

International treaties against terrorism and the use of terrorism during armed conflict and by armed forces

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Abstract

During the second half of the twentieth century the international community, facing the terrorist phenomenon, reacted with the adoption of a series of treaties concerning specific types of terrorist acts, and the obligations of states with regard to them. Alternatively terrorism-oriented legislation, which initially covered only acts affecting civilians, has gradually expanded to cover some acts of terrorism against military personnel and installations. This contribution attempts to assess the repercussions of this evolution on the status and the protection of armed forces engaged in the so-called "war on terrorism" by examining the existing dynamic between these regulations and international humanitarian law.

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Terrorism is not a new phenomenon. During the second half of the twentieth century many countries in Europe, Latin America, Africa and Asia confronted movements of the most diverse kinds that had in common the willingness to resort to the use of violence against innocent civilians to obtain their goals. In some, the victims were numbered in the tens of thousands. In response, the international community began to adopt a series of treaties concerning specific types of terrorist act and the obligations of states with regard to them. There are now thirteen international treaties against terrorism, as well as numerous regional treaties, and

the process of drafting a general treaty against international terrorism is nearly complete.

Various conflicts around the world have been described as part of a “war on terrorism”. If regular armies are indeed engaged in armed conflict with terrorists, what protection do they derive from the international treaties against terrorism? To what extent are international treaties against terrorism applicable to acts committed by armed forces during an armed conflict or occupation? To what extent do these treaties protect armed forces from terrorist attacks in times of peace, and to what extent to they apply to abuses committed in peacetime by military forces? What is the relationship between this branch of international law and international humanitarian law?

The international treaties concerning terrorism, their content and scope of application

International treaties against terrorism

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo in 1963, is considered to be the first international treaty against terrorism.¹

Five more were adopted during the 1970s: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,² the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,³ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁴ the 1979 International Convention against the Taking of Hostages⁵ and the 1979 Convention on the Physical Protection of Nuclear Material.⁶ Three treaties were adopted in 1988: the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,⁷ a Protocol to that Convention for the Suppression of Unlawful Acts

1 704 UNTS 10106. This Convention entered into force on 4 December 1969 and has 180 states parties, according to the website of the UN Counter-Terrorism Committee (CTC) <www.un.org/sc/ctc/law.shtml>, last viewed 6 February 2007 (but note the webpage was last updated 8 March 2006).

2 Done at The Hague on 16 December 1970, 860 UNTS 12325. This Convention entered into force on 14 October 1971 and has 181 states parties, according to the website of the UN CTC (*supra*, note 1).

3 Done at Montreal on 23 September 1971, 974 UNTS 14118. This Convention entered into force on 26 January 1973 and has 183 states parties, according to the website of the UN CTC (*ibid.*).

4 Adopted by the UN General Assembly by resolution 3166 (XXVIII) of 14 December 1973, 1035 UNTS 15410. This Convention entered into force on 20 February 1977 and has 159 states parties, according to the website of the UN CTC (*ibid.*).

5 Adopted by the UN General Assembly by resolution 34/145 (XXXIV) of 17 December 1979, 1316 UNTS 205. This Convention entered into force on 3 June 1983 and has 153 states parties, according to the website of the UN CTC (*ibid.*).

6 Adopted by the UN General Assembly by resolution A/34/146 of 17 December 1979, 1456 UNTS 24631. This Convention entered into force on 8 February 1987 and has 116 states parties, according to the website of the UN CTC (*ibid.*).

7 Done in Rome on 10 March 1988, IMO Document SUA/CONF/15/Rev.1. This Convention entered into force on 1 March 1992 and has 134 states parties, according to the website of the UN CTC (*ibid.*).

against the Safety of Fixed Platforms Located on the Continental Shelf,⁸ and a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.⁹ The 1990s saw the adoption of the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection,¹⁰ the 1997 International Convention for the Suppression of Terrorist Bombings¹¹ and the 1999 International Convention for the Suppression of Financing of Terrorism.¹² The most recent addition is the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly on 13 April 2005.¹³

These treaties define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of “bombs” or nuclear materials, and two crimes concerning the financing of terrorism. There is a tendency to consider these treaties as establishing a sort of evolving code of terrorist offences. The most significant evidence of this trend is the 1999 Convention against the financing of terrorism, which establishes the crime of donating or collecting funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”.¹⁴ The duties of states parties to this Convention with respect to the crime of financing the activities defined in the treaties listed in the annex is independent of their ratification of them, although it does allow states that are not party to one or more of the listed treaties to make reservations limiting the scope of their obligations under the 1999 Convention with respect to the financing of the activities prohibited by any unratified treaty or treaties.¹⁵ In 2002 the Organization of American States adopted a second treaty against terrorism, which uses the same approach. The Inter-American Convention against Terrorism establishes a series of obligations for states parties with respect to the crimes defined in ten treaties: the 1999 Convention against the financing of terrorism and the nine international

8 Done in Rome on 10 March 1988, IMO document SUA/CONF/15/Rev.1. This Convention entered into force on 1 March 1992 and has 123 states parties, according to the website of the UN CTC (*ibid.*).

9 Done at Montreal on 24 February 1988, ICAO document 9518. This Convention entered into force on 6 August 1989 and has 156 states parties, according to the website of the UN CTC (*ibid.*).

10 Adopted by the International Civil Aviation Organization on 1 March 1991. The treaty entered into force on 21 June 1998 and has 123 states parties, according to the website of the UN CTC (*ibid.*).

11 Adopted by the UN General Assembly on 15 December 1997 by resolution A/52/164. This Convention entered into force on 23 May 2001 and has 145 states parties, according to the website of the UN CTC (*ibid.*).

12 Adopted by the UN General Assembly on 9 December 1999 by resolution A/54/109. This Convention entered into force on 10 April 2002 and has 150 states parties, according to the website of the UN CTC (*ibid.*).

13 Adopted by the UN General Assembly on 13 April 2005 by resolution A/59/290. It has 100 signatories but no Parties, according to the website of the UN CTC (*ibid.*).

14 Article 2(1). (Article 2(1)(b) contains a general provision concerning other terrorist acts. See below.)

15 Article 2(2).

treaties listed in the annex thereto.¹⁶ The 1977 European Convention for the Suppression of Terrorism as amended by the Protocol of 2003 adopts a similar approach, establishing a series of obligations concerning acts of terrorism as defined in ten international treaties.¹⁷ UN Security Council Resolution 1566 also supports that idea that the crimes recognized by existing international treaties form part of a code of terrorist offences.¹⁸

The obligations established by the international treaties against terrorism

The principal obligation set forth in the international treaties against terrorism is to incorporate the crimes defined in the treaty in question into the domestic criminal law, and to make them punishable by sentences that reflect the gravity of the offence.¹⁹ The states parties to these treaties also agree to participate in the construction of “universal jurisdiction” over these offences,²⁰ that is, to take the

16 Article 2(1). (Article 2(2), like Article 2(2) of the Convention against the financing of terrorism, allows reservations with regard to the crimes defined in unratified treaties.)

17 The obligations set forth in the European Convention as amended apply only insofar as the states parties also have ratified the listed treaties against terrorism, and the states party to the European Convention may opt to accept certain of the obligations established therein with respect to two offences defined without reference to other treaties, namely, other serious acts of violence against the life, physical integrity or liberty of a person and serious acts against property that pose a collective danger for persons (Article 2). The OIC Convention and the SAARC Convention (see note 79, below) also incorporate by reference the definitions contained in universal treaties, in addition to generic definitions of terrorism they contain (Article 1 in each instance).

18 Operative paragraph 2.

19 Article 2 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 3 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 2(1) and (2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 2 of the 1979 International Convention against the Taking of Hostages; Article 7(1) and 7(2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 5 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 5 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Articles 4 and 5 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 4 of the 1999 International Convention for the Suppression of Financing of Terrorism.

20 Strictly speaking, the term “universal jurisdiction” refers to the rule or principle of international law that confers on “any nation which has the custody of the perpetrators” the right to prosecute them for “crimes [that] are so universally condemned that the perpetrators are the enemies of all people”. *Demjanjuk v. Petrovsky*, 1982, 776 F.2d 571, at 582, cited in “State consent regime v. universal jurisdiction”, ICRC, 1997, available at <www.icrc.org/web/eng/siteeng0.nsf/html/57JPEC>, consulted 10 February 2007. For all practical purposes, jurisdiction based on the mere presence of an accused in the national territory, when added to more traditional grounds for jurisdiction, is the functional equivalent of universal jurisdiction. There is a tendency, particularly on the part of activists, to use the term more broadly to refer to the legal regime that binds all the parties to a treaty that contains provisions obliging them to establish extraterritorial jurisdiction over certain offences, and in some cases to view the *aut dedere aut judicare* rule as part of this concept. See e.g. Human Rights Watch, “Universal jurisdiction in Europe: The state of the art”, at <www.hrw.org/reports/2006/ij0606> (“The exercise of universal jurisdiction is commonly authorized, or even required, by an international convention to which the state is a party. For example, the Convention against Torture ...”). See also Amnesty International, “Universal jurisdiction: the duty of states to enact and enforce legislation”, at <www.amnesty.org/pages/uj-memorandum-eng> (“Indeed, almost every treaty imposing an *aut dedere aut judicare* obligation expressly requires states to provide for universal jurisdiction in the event that extradition is not possible”, citing as an example the Convention against Torture), consulted 10

necessary measures to give their courts very broad jurisdiction over the offences in question, including jurisdiction based on territoriality, jurisdiction based on the nationality of the offender and the victims and, according to most of these treaties, jurisdiction based on the mere presence of a suspect in the territory of the state.²¹ In addition, they accept the obligation either to extradite any suspected offenders found in their territory or to begin criminal proceedings against them.²² In order to facilitate extradition these treaties invariably provide that the offences in question shall not be considered political offences, which are not extraditable under most treaties on extradition.²³ In addition, these treaties require various types of co-operation among the states parties, ranging from co-operation in

February 2007. As Professor Higgins points out, “The right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under general international law.” R. Higgins, *Problems & Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p. 58. Three of the oldest treaties against terrorism are in force for 180 states or more, and four others, including the Convention against financing terrorism, are in force for at least 150 states (notes 1–5, 9 and 12, above). The near-universal ratification of the earliest treaties suggests that universal jurisdiction may already exist for at least the terrorist offences defined therein. Whether sufficient grounds exist to claim that universal jurisdiction may also exist for some of the offences defined in other treaties is beyond the scope of this article, but the intent of the drafters of these treaties is clearly to construct universal jurisdiction through the process of ratification and accession, a process that may ultimately transform these norms into customary law. Repeated calls by the UN Security Council and General Assembly for ratification of all these treaties clearly evidences the intent to create a legal regime that gives all members of the international community jurisdiction over these offences. (See e.g. S/RES/1373, para. 3(d) and A/RES/60/43, paras. 9–10.)

- 21 Article 4 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (jurisdiction based on the registration of the aircraft and the presence of the suspect); Article 5 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and Article III of the Protocol for the Suppression of Unlawful Acts of Violence at Airports; Article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 5 of the 1979 International Convention against the Taking of Hostages; Article 8(1) and 8(2) of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 3 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Article 6 of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 7 of the 1999 International Convention for the Suppression of Financing of Terrorism.
- 22 Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 7 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 8(1) of the 1979 International Convention against the Taking of Hostages; Article 10 of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 10(1) of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 4 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; Article 8(1) of the 1997 International Convention for the Suppression of Terrorist Bombings and Article 10(1) of the 1999 International Convention for the Suppression of Financing of Terrorism.
- 23 Article 8 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 8 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 8 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 10 of the 1979 International Convention against the Taking of Hostages; Article 11 of the 1979 Convention on the Physical Protection of Nuclear Materials; Article 11 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Articles 9 and 11 of the 1997 International Convention for the Suppression of Terrorist Bombings; Articles 13 and 14 of the 1999 International Convention for the Suppression of Financing of Terrorism; and Articles 14 and 17 of the draft general convention against international terrorism.

preventing terrorist acts to co-operation in the investigation and prosecution of the relevant offences.

Most of these treaties also contain dispositions concerning the protection of human rights. 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.

The clauses concerning the right to due process contained in some of the earlier treaties are rather vague. Article 9 of the 1973 Convention on internationally protected persons, for example, provides simply that “Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment in all stages of the proceedings.” Similar provisions are found in the 1979 Convention against hostage-taking, the 1979 Convention on nuclear material and the 1988 Convention on maritime navigation.²⁴ The 1997 Convention against terrorist bombings and the 1999 Convention against the financing of terrorism contain the following, more comprehensive formula:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.²⁵

Many of these treaties also recognize the right of a foreign detainee to communicate with, and in some cases to receive the visit of, his or her consular representative.²⁶ Like the right to due process, this right is stated in more generous terms in more recent treaties. The 1997 Convention against terrorist bombings and 1999 Convention against the financing of terrorism provide that a detainee has the right to be informed of his or her right to contact a consular representative.²⁷ With regard to the right to asylum, the saving clause contained in the 1973 Convention on internationally protected persons and the 1979 Convention against hostage-taking provides that “The provisions of this

24 Articles 8(2), 12 and 10(2), respectively. (The 1970 and 1971 Conventions on civil aviation do not contain provisions of this kind.)

25 Articles 14 and 17, respectively.

26 Article 6(3) of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; Article 6(3) of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Article 6(2) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; Article 6(3) of the 1979 International Convention against the Taking of Hostages; Article 11.6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Article 7(3) of the 1997 International Convention for the Suppression of Terrorist Bombings; and Article 9(4) of the 1999 International Convention for the Suppression of Financing of Terrorism.

27 Articles 7(3) and 9(2).

Convention shall not affect the application of the Treaties on Asylum, in force as of the date of the adoption of this Convention, as between the States which are parties to those Treaties".²⁸ The Convention against hostage-taking also contains an important provision that, in substance, reaffirms the principle of *non-refoulement*, a cornerstone of international refugee law.²⁹ The 1997 Convention against terrorist bombings and 1999 Convention against the financing of terrorism not only recognize this principle, but also extend it to mutual legal assistance.³⁰

Recent treaties also contain a provision that in effect prohibits the practices known as "rendition" and "extraordinary rendition",³¹ whose links to torture, denial of access to competent courts, incommunicado detention and other human rights violations have been documented. Article 13(1) of the Convention against terrorist bombings provides:

A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met: (a) The person freely gives his or her informed consent; (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

28 Articles 12 and 15, respectively.

29 Article 9(1). This saving clause appears to be inspired by Article 5 of the 1977 European Convention on the Suppression of Terrorism.

30 Article 12 of the Convention against terrorist bombings is substantially identical.

31 There does not yet appear to be any precise and broadly accepted definition of these two terms. Rendition can be understood to mean transfer of a prisoner or detainee to a country where he or she is wanted for questioning, or to give testimony, but where they are not accused of a crime, in which case extradition would be the usual procedure. See A. Khan, "Partners in crime: friendly renditions to Muslim torture chambers", Washburn University School of Law, 2005, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=937130>. CIA documents in the public domain use the term "rendition" to refer to the transfer of prisoners to the United States or to US custody. This seems to be consistent with a presidential directive No. 36 of 21 June 1995, which provides that "If we [the United States government] do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government". Available at <www.fas.org/irp/offdocs/pdd39.htm>. Extraordinary rendition appears to be a more recent concept that is most often used to describe either the capture of a suspected terrorist by US forces in a foreign country and the transfer of that person to another foreign country, or the transfer by US forces of a person in the custody of a government other than that of the United States to another country other than the United States, primarily or exclusively for purposes of interrogation. A common element in both cases is the absence of legal formalities. The term "detention" in Article 13(1) and similar clauses of other treaties is very broad: it means being in the custody of an official body (*New Oxford Dictionary of English*, 1998) but does not imply that the deprivation of liberty is authorized by law, much less judicially authorized. In this broad sense, almost any transfer of a person from one country to another by an official agency without the consent of the person concerned by definition involves detention. In practice, in most reported cases such persons are detained for days, weeks or even longer, prior to their transfer. See the Marty Report, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", Parliamentary Assembly, AS/Jur (2006) 16, Part II, 7 June 2006, paras. 92–214 (describing nine cases, in eight of which the victims were detained by national authorities prior to being transferred by the US operatives to a third country).

Article 16.1 of the Convention against the financing of terrorism and Article 17.1 of the Convention against nuclear terrorism are substantially identical, although the latter adds that a prisoner must “freely” consent to his transfer to another country.

The scope of international treaties against terrorism

Since treaties concerning terrorism have been elaborated mainly in order to combat international terrorism, their scope is generally limited to acts that have an international dimension. The conventions on the safety of civil aviation expressly apply only to international flights and international airports.³² The Convention on maritime navigation contains a provision indicating that it applies only to acts affecting ships scheduled to travel in international waters, although an exception indicates that it also applies when the suspected author of one of the crimes recognized in the treaty is found in a state other than that of the ship's registration.³³ The provisions of the 1973 Convention on crimes against internationally protected persons that concern crimes against heads of state and government, ministers of foreign affairs and their family members apply only when such persons are abroad.³⁴ The other persons protected by this treaty include diplomatic personnel and international civil servants on mission and their family members.³⁵ Article 13 of the 1979 Convention against hostage-taking specifies that it “shall not apply where the offence is committed within a single state and the hostage and alleged offender are nationals of that state and the alleged offender is found in the territory of that State”. Article 3 of the Convention against terrorist bombings and Article 3 of the Convention against financing terrorism contain substantially identical language, followed by certain exceptions, including one concerning the extradition of accused persons who have fled abroad. The only treaties that are generally applicable to acts committed within the territory of a state by a national of that state are the Convention on the Physical Protection of Nuclear Material and the Protocol on continental platforms.³⁶

The three most recent conventions, adopted by the same working group that is now attempting to finalize a draft general convention against terrorism, establish two legal regimes. All of the obligations established by the Convention against terrorist bombings, the Convention against the financing of terrorism and the Convention against nuclear terrorism, including the penal provisions, apply to

32 Article 3(3) of the Convention for the Suppression of Unlawful Seizure of Aircraft; Article 4(2) of the Convention on the Safety of Civil Aviation; Article 1 of the Protocol for the Suppression of Unlawful Acts of Violence at Airports; and Article 4(1) of the Convention on the Safety of Maritime Navigation.

33 Article 4(1) and (2).

34 Article 1(a).

35 Article 1(b), which refers implicitly to the Vienna Convention on Diplomatic Relations, the Convention on the Privileges and Immunities of the United Nations and similar instruments, as well as customary international law on diplomatic immunity.

36 Articles 2(1) and 2(1), respectively. (The penal provisions of these instruments are applicable to the acts committed within the territory of a state by a national, regardless of the nationality of the victim, if any. Most of these crimes do not require injury to a person.)

acts that have an international dimension; a more limited regime applies to acts that lack an international dimension. The latter includes the duty of the states parties to prevent the use of their territory for acts aimed at the commission of offences in other states; the duty to co-operate with other states in obtaining evidence; the duty not to consider acts of terrorism as political offences for purposes of extradition; and certain obligations concerning the human rights of persons suspected of direct or indirect links with terrorism.³⁷

Most acts of terrorism recognized by existing treaties involve crimes against the person. When acts affecting aircraft or ships are criminalized, it is usually with the express requirement that the act represents a danger to flight or navigation, which implies a danger to the life of the crew and passengers. The provisions of the treaty on the protection of nuclear materials that criminalize the theft of such materials are an exception, but 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. The provision of the treaty against financing terrorism that criminalizes the financing of acts other than those criminalized by previous treaties applies only to acts that represent a threat to life.³⁸ The principal exception to this rule thus far is the Convention against terrorist bombings, which criminalizes the use of explosives and other deadly devices against public places and infrastructure with the intent to cause serious destruction or great economic loss.³⁹

Another important characteristic of these treaties concerns the specific intent with which an act is committed. The treaties on the safety of civil aviation and the 1988 Convention on maritime navigation criminalize certain acts without any specific requirement as to the intent with which they are committed. In contrast, motive is a key element of the only act criminalized by the 1979 Convention against hostage-taking, whose Article 1(1) provides:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

Other 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. The 1979 Convention on nuclear material, for example, criminalizes categorically the

37 Articles 10–15 of the Convention on terrorist bombings and Articles 12–18 of the Convention on financing terrorism. (Article 13 of the latter also prohibits classifying the crimes defined therein as fiscal offences.) The obligations concerning human rights are described below.

38 Article 2(1)(b).

39 *Ibid.* See also Article 1(b) of the Protocol on unlawful acts of violence at airports, which criminalizes the total or partial destruction of an airport or an unoccupied aircraft.

theft of such materials and their threatened use, but criminalizes the threat of theft of nuclear materials only when there is the intent to “compel a natural or legal person, international organization or State to do or to refrain from doing any act”.⁴⁰ The Convention on maritime navigation and the Protocol on platforms on the continental shelf also criminalize acts of violence without any requirement as to intent, but incorporate threats into the legal regime they establish only when made with the specific intent to force a natural or legal person to do or not to do something.⁴¹

The 1999 Convention against the financing of terrorism criminalizes the donation or collection 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”.⁴² This represents a milestone in the development of international law on terrorism, because it is the first treaty provision to refer to the purpose of terrorism as recognized by international humanitarian law, namely, to terrorize the population. Unlike some earlier treaties, it does not criminalize acts intended to coerce private persons or corporations.⁴³ This limitation helps to distinguish terrorism from ordinary crime and underline the uniqueness of the threat it poses to peace and security.

The older treaties protect primarily civilians and civilian property. The 1970 and 1971 conventions concerning the safety of civil aviation expressly provide that they are not applicable to military, police or customs aircraft, and the scope of application of the Protocol to the 1971 convention is limited to “airports serving international civil aviation”.⁴⁴ The 1988 Convention on maritime navigation contains a provision expressly excluding its application to warships and police and customs vessels, and the 1988 Protocol applies exclusively to platforms on the continental shelf used for economic purposes.⁴⁵ The Convention on crimes against internationally protected persons would protect only a very limited category of military personal, namely those in diplomatic posts or on assignment with international organizations. The provisions of the treaty on the physical protection of nuclear materials that criminalize the dispersal or threat of use of nuclear materials against persons or property are an exception. The treaty applies only to nuclear material intended for peaceful civilian use, but makes no distinction as to the civilian or military nature of the persons or installations targeted or threatened.⁴⁶

40 Article 7(1)(a), (b), (c) and (d)(i) and 7(1)(d)(i), respectively.

41 Articles 2(c) and 2(2)(c), respectively.

42 Article 2(1)(b).

43 Compare Article 7(1)(b) of the Convention on the protection of nuclear materials, Article 2(c) of the Convention on the safety of maritime safety and Article 2(2)(c) of the Protocol on continental platforms.

44 Articles 3(2), 4(1) and 1, respectively.

45 Article 2(1)(a) and (b) and Article 1(3), respectively.

46 Articles 2 and 7(1)(a)(e) and (i), respectively.

The most recent conventions against terrorism, as we shall see below, mark a departure from this trend, and provide some protection to military as well as civilian personnel and installations. The scope of their applicability in this regard, as we shall also see, is generally circumscribed by reference to international humanitarian law.

Act of terrorism, war crime or act of state? The interplay between international humanitarian law, international law concerning terrorism and international human rights law

International humanitarian law contains several provisions that expressly prohibit acts of terrorism. Article 33 of the Fourth Geneva Convention provides in part that “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” A similar provision is found in the two Additional Protocols to the four 1949 Geneva Conventions: Article 51(2) of Protocol I on international armed conflict and 13(2) of Protocol II on non-international armed conflict provide in part that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 4(2) of Additional Protocol II provides that “acts of terrorism” against civilians and non-combatants “are and shall remain prohibited at any time and in any place whatsoever”. International humanitarian law also contains provisions which, without using the term “terrorism”, prohibit acts that – depending on the intent, the nationality of the perpetrator and victim(s) and other such considerations – may be prohibited by one of the treaties against terrorism. The prohibition in Article 3 common to the four Geneva Conventions of acts of violence against “persons taking no active part in hostilities”, for example, would apply to some acts of terrorism. Similarly, the prohibition of attacks against nuclear power plants in Article 56 of Additional Protocol I would apply to some acts prohibited by the 2005 Convention against nuclear terrorism.

Four of the treaties against terrorism – the 1979 Convention against hostage-taking, the 1997 Convention against terrorist bombings, the 1999 Convention against the financing of terrorism and the 2005 Convention against nuclear terrorism – contain provisions referring to international humanitarian law, or to concepts derived from it. Most of them are exclusionary clauses, designed to ensure that acts that in principle come within the scope of both international humanitarian law and international law against terrorism are governed by one or the other.⁴⁷ What are the scope and implications of these clauses?

Article 12 of the 1979 Convention against hostage-taking provides that this treaty is inapplicable to acts of hostage-taking covered by the Geneva Conventions and their Protocols. The taking of hostages is prohibited by Article 34

47 The exception is Article 2(1)(b) of the Convention against the financing of terrorism.

of the Fourth Geneva Convention on the protection of the civilian population, by Article 75(2)(c) of Additional Protocol I and Article 4(2)(c) of Additional Protocol II, and by Common Article 3 of the Geneva Conventions – provisions that protect all persons, whether civilian or military. The language of the said Article 12 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. However, Article 12 provides that only acts that a state has an obligation to prosecute (or extradite) under the Geneva Conventions or one of their Protocols are excluded.⁴⁸ The scope of this exclusionary clause therefore is relatively straightforward: if a state has an obligation to prosecute or extradite a hostage-taker under one of the Geneva Conventions or Protocols, then the Convention against hostage-taking will not be applied; but if no such obligation exists, then the Convention against hostage-taking must be applied. It should be noted that, although the prohibition of the taking of hostages is considered a rule of customary international humanitarian law,⁴⁹ this exclusionary clause would not prevent the Convention against hostage-taking from being applied to an act of hostage-taking covered by customary international humanitarian law, but not by one of the Conventions or Protocols.

The 1997 Convention against terrorist bombings prohibits the unlawful and intentional delivery, placement, or detonation of an explosive or other lethal device in or against a place of public use, public transportation system or a state or government facility with the intent to cause death or serious bodily injury or extensive destruction that results in, or is likely to result in, major economic loss.⁵⁰ The term “lethal device” includes chemical, biological and radioactive weapons. The material elements of the acts criminalized by this treaty, in contrast to those of most earlier treaties, do not distinguish between acts affecting civilian or military targets. Consequently, since the use of explosive devices is an intrinsic part of warfare, the exclusionary clauses are of particular importance for this treaty. It is useful to analyse the scope of these clauses from three perspectives: their relevance for acts committed by armed forces during an armed conflict; their relevance for acts against armed forces during an armed conflict; and their relevance for acts committed by armed forces in the absence of an armed conflict.

Acts committed by armed forces during an armed conflict

The first of two exclusionary clauses contained in Article 19.2 of the Convention against terrorist bombings excludes “The activities of armed forces during an

48 The article provides in part “in so far as States Parties to this Convention are bound under those conventions [the Geneva Conventions and Protocols I and II] to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts”.

49 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005, I, p. 334.

50 Article 2(1). (This provision also includes the placement or use of such devices against infrastructure facilities, but the definition of this term in Article 1(6) would appear to preclude military facilities.)

armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”.⁵¹ In contrast to Article 12 of the Convention against hostage-taking, which refers only to the Geneva Conventions and their Additional Protocols I and II, this exclusionary clause refers to international humanitarian law in general, thus including customary law.

International humanitarian law comprises numerous rules applicable to the use of explosives and other “lethal devices” of the sort covered by the Convention against terrorist bombings. One of the most relevant rules, although it does not refer expressly to the use of devices of this kind, is the prohibition of all attacks against the civilian population.⁵² Indeed, humanitarian law recognizes, implicitly, that attacks against the civilian population can be considered acts of terrorism. The Protocols to the Geneva Conventions contain a common provision that states: “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.”⁵³

Other rules of humanitarian law prohibit the use of certain types of lethal devices even during armed conflict, or restrict the way in which explosive devices may be used against enemy forces during armed conflict. The First Geneva Convention, for example, prohibits attacks of any kind against hospitals or other medical facilities or personnel.⁵⁴ The prohibition of acts of perfidy, including feigning civilian status in order to carry out an attack, applies to the use of explosive devices.⁵⁵ The 1980 Protocol on the use of mines and other explosive devices prohibits a number of perfidious uses of explosive devices, such as hiding them in toys, food, medical equipment and human remains.⁵⁶ The use of certain types of devices or substances is banned by treaties adopted for that specific purpose, such as the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; and the 1997 Convention

51 Article 2(1).

52 This is one of the most elemental rules of customary international humanitarian law. See Henckaerts and Doswald-Beck, above note 49, pp. 25–29.

53 Article 51(2) of AP I and Article 13(2) of AP II.

54 See GC I, Articles 19–21, 24–25 and 35–36. This is another elemental rule of customary international humanitarian law, which Henckaerts and Doswald-Beck consider binding in both international and non-international armed conflicts. Above, note 49, pp. 79–84 and 91–102.

55 Article 37(1) of AP I contains the following definition: “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.” Henckaerts and Doswald-Beck consider that killing an enemy by resort to perfidy is a norm of customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 221–5.

56 This Protocol to the 1980 Conventional Weapons Convention has 89 Parties, according to the ICRC website <www.icrc.org/ihl.nsf/INTRO?OpenView>, consulted 10 Feb. 2007. Henckaerts and Doswald-Beck consider that “The use of booby-traps which are in any way attached to or associated with objects entitled to special protection [e.g. medical equipment and human remains] or with objects that are likely to attract civilians [e.g. food, toys] is prohibited” by customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 278–9.

on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.⁵⁷ However, compliance with these rules of humanitarian law is immaterial for the purposes of this exclusionary clause: if the act is committed by an armed force during an armed conflict, the Convention against terrorist bombings is not applicable regardless of whether the device is prohibited by humanitarian law or is used in a way that is consistent with humanitarian law.

Acts targeting armed forces

The first exclusionary clause – unlike the second, which refers to “the armed forces of a State” – applies to any armed force, and provides expressly that the meaning of this term is to be determined by reference to international humanitarian law. This clearly means that acts committed by irregular forces are excluded from the scope of the Convention against terrorist bombings, provided that they satisfy the definition of an “armed force”.

The question of how the term “armed forces” is defined has long been a sensitive one.⁵⁸ The first definition adopted by the international community is that found in the Hague Regulations respecting the Laws and Customs of War on Land, which provides:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.⁵⁹

The Regulations also provide that the inhabitants of a territory that spontaneously take up arms at the approach of invading enemy forces are entitled to be regarded as “belligerents”, provided that they carry their arms openly and respect the laws and customs of war.⁶⁰ The Third Geneva Convention reaffirms

57 The Protocol on chemical and biological weapons has 134 states parties, the Convention on chemical weapons has 181 parties and the 1997 Ottawa Convention has 152 parties, according to the website of the International Committee of the Red Cross (above, note 56), consulted 10 February 2007. Henckaerts and Doswald-Beck consider that the use of poisons and chemical and biological weapons is a norm of customary international humanitarian law applicable to both international and non-international armed conflicts. Above, note 49, pp. 251–4 and 256–65.

58 See the commentary on Article 3 common to the Geneva Conventions in Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 3, ICRC, Geneva, 1958, p. 35, also available at <www.icrc.org>.

59 Article 1 of the Regulations, contained in the Annex to Hague Convention (II) with Respect to the Laws and Customs of War on Land.

60 Article 2.

these four conditions as criteria for determining when “militias” or “organized resistance movements” are entitled to protection.⁶¹

The evolution of the strategies and tactics of warfare since 1949 convinced the international community of the need to adapt the definition of armed forces to contemporary forms of conflict. This was done by the adoption in 1977 of two Protocols to the Geneva Conventions. Protocol I, relating to the protection of victims of international armed conflicts, was drafted in part to adapt the law of armed conflict to the realities of national liberation struggles. It contains the following definition:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. 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.⁶²

The structure of this provision and the content of the second sentence imply that, although compliance with humanitarian law is an obligation binding upon all armed forces, it is not an element of the definition of an armed force.⁶³ Article 44 of Protocol I also supports the idea that respect for humanitarian law is no longer an element of the definition of an armed force. The second paragraph of this article provides that

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war ...

The paragraph following recognizes that in certain types of conflicts combatants cannot permanently distinguish themselves from the civilian population.⁶⁴ When this is the case, a combatant retains his or her status as a combatant provided that he or she carries arms openly during each military engagement and while deploying in preparation for an attack.⁶⁵ Protocol II applies to non-international

61 Article 4.A(2).

62 Article 43(1).

63 This conclusion finds some additional support in Article 4(2) of AP I, which provides, “While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his [*sic*] right to be a combatant”.

64 It will be recalled that AP I applies not only to armed conflict between independent states, but also to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” (Article 1(4)). The reference in Article 44(3) to situations in which combatants cannot distinguish themselves from the civilian population is an implicit reference to guerrilla conflicts. (See paragraph 1684 of the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, The Hague, 1987.) Article 44(7) warns that this provision “is not intended to change the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”.

65 Article 44(3).

conflicts, in which the status of irregular forces is a crucial element. The threshold for application of Protocol II does not require the existence of a conflict between a state and an armed group that respects humanitarian law, but it does require the non-state armed force to “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.⁶⁶ It also requires that such groups be “organized” and “under responsible command”, but these requirements are not linked expressly to compliance with the laws and customs of war.⁶⁷

To consider compliance with humanitarian law to be an essential part of the definition of the term “armed force” would greatly narrow the scope of the exclusionary clauses. This is significant because, while it is vitally important to create incentives for irregular armed groups to respect humanitarian law, the tactics that irregular forces are often obliged to adopt in asymmetrical warfare should not be assimilated indiscriminately to terrorism. As a matter of policy, it would seem desirable to be able to apply the international treaties against terrorism to groups that indiscriminately detonate explosives in public places. However, applying the Convention against terrorist bombings to irregular groups would mean that almost any use of explosives against enemy military forces could be considered an act of terrorism, which would weaken the incentive for such groups to distinguish between acts that target civilians and those that target military objectives. Moreover, it would in effect hold them to a higher standard than regular armed forces, since the indiscriminate use of explosives against civilian targets by regular armed forces (for example) would not prevent them from benefiting from the exclusionary clause.

It should be noted that the first exclusionary clause of the Convention against terrorist bombings applies only to acts committed during an armed conflict, and not to other situations in which international humanitarian law is applicable, such as occupation. Hence the use of explosive or other lethal devices by non-state forces against an occupying power would not be excluded from the scope of the Convention against terrorist bombings, if resistance to occupation does not rise to the level of an armed conflict. However, the use of explosives during an occupation by the armed forces of a state, including an occupying power, would be excluded under the second exclusionary clause, which applies to acts undertaken by state forces in their official capacity, even those that violate humanitarian law.

The correct interpretation of the exclusionary clauses would seem to be that this treaty (as well as the Convention against nuclear terrorism, which contains an identical clause in Article 4(2)) is not applicable to acts of terrorism committed during an armed conflict by an armed group that is organized and under responsible command, and that exercises sufficient control over territory to be able to mount sustained military operations and apply humanitarian law – provided, of course, that the act of terrorism committed also violates

66 Article 1(1).

67 *Ibid.*

international humanitarian law. It would be applicable to acts of terrorism committed by individuals who do not form part of an armed group, or by armed groups that are not organized or are not under responsible command, or by armed groups that do not control sufficient territory to be able to mount sustained military operations and apply humanitarian law.

The 1999 Convention against the financing of terrorism takes a different approach. It does not contain an exclusionary clause, but the provision concerning support for acts not criminalized by earlier treaties applies to “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict”.⁶⁸ The absence of an express reference to humanitarian law means that the identity of the perpetrator and his or her status with respect to an armed conflict is immaterial. Consequently, collecting or donating funds knowing that they will be used to finance attacks on military forces participating in an armed conflict, with the requisite intent (e.g. forcing a government to withdraw its troops from a conflict) would not be terrorism, regardless of the means used to kill the combatants and regardless of the status of the perpetrator vis-à-vis the conflict. Such acts would be considered terrorism, however, if the persons killed or injured are civilians or, in the event of an armed conflict, other persons not taking an active part in hostilities.

The terms “civilian” and “armed conflict” and the concept of “direct participation” obviously allude to humanitarian law, and should be interpreted in the light of such law. The term “civilian” means “any person who does not belong” to the armed forces.⁶⁹ The term “other persons who do not participate directly in hostilities” therefore must be understood as referring to members of an armed force. Under international humanitarian law there are two categories of members of the armed forces who do not participate directly in hostilities: non-combatants, that is, medical and religious personnel, and combatants who have laid down their arms or are unable to fight due to injury, illness or capture.⁷⁰ “Direct participation” is a term of art; members of the armed forces who belong to logistical or administrative services have no right to special protection. The mercenary is a special case, neither civilian nor a member of the armed forces.⁷¹ However, since a mercenary by definition participates directly in hostilities, financing acts aimed at killing or injuring mercenaries (with the specific intent required by this treaty) would not be considered acts of terrorism under Article 2.1 of this Convention.

Article 2(1)(b) of the Convention against the financing of terrorism therefore means that the killing of non-combatant members of the armed forces or combatants *hors de combat* can be considered an act of terrorism, provided that it

68 Article 2(1)(b). (This provision also requires intent to “intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”)

69 AP I, Article 50.

70 GC I, Articles 24–25, and Common Article 3.

71 AP I, Article 47. See also the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

is done with the requisite intent, even if the act occurs during an armed conflict.⁷² The killing of military personal outside the context of an armed conflict also could be considered a terrorist act under this provision, if done with the requisite intent, regardless of the means employed.⁷³ This Convention thus criminalizes the financing of such acts, but not the financing of attacks against combatants during an armed conflict.

Acts committed by armed forces in the absence of an armed conflict

The second exclusionary clause of the Convention against terrorist bombings provides that “the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention”.⁷⁴ There are various ways in which explosive or chemical devices may be used by military forces in the absence of an armed conflict.⁷⁵ Mines are sometimes used to limit access to restricted facilities; explosives are used to obtain entrance to a fortified room or building, and certain gases to control riots, to incapacitate dangerous individuals or to force someone to surrender. Armed forces sometimes participate in activities falling short of armed conflict in which such devices could be used. The armed forces of repressive regimes have been known to use explosives to destroy the offices of opposition groups or the media, to assassinate political leaders and to punish communities suspected of support for opposition movements. If explosives are used against persons in exile, or if those responsible for such acts travel abroad or eventually go into exile themselves, the Convention against terrorist bombings could be applicable. States also sometimes use explosives against targets in foreign countries in isolated acts not forming part of an armed conflict. The bombing by members of the French armed forces that sank the *Rainbow Warrior* in 1985 is one example; the destruction of a factory in Sudan by the United States in 1998 is another. The second exclusionary clause would prevent the application of the

72 The language of Article 2(1)(b) of the Convention against the financing of terrorism echoes Common Article 3(1) of the Geneva Conventions, which uses the term “[p]ersons taking no active part in the hostilities” to refer to “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. The term “persons taking no active part in the hostilities” is a term of art; international humanitarian law considers all members of the armed forces other than medical and religious personnel to be combatants, and all combatants to be legitimate military targets, unless they are *hors de combat*, i.e. incapable of fulfilling their duties due to illness, injury or capture.

73 Under international humanitarian law the killing of combatants *hors de combat* or non-combatant military personnel during an armed conflict constitutes a war crime, regardless of the specific intent with which it is committed. The penal provisions common to the Geneva Conventions provide that intentional homicide (among other acts) of protected persons (including medical and religious personnel of the armed forces and combatants *hors de combat*) that is not justified by military necessity and is committed on a large scale is a grave breach of the Conventions; GC I, Article 50; GC II, Article 51; GC III, Article 130; and GC IV, Article 147.

74 Article 19(2).

75 Article 1(3). (It also covers devices that release radiation or bacteriological agents.)

Convention to such acts, provided only that the perpetrators act in an official capacity.

In contrast to the 1979 Convention against hostage-taking, which excludes acts of hostage-taking only if states have an obligation to prosecute the perpetrator or hand him over to a state that intends to do so, the exclusionary clauses of the Convention against terrorist bombings apply to acts “governed by” international humanitarian law or other international law. The Convention therefore is inapplicable to such acts, whether they are permitted or prohibited under the applicable international standards. When armed forces detonate explosives in the territory of another state, rules of international law such as the prohibition of aggression apply. International human rights law also would be applicable in most cases, whether the perpetrators act within their own country, in an occupied territory or elsewhere.⁷⁶ Hence, human rights violations that would otherwise be considered acts of terrorism – such as war crimes or crimes of aggression that meet the definition of acts of terrorism – cannot be dealt with under this Convention.

The exclusionary clauses are preceded by a provision to the effect that “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.”⁷⁷ However, while the exclusionary clauses do not affect the legality of acts of terrorism, they make some acts of terrorism exempt from the system of international co-operation developed through these treaties as the central element of the international struggle to eliminate terrorism. Both international human rights law and international law concerning aggression and violations of territorial integrity focus on state responsibility, not the criminal responsibility of the individual. Only one international human rights treaty, the Convention against Torture, contains provisions on universal jurisdiction similar to those contained in the treaties against terrorism.⁷⁸ Consequently, while states that have jurisdiction over acts of terrorism committed with explosives may have an obligation under international human rights law to investigate, identify the perpetrators and prosecute them, other states may not have any legal obligation to extradite the perpetrators to a state having jurisdiction or to co-operate in the investigation of the acts of terrorism.

76 See e.g. the “Concluding Observations of the Human Rights Committee concerning the responsibility of Israel for violations of the International Covenant on Civil and Political Rights in the Gaza Strip and West Bank”, in CCPR/CO/78/ISR (2003), para. 11, the “Concluding Observations of the Committee against Torture on the responsibility of the United Kingdom for the activities of its forces in Afghanistan and Iraq”, in CAT/C/CR/33/3 (2004), para. 4(b), and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of the International Court of Justice, [2004] ICJ Rep., n. 33, para. 111.

77 Article 19(1).

78 Articles 5–9.

The draft comprehensive convention against international terrorism

Although some regional treaties contain a generic definition of terrorism,⁷⁹ the UN bodies that have taken on this task have thus far failed to reach agreement on such a definition. The International Law Commission, which spent years preparing the draft Code on Crimes against Peace and the Security of Humanity, was obliged to abandon the effort to include the crime of terrorism because it could not agree on a definition.⁸⁰ In 1996 the UN General Assembly established an Ad Hoc Committee to support the efforts of the Sixth Committee to draft new treaties against terrorism. Since 2000 the Ad Hoc Committee has focused on the drafting of a treaty against nuclear terrorism and a comprehensive convention against terrorism, and since 2005 it has focused exclusively on the latter. Agreement on a universally acceptable definition of the term, however, remains problematic.

The difficulties that have been encountered in seeking agreement on a generic, universally valid definition of terrorism can be appreciated by comparing the definitions of terrorist acts contained in existing treaties. Some definitions require these crimes to cause death or injury to persons, but others require only damage to certain types of property. Of the crimes involving damage to or destruction of property that may constitute acts of terrorism, most are required to cause damage to or destruction of public property or property used by the public. Some acts, including most crimes against civil aviation and crimes involving the use of bombs and other lethal devices, are defined as terrorist crimes per se, irrespective of the intent with which they are committed; other acts, including the taking of hostages, constitute terrorist crimes only if committed with a specific intent. Where specific intent is an element of the crime, the intent required is usually that of terrorizing the public or obliging a state or international organization to take a certain course of action. The Convention on the Physical Protection of Nuclear Material contains definitions that depart even further from these parameters: it criminalizes any use or disposal of nuclear materials that causes serious damage to property of any kind, defines theft per se as a crime and, in a provision that requires specific intent, recognizes as sufficient the intent to oblige a private entity to adopt a certain course of action. While many acts are classified as terrorist crimes only if they affect civilian facilities or installations, others are classified as terrorism if they affect military personnel or facilities in peacetime or if they take place during an armed conflict but are not covered by humanitarian law.

The working definition of terrorism under consideration by the Ad Hoc Committee of the General Assembly is the following:

79 See the definitions contained in Article 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism; Article 1 of the 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism; Article 1(3) of the 1999 OAU Convention on the Prevention and Combating of Terrorism, and Article 1(e) of the South Asian Association for Regional Cooperation's 1987 Regional Convention on the Suppression of Terrorism.

80 Report of the Special Rapporteur on Terrorism and Human Rights, E/CN.4/Sub.2/2003/WP.1, para. 53.

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
 - (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.
2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.⁸¹

The draft treaty is intended to supplement existing standards, not replace them. The material element of the draft definition does not encompass certain acts outlawed by existing treaties against terrorism, such as the taking of hostages, hijacking or the theft of nuclear materials. The draft definition does not represent a radical departure from existing international standards. The inclusion of a requirement of specific intent recognizes that acts that by their very nature constitute such a grave danger to public security that they deserve to be considered as terrorist acts per se are exceptional. Expanding the material element to include serious damage to private property of any kind is a significant departure from existing definitions, since the main thrust of existing international standards against terrorism is to safeguard the public interest.⁸² The impact of this provision would be limited, however, by the requirement of the specific intent to terrorize the public or influence the behaviour of governments and international organizations. This version of the intent requirement, used in most of the existing treaties that have an intent requirement, avoids inflating the concept of terrorism by extending it to actions intended to influence private players. Recognition of serious damage to the environment as a material element of the definition may be the most significant innovation contained in the present draft.

81 “Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism held from 25 to 29 July 2005” (hereinafter “Report of the coordinator”), A/59/894, Appendix II. (The third and fourth paragraphs of this draft article cover attempts, abetting and conspiracy.)

82 The generic definition proposed recently by the Secretary-General’s High-Level Panel on Threats, Challenges and Change does not include any acts against property other than those recognized by earlier instruments. It is “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an 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.” “A more secure world: Our shared responsibility”, 2 December 2004, para. 164(d).

Article 3 of the draft reflects the principle that treaties against terrorism apply mainly to acts having an international dimension. The general rule contained in draft Article 3 is that “This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State [and] the alleged offender is found in the territory of that State”. A number of exceptions are recognized, as for example when the act affects an embassy, a consulate or a ship or aircraft registered in a third country, or when the intent is to coerce a third country. Like the earlier conventions drafted by the Ad Hoc Committee, the draft convention would establish two legal regimes: a comprehensive one that includes the obligation to criminalize terrorism and the “prosecute or extradite” rule, and a more limited set of obligations that include the duty to prevent acts of terrorism, especially preparations for terrorist acts to be carried out in a third country, the duty to co-operate in the investigation of terrorism (referred to as “reciprocal judicial assistance”), the duty to respect the right to due process and humane treatment of persons detained or subject to extradition proceedings related to terrorism, the duty not to extradite persons to a state where they would be exposed to persecution and the duty not to deliver a person without his or her consent to a third state for purposes of interrogation or to obtain testimony against a person accused of terrorism.⁸³

Recent reports of the Ad Hoc Committee mention two differences of opinion concerning the definition of terrorism. Some states insist that acts of terrorism should be distinguished from the legitimate struggle of peoples for self-determination and against foreign occupation, and that the definition of terrorism should include state terrorism.⁸⁴ Although these concerns are described as concerning the definition of terrorism, in practical terms they concern the draft exclusionary clauses more than the draft definition as such. Some states consider that the first concern could be satisfied by a preambular paragraph on the right to self-determination of the kind contained in many other treaties and UN resolutions concerning terrorism. Others maintain that it requires the adoption of an exclusionary clause proposed by the member states of the Organization of the Islamic Conference (OIC) that refers to acts committed during an occupation (see below). The concern of some states regarding the way in which the term “terrorist” is sometimes applied indiscriminately to any organization that engages in or supports armed struggle, as if terrorism was an end in itself and not a tactic employed to defend objectives that may or may not be legitimate under international law, is a valid one. However, if it is wrong to label an organization “terrorist” simply because it uses or advocates armed struggle, it is no less wrong to employ methods of armed struggle that are illegal under humanitarian law and international penal law, no matter how legitimate the cause may be. This principle is universally recognized. A resolution adopted by the UN Security Council in 2004 declares that acts of terrorism “are under no circumstances justifiable by

83 Articles 8 and 12–16.

84 Report of the coordinator, above note 81, p. 3; see also the Report of the Ad Hoc Committee for 2005, A/59/37, Annex I, para.15.

considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”.⁸⁵ Basically, it should not be difficult to reconcile this principle with the right of peoples to self-determination. Whether it will be possible to reach a compromise on the reference to occupation in the draft exclusionary clause proposed by states belonging to the OIC is a more difficult question.

The term “state terrorism” has two meanings. One refers to the adoption by a state of a policy of systematic use of violence and intimidation, including practices such as torture, extrajudicial execution and enforced disappearances, in order to eradicate a political or other opposition movement.⁸⁶ The other, broader meaning includes any deliberate resort by a state to acts that *a priori* satisfy the legal definition of terrorism, such as the taking of hostages or the use of explosives in ways described by the relevant international treaties. Ironically, such acts are often undertaken with the avowed aim of combating terrorism. The Convention against terrorist bombings tacitly accepts certain forms of state terrorism by excluding acts committed by the military forces of a state. Whether or not a similar clause will be included in the future comprehensive convention against terrorism, or whether acts committed by states will be excluded from the scope of the convention only if they are compatible with international law, is the most important unresolved issue concerning the draft treaty.

The main issue preventing adoption of the draft convention thus concerns two paragraphs of draft Article 20 on the relationship between the future convention and international law, in particular international humanitarian law. Two versions of this article are under consideration: a working draft prepared by a group of “Friends of the Chairman” and an alternative proposed by states belonging to the OIC. Each contains four paragraphs, of which the first and last are identical. The paragraphs on which there is agreement are as follows:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.⁸⁷

The other two paragraphs exclude the application of the future Convention to acts governed by international humanitarian law and other acts committed by military forces, similar to the exclusionary clauses contained in the Convention against terrorist bombings and the Convention against nuclear

85 S/RES/1566 (2004), para. 3.

86 The Commission for Historical Clarification (Truth Commission) of Guatemala, for example, concluded that “throughout the armed confrontation the Army designed and carried out a strategy to create terror in the population”. *Guatemala: Memoria del Silencio*, UNOPS, Guatemala City, 1999, Vol. 5, para. 44 (my translation).

87 Report of the coordinator, above note 81.

terrorism. The version of these two paragraphs prepared by the Friends of the Chairman on the basis of the deliberations of the Working Group is as follows:

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
3. 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, are not governed by this Convention.⁸⁸

The alternative proposed by the states belonging to the OIC is as follows:

2. The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law, are not governed by this Convention.⁸⁹

The version of paragraph 2 proposed by the Islamic states is broader in two respects. The first and most obvious difference is that it appears to be designed to exclude from the scope of the future Convention acts that occur during foreign occupation in the absence of armed conflict. 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. However, 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. The concern expressed by these states to distinguish the struggle for self-determination from terrorism supports this interpretation. In reality, since the actions taken by military forces of a state during an occupation would be excluded by draft paragraph 3, this provision would in effect tend to put non-state armed forces on a more even footing with state forces, insofar as situations of occupation are concerned. However, the scope of acts excluded under draft paragraph 2 is not limited to those that are in conformity with international law, but extends to all acts “governed by” international humanitarian law, whether legal or illegal. The advantage of this formula is that, by exempting both state and non-state forces, it gives the latter an incentive to accept and abide by international standards; the disadvantage is that it excludes acts that violate international humanitarian law as well as those that comply with it. Paragraph 2 of the “Friends of the Chairman” version shares this disadvantage, but only with respect to acts committed during armed conflict, not acts occurring during an occupation.

The second difference is that, while the unofficial draft would exclude acts committed by armed forces, the alternative supported by the Islamic states would

88 Ibid., Appendix II.

89 Report of the Ad Hoc Committee, A/58/37, Annex IV, 11 February 2002.

exclude the activities of a party to a conflict or an occupation. This would exclude from the scope of the Convention the acts of agents of a party other than its armed forces. Whilst regulation of the activities of armed forces is clearly one of the main objectives of humanitarian law, other agents also can violate humanitarian law, especially during an occupation. This provision appears designed to circumvent the application of the definition of armed forces recognized by humanitarian law – that is, to ensure that the activities of any irregular force that participates in hostilities or struggles against an occupying power would be excluded, even if they do not meet the accepted definition of an “armed force”.⁹⁰ One certain consequence of this proposed draft would be that if a party to a conflict employs groups that do not form part of its armed forces to commit acts that violate humanitarian law – to torture prisoners or to assassinate civilians, for example – international humanitarian law would be applicable and those acts would be excluded from the scope of the future Convention.

The question that is less clear has to do with the requirements for being recognized as a party to a conflict. Under humanitarian law, an armed force that does not belong to a state can be a party to a conflict.⁹¹ The question that arises from the types of conflict that have occurred recently is whether an armed group or movement that is not under the control of a state can be considered a party to a conflict, even if it does not meet the definition of an armed force.⁹² If it can, then the language proposed by the OIC member states would open a significant gap in the scope of application of the future Convention against terrorism.

The other exclusionary clause that continues to be an obstacle to approval of the draft convention concerns acts committed by the military forces of a state in the absence of an armed conflict or occupation. The draft prepared by the Friends of the Chairman would exclude such acts “inasmuch as they are governed by other rules of international law”, whereas the draft proposed by the member states of the OIC would exclude them “inasmuch as they are in conformity with international law”. Two of the most relevant parts of international law, as indicated above, are international human rights law and international law prohibiting aggression and the violation of sovereignty. By excluding acts committed by state military forces merely because they are governed by international human rights standards or basic principles of international law recognized by the UN Charter, the informal draft would create an unacceptably broad limitation on the scope of the future Convention. Acts of terrorism committed by the military forces of a state during peacetime in the exercise of their official duties should be treated with the entire rigour that the conventions on terrorism require, and should not be excluded simply because they also could be considered human rights violations or violations of the UN Charter.

90 This inference is supported by an alternative draft proposed by Jordan in 2005, which refers simply to “activities” without any subject – language that other states objected to on the grounds that it would “exclude a broad range of non-State actors from the scope of the convention”. *Ibid.*, p. 5.

91 See Article 1(1) of AP II.

92 For example, because it does not control territory or is not under responsible command.

It is unfortunate that the exclusionary clauses contained in two earlier treaties exclude terrorist acts committed with certain types of weapons, such as explosives, from the scope of international law against terrorism for reasons of this kind. This precedent is no reason to widen the loophole and exclude other acts of terrorism from the scope of international law against terrorism. The version of draft Article 20(3) proposed by the OIC member states, which would preclude the application of the future Convention only to acts committed by military forces in peacetime that do not violate international human rights law or other basic principles of international law, is a more appropriate way of ensuring the complementarity of these branches of international law. It is, indeed, more in harmony with the rule of law, because it comes closer to applying the same rules to all acts of terror, regardless of the identity of the perpetrator. If the struggle against terrorism is to be seen as the defence of universal values and not the defence of narrower interests, every effort must be apply the same law to all terrorists, regardless of the uniform they wear or the cause they defend.

Conclusion

International treaty law concerning terrorism, which initially covered only acts affecting civilians, has gradually expanded to cover some acts of terrorism against military personnel and installations. The taking of military personnel hostage is, in principle,⁹³ covered by the Convention against hostage-taking, if the act in question is not covered by the Geneva Conventions or their Additional Protocol I or II, for example, because it does not occur during an armed conflict or occupation. The use of explosives or certain other lethal devices in a public place or against a state facility to cause death, serious injury or serious economic loss is, in principle,⁹⁴ covered by the Convention against terrorist bombings, even if the target is a military one, when the act does not take place during an armed conflict, or when it does take place during an armed conflict but the perpetrator is not part of an armed force. Using nuclear material or a nuclear device with the intent to cause death, serious injury or substantial damage to property, or damaging a nuclear facility or device in a way that entails a risk of releasing radioactive material, is, in principle,⁹⁵ covered by the Convention against nuclear terrorism whether the target is civilian or military, provided that act is not committed by an armed force during an armed conflict. Financing activities intended to kill or injure members of an armed force during peacetime, or to kill non-combatants during an armed conflict is, in principle,⁹⁶ covered by the Convention against financing terrorism.

93 Assuming that the other elements, including specific intent, are met.

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Expanding the concept of terrorism to include attacks against military targets – like expanding it to cover attacks against property as well as attacks against the person – weakens somewhat the moral opprobrium attached to it. Crimes against civilians are generally more widely and passionately condemned than those against military personnel. The consequences of this trend are limited, to the extent that new international instruments expand the concept to include attacks against military personnel and facilities committed during times of peace. They are more far-reaching when these instruments apply to attacks committed against military forces, during an armed conflict or occupation, by irregular forces that may not meet the criteria for application of international humanitarian law. The use of the term “terrorist” as a propaganda tool has a long history, and expanding the legal definition of terrorism so that it applies to certain attacks that may be used by irregular forces against enemies who enjoy an overwhelming technological advantage facilitates such abuse. If the aim is to treat all parties to an unequal conflict equally, exclusionary clauses that may allow the treaties against terrorism to apply to some parties, but not to others, because of their status rather than their actions, should be interpreted and applied narrowly.

The newer treaties against terrorism also provide members of armed forces with a degree of immunity for certain acts.⁹⁷ The Convention against terrorist bombings is not applicable to any member of an armed force who commits an act of terrorism using an explosive device when his or her act is governed by international humanitarian law, even if they violate such law. Members of the armed forces of a state enjoy even broader protection: the Convention against terrorist bombings is not applicable to them, provided only that they have committed an act of terrorism in the exercise of their official duties, even if that act is not covered by international humanitarian law. This means that the Convention is inapplicable to them even for acts of terrorism committed with explosive devices during peacetime. The former exemption is at least even-handed, and its practical consequences are mitigated to some extent by universal jurisdiction over war crimes. The latter is even more objectionable, because it applies only to the armed forces of states, and there is no comparable basis to exercise extraterritorial jurisdiction. Exemption from the important regime of “mutual legal assistance” for investigating and prosecuting terrorist crimes, which has no equivalent in international humanitarian law, also is regrettable.

If the possibility that the Convention against terrorist bombings may be applied to irregular groups participating in armed conflict, but not to regular forces who commit similar acts, is unfortunate, the exemption for acts of terrorism committed by the armed forces of states even when international humanitarian law is inapplicable is an affront to the rule of law. It can only be hoped that the

97 The observations that follow also apply to the Convention against nuclear terrorism; the Convention against financing terrorism would appear to be of little relevance to actions committed by members of armed forces, unless they were to finance the activities of irregular groups.

draft general convention against terrorism will not be adopted, unless the scope of the exemption clauses is limited to acts that are compatible with international law, including international humanitarian law.