the latter would more clearly cover the acts committed by non-state armed forces, but would also cover those committed by civilians taking part in hostilities, as well as those committed during occupation[143].

[140] Article 12 of the 1979 International Convention against the Taking of Hostages.
[141] D. O'DONNELL, *op. cit.*, p. 864.
[142] Article 12 of the 1979 International Convention against the Taking of Hostages.
[143] This is not going to happen: even if a Draft Comprehensive Convention were to be adopted following these recommendations, it would not replace the pre-existing conventions: D. O'DONNELL, *op. cit.*, p. 873.

D. The acts of state armed forces

Another type of clause excludes "the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law"[144]. This is the second exclusionary clause of the 1997 Terrorist Bombings Convention and again, of the proposal made by the Friends of the Chairman in the Draft Comprehensive Convention.

What does "other rules of international law" mean? When read in isolation, this clause would mean that the activities of state armed forces would be excluded from the convention if regulated by, for instance, the prohibition of aggression or international human rights law[145], but also if regulated by international humanitarian law. If that was the correct interpretation, it would mean that where IHL applies, only the activities of state armed forces would be exempted from the scope of the anti-terrorism convention, while the acts committed by other entities – in particular organized armed groups engaged in a NIACS, but perhaps also national liberation movements[146] – could be qualified as terrorist by the convention even if they respect IHL. We already underlined the problems of treating differently the two parties to a conflict in the previous section.

However, this clause is inserted in the above-mentioned instruments following a first clause excluding, as we have seen above, "the activities of armed forces during armed conflict" which are regulated by IHL. Therefore, the phrase "other rules of international law" should be understood as comprising rules of international law other than international humanitarian law. We will therefore not examine this clause.

Section 2. The acts "covered by" or "lawful under" IHL

So far, we have seen that all acts covered by IHL should be excluded from the scope of application of counter-terrorism conventions in order to induce compliance with IHL by all

[144] Article 19(2) of the 1997 International Convention for the Suppression of Terrorist Bombings; UNITED NATIONS, *Report of the Ad Hoc Committee…, op. cit*., p. 18.
[145] D. O'DONNELL, *op. cit.,* p. 871.
[146] Indeed, the phrase « military forces of a state » could be interpreted literally or in view of Additional Protocol I, which assimilates national liberation movements to states.

those who participate in an armed conflict or in a struggle against an occupying power. As a reminder, the justification was that if a counter-terrorism convention criminalizing acts even when committed against military targets was applicable to situations covered by IHL, those who commit hostile acts would face prosecution for terrorist offences even if they have respected IHL. Non-state armed groups and civilians who take part in hostilities do not benefit from combatant privilege. They will thus probably face prosecution for taking up the arms, despite Article 6 (5) of Additional Protocol II. However, the qualification of their acts as "terrorist" would lead to harsher penalties[147]. Eventually, complying with IHL would not alleviate their criminal sanctions.

In view of this justification, one alternative is possible. Indeed, we could exclude only acts which conform with IHL, as opposed to "all acts covered by IHL", from the scope of application of the counter-terrorism convention. This was suggested by Liechtenstein in the context of the Draft Comprehensive Convention, which proposed an additional clause stating that "nothing in this Convention makes acts unlawful which are governed by international humanitarian law and which are not unlawful under that law"[148]. That is also the approach taken by Canadian legislation[149]. Under this approach, the exclusion only operates with regard to acts which are lawful under IHL, while acts which violate IHL can still be qualified as terrorist. Excluding the terrorist qualification for acts which conform with IHL would give an incentive to those engaged in hostilities to respect IHL.

However, as Van Steenberghe explains, "such approach is not very consistent. It consists in recognizing the specificity of international humanitarian law as regards the regulation of terrorism during an armed conflict when the act to which it applies is lawful, while denying such a specificity when its rules are violated. Yet, this specificity remains. It is inherent to the rules of international humanitarian law and does not depend on the lawfulness of the act under that law"[150].

[147] R. VAN STEENBERGHE, *op. cit.*, p. 55 of the contribution.
[148] See UNITED NATIONS, *Report of the Ad Hoc Committee…, op. cit.,* p. 17; M. SASSÒLI, *op. cit.*, p. 978.
[149] R. VAN STEENBERGHE, *op. cit.*, p. 55 of the contribution.
[150] R. VAN STEENBERGHE, *op. cit.*, p. 56 of the contribution.

Section 3. The acts of national liberation movements absent an armed conflict

As Bianchi and Naqvi put it, "while there exists widespread acceptance of the prohibition of terrorism, there is disagreement concerning the exception to the prohibition, namely to exclude from the definition of terrorism the acts of national liberation movements (so-called 'freedom fighters'"[151]. Indeed, developing countries wanted to exclude from the crime of terrorism "acts of violence committed by those struggling for their right to self-determination"[152].

We saw that when there is an armed conflict, the acts of such movements were in any event excluded by the first or third type of exclusionary clause examined above. What if hostilities do not rise to the level of an armed conflict? We concluded earlier that in a situation of occupation, the acts of resistance movements should be excluded from the scope of application of counter-terrorism instruments, and that it would not leave terrorist acts unpunished since IHL applies, including the prohibition of terrorism. Besides situations of occupation, however, nothing justifies the exclusion of acts committed by these movements from the scope of application of counter-terrorism conventions. On the one hand, IHL is not applicable in these situations. On the other hand, as Bianchi and Naqvi observe, " despite the refusal by developing countries for terrorism to include acts of violence committed by those struggling for their right to self-determination, there emerged in the 1990s a consensus regarding the prohibition of acts of terrorism, irrespective of their motivation"[153] This consensus was reflected in a UN Security Council resolution adopted in 2004[154].

Certain regional counter-terrorism conventions nevertheless exclude the acts committed in the struggle for self-determination from their scope of application. The Arab Convention for the Suppression of Terrorism, for instance, excludes "all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination"[155]. Likewise, the OIC Convention on Combating Terrorism (1999) excludes "Peoples struggle including armed struggle against foreign occupation, aggression, colonialism,

[151] A. BIANCHI and Y. NAQVI, *op. cit.*, p. 62.
[152] A. BIANCHI and Y. NAQVI, *op. cit.*, p. 63.
[153] A. BIANCHI and Y. NAQVI, *op. cit.*, p. 62-63.
[154] S/RES/1566 (2004), para. 3, which reads: "[acts of terrorism] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature"; see D. O'DONNELL, *op. cit.*, p. 874-875.
[155] Art. 2(a) of the 1998 Arab Convention for the Suppression of Terrorism.

and hegemony, aimed at liberation and self-determination"[156], albeit these struggles must be carried out "in accordance with the principles of international law"[157][158].

In the debates concerning the Draft Comprehensive Convention, however, the proposal made by the OIC only excludes acts committed during occupation, as we studied above. Other situations where a movement seeks to assert its right to self-determination are not mentioned.

Chapter 2. The scope of application of IHL in relation to terrorist acts

In the previous chapter, we saw that the relationship between IHL and counter-terrorism conventions is governed by exclusionary clauses inserted in the latter instruments. These clauses exclude the applicability of the convention in question to situations which are governed by IHL. In order to grasp more concretely which body of law applies to a certain situation of a terrorist nature, it is thus useful to study the scope of application of IHL in relation to terrorist acts.

As Quenivet rightly stresses, the applicability of IHL to "situations of a terrorist nature" only depends on "whether such situations can be considered as an armed conflict in the sense of the Geneva Conventions and their Additional Protocols"[159]. According to Quenivet, "general theories on the legal characterisation of terrorism are of no avail since each "terrorist" situation is peculiar and needs to be examined as such"[160]. It is true that in view of the very different forms that terrorism might take and because the existence of an armed conflict must be assessed on a case by case basis, we cannot readily conclude that "terrorism" would always constitute an IAC or a NIAC. However, as the author observes, the analysis of different terrorist situations "inevitably leads to some kind of classification in order to ease the examination"[161], even though the terrorist phenomenon has and will probably continue to take new forms which might call for a measure of readjustment of such classification.

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[156] Art. 2(1) of the 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism.
[157] *Ibidem*.
[158] A. BIANCHI and Y. NAQVI, *op. cit.*, p. 63.
[159] N. QUENIVET, "The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature", *International Humanitarian Law and the 21st Century's Conflicts – Changes and challenges*, P.-A. Hilbrand and R. Arnold (eds), Lausanne, Edis, 2005, p. 27.
[160] N. QUENIVET, *ibidem*, p. 30.
[161] N. QUENIVET, *op. cit.*, p. 30.

As Tigroudja observes, "when an act of extreme violence is committed by individuals with the intent to spread terror, we assume it's a violation of the laws of peace. This presumption is rebutted only if the act is committed in the context of an already triggered international or non-international armed conflict and can be considered as a "violation of the laws of war". Therefore, the law applicable to international terrorism is predetermined by the context in which it intervenes (laws of peace or laws of war), but so far, even when terrorism took its most serious forms and led to the use of force, it never had the effect of substituting, on its own, the application of a regime (laws of war) to another (laws of peace)"[162]. As the author further notes, this is precisely what changed after the 9/11 attacks according to the United States. Also, this deserves to be re-examined in the light of the attacks committed by the Islamic State.

In this chapter, we distinguish between two types of situations. We start by analysing whether certain terrorist acts might trigger an armed conflict and, therefore, the applicability of IHL (section 1). Next, we examine whether some of these situations that take place in peacetime and fall short of creating an armed conflict may nevertheless be linked to an already existing armed conflict and, therefore, be subject to IHL (section 2).

Section 1. Can terrorism create an armed conflict?

As we have just noted, the aim of this section is to examine whether certain terrorist acts may trigger an armed conflict. This implies that there is no pre-existing armed conflict or, in other words, that the terrorist acts in question take place in peacetime.

Because "the precise scope of the term "armed conflict" differs according to whether the conflict is international or non-international in scope"[163], we will examine each type of armed conflict in turn. We will start by mentioning the few situations of a terrorist nature which might qualify as an international armed conflict (A) before turning to non-international armed conflicts (B). By doing so, we will give examples drawn from practice – provided such examples exist. Since the most active terrorist group carrying out operations worldwide these days is the Islamic State, this will be the example which we will rely upon the most.

Let us note at the outset that the purpose of this section is to examine the issue of whether one or several terrorist acts committed by individuals or groups may trigger a (non-)international

[162] Free translation from H. TIGROUDJA, *op. cit.*, p. 84.
[163] E. CRAWFORD and A. PERT, *op. cit.*, p. 34.

armed conflict by themselves, i.e. irrespective of the counter-terrorism response by the victim state. Concerning the latter issue, it is obvious that it will trigger an international armed conflict when the operations are directed against the armed forces of a state which is believed to be responsible, in one way or another, for the terrorist attack committed by individuals or groups. As for the situation where the counter-terrorism response is directed against a terrorist group located in another state, it will trigger a non-international armed conflict[164] if the hostilities reach the required level of intensity.

A. Terrorism as a trigger for the law of international armed conflicts

There is no definition of what constitutes an international armed conflict in IHL treaties[165]. However, Common Article 2 to the four Geneva Conventions, which apply to international armed conflicts, provides that these Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"[166]. This indicates that international armed conflicts may only occur between states, since only states may be parties to the Conventions[167]. This interpretation was confirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY), which held that there is an armed conflict "whenever there is a resort to armed force between States"[168]. Therefore, the law of international armed conflicts will in principle not apply to a conflict with a non-state actor such as a terrorist group[169].

However, as Sassòli observes, "some acts of terrorism and some parts of the 'war on terrorism' are covered by the law of international armed conflicts (…)"[170]. We believe that there are only two situations in which that will be the case. A first situation is where a group which qualifies as a national liberation movement uses terrorism as a tactic, a means to achieve its right to self-determination[171]. We have already examined the conditions under which a group fighting for

[164] Although the qualification of the conflict in this case is controversial: see R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 14.
[165] E. CRAWFORD and A. PERT, *op. cit.*, p. 52.
[166] Common Article 2 GC; Article 1 of AP I refers to Common Article 2.
[167] M. SASSÒLI, *op. cit.*, p. 963.
[168] ICTY, *Prosecutor v. Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.
[169] M. SASSÒLI, *op. cit.*, p. 963.
[170] M. SASSÒLI, *op. cit.*, p. 964.
[171] On the difference between terrorism as a tactic and terrorism as a strategy, see I. DUYVESTEYN and M.A. FUMERTON, "Insurgency and Terrorism: What's the Difference?", *The Character of War in the Early 21st Century*, C. Holmqvist-Jonsäter and C. Coker (eds), London, Routledge, 2009, referred by J. DE ROY VAN ZUIJDEWIJN, *op. cit.*, p. 213.

its right to self-determination qualifies as a national liberation movement, to which the law of international armed conflict applies. The second situation is that of a terrorist group "representing another state or acting de facto under the direction or control of such state"[172]. Although this scenario has occurred in the past, we will not examine it in the present paper since it would require lengthy developments on the criteria to be fulfilled in order to be considered as a group acting under the direction or control of a state.

B. Terrorism as a trigger for the law of non-international armed conflicts

As a reminder, the aim of this subsection is to examine whether a single or a series of terrorist attacks committed outside the context of an armed conflict may create a non-international armed conflict and, therefore, trigger the application of the law of non-international conflicts.

There are two types of non-international armed conflicts: "low-intensity" conflicts, which are regulated by Common Article 3 to the four Geneva Conventions, and "high-intensity" conflicts, to which Additional Protocol II applies[173]. However, customary international law has greatly reduced the relevance of this distinction. As Van Steenberghe and de Hemptinne put it, "it is now widely recognized that most of the rules – if not all – governing high-intensity non-international armed conflicts also apply in low-intensity non-international armed conflicts"[174].

1) When does a NIAC exist

As Van Steenberghe and de Hemptinne explain, "low-intensity NIACs represent the minimum threshold for IHL to apply"[175]. We shall therefore study the criteria that must be fulfilled for such a conflict to exist and apply them to terrorist acts.

Common Article 3 does not provide a definition of what constitutes an "armed conflict not of an international character"[176]. According to the definition provided by ICTY Appeals Chamber, an armed conflict not of an international character exists whenever there is "protracted armed violence", either "between governmental authorities and organised armed groups", or "between

[172] M. SASSÒLI, *op. cit.*, p. 964.
[173] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 12.
[174] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 14.
[175] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 3, p. 12.
[176] N. QUENIVET, *op. cit*., p. 32.

such groups within a State"[177]. In sum, low-intensity non-international armed conflicts "include all hostilities where one or more non-governmental armed groups are involved".[178].

On the basis of the ICTY Appeals Chamber definition, the ICTY Trial Chamber ruling on the merits in Tadic has articulated two criteria in order to establish the existence of such a conflict, i.e. the organization of the parties and the intensity of the hostilities[179]. These criteria are meant to distinguish non-international armed conflicts from "isolated and sporadic acts of violence", which are not governed by IHL[180].

In order to be considered as an armed group engaged in a non-international armed conflict, the armed group must be sufficiently organised. The ICTY has articulated a number of indicative factors "none of which are, in themselves, essential to establish whether the "organization" criterion is fulfilled"[181]. These include: "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords"[182]. On this basis, it is clear that the Islamic State, for instance, qualifies as an organized armed group which may be engaged in a non-international armed conflict.

As for the criterion of intensity of the hostilities, the ICTY has also adopted a list of indicative factors, with the same caveat that "none of [these factors] are, in themselves, essential to establish that the criterion is satisfied"[183]. Such indicia include: "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and types of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of

[177] ICTY, *Prosecutor v. Tadic* (IT-94-1-AR72), *op. cit.*, para. 67; A. BIANCHI and Y. NAQVI, *op. cit.*, p. 110-111.
[178] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 12.
[179] ICTY, *Prosecutor v. Tadic* (IT-94-1-T), Opinion and Judgment of the Trial Chamber, 7 May 1997; A. BIANCHI and Y. NAQVI, *op. cit.*, p. 111.
[180] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 12; A. BIANCHI and Y. NAQVI, *op. cit.*, p. 114-115.
[181] ICTY, *Prosecutor v Haradinaj* (IT-04-84-T), Judgment of the Trial Chamber, 3 April 2008, para 60.
[182] ICTY, *Prosecutor v Haradinaj* (IT-04-84-T), *ibidem*, para. 60.
[183] ICTY, *Prosecutor v Haradinaj* (IT-04-84-T), *op. cit.*, para 49.

civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict"[184].

Based on these indicia, it is possible to assess on a case-by-case basis whether a conflict with an organised armed group amounts to a non-international armed conflict. As noted above, the most active terrorist group worldwide nowadays is the Islamic State.

2) Application to the acts committed by the Islamic State

It is clear that in Iraq and in Syria, where the rise of the Islamic State took place, the hostilities opposing this terrorist group to other armed groups and to the governments concerned amount to non-international armed conflicts. However, the hostilities in these countries correspond to what is commonly understood by the term "non-international armed conflicts", in the sense that they involve clashes between the belligerents. In other words, violence is reciprocal, and it cannot be said that it is the commission of terrorist acts only that triggered an armed conflict.

The situation is less clear when it comes to attacks committed by the Islamic State in other parts of the world. Here again, it is worth reminding that we are examining the situation taking place in other countries irrespective of a potential link with the conflicts taking place in Iraq and Syria; indeed, the latter issue will be examined in the next section. Quenivet asks the question in the following terms: "does a single hostage crisis totally unrelated to other events amount to an armed conflict? Can a series of situations, such as hostage-taking, kidnapping, and suicide-attacks amount to an armed conflict?[185]". As we will see, the question is particularly relevant for those states which are not part of the coalition against the Islamic State in Iraq and Syria.

According to Bott, "large scale attacks such as those carried out in Paris and Brussels can be characterized as armed conflicts", for "such attacks fall well beyond riots or domestic disturbances"[186]. The author nevertheless concedes that not every attack reaching the required threshold of intensity will trigger an armed conflict, since the link between the attacker and the terrorist group is sometimes very loose[187]. Indeed, as we saw above, if the act cannot be attributed to an organized armed group, it cannot trigger an armed conflict.

[184] ICTY, *Prosecutor v Haradinaj* (IT-04-84-T), *op. cit*., para 49.
[185] N. QUENIVET, *op. cit*., p. 31.
[186] G. BOTT, "Operations of the Islamic State and the Relevance of International Humanitarian Law", *Australian International Law Journal*, vol. 22, 2015-2016, p. 103.
[187] G. BOTT, *ibidem*, p. 103.

We think that such an interpretation of the scope of application of IHL is too extensive. Even when a specific state has been the victim of large-scale attacks on several occasions, this doesn't suffice to qualify the situation as an armed conflict. In our opinion, the existence of a non-international armed conflict requires the intensity threshold to be met on the side of both belligerent parties. Even though the indicia provided for the purpose of determining whether an armed conflict exists are non-cumulative, the list suggests that what is required is some kind of state of belligerency. This cannot be said when we look at the reaction showed by states which are the victims of terrorist attacks (cf. infra).

Section 2. Terrorism linked to an armed conflict

As Van Steenberghe and De Hemptinne observe, "IHL does not contain any general rule providing for its geographical scope. Such a silence raises many unsettled issues on the matter"[188]. As the authors explain, it is widely accepted that "IHL applies to the entirety of states involved in the conflict"[189]. This territorial approach doesn't mean that any act occurring in the territory of a state involved in an armed conflict will be governed by IHL. Indeed, "in the concrete case, IHL only applies to acts linked to the armed conflict. In other words, a nexus must be established between the act and the conduct of hostilities, otherwise the act will not be regulated by IHL"[190]. A first difficulty is then to determine when such a nexus exists. Besides, in spite of its general acceptance, the territorial approach may be questioned in light of the rise of transnational terrorist groups such as Al Qaeda or the Islamic State. These considerations lead us to examine three situations in which it is not clear whether IHL applies to terrorist acts.

[188] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 25.
[189] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 25.
[190] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 25.

A. Application of IHL to the territory of a state involved in a NIAC abroad

A first controversial question concerns "the application of IHL to [terrorist acts committed in] the territory of states parties to an extraterritorial NIAC"[191]. As Koutroulis observes, such application "would be in line with the territorial approach to the scope of application of IHL[192]. The ICRC also pleads "in favour of the application of IHL to the territory of all the states involved in the NIAC"[193], based on the principle of equality of belligerents[194].

However, States seem to deny the application of IHL to terrorist attacks carried out in their territory by members of armed groups against which they are fighting abroad. As Sassòli observes, "after the Madrid and London attacks in 2004 and 2005, the British and Spanish governments did not consider themselves involved in an armed conflict"[195], even though both states were participants in the Operation Enduring Freedom in Afghanistan. Similarly, Koutroulis notes that "attacks by ISIL outside the territory of Iraq and Syria have been treated under a law enforcement paradigm rather than under IHL. France's reaction to the 13 November 2015 attacks is a telling example in this respect. Despite the bellicose rhetoric adopted by French authorities in the aftermath of the attacks, the reaction to the attacks on behalf of the French authorities was a typical law enforcement operation of search for and arrest of suspected criminals"[196]. The same can be said of the reaction by Belgian authorities to the 22 March 2016 attacks in Brussels. France and Belgium were among the international coalition targeting the Islamic State in Iraq and Syria.

We should, however, add two caveats to this observation. The first one is expressed by Koutroulis in the following terms: "such practice [of applying the domestic law enforcement paradigm to terrorist attacks] may very well be reflective of a political choice rather than a legal conviction that IHL is not applicable and cannot be invoked at all"[197].

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[191] V. KOUTROULIS, "The Fight Against the Islamic State and *Jus in Bello*", *Leiden Journal of International Law*, vol. 29, 2016, p. 848.
[192] V. KOUTROULIS, *ibidem*, p. 848.
[193] V. KOUTROULIS, *op. cit.*, p. 849.
[194] V. KOUTROULIS, *op. cit.*, p. 849; See ICRC, *International humanitarian law and the challenges of contemporary armed conflicts. Report prepared for the 32nd International Conference of the Red Cross and the Red Crescent*, 2015, available at https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts, p. 14.
[195] M. SASSÒLI "Transnational Armed Groups and International Humanitarian Law", *Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series*, 2006, n° 6, available at https://archive-ouverte.unige.ch/unige:6418, p. 10.
[196] V. KOUTROULIS, *op. cit.*, p. 849.
[197] V. KOUTROULIS, *op. cit.*, p. 849.

The second caveat has already been mentioned above. It concerns the fact that it is not always easy to attribute attacks to a terrorist group. Therefore, states might question the existence of a nexus between the terrorist act and the extraterritorial NIAC rather than the territorial approach itself. Indeed, the authors of attacks are "perhaps not linked to [a certain terrorist group] by anything other than consulting the same websites or harbouring the same hate against Western societies as [the terrorist group] apparently does"[198]. This observation made by Sassòli before the rise of the Islamic State is even more relevant today, when we see that certain attacks committed by individuals are claimed by the Islamic State, which nevertheless seems to have had nothing to do with the planning of the attack. According to Sassòli, such a loose link "cannot be a sufficient basis for considering them as members of an armed group"[199]. However, as the author notes, "membership in a transnational armed group […] can only be determined individually"[200]. The ICRC Interpretive Guidance on the notion of direct participation in hostilities might be of help in determining such membership. According to the ICRC:

"For the practical purposes of the principle of distinction […], membership in [organized armed groups] cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse […] Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function") […] Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act"[201].

As is made clear by the ICRC, the criterion of assuming a "continuous combat function" and the factors proposed for the assessment of whether the criterion is fulfilled were articulated for the purposes of determining whether and when an individual may be targeted in a NIAC. In other words, they were articulated "for the purposes of the conduct of hostilities"[202], and not for

[198] M. SASSÒLI "Transnational Armed Groups…", *op. cit.*, p. 10.
[199] M. SASSÒLI, "Terrorism and War", *op. cit.*, p. 966.
[200] M. SASSÒLI "Transnational Armed Groups…", *op. cit.*, p. 19.
[201] N. MELZER, *op. cit.*, p. 34-34.
[202] In the introduction, the ICRC stresses: "it should be emphasized that the interpretive Guidance

the purposes of determining whether IHL applies. However, we believe that they may be useful for the latter purpose as well. For instance, if we apply them to the Islamic State, an individual who commits an attack cannot be considered as a member of the terrorist group even if he claims to have acted on behalf of ISIS and even if the attack is claimed by ISIS ex post facto, except if it can be established that the individual was effectively recruited by the group, was given instructions for the perpetration of specific attacks, was perhaps given the funds to commit the attack, or was even trained by the group in Syria.

B. "Worldwide application of IHL in relation to a specific NIAC occurring in a State"[203]

Another issue is that of the application of IHL in the territory of a state victim of terrorist attacks by a group involved in a NIAC abroad, where the victim state is not a party to that conflict. Koutroulis gives the example of the acts committed by the Islamic State in Tunisia[204].

Applying IHL to such a state would require, just like in the theory of the "global war on terror", to "'(…) move away from geographic-based ideas of applicability of the law' and to establish the nexus between the conduct at issue and the conflict as the decisive factor in determining the geographical application of IHL"[205]. As Koutroulis observes, "the ICRC has explicitly rejected this view, pointing to the 'essentially territorial focus of IHL' and asserting that the argument of a territorially unhinged application of IHL is not supported by state practice"[206]. More importantly, even a nexus-based approach to the scope of application of IHL would not support such application to terrorist acts committed in a state like Tunisia, since there is no armed conflict between the terrorist group and the victim state even extraterritorially.

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examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities": N. MELZER, *op. cit.*, p. 11. Throughout its work, the ICRC begins with the phrase "for the purposes of the principle of distinction, […]": see, concerning organized armed groups, N. MELZER, *op. cit.*, p. 27

[203] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 28, which nevertheless examines another situation, i.e. the situation where the parties to a NIAC carry out their activities in a state other than that where the NIAC is taking place. In that situation, both parties are engaged in a NIAC. On the other hand, we examine the situation where only one party is engaged in a NIAC.

[204] V. KOUTROULIS, *op. cit.*, p. 50.

[205] V. KOUTROULIS, *op. cit.*, p. 850.

[206] V. KOUTROULIS, *op. cit.*, p. 850; See ICRC, *International humanitarian law and the challenges…*, *op. cit.*, p. 15.

C. Worldwide application of IHL in relation to a NIAC without borders

The most controversial issue regarding the scope of application of IHL is whether it may apply to a non-international armed conflict taking place all over the world, and not in a specific state. This was the argument developed by the United States following the 9/11 in the context of its "global war on terror". As Sassòli explains, "shortly after 11 September 2001, the US administration declared that it was engaged in a 'war on terrorism'. This 'war' was seen as one single worldwide international armed conflict against a non-state actor (Al Qaeda), or perhaps, also against a social or criminal phenomenon (terrorism). This conflict started – without the US characterizing it a such at that time – at some point in the 1990s and will continue until victory"[207]. The U.S. Supreme Court then rejected that qualification, holding that the conflict with a non-state actor could only be non-international[208]. The US government thus qualified it as a non-international armed conflict, "which was territorially unlimited in scope"[209]. As Van Steenberghe and de Hemptinne explain, "according to that view, all people over the world who are affiliated to Al Qaeda constitute one unitary party to the conflict against the US and their violent acts may be aggregate as to reach the intensity threshold for the non-international armed conflict to exist. Therefore, IHL can apply to any action directed towards Al Qaeda and its affiliates as part to a non-international armed conflict, wherever they are located"[210]. As we will see in the next part, the application of IHL would notably allow the wartime regime of detention.

That view is at the opposite end the territorial approach to the scope of application of IHL, since it doesn't even require that a NIAC exist in one particular state[211]. Even if the territorial approach was mitigated, however, it could not justify such a broad application of IHL which relies on nothing more than a fiction. As Milanovic puts it, "one simply cannot aggregate all terrorist acts motivated by Islamic fundamentalism coupled with professed allegiance to Al-Qaeda all across the world in order to satisfy the two-fold intensity and organization test"[212].

[207] M. SASSÒLI, "Terrorism and War", *op. cit.*, p. 963.
[208] US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 29 June 2006.
[209] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 29.
[210] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 29.
[211] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 29.
[212] M. MILANOVIC, «The end of application of international humanitarian law", *International Review of the Red Cross*, vol. 96, 2014, p. 187, quoted by R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 29.

PART III. THE DETENTION OF SUSPECTED TERRORISTS IN NIACS: BETWEEN IHL AND LAW ENFORCEMENT

In the previous chapter, we saw the difficulties of determining the scope of application of IHL in relation to terrorist acts. Such determination is crucial with regard to the treatment of terrorists, in particular concerning their detention regime. However, the difficulties don't end when the determination of the applicable law is made. Indeed, when certain terrorist acts are considered to fall under the scope of IHL, two issues relating to the detention regime applicable to terrorists remain unclear. The first one concerns the detention of "unlawful combatants" in IACS, while the second concerns the detention of terrorists in NIACS. Both these issues arose in the context of Al Qaeda members captured by the United States in the aftermath of the 9/11 attacks in Afghanistan and elsewhere, and detained at Guantanamo Bay.

Given that terrorists will more often be engaged in NIACS than in IACS (cf. supra), this part will only deal with the issue of detention of suspected terrorists in NIACS. We will examine the two models available for detaining these individuals. The first model to be considered will be that of security detention under the law of armed conflict (chapter 2). The uncertainties relating to that regime of detention will lead to the second, law enforcement model (chapter 3). Under that term, we designate detention for the purpose of criminal prosecution, whether it is for violation of the domestic laws of the state, including counter-terrorism legislation, or for violation of IHL. Indeed, as we have seen in the first part, the provisions of IHL are enforced not only by international criminal courts, but also by national courts. Before examining these two different paradigms, however, we will briefly consider what is at stake in the choice of the detention regime, i.e. the right to liberty (chapter 1).

Chapter 1. The right to liberty and the relationship between IHL and IHRL

The examination of the regime applicable to the detention of terrorists in NIACS cannot be made without referring to the right to liberty which, as Teferra puts it, "is one of the most sacrosanct and highly safeguarded rights in international law"[213].

On the one hand, a number of international human rights law prohibits unlawful or arbitrary detention under a number of treaties. Some of these treaties are regional while others are universal. The most notable example of a universal treaty is the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to liberty under Article 9 (1)[214]. Due to the universal scope of application of the ICCPR[215], this part will base on this provision and its interpretation by the Human Rights Committee, although it is not certain to what extent these guarantees reflect customary human rights law[216].

On the other hand, and "despite the absence of an explicit treaty provision to that effect, there is also a growing consensus that customary rules of IHL similarly forbid the arbitrary and capricious detention of individuals in armed conflict situations"[217]. Moreover, Teferra observes, "arbitrary detention is usually viewed as something incompatible with the requirement of humane treatment – a norm that has a solid foundation in the various rules applicable in international and non-international armed conflicts alike"[218].

As Dormann puts it, IHL is not the only legal framework relevant in [situations of armed conflicts]"[219]. Indeed, and despite the objections of some states like the United States, it is now generally accepted than international human rights law continues to apply in armed conflicts, "and that it also applies extraterritorially"[220]. On the other hand, "What is not settled is the precise interplay of the two branches of international law in situations of armed conflict and the

[213] Z. M. TEFERRA, "National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law", International Review of the Red Cross, vol. 98, 2016, p. 964.
[214] Article 9 of the International Covenant on Civil and Political Rights (ICCPR); see also Art. 3 and 9 of the Universal Declaration of Human Rights
[215] Although the ICCPR has a universal scope of application, it has not been ratified universally, with currently 172 state parties.
[216] See M. SASSÒLI and L.M. OLSON, "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts", *International Review of the Red Cross*, 2008, vol. 90, p. 619.
[217] Z. M. TEFERRA, *op. cit*., p. 964; See Rule 99 of the ICRC Study on Customary International Law: J.-M. HENCKAERTS and L. DOSWALD-BECK, *op. cit*., p. 344.
[218] Z. M. TEFERRA, *op. cit*., p. 964.
[219] K. DORMANN, "Detention in Non-International Armed Conflicts", *International Law Studies Series. US Naval War College*, vol. 88, 2012, p. 348.
[220] K. DORMANN, *ibidem*., p. 348; see also D. CASSEL, "Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law", *Journal of Criminal Law and Criminology*, vol. 98, 2008, p. 818-819.

extent of the extraterritorial application of human rights law"[221]. In the Wall Advisory Opinion[222], the International Court of Justice clarified that relationship between these two branches of law. According to the Court, "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law"[223]. In the latter situation, the *lex specialis* principle applies[224].

As Pejic observes, the right to liberty of persons detained during an armed conflict "may be said to fall into the category of rights that, in the ICJ's wording, are "matters" of both branches of law"[225]. According to the *lex specialis* principle, international humanitarian law would in principle prevail over human rights, since it "takes better account of the uniqueness of the context"[226] of an armed conflict. However, as Sassòli and Olson explain, "The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it determines which rule prevails over another in a particular situation. Each case must be analysed individually"[227]. When it comes to detention, as we will see, the law of IACS may be seen as the *lex specialis*. On the other hand, because the law of NIACS is "more rudimentary"[228], the perspective might be reversed.

It is also important to note that, even if human rights apply in armed conflicts, some of them may be derogated from "in time of public emergency which threatens the life of the nation"[229]. Armed conflicts certainly qualify as such, and the right to liberty is not among the non-derogable rights[230]. However, even when the right to liberty is derogated from, certain guarantees continue to apply. According to the Human Rights Committee, the deprivation of liberty "must (…) not exceed those [measures which are] strictly required by the exigencies of the actual situation"[231]. Moreover, while the right to liberty may be derogated from, such

[221] K. DORMANN, *op. cit.*, p. 348.
[222] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106.
[223] ICJ, *Legal Consequences…, ibidem,* para. 106.
[224] ICJ, *Legal Consequences…, op. cit.,* para. 106.
[225] J. PEJIC, "Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, vol. 87, p. 377-378.
[226] M. SASSÒLI and L.M. OLSON, *op. cit.*, p. 603.
[227] M. SASSÒLI and L.M. OLSON, *op. cit.*, p. 603-604.
[228] K. DORMANN, *op. cit.*, p. 349.
[229] Article 4.1 ICCPR.
[230] Article 4.2 ICCPR.
[231] HUMAN RIGHTS COMMITTEE, *General Comment n° 35 – Article 9 (Liberty and security of person)* (CCPR/C/GC/35), 2014 (hereinafter "HRC, General Comment 35"), para. 65.

derogation, "may never (…) circumvent the protection of non-derogable rights"[232]. Thus, for example, "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation"[233]. Thirdly, the derogation must be non-discriminatory"[234]. Finally, "derogating measures must also be consistent with a State party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty"[235].

Chapter 2. Security detention in NIACS

The terms "security detention", "internment" and "preventive or administrative detention" may be used interchangeably[236] to designate "the deprivation of liberty of a person that has been initiated/ordered by the executive branch — not the judiciary — without criminal charges being brought against the internee/administrative"[237]. As Pejic puts it, "internment is an exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security or public order in non-conflict situations"[238]. As the ICRC observes, this form of detention has increasingly been used in the fight against terrorism[239]. Yet, whether in peacetime or during an armed conflict, this form of detention is challenging with regard to the compatibility with the right to liberty[240].

According to the Human Rights Committee, "[security detention] presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available"[241]. The Committee goes on to state the conditions under which security detention nevertheless complies with Article 9 of the ICCPR. These conditions are applicable in the absence of a derogation to the right to liberty. In times of armed conflict, if a derogation is

[232] HRC, General Comment 35, para. 67.
[233] HRC, General Comment 35, para. 67.
[234] HRC, General Comment 35, para. 65.
[235] HRC, General Comment 35, para. 65.
[236] Z.M. TEFERRA, *op. cit*., p. 963; J. PEJIC, *op. cit*., p. 376.
[237] J. PEJIC, *op. cit*., p. 375-376.
[238] J. PEJIC, *op. cit*., p. 376.
[239] ICRC, *Contemporary challenges to IHL – security detention*, 2010, available at https://www.icrc.org/en/document/security-detention
[240] ICRC, *Contemporary challenges to IHL, ibidem.*
[241] HRC, General Comment 35, para.15.

made, only the limited guarantees stated above apply. As a reminder, the deprivation of liberty must be proportional and non-discriminatory; it must comply with IHL; and it must be accompanied by the "right of the detainee to seek prompt judicial review of the lawfulness of the detention"[242].

We should note that, according to the Human Rights Committee, "Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary"[243].The problem is that, while the regime of detention applicable in international armed conflict is very detailed under Geneva Conventions III and IV, IHL is almost silent on that applicable in non-international armed conflicts[244].

The absence of rules specifically governing detention in NIACS raises two issues: first, is it authorized under IHL? And if so, how is it regulated?

As Van Steenberghe and de Hemptinne observe, "it is true that domestic law may provide a ground for internment by governmental forces"[245]. However, a power to detain provided for under domestic law "may turn out to be problematic when these forces act abroad in the context of 'transnational armed conflicts'"[246] More fundamentally, domestic law should still comply with the right to liberty, guaranteed by IHRL and IHL.

However, the regulation of security detention in NIACS by IHRL is not satisfying either. Even if human rights law provides some guarantees to the detainees in NIACS, these are limited. Moreover, even though it is now widely accepted that human rights continue to apply in armed conflict and extraterritorially, some states still deny such application[247]. It is thus useful to find a legal basis under IHL to bind these states even when they detain individuals abroad.

Finally, even though this part examines the detention of terrorist suspects by a state, we must take a more general perspective on the issue of security detention. In this regard, the *authorization* of security detention in NIACS by IHL is important in order to give non-state

[242] D. CASSEL, *op. cit*., p. 821.
[243] HRC, General Comment 35, para. 64.
[244] See HRC, General Comment 35, para. 66: "During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention. Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph 15 above, including review by a court within the meaning of paragraph 45 above".
[245] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 4, p. 25.
[246] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit*., chapter 4, p. 25.
[247] G. RONA, "Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?", *International Law Studies. U.S. Naval War College*, vol. 91, 2015, p. 34.

parties to an armed conflict the same right to detain as that which might be recognized to states. As Van Steenberghe and de Hemptinne observe, "Armed groups (…) will never receive any benefit from the government's right to detain under domestic law"[248]. Likewise, the *regulation* of detention by IHL is important in view of the limited scope of application of human rights, which only impose obligations on states parties, and therefore do not apply to a non-state party to an armed conflict[249]. As Dormann observes, "IHL is the only branch of international law aimed at the protection of persons that clearly binds both State and non-State parties in armed conflict"[250].

In view of these considerations, we will thus first examine whether IHL provides a legal basis for security detention in NIACs (section 1). Whatever the answer may be, based on the observation that security detention does occur, we will then look into the legal regime which should apply to that situation (section 2).

Section 1. Legal basis for detention in NIACS under IHL

IHL clearly authorizes detention for security reasons in international armed conflicts. On the one hand, Geneva Convention III allows the internment of combatants as prisoners of war upon capture and until the end of hostilities "without specific reasons or procedures"[251]. As Teferra observes," This measure may itself be considered as a national security measure in its wider sense"[252]. Indeed, internment of combatants aims at preventing them from returning to the battlefield, which "[would obviously be] prejudicial to the security of the adverse party"[253].

On the other hand, Geneva Convention IV allows the internment of civilians when "[their] activity is deemed to pose a serious threat to its security"[254]. As Van Steenberghe and de Hemptinne explain, "Geneva Convention IV considers that restricting the freedom of action of individuals, without criminal charges, for preventive security reasons is extreme, even in

[248] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 4, p. 25.
[249] K. DORMANN, *op. cit.*, p. 349.
[250] K. DORMANN, *op. cit.*, p. 349.
[251] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 4, p. 6.
[252] Z.M. TEFERRA, *op. cit.*, p. 965; see ICRC, *Internment in armed conflict: Basic rules and challenges – Opinion Paper*, 2014, available at https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges, p. 4.
[253] ICRC, *Internment in armed conflict…*, *ibidem*, p. 4.
[254] ICRC, *Internment in armed conflict…*, *op. cit.*, p. 4.

international armed conflicts. Such measures are thus strictly constrained by substantive and procedural requirements"[255].

In non-international armed conflicts, there is no provision that explicitly allows detention for security reasons – nor even for "other grounds such as criminal charge"[256]. As Teferra observes, "this lack of explicit authorization or proscription of detention in the rules governing NIACs has been a source of continuous debate among scholars and practitioners"[257].

The author examines the different arguments that were put forward for providing a legal basis to security detention in NIACS.

According to some authors, certain provisions applicable to NIACS – in particular, Article 3 Common to the Geneva Conventions and Articles 4 to 6 of Additional Protocol II – implicitly recognize the right to detain for security reasons, since they refer to detained persons[258]. However, as Teferra argues, "The regulation of a particular measure by the law does not certainly imply that the law *authorizes* the recourse to such a measure"[259]. The author gives the example of IHL, which regulates the conduct of war while leaving to the *jus ad bellum* the determination of whether the war is lawful[260]. Similarly, the author goes on, the fact that IHL regulates the treatment of detained persons is simply based on the reality that detention does occur in NIACS, and "does not lead to the conclusion that a belligerent State or a non-State armed group is authorized by the same to take such a measure"[261]. "If that was the case, [the author argues,] "the relevant rules would explicitly do so"[262].

It has also been argued that "the authority to detain, including for security reasons, is an implicit and intrinsic aspect of the power to target individuals in armed conflict"[263]. As Teferra concedes, "it is true that detention represents a less severe measure compared to targeting, a measure which the rules of both NIACs and IACs permit, when it comes to combatants and civilians directly participating in hostilities (DPH)"[264]. However, the author argues, "the two

[255] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 4, p. 15.
[256] Z.M. TEFERRA, *op.cit.*, p. 966.
[257] Z.M. TEFERRA, *op.cit.*, p. 966.
[258] Z.M. TEFERRA, *op.cit.*, p. 966-967. See, for instance, K. DORMANN, *op. cit.*, p. 348; J. PEJIC, *op. cit*. p. 377.
[259] Z.M. TEFERRA, *op.cit.*, p. 967.
[260] Z.M. TEFERRA, *op.cit.*, p. 967.
[261] Z.M. TEFERRA, *op.cit.*, p. 967.
[262] Z.M. TEFERRA, *op.cit.*, p. 967-968.
[263] Z.M. TEFERRA, *op.cit.*, p. 968.
[264] Z.M. TEFERRA, *op.cit.*, p. 968. In fact, the power to target in NIACS is still controversial: see M. SASSÒLI and L.M. OLSON, *op. cit.*

regimes of detention and targeting and the subjects they regulate are distinct and should not be conflated"[265]. Indeed, Teferra explains, "DPH itself is not a requirement to detain individuals on security grounds. In other words, to be a security threat is not synonymous with and, in fact, is broader than DPH. A person may be a security threat, and hence be subjected to detention, without directly or even *indirectly* participating in hostilities or engaging in activities that cause material and direct, *actual or potential harm* to a State and without violating the rules of IHL".

According to another argument, put forward by Professor Ryan Goodman, "States have a power to detain individuals in NIACs since they have the same power in IACs, where they assume more exacting obligations"[266]. However, as Teferra argues, "the nature of the conflict and the parties involved in IACs and NIACs is completely different. *The raison d'être* behind the rules regulating NIAC and IAC, including those concerning detention, is also not the same"[267]. One important element in this regard is that in IACS, the power to detain has "reciprocal benefits" for the belligerent states, "the basic assumption [being] that the belligerent States have the capacity and institutional ability to keep individuals in detention humanely and with dignity and have judicial or quasi-judicial mechanisms to redress possible arbitrary incarcerations"[268]. The same cannot be said with certainty when it comes to non-states actors. Moreover, Teferra argues, "the lack of an express authorization of detention is evidently a reflection of States' aversion to any rules that may bestow a degree of recognition on the non-State actors"[269]. This does not mean that states then "had the intention to restrict their own capacity to detain in NIACS"[270]. "Instead, [the author further argues] they are well aware that they have other legal avenues that they may use, besides the rules of IHL, to detain individuals threatening their security, including domestic law"[271].

Having set aside all these arguments, Teferra nevertheless finds two grounds which may be seen as valid legal bases for detention in NIACS.

On the one hand, Article 3 of Additional Protocol II states that "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, *by all legitimate means*, to maintain or re-establish law and order in the State or to

[265] Z.M. TEFERRA, *op.cit.*, p. 969.
[266] Z.M. TEFERRA, *op.cit.*, p. 969; see R. GOODMAN, "The Detention of Civilians in Armed Conflict", *American Journal of International Law*, vol. 103, 2009, p. 50.
[267] Z.M. TEFERRA, *op.cit.*, p. 969.
[268] Z.M. TEFERRA, *op.cit.*, p. 969.
[269] Z.M. TEFERRA, *op.cit.*, p. 969.
[270] Z.M. TEFERRA, *op.cit.*, p. 969.
[271] Z.M. TEFERRA, *op.cit.*, p. 969-970.

defend the national unity and territorial integrity of the State [emphasis added]". As Teferra observes, the phrase "all legitimate means" "encompasses a wide range of measures that States may adopt to protect their security"[272]. "Although the provision does not mention examples of such measures, [the author goes on,] undoubtedly one can envisage security detention as forming part of "all legitimate means" necessary"[273] to achieve that objective.

On the other hand, the legal basis could simply be based on an "inherent power to intern" recognized under customary international law. Indeed, Teferra argues, "States have always engaged in detaining individuals threatening their security, whether in peacetime or in NIACs, and this has generally been accepted as lawful. It may consequently be argued that the necessary elements of customary law – practice and opinio juris – exist, and hence there is a customary rule permitting detention in NIACs"[274]

However, both these grounds only confer the right to detain to States parties to an armed conflict, and not to non-state armed groups. This is clear from the wording of Article 3 of Additional Protocol II. Regarding the legal basis under customary IHL, as Teferra explains, "States rarely agree or even acquiesce to the *de facto* power of their adversaries to target or detain individuals"[275], which opposes the formation of a customary rule authorizing detention by non-states armed groups.

Section 2. The regime applicable to detention in NIACS

"Moving away from the debate on authorization (…)"[276], as Teferra puts it, "what is more important for detainees is to focus on the conditions rather than the permissibility of detention"[277]. However, as noted above, the law of non-international armed conflicts only provides very minimal guarantees to detained persons. Common Article 3 to the Geneva Conventions and Article 4 of Additional Protocol II guarantee that persons who do not or have ceased to take part in hostilities, including detained persons, shall be treated humanely and without discrimination, and prohibits certain acts against these persons. Article 5 (1) and (2) of Additional Protocol II provide additional guarantees to "persons deprived of their liberty for

[272] Z.M. TEFERRA, *op.cit.*, p. 970.
[273] Z.M. TEFERRA, *op.cit.*, p. 970.
[274] Z.M. TEFERRA, *op.cit.*, p. 970.
[275] Z.M. TEFERRA, *op.cit.*, p. 971.
[276] Z.M. TEFERRA, *op.cit.*, p. 971 : « moving away from the debate on authorization versus regulation".
[277] Z.M. TEFERRA, *op.cit.*, p. 971.

reasons related to the armed conflict, whether they are interned or detained". Besides these minimal guarantees, IHL is silent on certain crucial questions, such as the grounds and duration of internment and the procedural guarantees that must be afforded in case of security detention.

As we have stressed several times, human rights continue to apply in times of armed conflict. "In accordance with the *lex specialis principle*"[278], human rights law "should step in to fill the gap"[279] in the protection afforded to persons detained in NIACS. In fact, the application of human rights in NIACS is contemplated by Additional Protocol II, whose preamble states that "international instruments relating to human rights offer a basic protection to the human person"[280]. However, assuming a derogation is made to the right to liberty, we have seen that the human rights guarantees are minimal themselves. As a result, their application is not sufficient to lead to a satisfactory level of protection of the right to liberty. Moreover, we have seen the difficulties related to the scope of application of human rights, which might be more limited than IHL.

Therefore, another solution to the silence of the law of NIACS would be to apply the law of international armed conflicts by analogy. Indeed, detention of persons in IACS is far more regulated by Geneva Conventions III and IV and Additional Protocol I.

As Sassòli and Olson note, "such a legal analogy is also consistent with the noted gradual erosion of the distinction between the law applicable in international and non-international armed conflicts"[281]. Moreover, Common Article 3 encourages the parties to a non-international armed conflict to agree on the application of the other provisions of the Conventions[282]. However, as we have seen above, the law of IACS contains two different regimes depending on the status of the person detained, i.e. prisoner of war or civilian detainee.

As Sassòli and Olson observe, "The ICRC Study [on Customary International Law] in fact indicates application by analogy in such conflicts of the standards of the Fourth Geneva Convention to civilians and those of the Third Geneva Convention to persons designated as 'combatants'"[283]. It may seem unlikely that states would accept such an analogy, in view of

[278] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 621.
[279] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 621.
[280] Preambular para. 2 to AP II.
[281] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 623.
[282] Common Article 3, para.3 ; M. SASSÒLI and L.M. OLSON, *op. cit*., p. 623.
[283] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 623.; see J.-M. HENCKAERTS and L. DOSWALD-BECK, o*p. cit*., p. 352. See also E. CRAWFORD, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict*, Oxford, Oxford University Press, 2010, who argues in favour of the application of GC III to "legitimate

their traditional political opposition to recognizing combatant status. However, "as analogous application does not confer any status, there would still, for example, be no combatant immunity"[284].

This approach would nevertheless raise a number of difficulties. In particular, it would then be necessary to determine who is a combatant and who is a civilian: "should 'combatants' be measured against the criteria in Article 4 of the Third Convention or Article 44 of Protocol I, or perhaps through the 'membership approach'?"[285]. Moreover, due to the difficulty of determining membership to an organized armed group, "such a determination [should be made] on an individual basis", while this individual assessment is only provided for by the law of IACS in case of doubt (article 5 GCIII) or in the situations set out in Article 45 API.

Besides this difficulty, the application of Geneva Convention III to "combatants" in NIACS would entail that these persons could be detained until the end of hostilities. Because non-international armed conflicts can last considerably longer than international armed conflicts, this would raise a serious issue with regard to the right to liberty.

These are precisely the criticisms that have been addressed to the U.S. detention policy of Al Qaeda members at Guantanamo Bay. Al Qaeda members were detained on the same model as those captured during the war in Afghanistan. While they were denied prisoner of war status[286] – which is not surprising since they effectively do not fulfil the conditions –, the U.S. administration considered that under the Authorization for Use of Military Force Act (AUMF), "detention is generally authorized until the end of hostilities"[287]. Moreover, as Crawford notes, "the US Government also determined that any detainees in Guantanamo would not be able to challenge their detention in a US Federal Court via petition for a writ of *habeas corpus*"[288]. These elements show that although the detainees were not afforded the protection of Geneva Convention III, they were interned on the same model as prisoners of wars. This did not change

participants", but does not say anything about a possible application of GC IV to civilians (i.e. "persons who take part only sporadically in hostilities"): p. 168.

[284] M. SASSÒLI and L.M. OLSON, *op. cit.*, p. 624.

[285] M. SASSÒLI and L.M. OLSON, *op. cit.*, p. 624. On the "membership approach", see ICRC Interpretive Guidance: N. MELZER, *op. cit.*, p. 32-35.

[286] See THE WHITE HOUSE, *Memorandum from George Bush to Vice President et al: Humane Treatment of Taliban and Al-Qaeda Detainees*, 7 February 2002, available at: http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf

[287] THE WHITE HOUSE, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, December 2016, available at https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf, p. 30.

[288] E. CRAWFORD, *op. cit.*, p. 57-58.

after the Supreme Court's determination in Hamdan v Rumsfeld[289] that the conflict with Al Qaeda could only be non-international. However, the right to petition for a writ of habeas corpus was then recognized by the US Supreme Court in the 2008 judgment of Boumediene v Bush[290]. Moreover, in 2011, President Obama issued an Executive Order establishing Periodic Review Boards (PRBs) "to ensure that individuals detained at Guantanamo Bay under the law of armed conflict remain in detention only when necessary to protect against a continuing significant threat to the security of the United States"[291].

These considerations suggest that the provisions applying to prisoners of war are not well-fitted to be applied in non-international armed conflicts. However, another possibility would be to apply the regime of Geneva Convention IV only. This Convention allows the internment of civilians "if the security of the Detaining Power makes it absolutely necessary"[292] or, in occupied territories, "if the Occupying Power considers it necessary, for imperative reasons of security".[293] Interned civilians must be released "as soon as the reasons which necessitated [their] internment no longer exist"[294] and, "For those civilians not released during the armed conflict, (…) their '[i]nternment shall cease as soon as possible after the close of hostilities'[295]"[296]. Moreover, Geneva Convention IV provides that interned civilians have the right to appeal that measure "as soon as possible", and then have a right of periodic review[297].

The provisions of Geneva Convention IV appear more suitable to be applied by analogy to security detention in NIACS, and may thus be considered as the *lex specialis* in this context. However, the fact that there is a *lex specialis* other than human rights doesn't have the effect of

[289] US Supreme Court, *Hamdan v Rumsfeld*, *op. cit*.
[290] US Supreme Court, *Boumediene v. Bush*, 553 U.S. 723, 12 June 2008; E. CRAWFORD, *op. cit*., p. 59, note 52.
[291] THE WHITE HOUSE, *Report on the Legal*…, *op. cit*., p. 31. Although these elements may suggest that the Obama administration was heading towards an application of the GC IV model, this was expressly denied: "During ongoing hostilities, the U.S. Government's legal authority to detain "is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities." However, *as a matter of policy*, a detainee may be released or transferred while active hostilities are ongoing if a competent authority determines that the threat the individual poses to the security of the United States can be mitigated by other lawful means [emphasis added]": p. 30.
[292] Article 42 GC IV, which applies to "an alien in the territory of a party": M. SASSÒLI and L.M. OLSON, *op. cit*., p. 617, note 86.
[293] Article 78 (1) GC IV.
[294] Article 132 (1) GC IV.
[295] Article 133 (1) GC IV.
[296] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 617.
[297] GC IV, Art. 43 (1) for aliens in the territory of a party and Art. 78(2) for civilians in occupied territory.

displacing the application of human rights. The latter may be used to interpret IHL, or even to complement it on certain issues[298] – which is more likely in the absence of a derogation.

Finally, it must be noted that certain authors have proposed a set of guarantees that should regulate security detention in whatever context – either in peacetime or in international as well as non-international armed conflicts – , considering that no body of rules provided sufficient guarantees to accompany such a measure[299].

Chapter 3. Detention in view of criminal prosecution

Another basis for depriving suspected terrorists of their liberty in the context of a non-international armed conflict is to detain them for the purposes of criminal prosecution. Indeed, while these individuals are "members of the enemy force in war"[300], they may be, at the same time, war criminals under IHL, criminals under the domestic laws of the state involved in the conflict, or both.

While security detention in NIACS is a measure whereby "each is held because of the threat he poses if released"[301], criminal detention is characterized by the objective of punishing individuals for *past* acts. Therefore, "the criminal model (…) permits detention in essentially two circumstances: (1) where the person has been charged with a criminal offense and is awaiting a criminal adjudication; and (2) where the person is being punished after a criminal conviction"[302].

Another main difference concerns the guarantees applicable under each paradigm. As we have seen in the previous chapter, security detention is governed by international humanitarian law and by human rights law, the precise interplay between the two branches being uncertain. When a person is detained for the purpose of criminal prosecution, additional guarantees apply.

[298] M. SASSÒLI and L.M. OLSON, *op. cit*., p. 625.
[299] See J. PEJIC, *op. cit*.
[300] W.K. LIETZAU, "U.S. Detention of Terrorists in the 21st Century", *Detention of Non-State Actors Engaged in Hostilities. The Future Law*, G. Rose and B. Oswald (eds), Leiden, Brill/ Nijhof, 2016, pp. 284.
[301] W.K. LIETZAU, *ibidem*, p. 285.
[302] HAKIMI (M.), "International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide", *Case Western Reserve Journal of International Law*, vol. 40, 2009, p. 599.

On the one hand, IHL does not contain provisions dealing specifically with pre-trial detention. Therefore, human rights law provides the *lex specialis*. Human rights law notably ensures the right to trial within a reasonable time[303] and the right to be brought without delay before a judge to decide on the lawfulness of detention and order release if the detention is unlawful[304]. As Cassel points out, "the Human Rights Committee interprets "without delay" in this context to mean not more than a "few days"[305]"[306]. As the author further observes, "this leaves prosecutors scant time after arrest to assemble sufficient evidence to persuade a judge to order pretrial detention"[307]. While a derogation to the right to liberty may be made in times of armed conflict, as we have seen, the Human Rights Committee considers the latter right to be non-derogable. As Cassel explains, "even if the right of access to a court is non-derogable, States may nonetheless attempt to derogate from the requirement that such access be afforded "promptly", or at least as promptly as would ordinarily be required. If they succeed, this would allow police additional time to detain a suspect before bringing him before a judge"[308]. But it would probably not gain the police more than a few additional days, as is suggested by the case law of the European Court of Human Rights (ECHR)[309].

On the other hand, the law of non-international armed conflicts provides a number of guarantees related to the right to a fair trial. Article 6 of Additional Protocol II notably guarantees the right to be tried "by a court offering the essential guarantees of independence and impartiality"[310]; the right of the accused to be informed of the charges against him; the presumption of innocence; etc. The right to a fair trial is also guaranteed in human rights instruments, such as the ICCPR[311]. As Bhuta observes, "the protection of fair trial rights during international and non-international armed conflicts might reasonably be seen as an area where the convergence between international humanitarian law (IHL) and international human rights law (IHR) is considerable, and in which the co-application of the two bodies of international law results in

[303] See for example Article 9.3 ICCPR
[304] See for example Article 9.4 ICCPR
[305] HRC, General Comment 35, para. 33.
[306] D. CASSEL, *op. cit*., p. 826.
[307] D. CASSEL, *op. cit*., p. 826.
[308] D. CASSEL, *op. cit*., p. 829.
[309] see ECHR, *Brannigan and McBride v. The United Kingdom*, 25 May 1993, in which the Court upheld police detentions of seven days and ECHR, *Aksoy v. Turkey*, 18 December 1996, in which the Court considered as contrary to the right to liberty the detention of a suspected terrorist for fourteen days without judicial control. In the subsequent case of *Sen v. Turkey*, 17 June 2003, the Court ruled against police detention of eleven days without judicial supervision: D. CASSEL, *op. cit.*, p. 829-830.
[310] See also Common Article 3: "judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples".
[311] Article 14 ICCPR

"interpretive complementarity" in respect of specific guarantees contained in both legal regimes»[312].

Because of these guarantees, criminal detention is less problematic with regard to the right to liberty than security detention. Therefore, one view would be to deny states the right to detain suspected terrorists based on the IHL paradigm of security detention, and to allow their deprivation of liberty only in view of criminal prosecution. In fact, this argument is made in the context of U.S. detention of suspected terrorists, and it is thus probably the consequence of the view that there is no armed conflict between the U.S. and those suspected terrorists[313]. When an armed conflict undeniably exists, however, denying the right of states to detain would also deny the specificity of armed conflicts, which make it necessary to intern the enemy. The fact that security detention is still the subject of legal uncertainty does not mean that it is unlawful. As Lietzau explains, in case a suspected terrorist is captured in the context of an armed conflict, "it would make no sense suddenly to 'turn off' the wartime paradigm and switch to that of law enforcement, providing all the process associated with criminal procedure"[314]. That "switch" can take place if and when the decision is made to prosecute the suspected terrorist for past acts – in view of the consensus between IHL and IHRL – but not immediately upon capture.

In order to better understand the relationship between security detention and criminal detention, it is useful to look at the practice of states, and in particular the United States. Even though we do not consider the conflict between the U.S and Al Qaeda to be an armed conflict within the meaning of IHL, it provides a good example of the problems linked to each paradigm.

As Lietzau explains, "criminal procedure is (…) the body of law that provided authority for terrorist criminal detention throughout most of the twentieth century"[315]. All over the world, states would rely on the law enforcement paradigm to fight terrorism[316]. This approach was reflected in the numerous international counter-terrorism instruments, which notably

[312] BHUTA (N.), "Joint Series on International Law and Armed Conflict: Fair Trial Guarantees in Armed Conflict", *European Journal of International Law*, 2016, available at https://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-fair-trial-guarantees-in-armed-conflict/.
[313] Lietzau explains that the first cause of this criticism lies in the lack of knowledge of the laws of war: « in the days following the establishment of the Guantanamo detention facility, very few seemed even to be aware that a wartime model for terrorist detention existed': W.K. LIETZAU, *op. cit*., p. 278.
[314] W.K. LIETZAU, *op. cit*., p. 282.
[315] W.K. LIETZAU, *op. cit*., p. 278.
[316] W.K. LIETZAU, *op. cit*., p. 272-275.

established a "regime of *aut dedere aut punire* (extradite or prosecute) for terrorism offenses"[317].

After the 9/11 attacks, the U.S. adopted another approach, which is that of security detention in the context of an armed conflict. However, we must stress that such a change of paradigm was motivated by the view that the conflict with Al Qaeda amounted to an armed conflict – whether international or non-international – within the meaning of IHL. As Lietzau explains, "the United States still approaches terrorism as a law-enforcement matter; it is the distinct conflict with Al-Qaeda that is viewed differently"[318].

However, the Obama administration seems to have heard the criticism of the U.S. policy regarding the detention of suspected terrorists, since it has turned to the law enforcement paradigm by deciding to prosecute some of these individuals on the basis of criminal law[319]. The objective behind this measure was "to reduce the detainee population at Guantanamo and to close the detention facility in a responsible manner that protects U.S. national security"[320] Still, the Periodic Review Boards concluded that "at least forty-eight detainees could be neither prosecuted nor transferred"[321].

This points to the fact that criminal prosecution can be difficult for several reasons. First, prosecuting a suspected terrorist requires the gathering of sufficient evidence, which may be difficult when the suspected terrorist was captured in the context of a non-international armed conflict, and especially when he was captured abroad[322].

Second, suspected terrorists have sometimes not (yet) committed any offense. In that regard, it may be useful to introduce new criminal offenses in the domestic legal systems, which would allow prosecution, for instance, for membership to a terrorist organization. But we have earlier argued that counter-terrorism legislation should exclude all acts covered by IHL from its scope

[317] W.K. LIETZAU, *op. cit.*, p. 274.
[318] W.K. LIETZAU, *op. cit.*, p 276.
[319] See THE WHITE HOUSE, *Report on the Legal…*, *op. cit.*, p. 31: « [Executive Order 13567] directed the PRBs to consider cases of detainees who were either designated for continued law-of-armed-conflict detention or referred for prosecution".
[320] THE WHITE HOUSE, *Report on the Legal…*, *op. cit.*, p. 31. We should note that today, while Guantanamo is still open, the population has not increased despite President Trump's assertion in January 2018 that he had no intention of closing the facility and would rather consider sending members of the Islamic State. See E. PILKIGNTON, "Guantánamo prisoner released in surprise move by Trump administration", *The Guardian*, 2018, available at https://www.theguardian.com/us-news/2018/may/02/guantanamo-prison-ahmed-al-darbi-release-trump-administration.
[321] W.K. LIETZAU, *op. cit.*, p. 281.
[322] R. VAN STEENBERGHE, *op. cit.*, p. 60 of the contribution.

of application. If there is such an exclusionary clause – which is the case in the U.S.[323] –, suspected terrorists captured in the context of a NIAC could not be prosecuted for membership to a terrorist organization, but only for a violation of IHL, which is more difficult to prove and may not even have occurred.[324].

As a result, while criminal detention raises less issues with regard to the right to liberty, it is not sufficient to protect national security in case of a non-international armed conflict. To do so requires the more controversial measure of security detention. In order to balance the right to liberty of interned individuals with the necessity to protect national security, however, the regime applicable to security detention in NIACS should be developed in a way that takes into account the specificities of non-international armed conflicts.

[323] R. VAN STEENBERGHE and J. DE HEMPTINNE, *op. cit.*, chapter 3, p. 28.
[324] These factors explain why national courts are sometimes reluctant to apply the exclusion clause, and prefer to prosecute suspected terrorists based on domestic counter-terrorism law: See VAN STEENBERGHE, *op. cit.*, p. 57-60 of the contribution.

CONCLUSION

This study started from the observation that acts of terrorism are committed in a wide variety of contexts, from situations which clearly amount to an armed conflict to peaceful situations. We studied how these acts are regulated by IHL in the first context, and by domestic and counter-terrorism conventions when committed in peacetime.

Although clear in appearance, this divide is however not a given. Indeed, while IHL only applies to terrorist acts committed during an armed conflict – or in a situation of occupation –, counter-terrorism legislation can potentially be applied not only to peacetime, but also to wartime terrorism. We also noticed that the acts qualified as terrorist under these instruments could take place in armed conflict. This made it necessary to examine the existing counter-terrorism conventions in order to study how they regulate their application in wartime. This led us to study the different clauses inserted in these instruments which exclude certain acts which are regulated by IHL. It appeared that, due to the use of terms requiring an important exercise of interpretation, certain conventions could be interpreted as covering some acts already regulated by IHL. We saw how problematic it would be from the point of view of compliance with IHL if counter-terrorism conventions criminalized acts which are lawful under IHL. We also concluded that, as a matter of consistency, even acts which are unlawful under IHL should not fall under the scope of counter-terrorism conventions. We can thus conclude that the traditional divide between the regulation of wartime terrorism by IHL and of peacetime terrorism by domestic and international counter-terrorism law is a valid one. Although this seems clear from a theoretical point of view, one remaining issue was how to know which paradigm applies in practice. Because it all depends on the interpretation of the scope of application of IHL, we thus turned to examine the issue of when IHL applies to situations of a terrorist nature. We have seen that several issues remain controversial in this regard.

In the third part, we applied this distinction between the wartime and peacetime paradigms to the issue of the detention of suspected terrorists in NIACs. It soon became apparent that the determination of the applicable paradigm could in fact only serve as a starting point to determine the regime applicable to detention. Indeed, while the wartime model of detention should be governed by IHL, the law of non-international armed conflicts does not provide for sufficient guarantees to protect interned individuals. We have seen that an alternative would be to apply the provisions of the law of international conflicts which govern the detention of civilians.

However, because this is not explicitly stated in the applicable conventions, security detention in NIACs remains the subject of legal uncertainty. That is why states may prefer to turn to the peacetime paradigm of law enforcement, and prosecute suspected terrorists for violation of either IHL or of domestic, counter-terrorism legislation. The prosecution of war criminals is an obligation imposed on states by IHL. When it comes to suspected terrorists, however, it may be very difficult to establish that a war crime has been committed. That is why states sometimes prefer to prosecute these individuals on the basis of the domestic arsenal at their disposal to fight terrorism. However, this is contrary to our finding that counter-terrorism legislation should not apply to situations covered by IHL. We therefore concluded that security detention remained a necessary measure to fight terrorism in non-international armed conflicts. Because of the legal uncertainty surrounding this measure, however, the law of non-international armed conflicts should be developed in a way that protects the right to liberty of detained individuals.

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