



UNODC

United Nations Office on Drugs and Crime



1

Counter-Terrorism in the International Law Context

COUNTER-TERRORISM
LEGAL TRAINING CURRICULUM

UNITED NATIONS OFFICE ON DRUGS AND CRIME

COUNTER-TERRORISM LEGAL TRAINING
CURRICULUM

Module 1

Counter-Terrorism in the International Law Context



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BACKGROUND: COUNTER-TERRORISM LEGAL TRAINING CURRICULUM

The United Nations Office on Drugs and Crime (UNODC) is mandated to provide assistance to requesting countries in the legal and criminal justice aspects of countering terrorism. The UNODC Terrorism Prevention Branch (TPB) is responsible for carrying out this mandate, primarily by assisting countries in ratifying international legal instruments against terrorism, incorporating the provisions of such legal instruments into national legislation and building the capacity of national criminal justice systems to implement those provisions effectively, in accordance with the rule of law and with due respect for human rights.

The Counter-Terrorism Legal Training Curriculum is one of several tools developed by UNODC/TPB for the sharing of knowledge and expertise to strengthen the capacity of national criminal justice officials and to put the universal legal framework against terrorism into practice. The curriculum harmonizes and systematizes legal concepts and related training materials and information to maximize the impact of the training activities delivered by UNODC/TPB. This transfer of knowledge is pursued through:

- Direct training of criminal justice officials;
- Train-the-trainer activities;
- Supporting national training institutions of criminal justice officials (schools of judges and prosecutors; law enforcement academies; and other relevant institutions) in developing and incorporating counter-terrorism elements as part of their curricula.

Structure and contents

The curriculum consists of several modules, each dealing with specific thematic areas of the legal and criminal justice aspects of countering terrorism. The first six modules are:

- Module 1. Counter-terrorism in the international law context (the present module)
- Module 2. The universal legal framework against terrorism
- Module 3. International cooperation in criminal matters: Counter-terrorism
- Module 4. Human rights and criminal justice responses to terrorism
- Module 5. Transport-related (civil aviation and maritime) terrorism offences
- Module 6. The international legal framework against chemical, biological, radiological and nuclear terrorism

Index of training tools

Focus boxes: Readers are introduced to topics of specific interest through a series of focus boxes on narratives related to counter-terrorism, providing in-depth background information or illustrative examples, which allow for a comparative approach to the subject.

Case studies: Readers can review case studies illustrating the application of legal rules, doctrines or policies.

Activities: Participants can use the activities tool to explore how various topics dealt within the curriculum are handled or reflected in practice, with a specific focus on how this applies in their national legal systems. Activities take the form of: (a) questions geared to encouraging discussion; or (b) hypothetical cases, in addressing which participants must apply the rules and principles explained in the text. These activities are designed to be most suitable for the use of small break-out groups during capacity-building exercises. Numerous activities could also be used as a basis for mock hearings or written submissions or could be used by self-learners as tools to examine the practical application of the knowledge acquired.

Tools: A list of selected bibliographical references to publications, reports and manuals for trainees wishing to obtain in-depth knowledge of relevant legal topics.

Self-assessment questions: The questions cover the topics dealt with in each section. Unlike the activities tool, the assessment questions require straightforward answers, which makes them useful for trainers who need to quickly evaluate the degree of knowledge acquired by participants. The questions are typically answered at the end of a training session, but they can also be used as preliminary tools to identify the level of pre-existing knowledge of participants and address training needs.

Target audience

The modules can be adapted to suit the particular needs, expertise and expectations of specific groups.

The modules draw on the experience of UNODC/TPB in delivering training activities and are based on its mandate. Target audiences typically include criminal justice and law enforcement officials (police, prosecutors and judges), military commanders, policymakers, government officials from key departments (in particular, ministries of foreign affairs, justice and the interior) and criminal defence lawyers.

INTRODUCTION

The threat of terrorism continues to evolve. Transnational terrorist groups with diverse membership engage in violence in the context of armed conflicts, find new ways to obtain weapons and to fund their activities, including through transnational organized crime and complex money-laundering and financing operations. Terrorist groups perpetrate severe human rights abuses and engage in activities that qualify as war crimes and crimes against humanity. At the same time, human rights violations that are committed as part of efforts to counter terrorism may serve to undermine the legitimacy and effectiveness of counter-terrorism measures. Conflicts involving terrorist groups, including some fueled by foreign terrorist fighters, force people to leave their homes for their survival and safety, thus contributing to migration and refugee flows.

These global terrorism trends and emerging challenges highlight the need to examine more closely how terrorism and counter-terrorism law interact and relate to other areas of international law. Modern manifestations of terrorism call for the development of specific legal competencies and skills by national officials involved in the criminal justice response to terrorism, taking into account the complex interaction between counter-terrorism law and other key branches of international law.

The present module of the curriculum is designed to empower criminal justice practitioners and other relevant national officials with the requisite knowledge and skills to navigate these complex legal issues. It places the counter-terrorism legal and policy framework in the context of related areas of international law, including international human rights law, refugee law, international humanitarian law, the law on the use of force and arms control, as well as international criminal law and the international legal framework for combating transnational organized crime.

An introduction to international law, presented before the six substantive chapters, provides criminal justice practitioners who may not be familiar with public international law with some fundamental notions that will be of particular relevance for the comprehension and use of the module.

Chapter I discusses key human rights issues emerging in the context of counter-terrorism, including how terrorism may undermine human rights; State obligations to protect human rights in the context of terrorism; possible limitation of rights to enable governments to respond to the threat of terrorism; and the impact of counter-terrorism measures on human rights.

Chapter II explores the interactions of counter-terrorism and international refugee law and the international legal and policy framework for migration, including the implications for the protection of refugees and migrants, the principle of *non-refoulement* and extradition processes. It also addresses the protection of internally displaced persons and stateless persons in the context of terrorism and counter-terrorism.

Chapter III examines the fundamental principles of international humanitarian law and their application to the conduct of terrorists engaged in armed conflict and presents a discussion on the relationship between this area of law and counter-terrorism laws during periods of armed conflict. In addition, the chapter contains a discussion of how the impact of counter-terrorism measures on the delivery of humanitarian relief and assistance could be mitigated.

Chapter IV addresses how the international legal regimes for controlling conventional weapons apply to the activities of terrorist groups, including: international law instruments regulating, restricting or prohibiting certain weapons; rules applying to State conduct in relation to weapons; rules applying directly to non-State actors; and other rules requiring States to suppress the flow of arms to non-State actors.

Chapter V addresses the links between acts of terrorism and transnational crimes, identifies different ways in which terrorist acts may constitute transnational crimes within the framework of the United Nations Convention against Transnational Organized Crime and its protocols and discusses ways in which the legal framework against transnational organized crime can be useful to counter-terrorism practitioners.

Chapter VI deals with how terrorist acts, or the activities of terrorist groups, may constitute international crimes, including genocide, war crimes and crimes against humanity, and discusses ways in which the legal framework against international crimes may be used in the prosecution of terrorism-related cases.

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BASIC CONCEPTS OF INTERNATIONAL LAW

The present module examines interactions between the legal and policy framework of international counter-terrorism efforts and other key branches of international law (also known as public international law and the law of nations) that may be relevant when States take action to counter terrorism. This section provides a brief introduction to the nature and sources of international law and a discussion of the relationship between international and national law.

What is international law?

International law primarily addresses the conduct of and relations between States, although it also regulates international organizations, groups of persons (such as armed groups) and entities (such as corporations or non-governmental organizations (NGOs)) and individuals. The rules of international law address matters such as:

- What constitutes a “State” (country)?
- What are the sources of international law?
- Rights of States (such as to exercise legal jurisdiction over people, land and sea and to enjoy certain immunities from the legal processes of other States).
- Duties of States (including respect for the sovereignty of other States, to refrain from the use of aggressive military force against other States or to intervene in the internal affairs of other States).
- Legal responsibility of States for breaches of international law.
- Peaceful settlement of international disputes.

Contemporary international law also includes specialized branches of law that address particular subject areas dealt with in this module, including human rights, refugees, transnational crime, international criminal law, weapons control, international humanitarian law and international law on the use of force.

Sources of international law

The sources of international law differ from the sources of national law (which typically include the constitution, legislation, judicial decisions and executive decrees). There are three formal sources that create international legal obligations: treaties; customary international law; and general principles of law. The first two are the most common. There are also two subsidiary sources of international law, which help to identify the aforementioned formal sources: judicial decisions and the work of highly qualified international lawyers. In addition, non-binding “soft law” (discussed below) can be influential in identifying international law.

A. Treaties

An international treaty is a formal, legally binding agreement concluded between or among States and/or international organizations. These agreements may be labelled as, inter alia, conventions, charters, protocols or covenants.

Treaties may be bilateral (concluded between two States or international organizations) or multilateral (concluded between three or more States or international organizations). Examples of multilateral treaties with near universal participation by States include the Charter of the United Nations of 1945, the Geneva Conventions on armed conflict of 1949 and Additional Protocol I thereto of 1977, the Convention on the Rights of the Child of 1989, the Convention against Transnational Organized Crime of 2000 (also known as “Palermo Convention”) and, in the field of counter-terrorism, the International Convention for the Suppression of the Financing of Terrorism of 1999.

Treaties are one of the primary means through which legally binding norms between States come into existence. They may establish substantive international rights and obligations, require States to implement certain measures in domestic law, create procedures and institutions and provide metrics for treaty enforcement.

A fundamental principle of the law of treaties is “*pacta sunt servanda*”, meaning that the obligations under each treaty in force is binding upon the parties to it and must be followed by them in good faith.¹ States cannot invoke national law to avoid this obligation.² The Vienna Convention on the Law of Treaties of 1969 regulates a number of issues concerning treaties, including their making, interpretation, amendment, breach, invalidity, suspension and termination.

Treaty making

A treaty is only binding on States that have consented to be bound by it. Consent may be expressed by various technical means,³ but is most commonly executed through a two-step process of signature followed by ratification (with the treaty becoming binding only after ratification), particularly in the case of newly drafted treaties not yet in force. This process may involve consultation and approval through national legal channels, such as the State legislature. A common alternative process for becoming a party to a treaty is through a one-step accession to a treaty already adopted, whereupon the treaty becomes binding on the acceding State.

By becoming party to a treaty, States are bound by its obligations. States can, however, formally limit or modify their obligations in some cases. For instance, when becoming a party to a treaty, a State can make a “reservation” that varies its rights or obligations under it.⁴ The ability to make reservations may, however, be prohibited or limited by the treaty.⁵ Moreover, reservations are not permitted to treaty provisions that reflect norms of *jus cogens* (such as prohibitions on torture, slavery or genocide) or which are incompatible with the treaty’s object and purpose.

¹ Vienna Convention on the Law of Treaties, article 26 (United Nations, *Treaty Series*, vol. 1155, No. 18232).

² *Ibid.*, article 27.

³ *Ibid.*, article 11.

⁴ *Ibid.*, article 2 (1)(d).

⁵ *Ibid.*, article 19.

Advantages of treaties

Treaties have a number of advantages as a source of international obligations:

- Treaties can be drafted to respond quickly to contemporary developments or challenges.
- States drafting a treaty have a high level of control over its contents, so the treaty can reflect their collective will (while reservations allow flexibility for individual States).
- Treaties can be written in precise terms, creating certainty and avoiding disputes.
- The requirement of consent demonstrates the public commitment of a State to abide by its terms, thereby increasing the likelihood of compliance with the treaty.
- Treaties can establish procedures for monitoring, supervising or enforcing their obligations.

B. Customary international law

Customary international law consists of unwritten rules arising out of the practice of States in their international relations over time. Two elements are required to establish a custom:

- State practice (that is, what States do, refrain from doing or publicly state) is sufficiently uniform and consistent over a sufficient period of time. Rigorous conformity is not required, it is sufficient that practice is generally consistent with the rules and that any practices inconsistent with the rules are regarded as breaches.
- The practice is considered to be legally obligatory (*opinio juris*), that is, States believe or accept that a practice is carried out as it is required by law.

Treaties bind only those States that have expressed their consent to be bound, whereas customary law is binding upon all States.

Customary law has a number of advantages:

- It applies universally, which may be important where: (a) there is no treaty on a topic; (b) a treaty has few States parties; (c) a State party to a treaty does not accept adjudication of disputes under the treaty but accepts adjudication based on custom; or (d) new States emerge that are not bound by treaty obligations;
- Since custom derives from uniform State practice over time, States are familiar with how they are expected to behave and are likely to accept custom as law;
- Custom can dynamically evolve as State practice and the needs of the international community evolve.

C. Other sources of international law

A number of other sources of international law may be briefly mentioned:

- “**General principles of law**” are relatively uncommon sources used to fill gaps or cure ambiguities in international law. They are typically derived from principles familiar across national legal systems, or from the nature of the international community and its legal order. Examples include the principles of

pacta sunt servanda (described above) and *res judicata* (a matter that has been finally adjudicated by a court may not be reopened by the same parties).

- **Judicial decisions** (of national or international tribunals) are “subsidiary” sources⁶ that may assist in identifying or interpreting treaties, custom or general principles, although they are not sources of law themselves. There is no doctrine of binding judicial precedent in international law (the decisions of international courts, such as the International Court of Justice, are only binding on the parties to a specific case).⁷
- Similarly, “**teachings of the most highly qualified publicists**”, such as publications of senior international lawyers, are additional subsidiary sources that can help to clarify rules of international law.

D. Soft law

So-called soft law is not formally a source or subsidiary source of international law but can be influential either as evidence of customary law or in treaty interpretation. Soft law refers to non-binding political instruments such as resolutions, declarations, recommendations, programmes of action, guidelines issued by international organizations or reports adopted at international conferences. These do not impose binding legal obligations but can – depending on their language and intent – show evidence of a common understanding of, or political commitment to, specific norms. The International Court of Justice has noted that resolutions of the General Assembly may provide evidence of a rule of customary law or the emergence of an *opinio juris*, while “a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.⁸

States increasingly use soft law to advance standards for counter-terrorism and the prevention of violent extremism. Examples include the Madrid Guiding Principles on foreign terrorist fighters adopted by Counter-Terrorism Committee of the Security Council,⁹ the recommendations of the Financial Action Task Force (FATF)¹⁰ and the good practices memoranda adopted by the Global Counterterrorism Forum (GCTF), including such as the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism. In certain resolutions, the Security Council refers Member States to the FATF recommendations and GCTF documents.¹¹

As observed by the United Nations Special Rapporteur on human rights while countering terrorism, the “turn to soft law in counter-terrorism ... provides the benefits of speed, informality and less onerous procedural limitations and is often produced by groups of States with similar views that have reasonable degrees of existing consensus on values, processes and outcomes”.¹² The Special Rapporteur expressed concern, however, that some soft law involves processes that “are non-transparent and not accessible to all States”.¹³

⁶ Statute of the International Court of Justice, article 38 (1)(d).

⁷ Ibid., article 59.

⁸ Advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), A/51/218, para. 70.

⁹ See S/2015/939 and S/2018/1177.

¹⁰ Financial Action Task Force (2012–2020), *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, FATF, Paris (www.fatf-gafi.org/recommendations.html).

¹¹ See Security Council resolutions 2178 (2014), para. 24; 2396 (2017), twenty-fourth preambular para.; and 2482 (2019), paras. 3 and 9.

¹² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/74/335, para. 10).

¹³ Ibid., para. 20.

E. Relationship between the sources of international law

There is no formal hierarchy between treaty law, customary international law and general principles of law. Custom and treaties can relate to each other in a number of ways. A treaty may: (a) codify existing (unwritten) customary rules; (b) crystallize (that is, complete) an emerging custom; or (c) initiate the formation of a new customary rule.

Customary law and treaties may address the same subject, and often in a complementary manner. If, however, there is a divergence or conflict of obligations between the two regimes, there are a number of legal techniques available for resolving the situation. In practice, a treaty may be preferred as providing a more specific, or more recent, rule than customary law.

F. Rights and duties of States and individuals under international law

Since much of international law comprises rules governing relations between States, States remain the principal rights holders and duty bearers.

Some areas of international law also impose duties on States in relation to their dealings with individuals and confer rights on individuals. Examples include international human rights law, international refugee law, international humanitarian law and international criminal law. Human rights law requires that States themselves respect rights, protect rights from interference by private actors and fulfil rights by providing necessary support to all individuals in their territory and jurisdiction. Humanitarian law requires States to provide humanitarian protections in armed conflict, including when fighting non-State armed groups.

Individuals hold rights and are also subject to obligations under international law. Individuals can be held criminally responsible for international crimes, including war crimes, crimes against humanity and genocide. Accountability can be pursued through international criminal tribunals or national courts.

Some areas of international law also establish obligations for non-State groups or entities. As discussed in chapter III of this module, all parties to non-international armed conflicts, including armed groups designated as terrorist entities, are obliged to respect international humanitarian law (IHL).¹⁴ IHL also provides incentives for non-State groups to comply with IHL. Moreover, there are numerous United Nations and other sanctions regimes applying to listed non-State entities, such as the sanctions regime applied to ISIL (Da'esh) and Al-Qaida established by the Security Council under resolutions 1267 (1999), 1989 (2011) and 2253 (2015).

G. Implementation and enforcement of international law

In State legal systems, national law is typically implemented and enforced through regulatory authorities, the police and the courts. International law, which is a more decentralized legal system, does not possess equivalent institutions. Nonetheless, there are many ways in which international law is effectively applied.

¹⁴International Committee of the Red Cross, Customary International Humanitarian Law, rule 139 (<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>).

These include: (a) implementation in national law; (b) treaty law; (c) adjudication by international tribunals; (d) action by the Security Council; (e) monitoring or supervision by international organizations; and (f) unilateral action.

Implementation in national law

Some international rules only apply at the inter-state level, that is, in the executive conduct of international relations between States, and do not need to be implemented in domestic law. However, other rules of international law affect activities within the national territory of States, including the conduct of individuals or companies, and must be implemented domestically. An example is human rights treaties, which require that States guarantee specified rights to individuals within their territory and jurisdiction and provide effective remedies for breaches.

National law can be one of the most important means of implementing and enforcing certain areas of international law because it enables the utilization of the enforcement capabilities (including regulatory authorities, the police and the courts) of national legal systems.

National legal systems incorporate international law into their domestic legal systems in different ways, broadly depending on whether a State has a “monist” or “dualist” legal system:

- A **monist** system automatically treats international law as part of national law. For instance, the Constitution of Kenya stipulates that any “treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution” (article 2(6)).
- A **dualist** system regards international law as a separate legal system, meaning that its rules will have domestic legal effect only when they are incorporated into domestic law, usually by legislation.
- Many legal systems adopt a mixed approach. In the common law tradition, for instance, customary international law is regarded, in principle, as part of the common law (a monist approach), whereas treaties must be incorporated by act of parliament (dualist).

Ofentimes, a treaty requires that States implement its provisions, or portions thereof, in domestic law. Multilateral treaties for the suppression of terrorism, international and transnational crime, and some human rights violations, require States to implement offences in national law and to prosecute or extradite suspects.¹⁵ States retain some discretion in determining how key aspects of treaty provisions are implemented, for example, how certain crimes are defined, how extensively jurisdiction is exercised and what penalties apply.

The instruments relating to terrorism, for example, require that States parties establish specified offences in domestic law, while leaving it up to individual States to precisely define the material and mental (also known as “fault”) elements of offences in accordance with domestic criminal law. These instruments further require that offences be punishable by appropriate penalties, taking the gravity of such offences into account. This allows States parties the flexibility to establish penalties that are consistent with or proportionate to the scale of penalties for serious crimes under domestic law.

¹⁵See, for example, the International Convention for the Suppression of Terrorist Bombings, 1997; the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

H. Treaty law

One important method of implementing international law, mentioned above, is the principle that treaties are binding and must be performed by parties to them in good faith. This includes instances where the treaty itself provides for mechanisms for enforcement or remedies for breaches.

The Chemical Weapons Convention, for example, requires States to cooperate with the Organization for the Prohibition of Chemical Weapons (OPCW); the Geneva Conventions of 1949 require cooperation with the International Committee of the Red Cross (ICRC); and human rights treaties require States to provide effective remedies to victims of rights violations.

The settlement of international disputes

There is no international court with compulsory, binding jurisdiction over international disputes. The International Court of Justice can exercise jurisdiction only if the States involved in a dispute have consented (which they may do prospectively, ad hoc, or under a specific treaty clause). However, since 1945, international tribunals in specialized areas have proliferated, including the establishment of the World Trade Organization, the International Tribunal for the Law of the Sea (including other compulsory settlement methods under the United Nations Convention on the Law of the Sea) and the International Centre for the Settlement of Investment Disputes, thus increasing the ability to enforce international law by judicial decision or arbitration. There are regional human rights courts in the Americas, Europe and Africa that issue binding judgments, including in numerous cases concerning the application of human rights law in the context of counter-terrorism.

Various international criminal tribunals have pursued accountability for international crimes, culminating, in 1998, in the establishment of the International Criminal Court. The relevance of international criminal law and tribunals to counter-terrorism is discussed in chapter VI of the present module.

International monitoring/supervision

Some areas of international law have not established binding tribunals but have nonetheless empowered international institutions to “softly” monitor compliance with treaty obligations. Such activities may be public (as in the case of many human rights processes) or confidential (as in the case of dialogue by ICRC with States involved in armed conflict). International bodies with compliance functions of various sorts include:

- Committees of independent experts established by human rights treaties, such as the Human Rights Committee, with powers to monitor State performance (through periodic reporting and dialogue) and receive and decide complaints from individuals about alleged State violations of their rights, as well as inter-state complaints. Although not courts, these treaty bodies are highly authoritative interpreters of their respective treaties and decide individual cases in a quasi-judicial manner;
- Human Rights Council, which is a body of periodically elected States that monitors the human rights performance of other States through the “Universal Periodic Review” process;
- International Labour Organization (ILO);
- Office of the United Nations High Commissioner for Refugees (UNHCR);
- ICRC and the International Humanitarian Fact-Finding Commission;

- International Atomic Energy Agency (IAEA) and the Organization for the Prohibition of Chemical Weapons (OPCW);
- International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO);
- Various mechanisms under multilateral environmental agreements.

I. Security Council

The Security Council may take non-forcible action (such as imposing sanctions or embargoes) or military action to restore or maintain international peace and security under Chapter VII of the Charter of the United Nations.¹⁶ Under the Charter, all States Members of the Organization must comply with the decisions of the Council.¹⁷ This power has been applied to deal with a number of threats to international peace and security,¹⁸ including inter-State war, internal conflicts, terrorism, mass human displacement, human rights violations and international crimes.

While the General Assembly may make recommendations for dealing with threats to international peace and security, it cannot take binding enforcement action. Furthermore, all States involved in disputes that are likely to endanger international peace or security must “seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.¹⁹

J. Unilateral action by States

Under international law, States are occasionally authorized to act unilaterally to protect themselves against violations of international law. One example is the right of self-defence against an armed attack under Article 51 of the Charter and under customary international law, which is discussed in chapter III of the present module.

Another example is peaceful counter-measures, by which a State may respond to an unlawful act by another State by resorting to unlawful acts of its own, strictly for the purpose of compelling the other State to cease breaking the law. For instance, the victim State could suspend the performance of its obligations under a treaty (such as agreements on free trade) with the other State.

¹⁶Charter of the United Nations, Article 41.

¹⁷Ibid., Article 25.

¹⁸Ibid., Articles 11, 12 and 35.

¹⁹Ibid., Article 33.



Counter-terrorism and international human rights law

COUNTER-TERRORISM LEGAL TRAINING CURRICULUM MODULE 1

COUNTER-TERRORISM IN THE INTERNATIONAL LAW CONTEXT

Objectives

By the end of chapter I, readers will be able to:

- 1 Identify to whom international human rights law is addressed, including who enjoys rights, who bears duties and what is the position of State and non-State actors.
- 2 Explain how terrorism may impact and undermine human rights.
- 3 Explain State obligations to protect human rights by diligently suppressing terrorism and providing remedies to its victims.
- 4 Explain State obligations to respect human rights in counter-terrorism efforts.
- 5 Understand how terrorism and counter-terrorism measures impact certain rights, namely the right to life and the right to education.
- 6 Understand how human rights violations by a State may be counter-productive in the fight against terrorism.

Introduction

International human rights law is especially important in relation to terrorism and counter-terrorism because it applies concurrently with all of the other branches of international law examined in the present module, including international criminal law, international humanitarian law (IHL), refugee law, weapons controls and the law on the use of force. For this reason, it is considered first, as the over-arching framework governing the lawfulness and legitimacy of all counter-terrorism measures.

Section A starts with the basics: individuals enjoy human rights; States have obligations to respect, protect and fulfil them; and abuses of rights by non-State actors (including terrorist groups) must generally be prevented and suppressed by States themselves.

It is debatable whether terrorist groups can technically “violate” human rights, since they are not parties to human rights treaties, however, they may, by their actions, abuse human rights, and in section B below the many ways in which terrorist acts adversely affect the full spectrum of rights: civil, political, economic, cultural, social and developmental are explained.

Section C focuses on the obligations of the State to protect human rights from interference by non-State actors, including terrorists. One aspect of this duty is to prevent terrorist activity on its territory, whether targeted at home or abroad, including through criminal suppression. A second aspect is to provide effective remedies for any failures by the State itself to diligently prevent terrorist violence. It is also good practice for States to provide remedies for victims of terrorism even where the State itself is not at fault.

When countering terrorism, States are always required to respect human rights. Section D explains how human rights law accommodates security threats while preserving rights, namely through processes for the “limitation” and “derogation” of rights. Human rights law also takes into account the specifically tailored measures of IHL applicable to armed conflict.

On the other hand, counter-terrorism measures that violate human rights may be counter-productive, as explained in section E below. They may provoke further acts of terrorism; undermine the effectiveness of law enforcement; and restrict effective international legal cooperation.

Section F seeks to illustrate the relationship between acts of terrorism, counter-terrorism measures and human rights by exploring two examples: the rights to life and to education.

A. To whom is international human rights law addressed?

Human rights are rights inherent to all human beings and are essential to ensure human dignity, equality, empowerment and life opportunity. The beneficiaries or holders of rights are thus primarily individuals as opposed to group entities.¹

At a formal level, States bear obligations under treaties and customary international law to respect human rights (that is, not to interfere with them), to protect human rights (from abuses by private actors) and to fulfil human rights (by taking positive action to provide for them). All three levels of duty are relevant to terrorism, as discussed in sections C to E below.

Individuals, as well as non-State actors (such as terrorist groups), are not parties to human rights treaties and such treaties do not usually impose obligations directly on them as they do on States.² Therefore, individuals do not bear the same human rights obligations as States, and they cannot legally violate human rights in the way that States can. In addition, non-State actors do not usually have the legal and practical capacity of States to implement the spectrum of human rights, such as protecting, respecting and promoting all civil, political, economic, social and cultural rights. There has also been some concern that the recognition of non-State actors as having human rights duties would legally or politically legitimize them.

A State is, however, legally responsible for human rights violations committed by a non-State actor, including terrorist acts, if the State has effective control over the group's activities. International law on State responsibility governs circumstances in which the conduct of non-State actors (individuals or groups) is "legally attributable" to a State. In addition, as discussed in section C, States are required by both human rights law and international counter-terrorism law to diligently suppress terrorist acts by non-State groups and are legally responsible for failing to discharge these duties.

In instances where terrorist acts are not attributable to a State, it is legally controversial whether terrorist acts by autonomous individuals or groups may be regarded as violating human rights. While terrorism is widely understood to threaten human rights in a practical sense, the technical term "violation" usually refers to the breach of a legal obligation. As noted above, non-State actors are not traditionally regarded as bearing such obligations.

These tensions are reflected in the fact that some States and international organizations prefer to refer to human rights "abuses" by non-State actors, in contrast to "violations" by States. Recent United Nations practice has, however, recognized that at least some human rights obligations apply to some non-State actors, particularly in cases where they exercise government-like functions or are de facto State authorities controlling territory and administering populations.³ Since

¹ Some human rights have group dimensions (such as the right to self-determination, minority rights, cultural and linguistic rights or religious rights), while in regional human rights law other actors (such as corporations or non-governmental organizations) may claim rights in certain circumstances.

² One exception is set out in article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (General Assembly resolution 54/263, annex I), which prohibits armed groups from recruiting or using children in hostilities.

³ Office of the United Nations High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva, 2011), p. 25.

the 1990s, numerous United Nations bodies have called on non-State groups to respect human rights law⁴ and have established special mechanisms to address abuses.⁵

CASE STUDY THE QUESTION OF THE HUMAN RIGHTS OBLIGATIONS OF THE LIBERATION TIGERS OF TAMIL EELAM

Following a fact-finding mission to Sri Lanka in 2004, the Special Rapporteur on extrajudicial, summary or arbitrary executions discussed the question of whether the Liberation Tigers of Tamil Eelam LTTE as a non-State armed group (designated as terrorist entity by more than 30 Member States) had human rights obligations:^a

“25. Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. ... As a non-State actor, the LTTE does not have legal obligations under ICCPR [the International Covenant on Civil and Political Rights] but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.

“26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure’. This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law.”

^aSee E/CN.4/2006/53/Add.5 [footnotes omitted].

⁴ These include, for example: the Security Council; the General Assembly; the Human Rights Council; commissions of inquiry and fact-finding missions; United Nations human rights treaty bodies; special procedures (such as Special Rapporteurs); specialized agencies, such as OHCHR; the good offices of the Secretary-General; and United Nations peacekeeping missions; see also *International Legal Protection of Human Rights in Armed Conflict*, pp. 23–27 and 92–116; Joint statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors, 25 January 2021; and Jessica Burniske, Naz Modirzadeh and Dustin Lewis, “Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the UN Security Council and the UN General Assembly” (Harvard Law School Program on International Law and Armed Conflict, June 2017).

⁵ See Security Council resolution 1612 (2005) concerning the protection of children in armed conflict.

While private actors may not be directly responsible for rights “violations” in a legal sense, neither are they entirely unregulated. The preamble of the Universal Declaration of Human Rights of 1948 states that “every individual... shall strive... to promote respect for these rights and freedoms... to secure their universal recognition and observance”, and this is reiterated in many United Nations resolutions.⁶ Article 29(1) of the Universal Declaration of Human Rights further recognizes that “everyone has duties to the community”. The preambles to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) make similar points,⁷ while common article 5(1) of ICCPR and ICESCR insist that no “State, group or person” has a right to destroy or limit the rights of others (unless permitted by human rights law).⁸

CROSS-REFERENCE Individuals are also subject to duties under IHL and international criminal law. These are discussed in chapters III and VI of the present module.

In practice, uncertainty about the human rights obligations of non-State actors is of importance because, in general, monitoring and supervision mechanisms apply only to States as duty bearers. This can make it more difficult to hold terrorist groups accountable for abuses. In addition, it can make it harder for external actors to engage with non-State armed groups in order to encourage them to implement, respect and fulfil human rights.

B. Impact of terrorism on human rights

Since the 1970s, the General Assembly has declared in numerous resolutions that terrorism threatens or destroys basic human rights, particularly life, liberty and security, but also other civil and political rights as well as economic, social and cultural rights. The United Nations Global Counter-Terrorism Strategy reaffirms that “acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights” (see preamble). There is probably not a single human right that is exempt from the impact of terrorism.

ACTIVITY

- *How has terrorism impacted human rights in your country?*
- *List five human rights protected by the Universal Declaration of Human Rights that have been impacted by acts of terrorism.*

⁶ See General Assembly resolution 48/22 (1993), preamble; see also preambles to Commission on Human Rights resolutions 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30 and 2001/37.

⁷ International Covenant on Civil and Political Rights (ICCPR) (General Assembly resolution 2200A (XXI)) and International Covenant on Economic, Social and Cultural Rights (ICESCR) (General Assembly resolution 2200A (XXI)), preambles; see also Universal Declaration of Human Rights (General Assembly resolution 217A (III), preamble).

⁸ See Universal Declaration of Human Rights, article 30; see also Sub-Commission on Prevention of Discrimination and Protection of Minorities, preliminary report of the Special Rapporteur on the question of terrorism and human rights (E/CN.4/Sub.2/1999/27, paras. 22 and 23).

The 2018 report of the Secretary-General⁹ details some of the many impacts of terrorist acts on human rights, including:

- The right to life was affected by terrorism in 106 countries in 2016;
- Due process was completely disregarded in areas controlled by ISIL, in ways designed to terrorize the population (such as summary executions carried out in atrocious ways, often in public and/or recorded for online publication);
- The right to education was attacked by Boko Haram in Nigeria, which sees education as a threat to its ideology (from 2014 to 2017, 1,500 schools were destroyed and many students and teachers were killed or injured);
- The right to health was seriously undermined by terrorist attacks on humanitarian personnel and the provision of humanitarian assistance was impeded;
- The right to cultural life was negatively impacted by attacks against artists and citizens attending cultural events, including self-censorship and financial loss for artists and cultural industries;
- The rights of particular groups in society were affected by the systematic and intentional targeting of religious communities, women, children, political activists, journalists, human rights defenders and members of the lesbian, gay, bisexual, transgender and intersex community;
- Children's rights have been affected by terrorist recruitment, their use as human shields, forced religious conversion, forced marriage, rape, physical and psychological abuse, forced labour, their use as informants, and family separation;
- The right to development was harmed by terrorists destroying critical infrastructure, thus reducing business activity, discouraging tourism and undermining economies.

FOCUS BOX IMPACT OF TERRORISM ON WOMEN AND GIRLS

The 2018 report of the Secretary-General on the effects of terrorism on the enjoyment of human rights⁹ highlights the gender-specific impact of terrorism on women and girls:

“29. In many regions, terrorist and violent extremist groups have deprived women and girls of their human rights, including through forced marriage, restrictions on education and participation in public life as well as sexual and gender-based violence. Under ISIL rule, women and girls have been trafficked and enslaved, confined to their houses, removed from public life and told what to wear and where they could work, thus exacerbating women's subordinate role, reinforcing patriarchal attitudes and demonstrating discriminatory treatment on the basis of gender.

⁹ Report of the Secretary-General on the effects of terrorism on the enjoyment of human rights (A/73/347).

“30. Sexual violence is employed as a tactic of terror by terrorist and violent extremist groups and is linked to their strategic objectives, ideology and funding. It is used to advance such tactical imperatives as recruitment, terrorizing populations into compliance, displacing communities from strategic areas, generating revenue through sex trafficking, torture to elicit intelligence, conversion and indoctrination through forced marriage, and to establish, alter or dissolve kinship ties that bind communities.

“31. Egregious forms of conflict-related sexual violence – for example, rape, sexual slavery, forced marriage, forced pregnancy and abortion, including as a form of religious and ethnic persecution – have been perpetrated by terrorist and violent extremist groups mainly in Iraq, Mali, Nigeria, Somalia and the Syrian Arab Republic. The Commission of Inquiry considered that ISIL had committed the international crime of genocide against Yazidis, notably including the commission of systematic rape of women and girls as young as 9 years of age, sexual violence, including slavery, enslavement, and torture and inhuman and degrading treatment of women and girls.”

[The report goes on to discuss sexual and gender-based violence by Boko Haram and Al-Shabaab].

^o A/73/347, paras. 29–31.

Victims cannot generally seek remedies from non-State armed groups. As a result, States should ensure that victims of terrorism can secure effective remedies through the State’s own mechanisms, discussed in section C.2 below.

C. State obligations to protect human rights

This section examines two ways in which States are required to protect human rights from terrorist abuses: first, by diligently suppressing terrorism in their territories; and secondly, by providing remedies for victims of terrorism.

1. State obligations to diligently suppress terrorism

Even if non-State actors do not directly bear human rights duties, and a State is not responsible for their conduct, States nevertheless bear obligations to diligently suppress terrorism. Under international human rights law, in implementing their duty to protect or “ensure” rights, States must protect individuals from violations of rights by non-State actors “in so far as they are amenable to application between private persons or entities”.¹⁰

This may require States to take positive measures of protection (including through policy, legislation and administrative action) and to exercise due diligence to prevent, punish, investigate or redress the harm or interference to rights caused by private acts.¹¹ These duties are related to the duty to ensure effective remedies for rights violations, as discussed in section C.2 below.¹²

¹⁰ United Nations, Human Rights Committee, general comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (CCPR/C/21/Rev.1/Add.13, para. 8).

¹¹ Ibid.; see also *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights (Ser. C) No. 4 (http://hrlibrary.umn.edu/iachr/b_11_12d.htm), paras. 172 and 173.

¹² ICCPR, article 2 (3).

A State's obligation to ensure human rights by protection its population from non-State interference is additional to, and reinforces, the State's related obligations under the law on the use of force and non-intervention and international counter-terrorism law. These include a State's obligations:

- Not to use force against, or intervene in the domestic affairs of, other States by sending or supporting armed groups;
- To prevent and suppress the use of its territory by private actors (including terrorists) to cause harm to other States;
- To diligently prevent and suppress any harm to foreign nationals or foreign property on its own territory;¹³
- To suppress transnational terrorism under Security Council resolution 1373 (2001) and other relevant Security Council resolutions, the United Nations Global Counter-Terrorism Strategy 2006, and international counter-terrorism conventions to which a State is party.

FOCUS BOX

Security Council resolution 1373 (2001) lists the multiple ways in which States must adopt effective measures to prevent and suppress acts of terrorism.

"2. ... all States shall:

"(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

"(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

"(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

"(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

"(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

¹³ See *British Claims in the Spanish Zone of Morocco, Arbitral Award of 1 May 1925*, UNRIAA, vol. II, pp. 615–742, p. 640; *Tehran Hostages*, *ibid*; *Janes Case (US v. Mexico)* (1925) 4 UNRIAA, pp. 82 and 87; *Youmans Case (US v. Mexico)* (1926) 4 UNRIAA, p. 110; *Solis* (1928) 4 UNRIAA, pp. 358 and 361; *Texas Cattle Claims*, *ibid*; *Home Missionary Society (US v. Great Britain)* (1920) 6 UNRIAA, p. 42; and *Noyes Case (US v. Panama)* (1933) 6 UNRIAA, p. 308.

“(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

“(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”

2. State obligations to provide remedies for victims of terrorism

Victims of human rights violations by States (including State-controlled terrorism) enjoy a right to an accessible, effective and enforceable remedy.¹⁴ This right to reparation normally involves compensation, but may also involve “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”.¹⁵ Compensation must cover material damage (for example, personal injury and property damage) and moral damage (including for mental suffering).

As mentioned earlier, if non-State actors are not legally regarded as committing human rights “violations”, then the victims of terrorism may be left without legal remedies. Many States have adopted ordinary “victims of crime” legislation, which may also cover terrorist crimes, whether by requiring criminals to compensate their victims or providing funds from the State budget. Recovering compensation from terrorist groups or individuals is often very difficult. Ordinary victims of crime legislation may not reflect the special needs of victims of terrorism, which flow from terrorism, often involving large scale human and material devastation, and impact on indirect victims (including dependents, relatives and the public).¹⁶

Some States have created special schemes for victims of terrorism, whether the crimes occur on their territory or against their citizens or residents abroad, although some are ad hoc or discretionary schemes and thus do not establish a legally enforceable right to a remedy.

ACTIVITY

- *What remedies are available to victims of terrorism in your country?*
- *How accessible and adequate are these remedies in practice?*
- *Are these remedies recognized as rights held by victims of terrorism, or as forms of assistance granted by the government?*

¹⁴ ICCPR, article 2 (3).

¹⁵ United Nations, Human Rights Committee, general comment No. 31 (CCPR/C/21/Rev.1/Add.13, para. 16).

¹⁶ United Nations Office on Drugs and Crime (UNODC), *The Criminal Justice Response to Support Victims of Acts of Terrorism* (2011), para. 375.

The United Nations Global Counter-Terrorism Strategy of 2006 encourages States to voluntarily establish national systems of assistance to promote the needs of victims and their families and the normalization of their lives,¹⁷ and the General Assembly has also called on the organization to provide technical assistance to that end.¹⁸ The Human Rights Council has further called on States “to ensure that any person whose human rights ... have been violated [by terrorism] has access to an effective remedy and that victims will receive adequate, effective and prompt reparations”¹⁹

There is, however, no international agreement addressing the rights of victims of terrorism, although there are regional standards.²⁰ In 2012 the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism proposed framework principles for securing the human rights of victims of terrorism.²¹ The Special Rapporteur argued that the right to a remedy “should apply to all victims of terrorism or their next-of-kin, without distinction”, since terrorism should be recognized as interfering with the rights to life and/or physical security²² and he accordingly urged States:

“to voluntarily accept a binding international obligation to provide reparation to the victims of all acts of terrorism occurring on their territory in which a natural person has been killed or has suffered serious physical or psychological harm irrespective of the nationality of the perpetrator or the victim...”²³

Many other independent United Nations human rights experts have similarly recommended that States should investigate, prosecute and punish human rights violations by armed non-State actors and ensure adequate reparation, redress and other assistance to victims, particularly in cases where the non-State actor is unable or unwilling to meet its own responsibilities.²⁴

¹⁷ United Nations Global Counter-Terrorism Strategy, resolution 60/288, sect. I, para. 8.

¹⁸ General Assembly resolution 64/168, para. 17.

¹⁹ Human Rights Council resolution 19/19 on the protection of human rights and fundamental freedoms while countering terrorism, paras. 4 and 9.

²⁰ Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (adopted 16 May 2005, entered into force 1 June 2007) (“Council of Europe Convention”), article 13 (requiring States to adopt “such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory”. Such measures may include, “through the appropriate national schemes and subject to domestic legislation, inter alia, financial assistance and compensation for victims of terrorism and their close family members”); see also Council of Europe, “Guidelines of the Committee of Ministers on the protection of victims of terrorist acts” (2 March 2005) (concerning the State’s duty to investigate terrorist incidents and prosecute suspects and ensure victims timely access justice and compensation).

²¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: framework principles for securing the human rights of victims of terrorism (A/HRC/20/14).

²² *Ibid.*, para. 53.

²³ *Ibid.*: it should be noted that elements of the framework principles are based on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex, paras. 15–23); and Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (General Assembly resolution 40/34), which apply to victims of crime generally.

²⁴ Joint statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors, 25 January 2021, paras. 2 and 3.

FOCUS BOX MAIN ELEMENTS OF THE FRAMEWORK PRINCIPLES FOR SECURING THE HUMAN RIGHTS OF VICTIMS OF TERRORISM PROPOSED BY THE SPECIAL RAPPORTEUR^a

Prevent terrorism and promptly investigate, prosecute and punish terrorist offenders (principles (a)–(c) and (h));

Enable victim participation in criminal proceedings (principle (d)–(g)), permit victims to form representative organizations (principle (j)), and protect victims’ privacy and safety (principle (i));

Provide reparation to victims where death or serious injury results from terrorism committed on their territory (principles (k)–(l));

Consider prohibiting insurance policies from excluding terrorism (principle (m));

Make greater use of conflict resolution methods where a designated terrorist group or violence against civilians is involved (principle (n)).

^a A/HRC/20/14.

TOOLS UNODC: TECHNICAL ASSISTANCE TOOLS ON SUPPORTING VICTIMS OF TERRORISM

The Criminal Justice Response to Support Victims of Acts of Terrorism (2011)
www.unodc.org/documents/terrorism/Victims_Rights_E-Book_EN.pdf.

Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework (2015)
www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf.

Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism (2019)
www.unodc.org/documents/terrorism/Publications/17-08887_HB_Gender_Criminal_Justice_E_ebook.pdf, which addresses gender aspects of support and access to justice for victims of terrorism.

D. State obligations to respect human rights in countering terrorism

The General Assembly, Security Council and the Human Rights Council have repeatedly affirmed that States must respect human rights when countering terrorism.²⁵ The international counter-terrorism treaties also require that States parties respect human rights.²⁶ As discussed in

²⁵ See General Assembly resolution 60/158; United Nations Global Counter-Terrorism Strategy, General Assembly resolution 60/288, annex, sect. IV, para.2; Security Council resolution 1624 (2005) preamble and para. 4; Security Council resolution 2178 (2014) preamble and paras. 5, 11 and 17; and Security Council resolution 2396 (2017), preamble and paras. 4, 7 and 11–13.

²⁶ See article 14 of the International Convention for the Suppression of Terrorist Bombings, General Assembly resolution 52/164, annex.

the next section, counter-terrorism measures that violate human rights can be conducive to the spread of terrorism, undermine law enforcement and obstruct international cooperation.

A State's human rights obligations apply not only on its own territory but also wherever it exercises jurisdiction outside its own territory.²⁷ This includes military occupation of foreign territory²⁸ as well as the detention of individuals on foreign territory.²⁹

Counter-terrorism measures may potentially affect virtually all human rights in one way or another, as documented in numerous United Nations reports.³⁰ In this instance, we are concerned not with how specific rights may be affected, but rather how the general framework of human rights law applies when faced with the special challenge of terrorism. How exactly does human rights law accommodate legitimate security concerns while preserving individual rights?

1. Limitations on rights

Many counter-terrorism measures can be adopted and carried out without restricting human rights. In some circumstances, however, there will be a need, whether perceived or real, to limit the enjoyment of certain rights to protect national security and the life, physical integrity and freedoms of others.

Some human rights are "absolute", such as the prohibitions on torture or cruel, inhuman or degrading treatment or punishment, which can never be restricted, including when countering terrorism. Most rights, however, are not absolute. States can limit the exercise of these rights for valid reasons, including to counter terrorism, as long as they respect certain conditions.

The conditions for limiting some rights are spelled out in the relevant treaty provisions, requiring grounds such as national security or public order, including the rights to freedom of expression, freedom of association, freedom of assembly and freedom of movement, and the requirement of public court hearings (see focus box below).

²⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (Israeli Wall Advisory Opinion)*, I.C.J. Reports 2004, p. 240 [111]; see also Human Rights Committee, general comment No. 31 (CCPR/C/21/Rev.1/Add.13, para. 10).

²⁸ Human Rights Committee, Concluding Observations: Israel (CCPR/C/79/Add.93 and CCPR/CO/78/ISR); *Al Skeini and Others v. United Kingdom*, European Court of Human Rights, Grand Chamber, Application No. 55721/07, Judgment (Merits and Just Satisfaction), 7 July 2011.

²⁹ *Coard v. United States*, Case 10.951, report No. 109/99 (Inter-American Court of Human Rights, 29 September 1999) (Grenada); see also Inter-American Court of Human Rights, resolution 2/06 (concerning Guantanamo Bay).

³⁰ See A/73/347.

FOCUS BOX CONDITIONS FOR LIMITATION OF NON-ABSOLUTE RIGHTS

Article 19 of ICCPR protecting the right to freedom of expression, exemplifies the structure of non-absolute rights.

Paragraph 2 sets forth the substance of the right:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Paragraph 3 provides the conditions under which the right can be legitimately limited:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

On the basis of provisions such as article 19 of ICCPR protecting the right to freedom of expression (other examples in ICCPR include articles 12, 18, 21 and 22), human rights courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate. The following questions must be asked:

Is there a legal basis for the measure limiting the right, and is the legal basis sufficiently precise, foreseeable and accessible?

Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?

If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate.

ACTIVITY

- *Think of a law in your country which, in your view, legitimately restricts a particular human right.*
- *Explain how it complies with the test for limiting rights under international human rights law*

For some rights, the treaty provision limits itself to stating that the right may not be interfered with “arbitrarily”. For instance, article 9 of ICCPR requires that deprivation of liberty must not be arbitrary. A similar test applies to non-arbitrary deprivation of the right to life under article 6. The notion of “arbitrariness” is not to be equated with “against the law” but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.³¹

Other rights are subject to “inherent” limitations. The right of an accused person in a criminal case to be tried without “undue delay” is an example. What constitutes a reasonable delay must be assessed considering the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the authorities.

For economic, social and cultural rights, a general limitation provision applies to all such rights. Article 4 of ICESCR provides that “the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Some of these rights are also subject to specific limitations in their provisions.

2. Derogation in times of public emergency

In exceptional circumstances, “in time of public emergency which threatens the life of the nation” (article 4 of ICCPR), States may take measures to derogate from the Covenant. Derogation means to temporarily suspend or adjust human rights obligations, provided a number of conditions are met, in order to address the emergency. Derogation is not automatic but is a right of the State and the State may equally decide that derogation is undesirable.

The threshold for derogation is very high – a public emergency threatening the life of the nation – and could include armed conflict or widespread civil unrest. It may also include very grave terrorist threats, as long as they threaten the whole country. For example, after the 9/11 attacks on the United States of America, the United Kingdom declared a public emergency on the basis of its belief that Al-Qaeda also posed a threat to the United Kingdom, while France declared an emergency in 2015 in response to the ISIL attacks in Paris. The threat must be actual, clear, present or imminent, not merely apprehended.³²

³¹ United Nations, Human Rights Committee, general comment No. 35 (Article 9) (Liberty and security of person) (CCPR/C/GC/35, para. 12.)

³² Principle 54 of the Siracusa Principles on the Limitation and Derogation Provisions in ICCPR (E/CN.4/1985/4, annex).

FOCUS BOX EMERGENCY POWERS WHILE COUNTERING TERRORISM

The Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism dedicated her 2018 report to the question of the use of emergency powers while countering terrorism.⁹ Some of the important points made by the Special Rapporteur included:

- While it is “generally recognized that some terrorist acts and the actions of terrorist organizations can create necessary and sufficient conditions to activate the threshold of emergency under both national and international law ...”, “... each country must individually demonstrate that it experiences the level and scope of threat to necessitate the use of emergency powers.” (para. 3).
- “... in many contexts, States would be better served by regulating terrorism using ordinary law rather than resorting to exceptional regulation. International law requires States to use ordinary law if emergency measures are not strictly necessary.” (para. 6).
- “... an emergency will justify derogation only if the relevant circumstances are of an exceptional and temporary nature.” (para. 14).

In her report the Special Rapporteur also discussed declarations of emergency and the problem of de facto emergencies, as well as human rights protection measures that must be taken. She stressed the importance of domestic measures, which are supplemented by international oversight (para. 51). In addition, the Special Rapporteur provided recommendations regarding the use of emergency powers in the context of counter-terrorism.

⁹ A/HRC/37/52.

The application of emergency measures derogating from human rights obligations is subject to other strict requirements, including:

- They cannot derogate from other international law obligations, including peremptory (fundamental) norms and IHL;
- They must be proportional, that is, they must limit rights only to the extent strictly required by the exigencies of the situation; this requires consideration of whether there are less rights-restrictive means of effectively responding to the threat;
- They must be temporary;
- They must be non-discriminatory;
- They must be officially proclaimed and notified to the Secretary-General.

The Special Rapporteur on human rights and counter-terrorism emphasized that emergency measures must be subject to “robust and independent judicial access and oversight”.³³ Oversight is particularly important where emergency measures endure for a long period.

³³ Ibid.

Non-derogable rights

Finally, it must be emphasized that certain human rights are “non-derogable”, meaning that they may not be suspended even in times of the most serious public emergency. In ICCPR the non-derogable rights of particular relevance to counter-terrorism include:

- Article 6 (right to life);
- Article 7 (prohibition on torture, cruel, inhuman or degrading treatment);
- Article 15 (prohibition against the retrospective operation of criminal laws);
- Article 18 (freedom of thought, conscience and religion).

The jurisprudence of the Human Rights Committee suggests that elements of certain other rights are also non-derogable:³⁴

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (article 10 of ICCPR);
- Prohibition against taking of hostages, abductions and unacknowledged detention;
- The fundamental requirements of a fair trial, including trial by a court and the presumption of innocence;
- Procedural guarantees in detention, such as judicial review of detention, necessary to protect non-derogable rights (particularly the rights to life and freedom from torture);³⁵
- The right to an effective remedy.

However, economic, social and cultural rights under ICESCR are not subject to derogation whatsoever. This is because they include rights which are essential to survival (such as food, water, shelter, clothing, health care, education, social security, or a living wage); rights which are otherwise indispensable to human dignity (such as safe work conditions or cultural rights); or rights the suspension of which would not assist in confronting an emergency (such as protection of the family or culture).

³⁴ United Nations, Human Rights Committee, general comment No. 29 (Article 4) (States of Emergency) CCPR/C/21/Rev.1/Add.11, paras. 13–17.

³⁵ United Nations, Human Rights Committee, general comment No. 35 (Article 9) (Liberty and security of person), CCPR/C/G/35, para. 67.

ACTIVITY CASE STUDY ON LIMITATION AND DEROGATION

Over the past three years, 10 terrorist attacks have occurred in the country of Westeros, targeting government buildings and killing over 100 security personnel and public servants. At least three different groups were involved, although it is unknown whether they are connected. The size of the groups is also unknown, although each appears to be drawn from one of the minority populations living in three of the seven provinces of the country. Each of the minority groups favours independence from Westeros. One of the groups has links to a foreign government that previously supplied radioactive material to terrorists in another country for a “dirty bomb”. Border security is strong and effective in Westeros. The latest intelligence intercepts of WhatsApp messages indicate that TTT, one of the groups, is planning a “fireworks” display this weekend in the capital.

Following the procedure set forth in the constitution, the President of Westeros issues a decree declaring a public emergency and orders the following measures:

- 1. *The detention without charge or judicial review of all members of the three minorities resident in the capital city for up to three weeks.*
- 2. *The indefinite closure of the internal borders of the three provinces from which the three groups come.*
- 3. *The population of the capital to remain indoors all weekend.*
- 4. *A new criminal offence prohibiting the expression or belief of secessionist ideas.*
- 5. *All social media in Westeros to be switched off for a week.*

Please advise:

- (a) *Which are the human rights protected under international law affected by these measures? (Note, Westeros has ratified ICCPR and ICESCR without reservations).*
- (b) *Are these rights that can be subject to limitation? If so, what are the conditions that have to be met for a limitation to be lawful?*
- (c) *Is there a public emergency threatening the life of the nation Westeros?*
- (d) *Are the measures adopted permissible under human rights law concerning derogation?*

3. Concurrent application of international humanitarian law and human rights law in armed conflict

It is generally accepted that international human rights law applies alongside IHL (IHL, as discussed in chapter III of the present module) in cases where an armed conflict exists.³⁶ If the

³⁶ See: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (Nuclear Weapons Advisory Opinion)*, I.C.J. Reports 1996, p. 239 [para. 25] (A/51/218, annex); see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (Israeli Wall Advisory Opinion)*, I.C.J. Reports 2004, p. 240 [para. 106] (A/ES-10/273 and Corr. 1), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment)* I.C.J. Reports 2005, p.168 [para. 216]; Human Rights Committee, general comment No. 31 (CCPR/C/21/Rev.1/Add. 13); *Bámaca Velásquez v. Guatemala* (2000) Inter-American Court of Human Rights (Series C) No. 70 [para. 207]; Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (International Committee of the Red Cross and Cambridge University Press 2005), p. 303.

conflict also qualifies as a “public emergency” (which will not necessarily be the case, depending on its gravity), a State may be entitled to derogate from certain human rights, as discussed above.³⁷

The co-application of IHL and human rights law in situations of armed conflict is important because human rights law often provides victims with direct rights to claim remedies against the State (for example, in a court of law), whereas IHL does not provide comparable rights. IHL is instead enforced through internal military discipline, inter-State claims, external supervision and war crimes prosecutions.

While IHL and human rights law apply concurrently, the relationship between their rules in particular areas varies according to the context. Concerning the conduct of hostilities, for example, IHL may be given precedence as the more specific law (*lex specialis*),³⁸ because its rules are specifically designed for the exceptional circumstances of conflict, unlike general human rights law, which also applies in peacetime. The *lex specialis* principle aims to resolve possible conflicts between rules in different areas of law. In the Nuclear Weapons Advisory Opinion, the International Court of Justice gave this example:

“In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”³⁹

Thus, a killing that is lawful under IHL will not be an unlawfully “arbitrary” deprivation of life under human rights law – for instance, where one combatant attacks another while respecting the IHL principles of distinction, proportionality, rules of the means and methods of warfare and the limitations on weapons. On the other hand, a violation of IHL may also constitute a violation of the human right to life, thus enabling individual remedies.

A similar point may be made about the freedom from “arbitrary” detention under human rights law.⁴⁰ While administrative security detention of allegedly dangerous civilians is not normally permitted in peacetime, the rules of IHL permit such detention in situations of international armed conflict, thereby establishing that it is not “arbitrary” under human rights law. In contrast, in non-international armed conflict, since IHL does not regulate the grounds and procedures of detention, international human rights law applies as the *lex specialis* to regulate national detention laws and practices.

Another example concerns criminal trials. While human rights law normally requires trial by a civilian court, it allows exceptions for special or military courts in compelling circumstances; one such instance is where IHL permits military court trials of civilians in occupied territory for

³⁷ *Nuclear Weapons Advisory Opinion* [para. 25]; *Israeli Wall Advisory Opinion* [para. 106].

³⁸ *Ibid.*

³⁹ *Nuclear Weapons Advisory Opinion* [para. 25].

⁴⁰ ICCPR, article 9.

security offences against an Occupying Power (as long as the court is still independent and impartial and guarantees a fair trial).

In the *Israel Wall Advisory Opinion*, the International Court of Justice further suggested that there are three possible relationships between IHL and human rights law: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.⁴¹

In instances in which either IHL or human rights law exclusively govern an issue, no direct conflict will arise. For example, human rights law does not contain specific rules on weapons or non-State armed groups, while IHL does not deal with the right to vote or policing. Human rights law is also much more extensive in relation to economic, social and cultural rights.

Where both branches regulate an issue, in most cases no inconsistency will arise precisely because both branches share humanitarian objectives. For example, both branches prohibit torture, establish similar minimum fair trial rights⁴² and require the humane treatment of detainees and minimum conditions of detention. Both branches also require criminal trial by an independent and impartial court applying fair trial standards.

Only occasionally are there direct conflicts. For example, human rights law generally requires a judicial review of detention,⁴³ whereas IHL requires review only by a “competent” body (but not necessarily a court) of administrative detention of civilians or prisoners of war in international conflicts. IHL rules effectively take precedence over human rights standards to the extent of the inconsistency.

The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions recommends that a blended or hybrid “systemic integration approach” should be taken to the interaction of human rights law and IHL. This would mean seeking the application of both bodies of law, depending on the specific context and situation, rather than simply regarding one or other branch of law as prevailing over the other in the event of a conflict.

⁴¹ *Israeli Wall Advisory Opinion*, para.106.

⁴² See Geneva Conventions of 1949 (United Nations, *Treaty Series*, vol. 2716, No. 48088), common article 3; Protocol I to the Geneva Conventions (United Nations, *Treaty Series*, vol. 1125, No. 17512), article 75; and ICCPR, article 14.

⁴³ ICCPR, article 9, para. 4.

FOCUS BOX THE USE OF UNCREWED AERIAL SYSTEMS (DRONES) AGAINST TERRORISM SUSPECTS

The “targeted killing” of suspected terrorists by various States, including by missiles and uncrewed aerial “drones”, illustrates the practical relevance and complexity of the interaction between human rights law and IHL in counter-terrorism. The Special Rapporteur on extrajudicial, summary or arbitrary executions has provided a working definition for this phenomenon:

“A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under the color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”^a

A targeted killing is distinguishable from unintentional, accidental or reckless killings, or law enforcement operations involving the use of force in self-defence or the defence of others.

As noted by the Special Rapporteur in her report of August 2020, at least 102 countries possess active military drones and around 40 countries possess or are procuring armed drones.^b

There is no special international law on targeted killings; the general rules of human rights law apply. Targeted killings in armed conflict must comply with the IHL rules on the conduct of hostilities (discussed in chapter III of the present module), namely that they are directed against a military objective, avoid excessive civilian casualties and use lawful weapons and tactics. In this context, the Human Rights Committee has criticized States for:

- Unnecessary and disproportionate attacks resulting in the death of civilians, including a failure to attempt to arrest persons in occupied territory and to independently investigate alleged violations;^c
- Unclear interpretations of who is a combatant or a civilian taking direct part in hostilities;^d
- The inadequacy of precautionary measures to avoid civilian casualties;
- Overly broad definitions of the geographical scope of armed conflict (that is, beyond the territory of the State in which a non-international armed conflict is taking place).

In addition, State use of military force on the territory of another State may be separately justified as an exercise of the national right of self-defence under the Charter of the United Nations and customary international law. Under that law, self-defence would only be justified if a terrorist threat was of the gravity of an “armed attack” or presented an imminent armed attack (although anticipatory self-defence is controversial). In this context, the Human Rights Committee has expressed concern about the unclear interpretation of what constitutes an “imminent threat”, and this being used to justify targeted killings.^e Military force in national self-defence must always comply with IHL and human rights law.

Two Special Rapporteurs on extrajudicial, summary or arbitrary executions have dedicated reports to the use of drones for targeted killings in 2010 and 2020, respectively. As noted in the 2020 report, where a strike occurs outside armed conflict and not pursuant to national self-defence, human rights law still governs: the question is whether the killing is strictly necessary, as a last resort, to protect against an imminent threat to life.^f

As noted in the 2010 report, in practice, the use of targeted killings has blurred and expanded the boundaries of the legal frameworks. States have often failed to specify the legal bases of killings, the applicable safeguards and the identities and substantive reasons for targeting those killed.^g

There has also been a lack of accountability mechanisms for victims, including because of the secrecy surrounding many drone strikes and the resulting casualties.^b To enhance accountability for targeted killings, the Special Rapporteur on extrajudicial, summary or arbitrary executions recommends that States should:

- Publicly identify the international rules they recognize as providing the authorization for targeted killings;
- Specify procedural safeguards to ensure compliance with international law and the remedies for violations;
- Indicate whether another State has consented to any targeted killings on its territory;
- Publicly disclose the number of civilians collaterally killed;ⁱ
- Investigate all allegations of unlawful deaths related to the use of drones.^j

^a A/HRC/14/24/Add.6, para. 1.

^b A/HRC/44/38, para. 7.

^c CCPR/C/ISR/CO/3.

^d CCPR/C/USA/CO/4, para. 9 [also for the following two bullet points].

^e CCPR/C/USA/CO/4, para. 9.

^f A/HRC/44/38, para. 35.

^g A/HRC/14/24/Add.6, para. 3.

^h A/HRC/44/38, para. 22.

ⁱ A/HRC/14/24/Add.6, para. 93.

^j A/HRC/44/38, para. 85.

E. State human rights violations in countering terrorism

There are a number of reasons why State violations of human rights can be counterproductive in countering terrorism: (a) they undermine the professionalism and moral high ground of State responses to terrorism; (b) they may create conditions conducive to more terrorism; (c) they may undermine the effectiveness of law enforcement; and (d) they may undermine prospects for international legal cooperation (including extradition and mutual assistance).

1. Professionalism and moral high ground

Respecting human rights in confronting terrorism is the right thing to do. For individuals it is morally right to treat all people with basic human dignity and respect, without discrimination. It is also a mark of the professionalism, responsibility and integrity of law enforcement and criminal justice systems, which reflects and serves the values of the community, enhances public confidence and cooperation and sets a positive example for others to follow.⁴⁴

Respecting human rights must indeed be one of the key elements distinguishing government responses to terrorist acts from the actions of terrorists. In the words of former Secretary-General Kofi Annan:

⁴⁴ OHCHR, *Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police*, Professional Training Series No. 5/Add.2 (2002), p. 16; see also Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169, annex, article 1.

“Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.”⁴⁵

2. Human rights violations can be conditions conducive to terrorism

Human rights violations cannot be used to justify terrorism. There is little doubt, however, that such abuses are among the conditions that provoke tension, hatred, exclusion and mistrust of governments. Many terrorist groups aim at provoking hatred towards governments, and by resorting to rights violations such as torture, unfair trial or illegal detention, governments facilitate the achievement of one of the terrorists’ objectives. Human rights violations, particularly those committed in the name of combating terrorism, can become terrorist groups’ most effective “recruiting agent”.

Ever since the General Assembly began discussing terrorism in the early 1970s,⁴⁶ many States have been concerned about the need to identify and address the root causes of terrorism. Understanding the factors that are conducive to terrorism does not excuse nor does it justify indiscriminate violence against civilians; nevertheless, it is necessary to consider such factors in order to determine appropriate responses and reduce the prevalence of terrorism.

There are many different views on what factors contribute to terrorism, and the answer is often situation-specific. In broad terms, the General Assembly’s Global Counter-Terrorism Strategy of 2006⁴⁷ identifies “conditions conducive to the spread of terrorism” as:

“including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism: ...”

The Special Rapporteur on human rights and counter-terrorism has stated that:

“While there is no scientific evidence of a causal connection between economic and social grievances and acts of terrorism, patterns of correlation can be demonstrated that suggest that societies characterized by such grievances and educational exclusion are often breeding or recruitment grounds for terrorists.”⁴⁸

⁴⁵ A/59/2005, para. 94.

⁴⁶ In 1972, a study was initiated on “the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair”. For a discussion of causes, see report of the Ad Hoc Committee on International Terrorism (1973) (A/9028, para. 26), and the report of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages, (1979) (A/34/39, para. 38).

⁴⁷ See General Assembly resolution 60/288.

⁴⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counter-acting terrorism (A/HRC/6/17 and Corr.1, para. 64).

FOCUS BOX THE SECRETARY-GENERAL'S PLAN OF ACTION TO PREVENT VIOLENT EXTREMISM

Human rights violations often interact with underlying structural problems relating to governance and the rule of law, as explained by the Secretary-General in his 2015 report:

“Violent extremism tends to thrive in an environment characterized by poor governance, democracy deficits, corruption and a culture of impunity for unlawful behaviour engaged in by the State or its agents. When poor governance is combined with repressive policies and practices which violate human rights and the rule of law, the potency of the lure of violent extremism tends to be heightened. Violations of international human rights law committed in the name of State security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists. Violent extremists also actively seek to exploit State repression and other grievances in their fight against the State. Thus, Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law, such as profiling of certain populations, adoption of intrusive surveillance techniques and prolongation of declared states of emergency, tend to generate more violent extremists. International partners that are complicit in such action by States further corrupt public faith in the legitimacy of the wider international system.”^a

^a A/70/674, para. 27.

The United Nations Global Counter-Terrorism Strategy unanimously adopted by the General Assembly in 2006⁴⁹ and since then renewed every two years, states that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. The Security Council similarly observed that “effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort.”⁵⁰

The Global Counter-Terrorism Strategy accordingly commits States to taking a range of measures to address the conditions conducive to terrorism. They include promoting conflict resolution; inter-civilizational dialogue between religions and cultures;⁵¹ a culture of peace, justice, development and tolerance; preventing and prohibiting incitement to terrorism;⁵² realizing development and eradicating poverty; pursuing social inclusion; supporting the rule of law, human rights and good governance; and assisting victims of terrorism. Countering terrorist narratives has also been recommended by organs of the United Nations.⁵³

⁴⁹ See General Assembly resolution 60/288, sect. IV.

⁵⁰ See Security Council resolution 1963 (2010), para. 10.

⁵¹ See Security Council resolution 1624 (2005), para. 3.

⁵² *Ibid.*, para. 1.

⁵³ See Security Council resolution 2354 (2017).

The mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted many examples of practical measures that States can take to address the conditions conducive to terrorism in relation to human rights: Tunisia has sought to address marginalization, exclusion and poverty by promoting economic growth, integrating vulnerable populations into the economy, and providing special assistance to the poorest;⁵⁴ Spain has taken measures to prevent xenophobia, better integrate Muslim communities and promote and protect religious freedom;⁵⁵ and Germany has included, in its development assistance programmes, a component to address the structural conditions conducive to terrorism.⁵⁶

ACTIVITY

- *Can you think of any counter-terrorism laws or measures in your country or region which may have inadvertently contributed to the spread of terrorism?*
- *How could such measures be modified to reduce negative unintended consequences?*
- *How could measures to protect and fulfil human rights in your country and region contribute to addressing the conditions conducive to terrorism?*

3. Human rights violations undermine the effectiveness of law enforcement

Human rights violations against suspected terrorists or others risk alienating – from the authorities or other parts of the population – those sectors of the population whose grievances terrorist groups claim to represent. Members of these often already marginalized communities are among the most important sources of information for police and security agencies on terrorist activity, including the identities, hiding places and plans of terrorists. When the relationship between the police and these communities is dominated by mistrust, or even hatred, serious damage is done to the government’s ability to uncover terrorist plots, disrupt groups, prevent terrorist attacks and investigate acts of terrorism.

Human rights violations can also undermine counter-terrorism efforts in more immediate and concrete ways. For example, information obtained by torture will be excluded as evidence by the courts. In addition, information obtained by illegal methods of search or surveillance may be excluded as evidence, thus undermining terrorist prosecutions and accountability. Illegal mass arrests, based on vague suspicions, unnecessarily tie up scarce investigative resources and divert energies from targeting real suspects. Unfair trials risk convicting the innocent and distracting from the pursuit of the real perpetrators of violence.

⁵⁴ Mission to Tunisia: report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/51/Add.2, para. 55).

⁵⁵ Mission to Spain: report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/10/3/Add.2, para. 49).

⁵⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/6/17, paras. 67 and 68).

4. Human rights violations undermine international counter-terrorism cooperation

Human rights violations in one State can preclude counter-terrorism cooperation by other States. One prominent obligation in this regard is the *non-refoulement* principle (discussed in chapter II of the present module), which prohibits States from extraditing individuals to another State when there are substantial grounds for believing that they would be in danger of being tortured, extrajudicially killed or subject to other serious human rights violations, such as arbitrary detention or denial of a fair trial. A government that resorts to torture, or allows evidence obtained through torture to be utilized in legal proceedings,⁵⁷ will encounter great difficulties in obtaining the extradition of terrorist suspects. It may also encounter difficulties obtaining mutual legal assistance to support investigations and trials and other forms of cooperation.

States that have abolished capital punishment are also under a legal obligation to apply the *non-refoulement* principle also to the risk of the imposition of the death penalty. Many of them also refuse mutual legal assistance where it may lead to the imposition of the death penalty. Furthermore, overly broad or vague definitions of terrorist offences in domestic law (contrary to the human rights principle of legality),⁵⁸ or the abuse of terrorism charges against non-violent political dissidents (also contrary to human rights law), will, in many cases, constitute an obstacle to obtaining international cooperation.

TOOLS NON-REFOULEMENT AND THE TRANSFER OF TERRORISM SUSPECTS

Chapter 7 of the Counter-Terrorism Legal Training Curriculum Module 4, *Human Rights and Criminal Justice Responses to Terrorism* (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf) examines in detail the *non-refoulement* principle applied to extradition and other forms of transfer of terrorism suspects or convicts.

Chapter II of the present module discusses *non-refoulement* as a principle of international refugee and human rights law.

In addition, international law requires States not to aid or assist other States in the commission of human rights violations.⁵⁹ A State must refuse to cooperate where its authorities (such as law enforcement, intelligence, security, or military personnel) would risk being complicit in the human rights violations of another State.

⁵⁷ Prohibited under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 39/46, article 15).

⁵⁸ ICCPR, article 15.

⁵⁹ International Law Commission, draft articles on responsibility of States for internationally wrongful acts (A/56/10, chap. IV.E, article 16).

A growing number of States have legislation or policies that prohibit the provision of weapons and other police or military equipment and training to States that are reported to engage in serious human rights violations. A reputation as a country in which human rights abuses in counter-terrorism efforts are widespread can become a significant obstacle in obtaining the military hardware and technical assistance vital to a government's counter-terrorism efforts.

FOCUS BOX HUMAN RIGHTS RISKS AS PART OF THE EXPORT ASSESSMENT UNDER THE ARMS TRADE TREATY (2013)^a

The Arms Trade Treaty regulates the trade of conventional weapons, such as armoured combat vehicles, large-calibre artillery systems, attack helicopters and small arms and light weapons, which may be required by governments engaged in conflict with armed terrorist groups. The treaty specifically deals with the impact of arms transfers on human rights.

Article 6 (3) of the Arms Trade Treaty prohibits States Parties from authorizing any transfer of conventional arms “if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.”

Even if transfers are not prohibited under article 6, States Parties must conduct human rights due diligence before authorizing other arms transfers. Article 7 (1)(b) requires States Parties to assess, prior to authorization of the export of conventional arms, the potential that they could be used to commit or facilitate a serious violation of IHL or international human rights law. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of human rights violations being committed, “the exporting State Party shall not authorize the export.” (article 7 (3)).

^a See also Human Rights Council, report on the impact of arms transfers on the enjoyment of human rights (A/HRC/35/8).

F. Two examples of the impact of terrorism and counter-terrorism on specific human rights

It is beyond the scope of the present training curriculum to examine the relationship between counter-terrorism measures and the full range of human rights. Section F discusses, by way of example, two rights: the right to life and the right to education. Numerous tools, some of them listed at the end of the present chapter, provide analysis and guidance in relation to other rights and freedoms in the context of counter-terrorism, including, in particular, with regard to the administration of justice.

FOCUS BOX THE RIGHT TO LIFE IN THE CONTEXT OF TERRORISM AND COUNTER-TERRORISM

Terrorist acts and counter-terrorism measures may affect the non-derogable human right not to be arbitrarily deprived of life. Key duties concerning the right to life require that a State must:

- Diligently prevent and punish arbitrary killings by both State officials and non-State actors, including terrorists (particularly where the State is forewarned of an attack);^a
- Ensure legal frameworks regulating the use of force comply with human rights law, and that State officials are adequately trained on the lawfulness of the use of force;
- Exercise appropriate care in the planning and implementation of any operations that may involve the use of lethal force, including in the choice of weapons and tactics;^b
- Only take a life where doing so is: (a) strictly necessary in personal self-defence or the defence of others from an imminent threat of death or serious injury;^c and (b) proportionate, meaning that no more force should be used than is required to avert the threat and that non-lethal means should first be considered;
- Investigate all killings, in order to prosecute and punish the perpetrators as required, and to provide effective remedies, including compensation to the victims.^d

General policies to “shoot to kill” terrorists on sight are incompatible with the right to life,^e unlike situations of armed conflict, in which IHL may authorize the targeting of a member of a non-State armed group even if the member of the group does not constitute an imminent threat.

^a Human Rights Committee, general comment No. 6: Article 6 (Right to life) (CCPR/C/GC/36, para. 3).

^b *McCann, Farrell and Savage v United Kingdom*, European Court of Human Rights, Application No. 18984/91, Judgment, 27 September 1995, p. 324.

^c Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9 (see *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B).

^d *Baboeram-Adhin et al. v. Suriname*, Human Rights Committee, Communication Nos. 146/1983 and 148–153/1983, para. 16.

^e A/HRC/4/26, paras. 74–78.

ACTIVITY HOSTAGE-TAKING SCENARIO^a

Fifty members of an armed group listed as a terrorist entity by your government have seized control of a large theater in your country’s capital during an evening show. They have taken almost 900 hostages, killed some of them and booby trapped the theatre with explosives.

After three days of unsuccessful negotiations with the hostage-takers, the commander of the police’s paramilitary forces proposes that the president plan to take back control of the theatre and release the hostages. The plan is based on verified information that the militants are heavily armed and making unrealistic demands, some hostages have already been executed and the conditions of the remaining hostages are deteriorating, so that there is a real, serious, immediate risk to their lives.

The special forces commander proposes to pump gas into the theatre to immobilize militants and hostages, thus preventing the militants from detonating the explosives or harming the hostages.

The commander acknowledges that the gas is potentially lethal, but there is a high chance of survival upon rescue. He states that his plan offers the only realistic avenue to liberate the hostages before they die of wounds, exhaustion or execution by the terrorists, and to stop the terrorists from obtaining further propaganda from the shock of their actions.

You are the senior human rights adviser to the president and are given one hour to prepare a memorandum on measures to ensure human rights compliance of the special forces' plan.

^a This scenario is inspired by the mass hostage taking at the Dubrovka Theatre in Moscow, which took place in 2002. The human rights aspects of the liberation of the hostages were examined by the European Court of Human Rights in *Finogenov and Others v. Russia*, European Court of Human Rights Judgment, Applications Nos. 18299/03 and 27311/03, 4 June 2012.

FOCUS BOX THE RIGHT TO EDUCATION: TERRORISM, COUNTER-TERRORISM AND CONDITIONS CONDUCTIVE TO TERRORISM

Education is a human right which is indispensable to the realization of other human rights^a since it empowers economic opportunity, participation in social and political life and the fulfilment of a person's potential. States must ensure that education is sufficiently available, physically and economically accessible on a non-discriminatory basis, culturally acceptable and of sufficient quality, and adaptable to different contexts and changing needs. The right is non-derogable, even in emergencies. IHL also protects students and teachers (as civilians) and schools (as civilian objects) in armed conflict and guarantees the education of children.^b

The international community recognizes that terrorism and counter-terrorism measures can impede the right to education.^c Terrorism can disrupt education through: (a) threats against schools, teachers and students, and as a result schools may be closed and children may be afraid to attend; (b) the misuse of schools for military purposes; (c) the denial of schooling to girls (for example, as has been done by Boko Haram, Al-Shabaab and the Taliban); (d) the co-opting of schools for extremist indoctrination; and (e) the forced recruitment of children, and the enslavement of girls, into terrorist groups.

Counter-terrorism measures that are not necessary, proportionate or non-discriminatory can also disrupt education. As stated in the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, these include the unnecessary closure of schools for security reasons; interference in the operation or curricula of religious or minority schools; unjustified duties on teachers to inform on their students, thus producing distrust; the misuse of schools for military purposes; military or police operations which unjustifiably damage schools; failure to educate displaced children; and recruitment of children as auxiliary police in displacement camps.^d The intergovernmental "Safe Schools Declaration" (2015) politically commits States to protect students, teachers and schools in armed conflict.

States' failure to fulfil the right to education can be a condition conducive to terrorism or violent extremism.

In his Plan of Action to Prevent Violent Extremism (2015), the Secretary-General urged States to address the drivers of violent extremism by "ensuring inclusive and equitable quality education and promoting lifelong learning opportunities for all", consistent with Goal 4 of the Sustainable

Development Goals.^e Moreover, as noted in the above-mentioned report of the Special Rapporteur, poor school attendance or low-quality education or a failure to prevent the use of schools for the promotion of religious intolerance and discrimination leave children and young people vulnerable to indoctrination by terrorist groups, as does the educational exclusion of minorities.^f

^a See ICESCR, articles 13 and 14; Convention on the Rights of the Child (General Assembly resolution 44/25), articles 28 and 29; and Convention on the Elimination of All Forms of Discrimination against Women (General Assembly resolution 34/180), articles 10 and 14, and Committee on Economic, Social and Cultural Rights, general comment No. 13 on the right to education (E/C.12/1999/10, para. 1).

^b See Fourth Geneva Convention of 1949, article 50; and Additional Protocol II 1977, article 4, para. 3(a).

^c See Human Rights Council resolution 34/8 on the effects of terrorism on the enjoyment of all human rights, preamble.

^d A/HRC/6/17 and Corr.1, paras. 52–56.

^e A/70/674, para. 34.

^f A/HRC/6/17 and Corr.1, paras. 52, 56 and 64.

TOOLS COUNTER-TERRORISM AND HUMAN RIGHTS

UNODC and other entities have produced a significant number of reference and capacity-building tools examining how terrorism and counter-terrorism interact with specific human rights.

Counter-Terrorism Legal Training Curriculum Module 4, *Human Rights and Criminal Justice Responses to Terrorism* (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf) examines the human rights aspects of the criminalization of terrorism offences (including the impact on freedoms of expression and association); investigation, detention, trial and punishment of terrorism suspects; and extradition and other forms of transfer of terrorism suspects.

UNODC has also published two handbooks examining the rights of children and women associated with terrorist groups:

Children Recruited and Exploited by Terrorist Groups: The Role of the Justice System (2017)

(www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf).

Gender Dimensions of Criminal Justice Responses to Terrorism (2019)

(www.unodc.org/documents/terrorism/Publications/17-08887_HB_Gender_Criminal_Justice_E_ebook.pdf).

The Counter Terrorism Implementation Task Force's (CTITF) Working Group on Protecting Human Rights while Countering Terrorism has produced five basic human rights reference guides:

1. The Stopping and Searching of Persons in the Context of Countering Terrorism (www.un.org/es/terrorism/ctitf/pdfs/bhrrg_stopping_searching.pdf).

2. Security Infrastructure (www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/basic-human-rights-reference-security-infrastructure2014.pdf).

3. Detention in the Context of Countering Terrorism

(www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf).

4. Conformity of National Counter-Terrorism Legislation with International Human Rights Law (www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf).

5. Right to a Fair Trial and Due Process in the Context of Countering Terrorism (www.ohchr.org/EN/newyork/Documents/FairTrial.pdf).

The CTITF Working Group on Protecting Human Rights while Countering Terrorism has also published a guide on *Human Rights Compliant Responses to the Threat Posed by Foreign Fighters* (2018) (www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf).

In addition, regional organizations have produced tools on human rights and counter-terrorism.

Below are two examples:

Organization for Security and Cooperation in Europe (OSCE), *Human Rights in Counter-Terrorism Investigations. A Practical Manual for Law Enforcement Officers* (2013) (www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf).

African Commission on Human and Peoples' Rights, *Principles and Guidelines on Human and People's Rights while Countering Terrorism in Africa* (http://caert.org.dz/official-documents/human_rights.pdf).

Self-assessment questions

1. Who bears human rights obligations?
2. Explain why some international law scholars and governments oppose the idea of applying human rights obligations to terrorists.
3. List five examples with regard to the impact of terrorist acts on human rights.
4. Does human rights law require States to suppress terrorist acts? Explain your answer in five sentences.
5. Are States under a human rights obligation to provide remedies to victims of terrorist acts?
6. Name five examples of how acts of terrorism and counter-terrorism measures impact on the right to education.
7. Explain the difference between the concepts of "limitation of human rights", "derogation from human rights" and "violation of human rights". Provide an example for each.
8. Explain how human rights law and IHL interact during armed conflict in relation to the right to life.
9. Discuss at least three ways in which violating human rights in counter-terrorism is counter-productive.



International refugee law, migration and counter-terrorism

Objectives

By the end of chapter II, readers will be able to:

- 1 Understand the key differences between refugees, asylum seekers, stateless persons, internally displaced persons and migrants.
- 2 Summarize the international law and policy framework regarding migration.
- 3 Discuss the definition of a refugee under the 1951 Convention relating to the Status of Refugees.
- 4 Describe how involvement in terrorist activity may exclude or limit refugee protection.
- 5 Describe the principle of non-refoulement (including any exceptions) under refugee law and human rights law, and how it interacts with extradition law.
- 6 List international law obligations regarding cross-border movement of suspected terrorists.
- 7 Discuss the key international law safeguards applicable to the arrival, reception and removal of migrants and refugees, and to their detention.
- 8 Describe the main international legal protections of internally displaced persons (IDP) and stateless persons.

INTRODUCTION

Both terrorist violence and counter-terrorism efforts can force people to leave their homes for their survival and safety. Moreover, because of the devastating impact terrorism has on the economy, people may decide to move in search of better opportunities. Displacement from their homes leaves people vulnerable to the violation of their rights and creates needs for specific legal protections.

Some States have expressed concern that terrorist groups can exploit this vulnerability to recruit among migrants, internally displaced persons (IDPs) and refugees. They have also expressed their concern that terrorists may exploit the movement of large flows of people across borders to avoid detection of their cross-border activities. States receiving flows of refugees and migrants have the right to regulate access to their territory and an interest in ensuring that their populations are protected from any security risks posed by people seeking to enter their territories.

People who are compelled, or choose, to leave their homes (“human mobility”) fall into different categories. Some, including refugees and migrant workers, are defined and regulated by specific rules of international law (in addition to general international law, including human rights law). Other categories, including migrants in general, and IDPs, are not legally defined and are addressed only under general international law and non-binding international standards. Large movements of people may involve “mixed flows” of refugees and migrants, all of whom are entitled to “the same universal human rights and fundamental freedoms”, even if separate legal frameworks otherwise govern their treatment.¹ Both the Security Council and the General Assembly have insisted that all counter-terrorism measures respect international refugee law and human rights law, including the rights of migrants.

Chapter II begins with a discussion of the intersection between terrorism, counter-terrorism and human mobility (section A) and continues with a consideration of international policy and law regarding migration and the rights of migrant workers (section B).

In section C there is a discussion of aspects of international refugee law relevant to counter-terrorism: the legal definition of a “refugee”, specifically in relation to people at risk from terrorist groups; how refugee law enables security concerns to be effectively addressed by requiring individuals to be excluded from refugee protection if they have committed serious terrorist-type conduct; and refugee status determination (RSD).

¹ New York Declaration for Refugees and Migrants (2018) (General Assembly resolution 71/1, para. 6).

Legal questions concerning the arrival, reception and removal of migrants and refugees are discussed in section D. Effective and protection-sensitive border management, including international counter-terrorism obligations addressing mobility (such as measures to counter the movement of foreign terrorist fighters), are addressed in D.1 to D.3. The principle of *non-refoulement* (non-return) to a place of persecution under international refugee law (including security exceptions) or to situations where they may be liable to face other serious harms (such as torture) under international human rights law is discussed in D.4 and D.5, respectively. Neither refugee status nor complementary human rights protection shield a person from criminal prosecution, and the question as to how refugee law interacts with extradition processes is addressed in D.6. Due process in cases of expulsion (D.7) and the detention of asylum seekers, refugees and migrants (D.8) are discussed at the end of section D.

The final sections of chapter II discuss two topics closely related to refugee law and migration impacted by terrorism and counter-terrorism measures: stateless persons (section E) and internally displaced persons (IDPs) (section F).

OVERVIEW OF KEY TERMS AND LEGAL FRAMEWORKS

A “**refugee**” is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality [or habitual residence in the case of a stateless person] and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.^a Certain exclusions apply to the definition, including for specified serious crimes.

- There were 26 million refugees worldwide in 2019.^b
- Refugees are primarily governed by the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention), international human rights law, and regional refugee standards. There are also numerous “soft law” standards issued by the Office of the United Nations High Commissioner for Refugees (UNHCR). UNHCR, the lead international agency mandated to protect refugees and asylum seekers, is also responsible for addressing aspects of internal displacement, migration and statelessness.

An “**asylum seeker**” is a person outside their country of origin who is seeking international protection and whose claim for refugee status has not yet been determined.

- There were 4.2 million asylum seekers globally in 2019.^c
- Asylum seekers are primarily governed by the 1951 Convention relating to the Status of Refugees and international human rights law.

A “**migrant**” is not defined in international law but is understood to mean “a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons”, including migrant workers. Migrants can be in a “regular” situation (where they are authorized to enter by that state’s national law) or “irregular” or “undocumented” situation (where they have no such authorization).^d They may be forced to move, may move voluntarily or may move due to a combination of factors (including “economic” migrants who move to escape poverty or lack of opportunity).

- There were over 271 million migrants living outside their own countries in 2019. About one fifth of migrants (or 54 million people) are considered to be “irregular”.^e
- No treaty deals comprehensively with all categories of migration, although there are treaties addressing certain aspects of it (such as migrant workers and migrant smuggling). International human rights law applies to all migrants, regular or irregular. There are also aspirational “soft law” standards, such as the Global Compact for Safe, Orderly and Regular Migration of 2018.

A “**stateless person**” is a person who is “not recognized as a national by any State under the operation of its law”.^f

- There were 4.2 million stateless persons in 2019.^g
- Two international treaties specifically address stateless persons: the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). International human rights law and (where applicable) international refugee law also apply.

“**Internally displaced persons**” (IDPs) are people who have been “forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid, the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”.^h

- There were 45.7 million IDPs worldwide in 2019.ⁱ
- No international treaty specifically addresses IDPs, although there is an African Union convention on the subject.^j IDPs are governed by national law and protected by international human rights law and (in armed conflict) international humanitarian law. The United Nations Guiding Principles on Internal Displacement of 1998 are “soft law” standards that particularize how existing rules of international law apply in the specific context of IDPs.

^a Convention relating to the Status of Refugees (1951), article 1 A (2), United Nations, *Treaty Series*, vol. 189, No. 2545.

^b Office of the United Nations High Commissioner for Refugees (UNHCR), “Figures at a Glance”(2019) (www.unhcr.org/en-au/figures-at-a-glance.html).

^c Ibid.

^d International Organization for Migration (IOM), Glossary on Migration, International Migration Law No. 34 (2019), p. 132–133 and 223 (www.iom.int/glossary-migration-2019).

^e Migration Data Portal, “Data” (https://migrationdataportal.org/data?i=stock_abs_&t=2019).

^f Convention relating to the Status of Stateless Persons (1954), article 1, United Nations, *Treaty Series*, vol. 360, No. 5158.

^g UNHCR, “Global Trends: Forced Displacement in 2019”, p. 56 (www.unhcr.org/globaltrends2019).

^h United Nations, Office for the Coordination of Humanitarian Affairs (OCHA), Guiding Principles on Internal Displacement (1998), para. 2 (www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement).

ⁱ UNHCR, “Figures at a Glance” (2019) (www.unhcr.org/en-au/figures-at-a-glance.html).

^j African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention, 2009).

A. Relationship between terrorism, counter-terrorism and human mobility

Terrorism and counter-terrorism relate to displacement in a number of ways. **Firstly, terrorist violence has provoked large flows of persons seeking safety** across borders and mass internal

displacement, whether because of direct attacks on civilians, the collateral effects of armed conflict between governments and organized armed terrorist groups, counter-terrorism operations or the inability to meet basic humanitarian needs in conflict areas. Refugees, migrants and stateless persons living in or transiting through other countries (along with migrants) may, by chance, find themselves caught up in terrorist violence in such situations and may thus be revictimized.

Secondly, numerous counter-terrorism measures have an impact on refugees, asylum-seekers and migrants. These measures include more restrictive border controls (legal and physical) and interdiction (including unsafe “push backs”) at sea; increased detention of people who irregularly cross borders; unlawful return of refugees to locations where they may face persecution; increased sharing of personal information by authorities; accelerated procedures, with fewer safeguards, to return persons to their country of origin on security grounds, including to volatile security and humanitarian situations; and a reduced commitment to the resettlement of refugees. Security measures at the national level can also impact on the human rights of internally displaced (see section F) and stateless persons (section E).

In this regard, UNHCR emphasizes that “refugees are themselves escaping persecution and violence, including terrorist acts”.² It has expressed concern that asylum seekers may be victimized by public prejudice and unduly restrictive legal or administrative measures, and that refugee protection may be eroded due to anxieties about terrorism.³ Such measures may be counterproductive because they compel people to move in even more irregular and dangerous ways, exposing them to risks of migrant smuggling and human trafficking crimes,⁴ whereas creating safe, regular pathways for people to move (including through greater international cooperation on the sharing of responsibility for refugees) can enhance the security of destination countries themselves.⁵

Thirdly, displaced persons or migrants may participate in terrorist acts or organizations, including where the causes of forced displacement or economic migration, and/or harsh experiences abroad, are conducive to violent extremism or terrorism. The number of such persons is, however, very small relative to the total number of displaced persons and migrants worldwide. As discussed throughout chapter II, both international refugee law and international human rights law effectively enable States to counter the security and criminal risks posed by such persons, including through effective, human rights-compliant border controls. In addition, providing adequate support to refugees in the community can prevent exclusion and marginalization that could be conducive to disempowerment, disenfranchisement, and in some extreme cases, radicalization.⁶

² UNHCR, “Addressing Security Concerns without Undermining Refugee Protection: UNHCR’s perspective” (Rev. 2), Geneva, 2015, para. 7 (<https://data2.unhcr.org/en/documents/details/44402>).

³ *Ibid.*, para. 6.

⁴ Open Briefing by Volker Türk, Assistant High Commissioner for Protection, Security Council Counter-Terrorism Committee, New York, 5 April 2017 (www.un.org/sc/ctc/news/document/united-nations-security-council-counter-terrorism-committee-new-york-5-april-2017-open-briefing-volker-turk-assistant-high-commissioner-protection-unhcr/).

⁵ *Ibid.*

⁶ *Ibid.*

ACTIVITY

- 1. In your country, has terrorism (at home or abroad) resulted in people being forcibly displaced from their homes, or into (voluntary) migration?
- 2. Have counter-terrorism measures in your country had any negative impacts on people forcibly displaced from their homes or on (voluntary) migrants?

B. Migrants

No treaty deals comprehensively with all categories of migration, although there are treaties that address certain aspects of migration, such as migrant workers (regular and irregular) and the smuggling of migrants. Under international law, States enjoy a wide discretion regarding the grounds on which to admit – or refuse to admit – non-citizens.⁷

National migration controls must, however, still comply with a state’s other international obligations, discussed in this chapter. These include controls with regard to the protection of refugees, non-return (*non-refoulement*) to a place of persecution or other serious human rights violations; due process in expulsion; safeguards against and during detention; and the protection of vulnerable groups (such as children, victims of trafficking, and migrant workers).

Beyond the minimum legal obligations, recent international policy agreements, including the New York Declaration for Refugees and Migrants of 2016 and the Global Compact for Safe, Orderly and Regular Migration of 2018, seek to strengthen “global governance” of all forms of migration⁸ by, for instance:

- Addressing drivers and structural factors (from poverty to conflict to climate change)⁹ behind migration;
- Protecting the safety, dignity and human rights of migrants;¹⁰
- Facilitating opportunities for safe, orderly and regular migration (including employment creation, labour mobility, circular migration, family reunification and educational opportunities);¹¹
- Encouraging cooperation on returns of irregular migrants.¹²

⁷ New York Declaration for Refugees and Migrants (2016), para 42; and Global Compact for Safe, Orderly and Regular Migration (2018) (A/CONF.231/3, annex, para. 15).

⁸ New York Declaration for Refugees and Migrants, para. 49.

⁹ *Ibid.*, para. 43; and Global Compact for Safe, Orderly and Regular Migration, paras. 12 and 18.

¹⁰ New York Declaration for Refugees and Migrants, para. 41.

¹¹ *Ibid.*, para. 57; and Global Compact for Safe, Orderly and Regular Migration, para. 21.

¹² New York Declaration for Refugees and Migrants, para. 58.

Migrant workers

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990¹³ addresses the human rights of migrant workers. The Convention has 55 States parties, most of which are migrant-sending countries rather than countries that receive migrants, where the rights of migrants may be most at risk. The Convention does not limit the freedom of States to decide who may be admitted and under what conditions, thus preserving their immigration policy and national security prerogatives.

The Convention applies to both regular/documented and irregular/undocumented migrants.¹⁴ Under both categories migrants enjoy a wide range of fundamental human rights protections (including civil and political rights, labour and other socioeconomic rights and the freedom to leave any State¹⁵ and to re-enter their own State). The Convention explicitly affirms that according human rights to irregular/undocumented migrants does not imply the regularization of their immigration status (article 35). Regular/documented migrant workers receive additional labour, social, security and immigration-related rights (articles 36–56). States also agree to cooperate to promote equitable, humane and lawful conditions in relation to international migration of workers and their families (articles 64–71).

Relevant to the criminal justice system (whether as victims or perpetrators of crime), all migrant workers have the following rights:

- Protection by law (article 9), equality before the law (article 18), recognition before the law (article 24), and the right to a fair trial (articles 18 and 19);
- Effective protection by the State against violence by public officials or private actors (article 16 (2)); freedom from torture or cruel, inhuman or degrading treatment or punishment (article 10); and freedom from slavery, servitude or forced or compulsory labour (article 11);
- Freedom from arbitrary or unlawful interference in privacy, family, home, correspondence or communications (article 14);
- Any verification by law enforcement of the identity of migrant workers and their families shall be done in accordance with procedures established by law (article 16 (3)); any confiscation or destruction of identity or migration documents must be authorized by law and recorded, and passports must never be destroyed (article 21);
- Liberty and security of person (article 16 (1)), judicial review of detention (article 16 (6) and (8)), consular assistance in detention (article 16 (7)), and humane conditions in detention (article 17);
- Migrant workers detained on immigration law grounds should be held separately from convicted persons or persons awaiting trial (article 17 (3));

¹³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations, *Treaty Series*, vol. 2220, No. 39481.

¹⁴ *Ibid.*, documented and irregular/undocumented migrants are defined in article 5 of the Convention.

¹⁵ Subject only to restrictions provided by law and that are necessary, inter alia, to protect “national security” or “public order” (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 8 (1)).

- Freedom from collective expulsion (article 22); individual expulsion decisions must be made by a competent authority in accordance with law, guaranteeing due process. A person subject to expulsion must also be informed of the right to consular or diplomatic protection and assistance and this must be facilitated (article 23).

Furthermore, in relation to irregular migrant workers, States must also cooperate to prevent and eliminate illegal or clandestine movements and employment of irregular migrants, including by sanctioning those who organize, operate or assist such movements, sanctioning those who use violence, threats or intimidation against irregular migrants, and sanctioning employers of irregular migrants (article 68). In addition, States, inter alia, consider the regularization of the situation of irregular migrant workers and work to ensure that irregular migrant working does not persist (article 69).

CROSS-REFERENCE Chapter V of the present module discusses the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime.

C. Refugees

As affirmed repeatedly by both the Security Council and the General Assembly, measures to counter terrorism, including by restricting the movement of refugees, must comply with international law, including human rights and refugee law. The right to “seek and to enjoy in other countries asylum from persecution” is enshrined in article 14 of the Universal Declaration of Human Rights (1948). The Convention relating to the Status of Refugees of 1951 and its Protocol of 1967, which extends the Convention geographically and temporally, are the core of the legal framework protecting refugees, complemented by regional treaties and declarations which address rights of refugees.¹⁶ Key principles of international refugee protection also form part of customary international law.

First and foremost, international refugee law guarantees that persons in need of international protection as refugees cannot be returned to a place of persecution (discussed in section D.2 below) and that persons seeking international protection are given access to fair and efficient procedures for the determination of their asylum claims. In addition, a State in which refugees are present must guarantee them an extensive range of fundamental rights under the Refugee Convention (including articles 3 and 4 and articles 12–30). The State of refuge thereby provides international protection to foreign nationals whose own States are unable or unwilling to protect them from harm.

¹⁶ See Organization of African Unity (OAU), Convention governing the specific aspects of refugee problems in Africa (1969) (United Nations, *Treaty Series*, vol. 1001, No. 1469) and the non-binding Cartagena Declaration on Refugees (1984).

1. Definition of a refugee

CONVENTION RELATING TO THE STATUS OF REFUGEES, ARTICLE 1 A(2)

A refugee is any person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it.”

From the above definition, the three key elements of refugee status are that a person:

- Is outside their country of nationality or, in the case of a stateless person, their country of habitual residence;
- Has a well-founded fear of persecution (in their country of nationality) for reasons of race, religion, nationality, membership of a particular social group, or political opinion;
- Is unable or unwilling to return to their country because they would be at risk there, and their home country denies protection or is unable to provide it, for example because of conflict, insecurity, or threats from non-State actors.

These elements are sometimes described as the “inclusion” criteria of the refugee definition. In addition, the Refugee Convention contains various “exclusion” grounds that disqualify individuals as refugees (see section 2 below) even if they satisfy the inclusion clauses. For example, persons who have participated in terrorist crimes may not be classified as refugees because, since their fear is “of legitimate prosecution as opposed to persecution”, they do not meet the inclusion criteria.¹⁷ Even if the inclusion criteria are met, the exclusion clauses may apply to deny refugee status.

(a) Well-founded fear of persecution

The concept of “persecution” is not defined in the Refugee Convention but implicitly includes threats to life or freedom, or other serious human rights violations, on one or more of the five listed grounds.¹⁸ Persecution can also be gender-related, for example in cases of rape and sexual violence, trafficking, forced marriage, forced abortion or sterilization and gendered punishments for transgressing social or religious mores.¹⁹

¹⁷ Ibid.

¹⁸ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva (reissued 2019), para. 51 (www.unhcr.org/en-us/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html).

¹⁹ UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002, paras. 9 and 13 (www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html); see also Andreas Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law) pp. 413 and 414.

A “fear of being persecuted” relates to a person’s subjective state of mind and must be reasonable or justified, based on the person’s background, identity, experience and beliefs.²⁰

A person’s fear is considered to be “well-founded” if it is supported by solid reasons and/or objective circumstances.²¹ Independent information about conditions in the person’s country of origin can assist in verifying whether such fear is well-founded. A person’s fear relates to a risk of future persecution. UNHCR suggests that for such fear to be considered “well-founded”, risk must be established to a reasonable degree.²²

(b) Agents of persecution and harm by non-State actors

Persecution commonly emanates from State authorities, given that States ordinarily control their own territory and populations and have the ability to protect or harm people.

Non-governmental actors can inflict intolerable harm, forcing people to move to find safety, including, for example:

- Non-State armed groups, such as de facto authorities controlling parts of the national territory and population, irregular or rebel forces, guerilla organizations, pro-government paramilitaries or terrorist groups;²³
- Segments of the population that target other segments, such as in situations where there is sectarian or communal violence (for example, violence based on religious or ethnic tensions);²⁴
- Private individuals that perpetrate domestic violence or serious discrimination based on sexual orientation, including cases where the State does not provide protection for reasons related to one or more grounds set out in the Refugee Convention of 1951 and impunity prevails.²⁵

In the above situations, non-State conduct will only amount to persecution in cases where it is condoned or tolerated by the State authorities, or the State is unable (because of the prevailing insecurity or a lack of capacity) or is unwilling to offer effective protection.²⁶

(c) Grounds of persecution

A person’s well-founded fear of persecution must be “for reasons of” one or more of the five grounds of the Convention. Such grounds, which may overlap, need not be the only reason that people leave their country of origin.²⁷ The relevant Convention ground may be a contributing factor to an individual’s fear, but it need not be the sole, or even dominant, cause.

²⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva (reissued 2019), paras. 37 and 41 (www.unhcr.org/en-us/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html).

²¹ *Ibid.*, para. 38.

²² *Ibid.*, para. 42.

²³ See UNHCR, “Agents of Persecution: UNHCR Position”, March 1995, paras. 4 and 5 (a category also described as “the local populace” or “sizeable fractions of the population”); see also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2019), para. 65.

²⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2019), para. 65.

²⁵ UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1 A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)* (HCR/GIP/02/01, para. 15).

²⁶ UNHCR, *Handbook and Guidelines* (reissued 2019), para. 65; see also UNHCR, “Agents of Persecution” (1995), para. 4.

²⁷ *Ibid.*, paras. 372 and 373.

FOCUS BOX THE FIVE GROUNDS OF PERSECUTION UNDER THE REFUGEE CONVENTION OF 1951

Race: “Race” extends to “all kinds of ethnic groups that are referred to as ‘races’ in common usage”, as well as social groups of common descent^a or cultural, linguistic and historical identities.^b

Religion: “Religion” refers to the major world religions as well as to newer or less well-known belief systems,^c covering religious beliefs (and lack of belief – atheism), identity and ways of life.^d

Nationality: “Nationality” is not confined to formal legal citizenship but can include membership of a political “nation” based on common ethnic, cultural, linguistic or historical ties (usually involving a minority group).^e

Membership of a particular social group: While this ground is undefined and ambiguous, in practice it has been applied to protect people of a similar background, habits or social or economic status.^f UNHCR interprets it as:

“... a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”^g

Examples include certain social classes, statuses or castes (such as “untouchables” or *dalits*), women at risk of gender-related violence and persons of a certain sexual orientation (as in the case of lesbian, gay, bisexual or transgender people).^h

Political opinion: Political opinion concerns views relating to the State, government, public affairs or policy.ⁱ Persecution may occur where a person’s actual or perceived political opinion is not tolerated by the authorities,^j or would not be tolerated if discovered. A person’s acts may also indicate their political opinion (for example, by refusing military service or joining a trade union).^k

^a UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), paras. 68–70.

^b Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law) p. 376.

^c *Ibid.*, p. 380.

^d UNHCR, *Guidelines on International Protection, Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (HCR/GIP/04/06, para. 5) (www.unhcr.org/en-us/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html).

^e UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), paras. 74–76; see also Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, p. 388.

^f UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), paras. 77–79.

^g UNHCR, *Guidelines on International Protection*, “Membership of a particular social group” within the context of article 1 A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, (HCR/GIP/02/02, para. 11).

^h Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, pp. 396–398 and 417–430; see also UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008 (www.unhcr.org/509136ca9.pdf).

ⁱ Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law), pp. 398 and 399.

^j UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), paras. 80–86.

^k Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law), p. 402.

(d) Other risks outside the protection of refugee status

Because, according to the above grounds, a refugee must face risk of persecution, other threats may not give rise to refugee status. Examples include persons fleeing natural or human disasters,²⁸ such as floods, famine, the impacts of climate change, or the generalized effects of armed conflict or other situations of violence or insecurity. Refugees are also distinguishable from economic migrants²⁹ who move to seek employment, better living standards or economic opportunities. A person can still, however, be classified as a refugee where any of these risks also involves persecution on grounds set out in the Convention, for example where a particular group is discriminated against by being denied humanitarian relief by a State during a disaster.³⁰

Fugitives from justice are not usually considered to be refugees: refugee status protects individuals against persecution but not legitimate prosecution. However, certain human rights violations in the administration of justice may involve persecution, as in cases where individuals or members of certain groups are targeted for discriminatory prosecutions, unfair trials or excessively harsh sentencing.³¹

2. Exclusion from refugee protection

Exclusion from international refugee protection means denial of refugee status to persons who would otherwise meet the inclusion criteria under the definition of a refugee (discussed above), but who are not eligible for protection under the Convention for certain reasons.³²

In relation to terrorism, the most relevant exclusion grounds are in article 1 F of the Convention (discussed below), which deems persons undeserving of international protection if there are serious reasons for considering that they have committed: (a) an international crime; (b) a serious non-political crime; or (c) acts contrary to the purposes and principles of the United Nations.

A person excluded from refugee status may still be separately protected under international human rights law against return to a country where they may face other serious human rights harms (see section D.6 below).

²⁸ UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), para. 39.

²⁹ *Ibid.*, paras. 62–64.

³⁰ For refugee status in the context of the effects of climate change, see UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, October 2020.

³¹ UNHCR, *Handbook on Procedures and Criteria* (reissued 2019), para. 57.

³² See 1951 Convention relating to the Status of Refugees, articles 1 D (1) (already protected by a United Nations agency in addition to UNHCR), article 1 E (nationality-equivalent protection in another State), and article 1 F (discussed in the present section).

(a) Exclusion of persons involved in terrorism

The international community has long been concerned with the prevention of the abuse of refugee status by terrorists in order to escape accountability for international crimes or other serious crimes. In its Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly in 1994, the Assembly urged States to: (a) refrain from granting asylum to terrorists; and (b) prevent the abuse of refugee status by individuals involved in terrorist activity.³³ A further Declaration of the General Assembly adopted in 1996 provided that States should consider whether an asylum seeker was subject to investigation for, charged with, or convicted of, “offences connected with terrorism”.³⁴

In its resolution 1269 (1999), the Security Council called on States to deny safe haven to those who plan, finance or commit terrorist acts (by apprehending, prosecuting or extraditing them) and to refrain from granting refugee status to terrorists.³⁵ Similarly, the Council, in its resolution 1373 (2001), also called on States to prevent the granting of refugee status to those who plan, facilitate or participate in terrorism and to ensure that refugee status “is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.³⁶

In making these recommendations, both the Security Council and the General Assembly also affirmed that States must comply with their obligations under international refugee law and human rights law.

The international counter-terrorism conventions do not expressly require States to deny refugee status to persons who commit offences under the conventions. Some of the conventions, such as the Terrorist Bombings Convention of 1997 and the Terrorist Financing Convention of 1999, exclude such offences from the political offence exception in national extradition law³⁷ but are silent in relation to refugee status.³⁸

Terrorism is not listed as a separate ground of exclusion in the Refugee Convention and there is no legal basis for automatically excluding a person suspected of terrorism. Rather, such persons must be excluded from refugee protection only where their conduct falls within one or more of the three exclusion grounds under in article 1 F of the Convention, as discussed in the next section.

³³ General Assembly resolution 49/60, annex, Declaration on Measures to Eliminate International Terrorism, para. 5 (f); see also General Assembly resolution 51/210, annex, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, para. 3.

³⁴ General Assembly resolution 51/210, annex, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, para. 3.

³⁵ Security Council resolution 1269 (1999), para. 4.

³⁶ Security Council resolution 1373 (2001), paras 3. (f) and (g); see also Security Council resolution 1377 (2001), annex, in the attached declaration the Council also underlined the obligation of States to deny safe haven to terrorists.

³⁷ International Convention for the Suppression of Terrorist Bombings (1997), article 11, United Nations, *Treaty Series*, vol. 2149, No. 37517; see also International Convention for the Suppression of the Financing of Terrorism (1999), article 14 (General Assembly resolution 54/109).

³⁸ Draft article 7 of the United Nations draft comprehensive terrorism convention (A/C.6/55/1) proposes that States be required to ensure “that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed” a terrorist offence.

(b) Article 1 F of the Refugee Convention: grounds for exclusion related to serious crimes or security risks

FOCUS BOX REFUGEE CONVENTION, ARTICLE 1 F

It is stipulated that the provisions of the Convention shall not apply to any persons with respect to whom there are serious reasons for considering that:

- (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) They have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

UNHCR has noted that “acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though article 1 F is not to be equated with a simple anti-terrorism provision”.³⁹ Exclusion must be based on individual responsibility and be determined on a case by case basis, according to the criteria in article 1 F, not by automatic exclusion.

Given the potentially severe consequences of exclusion from refugee status, UNHCR has cautioned against overly broad interpretations of the exclusion clauses and emphasized that they should be applied in a restrictive manner.⁴⁰ In the same vein, the United Nations Special Rapporteur on human rights and counter-terrorism has expressed concern about overly broad definitions of “terrorist acts”:

“In the absence of a universally agreed definition of terrorist acts, some States have included in their national counter-terrorism legislation a broad range of acts which do not, in terms of severity, purpose or aim, reach the threshold of objectively being considered terrorist acts, or the threshold required for exclusion from refugee status. Such broad definitions have in many instances been used to suppress legitimate activities which fall within the ambit of the freedom of opinion, expression or association....”⁴¹

³⁹ UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, para. 25) (www.unhcr.org/en-us/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html).

⁴⁰ *Ibid.*, para. 2.

⁴¹ Report of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/62/263, para. 66).

Standard of proof

The threshold for excluding a person from refugee status under article 1 F is that there are “serious reasons for considering” that the person has “committed” or is “guilty” of the excludable conduct. This could be met where a person has already been convicted by a court after a fair trial. However, the application of article 1 F does not require a conviction, a trial or evidence meeting the criminal standard of proof (“beyond reasonable doubt”).

The threshold is nonetheless higher than a “reasonable suspicion” or even the “balance of probabilities”.⁴² Clear and credible evidence is required in order to give rise to substantial suspicion that the person has “committed”, or has been guilty of, the excludable conduct.⁴³ This requires a determination that the person concerned incurred individual liability, be it as a perpetrator of acts within the scope of article 1 F or through his or her participation in the commission of these acts by another person.⁴⁴ As discussed further below, mere membership of a group engaged in excludable crimes is not sufficient to automatically exclude an individual.

In the case of children, exclusion clauses should only apply if children have reached the age of criminal responsibility under national law.⁴⁵ Even then, or in cases where no minimum age has been established, they should be applied cautiously in the light of the maturity and mental capacity of the child. It is also relevant to ascertain whether a child was: coerced to participate in a crime; involuntarily intoxicated; traumatized; or limited in education.

Article 1 F(a): international crimes

Under article 1 F(a), exclusion is required where there are serious reasons for considering that a person has committed a crime against peace, a war crime or a crime against humanity,⁴⁶ or has participated in the commission of such crimes by others. Some terrorist acts may constitute international crimes if the elements of those crimes are met (see chapter VI of the present module).

Offences under the international counter-terrorism conventions are not in and of themselves excludable, unless the conduct separately qualifies as a war crime or crime against humanity.

⁴² UNHCR, “Addressing Security Concerns without Undermining Refugee Protection: UNHCR’s perspective”, (Rev. 2), para. 23; see also Andreas Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law), pp. 592 and 593.

⁴³ Andreas Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford Commentaries on International Law), p. 593.

⁴⁴ UNHCR, “Addressing Security Concerns without Undermining Refugee Protection: UNHCR’s perspective”, (Rev. 2), para. 23.

⁴⁵ UNHCR, Background Note on the Application of the Exclusion Clauses, Article 1F of the 1951 Convention relating to the Status of Refugees, September 2003, paras. 91 and 92.

⁴⁶ See UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, paras. 10–13); see also Jelena Pejic, “Article 1F(a): The Notion of International Crimes”, *International Journal of Refugee Law*, vol. 11.

CASE STUDY (JS (SRI LANKA)) V. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2011] 1 AC 184^a

In this case the Supreme Court of the United Kingdom found that mere membership in the Liberation Tigers of Tamil Eelam (LTTE) and its intelligence division was not sufficient to establish serious reasons for considering that a person had committed a war crime. The Court held that “one needs... to concentrate on the actual role played by the particular persons, taking all material aspects of that role into account so as to decide whether the required degree of participation is established”. The Court identified a non-exhaustive list of relevant factors to consider in making this assessment:

- (a) The nature and (potentially of some importance) the size of the organization and particularly that part of it with which the asylum-seeker was himself most directly concerned;
- (b) Whether and, if so, by whom the organization was proscribed;
- (c) How the asylum-seeker came to be recruited;
- (d) The length of time he remained in the organization and what, if any, opportunities he had to leave it;
- (e) His position, rank, standing and influence in the organization;
- (f) His knowledge of the organization’s war crimes activities;
- (g) His own personal involvement and role in the organization, including, in particular, whatever contribution he made towards the commission of war crimes.

^a *R (on the application JS (Sri Lanka)) v. Secretary of State for the Home Department* [2010] 1 AC 184 (<https://app.justis.com/case/r-js-sri-lanka-v-secretary-of-state-for-the-home-department/overview/c5eJn5mdn0Wca>); see also *Ezokola v. Canada (Citizenship and Immigration)* [2013] (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13184/index.do>) citing Security Council resolution 678 (1990) (complicity in an international crime requires a voluntary, significant and knowing contribution to an organization’s crime or criminal purpose, thereby excluding rank-based complicity by association or passive acquiescence).

Article 1 F(b): serious non-political crimes

Under article 1 F(b), refugee status shall not be granted to a person if there are “serious reasons” for considering that “he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”.⁴⁷

“Serious” and “non-political” crimes are not defined and national practice varies.⁴⁸ Because of this vagueness, coupled with the humanitarian purpose of refugee status, UNHCR notes that this ground of exclusion should be applied cautiously,⁴⁹ taking into account whether most jurisdictions would consider is a serious crime (such as murder, rape or armed robbery).⁵⁰

⁴⁷ See Kälin, W., and Künzli, J., “Article 1 F(b): Freedom Fighters, Terrorists and the Notion of Serious Political Crimes”, *International Journal of Refugee Law*, vol.12, Issue suppl. 1, 12 July 2000.

⁴⁸ UNHCR, Background Note on the Application of the Exclusion Clauses, para. 41.

⁴⁹ UNHCR, Handbook on Procedures and Criteria (reissued 2019), para. 179.

⁵⁰ UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para.14).

Most terrorist acts of violence constitute serious non-political crimes because they are disproportionate, atrocious and inconsistent with human rights.⁵¹ Another relevant, but not decisive, factor is whether a crime is designated under international counter-terrorism conventions as non-political for extradition purposes⁵² (for example, the Terrorist Bombings Convention). However, offenders are not expressly excluded from refugee status under the conventions.

UNHCR has cautioned that terrorist acts are not automatically excludable under article 1 F(b), but only where an act is a “serious non-political crime” under the circumstances.⁵³ Even in cases where a person appears on a national or international list of suspected terrorists or their associates, a separate assessment of the individual’s conduct is still necessary.⁵⁴

Excludable terrorist acts should be distinguished from military attacks by non-State armed groups on military targets during non-international armed conflict. Such conduct is already regulated under international humanitarian law (IHL).

Article 1 F(c): acts contrary to the purposes and principles of the United Nations

Under article 1(F)(c), refugee status cannot be granted to persons if there are “serious reasons” for considering that they have “been guilty of acts contrary to the purposes and principles of the United Nations”.⁵⁵ The purposes and principles of the United Nations, which are outlined in articles 1 and 2 of the Charter of the United Nations, include the maintenance of international peace and security, friendly inter-State relations and cooperation and the non-use of force.

Owing to the breadth of these goals, UNHCR has noted that article 1 F(c) “is only triggered in extreme circumstances by [international] activity which attacks the very basis of the international community’s coexistence”.⁵⁶ Article 1 F(c) should accordingly be interpreted narrowly, particularly since article 1 F(a) and (b) already cover much of the relevant conduct.⁵⁷ It could cover, for instance, threats to international security or serious and sustained violations of human rights by State or de facto State authorities.⁵⁸

Since 2001, the Security Council has repeatedly identified terrorism, including financing, planning and inciting terrorist acts,⁵⁹ as contrary to the purposes and principles of the United Nations.⁶⁰ In addition, in its resolution 1624 (2005), the Council stated that persons suspected of terrorist acts, being contrary to the purposes and principles of the United Nations, shall not enjoy the protection of refugee status.⁶¹

⁵¹ Ibid., paras. 15 and 26; UNHCR, Background Note on the Application of the Exclusion Clauses, para. 81.

⁵² UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para. 15); see also UNHCR, Background Note on the Application of the Exclusion Clauses, para. 81.

⁵³ UNHCR, Guidelines on International Protection, (HCR/GIP/03/05, para. 26); UNHCR, Background Note on the Application of the Exclusion Clauses, para. 81.

⁵⁴ UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para. 26).

⁵⁵ See E. Kwakwa, E., “Article 1 F(c): Acts Contrary to the Purposes and Principles of the United Nations” *International Journal of Refugee Law*, vol. 12, Issue suppl.1, 12 July 2000.

⁵⁶ UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para. 17).

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Security Council resolution 1624 (2005), preamble.

⁶⁰ Security Council resolutions 1373 (2001) para. 5; 1269 (1999) para. 3; 1377 (2001), annexed declaration; and 1624 (2005), preamble.

⁶¹ Ibid.

UNHCR cautions that the labelling of an act as “terrorist” does not automatically exclude a person under article 1 F(c) of the Refugee Convention, “not least because ‘terrorism’ is without clear or universally agreed definition”.⁶² UNHCR also notes that Security Council resolution 1624 (2005) contains an express reference to the obligations of States under international refugee law.⁶³ An individual assessment must still be made as to “the extent to which the act impinges on the international plane – in terms of its gravity, international impact and implications for international peace and security”.⁶⁴ Lesser terrorist acts, such as minor domestic terrorism or minor preparatory acts not involving violence, may thus not warrant exclusion.

FOCUS BOX SOME CASES CONSIDERING EXCLUSION UNDER ARTICLE 1 F(C) OF THE CONVENTION ON THE STATUS OF REFUGEES (1951)

1. Two Indian citizens living in the United Kingdom were excluded under article 1 F(c) for being involved in supporting and organizing terrorist activities in India and associating with Sikh extremist groups in the United Kingdom in an attempt to violently create an independent Sikh homeland in Khalistan, India.^a

2. Insurgent military operations against the International Security Assistance Force in Afghanistan (ISAF), which was authorized by the Security Council, were found to be excludable acts contrary to the purposes and principles of the United Nations under article 1 F(c).^b

^a *Singh v. Secretary of State for the Home Department* [1993] Imm AR 76.

^b *Al-Sirri v. Secretary of State for the Home Department* [2013] 1 AC 745.

Article 1 F and participation in terrorist organizations

Individuals may contribute to the activities of a terrorist organization without personally being directly involved in violent acts. A terrorist group may be supported, inter alia, by recruiters, propagandists, financiers, suppliers (of weapons, equipment, accommodation or services), logisticians and spiritual leaders. The question arises as to what kinds of involvement in terrorist groups are sufficient to justify exclusion under article 1F.

The Grand Chamber of the Court of Justice of the European Union⁶⁵ has held that the listing of a terrorist organization “cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status” (para. 91). Furthermore, the Court found that participation in the activities of a terrorist group does not “necessarily and automatically” come within the grounds of exclusion (para. 92). Rather:

“the exclusion from refugee status of a person who has been a member of an organization which uses terrorist methods is conditional on an individual assessment of the specific facts,

⁶² UNHCR, Background Note on the Application of the Exclusion Clauses, para. 49; see also UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para. 17).

⁶³ UNHCR, Note on the Impact of Security Council resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention Relating to the Status of Refugees, 9 December 2005, paras. 3 and 4.

⁶⁴ *Ibid.*

⁶⁵ *Bundesrepublik Deutschland v. B and D* (joined cases C-57/09 and C-101/09), Grand Chamber of the Court of Justice of the European Union (CJEU), 9 November 2010, paras. 91–94 (<https://fra.europa.eu/en/caselaw-reference/cjeu-joined-cases-c-5709-and-c-10109-judgment>).

making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organization, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way..." (para. 94)

The factors to be taken into account include "the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct" (para. 97).

UNHCR also takes the position that mere association with a listed terrorist organization is not sufficient to warrant automatic exclusion.⁶⁶ However, voluntary membership of violent extremist groups, including listed organizations, gives rise to a rebuttable presumption that the person has contributed to the group's acts of violence.⁶⁷

FOCUS BOX ARTICLE 1 F(C) AND PARTICIPATION IN TERRORIST ORGANIZATIONS – EXAMPLES

1. A Moroccan national was convicted participating in the activities of the Belgian cell of a terrorist organization, the Moroccan Islamic Combatant Group. He was a member of the cell's leadership and provided logistical support, including false travel documents. He was excluded from refugee status under article 1 F(c). A Belgian appeals court found that he was not excludable because he had not participated in a terrorist act.^a The Court of Justice of the European Union found that:

- (a) Exclusion is not limited to participation in terrorist acts but extends to supporting activities such as recruitment, organization, transport and equipping of others to travel abroad to commit or participate in terrorist acts;
- (b) It is relevant that the organization is listed as a terrorist entity by the Security Council;
- (c) It is particularly relevant that a person has been finally convicted by a court of an offence such as participation in the activities of a terrorist organization.^b

2. A Syrian Kurd, who was aware of the nature of the activities of the Kurdistan Workers' Party (PKK), was initially excluded from refugee status for nursing wounded members of the group and for providing other non-military support for the organization's infrastructure. An appeals court in the United Kingdom appeals found that such conduct did not involve acts contrary to the purposes and principles of the United Nations.^c

^a Conseil du Contentieux des Etrangers, 13 January 2011, No. 54.335 (Belgium) (www.refworld.org/topic,50ffbce484,50ffbce48a,,0,BEL_CCE,,.html).

^b *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, European Court of Justice (Grand Chamber) Judgment, Case C573/14, 31 January 2017, paras. 66–79 (<https://curia.europa.eu/juris/liste.jsf?num=C-573/14>).

^c *MH (Syria) v. Secretary of State for the Home Department* [2009] EWCA Civ 226 (www.refworld.org/cases,GBR_CA_CIV,49ca60ae2.html).

⁶⁶ UNHCR, Background Note on the Application of the Exclusion Clauses, paras. 59 and 62.

⁶⁷ *Ibid.*, para. 60; see also UNHCR, Guidelines on International Protection (HCR/GIP/03/05, para. 26); see also *Bundesrepublik Deutschland v. B and D*, para. 98.

3. Mass influx situations

(a) Exclusion

Where refugee status is recognized on a *prima facie* (rather than individual) basis for persons falling within a particular group, notably as in mass influx situations, it is still necessary to consider exclusion if there are indications of possible involvement in acts under article 1 F of the Refugee Convention of 1951 – for example in cases where *former* combatants committed war crimes or other international crimes prior to laying down their arms and seeking refugee protection.

(b) Ineligibility of combatants for refugee protection

On the other hand, *active* combatants must not be included in a *prima facie* recognition of refugee status in the first place, as their involvement in armed or military activities is incompatible with the civilian and humanitarian character of asylum, which host States are obliged to guarantee.⁶⁸ In such instances, it is unnecessary to also consider exclusion.

UNHCR recommends that States should identify, disarm, separate and intern combatants as early as possible, including through screening at the point of arrival.⁶⁹ In addition, host States should locate refugee camps away from the border, maintain law, order and security within camps, prevent the flow of weapons into camps, and prevent military recruitment in camps.⁷⁰

Family members of combatants should, however, be treated as refugees. Former combatants who have genuinely and permanently renounced military activities may also be entitled to refugee status, where there are no grounds for excluding them, upon an individual determination in a fair procedure.⁷¹ Former child soldiers should enjoy special protection, assistance and rehabilitation.

TOOLS

UNHCR, *Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees*, September 2003 (www.unhcr.org/en-us/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html).

UNHCR, *Background Note on the Application of the Exclusion Clauses, Article 1 F of the 1951 Convention relating to the Status of Refugees*, September 2003 (www.un.org/sc/ctc/news/document/unhcr-background-note-on-the-application-of-the-exclusion-clauses-article-1f-of-the-1951-convention-relating-to-the-status-of-refugees/); and UNHCR, *Guidance Note on Maintaining the Civilian and Humanitarian Character of Asylum*, December 2018 (<https://emergency.unhcr.org/entry/44590/civilian-and-humanitarian-character-of-asylum>).

⁶⁸ UNHCR, *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees* (2006), para. 10; see also Executive Committee, Conclusion No. 94 (LIII), 2002, on the Civilian and Humanitarian Character of Asylum paras. (a)–(b).

⁶⁹ For specific measures see UNHCR, *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1 F (2006)*, para. (c); see also UNHCR, *Guidance Note on Maintaining the Civilian and Humanitarian Character of Asylum*, December 2018, part 5.

⁷⁰ UNHCR, *Guidance Note on Maintaining the Civilian and Humanitarian Character of Asylum*, paras. (c) and (e) (<https://emergency.unhcr.org/entry/44590/civilian-and-humanitarian-character-of-asylum>).

⁷¹ *Ibid.*, UNHCR, *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1 F (2006)*, para. 10.

4. Refugee status determination

Refugee status determination (RSD) is the legal or administrative process by which Governments or UNHCR determine whether a person is legally considered a refugee. While States have the primary responsibility to conduct RSD, UNHCR may determine such status if a State is not a party to the 1951 Refugee Convention and/or does not have a fair and efficient national asylum procedure in place.⁷²

While the Refugee Convention itself does not specify determination procedures, fair and efficient procedures are an essential element in the full application of the Convention.⁷³ UNHCR has developed “good practice” guidance for States (see “Tools” box below).

The determination as to whether or not a person seeking international protection meets the refugee definition must be made on an individual basis. In emergency or “mass influx” situations, however, individual decision-making may not be immediately feasible and, exceptionally, all members of large groups may be prima facie considered refugees.⁷⁴ Refugee status cannot, however, be denied on a collective basis. Such situations could include persons fleeing international crimes, serious human rights violations, or adverse effects of armed conflict, particularly (but not only) where such persons are targeted for persecution on grounds of the Convention. Some regional organizations (such as the African Union and the Organization of American States (OAS)) do, however, support extending protection to such wider categories of persons,⁷⁵ irrespective of persecution.

TOOLS

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva (reissued 2019) (www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html).

UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1 A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, May 2002 (www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html).

⁷² UNHCR, *Refugee Status Determination* (www.unhcr.org/refugee-status-determination.html).

⁷³ UNHCR, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, para. 4.

⁷⁴ UNHCR *Handbook and Guidelines* (2011), para. 44; UNHCR, *Agents of Persecution* (1995), para. 8; and UNHCR, *Guidelines on International Protection No. 11, Prima Facie Recognition of Refugee Status (HCR/GIP/15/11)* (www.unhcr.org/en-us/publications/legal/558a62299/guidelines-international-protection-11-prima-facie-recognition-refugee.html).

⁷⁵ See the OAU Convention governing the specific aspects of refugee problems in Africa (1969), article 2(3) (covering refugees as well as persons seeking refuge from external aggression, occupation, foreign domination or events seriously disturbing public order) and the non-binding Cartagena Declaration on Refugees (1984), article 3 (covering people fleeing from generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order).

UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, June 2015 (www.unhcr.org/en-us/publications/legal/558a62299/guidelines-international-protection-11-prima-facie-recognition-refugee.html).

UNHCR, Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1 A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions, December 2016 (www.unhcr.org/en-us/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html).

UNHCR, Legal Considerations regarding Claims for International Protection made in the Context of the Adverse Effects of Climate Change and Disasters, October 2020 (see: www.unhcr.org/en-us/climate-change-and-disasters.html).

D. Arrival, reception and removal of migrants and refugees

In many cases, migrants and refugees are authorized to migrate to other countries in advance, for instance, through the issuance by national Governments of work visas, or in cases where refugees are being resettled through a UNHCR or related process from a refugee camp. Issues of international law may still arise, however, if countries subsequently wish to expel such persons for various reasons, including involvement in crime or terrorism.

When migrants or refugees arrive irregularly in a country – i.e., without advance authorization – further legal issues arise concerning whether they can, for instance, be rejected at the border, detained, or later be expelled. A number of key international legal principles are relevant, particularly in relation to international counter-terrorism obligations, the principle of *non-refoulement*, restrictions on expulsion, and safeguards concerning detention. Each of these principles is discussed below.

1. Protection-sensitive border management

As mentioned above, States have a general right to control their borders and border management procedures and systems play an important role in this regard. Border management is also important for reasons pertaining to international law:

- From a security standpoint, international law requires States to take certain border-related measures to prevent the movement of persons involved in terrorism (discussed below).
- From a refugee and human rights law perspective, international law requires States to guarantee certain protections.

FOCUS BOX NON-BINDING STANDARDS AFFIRMING THE IMPORTANCE OF BORDER MANAGEMENT

The General Assembly, in its New York Declaration for Refugees and Migrants of 2016, recognized that “States have rights and responsibilities to manage and control their borders”, including to ensure security and counter-terrorism (as well as to counter human trafficking and migrant smuggling), and that border control procedures must be implemented “in conformity with applicable obligations under international law, including international human rights law and international refugee law”.^a

The United Nations Global Compact for Safe, Orderly and Regular Migration of 2018 committed States to: manage national borders in an integrated, secure and coordinated manner; ensure security for States, communities and migrants; facilitate safe and regular cross-border movements; and prevent irregular migration (Objective 11); and to increase legal certainty and predictability of migration procedures for appropriate screening, assessment and referral, in accordance with international law (Objective 12).

^a General Assembly resolution 71/1, para. 24.

All of these international obligations necessarily require effective border control procedures: (a) to identify persons in need of protection or involved in terrorism, respectively; and (b) to refer them to the appropriate channels. “Protection-sensitive” border management systems can ensure that security and human rights goals are complementary and mutually reinforcing.⁷⁶

UNHCR, the lead international agency with a mandate to protect refugees, has long advocated that States establish proper systems for the reception and screening of new arrivals, including to prevent infiltration by terrorists,⁷⁷ including:

- (a) Proper registration, including biometrics, by border authorities who are trained on security, refugee law and human rights;
- (b) Referral of those who claim protection to fair and efficient asylum procedures; and
- (c) Identification of victims of human trafficking or at risk of being trafficked to ensure that they have access to safety, protection, and support.⁷⁸

2. International counter-terrorism obligations concerning the cross-border movement of people

International counter-terrorism law imposes a number of specific obligations on States concerning the cross-border movement of people. Most directly, the Security Council, in its resolution 1373 (2001), required all States to:

⁷⁶ See UNHCR, “Addressing Security Concerns without Undermining Refugee Protection: UNHCR Perspective” (2015).

⁷⁷ Open Briefing by Volker Türk, Assistant High Commissioner for Protection, Security Council Counter-Terrorism Committee New York, 5 April 2017; see also OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf).

⁷⁸ Open Briefing by Volker Türk, 5 April 2017.

- Prevent the movement (inbound or outbound) of persons involved in terrorist acts through controls on borders; controls on the issuance of identity and travel documentation; and measures to prevent the counterfeiting, forgery or fraudulent use of such documents (para. 2 (g));
- Deny safe haven to such persons (para. 2 (c));
- Prevent the use of their territory for the preparation of terrorists acts abroad (para. 2 (d)).

Where such persons are detected by border control authorities, States must “extradite or prosecute” persons suspected of involvement in international counter-terrorism convention offences, “terrorist acts” or international crimes such as war crimes or torture.

All counter-terrorism measures, including those relating to border management, must comply with a State’s international law obligations, including international human rights law, international refugee law, and international humanitarian law.⁷⁹

3. Foreign terrorist fighters

In recent years, the United Nations, regional organizations and Member States have identified individuals who cross borders to join terrorist groups and who may subsequently seek to return to their countries of origin, or to relocate to third countries, as a grave threat to international peace and security: to address this situation, States have been required to take extensive measures to stop the movement of “foreign terrorist fighters” (“FTF”). In its resolution 2178 (2014), the Security Council defined FTFs as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.⁸⁰

Under Security Council resolution 2178 (2014), all States must:

- “Prevent and suppress” the “transport” (and various kinds of facilitation) of individuals for the purpose of involvement in terrorist acts in a State other than their State of nationality or residence (para. 5);
- Criminalize such “travel” and support for it (para. 6);
- “Prevent the entry into or transit through their territories” of suspected foreign terrorist fighters (not including the State’s own nationals or permanent residents) (para. 8).

Under Council resolution 2396 (2017) States are required to take further specific measures to stop such travel, including by:

- Requiring airlines to provide advance passenger information (API) to detect foreign terrorist fighters (para. 11);
- Collecting, analysing and sharing passenger name record (PNR) data to detect and prevent the travel of foreign terrorist fighters (para. 12);

⁷⁹ Security Council resolution 2396 (2017).

⁸⁰ Security Council resolution 2178 (2014), eighth preambular paragraph.

- Developing watch lists or databases of foreign terrorist fighters (para. 13);
- Collecting biometric data to identify foreign terrorist fighters (para. 15).

All of the above measures must comply with international law, including refugee law and human rights law, as discussed below. For example, as the Security Council acknowledges, States cannot prohibit the return of their own nationals even if they are involved in terrorism abroad or are family members who accompanied a national involved in terrorism abroad.

In another example, in relation to the various data-related measures under Security Council resolution 2396 (2017), the 2018 Addendum to the Madrid Guiding Principles (non-binding international “best practice” guidelines) recommends measures to avoid arbitrary or unlawful interferences in privacy, such as through:

- Clear legislation/regulations and appropriate criteria;
- Non-discriminatory profiling;
- Precautions against misuse or abuse of data (such as unauthorized access, identity theft, and deletion and replacement of or deliberate damage to data), the use of data protection officers and data risk assessments;
- Protecting children’s rights;
- Effective oversight and safeguards and judicial redress for breaches.⁸¹

FOCUS BOX FAMILY MEMBERS OF FOREIGN TERRORIST FIGHTERS

Foreign terrorist fighters may be travelling with family members they brought with them to conflict zones, with families they have formed or family members who were born while in conflict zones. The Security Council has called on Member States to distinguish the accompanying family members from the individuals whom they have reasonable grounds to believe are foreign terrorist fighters and has stressed “that children need to be treated in a manner that observes their rights and respects their dignity, in accordance with applicable international law”.^a

^a Security Council resolution 2396 (2017), para. 4.

⁸¹ Addendum to the Madrid Guiding Principles (S/2018/1177, annex, paras. 7, 8, 11 and 15–17).

TOOLS

Office of the United Nations High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights at International Borders* (www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf).

Counter-Terrorism Implementation Task Force (CTITF), *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters* (www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf).

Security Council Counter-Terrorism Committee, *Guiding Principles on Foreign Terrorist Fighters: the 2015 Madrid Guiding Principles (S/2015/939, annex II) and the 2018 addendum (S/2018/1177, annex)*.

United Nations Key Principles for the Protection, Repatriation, Prosecution, Rehabilitation and Reintegration of Women and Children with Links to United Nations Listed Terrorist Groups (April 2019) (www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/key_principles-april_2019.pdf).

4. *Non-refoulement* under international refugee law

Non-refoulement is “the cornerstone of asylum and of international refugee law.”⁸² The term comes from the French “refouler”, which can be translated as “pushing back” or “turning back” a person. Article 33 (1) of the 1951 Convention Relating to the Status of Refugees provides that no State Party shall expel or return “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” UNHCR explains the purpose of *non-refoulement* as follows:

“[f]ollowing from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”⁸³

There are a number of important elements of the principle of *non-refoulement* as provided for in article 33 (1) of the 1951 Convention:

- It applies to both refugees and asylum seekers (for the latter, for the entire duration of the examination of their asylum claim);

⁸² UNHCR, UNHCR Note on the Principle of *Non-Refoulement*, November 1997 (www.refworld.org/docid/438c6d972.html).

⁸³ *Ibid.*

- It applies wherever a State acts, such as within its territory, at its borders, or abroad where it exercises jurisdiction (such as through naval interception on the high seas);⁸⁴
- It applies to returns to any country where there is a risk of persecution, whether a country of origin, transit or nationality, or to some other country (such as a country requesting extradition);
- It also prohibits a State from returning a person to a second State, which itself is safe, if there is a risk that it would transfer the person to a third State where there is a risk of persecution (“*chain refoulement*”);
- It covers all forms of return or transfer (“in any manner whatsoever”), including through immigration processes (such as deportation or expulsion), criminal justice related measures (such as extradition⁸⁵ or transfer of prisoners), military transfers of custody, informal transfers (such as ‘rendition’), and non-admission at the border in certain circumstances.⁸⁶

While the principle of *non-refoulement* does not mean that a person must be granted asylum to remain permanently in a particular state, it prevents the person’s removal to any country where the person is at risk.

Exceptions to *non-refoulement*: article 33 (2) of the Refugee Convention of 1951

Under article 33 (2) of the 1951 Refugee Convention, the benefits of *non-refoulement* protection under article 33 (1) “may not... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

These exceptions to the principle of *non-refoulement* under international refugee law are distinct from the exclusion clauses under article 1 F:

- Article 1 F focuses on past conduct outside the country of refuge and precludes the grant of refugee status because a person is considered undeserving of international refugee protection. It also ensures that refugee protection does not impede accountability for serious crimes, for instance through extradition to another country, or prosecution in the country in which the person is present.
- Article 33 (2) focuses instead on the present or future risk presented by a person who is already a refugee and aims to protect the country of refuge from a threat to its security or a danger to its community.⁸⁷

In the exceptional circumstances provided for in article 33 (2), international refugee law thus permits dangerous refugees to be returned to a place of persecution. Because of its potentially grave consequences, it must be stringently interpreted. As discussed in the next section,

⁸⁴ Ibid.

⁸⁵ UNHCR, “Addressing Security Concerns without Undermining Refugee Protection: UNHCR Perspective”, (Rev. 2) para. 30; see also UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2008.

⁸⁶ UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 7 (www.refworld.org/docid/45f17a1a4.html).

⁸⁷ UNHCR, “Addressing Security Concerns without Undermining Refugee Protection” (Rev. 2), paras. 28 and 29.

however, article 33(2) does not release States from their *non-refoulement* obligations under international human rights law, which absolutely preclude return to torture or cruel, inhuman or degrading treatment or the arbitrary deprivation of life.

Article 33(2) imposes a high threshold of very serious danger, rather than lesser threats, which target either national security or the “community” (namely, the safety and well-being of the population as a whole).⁸⁸ Such acts could include (depending on the circumstances) espionage, sabotage and terrorist acts targeting civilians.⁸⁹ Threats to the community must be substantiated by a criminal conviction *as well as* evidence that the person presents an ongoing risk.

While article 33(2) does not specify the applicable procedural guarantees, UNHCR recommends that the same standards should apply as those expressly mentioned in relation to expulsion under article 32⁹⁰ (discussed in the section D.4 below). These include a decision in accordance with due process of law and the rights to be heard, to appeal, and to seek legal admission to another country.

CASE STUDY IS THIS PERSON: (a) A REFUGEE; AND (b) ENTITLED TO NON-REFOULEMENT?

Billy was a member of the Blue Group, a politically-motivated organization engaged in attacks against security personnel and civilians in the country of Redland. The Blue Group claims that Redland is unlawfully occupying the Blue Territory, which was formerly an independent country.

Billy was recruited and indoctrinated into the Blue Group at the age of 13 years. She undertook training and missions for the group and possessed and transported weapons for it. At age 14, she was arrested by Redland soldiers at a checkpoint after a failed suicide bombing attempt. It was unknown whether her target might have been military or civilian, but the location of the planned attack was a checkpoint, where civilians gather and queue.

Billy was tortured and raped while kept in detention by the Redland anti-terrorism unit. After being released, she travelled to Green State, where she claimed refugee status, fearing that she would be regarded as a traitor and killed by members of Blue Group if she remained in Redland because of the information she had provided to the Redland authorities under torture. Rape victims and persons affiliated with Blue Group, are also often socially ostracized in Redland.

The Blue Group is proscribed as a terrorist organization under the laws of Green State. A few members of Blue Group are secretly active in Green State, providing support to the members of Blue Group in Redland, but Blue Group has not carried out any attacks in Green State. The age of criminal responsibility is 14 years in Redland.

⁸⁸ Lauterpacht, E. and Bethlehem, D., “The scope and content of the principle of *non-refoulement*: Opinion” in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), p. 87, paras. 169 and 192 (see www.unhcr.org/en-us/protection/globalconsult/4a1ba1aa6/refugee-protection-international-law.html).

⁸⁹ *Ibid.*, para. 171.

⁹⁰ UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2008, para. 15 (www.refworld.org/docid/481ec7d92.html).

Expulsion of lawfully resident refugees: article 32 of the Refugee Convention of 1951

Article 32 (1) of the Refugee Convention provides that a refugee lawfully present in a State's territory may be expelled only "on grounds of national security or public order". The main difference between article 32 and article 33 (2) is that article 32 is *not* an exception to *non-refoulement* and only permits expulsion to a State where the person in question is not at risk. Article 32 (2) also provides explicit due process guarantees:

"The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

In addition, a refugee subject to expulsion must be allowed a reasonable period within which to seek legal admission into another country (article 32 (3)).

5. *Non-refoulement* under human rights law

International human rights law provides protection beyond *non-refoulement* under refugee law in three ways. First, it protects a person even in cases where the exception to *non-refoulement* in article 33 (2) of the Refugee Convention applies. Secondly, it applies to all individuals, not only refugees or asylum seekers. Thirdly, human rights law extends *non-refoulement* beyond a well-founded fear of *persecution* when there is a real and foreseeable risk of other serious human rights violations, namely:

- Torture or cruel, inhuman or degrading treatment or punishment (International Covenant on Civil and Political Rights (ICCPR),⁹¹ article 7; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁹² article 3;
- Arbitrary deprivation of life (ICCPR, article 6), including the application of the death penalty to crimes which are not the "most serious";
- The death penalty, where the expelling state does not apply the death penalty or is a party to the Second Optional Protocol to ICCPR (which prohibits the death penalty);
- The flagrant denial of other fundamental human rights,⁹³ such as the right to a fair trial;⁹⁴ liberty;⁹⁵ or freedom of religion in exceptional cases.⁹⁶

⁹¹ General Assembly resolution 2200A (XXI), 1966.

⁹² United Nations, *Treaty Series*, vol. 1465, No. 24841.

⁹³ *A.R.J. v. Australia*, United Nations, Human Rights Committee, Communication No. 692/1996 (28 July 1997) (CCPR/C/60/D/692/1996, para. 6.9) (concerning ICCPR rights).

⁹⁴ *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, European Court of Human Rights (ECHR) Judgment (9 May 2012) (hudoc.echr.coe.int/fre#%22itemid%22:%22001-108629%22}).

⁹⁵ *Tomic v. United Kingdom*, Application No. 17837/03, ECHR Judgment (14 October 2003) (www.refworld.org/cases,ECHR,402b53f04.html).

⁹⁶ *Z and T v. United Kingdom*, Application No. 27034/05, ECHR Judgment (28 February 2006) (www.refworld.org/cases,ECHR,45ccab042.html).

Where these acts also involve persecution under the Convention, *non-refoulement* under refugee law will still apply, but as mentioned it is subject to the article 33(2) exception (unlike under human rights law).

The above risks can include those posed by non-State actors. For example, in one case the United Nations Human Rights Committee found that deporting an individual with no real connections to Somalia would violate freedom from torture or ill-treatment (ICCPR, article 7) and the right to life (article 6), in part because of his fear of forced recruitment by armed Islamist groups.⁹⁷

6. Relationship between refugee exclusion, *non-refoulement* and extradition law

Refugee law presents no barrier to extradition where a person is excluded from refugee status under article 1 F of the Refugee Convention, comes within the *non-refoulement* exception in article 33(2), or is subject to security expulsion under article 32. In all of these situations, however, complementary human rights protections may still apply to bar a person's return to torture, ill-treatment or arbitrary deprivation of life.

In cases in which a person qualifies for *non-refoulement* protection under international refugee law, according to UNHCR the “bars to the surrender of an individual under international refugee and human rights law prevail over any [conflicting] obligation to extradite”, including in the context of counter-terrorism.⁹⁸ In practice, asylum and extradition proceedings may be conducted in parallel by the respective decision makers,⁹⁹ with information from the latter informing the former (and vice versa).

Extradition law (in national law and treaties) may also preclude extradition in a range of circumstances, whether the wanted person is a refugee or asylum-seeker or not. These may include rules on specialty (ensuring prosecution only for the requested offence(s)), double criminality (requiring the conduct to be criminal in both jurisdictions), the political offence exception (involving similar considerations as in the interpretation of non-political crime under article 1 F(b) of the Refugee Convention, as discussed earlier), non-discrimination or fair trial protections (which may overlap with the grounds of the refugee claim), bars on the death penalty, restrictions on re-extradition (to a third State), and return to the requested state after the conclusion of foreign criminal process.¹⁰⁰

⁹⁷ *Jama Warsame v. Canada*, United Nations, Human Rights Council, Communication No. 1959/2010 (21 July 2011) (CCPR/C/102/D/1959/2010, para. 8.3).

⁹⁸ UNHCR, Guidance Note on Extradition and International Refugee Protection, Geneva, April 2008, paras. 21 and 23.

⁹⁹ UNHCR, “Addressing Security Concerns without Undermining Refugee Protection” (Rev. 2), paras. 31 and 32.

¹⁰⁰ UNHCR, Guidance Note on Extradition and International Refugee Protection (2008), para. 5.

However, neither refugee status nor human rights protection shields a person from criminal prosecution.¹⁰¹ Where the host State's *non-refoulement* obligations establish a bar to extradition, the person may still be liable to face justice in the country of refuge. Almost all of the international counter-terrorism instruments establish that, in such cases, the State refusing extradition is under an obligation to "submit the case without undue delay to its competent authorities for the purpose of prosecution" (see, for instance, article 8 of the 1997 Terrorist Bombing Convention). This is referred to as the "extradite or prosecute" principle. The principle also applies to certain international crimes such as war crimes and torture.

TOOLS

- UNHCR, Guidance Note on Extradition and International Refugee Protection, Geneva, April 2008 (<http://www.unhcr.org/refworld/docid/481ec7d92.html>).
- United Nations Office on Drugs and Crime (UNODC), Counter-Terrorism Legal Training Curriculum, module 4, *Human Rights and Criminal Justice Responses to Terrorism*, discusses in depth the application of the *non-refoulement* principle in terrorism cases under international human rights law, including the question of diplomatic assurances (part 7) (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf).

7. Due process in expulsion

Where a person is not a refugee or there is no risk of return to serious human rights violations, international law guarantees procedural rights for aliens subject to expulsion. Under article 13 of ICCPR, all regular migrants (that is, those "lawfully" in a State) enjoy due process protections when subject to any form of obligatory¹⁰² expulsion, including extradition.¹⁰³ While it does not regulate the substantive grounds of expulsion, article 13 aims to prevent arbitrary expulsions.¹⁰⁴ It is modelled on the due process guarantees in article 32 (2) of the 1951 Refugee Convention.¹⁰⁵ The provision contains four key protections:

- Expulsion must be reached "in accordance with law", including that the law itself is not arbitrary or discriminatory;

¹⁰¹ Report to the General Assembly of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 15 August 2007 (A/62/263, para. 35).

¹⁰² United Nations, Human Rights Committee, general comment No. 15: The Position of Aliens under the Covenant (11 April 1986), para. 9 (www.refworld.org/docid/45139acfc.html); Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2005), p. 293.

¹⁰³ *Giry v. Dominican Republic*, UNHRC Communication No 193/1985 (20 July 1990), para. 5.5 (www.hr-dp.org/contents/855).

¹⁰⁴ United Nations, Human Rights Committee, general comment No 15, para. 10 (www.refworld.org/docid/45139acfc.html).

¹⁰⁵ Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, p. 291.

- A person “shall ... be allowed to submit the reasons against his expulsion”, which implies rights to be notified of the decision and to be informed of the allegations;¹⁰⁶
- A right of “review” by a “competent authority” which is higher than, and independent from, the original decision maker, although it need not be a court.¹⁰⁷ The remedy must be effective¹⁰⁸ in that it is legally binding, not discretionary.¹⁰⁹ An appeal must be available prior to a person’s expulsion and expulsion must be suspended pending its determination.¹¹⁰
- A right to be represented on appeal.¹¹¹

While expulsion decisions must always be reached in accordance with law, article 13 of ICCPR enables the other three elements of due process in the expulsion of aliens to be adjusted “where compelling reasons of national security otherwise require”. The Human Rights Committee accepts that a State enjoys a “wide discretion” in deciding when the security exception applies.¹¹² However, where a domestic procedure does allow a person to provide (limited) reasons against expulsion and to receive to have the case (partially) reviewed, the due process guarantees of article 13 of ICCPR apply.¹¹³

The International Law Commission suggests that aliens who are irregularly or unlawfully present in a State should also be entitled to minimum procedural guarantees in expulsion (with the exception of those who have been unlawfully present for a ‘brief duration’),¹¹⁴ although this view does not yet reflect customary international law.¹¹⁵ The rights it envisages for unlawfully present aliens are the same as those for lawfully present aliens, and roughly correspond to the rights set out in article 13 of ICCPR.¹¹⁶

¹⁰⁶ Goodwin-Gill, Guy, and McAdam, Jane, *The Refugee in International Law* (3rd ed.), Oxford University Press, 2007, p. 523.

¹⁰⁷ Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, p. 297.

¹⁰⁸ United Nations, Human Rights Committee, general comment No 15, para. 10.

¹⁰⁹ United Nations, Human Rights Committee, Concluding Observations: Syrian Arab Republic (5 April 2001) (CCPR/CO/71/SYR, para. 82).

¹¹⁰ *Hammel v. Madagascar*, United Nations, Human Rights Committee, Communication No. 155/1983 (3 April 1987) (CCPR/C/29/D/155/1983, para. 19.2); see also Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary Nowak*, CCPR Commentary, pp. 298 and 299.

¹¹¹ *Ibid.*, pp. 299 and 300.

¹¹² *Alzery v. Sweden*, United Nations, Human Rights Committee, Communication No. 1416/2005 (25 October 2006), (CCPR/C/88/D/1416/2005, para. 11.10).

¹¹³ *Ahani v. Canada*, United Nations, Human Rights Committee, Communication No. 1051/2002 (29 March 2004), (CCPR/C/80/D/1051/2002, para. 10.8).

¹¹⁴ International Law Commission (ILC), Draft Articles on the Expulsion of Aliens, with Commentaries (2014), article 26 (4) (legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf).

¹¹⁵ *Ibid.*, commentary to article 26, para. 11.

¹¹⁶ *Ibid.*, commentary to article 26 (1) (notice, right to challenge the decision, right to be heard before a competent authority, access to effective remedies, right to be represented, freed assistance of an interpreter) and 26 (3) (consular assistance).

FOCUS BOX FAMILY AND CHILDREN'S RIGHTS

The human rights of families and children are also relevant to decisions to remove a person, whether by expulsion or extradition. According to the United Nations Human Rights Committee, States enjoy a “significant scope... to enforce their immigration policy and to require the departure of unlawfully present persons” (including on security grounds), but that discretion is not unlimited and may not be exercised arbitrarily.^a The critical issue is whether the interference may be justified, which requires considering “on the one hand ... the significance of the State party’s reason for the removal of the person concerned, and, on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal”.^b

The Human Rights Committee has found that the expulsion of a family member, resulting in separation from other family members remaining in a State’s territory, may involve an interference in the right to family life under ICCPR, including articles 17 (prohibiting arbitrary or unlawful interference in the family), 23(1) (protection of the family) and 24(1) (protection of the child in the family).^c Such interference would be unjustified, for example, where the expulsion of both parents would involve substantial changes to long-settled family life, by requiring dependent citizen children to choose whether to remain in their home country or to accompany their expelled parents.^d In addition, the “best interests” of a child must be a primary consideration in all decisions affecting the child,^e which normally does not include separation from parents or the disruption of long-settled life in the community.

^a *Winata v. Australia*, United Nations, Human Rights Committee, Communication No. 930/2000, 26 July 2001 (CCPR/C/72/D/930/2000, para. 7.3).

^b *Byahuranga v. Denmark*, UNHCR Communication No. 1222/2003, 9 December 2004, (CCPR/C/D/1222/2003, para. 11.7).

^c See *Winata v. Australia*, United Nations, Human Rights Committee, Communication No. 930/2000, (CCPR/C/72/D/930/2000, para. 7.1).

^d *Ibid.*, para. 7.2.

^e Under the International Covenant on Civil and Political Rights (ICCPR), article 24; see also *Bakhtiyari v. Australia*, United Nations, Human Rights Council, Communication No. 1069/2002, 29 October 2003 (CCPR/C/D/1222/2003, para. 9.7).

8. Detention of asylum seekers, refugees or migrants

International human rights law places limits on the detention of refugees, asylum seekers or migrants, whether they arrive irregularly at the border, are intercepted at sea, are found irregularly living in the community or are awaiting expulsion or extradition. Its protections apply to all forms of detention, whether administrative or criminal.

Many countries criminalize illegal entry, although in practice some of them aim to deport rather than prosecute and imprison such persons.¹¹⁷ Exceptions must be made for refugees and asylum seekers, since the Refugee Convention prohibits States from punishing them on account of their illegal entry or presence in certain circumstances.¹¹⁸ Some countries use administrative detention, pending an immigration admission or deportation decision or the finalization of extradition proceedings. Yet other countries do not use detention.

¹¹⁷ See The Law Library of Congress, *Criminalization of Illegal Entry around the World* (August 2019) (mpl.bibliocommons.com/item/show/7414086075).

¹¹⁸ Refugee Convention (1951), article 31 (1).

In all cases, article 9 (1) of ICCPR prohibits the unlawful or “arbitrary” deprivation of liberty of any person. According to the Human Rights Committee, “the notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”.¹¹⁹

Where a person is subject to criminal prosecution, detention on remand pending trial must be reasonable and necessary in all the circumstances,¹²⁰ for instance because of the seriousness of the alleged offence, the risk of the person absconding or destroying evidence, or risks to the community. Fair trial rights are also applicable to aspects of pre-trial detention.¹²¹

As regards administrative detention (where no criminal offence is concerned), automatic detention of an asylum seeker or migrant, regardless of their individual circumstances, is not lawful. The fact of entering a State in violation of domestic law does not in and of itself justify detention,¹²² nor does the purpose of processing or deciding an asylum/refugee or other international protection claim. Any detention “must be justified as reasonable, necessary and proportionate in light of the circumstances”.¹²³ Detention is only necessary if:

- A very brief initial period is needed to verify the person’s identification;
- It is otherwise justified for longer periods by “reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security”;¹²⁴
- Any “less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding”¹²⁵ would not be effective;
- It is not applied on discriminatory grounds.

Even if detention is initially justified, detention may only continue for as long as it remains necessary; it “should not continue beyond the period for which the State can provide appropriate justification”.¹²⁶

ACTIVITY CASE STUDY ON DETENTION

One night Clara secretly crosses the border from country X to country Y where she is immediately arrested. Country X is affected by an insurgency involving a violent extremist group, Zero, which controls around 10 per cent of the country. It is known that the Zero group has forced many civilians in areas under its control to support it by providing food, shelter, money or manual labour. Some civilians also join the movement because they lack other livelihood prospects.

¹¹⁹ *F.K.A.G. v. Australia*, United Nations, Human Rights Committee, Communication No. 2094/2011 (26 July 2013) (CCPR/C/108/D/2094/2001, para. 9.3).

¹²⁰ United Nations, Human Rights Committee, general comment No 35 (CCPR/C/GC/35, para 12).

¹²¹ ICCPR, article 14 (for instance, the right adequate facilities to prepare a defence).

¹²² *A v. Australia*, United Nations, Human Rights Committee, Communication No. 560/1993 (30 April 1997) (CCPR/C/59/D/560/1993, para. 9.4).

¹²³ *F.K.A.G. v. Australia* (CCPR/C/108/D/2094/2011, para. 9.3).

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *A v. Australia* (CCPR/C/59/D/560/1993, para. 9.4).

Upon being arrested, Clara tells the authorities of country Y that she is looking for a job and that she comes from a part of country X where the Zero group is not active. She shows proof of her address on her driver's license. A border official does not believe her and tells her he suspects her of being a supporter of the Zero group, "just like every other woman who crosses the border here with false documents and wants to disappear". There are more than 100,000 irregular migrants from country X living in country Y without authorization, and country Y authorities are not able to locate them.

Clara is not charged with any crimes; her name is not on any immigration database "blacklist"; and she is not told any details of her alleged association with the Zero group.

The border authorities of country Y intend to detain Clara until a decision on her deportation is final and can be carried out.

- *Would Clara's detention be justified under international law?*
- *Consider refugee law, human rights law and counter-terrorism law.*

International law also imposes indispensable procedural safeguards on detention to ensure that it is, and remains, necessary and proportionate, including the following:

- Article 9 (4) of ICCPR requires a State to guarantee judicial review of detention. Judicial review must be "real" in the sense that a court must be empowered to both assess the substantive reasons for detention and order a person's release from detention if it is not justified.¹²⁷ A "merely formal" review of domestic legality is not sufficient,¹²⁸ such as review of whether a person does or does not possess a valid visa.¹²⁹
- Detention may become arbitrary, contrary to article 9 (1) of ICCPR, if the decision to detain a person is not open to periodic review, enabling an assessment of the grounds for detention.¹³⁰
- Even where grounds for detention are identified, an initially lawful detention may become arbitrary under article 9 (1) where a "reasonable prospect" or likelihood of expelling a person no longer exists (for example, because a person is at risk of harm in another State or no State where they would not face such a risk is willing to admit them) and detention is not terminated.¹³¹ The fact that a State "is unable to carry out their expulsion" does not justify indefinite detention.¹³²
- All persons in detention must also be treated with humanity and respect for their dignity and conditions of detention must also be humane¹³³ and be free from torture or cruel, inhuman or degrading treatment or punishment.¹³⁴

¹²⁷ Ibid., para. 9.5.

¹²⁸ Ibid.

¹²⁹ *C. v. Australia*, United Nations, Human Rights Committee, Communication No. 900/1999 (28 October 2002) (CCPR/C/76/D/900/1999, para. 7.4).

¹³⁰ *A. v. Australia*, (CCPR/C/59/D/560/1993, para. 9.4).

¹³¹ *Jalloh v. Netherlands*, United Nations, Human Rights Committee, Communication No. 794/1998 (15 April 2002) (CCPR/C/74/D/794/1998, para. 8.2).

¹³² *F.K.A.G. v. Australia*, (CCPR/C/108/D/2094/2011, para. 9.3).

¹³³ ICCPR, article 10 1.

¹³⁴ ICCPR, article 7.

TOOLS

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its resolution 43/173

(www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx).

UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012)

(www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html).

E. Stateless persons

A stateless person is someone who is “not recognized as a national by any State under the operation of its law”.¹³⁵ There were 4.2 million stateless persons in 2019.¹³⁶ While most stateless persons are resident in specific countries (often with limited rights due to their lack of nationality), some are forced to move to other countries (such as stateless Rohingya displaced or expelled from Myanmar to Bangladesh), while others seek to voluntarily migrate.

Terrorism and counter-terrorism may adversely affect stateless persons in a number of ways, and may contribute to creating new situations of statelessness:

- Stateless persons may be regarded as suspect populations by state counter-terrorism authorities, and/or stigmatized as terrorists by the public;
- Marginalization resulting from statelessness may make persons vulnerable to radicalization to violence and recruitment by terrorist groups;
- Suspected terrorists may be made stateless by national law, either to protect society from perceived threats or punish alleged civic disloyalty. For example, a number of States have adopted laws to revoke the citizenship of alleged foreign terrorist fighters. Children born to foreign terrorist fighters in conflict areas are at risk of being stateless where the father’s identity is not clearly established and discriminatory nationality laws do not allow women to pass on their citizenship to their children.

Where a stateless person has crossed an international border, the usual protections of international law (including against *non-refoulement*) for asylum seekers, refugees and migrants apply. The 1951 Refugee Convention specifically includes persons at risk of persecution who do not have a nationality and are who are outside their country of former habitual residence.¹³⁷

Statelessness is additionally regulated by the Convention relating to the Status of Stateless Persons 1954 (with 94 States parties) and the Convention on the Reduction of Statelessness 1961 (with 75 States parties). The 1954 Convention provides a definition of statelessness and guarantees minimum rights to stateless persons. It excludes (in article 1 (2)(iii)) undeserving

¹³⁵ Convention relating to the Status of Stateless Persons, 1954, article 1.

¹³⁶ UNHCR, “Global Trends: Forced Displacement in 2019”, p. 56 (www.unhcr.org/globaltrends2019).

¹³⁷ Convention relating to the Status of Refugees (1951), article 1 A(2).

persons on the same grounds as article 1 F of the Refugee Convention of 1951. The 1961 Convention aims to prevent and reduce statelessness over time.

In the context of counter-terrorism, three provisions in these treaties are particularly relevant:

- States must not expel a stateless person lawfully in their territory except on grounds of national security or public order (1954 Convention, article 31(1)). The provision mirrors article 32 of the Refugee Convention and is similarly restricted to serious security threats. It also replicates the due process guarantees of the Refugee Convention, including the rights to submit evidence and appeal and to be represented before a competent authority (article 31(2)). Those subject to expulsion are entitled to a reasonable period within which to seek legal admission into another country (article 31(3)). The usual protections against *non-refoulement* (under human rights law and refugee law) continue to apply as relevant.
- A State must not “deprive a person of nationality if such deprivation would render him stateless” (1961 Convention, article 8 (1)), except where nationality was obtained by misrepresentation or fraud (article 8 (2)(b)). Thus any deprivation of nationality on security grounds (as for involvement in terrorism) can only occur if the person already enjoys or has an enforceable right to some other nationality. A State may, however, make a declaration at the time of becoming a party to the Convention by which it retains the right, under existing national law, to deprive a person of nationality for (inter alia) conduct inconsistent with a person’s duty of loyalty to the State (such as acting “in a manner seriously prejudicial to the vital interests of the State”).¹³⁸
- Both Conventions prohibit discrimination, which would preclude the profiling of stateless persons on the basis of race, religion, ethnicity, politics or country of origin. The 1954 Convention requires States to guarantee the rights under the Convention to stateless persons without discrimination (article 3). The 1961 Convention requires that States not deprive any person or group of their nationality on a discriminatory basis (article 9).

The General Assembly has entrusted UNHCR with a mandate relating to the identification, prevention and reduction of statelessness and the protection of stateless persons.

TOOLS

Guidance Note of the Secretary-General: The United Nations and Statelessness (November 2018) (www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf).

UNHCR, Guidelines on Statelessness: Loss and Deprivation of Nationality under articles 5–9 of the 1961 Convention on the Reduction of Statelessness (May 2020) (www.unhcr.org/en-us/protection/statelessness/5defa8b74/unhcr-guidelines-statelessness-5-loss-deprivation-nationality-under-articles.html).

¹³⁸ Convention on the Reduction of Statelessness (1961), article 8 (3)(a).

F. Internally displaced persons

Terrorist violence and counter-terrorist conflict have often provoked mass internal displacement (that is, within the territory of a single State), whether because of direct attacks on civilians, the collateral effects of conflict, or the inability to meet basic humanitarian needs in conflict areas. For example:

- In its resolution 2233 (2015), the Security Council noted that a large-scale offensive by terrorist groups in Iraq, such as the Islamic State in Iraq and the Levant (ISIL), had displaced over three million Iraqi civilians;
- Boko Haram violence has displaced over 2.7 million IDPs in Nigeria and 680,000 IDPs in Cameroon, Chad and Nigeria, and has created 292,000 refugees outside their own countries. The refugees face serious threats to their rights to education, food, health, shelter, and to their access to water, sanitation and education; 3.5 million refugees are food insecure.
- Conflict involving the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) in Colombia internally displaced millions of people over decades, with a total 5.8 million IDPs recorded in December 2015 (about a year before a peace agreement in 2016).
- In 2014, the independent international commission of inquiry on the Syrian Arab Republic observed that the counter-terrorism military operations of the national Government, including aerial bombardment and the shelling of civilian areas, had produced extensive displacement (internal and external).

There is no international treaty dedicated specifically to IDPs (unlike treaties on refugees or migrant workers), although the African Union has adopted a regional instrument. While IDPs may enjoy the same rights as other citizens of the country, they may have special needs and vulnerabilities as a result of displacement. To the extent that IDPs are within the jurisdiction of the State (particularly but not only in areas still under government control), the State's general international human rights law and, where relevant, IHL obligations apply. As mentioned in chapters I and III of the present module, non-State armed groups also have minimum humanitarian obligations under IHL and are required not to abuse the human rights of those under their control.

The United Nations Guiding Principles on Internal Displacement of 1998 draw together the relevant binding international legal standards and specify their application to the circumstances of IDPs. They govern protection from displacement, assistance during displacement, and assistance during return, resettlement and reintegration. These obligations apply to "all authorities, groups and persons irrespective of their legal status" (principle 2), which includes terrorist organizations and other non-State armed groups.

In the context of terrorism and counter-terrorism, a key guiding principle is that no one must be arbitrarily displaced (principle 6 (2)). In armed conflict, displacement is regulated by IHL and civilians should only be forcibly moved if their security or imperative military reasons so demand (principle 6 (2)(b)). Another key principle is that all forms of violence against IDPs are prohibited (principle 10), and IDPs are to be accorded the full spectrum of their human rights. Humanitarian relief must not be impeded and must be facilitated (principles 24–27).

The Security Council has also paid attention to the needs of IDPs in specific situations. For example, in relation to the United Nations Assistance Mission for Iraq, the Council affirmed that all parties “should create conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons or local integration of internally displaced persons, particularly in areas newly liberated from ISIL, and to promote stabilization activities and long-term sustainable development”.

To the extent that particular IDPs present security risks (such as by recruitment into terrorist organizations), a State’s response must always conform with its human rights obligations.

Self-assessment questions

1. What is the difference between a refugee and: (a) an asylum seeker; (b) an internally displaced person; (c) a stateless person; and (d) a migrant?
2. Is a person fleeing from poverty to find economic opportunities in another country a refugee? Why/why not?
3. Can a person who commits a terrorist act be protected as a refugee? Why/why not? What about those who support a terrorist group without committing terrorist acts?
4. What are the differences between exclusion under article 1 F of the Refugee Convention, the exception to *non-refoulement* under article 33 (2) and expulsion under article 32?
5. Do the above exceptions apply where a person claims to be at risk of serious human rights-based harms (other than persecution)?
6. Can a refugee be extradited to face justice in another country?
7. In what circumstances can an asylum seeker, refugee or migrant be lawfully detained upon entry to a foreign country?
8. What due process protections apply where a person is expelled to another country?



International humanitarian law and terrorism

COUNTER-TERRORISM LEGAL TRAINING CURRICULUM MODULE 1

COUNTER-TERRORISM IN THE INTERNATIONAL LAW CONTEXT

Objectives

By the end of chapter III, readers will be able to:

- 1 Explain the legal classifications of international and non-international armed conflicts and the implications of these classifications.
- 2 Understand the application of key concepts and principles of international humanitarian law to the conduct of groups designated as terrorist (“terrorist groups”).
- 3 Discuss the classification of different actors relevant in a counter-terrorism context under international humanitarian law, including children associated with armed groups and foreign terrorist fighters.
- 4 Explain the rules under international humanitarian law regulating the detention of civilians during armed conflict.
- 5 Discuss the relationship between international humanitarian law and terrorism-related offences.
- 6 Explain the impacts of counter-terrorism measures on humanitarian relief in the context of conflicts involving terrorist groups and explain approaches to mitigate impact on humanitarian relief.

INTRODUCTION

International humanitarian law (IHL), also known as the law of armed conflict, regulates the conduct of armed conflict. Its rules govern the protection of civilians and those no longer taking part in hostilities (such as the wounded, sick or captured), as well as the means and methods of fighting and the lawfulness of using particular weapons. IHL aims to balance humanitarian protection against military needs (to fight and win wars) and binds both State armed forces and organized non-State armed groups. It applies to all sides of a conflict regardless of whether the initial resort to force by one party was legal or illegal.

The main sources of IHL are the four Geneva Conventions of 1949, the two Additional Protocols of 1977, various weapons control treaties, the Hague Convention and Regulations of 1907, and customary international humanitarian law. It is often interpreted and implemented at the national level through, for example, “rules of engagement” issued to personnel and military manuals.

Terrorism has long presented challenges for the law of armed conflict, for both civilian protection and the rules on fighting. These challenges have intensified as armed conflicts have increasingly involved non-State armed groups designated as “terrorist groups” (or entities or organizations) by the Security Council, regional organizations or individual States.

The General Assembly and the Security Council have both repeatedly reaffirmed that “Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular . . . international humanitarian law” (in addition to international human rights law and international refugee law).¹ IHL applies to armed conflicts involving terrorist groups, and the classification of such groups as terrorist under international or national counter-terrorism law (beyond IHL) does not legally prevent or limit IHL’s applicability

Section A of the present chapter addresses the applicability of international humanitarian law in situations of conflict involving terrorist acts or groups. Section B briefly examines the fundamental principles of IHL. Section C explores the classification under IHL of several categories of persons, including civilians participating in armed conflict and foreign fighters, both of whom may sometimes be classified as “terrorists” in applying counter-terrorism laws. It further discusses gender and terrorism in armed conflict and children recruited by armed

¹ See Security Council resolution 2178 (2014), preamble; Security Council resolution 2462 (2019), para. 6; and Security Council resolution 2482 (2019), para. 16.

groups. Circumstances in which “terrorists” may be detained in armed conflicts under IHL are addressed in section D.

A key consideration in the criminal justice approach of States towards persons who commit acts of terrorism in situations of armed conflict is the relationship between IHL and the counter-terrorism legal framework. This subject is addressed in section E. An examination of how counter-terrorism measures may adversely impact the delivery of humanitarian relief and assistance in armed conflicts is presented in the closing of the present chapter, in section F.

CROSS-REFERENCES The closely related issue of war crimes liability for acts of terrorism in armed conflict is considered in chapter VI of the present module. Questions related to arms and weapons control regimes are discussed in chapter IV.

A. Applicability of international humanitarian law and the classification of “armed conflict”

After the terrorist attacks of 11 September 2001, it became common to talk about a “war on terror”, with military engagements against terrorist groups taking place in many States. Many terrorist acts are already considered to be crimes under international treaties (including the Geneva Convention of 1949 and their Additional Protocols I and II) and national laws. In some circumstances, a pattern of terrorist violence can also form part of an armed conflict and be subject to the application of IHL. Unlike some other areas of law, however, IHL does not contain a special regime or rules for dealing with “terrorists” or terrorist groups (although it does prohibit the intentional spreading of terror among civilians, which is also a war crime). IHL applies to individuals and entities labelled “terrorists” in the same way as it applies to other actors involved in armed conflict.

There are several key determinants in whether, and how, international humanitarian law applies in a given situation involving terrorist groups, including:

- Whether an international or non-international armed conflict exists;
- Whether the terrorist groups have a sufficient “nexus” to the armed conflict;
- Whether the State in question is a party to relevant IHL treaties, and how customary IHL (binding on all States and non-State parties) applies to the conflict.

FOCUS BOX INTERNATIONAL LAW ON THE USE OF FORCE IN INTERNATIONAL RELATIONS

It is important to emphasize that IHL applies to all sides of an armed conflict, regardless of whether the initial or first use of military force by one party was legal or illegal under a different area of international law: the law on the use force (often referred to by the Latin phrase *jus ad bellum*). Those rules regulate the circumstances in which a State may use military force outside its own territory.

In brief, international law prohibits the use of military force by one State against another (Article 2(4) of the Charter of the United Nations) except where:

- (a) A State is acting in self-defence against an “armed attack” which is occurring (an “armed attack” can overlap with, but is not the same as, the concept of “armed conflict” which triggers the application of IHL);
- (b) The Security Council has authorized it under its international security powers (Chapter VII of the Charter);
- (c) A State has consented to another State using military force on its territory.

The unauthorized use of military force by a State violates a fundamental rule of international law and may also amount to the international crime of “aggression” by State leaders.

This area of law raises a number of controversial issues in relation to terrorism, including whether: (a) independent terrorist groups, not only States, can commit an “armed attack”, against which self-defence is justified in another State’s territory; (b) self-defence can be exercised against an attack which is imminent but has not yet occurred (“anticipatory” self-defence); and (c) States may use military force to protect citizens in lethal danger abroad.

Even if the initial use of military force by a State is illegal (for instance, by invading a country under an unjustified pretext of countering terrorism), IHL still applies. This means that the aggressor State is bound to respect IHL rules on the conduct of hostilities, such as those on who cannot be targeted, which weapons cannot be used, and on the humane treatment of prisoners. Equally, since the aggressor’s soldiers are human beings, they too enjoy protection from the use of illegal weapons or tactics or when wounded or detained. IHL is designed to alleviate suffering in war, not to punish individual soldiers for illegal aggression by their governments. The same considerations apply where self-defence is used against members of an armed terrorist group that has attacked a State: such persons still enjoy fundamental protections under IHL, but they are also required to respect IHL and are accountable for any war crimes committed.

1. Classification of armed conflicts under international humanitarian law

IHL applies wherever there is an international armed conflict (under common article 2 of the four Geneva Conventions of 1949 and article 1(4) of Protocol I of 1977) or a non-international armed conflict (under common article 3 of the Geneva Conventions).

The classification of the type of armed conflict determines which IHL rules apply. Some basic IHL rules apply to both types, but more detailed rules apply only in international conflicts. In some cases, multiple armed conflicts can take place simultaneously on the same territory.

(a) International armed conflict

An international armed conflict exists where there is military fighting between two or more States, or where one State occupies foreign territory, with or without fighting;² or where a State is fighting a national liberation movement covered by Additional Protocol I. Members of State armed forces are entitled to participate in the fighting and enjoy “combatant immunity” from national criminal law (including of the adversary State) for hostile acts which comply with IHL (see section C below).

Conflict between States

Conflict between two States most commonly involves fighting between regular State armed forces. It can also involve irregular military forces that belong to a State, such as paramilitaries, militias or volunteer units or resistance movements.³

Irregular forces belong to a State where the group depends on the State’s support (such as military training, weapons or other equipment, as well as logistical support) and the State exercises “overall control” over their military operations.⁴ Overall control means that the State has a role in organizing, coordinating or planning the group’s military operations, but does not necessarily specifically order, request or direct particular operations.⁵

In order to enjoy combatant immunity and prisoner of war status, irregular forces must:

- Be commanded by persons responsible for their subordinates;
- Display a fixed distinctive sign recognizable at a distance;
- Carry arms openly;
- Conduct operations in accordance with the laws and customs of war.⁶

Even if they are controlled by a State, terrorist groups will generally not meet these four conditions, since they typically do not fight in accordance with IHL (for example, by only attacking military targets and sparing civilians in compliance with IHL). They also may not identify themselves as fighters by openly carrying their weapons or wearing a uniform or symbol. Members of terrorist groups sometimes disguise themselves as civilians when attacking in order to obtain a tactical advantage. If members of irregular forces do not comply with these conditions, they will not enjoy combatant immunity and will be liable for any war crimes that they commit while fighting, including terrorist and other crimes under national law.

There is also a special rule for civilians who spontaneously take up arms to resist a foreign invasion, before they have had time to organize themselves as State forces.⁷ Such persons enjoy combatant status and immunity as long as they carry their arms openly and respect IHL, and only for a temporary period during the invasion until they become organized as State forces.

² Common article 2 to the four Geneva Conventions of 1949, United Nations, *Treaty Series*, vol. 75, Nos. 970–973.

³ Geneva Convention relative to the Treatment of Prisoners of War (“Third Geneva Convention”), adopted 12 August 1949, entered into force 21 October 1950, United Nations, *Treaty Series*, vol. 75, No. 972.

⁴ International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadić, Appeals Chamber Judgment*, Case No IT-94-1-A, 15 July 1999, para.122.

⁵ *Ibid.*, paras. 94, 131 and 137.

⁶ Third Geneva Convention, article 4 (2).

⁷ *Ibid.*, article 4 A (6).

Occupation of foreign territory

Military occupation of foreign territory, with or without fighting, constitutes an international armed conflict. In general, a territory is considered “occupied” when it is “actually placed under the authority of the hostile army”, that is, placed under the effective administrative control of another State.⁸ Where there is no armed resistance from the victim State, the situation is still regarded as an international conflict because its governmental has been forcibly displaced, without its consent.

Guerrilla resistance against an occupying power may be lawful under IHL if such forces: (a) qualify as combatants under IHL; and (b) comply with the IHL rules on the conduct of hostilities (discussed in section B below). Such forces may be considered as combatants if they meet the conditions for irregular forces mentioned above,⁹ or if they meet the more relaxed conditions of combatancy under article 44(3) of Protocol I (1977) to the Geneva Conventions of 1949¹⁰ – namely, when they carry their weapons openly during and preceding military operations. The latter rule recognizes the special circumstances and challenges of guerrilla warfare. Under such circumstances, resistance forces enjoy combatant immunity and prisoner of war status upon capture. They cannot therefore be prosecuted for terrorism under national law, although they are still liable for any war crimes or crimes against humanity that they may commit.

National criminal law may be applied to those who do not meet the conditions of combatancy. However, the International Committee of the Red Cross (ICRC) – which has an international treaty mandate to promote IHL – cautions against prosecuting such persons as “terrorists”, since there are policy reasons for distinguishing armed conflict from terrorism (see section E below).

National liberation wars and self-determination

Fighting between a State and national liberation or self-determination forces can be considered as an international conflict when the State is a party to Additional Protocol I of 1977.¹¹ Such forces may be constituted regularly, irregularly or as guerrilla-type resistance forces. Liberation fighters can thereby become recognized as combatants under IHL, entitled to fight, and, due to their combatant immunity, cannot be prosecuted as “terrorists” for hostilities conducted in accordance with IHL. When States are not parties to Protocol I, such conflicts are classified as non-international, and there is no right to combatancy nor to immunity from prosecution for offences under domestic law.

(b) Non-international armed conflict

Military violence involving terrorist groups more commonly involves non-international armed conflict, since some armed groups designated as terrorist are not controlled by a State and/or do not conduct operations in compliance with IHL. Non-international conflicts are recognized in

⁸ Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907, article 42 (see Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁹ Under article 4 (2) of the Third Geneva Convention.

¹⁰ Where the States concerned are parties to Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol I”), adopted 8 June 1977, entered into force 7 December 1978, United Nations, *Treaty Series*, vol. 1125, No.17512.

¹¹ *Ibid.*, article 1 (4).

common article 3 of the four Geneva Conventions. Common article 3 provides minimum humanitarian protections, even when a conflict takes place entirely within a State's own territory and does not involve other States.

FOCUS BOX GENEVA CONVENTIONS: COMMON ARTICLE 3

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

"(b) taking of hostages;

"(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

"(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

"(2) The wounded and sick shall be collected and cared for.

"An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

"The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

"The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

Common article 3 covers fighting between a State and a non-State armed group, for example during a classic civil war. It can also cover fighting between different non-State groups within a State, in addition to fighting between a State or multiple States and a non-State group, or even between multiple non-State armed groups, on the territory of another State.

Common article 3 has been interpreted to require two key elements to trigger the application of IHL: first, that there must be sufficiently "intense" military violence, and secondly, that the non-State armed group must be sufficiently "organized".¹² The criteria aim to exclude lesser levels of violence, including "internal disturbances and tensions, such as riots, isolated and sporadic acts

¹² ICTY: *Prosecutor v. Tadić (Interlocutory Appeal on Jurisdiction)* Case No IT-94-1, 2 October 1995, para. 70; *Prosecutor v. Limaj et al.*, Case No IT-03-66-T, 30 November 2005, para. 83; and *Prosecutor v. Boškoski*, Case No IT-04-82-T, 10 July 2008.

of violence and other acts of a similar nature”.¹³ Many terrorist acts, notably when sporadic and not carried out by an organized entity, will not trigger an armed conflict. However, larger, more sustained campaigns by terrorist groups, involving military-style attacks, may generate an armed conflict.

There are many examples where armed groups designated as “terrorist”, whether domestically, regionally or internationally, have been engaged in armed conflicts against their home States, including conflicts between Sri Lanka and the “Tamil Tigers” (LTTE); Colombia and “Revolutionary Armed Forces of Colombia” (FARC); Peru and the “Shining Path” (“Sendero Luminoso”); Turkey and the “Kurdistan Workers’ Party” (PKK); India and Naxalite or Maoist groups; the Philippines and Abu Sayyaf in Mindanao; Somalia and Al-Shabaab; Afghanistan and Al-Qaida; and the Syrian Arab Republic and Iraq and groups such as the Islamic State in Iraq and the Levant (ISIL - Da’esh) and the Nusrah Front (or Jabhat Fath al-Sham).¹⁴

The legal or political characterization of a group as terrorist (including by the Security Council) is irrelevant to the assessment as to whether it is an organized armed group involved in an armed conflict to which IHL applies.¹⁵ For instance, in 2006, the United Nations Commission of Inquiry on Lebanon found that an armed conflict existed between Hezbollah and Israel, irrespective of Israel’s classification of Hezbollah as a terrorist organization.¹⁶

Additional Protocol II of 1977

While all non-international conflicts are covered by common article 3, some non-international conflicts are also covered by Additional Protocol II (1977) to the Geneva Conventions of 1949. While the intensity and organization criteria are still relevant, Protocol II only applies if the non-State armed group is “under responsible command” and controls territory. It also only applies to conflicts between a State and non-State group, and not between armed groups.

While incipient and “underground” terrorist movements are unlikely to hold territory, some terrorist groups have proved capable of holding extensive territory for protracted periods, such as LTTE in the north and east of Sri Lanka, FARC in Colombia and ISIL (Da’esh) in Iraq, the Syrian Arab Republic and Libya.

Protocol II provides more detailed guarantees than common article 3, and extends protections to persons not, or no longer, taking part in hostilities, and prohibits attacks on civilians.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), article 1 (2) (United Nations, *Treaty Series*, vol. 1125, No. 17513) [a test also used in interpreting common article 3 of the Geneva Conventions: International Committee of the Red Cross (ICRC), *Commentary on Protocol II of 1977*, article 1(4), para. 4473].

¹⁴ While some of the armed groups listed are designated as terrorist entities by the Security Council, others have been listed as terrorist entities only by regional organizations or individual States. The examples given in this paragraph are not intended as a statement by the United Nations Office on Drugs and Crime (UNODC) regarding the designation of these armed groups as terrorist nor the classification under IHL of the conflicts they are or were involved in.

¹⁵ Geneva Academy of International Humanitarian Law and Human Rights, *Foreign Fighters under International Law*, Academy Briefing No. 7 (October 2014), p. 23; see also ICRC, “International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions”, report of the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019.

¹⁶ Human Rights Council, report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, para. 62.

Geographic scope of non-international armed conflicts

Where a non-international conflict exists, IHL “extends beyond the exact time and place of hostilities”¹⁷ to apply throughout the territory of the State party. It also applies to the territory of any other State that assists the belligerent State in combating an armed group.¹⁸

A more difficult issue is whether IHL applies if fighting spreads to, or members of the armed group are present in, the territory of a non-belligerent State. Such is the case, for instance, with groups such as Al-Qaida or ISIL (Da’esh), which operate in multiple States. There has also been legal controversy about drone strikes against Al-Qaida and its affiliates in places outside the “hot” battlefield of Afghanistan, including in Pakistan, Somalia and Yemen. If IHL applies in such situations, it could allow States to militarily target terrorists in the territory of non-belligerent States.

These issues are not settled in international law. The ICRC, however, takes the following approach:¹⁹

- Where fighting in a belligerent State “spills over” into a neighbouring non-belligerent State, IHL applies to the area of hostilities in that State (but not to its whole territory), given the close connection to the conflict in the first State;
- Where fighting between the belligerent State and the group takes place on the territory of non-adjacent non-belligerent, State, the violence must be separately assessed to determine if it meets the intensity and organizational criteria to be recognized as a conflict. IHL does not extend automatically from the conflict in the belligerent State’s territory; IHL does not recognize a “global war on terror” that follows the location of the group’s members or any fighting with the belligerent State outside its territory.

In the latter case, where there is no separate armed conflict elsewhere, law enforcement is the appropriate response and international human rights law is the appropriate legal framework (see chapter I of the present module).

“Transnational” conflicts in the territory of another State

Another question is whether a conflict between a State and a terrorist group on the territory of another State should be classified as an international or a non-international armed conflict. When the Geneva Conventions were drafted in 1949, common article 3 was thought to apply to civil wars between citizens and their government within the territory of a single State.²⁰

¹⁷ ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, Case No IT-94-1, 2 October 1995, para. 67.

¹⁸ International Committee of the Red Cross (ICRC), “International humanitarian law and the challenges of contemporary armed conflicts”, report of the 32nd International Conference of the Red Cross and Red Crescent, 2015 (32IC/15/11), p.15 (www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts).

¹⁹ Ibid.

²⁰ International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (San Remo, 2006), para 1.1.1.

Since 9/11, however, some States have fought terrorist groups on the territory of other States, including, for example, the multinational campaign led by the United States of America against Al-Qaida in Afghanistan; United States, British, Canadian, Australian, Russian, Iranian and Turkish attacks on ISIL (Da'esh) in the Syrian Arab Republic and Iraq; Turkish attacks on the PKK in Iraq; and Colombian attacks on FARC inside Ecuador.

Interpretation and practice since 9/11 has confirmed that there is no gap in IHL in this regard. In *Hamdan v. Rumsfeld*,²¹ the United States Supreme Court decided that common article 3 covers any conflicts that are not covered by common article 2 (namely, inter-State wars), regardless of where the hostilities take place. The United States Government unsuccessfully argued that the war against Al-Qaida in Afghanistan was not covered by IHL because it was neither an international conflict between two States, nor a non-international conflict (that is, not being a classic civil war in the United States). The Court rejected this view and found that the conflict between the United States and Al-Qaida in Afghanistan was a non-international conflict. The decision ensured that the humanitarian protections of common article 3 applied even to non-citizen “terrorists” on a foreign battlefield.

There are, however, other possible approaches. ICRC suggests, for instance, that a conflict between a State and a non-State group on the territory of another State could involve both: (a) a non-international conflict between the first State and the armed group, but also (b) an international conflict between the two States if the second State does not consent to the first State’s hostilities within its territory.

An example of parallel conflicts is the violence between Israel and Hezbollah in Lebanon in 2006, which involved: (a) a non-international conflict between Israel and Hezbollah; (b) an international conflict between Israel and Lebanon, because Lebanon did not consent to Israel’s actions;²² and (c) an international conflict between Israel and the Syrian Arab Republic, due to Israel’s continuing occupation of the Syrian Golan Heights.

Duration of a non-international conflict

IHL is triggered by the existence of an armed conflict. Accordingly, an “armed conflict exists for as long as the violence remains sufficiently intense and the parties organized, allowing for the usual way for flux of hostilities (which may be discontinuous for strategic, seasonal or other reasons).”²³ Usually a conflict ends, and IHL ceases to apply, when a “peaceful settlement” has been achieved,²⁴ as result of the “cessation of all hostilities between the parties to the conflict and the absence of a real risk of their resumption.”²⁵

²¹ *Hamdan v. Rumsfeld*, 548 US 557 (2006) (United States Supreme Court).

²² Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, “Qualification of Armed Conflicts”, 13 June 2012.

²³ Saul, Ben, “Terrorism and international humanitarian law”, in *Research Handbook on International Law and Terrorism* (Saul, Ben, ed.) (Edward Elgar Publishing, 2014), p. 221.

²⁴ ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, para. 70.

²⁵ ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, report of the 32nd International Conference of the Red Cross and Red Crescent, October 2015, p. 10.

ACTIVITY CLASSIFICATION OF AN ARMED CONFLICT

In Redland, the Redland armed forces are fighting an armed conflict against the “Blue Army”, a non-State armed group. The conflict takes place entirely in the territory of Redland, but the Blue Army receives weapons shipments, fuel and money from the intelligence services of neighbouring Black Country.

In a video disseminated through social media, the Blue Army leader has sworn allegiance to Group X, a non-State armed group operating in Greenland. Group X is listed as a terrorist by Greenland, Redland and the Security Council. However, there is no indication Group X is providing any tangible support to the Blue Army.

Whiteland is funding the participation of mercenaries to support the Redland armed forces. The mercenaries are mostly retired members of the Whiteland army.

➤ *Would you classify the conflict in Redland as an international or a non-international armed conflict for purposes of IHL?*

2. Nexus to armed conflict

IHL only applies to acts of terrorism that have a sufficiently close connection, or nexus, to an armed conflict, meaning that an individual acted in furtherance or under the guise of such conflict; for example, if the conflict played a substantial part in the person’s ability to commit a crime, the decision to commit it, or the manner in which or the purpose for which it was committed.²⁶

Ordinary crimes without such a nexus – for instance, crimes committed for private gain, or in pursuit of terrorist causes or campaigns unrelated to the military fighting between the parties to an armed conflict – are subject to law-enforcement measures, within the framework of counter-terrorism laws and international human rights law, but not IHL.

TOOLS

International Committee of the Red Cross, “International humanitarian law and the challenges of contemporary armed conflicts”, report of the 32nd International Conference of the Red Cross and Red Crescent, 2015.

International Committee of the Red Cross, “International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions”, report of the 33rd International Conference of the Red Cross and Red Crescent, 2019.

²⁶ ICTY, *Prosecutor v. Kunarac*, IT-96-23 and IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 58.

B. Key rules on the conduct of hostilities

The rules and principles of IHL on the conduct of hostilities aim to regulate the conduct of parties to a conflict and to protect those who do not take part, or have ceased to take part, in the conflict. These rules prohibit most acts that would be designated as “terrorist” acts outside the context of an armed conflict, such as attacks on civilians or civilian objects, including by indiscriminate attacks; hostage-taking; the use of prohibited weapons; and attacks on cultural property.²⁷ Many of these acts are criminalized as war crimes in the context of armed conflict. IHL also specifically prohibits acts of terrorism, as examined in section 5 below.

1. The principle of distinction

A cardinal rule of IHL is that the parties to a conflict must always distinguish between civilians and fighters, and civilian objects and military objectives, and must only attack fighters and military objectives, not civilians or civilian objects.²⁸

Military objectives are objects which, by their nature, location, purpose or use, make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances at the time of action, offer a definite military advantage.²⁹ Examples include establishments, buildings and positions where enemy fighters, their materiel and arms are located and military transport and communications objectives.

Civilian objects are all objects which are not military objectives, as defined above. They include civilian areas, towns, cities, villages, residential areas, dwellings, buildings and houses and schools, civilian transport, hospitals, medical establishments and units, historic monuments, places of worship and cultural property and the natural environment.³⁰

Parties to a conflict may use objects that are ordinarily used for civilian purposes for military purposes. Examples could include civilian transport (such as roads, airports, ports, railways and trucks), communications infrastructure, electricity services, economic target, or a strategically significant area of land. IHL permits so-called “dual use” civilian objects to be attacked only and for such time as they meet the definition of a military objective. In cases of doubt, objects normally dedicated to civilian activities (such as religious places, houses or schools) are presumed not to be military objectives.³¹

²⁷ Saul, Ben, “Terrorism and international humanitarian law”, in *Research Handbook on International Law and Terrorism* (Saul, Ben, ed.) (Edward Elgar Publishing, 2014), p. 226.

²⁸ Protocol I, articles 48, 51(2) and 52(2); Protocol II, article 13(2); ICRC, Customary IHL, rules 1 and 7.

²⁹ *Ibid.*, article 52(2).

³⁰ ICRC, Customary IHL, rule 9.

³¹ Protocol I, article 52 (3).

ACTIVITY DISTINGUISHING BETWEEN MILITARY AND CIVILIAN OBJECTIVES

In the northern region of country C, the government is engaged in an armed conflict against an armed group it has designated as “terrorist organization”. The group resorts to deadly attacks with roadside improvised explosive devices against buses transporting recruits and other staff of the armed forces from other parts of country C to barracks in the conflict zone.

The group has also carried out several attacks against police stations in the northern region of country C, killing police officers and seizing weapons from the police. In addition to ordinary law enforcement, the police in the northern region include special units trained and equipped for riot control, hostage-taking and high-risk search, seizure and arrest operations against terrorism suspects. These special police units are equipped with submachine guns, assault rifles, heavy body armour, armoured vehicles and night vision devices.

- *Are the buses and the police lawful military targets for the group under IHL?*
- *Do these attacks constitute “acts of terrorism” under the universal counter-terrorism conventions and protocols and/or under Security Council resolutions?*
- *Would these attacks be punishable as terrorism-related offences under your country’s criminal law? What other offences would they constitute?*
- *What is the relevance of the classification of the attacks under IHL to their classification under your country’s criminal law?*

2. Indiscriminate attacks

IHL further prohibits indiscriminate attacks.³² These include attacks which are of a nature to strike military objectives and civilians or civilian objects without distinction. Examples include bombarding a whole town sheltering both civilians and fighters or using inherently inaccurate weapons.

3. Proportionality

Even where a target is a military objective, a party must not launch an attack if there is a possibility that it might incidentally kill or injure civilians or damage civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.³³ In other words, civilian casualties must not be disproportionate. What is disproportionate thus varies according to the military importance of the target.

4. Specific prohibitions on acts of terrorism under international humanitarian law

In addition to the above protections for civilians, IHL prohibits acts of terrorism:

- In both international and non-international conflict, IHL prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.³⁴ Violation of this prohibition also constitutes a war crime;

³² Ibid., article 51 (4); and ICRC, Customary IHL, rule 11.

³³ Ibid., articles 51 (5)(b) and 57 (2)(a)(iii) and (b).

³⁴ Ibid., article 51 (2); Protocol II, article 13 (2).

- In international conflict, “all measures of intimidation or of terrorism” against protected persons are prohibited;³⁵
- In non-international conflict, “acts of terrorism” are prohibited.³⁶

These IHL prohibitions address certain tactics in war and are distinct from, and narrower than, many terrorist offences under national law that apply outside of armed conflict.

CROSS-REFERENCE Chapter VI of the module further discusses the relationship between the war crime of spreading terror among the civilian population and the offences under international counter-terrorism instruments.

5. Other special protections for civilians

While attacks on civilians and civilian objects are generally prohibited, IHL reinforces these rules with more specialized protections for particularly important civilian objects.

Objects indispensable to civilian survival must not be attacked, destroyed, removed or rendered useless for the purpose of denying sustenance to civilians.³⁷ These objects include: food; agricultural areas; crops; livestock; and drinking water installations, supplies and irrigation works. Deliberately starving civilians is also prohibited.³⁸

Works or installations containing dangerous forces must not be made the object of attack, even if they are military objectives, if an attack would cause the release of dangerous forces and consequent “severe losses” among civilians.³⁹ These include dams, dykes and nuclear electrical generating stations.

Important cultural and religious property enjoys special protection under IHL.⁴⁰ It is prohibited to attack (including by way of reprisal) historic monuments, works of art or places of worship “which constitute the cultural or spiritual heritage of peoples”.⁴¹ Attacking cultural and religious property is also a war crime in some situations.⁴² Such objects must also not be used in support of the war effort, such as by placing combatants or military equipment close to cultural or religious objects to shield them against attacks. Cultural property is also subject to the general IHL protections against the pillage or looting of property, discussed below.

The destruction of cultural property has often been used as a deliberate means of intimidating the enemy and as a technique of ethnic, religious or sectarian warfare. The destruction of cultural property during the Balkan Wars in the 1990s is notorious, as is the demolition of the monumental statues of the Buddha in Bamiyan in Afghanistan by the Taliban.

³⁵ Fourth Geneva Convention 1949, article 33 (1).

³⁶ Protocol II, article 4 (2)(d).

³⁷ Protocol I, article 54.

³⁸ Ibid.

³⁹ Ibid., article 56.

⁴⁰ See the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954), United Nations, *Treaty Series*, vol. 249, No. 3511.

⁴¹ Protocol I, article 53.

⁴² Ibid., articles 53 and 85(4)(d).

So-called “cultural terrorism” has also become a feature of conflicts involving terrorist groups. In Mali in 2012, fundamentalist religious militants destroyed around 40,000 ancient manuscripts and 16 Sufi mausoleums. ISIL (Da’esh) has destroyed cultural property in the Syrian Arab Republic, Iraq and Libya, including mosques, shrines, tombs, churches, monasteries, museums and ancient ruins, including the ancient World Heritage Site of Palmyra in the Syrian Arab Republic.⁴³

The natural environment is specially protected under IHL. War inevitably causes collateral environmental harm, and there is no absolute prohibition on damaging the environment. Instead, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,⁴⁴ including where it would prejudice the health or the survival of the population.⁴⁵

A number of other specially protected areas in international conflict must not be attacked under IHL, including undefended towns and localities; hospital and medical zones; civilian safety zones; neutralized zones; and demilitarized zones.

6. Prohibited methods of warfare

A number of special IHL rules on the methods of warfare are particularly relevant in the context of terrorism.

Perfidy, which is defined as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”,⁴⁶ is prohibited by IHL and constitutes a war crime – for example when people pretend to be civilians while mounting attacks by dressing in civilian clothing and concealing their weapons. Other examples include attacking when pretending to be:

- Wounded or sick;
- Surrendering;
 - a) Negotiating under a flag of truce;
 - b) Covered by a protected status, such as by misusing the: (a) Red Cross or Red Crescent emblem reserved for medical and religious activities; (b) United Nations emblem for its peace-keeping or relief missions; or (c) protected cultural property emblem;
 - c) A uniformed member of State not involved in the conflict.

The denial of quarter, or threatening to deny quarter, is prohibited by IHL.⁴⁷ It is thus prohibited to attack anyone who is “hors de combat”, including anyone who: has been detained; is defenceless because they are unconscious, shipwrecked, wounded or sick; is clearly intending to surrender; or is parachuting from an aircraft in distress.

⁴³ See Security Council resolution 2199 (2015), para.15.

⁴⁴ Protocol I, article 35 (3); see also ICRC, Customary IHL, rule 45.

⁴⁵ Ibid., article 55 (1).

⁴⁶ Ibid., article 37 (1); see also ICRC, Customary IHL, rule 65.

⁴⁷ ICRC, Customary IHL, rules 46–48.

Reprisals against civilians, others out of combat,⁴⁸ and civilian objects are prohibited by IHL.⁴⁹ A reprisal is an act that would otherwise be unlawful but that is exceptionally considered lawful when used as an enforcement measure in reaction to the unlawful acts of an adversary. The prohibition of reprisals against civilians is designed to prevent retaliation against innocent civilians, such as frequently occurred during the Second World War.

Civilian property is protected by IHL. Pillage (or plunder, or theft) is prohibited and is defined as the forcible taking or appropriation of property for private or personal use.⁵⁰ Private property must not be confiscated and may only be seized or destroyed where justified by imperative military necessity.⁵¹

7. Prohibited and restricted weapons

IHL specially prohibits the use of some weapons and restricts the use of others. It also contains a general prohibition on the use of weapons that are “of a nature to cause superfluous injury or unnecessary suffering”.⁵² Otherwise the general principles on distinction, proportionality and the means and methods of warfare apply to the use of lawful weapons. Outside IHL, various arms control treaties, Security Council resolutions and United Nations arms embargoes provide further restraints on weapons. The regulation of weapons by IHL and other instruments is considered in chapter V of the present module.

C. Classification under international humanitarian law of actors associated with terrorist groups

An individual may be simultaneously subject to IHL and counter-terrorism law. In some respects, both areas of law serve the similar purpose of protecting civilians from violence, including through criminal prosecution in certain circumstances. Nonetheless, IHL recognizes the right of certain categories of people – principally combatants – to lawfully use violence against other combatants and military objectives.

There is no distinct legal category of “terrorist” in IHL, and the legal status of terrorists under IHL has been debated extensively. It is critical to assess the status of an individual in a conflict as this dictates the privileges and protections afforded by IHL, and whether that person can be lawfully detained, prosecuted or militarily targeted.

International conflicts

In international conflicts, regular and irregular State forces and civilians who spontaneously resist an invasion are recognized as “combatants”, entitled to participate in hostilities, enjoy immunity under IHL from criminal prosecution under the criminal law of the foreign State for acts in conformity with IHL, and receive prisoner-of-war status upon capture. They can still be

⁴⁸ Including the wounded, sick and shipwrecked, medical and religious personnel, and captured combatants.

⁴⁹ Protocol I, articles 52–56; ICRC, Customary IHL, rules 146–147.

⁵⁰ ICRC, Customary IHL, rule 52.

⁵¹ *Ibid.*, rule 51.

⁵² Protocol I, article 35(2).

prosecuted for war crimes, as well as for infractions of their home State's criminal law that is compatible with IHL. In addition, as mentioned earlier, irregular State forces that do not meet the conditions of combatancy do not receive combatant immunity and may be prosecuted for crimes under national law.

If a person is not a combatant, by default he or she is classified by IHL as a civilian.⁵³ Civilians enjoy immunity from military attack and many special protections under IHL. Civilians may be held accountable under national counter-terrorism laws (of their own State or a foreign State) for acts they commit in international conflicts, whether under the law of the State where the act is committed or under a foreign State's extraterritorial offences.

Non-international conflicts

As discussed earlier, most conflicts involving terrorist groups are non-international. In non-international conflicts, there is no combatant status, no combatant privilege/immunity, and no prisoner of war status. Members of State armed forces derive their authority to target non-State armed groups from national law and IHL. Members of non-State armed groups ("fighters") are not lawfully authorized to fight under national law and remain subject to national laws, including prosecution for any national security offences, including terrorism offences, or war crimes. The prosecution of war crimes is discussed in chapter VI of the present module.

IHL nonetheless recognizes the existence of organized non-State armed groups, imposes obligations on them to respect IHL and regulates how States may respond to their threat.

1. Membership of non-State armed groups

Members of organized armed groups who perform a "continuous combat function" may be targeted at any time (similar to combatants in international conflicts). There must be sufficient reliable information about their activities to identify such individuals as performing a continuous combat function. Indications of continuous combat function may include:

- The carrying of uniforms, distinctive signs or certain weapons;
- Where a person has been recruited, trained and equipped for combat, before any actual participation in combat;
- Conclusive behaviour, as where a person has repeatedly directly participated in hostilities in support of an organized armed group, where such conduct indicates a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.⁵⁴

In cases of doubt, a person is presumed to be a civilian.

According to the ICRC's preferred approach, other members or associates of non-State armed groups who do not take part in hostilities are not regarded as performing continuous combat

⁵³ Ibid., article 50(1): "A civilian is any person who does not belong to one of the categories of persons referred to in article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian"; see also ICRC, Customary IHL, *rule 5*.

⁵⁴ ICRC, "Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law" (Geneva, 2009), pp. 33–35.

functions, such as those involved in political, administrative or other non-combat functions. These could include, for example:

- Recruiters, trainers, financiers and propagandists contributing to a general war effort;
- Those who purchase, smuggle, manufacture or maintain weapons or other military equipment outside specific military operations;
- Those who collect general intelligence but not tactical military intelligence;
- Civilian “reservists” who have received combat training but are not on active duty;
- Individuals involved in the construction of roads or infrastructure;
- Political and administrative personnel, including personnel of de facto State authorities.

Such persons are civilians who cannot be targeted unless they take a direct part in hostilities (see section 2 below).

Some aspects of the ICRC approach to the performance of continuous combat functions are not universally accepted. Some States take the view that any member of an armed group, not just those performing a continuous combat function, can be targeted. The incidental killing of such members thus need not be counted in assessing whether civilian casualties are disproportionate. However, States taking this position may not target such persons in practice since it may not be militarily useful to do so.

On the other hand, some experts have criticized the ICRC approach for widening the temporal dimension of the applicable IHL rules. As the next section explains, IHL only permits the targeting of persons taking a “direct part in hostilities” (including by way of a continuous combat function) for the duration of their participation (see sect. 2 below). Critics of the ICRC approach argue that a member of armed group can therefore only be targeted when actually engaged in hostilities, not at other times covered by the ICRC concept of “continuous combat function” (such as when training, or during breaks between military operations).

2. Civilians taking a direct part in hostilities

Civilians who are not members of an armed group performing a continuous combat function but who take a direct part in hostilities may be militarily targeted for the duration of their participation.⁵⁵ Once their direct participation ends, such individuals regain their protection from attack. The purpose of the rule is to maximize civilian protection by confining targeting to civilians who are considered to be militarily dangerous, and thus to protect all other civilians from attack.

There has been much debate about the interpretation of this rule in the context of terrorism. A key question is what counts as “direct” (as opposed to indirect) participation, and thus who can and who cannot be targeted. Terrorist groups often rely on extensive support networks of people who do not themselves fight but undertake activities that enable the group to function and fight. Examples include planners or strategists, financiers, propagandists, recruiters, arms suppliers and bomb-makers, messengers, spies and cyber-operatives. ICRC has provided guidance on the

⁵⁵ Protocol I, article 51(3).

meaning of direct participation in hostilities, which⁵⁶ it defines as “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”. An act must militarily harm the adversary or protected persons or objects, directly cause such harm, and aim to support one side over the other.⁵⁷ Depending on the circumstances, examples of direct participation in hostilities could include:⁵⁸

- The preparation, execution or command of military acts or operations;
- The provision of military equipment, instruction and transport of personnel for such acts;
- The gathering or transmitting of tactical military intelligence for such acts;
- The preparation, transport and positioning of weapons and equipment for such acts.

Common examples of indirect participation, not amounting to direct participation in hostilities, could include:⁵⁹

- Purchase, production, smuggling and hiding of weapons;
- General recruitment and training of personnel;
- Financial, administrative or political support to armed groups;
- Maintenance of computer networks, designing malware or cyber theft.⁶⁰

Direct participation in hostilities can include acts preparatory to executing a hostile act, as well as deploying to and returning from the place of an attack, since these are integral parts of the hostile activity.⁶¹

ACTIVITY DISTINGUISHING CONTINUOUS COMBAT FUNCTION AND CIVILIAN DIRECT PARTICIPATION IN HOSTILITIES UNDER IHL FROM COMMISSION OF TERRORISM-RELATED OFFENCES

Consider the following four scenarios:

1. The supreme leader of a terrorist organization has been hiding for some years in a house in country A, which is at peace but neighbours country B, where there is an armed conflict involving the terrorist group. Earlier in the conflict, the leader was present in country B and there was convincing evidence that he was giving orders to his group to engage in hostilities there (including the use of suicide bombs concealed under civilian clothes). After he fled to country A, the intelligence about his activities became more difficult to ascertain. It was not known whether he still commanded the daily military operations in country B remotely, or whether he only maintained overall political and spiritual leadership of the group but had devolved operational military command to his subordinates. Country B discovers his

⁵⁶ ICRC, “Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law” (Geneva, 2009), p. 43.

⁵⁷ Ibid., p. 46.

⁵⁸ Ibid., pp. 66 and 67 and pp. 33–35.

⁵⁹ Ibid.

⁶⁰ Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013), p. 120.

⁶¹ ICRC, “Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law” (Geneva, 2009), p. 65.

whereabouts and orders a secret mission to “capture or kill” him at his house in country A. When country B’s special forces arrive at his house in the middle of the night, they find him half-asleep, in his pajamas, in his bedroom.

2. A young woman earns a living selling vegetables from a cart beside a road that leads into a nearby government military base. Her brother is a member of a terrorist group. He gives her a mobile phone and asks her to call him whenever she sees tanks leaving the base. She knows that some of those tanks never seem to return to the base. She is not interested in politics or war. She just wants to please her brother. [Consider, would your answer be different if she was only collecting information about who enters the base, but not about active military operations?]
3. An expatriate banker is sympathetic to the cause of an armed group and secretly channels money to the group. He is not interested in knowing specifically what the money is used for, as long as it advances the cause, whether politically, militarily or for humanitarian relief for suffering civilians.
4. A young man, a national of country X, travels to country Y to join an armed group involved in hostilities with the government of country Y. The young man records videos for the group, for posting on social media, that call on his fellow citizens to travel abroad to join the armed group, whether as fighters, wives or to provide humanitarian assistance. Sometimes he also urges fellow citizens back home to attack his country’s soldiers, government officials and citizens, by whatever means, including by running people over using vehicles or randomly stabbing people on the streets.

TASKS

Apply your country’s criminal law to the activities of the persons in the examples 1, 2, 3 and 4 above. Assume the armed groups are considered terrorist entities under your country’s law:

- (a) Have the spiritual leader, the young woman, her brother, the banker and the young man committed terrorism related offences?
- (b) Are the spiritual leader, the young woman, her brother and the banker performing a continuous combat function for the purposes of IHL? If not, are they civilians taking part in hostilities – and if so, at what time? Could they be lawfully targeted by the use of (potentially lethal) military force?
- (c) List the differences between the consequences arising for military forces, investigators and prosecutors from the qualification of these individuals as: (i) performing a continuous combat function under IHL, (ii) otherwise directly participating in hostilities under IHL, and (iii) as terrorist suspects under domestic criminal law.

3. Other categories under international humanitarian law

While IHL primarily distinguishes between combatants/fighters and civilians, various IHL rules also refer to a variety of other terms or groups. Some of these are civilians who may have particular needs, such as children, women, the sick, the elderly and the injured. Others are civilians who require special protection because of the nature of their work, such as medical personnel, units and transports; religious personnel; humanitarian relief personnel and objects;⁶² peacekeepers (who are not taking a direct part in hostilities);⁶³ and war correspondents and journalists.

Others are civilians whose activities present a range of risks or regulatory challenges, such as mercenaries, private security contractors or child soldiers. Terms from outside IHL, such as “foreign fighters”, have also been applied to certain actors involved in armed conflicts. Foreign fighters and child soldiers are discussed below.

4. “Foreign fighters” and “foreign terrorist fighters”

The presence of foreign fighters in armed conflicts can have “significant negative impacts on both the immediate security environment and the longer-term impacts on regional peace, security and development”.⁶⁴ IHL does not recognize or confer a specific legal status on “foreign fighters” or “foreign terrorist fighters” involved in armed conflict, such as those who joined ISIL (Da’esh) in the Syrian Arab Republic. IHL treats them as any other actor involved in armed conflict. IHL itself does not prohibit the transit or entry of foreign fighters but focuses instead on regulating hostilities regardless of the people involved.

For the purposes of disarmament, demobilization and reintegration (DDR) processes, United Nations standards mention “foreign combatants” as a group that requires special attention. The United Nations integrated disarmament, demobilization and reintegration standards (IDDRS) define “foreign combatants” as “members of armed forces or groups who are not nationals of the country in which they find themselves”.⁶⁵ The standards note that “[d]ecisions on whether foreign combatants will be demobilized in the host country or in their country of origin should be taken on a country-by-country basis”.⁶⁶

Outside IHL and the DDR context, the Security Council has addressed the problem of “foreign terrorist fighters” by invoking its power, under Chapter VII of the Charter of the United Nations, to restore or maintain international peace and security. In its resolution 2178 (2014), the Security Council defined foreign terrorist fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of,

⁶² Protocol I, article 71(2); Rome Statute of the International Criminal Court (ICC), article 8(2)(b)(iii); Convention on the Safety of United Nations and Associated Personnel (General Assembly resolution 49/59), article 7(2); and ICRC, Customary IHL, rules 31 and 32.

⁶³ ICRC, Customary IHL, rule 33.

⁶⁴ African Union, Disarmament, Demobilization and Reintegration Capacity Program, Foreign Fighters Operational Guideline (2018), p. 9 (<http://www.peaceau.org/en/page/68-disarmament-demobilization-and-reintegration-ddr>).

⁶⁵ United Nations Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, “Operational Guide to the Integrated DDR Standards” (2014), p. 237 (www.unddr.org/operational-guide-iddrs/).

⁶⁶ Ibid., p. 236.

or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.⁶⁷

In its resolution 2178 (2014), the Security Council required that all States “establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense” to criminalize individuals who:⁶⁸

- (a) Travel or attempt to travel to a foreign State “for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”;
- (b) Finance such travel;
- (c) Organize, facilitate or recruit for such travel.

In the same resolution (para. 8), the Security Council also required that States prevent foreign terrorist fighters from transiting through their territories.

The Security Council subsequently adopted resolution 2396 (2017), building upon resolution 2178 (2014). In that resolution, the Council urged Member States to “investigate individuals whom they have reasonable grounds to believe are terrorists, including *suspected foreign terrorist fighters...*”⁶⁹ [emphasis added]. States were also urged “to take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures”, in accordance with international law.⁷⁰

ACTIVITY

The African Union has adopted an operational guideline for the disarmament, demobilization and reintegration of foreign fighters.^a

- ✎ *Compare the definition of foreign terrorist fighters under Security Council resolution 2178 (2014) with the meaning the IDDRS and the African Union operational guideline attribute to the terms “foreign combatant” and “foreign fighter”.*
- ✎ *Make a list of the key differences between these concepts.*

^a African Union, Disarmament, Demobilization and Reintegration Capacity Programme, “Foreign fighters operational guideline” (2018).

⁶⁷ Security Council resolution 2178 (2014), 8th preambular para.

⁶⁸ *Ibid.*, para. 6

⁶⁹ Security Council resolution 2396 (2017), para. 29.

⁷⁰ *Ibid.*; see also S/2018/1177, annex (Addendum to the guiding principles on foreign terrorist fighters (2018)), para. 45 (guiding principles 11 and 12).

5. Gender, international humanitarian law and counter-terrorism in armed conflict

Gender and IHL

IHL affords women the same protections as men, without discrimination, whether they are fighters, civilians or persons “hors de combat”. However, women often have special needs and vulnerabilities during armed conflict because they are at greater risk of sexual violence and because underlying gender inequalities in society expose them to specific risks (as when accessing humanitarian relief to support families).

IHL accordingly recognizes additional protections for women.⁷¹ These include protection from sexual violence (including rape, enforced prostitution and assault, which are also war crimes),⁷² the separation of women in detention from men,⁷³ and special care (and limits on the death penalty) for pregnant women and mothers of infants.

In addition, IHL rules that apply equally to men and women should be applied in gender-sensitive ways, for instance in relation to health care (including trauma treatment and counselling),⁷⁴ displacement, separation from family members (including missing men) and humanitarian needs (such as access to safe drinking water, food, fuel and medicines).

Security Council resolution 1325 (2000) on women, peace and security also calls on all parties to armed conflict “to fully respect international law applicable to the rights and protection of women and girls” particularly under IHL, and “to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence”.⁷⁵

IHL treaties tend to refer to women as passive victims (including of attacks on their “honour”) rather than considering the wider “gender” dimensions of armed conflict. This obscures other important issues, such as the role of women as fighters or as persons providing indirect support for hostilities. Furthermore, gender issues affecting men, such as the disproportionate military profiling and targeting of young men, even if they are not involved in the conflict, or the hidden shame of sexual violence targeting men, are not being addressed.

Gender and terrorism in armed conflict

Related gender issues arise in conflicts involving terrorist organizations. Once again, women may be specifically targeted by terrorist organizations, for example the kidnapping of women and girls by Boko Haram in Nigeria for purposes of sexual violence, forced labour or forced conscription, and the sexual enslavement by ISIL (Da’esh) of Yazidi women in Iraq. Women have also been threatened to control their social behaviour (such as how they dress and who must accompany them in public) as a result of extreme religious restrictions by ISIL (Da’esh), Al-Shabaab in Somalia or Ansar Eddine in Mali. Women have also been differentially affected by the destruction of homes, displacement and the social and economic consequences of losing

⁷¹ ICRC, Customary IHL, rule 134.

⁷² *Ibid.*, rule 93 (the protection applies to women and men, but disproportionately women tend to be victims).

⁷³ *Ibid.*, rule 119.

⁷⁴ ICRC, Customary IHL, rule 134.

⁷⁵ Security Council resolution 1325 (2000), paras. 9 and 10.

male relatives, as well as by interrogation and detention for information about their male relatives. The Security Council has recognized the “differential impact” of terrorism on women’s rights to health, education and participation in public life.⁷⁶

Women are not just victims of terrorism, however: they may also be active participants in terrorist organizations, whether as fighters (including foreign fighters), suicide bombers, intelligence gatherers, sympathizers, mobilizers, radicalizers or recruiters.⁷⁷ Women become involved in organizations such as ISIL (Da’esh) for similar reasons as men, including “adventure, inequality, alienation and the pull of the cause.”⁷⁸ Gendered assumptions about women’s roles may result in unduly lenient treatment in the criminal justice system, or more limited rehabilitation and reintegration support, putting them at greater risk of recidivism.⁷⁹

In relation to women who are foreign terrorist fighters or associated with them, in its resolution 2396 (2017) the Security Council emphasized that “women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing tailored prosecution, rehabilitation and reintegration strategies, and stresses the importance of assisting women and children associated with foreign terrorist fighters who may be victims of terrorism, and to do so taking into account gender and age sensitivities.”⁸⁰

6. Children associated with armed groups

The involvement of children (below age 18)⁸¹ in armed conflict and terrorism warrants special attention. Under IHL, children are entitled to special protection against harm and special care and aid.⁸² It is important that children who have taken part in hostilities continue to enjoy these special protections.⁸³

Protocols I and II to the Geneva Conventions prohibit the recruitment of children under the age of 15 years,⁸⁴ and prioritize the enlistment of older children first in instances where States recruit

⁷⁶ Security Council resolution 2242 (2015), preamble.

⁷⁷ United Nations Entity on Gender Equality and the Empowerment of Women (UN-Women), *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325* (New York, 2015), pp. 225 and 226.

⁷⁸ *Ibid.*, p. 226.

⁷⁹ Counter-Terrorism Executive Directorate (CTED), “Gender dimensions of the response to returning foreign terrorist fighters: research perspectives”, CTED Trends Report, February 2019, p. 2.

⁸⁰ Security Council resolution 2396 (2017), para. 31; see also Madrid Guiding Principles, S/2015/939, annex II, principle 30.

⁸¹ Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531), article 1.

⁸² Protocol I, article 77 (3); see also Protocol II, article 4(3); other provisions addressing children and/or families include the Fourth Geneva Convention, articles 23–25, 38, 50, 51, 68(4), 76, 78, 81, 82, 89 and 94; Protocol I, articles 8 (a), 74, 75 (5), 76 (3), 77 (3), 77 (4), 78 (1), 78 (3) and 82; see also ICRC, Customary IHL, rule 135 “Children affected by armed conflict are entitled to special respect and protection”; and ICRC, article 38(4), “In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.

⁸³ Protocol I, article 77 (3); Protocol II, article 4(3)(d); see also Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (United Nations, *Treaty Series*, vol. 2173, No. 27531, adopted 25 May 2000, entered into force 12 February 2002), articles 6 and 7, which, inter alia, provide that children who have been unlawfully recruited shall where necessary be accorded all appropriate assistance for their physical and psychological recovery and their social reintegration (article 6(3)).

⁸⁴ Protocol I, article 77(2), and Protocol II, article 4(3)(c); see also Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531), article 77 (3); the Convention requires States to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities” (article 38(2)). The Convention is almost universally binding.

children between ages 15 and 18. It is a rule of customary law that no child under the age of 15 can be recruited by armed forces and armed groups.⁸⁵

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits direct participation in hostilities by those under 18 years, prohibits compulsory recruitment under the age of 18, and sets strict requirements on the voluntary recruitment of those aged 16 to 18.⁸⁶ States must take all legal measures to ensure the effective enforcement of these provisions (article 6(1)).

The Optional Protocol also prohibits the recruitment or use of persons under the age of 18 years by non-State armed groups (article 4(1)) and requires States to take all feasible measures to prevent these, including through criminalization (article 4(2)). Children under the age of 18 recruited and exploited by armed groups are considered victims of trafficking in persons. Recruitment of children under the age of 15, or their use in hostilities, is a war crime in international and non-international armed conflict.⁸⁷

The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (“Paris Principles”),⁸⁸ adopted in 2007, have been endorsed by over 100 States. Although not legally binding, they reflect the strong commitment of States to end the recruitment of children and their use in hostilities by both State armed forces and non-State armed groups. They state, inter alia, in relation to children who were associated with armed forces or armed groups, that:

- Children who are accused of crimes under international law should be considered primarily as victims of offences against international law, not only as perpetrators. These children should be treated with rehabilitation in mind and alternatives to judicial proceedings should be sought wherever possible (paras. 3.6 and 3.7), such that criminal justice measures should be seen as a measure of last resort;
- Children should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership in armed forces or groups (para. 8.7);
- Children accused of crimes under international or national law are entitled to be treated in accordance with international standards for juvenile justice (para. 8.8).

Similarly, in its resolution 2427 (2018), the Security Council: (a) stressed the need to pay particular attention to the treatment of children associated or allegedly associated with non-State armed groups, including those who commit acts of terrorism; (b) emphasized that children who have been recruited in violation of international law by armed groups and who are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law; and (c) urged Member States to consider non-judicial measures, as alternatives to prosecution and detention, that focus on the rehabilitation and reintegration for children formerly associated with armed groups.⁸⁹

⁸⁵ ICRC, Customary IHL, rule 136 (“Children must not be recruited into armed forces or armed groups”).

⁸⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (United Nations, *Treaty Series*, vol. 2173, No. 27531, adopted 25 May 2000, entered into force 12 February 2002), article 1.

⁸⁷ ICC Statute, article 8(2)(b)(xxvi) and 8(2)(e)(vii), respectively.

⁸⁸ Principles and Guidelines on Children Associated with Armed Forces and Armed Groups (Paris Principles).

⁸⁹ Security Council resolution 2417 (2018), paras. 19–21.

The United Nations Global-Counter Terrorism Strategy Review explicitly recognized that children associated with terrorist groups must be “treated in a manner consistent with their rights, dignity and needs, in accordance with applicable international law, in particular obligations under the Convention on the Rights of the Child”, including “their potential status as victims of terrorism as well as of other violations of international law”⁹⁰

Children affected by the foreign terrorist fighters phenomenon

In its resolution 2396 (2017) the Security Council called on States to distinguish foreign terrorist fighters from “accompanying family members who may not have been engaged in foreign terrorist fighter-related offenses”⁹¹ and recognized the importance of providing timely and appropriate reintegration and rehabilitation assistance to children associated with foreign terrorist fighters returning or relocating from conflicts (including health care, psychosocial support and education programmes), in conformity with international law.⁹² The Council further stressed the importance of assisting children who are victims of terrorism, taking into account gender and age sensitivities.⁹³ Principle 7 of the 2018 addendum to the 2015 Madrid Guiding Principles (relating to issues concerning FTFs)⁹⁴ emphasizes that children’s rights must be respected and their best interests must be a primary consideration in all actions.

The Security Council, in its resolution 2396 (2017), noted, however, that children may have served in different roles, including as supporters, facilitators or perpetrators of terrorist acts, and they require special attention when developing tailored prosecution, rehabilitation and reintegration strategies⁹⁵ and further recognized that children may be especially vulnerable to radicalization to violence and in need of particular social support, such as post-trauma counselling.⁹⁶ The Convention on the Rights of the Child, in particular article 37 (concerning detention, as well as capital punishment)⁹⁷ and article 40 (fair trial and also alternatives to prosecution), applies to children who have been recruited and who are dealt with by the justice system.

In this respect, Security Council resolution 2396 (2017) should be read together with its resolution 2427 (2018) on the protection of children in armed conflict, which – as mentioned above – explicitly applies also to children associated with armed groups who commit acts of terrorism.⁹⁸ Security Council resolution 2396 (2017) should also be read together with general comment No. 24 on the child justice system adopted by the Committee on the Rights of the Child in 2019, which provides guidance on the treatment of children recruited by groups designated as terrorist.⁹⁹

⁹⁰ United Nations Global Counter-Terrorism Strategy Review, General Assembly resolution 72/284, para. 77.

⁹¹ Security Council resolution 2396 (2017), para. 29.

⁹² *Ibid.*, paras. 36 and 37.

⁹³ *Ibid.*, para. 31.

⁹⁴ See Madrid Guiding Principles, S/2015/939, annex II, and the addendum thereto, S/2018/1177, annex, p. 16.

⁹⁵ Security Council resolution 2396 (2017), para. 31.

⁹⁶ *Ibid.*, preamble.

⁹⁷ Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531), article 37, requires: (a) freedom from torture or cruel, inhuman or degrading treatment or punishment; no capital punishment for offences committed by persons under 18 years; (b) freedom from unlawful or arbitrary detention, and detention only as a last resort and for the shortest possible period of time; (c) humane and dignified conditions of detention, including separation from adults and family contact; and (d) access to legal assistance and habeas corpus.

⁹⁸ Security Council resolution 2417 (2018), para. 19.

⁹⁹ Committee on the Rights of the Child, general comment No. 24 (2019) on children’s rights in the child justice system, paras. 32 and 33; (CRC/C/GC/24), paras. 97–101.

TOOLS

- ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) (www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international).
- Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (A/70/330).
- Geneva Academy of International Humanitarian Law and Human Rights, “Foreign Fighters under International Law”, Academy Briefing No. 7 (October 2014).
- Operational guide to the Integrated Disarmament, Demobilization and Reintegration Standards (2014) (<https://digitallibrary.un.org/record/589201?ln=en>).
- African Union, Disarmament, Demobilization and Reintegration Capacity Program, Foreign fighters operational guideline (2018) (<http://www.peaceau.org/en/page/68-disarmament-demobilization-and-reintegration-ddr>).
- Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights, *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (2018) (www.osce.org/odihr/393503).
- Committee on the Rights of the Child, general comment No. 24 (2019) on the child justice system (CRC/C/GC/24): paras. 97–101 provide guidance on children recruited by groups designated as terrorist.
- UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*, chapters 1(C), 2(A) and 3(A) (www.un.org/victimsofterrorism/en/node/4662).
- United Nations Office of Counter-Terrorism, *Handbook on children affected by the foreign fighter phenomenon: Ensuring a child rights-based approach*.
- Global Counterterrorism Forum, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (2015) (see: www.thegctf.org/).
- Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, addendum to the guiding principles on foreign terrorist fighters (Madrid Guiding Principles) (S/2018/1177).
- Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (“Paris Principles”) (2007).

D. Detention for security reasons in armed conflict

In international conflict, IHL permits States to detain the adversary’s combatants as prisoners of war until the end of active hostilities. As mentioned above, civilians remain subject to national criminal law (including offences related to national security) in such conflicts, including in situations of occupation. Civilians may therefore be arrested and detained pending criminal charges and trial, subject to the safeguards of criminal process and human rights law, (including judicial review of detention) and fair trial before independent, regular courts.

Exceptionally, and as a last resort, civilians may also be administratively detained where “absolutely necessary” for State security, or (in occupied territory specifically) for “imperative reasons of security”.¹⁰⁰ Such reasons could include that a person intends to take part in hostilities, had previously taken part or is otherwise involved in activities in support of their army or resistance forces (such as indirect participation in hostilities).

Such persons must be informed promptly, in a language they understand, of the reasons why these measures have been taken.¹⁰¹ Civilians can only be detained for as long as they remain dangerous. Unless subject to prosecution, such persons must be “released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”.¹⁰² Detention decisions must be subject to a regular procedure,¹⁰³ a right of review and periodic review (at least every six months) by a competent body (but not necessarily a court).¹⁰⁴ Detainees must always be treated humanely in detention.¹⁰⁵

In non-international conflict, prisoner-of-war status does not exist for “fighters”. Common article 3 of the Geneva Conventions does not expressly authorize detention¹⁰⁶ or stipulate the grounds of detention or the procedures governing it.¹⁰⁷ Its guarantees of a fair trial and humane treatment implicitly acknowledge that detention occurs in such conflicts. Views differ as to whether IHL implicitly authorizes detention or leaves it to national law to regulate its grounds and procedures.¹⁰⁸

It is arguable that under common article 3 an inherent power to detain (including internment) is envisaged for parties to an armed conflict.¹⁰⁹ Customary IHL requires that detention must not be arbitrary.¹¹⁰ ICRC suggests that the minimum legal standard to justify detention is that it must be necessary for “imperative reasons of security”,¹¹¹ mirroring the test in international armed conflict for the internment of civilians.

As a matter of course, in international conflict, civilians or fighters may be detained for the purpose of criminal prosecution of offences under domestic law (including war crimes or other international crimes). Outside of the criminal process, however, persons may be detained under national law for a range of security reasons: as members of armed groups performing a continuous combat function; for past participation in hostilities; or for other dangerous activities (including for “indirect” participation in hostilities).

¹⁰⁰ Fourth Geneva Convention 1949, articles 42 and 78, respectively.

¹⁰¹ Protocol I, article 75(3).

¹⁰² *Ibid.*

¹⁰³ Fourth Geneva Convention 1949, article 78.

¹⁰⁴ *Ibid.*, articles 43 and 78.

¹⁰⁵ *Ibid.*, article 27; Protocol I, article 75; see also International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200 (XXI), annex, articles 7 and 10.

¹⁰⁶ See Royal Courts of Justice (England and Wales High Court, Queen’s Bench Division), *Serdar Mohammed v. Ministry of Defence*, case No. HQ12X03367, judgment, 2 May 2014.

¹⁰⁷ ICRC, Commentary of 2016 to the First Geneva Convention (article 3), para. 720.

¹⁰⁸ *Ibid.*, para. 727; ICRC, “Internment in armed conflict: Basic rules and challenges” (2014), p. 7.

¹⁰⁹ ICRC, Commentary of 2016 to the First Geneva Convention (article 3), para. 728.

¹¹⁰ ICRC, Henckaerts, J.M, and Doswald-Beck, Louise, *Customary International Humanitarian Law, Vol. I: Rules* (2005), rule 99.

¹¹¹ ICRC, Commentary of 2016 to the First Geneva Convention (article 3), para. 721.

As discussed in chapter I of the present module, international human rights law applies concurrently in armed conflict. Human rights law¹¹² requires that any security detention in non-international conflict must be:

- Prospectively authorized by law;
- Based on sufficiently certain and precise legal criteria;
- Strictly necessary for security reasons (including that less invasive means would not be effective);
- Proportionate to the legitimate security objective;
- Non-discriminatory;
- Subject to independent and effective judicial review.

It is controversial whether judicial review of detention can be suspended in a non-international armed conflict,¹¹³ bearing in mind that in international conflict security detention of civilians may be administratively controlled without judicial review. Recommended good practices concerning review of internment include the following rights:¹¹⁴

- Right to be promptly informed, in a language the person understands, of the reasons for internment, in sufficient detail so as to enable the decision to be challenged;
- Right to the effective review of the lawfulness of detention, with the least possible delay, by an independent and impartial body;
- Right to legal assistance;
- Right to attend proceedings in person;
- Right to the periodic review of the lawfulness of continuing detention.

While the resolutions of the Security Council may constitute another source of legal authority for detention in non-international conflicts, human rights guarantees continue to apply.¹¹⁵

National detention laws must always respect the humanitarian requirements of common article 3, which include non-discrimination, humane treatment and medical care.

¹¹² See ICCPR, article 9, and Human Rights Committee, general comment No. 35, CCPR/C/GC/35, paras. 64–66.

¹¹³ ICRC, *Internment in Armed Conflict: Basic Rules and Challenges* (2014), p. 7.

¹¹⁴ Pejic, Jelena, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence" (2005) (international-review.icrc.org/articles/procedural-principles-and-safeguards-internment-administrative-detention-armed-conflict), cited with approval by the ICRC, *Commentary 2016 to the First Geneva Convention (article 3)*, paras. 722–724 (<https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>).

¹¹⁵ *Al-Jedda v. United Kingdom*, European Court of Human Rights, Grand Chamber, Application No. 27021/08, Judgement, 7 July 2011.

E. Relationship between international humanitarian law and the counter-terrorism legal framework

There is no general rule of IHL or international law that excludes the concurrent application of counter-terrorism laws in armed conflict. In addition to laws criminalizing violations of IHL, domestic criminal law that criminalizes acts of terrorism may apply to certain terrorist acts in armed conflict:

- In international conflicts, the criminal law of the occupied territory as well as legislation passed by the occupying power within the limits set by IHL will still apply to those who are classified as civilians (even if participating in hostilities);¹¹⁶
- In non-international armed conflicts, the State party's domestic criminal law applies, and thus non-State actors may be criminally liable for terrorism or other national security offences, even where their conduct is not in violation of IHL;¹¹⁷
- In non-international conflicts in another State's territory, the domestic criminal law of both the territorial State and the foreign belligerent State (if extraterritorial jurisdiction has been extended) may apply.

Acts of violence that comply with IHL in armed conflict, and acts of terrorism, are different forms of violence governed by different legal frameworks, although national offences sometimes blur the boundaries. A number of issues should be considered when examining the relationship between the two regimes.

While IHL already prohibits much terrorist-type conduct, the concurrent application of counter-terrorism law can have practical advantages. First, national counter-terrorism law may criminalize additional conduct, which IHL does not, such as endangering the public (without actually injuring people), damaging the environment or security-related offences in occupied territory or in non-international armed conflict. National law, unlike IHL, often includes preparatory acts offences such as the possession of dangerous objects with a terrorist intent (before a crime is attempted), providing or receiving terrorist training or offences relating to terrorist organizations (such as finance, recruitment, membership, support, training and so on). Such offences may allow a preventive use of criminal justice to disrupt terrorist plots and hold those responsible to account before an attack takes place and lives are lost.

Secondly, international counter-terrorism conventions and Security Council resolutions impose wider and more specific obligations on States to take action to suppress terrorist offences than are imposed under IHL. Only "grave breaches" of IHL in international armed conflict, not other war crimes in international conflict or any war crimes in non-international conflict, are subject to a duty to "extradite or prosecute" and to provide mutual assistance. In contrast, States must extradite or prosecute, and provide mutual assistance, in relation all offences under the

¹¹⁶ See Fourth Geneva Convention, article 64.

¹¹⁷ Saul, Ben, "Terrorism and international humanitarian law", in *Research Handbook on International Law and Terrorism* (Saul, Ben, ed.) (Edwin Elgar Publishers, 2014), p. 228.

international counter-terrorism conventions and protocols, as well as in relation to terrorist acts (including preparatory offences) under Security Council resolution 1373 (2001).¹¹⁸

Thirdly, counter-terrorism law imposes more specific duties to prevent offences than IHL. Under the counter-terrorism conventions, States must take “all practicable measures to prevent preparations” in their territories for the commission of offences within or outside their territories, exchange information and coordinate administrative and other measures to prevent offences. Detailed preventive obligations are also set out in Security Council resolution 1373 (2001).¹¹⁹ In contrast, IHL contains a less elaborate duty to “respect and ensure respect” for IHL.¹²⁰

National counter-terrorism laws often contain strong, special law enforcement powers, including at the investigative and trial phases, which may make them more attractive than war crimes law as a way of dealing with terrorist offenders.

1. Exclusions under international counter-terrorism instruments

Some, but not all,¹²¹ international counter-terrorism instruments exclude military actors or certain types of conduct in armed conflict from their scope of application, although the nature of the exclusions varies between instruments. In the treaties concerning aviation safety offences, acts directed against military, customs or police aircraft are not covered by the relevant conventions,¹²² whether in peace or war. There is a similar exception to the maritime safety conventions for warships and naval, police or customs ships.¹²³ The Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastics Explosives Convention) also contains exceptions in relation to military or police purposes.¹²⁴

- Some of the conventions and protocols related to the prevention and suppression of terrorism, including the 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention), contain an explicit exclusion for the “activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”.¹²⁵ Such situations are left to be regulated by IHL (and international human rights law insofar as it applies). The term “armed forces” is understood to cover State and non-State armed forces. It would not,

¹¹⁸ In its resolution 1373 (2001) the Security Council requires States to “bring to justice” such persons, which was later interpreted to impose an “extradite or prosecute” obligation; see also Council resolution 1456 (2003), para. 3 and Council resolution 1566 (2004), para. 2.

¹¹⁹ Security Council resolution 1373 (2001), paras. 2 (a) (refrain from supporting terrorism), (b) (prevent terrorist acts), (c) (deny safe haven), (d) (prevent use of territory for terrorism), and (g) (prevent the movement of terrorists).

¹²⁰ Geneva Conventions of 1949, common article 1.

¹²¹ For example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973) criminalizes attacks on diplomats by any person, including by armed forces (General Assembly resolution 3166 (XXVIII)).

¹²² Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), 1963, article 1 (4); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), 1970, article 3 (2); Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal Convention), 1971, article 4; and International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), 1999, article 2 (1)(b).

¹²³ Convention for the suppression of unlawful acts against the safety of maritime navigation (Rome Convention), 1988, article 2.

¹²⁴ Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention), 1991, articles 3(2) and 4(2)–(4).

¹²⁵ International Convention on the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention), 2005, article 4(2); International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention), 1997, article 19(2); 2005 Protocol to the Rome Convention of 1988 (adding article 2 *bis* (2)), article 3; and 2005 amendment to the Convention on the Physical Protection of Nuclear Material (1980), inserting article 2(4)(b).

however, cover individuals who take part in the fighting but who are not members of an organized armed group.

- International Convention for the Suppression of the Financing of Terrorism only covers acts against civilians or other persons not taking an active part in an armed conflict,¹²⁶ thereby excluding attacks on fighters or others taking a direct part in hostilities.
- Some recent treaties include a further exception for the activities of State military forces (in peacetime) when exercising their official functions.¹²⁷ Official duties might include activities in conflict-affected areas, such as United Nations peacekeeping operations, humanitarian relief, emergency evacuations and law enforcement concerning civilian populations. Thus, for example, State military forces that use explosives to enter a building to rescue hostages would not be liable under the Terrorist Bombings Convention of 1997.
- The provisions excluding the activities of armed forces of the belligerents (States and non-States armed groups alike) during armed conflict determine the scope of application of each convention. In other words, States are only required to criminalize, and transnationally cooperate, in relation to the enumerated conduct not covered by the exclusionary provisions. National offences that go further will not enjoy the benefits of transnational cooperation (including extradition and mutual assistance) under the treaties.

2. Issues arising in the concurrent applicability of international humanitarian law and counter-terrorism laws

Since the adoption of its resolution 1373 (2001) onwards,¹²⁸ the Security Council has required States to criminalize “terrorist acts” and bring to justice those involved in them, although it has not explicitly defined “terrorist acts” or how such offences should relate to IHL. In practice the Council partly understands terrorist acts to mean the offences in international counter-terrorism conventions to which a State is a party.¹²⁹ As discussed above, some conventions address how they relate to IHL.

Many States have also defined terrorist acts in a wider or more general manner. In practice, the Security Council’s monitoring mechanisms¹³⁰ assess whether such laws comply with the human rights principle of legality, to ensure that terrorist offences are defined with sufficient precision so that a person can prospectively know the scope of their criminal liability.

Security Council resolution 1566 (2004) is also relevant to this matter as it provides a “working definition” of terrorist acts, which can guide Member States, although they are not required to follow it. That definition confines terrorist offences to criminal acts, including acts against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, which are already offences under counter-terrorism conventions and are committed to provoke

¹²⁶ International Convention for the Suppression of the Financing of Terrorism, article 2(1)(b).

¹²⁷ Hague Hijacking Convention of 1970, as amended by the Beijing Protocol of 2010, article 3 *bis*; Plastic Explosives Convention of 1991, articles 3 and 4; Nuclear Terrorism Convention of 2005, article 4(2); Terrorist Bombings Convention of 1997, article 19(2); 2005 Protocol to the Rome Convention 1988 (adding article 2 *bis* (2)), article 3; and 2005 amendment to the Convention on the Physical Protection of Nuclear Material (1980), inserting article 2 (4)(b).

¹²⁸ See Security Council resolution 2396 (2017), para. 17.

¹²⁹ CTED, technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions, S/2017/716, annex, pp. 33 and 34.

¹³⁰ Counter-Terrorism Committee and CTED.

a state of terror in the public, a group of persons or particular persons in order to intimidate a population or to compel a government or international organization. The definition also does not specifically address IHL, other than to the extent that the counter-terrorism treaties do so.

The Security Council has repeatedly emphasized that States must implement its resolutions in accordance with their obligations, *inter alia*, under international human rights law and IHL.¹³¹ In order to comply with IHL, in international conflicts States must not criminalize as terrorist acts any conduct which attracts combatant immunity¹³² – in other words, hostilities by another State’s armed forces.

Since there is no combatant immunity in non-international armed conflict, States are not prohibited from criminalizing the conduct of non-State armed groups – whether or not it is consistent with IHL. There are a number of quite different approaches in national laws to the interaction between terrorism offences and IHL:

- Some laws exclude “the activities of armed forces during periods of armed conflict, which are *governed by* international humanitarian law”¹³³ [emphasis added], regardless whether such acts are consistent or inconsistent with IHL. This is the approach of the 27 States members of the European Union in relation to EU terrorist offences. It leaves such acts entirely to IHL (including war crimes liabilities) as the more specialized law (*lex specialis*) adapted to the circumstances of armed conflict;
- Some laws exclude acts committed in armed conflict but only if they are “in accordance with” IHL. Examples include Canadian, New Zealand and Swiss law.¹³⁴ Accordingly, hostile acts that do not violate IHL by members of non-State armed groups cannot qualify as terrorist offences, whereas violations of IHL may do so (and, if serious, may also constitute war crimes under IHL);¹³⁵
- Some laws contain no exclusions concerning IHL and thus criminalize terrorist acts by members of non-State armed groups even if they comply with IHL. Examples include laws of the United Kingdom,¹³⁶ Australia¹³⁷ and the Netherlands,¹³⁸ as well as the terrorist financing law of the European Union.¹³⁹

¹³¹ See Security Council resolutions 2178 (2014), 2396 (2017) and 2462 (2019).

¹³² See section D above; while Security Council obligations may override other inconsistent international treaty obligations under Article 103 of the Charter of the United Nations, its counter-terrorism resolutions do not clearly express any intent to override IHL in any respect.

¹³³ European Union directive of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, recital 37; see also Belgian Criminal Code, article 141 *bis*; Chamber of Indictments of the Court of Appeal of Brussels, 8 March 2019; *Republic of Italy v. TJ (aka Kumar) and 29 Others*, Court of Naples, 23 June 2011; and *The Prosecutor v. Selliaha/Liberation Tigers of Tamil Eelam (LITE)*, District Court of The Hague, judgment of 21 October 2011 ([http://www.internationalcrimesdatabase.org/Case/202/Selliaha-Liberation-Tigers-of-Tamil-Eelam-\(LITE\)/](http://www.internationalcrimesdatabase.org/Case/202/Selliaha-Liberation-Tigers-of-Tamil-Eelam-(LITE)/)).

¹³⁴ Criminal Code (RSC 1985 c C-46) (Canada) sect. 83.01(1); see also Terrorism Suppression Act 2002 (New Zealand) sect. 5(4), and Swiss Criminal Code 1937, article 260quinquies1 (4) (in relation to terrorist financing offences only).

¹³⁵ Not all violations of IHL are war crimes attracting individual criminal liability.

¹³⁶ See *R v. Mohammed Gul* (2013) United Kingdom, Supreme Court 64; and Terrorism Act 2000 (United Kingdom) sect. 1.

¹³⁷ Criminal Code 1995 (Australia) sect. 100.1.

¹³⁸ Dutch Supreme Court, Judgment of 7 May 2004 (ECLI: NL: HR: AF6988), paras. 3.3.7 and 3.3.8; *Prosecutor v. Maher H*, Case No 09/767116-14, District Court of The Hague, Judgment (1 December 2014), para 3; and *Prosecutor v. Imane B. et al.*, District Court of the Hague, Judgment of 10 December 2015, paras. 7.23–7.29.

¹³⁹ See *Liberation Tigers of Tamil Eelam (LITE) v. Council of the European Union*, T-208/11, European Court of Justice, Judgment of the General Court (Sixth Chamber, Extended Composition) (16 October 2014), paras. 54–83 (EU Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism of 27 December 2001 (OJ 2001 L 344, p. 93) and Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism (OJ 2001 L344, p.70)).

While there is no combatant immunity for violence committed in non-international conflict, even if it complies with IHL, article 6(5) of Additional Protocol II encourages (but does not require) States to grant amnesties for hostile acts (that were consistent with IHL):

“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

At a policy level, little difficulty arises where national terrorism offences simply duplicate or reinforce existing war crimes under IHL or are otherwise limited to protecting civilians (such as by criminalizing the financing of attacks on civilians). However, it is more problematic where offences also criminalize acts that are not prohibited by IHL, such as attacks on military objectives by non-State armed forces. Such laws may effectively criminalize war-fighting by non-State armed groups as terrorism, particularly since many national laws apply to any persons or groups meeting the national definitions of terrorism (and are not limited to organizations listed by the Security Council).

ICRC has cautioned against conflating IHL and counter-terrorism law, arguing that:¹⁴⁰

- IHL does not prohibit attacks on military objectives by non-State armed groups. Designating such acts as “terrorist” under national criminal law thus undermines IHL, which reflects a carefully negotiated balance between military necessity and humanitarian protection;
- Designating acts that are not unlawful under IHL as “terrorist” may discourage compliance with IHL by non-State armed groups in a non-international conflict;
- Classifying acts that are lawful under IHL as “terrorist” is likely to impede the implementation of article 6(5) of Additional Protocol II to the Geneva Conventions (concerning amnesties) and, in addition, may impede humanitarian or peace negotiations and complicate the eligibility of persons associated with armed groups for DDR processes.

¹⁴⁰ ICRC, “The applicability of IHL to terrorism and counterterrorism”, 2015, (www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism); Pejic, Jelena, “Armed Conflict and Terrorism” in Ana Maria Salinas de Frias, Katja Samuel and Nigel White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012), pp. 171 and 177; and ICRC, “Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law” (Geneva 2002).

ACTIVITY

In the southern region of country A there is an armed conflict between the government and an armed group, which is designated as terrorist entity by both the government and the regional organization to which country A belongs (but not by a neighbouring State, country B).

Mr. T is a member of the armed group and an expert in preparing explosive devices, which have been deployed as roadside improvised explosive devices (IEDs) targeting vehicles of country A's armed forces in the southern region, killing scores of soldiers. It is also credibly alleged that Mr. T has manufactured suicide belts that were fitted on men, women and children, who carried out suicide attacks against soldiers at roadblocks in the southern region.

Mr. T fled country A and went into hiding in country B, where he was recently identified by the authorities. Country A is seeking his extradition on the charge of "murder as an act of terrorism". The extradition request invokes Security Council resolution 1373 (2001), specifically the requirement not to provide safe haven to terrorists and to bring to justice those involved in terrorist acts, and the 1997 Terrorist Bombings Convention, ratified by both countries.

Mr. T's lawyer argues that the extradition request should be rejected on the ground that the acts Mr. T is alleged to have committed are not prohibited by IHL, which governs the conduct of armed conflict.

Under country B's extradition procedure, the Prosecutor General has to express a legal opinion on the extradition request.

➤ *What legal advice would you give to the Prosecutor General?*

ACTIVITY

For an additional activity on the concurrent applicability of IHL and counter-terrorism laws consider the activity "Distinguishing between military and civilian objectives" in section B.1 above.

F. Humanitarian activities and counter-terrorism activities

In armed conflict, humanitarian activities (including aid, assistance, relief or protection) are essential to protect civilian lives, basic needs and human rights (including food, medical care and or humane treatment in detention). IHL instruments foresee that such humanitarian activities can be undertaken by impartial humanitarian organizations, subject to the consent and control of the parties concerned. The wounded and sick must receive necessary medical care,¹⁴¹ and medical personnel, units and activities must be protected.¹⁴² Under IHL, parties to a conflict

¹⁴¹ ICRC, Customary IHL, rule 110.

¹⁴² Ibid., rules 25–30.

must allow and facilitate the rapid and unimpeded passage of impartial humanitarian relief for civilians in need.¹⁴³ In addition, humanitarian personnel and objects must be respected and protected.

These fundamental obligations are subject to reasonable measures of control: “[U]nder IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or ... limiting/restricting the activities of relief personnel in case of imperative military necessity”.¹⁴⁴ Such measures can control or supervise the mode or timing of delivery but cannot prevent or unduly delay delivery.

Humanitarian actors are also affected by measures taken to prevent and suppress the financing of terrorist acts, whether concerning cash or financial instruments or tangible assets (such as food) intended for the assistance of civilians in need but at risk of diversion to (including on-sale by) terrorist groups. As the Security Council noted in its resolution 2462 (2019), “the provision of financial or other related services to terrorist organizations and individual terrorists, even in the absence of a link to a specific terrorist act, furthers their ability to engage in terrorist acts”.¹⁴⁵ In the same resolution, the Council also urged “all States to implement the comprehensive international standards embodied in the revised Forty FATF [Financial Action Task Force] Recommendations on Combating Money Laundering”,¹⁴⁶ including revised recommendation 8, which addressed risk mitigation in the non-profit sector.

In practice many humanitarian actors have expressed concern with regard to the impact of counter-terrorism laws on their activities during armed conflict. Humanitarian actors often have to negotiate with all parties to a conflict (including terrorist groups) to undertake their humanitarian activities, and they must sometimes coordinate with armed groups in order to deliver humanitarian relief to civilians in need living in areas under non-State control. In general, counter-terrorism laws do not prohibit contact or engagement with non-State actors for humanitarian purposes. However, some national counter-terrorism laws and policies have restricted engagement with groups designated as “terrorist” in a variety of ways, as discussed below.

Humanitarian actors have noted that their operations are affected in numerous ways, including through:¹⁴⁷

- Donor “no contact” policies, which prohibit humanitarian actors (such as aid agencies or NGOs) from dealing with terrorist groups, for instance to secure access or safety for humanitarian personnel, or the passage of relief supplies;
- Restrictive donor funding conditions, requiring humanitarian actors, including their partners and contractors, to exercise various kinds of burdensome due diligence in their operations; or imposing complex vetting and monitoring requirements;

¹⁴³ *Ibid.*, rule 55; see also Fourth Geneva Convention 1949, article 23; Protocol I, article 70 (2); Protocol II, article 18; ICC Statute, article 8 (2)(b)(xxv).

¹⁴⁴ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11 (2015), p. 30.

¹⁴⁵ See Security Council resolution 2462 (2019), preamble.

¹⁴⁶ *Ibid.*, para. 4.

¹⁴⁷ Kate Mackintosh and Ingrid Macdonald, “Counter-terrorism and Humanitarian Action”, *Humanitarian Exchange*, No. 58, July 2013, pp. 23 and 24.

- “De-risking” by banks and financial services, which refuse to provide services, including transfers, for humanitarian organizations to minimize their own exposure to laws against financing of terrorism;¹⁴⁸
- The criminalization of certain dealings with terrorist groups, such as providing any training, support or finance to the group, regardless of whether such activities contribute to terrorist crimes by the group or pursue solely humanitarian aims.¹⁴⁹

Restrictive measures have also affected NGOs and civil society actors working in conflict areas, such as human rights groups engaged in advocacy, monitoring or fact-finding.

ACTIVITY SCENARIO ON HUMANITARIAN ACTIVITIES AND COUNTER-TERRORISM

“WarAid” is a non-profit charity registered in country A, with a mission to provide for the humanitarian needs of civilians affected by armed conflict. An armed conflict in country B between its government and an armed group (listed as a terrorist organization by the government) has displaced 700,000 people. The government of country B, which lacks the resources to supply their basic needs, accepts WarAid’s offer to provide humanitarian relief. WarAid conducts a rapid needs assessment and determines that 120,000 civilians in rebel-held territory are most vulnerable. It decides to supply them with food aid, medicines and emergency health care.

WarAid begins to deliver its assistance. As its convoys enter rebel territory, rebel checkpoints often collect sizeable “road tolls” from the truck drivers, supposedly to cover the costs of repairing damage to the roads caused by heavy truck traffic, although no repairs are ever conducted. The trucks are also inspected at the checkpoints and on a few occasions, medicine is seized “for not meeting quality control standards”. WarAid personnel sometimes see the confiscated medicines for sale in local village markets. WarAid protests to rebel commanders about the tolls and seizures of medicine but is told “we know nothing”. WarAid continues to provide assistance. The armed group also often brings its wounded fighters to WarAid medical clinics. WarAid doctors often treat them immediately, even if civilian patients have more urgent injuries, so that the armed group does not cause any trouble.

Country B has heard rumours that WarAid is supporting the rebels. It insists that every WarAid truck must carry a live video camera so that the government can visually monitor who is receiving assistance. WarAid protests that the rebels will accuse them of being government spies and put their personnel at risk. Country B also threatens to prosecute WarAid personnel for the crimes of “providing support to a terrorist organization” (for treating wounded rebels) and “financing a terrorist organization” (for paying road tolls). Finally, country B tells WarAid that it must redirect half of its aid operations in rebel territories to assist civilians in need in government-held areas.

The WarAid board of directors asks you for legal advice on what it should do to be able to continue providing humanitarian assistance in country B in accordance with the principles of humanitarian action while avoiding threats to the security of its personnel, the risks of prosecution and of donors withdrawing funding.

¹⁴⁸ Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* (2018), p. 31 (www.nrc.no/resources/reports/principles-under-pressure/).

¹⁴⁹ See *Holder v. Humanitarian Law Project*, 561 US (2010), Nos. 08-1498 and 09-89, 21 June 2010.

Humanitarian exemptions

While the Security Council has emphasized that counter-terrorism must comply with international law (including IHL and human rights), which safeguards humanitarian activities by implication, it has not expressly provided for humanitarian exemptions to the counter-terrorism obligations of States. In its resolution 2462 (2019), concerning terrorist financing, the Council: (a) demanded that Member States ensure that all measures taken to counter terrorism, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;¹⁵⁰ and (b) urged States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.¹⁵¹

In its resolution 2482 (2019), which applies to counter-terrorism measures in general, not only to measures to suppress financing of terrorism, the Security Council replicated this language. The Secretary-General has likewise urged States “to consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for... humanitarian purposes”.¹⁵²

In contrast, Security Council sanctions regimes in other contexts (such as the conflict in Somalia) explicitly provide that sanctions “shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia”.¹⁵³ Even that provision has been criticized by some as too narrow, since it is limited to assistance provided by United Nations agencies, their partners and organizations with United Nations observer status.¹⁵⁴

An example of good practice is in the counter-terrorism law of Chad, which excludes from its scope “activities of an exclusively humanitarian and impartial character carried out by neutral and impartial humanitarian organizations”.¹⁵⁵ Another example is the European Union law, which excludes the “provision of humanitarian activities by impartial humanitarian organisations recognized by international law, including international humanitarian law”.¹⁵⁶

1. Impact of counter-terrorism activities on principled humanitarian action

The designation of some armed groups as “terrorist” presents challenges for principled humanitarian action. The four principles of humanitarian action are:

- Humanity (addressing suffering wherever it is found);

¹⁵⁰ Security Council resolution 2462 (2019), para. 6.

¹⁵¹ *Ibid.*, para. 24.

¹⁵² Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2010/579, para. 57.

¹⁵³ Security Council resolution 2385 (2017), para. 33.

¹⁵⁴ Norwegian Refugee Council, “Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action” (2018), p. 34 (www.nrc.no/resources/reports/principles-under-pressure/).

¹⁵⁵ Government of Chad, Law No. 003/PR/2020 on the suppression of acts of terrorism, article 1(4).

¹⁵⁶ EU Directive of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88/6, recital 38.

- Neutrality (not taking sides in hostilities or preferring some political, racial, religious or ideological causes over others);
- Impartiality (acting on the basis of need and without discrimination);
- Independence (remaining autonomous from the political, economic, military or other agendas of other actors).¹⁵⁷

Humanitarian actors must respect these principles in their dealings with terrorist groups (for instance, by not supporting or preferencing such groups in a partisan way), and in the same manner State counter-terrorism laws and practices must not compromise the ability of humanitarian organizations to act according to these principles. Requiring humanitarian actors to align with host State or donor counter-terrorism frameworks may, in practice, require actors to violate these principles. Participation of humanitarian actors in preventing/countering violent extremism agendas can also be compromising.¹⁵⁸

Counter-terrorism laws may also “take sides” by criminalizing various forms of engagement with certain terrorist groups, in practice restricting their ability to access the civilian population and to provide medical assistance to the wounded or sick.¹⁵⁹ Neutrality and independence can be compromised in instances where humanitarian actors are pressured to participate in multi-national stabilization or counter-insurgency efforts,¹⁶⁰ or in which humanitarian assistance is co-opted and militarized as part of strategies to win civilian “hearts and minds”. Humanity and impartiality can be undermined by restrictive policies that discourage aid to certain populations or places, for example, those under the control of an armed group designated as “terrorist”, even if they are in most need.

2. Impact of counter-terrorism activities on the capacity of humanitarian organizations to deliver assistance

Restrictive laws and policies have impacted on humanitarian operations in numerous ways, including by limiting funding to particular places, populations, partners and programmes. For example, after Al-Shabaab was labelled as a terrorist group, aid to southern Somalia was drastically reduced between 2008 and 2010¹⁶¹ – in the midst of a famine that killed 260,000 people by 2012.¹⁶² Islamic charities have been particularly hard hit by restrictions.¹⁶³

¹⁵⁷ General Assembly resolutions 46/182 and 58/114.

¹⁵⁸ Norwegian Refugee Council, “Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action” (2018), p. 31 (www.nrc.no/resources/reports/principles-under-pressure/).

¹⁵⁹ Debarre, Alice, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, 2018, pp. 8 and 9.

¹⁶⁰ Jackson, Ashley, “Talking to the other side: Humanitarian engagement with armed non-state actors”, Humanitarian Policy Group Brief 47, Overseas Development Institute, June 2012.

¹⁶¹ See Mackintosh, Kate, and Duplat, Patrick, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, commissioned by the Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council, July 2013.

¹⁶² BBC News, “Somalia famine ‘killed 260,000 people’”, 2 May 2013.

¹⁶³ Mackintosh, Kate, and Duplat, Patrick, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, commissioned by the Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council, July 2013.

Restrictive counterterrorism laws and regulations have led to donors attaching more stringent conditions to funding, and as a result, humanitarian organizations face increasingly burdensome administrative, legal and contractual requirements which slow operations and increase costs.¹⁶⁴

FOCUS BOX IMPACT OF COUNTER-TERRORISM LAWS ON WOMEN'S ORGANIZATIONS

These measures have had a particularly harsh effect on the resources, funding and activities of organizations promoting gender equality and women's rights, as these organizations often share the following characteristics:^a

- They tend to be grass-roots organizations operating on a small scale, particularly when operating in politically unfavourable environments where women face disadvantages;
- They tend to operate with a lower level of formal organization;
- They face particular challenges in complying with the auditing and due diligence requirements imposed by some terrorist financing regulations, which lead foreign donors to adopt more risk-averse funding priorities that favour large-scale, recognized and formally structured organizations.

In a 2017 study on the impacts of measures to counter the financing of terrorism on gender equality and the activities of women's rights organizations, 48 per cent of women's organizations surveyed responded that counter-terrorism financing demands had impacted their access to funds, while 41 per cent responded that they had not applied for certain grants as a result of such demands.^b

^a Duke Law International Human Rights Clinic and Women Peacemakers Program, "Tightening the Purse Strings, What Countering Terrorism Financing Costs Gender Equality and Security" (2017), p. 36.

^b *Ibid.*, p. 65.

In addition to increasing the administrative burdens on humanitarian actors, restrictive laws and policies have also led to self-limitation by some actors. Humanitarian actors and medical staff may face civil or criminal liability or other penalties for violations of restrictive counterterrorism laws which in some cases do not require intent or knowledge that the provided assistance benefits designated terrorist groups. Criminalization could cover activities including the provision of medical care to members of designated terrorist groups or entering into logistical engagements with these groups to access civilian populations.¹⁶⁵ This can result in actors refusing funding from some donors, ceasing operations in some places or to some populations, or passing on risk to partners and contractors. It can also impede information sharing, cooperation and coordination between actors in the field.

¹⁶⁴ Debarre, Alice, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute, 2018, p. 9.

¹⁶⁵ *Ibid.*, pp. 9 and 10.

Some humanitarian actors, such as ICRC and the United Nations, enjoy international immunities from national legal liabilities,¹⁶⁶ but NGOs and contractors do not. Informal engagement is often tolerated in practice, although this can still leave organizations facing legal uncertainty or induce self-restriction.¹⁶⁷ In some cases, there are specific United Nations mandates enabling limited engagement, as with Hamas in Gaza or Al-Shabaab in Somalia,¹⁶⁸ though this does not necessarily immunize NGOs from the application of their home States' laws.

FOCUS BOX SECURITY COUNCIL RESOLUTION 2444 (2018)

The Security Council, in its resolution 2444 (2018) on Somalia and Eritrea, condemned attacks against humanitarian actors, the misuse of donor assistance and the obstruction of the delivery of humanitarian aid, and reiterated its demand that all parties enable safe and unhindered access for the delivery of humanitarian aid across Somalia.

In light of the ongoing humanitarian situation in Somalia and its impact on the population, the Security Council decided that, without prejudice to humanitarian assistance programmes elsewhere, the measures imposed by resolution 1844 (2008) (para. 3) – namely a freeze on assets of designated entities threatening the peace, security or stability of Somalia – will not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia (para. 48).

TOOLS

- Norwegian Refugee Council, *Principles under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action* (2018) (www.nrc.no/resources/reports/principles-under-pressure/).
- Mackintosh, Kate, and Duplat, Patrick, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, commissioned by the Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council (2013).
- Debarre, Alice, *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework*, International Peace Institute (2018).
- Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings, What Countering Terrorism Financing Costs Gender Equality and Security* (2017) (<https://web.law.duke.edu/humanrights/tighteningthepursestrings/>).

¹⁶⁶ Mackintosh, Kate, and Macdonald, Ingrid, "Counter-terrorism and Humanitarian Action", *Humanitarian Exchange*, No. 58, July 2013, p. 25.

¹⁶⁷ Modirzadeh, Naz; Lewis, Dustin; and Bruderlein, Claude, "Humanitarian engagement under counter-terrorism: A conflict of norms and the emerging policy landscape" (2011) *International Review of the Red Cross*, vol. 93, No. 883, pp.19 and 20.

¹⁶⁸ General Assembly resolution 46/182 mandated United Nations actors under the Emergency Relief Coordinator within OCHA to negotiate with relevant parties: on Somalia, see Security Council resolution 1216 (2010).

Self-assessment questions

1. How does IHL differentiate between international and non-international armed conflicts?
2. Describe the principles of distinction, the prohibition of indiscriminate attacks and proportionality.
3. List three methods of warfare that are prohibited under IHL.
4. Are acts of terrorism prohibited under IHL?
5. Describe three ramifications of the categorization of an individual in an armed conflict as a: (a) combatant, (b) civilian, and (c) a civilian taking a direct part in hostilities.
6. What is the legal status of a “foreign terrorist fighter” under IHL?
7. What issues may arise in the concurrent application of international humanitarian law and national criminal law establishing terrorism offences?
8. List three examples of humanitarian action protected under IHL and the four principles of principled humanitarian action.
9. Describe three ways in which counter-terrorism measures can adversely impact principled humanitarian action. What has been done to mitigate the impact of counter-terrorism measures on humanitarian action?



IV.

Counter-terrorism and international law controls on conventional weapons

Objectives

By the end of chapter IV, readers will be able to:

- 1** Explain how international weapons control regimes differ in terms of scope, weapons covered and application to State and non-State actors, including terrorist entities.
- 2** Discuss United Nations arms embargoes against terrorist entities.
- 3** Discuss measures to counter the threat posed by improvised explosive devices (IEDs).
- 4** Compare different regimes prohibiting the illicit trafficking in weapons.
- 5** Compare related regimes regulating the trade in conventional weapons.
- 6** Discuss the prohibition or regulation of certain weapons under international humanitarian law (IHL).

INTRODUCTION

Preventing terrorists from acquiring weapons, including conventional arms, as well as weapons of mass destruction, is essential to countering terrorism. Terrorists obtain weapons by many means and methods in all parts of the world, facilitated by access to poorly secured stockpiles, weak border management, the use of online platforms, including hidden marketplaces, and diversion linked to poor transfer controls. Illicit weapons trafficking is often associated with other forms of organized crime, but there is also a licit trade in most weapons. Preventing weapons from falling into the hands of terrorists thus presents complex challenges, requiring an adequate regulatory environment, data collection, specialized skills and equipment, integrated multifaceted criminal justice responses and coordination within and between countries and regions.¹

A number of instruments of international law regulate, restrict or prohibit weapons. Some rules apply to State conduct in relation to weapons; some also apply directly to non-State actors; and yet others require States to suppress the flow of arms to non-State actors. Some rules only apply during armed conflict while others apply during both peace and war.

The present chapter will provide an overview of these rules organized into the following sections:

- A. Obligation of States to eliminate the supply of weapons to terrorists specifically, pursuant to Security Council resolution 1373 (2001) and other relevant resolutions on counter-terrorism;
- B. Situation-specific arms embargoes imposed by the Security Council, which may target individuals and entities designated as terrorists by the Security Council or at the regional or national level;
- C. Instruments preventing and suppressing a variety of illicit dealings with firearms/small arms, light weapons, their parts and components, and ammunition (such as illicit trafficking, trade, transfer, manufacture or diversion), and prohibiting unmarked plastic explosives;
- D. Instruments regulating the licit or authorized transfers (including export, import, transit, trans-shipment and brokering) of conventional weapons (including firearms/small arms, light weapons and heavy weapons), and preventing the diversion of arms;

¹ See statement of Mr. Yury Fedotov, Executive Director of the United Nations Office on Drugs and Crime (UNODC), to the Security Council on 2 August 2017 (Security Council document SC/12938).

E. Prohibitions or restrictions on the use of certain weapons in armed conflict under international humanitarian law (IHL) and related measures addressing certain dealings with some of these weapons generally (including outside armed conflict), such as their development, production, stockpiling, acquisition and transfer.

CROSS-REFERENCE Module 6 of the United Nations Office of Drugs and Crime (UNODC) Counter-Terrorism Legal Training Curriculum deals with the international legal framework against chemical, biological, radiological and nuclear terrorism. Chemical, biological, radiological and nuclear terrorism are not covered in the present chapter.

A. The obligation to eliminate the supply of weapons to terrorists

In its resolution 1373 (2001), the Security Council decided that all States shall “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by... eliminating the supply of weapons to terrorists” (para. 2(a)). The Council further required States to “[e]nsure that any person who participates... in supporting terrorist acts is brought to justice” and that terrorist acts are criminalized in domestic law (para. 2(e)). Those who support terrorists by arming them must therefore be brought to justice under national law. In the same resolution, the Council also encouraged States to exchange operational information on the traffic in arms, explosives or sensitive materials (para. 3(a)), and noted with concern the close connection between international terrorism and transnational organized crime, including illegal arms trafficking (para. 4).

In 2017, the Security Council adopted the first resolution dedicated to preventing terrorists from acquiring any weapons. In relation to small arms and light weapons specifically, Council resolution 2370 (2017) recommended that States prevent and suppress their illicit trafficking, including to terrorists, inter alia, by:

- Enhancing national systems for the collection and analysis of detailed data on illicit trafficking of weapons to terrorists;
- Putting in place adequate laws, regulations and administrative procedures to exercise effective control over the production, export, import, brokering, transit or retransfer of small arms and light weapons in order to prevent illicit weapons trafficking to terrorists.²

² Security Council resolution 2370 (2017), para. 5.

In relation to eliminating the supply of weapons generally to terrorists, the Security Council further recommended in its resolution 2370 (2017) that States:

- Ensure their ability to take legal action against those who arm terrorists;
- Ensure the proper physical security and management of weapons stockpiles;
- Implement marking and tracing procedures for weapons;
- Strengthen judicial, law enforcement and border-control capabilities;
- Prevent and disrupt violations of Council-mandated arms embargoes.³

In its resolution 2482 (2019), the Security Council addressed the linkages between terrorism and organized crime, urging Member States:

...“to establish as criminal offences under their domestic law the following illicit activities ...in order to ensure that those engaged in such activities can be prosecuted:

“(a) illegal manufacture, possession, stockpiling and trade of all types of explosives, whether military or civilian, as well as other military or civilian materials and components that can be used to manufacture improvised explosive devices, including detonators, detonating cords and chemical components;

“(b) trafficking of military and dual-use materials and equipment that could be used for the illegal manufacture of arms and armaments, including explosive devices;”⁴

In the same resolution, the Security Council further urged Member States to prohibit, including as criminal offences, “the illegal manufacture of unmarked or inadequately marked small arms and light weapons, as well as the illicit falsification, obliteration, removal or alteration of the unique markings prescribed in the International Tracing Instrument”.⁵ In its resolution 2482 (2019), the Council also encouraged States to promote and strengthen border cooperation and regional and subregional coordination between law enforcement agencies, customs and export and import licensing authorities, with a view to eradicating and combating the above-listed illicit activities across borders.⁶

³ Ibid., paras. 4 and 6.

⁴ Security Council resolution 2482 (2019), para. 10.

⁵ Ibid., para. 11.

⁶ Ibid., para. 12.

TOOLS

The 2019 updated “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions”^a provides guidance on the measures States should have in place to eliminate the supply of weapons to terrorists.

The technical guide spells out what is required in terms of:

- Appropriate legislative framework;
- Specific procedures as part of operational measures in order to eliminate the supply of weapons to terrorists;
- Enforcement programme for the control of arms and explosives on their territory;
- Customs border-control programme to detect and prevent smuggling of small arms and light weapons and explosives.

The Madrid Guiding Principles on foreign terrorist fighters, as amended by the 2018 addendum, are intended as a practical tool to enable Member States to better address the evolving threat posed by foreign terrorist fighters, including by eliminating the supply of weapons to terrorists.

The International Criminal Police Organization (INTERPOL) assists Member States to identify, track and intercept illicitly trafficked weapons and other materials used by terrorists, including providing access to the Illicit Arms Records and Tracing Management System (iARMS), thus facilitating real-time sharing of firearms intelligence through national and regional databases, as well as to the INTERPOL Ballistics Information Network (IBIN).

The World Customs Organization (WCO) Small Arms and Light Weapons Project aims to detect and prevent illicit trafficking of these items.

^a Security Council, Counter-Terrorism Committee Executive Directorate (CTED), Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions (S/2019/998, annex).

ACTIVITY

Find the updated “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions” online and identify the measures related to eliminating the supply of weapons to terrorists that concern your role in government or profession.

➤ *Are the measures required in place in your country?*

B. Situation-specific arms embargoes

The Security Council has the power, under Chapter VII of the Charter of the United Nations, to impose arms embargoes, where necessary, in order to restore or maintain international peace and security. The Council has imposed arms embargoes in many situations, including in response to apartheid, genocide, civil war and military coups. Arms embargoes have variously targeted States, non-State actors and named individuals (State or non-State). They have

sometimes been applied generally to all arms and related material, or to particular categories of weapons or listed types of weapons.

The Security Council has imposed a number of arms embargoes in the context of terrorism, including against States alleged to support terrorism; terrorist groups and individuals and entities associated with them, including in relation to conflicts in which terrorist groups are involved. The earliest embargo was imposed on Libya, through Council resolution 748 (1992), for its failure to surrender persons suspected of destroying a civilian airliner over Lockerbie in Scotland.

1. Arms embargo under the Islamic State in Iraq and the Levant (ISIL) (Da'esh) Al-Qaida sanctions regime

In Afghanistan, by its resolution 1333 (2000), the Security Council imposed a 12-month arms embargo on territory controlled by the Taliban, following its failure to surrender Osama bin Laden for trial for past terrorist attacks.⁷ In its resolution 1390 (2002), the Council broadened the arms embargo by extending it to Osama bin Laden, Al-Qaida, the Taliban and those associated with them (including beyond the territory of Afghanistan).

In June 2011, the Security Council split the embargo into separate arms embargoes, one on the Taliban (Council resolution 1988 (2011)) and one on Al-Qaida and associated individuals and entities (Council resolution 1989 (2011)). In its resolution 2253 (2015), the Council decided that the “Al-Qaida Sanctions Committee” would henceforth be known as the “ISIL (Da'esh) and Al-Qaida Sanctions Committee”. This is the regime that is currently in place.

The Sanctions Committee has provided guidance on the scope of the obligations of States concerning the arms embargo,⁸ in particular:

- States should prevent listed individuals and entities from obtaining arms in any way, including through intermediaries, brokers, other third parties or non-listed persons or entities acting on their behalf;
- The arms embargo should be interpreted broadly to include arms brokers, exports, imports, trans-shipments and other means of provision;
- Providing “services” includes the provision of military training to listed persons, recruitment to listed organizations and indoctrination into suicide bombing;
- States should prevent military or terrorist training facilities operating in their territory;
- States should submit illegal arms or services providers for listing on the sanctions list.

2. Improvised explosive devices

While there is no comprehensive legal definition of improvised explosive devices (IEDs), they are understood to refer to a device placed or fabricated in an improvised manner, incorporating explosive or destructive, lethal, noxious, incendiary or pyrotechnic materials or chemicals

⁷ Security Council resolution 1333 (2000), paras. 5 and 6.

⁸ Al-Qaida Sanctions Committee, “Arms embargo: explanation of terms”, 24 February 2015 (<https://www.un.org/securitycouncil/sanctions/1267>).

designed to destroy, disfigure, distract or harass.⁹ They are often devised from non-military components, thus differentiating them from conventionally manufactured military explosives or munitions.

As noted by the United Nations Mine Action Service (UNMAS), “improvised explosive devices are a uniquely dangerous weapon system due to their versatility, adaptability and method of employment. IED incidents often result in a large number of civilian casualties, widespread destruction of infrastructure and the economic disruption of entire communities”¹⁰

IEDs are not comprehensively prohibited in international law. Their use by any actor in armed conflict must comply with IHL, including the principles of distinction, proportionality, precautions and the prohibitions on attacking civilians and indiscriminate attacks. Their use in circumstances which endanger civilians is also restricted by an IHL treaty addressing booby-traps and “other devices” and munitions that are manually emplaced and designed to kill, injure or damage¹¹ (see sect. E below).

Some other international conventions (not limited to armed conflict) are also relevant, such as:

- The Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991 (MARPLEX Convention), which requires the marking of plastic explosives and the destruction of unmarked ones (see sect. C.3 below);
- The International Convention for the Suppression of Terrorist Bombings of 1997 (Terrorist Bombings Convention), which criminalizes the use of explosive and other lethal devices in various contexts while excluding the activities of armed forces (including non-State armed groups) in armed conflict.

In the counter-terrorism context, the Al-Qaida Sanctions Monitoring Team has called IEDs “the primary weapon of choice of Al-Qaida and its affiliates”¹² In its resolution 2161 (2014), the Security Council required States to

- Exercise vigilance in order to prevent Al Qaida and its associates from obtaining all types of explosives, including raw materials and components that could be used to manufacture IEDs or unconventional weapons to conduct attacks;
- Promote the exercise of vigilance by their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction that are involved in the production, sale, supply, purchase, transfer and storage of such materials, including through the issuance of good practices;
- Develop national strategies and capabilities to counter IEDs.¹³

⁹ International Ammunition Technical Guideline (IATG 01.40 (2nd edition 2015)), glossary, sect. 3.140: see also United Nations Mine Action Service, “Improvised Explosive Device Lexicon” (https://unmas.org/sites/default/files/unmas_ied_lexicon_0.pdf), p. 1.

¹⁰ Al-Qaida Sanctions Committee, “Arms embargo: explanation of terms”.

¹¹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, entered into force 2 December 1983); (Convention on Certain Conventional Weapons) (United Nations, *Treaty Series*, vol. 1342, No. 22495), Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, 1980, as amended in 1996 (United Nations, *Treaty Series*, vol. 2048, No. 22495).

¹² Fifteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to Security Council resolution 2083 (2012) concerning Al-Qaida and associated individuals and entities (S/2014/41, paras. 44 and 45).

¹³ Security Council resolution 2161 (2014), para. 14.

In its resolution 2370 (2017), reaffirming the obligation to eliminate the supply of weapons to terrorists, the Security Council focused on IEDs and called upon Member States to enhance their institutional capabilities and resources for preventing and countering the threat posed by IEDs, including by collaborating with the private sector. The Council further encouraged Member States to share information, establish partnerships and develop national strategies and capabilities to counter such weapons.

The Al-Qaida Sanctions Committee has further encouraged States to inform private companies (including mining, chemical and agribusiness entities) about the risks of the potential misuse of raw materials and to share information about countering IEDs.¹⁴

In the context of IED attacks by Al-Shabaab in Somalia, the Security Council has required all States to prevent the sale, supply or transfer of specified items from their territories or by their nationals outside their territories, or using their flag vessels or aircraft if there is sufficient evidence that such specified items will be used, or there is a significant risk they may be used, in the manufacture in Somalia of IEDs.¹⁵

These Security Council initiatives are complemented by General Assembly resolutions encouraging Member States to strengthen their measures against the use of IEDs, recognizing their use by terrorists.¹⁶ The Assembly has noted that “existing approaches in multilateral arms regulation, while valuable, do not fully address the use of improvised explosive devices in conflict and immediate post-conflict environments.”¹⁷

The General Assembly has specifically called on States to prevent terrorist groups from using and accessing materials that can be used in the making of IEDs and has also encouraged States, generally, *inter alia*, to:¹⁸

- Develop national policies to counter IEDs;
- Prevent and reduce IED risks;
- Strengthen the management of national ammunition stockpiles to prevent diversion of IED materials to illicit markets, illegal armed groups, terrorists and other unauthorized recipients;
- Combat the illicit procurement of IED materials;
- Stem the transfer of knowledge on IED construction and use to terrorists;
- Engage with private actors and civil society to counter IEDs;
- Enhance international and regional cooperation.

The Secretary-General has also made numerous recommendations concerning IEDs, including the need to address: cross-cutting issues (relating to the protection of civilians, disarmament and international security, humanitarian mine action and counter-terrorism); threat mitigation and emergency response; victim assistance; awareness and risk education; information sharing;

¹⁴ Al-Qaida Sanctions Committee, “Arms embargo: explanation of terms”.

¹⁵ Security Council resolution 2551 (2020), para. 26.

¹⁶ See General Assembly resolution 73/67 on countering the threat posed by IEDs, para. 14; General Assembly resolution 75/59, preamble and paras. 3 and 14; see also reports of the Secretary-General on United Nations efforts concerning IEDs: A/71/187, A/73/156 and A/75/175.

¹⁷ General Assembly resolution 72/36, para. 2.

¹⁸ General Assembly resolution 73/67, para. 15.

cooperation among customs, law enforcement and border agencies to identify and share good practices and strategies in combating the illicit diversion and trafficking of materials for the manufacture of IEDs, as well as for joint investigations; and national capacity-building.¹⁹

FOCUS BOX INTERPOL “PROJECT WATCHMAKER” INITIATIVE

The work of United Nations bodies is supplemented by other international and national initiatives against the threat of IEDs. Since 2014, the INTERPOL Project Watchmaker initiative has provided operational and specialized support to all 190 member countries through the issuance of INTERPOL notices and warning messages on individuals known to manufacture or employ IEDs. Its database currently includes over 3,100 names of known and suspected bomb makers as well as over 1,000 methodologies on the construction and use of devices.

In 2017, INTERPOL created the Watchmaker Crime Analysis File, which makes it possible to process the growing body of information provided by participating member countries. It also allows INTERPOL to produce analytical reports that are more specialized and which better exploit existing data and links. Information on detonator manufacturers can be channelled to the Watchmaker Crime Analysis File and used as a global repository to strengthen possibilities for investigation and prosecution.

The collection and sharing of personal information on suspected bomb makers must be consistent with international human rights standards, including as regards the right to privacy and fair trial.

Programme Global Shield is an initiative of the World Customs Organization (WCO), INTERPOL and UNODC aimed at monitoring the licit movement of 13 of the most common chemical precursors and other materials that could be used to manufacture IEDs in order to counter their illicit trafficking and diversion.^a

^a World Customs Organization (WCO), Improvised Explosive Devices (IEDs), Programme Global Shield (www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/security-programme/programme-global-shield.aspx).

TOOLS

United Nations Institute for Disarmament Research (UNIDIR), “Counter-IED Capability Maturity Model and Self-Assessment Tool” (2020) (<https://unidir.org/publication/counter-ied-capability-maturity-model-and-self-assessment-tool>).

United Nations Mine Action Service (UNMAS), “Improvised Explosive Device Lexicon” (https://unmas.org/sites/default/files/unmas_ied_lexicon_0.pdf).

Report of the Secretary-General on countering the threat posed by improvised explosive devices (A/75/175 and Corr.1, para. 88).

¹⁹ Report of the Secretary-General on countering the threat posed by improvised explosive devices (A/75/175, paras. 88–92 (conclusions and recommendations)).

3. Other relevant arms embargoes

The Security Council has sometimes imposed arms embargoes on States in which terrorist groups have been present, without specifically targeting terrorist individuals or entities:

- Some embargoes applied to all parties to a conflict in a State, as in Libya in 2011;²⁰
- Other embargoes initially applied to all parties but later exempted Governments and regional or multinational forces, as in Iraq after 2003,²¹ Somalia after 2006²² and Sierra Leone after 2010,²³ thereby refocusing exclusively on non-State actors;
- Some embargoes applied only to individuals or entities not authorized by the government or a United Nations mission, as in Lebanon in 2006²⁴ (after Hezbollah bombings);
- Some embargoes targeted specifically listed individuals and entities, such as the Houthi leadership in Yemen,²⁵ but without designating them as “terrorist”.

C. Preventing and suppressing illicit dealings in small arms and light weapons

The most common means of perpetrating terrorist acts is through the use of small arms and light weapons (SALW). Small arms, in particular, are readily available and easy to use, compared with, for example, larger conventional military weapons systems (light or heavy). The difficulty in regulating small arms is that they have lawful civilian uses, such as in law enforcement, hunting and recreational shooting. No sectoral counter-terrorism convention has been adopted to deal with such weapons.

Three key international frameworks focus on preventing, combating and eradicating illicit dealings in small arms and light weapons (regulation of legal trade is addressed separately in the next section):

- The (legally binding) Firearms Protocol (2001)²⁶ aims at promoting, facilitating and strengthening cooperation among States parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition;
- A (non-binding) political instrument, the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 2001,

²⁰ Security Council resolution 1970 (2011), paras. 9–14.

²¹ Security Council resolutions 1483 (2003), para. 10, and 1546 (2004), para. 21 (modifying the earlier comprehensive arms embargo on Iraq established by resolution 661 (1990) and related subsequent resolutions).

²² Security Council resolutions 1725 (2006) and 1744 (2007) (modifying the arms embargo established in resolution 733 (1992) and subsequent resolutions).

²³ Security Council resolution 1940 (2010) (modifying the embargo established by Council resolutions 1132 (1997) and 1171 (1998)).

²⁴ Security Council resolution 1701 (2006), para. 15.

²⁵ Security Council resolution 2216 (2015), paras. 14–17.

²⁶ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) (United Nations, *Treaty Series*, vol. 2326, No. 39574).

addresses the illicit trade, manufacture, diversion and trafficking of small arms and light weapons, supplemented by the International Tracing Instrument, adopted in 2005;²⁷

- The (binding) Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991, prohibiting unmarked plastic explosives.

Each of the three frameworks are considered, in turn, below. The different regimes partly overlap, for example because the term “firearms” is generally considered to be synonymous with “small arms”. The term “firearms” is often used in a law enforcement context, while the term “small arms” is used in conflict and disarmament contexts.

These instruments addressing the *illicit* aspects of arms partly overlap with others²⁸ more focused on *licit* arms-related activities. For example, both the Programme of Action and the Arms Trade Treaty 2013 (discussed in sect. D.1 below) regulate SALW generally (not only illicit activities), including to prevent diversion of arms from authorized transfers.²⁹

There are also various legally binding and non-binding (political) regional instruments for the control of small arms and light weapons,³⁰ although these are not addressed in detail in the present chapter. For example, in Africa two binding subregional instruments address small arms and light weapons,³¹ while another binding instrument addresses firearms, ammunition and related materials.³² Binding regional arrangements can thus extend global frameworks among States parties in a particular region.

1. Illicit trafficking in firearms

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol) of 2001 is the third Protocol to the United Nations Convention against Transnational Organized Crime. Its purpose is to strengthen cooperation among States to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (article 2).

With regard to the investigation and prosecution of offences, the Firearms Protocol is limited to offences that are transnational and involve an organized criminal group. However, the scope of the Protocol is not limited when it comes to the prevention of the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, meaning that States parties are required to adopt the marking, record-keeping and licensing provisions of the Protocol regardless of a possible nexus to organized crime. Moreover, the Protocol does not apply to

²⁷ United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects 2001 (A/CONF.192/15); International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (General Assembly decision 60/519).

²⁸ Such as the Arms Trade Treaty, 2013, as discussed in sect. D.1.

²⁹ See Arms Trade Treaty: (third and ninth preambular paras.) and article 1.

³⁰ For a full list see Small Arms Survey, “Regional instruments and organizations” (on small arms control), (<http://www.small-armsurvey.org/fileadmin/SALW/img/measuring-progress/Selected-regional-orgs-instruments.pdf>).

³¹ Nairobi Protocol for the Prevention, Control, and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 2004 (in force since 2006); Economic Community of West African States (ECOWAS), Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006 (in force since 2009); in addition, there is another instrument that will be binding when it enters into force: the Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly 2010 (“Kinshasa Convention”).

³² Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region (SADC Protocol) 2001 (in force since 2004).

State-to-State transactions or State transfers done in the interests of national security (article 4).

FOCUS BOX FIREARMS PROTOCOL

Article 3 Use of terms *[definitions]*

“For the purposes of this Protocol:

“(a) ‘Firearm’ shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas....

[...]

“(e) ‘Illicit trafficking’ shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol...”.

Article 5 (1) of the Firearms Protocol requires States to criminalize the illicit manufacturing of and trafficking in firearms, and falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of the Protocol.

In addition to criminal offences, the Firearms Protocol also establishes a comprehensive regulatory framework to ensure effective control over certain activities relating to firearms, their parts and components and ammunition, and allows for their tracing throughout their lifetime, from the time of their manufacture to their import and export until their final disposal. As such, the Protocol requires States parties to take various preventive and control measures, including:

- Providing for the confiscation, seizure and destruction of illicitly manufactured or trafficked firearms (article 6);
- Marking them to enable their identification and tracking, including in relation to their manufacturer and country and year of import (article 8);
- Keeping records to enable their identification and tracking (article 7);
- Preventing the reactivation of deactivated firearms (article 9);
- Establishing or maintaining an effective system of export and import licensing or authorization, and of measures on international transit, for their transfer (article 10);
- Detecting, preventing and eliminating their theft, loss or diversion, and illicit manufacture or traffic (article 11);
- Considering establishing a system to regulate brokers, such as through registration, licensing or authorization, and disclosure on import/export licenses or authorizations (article 15).

2. Illicit trade in small arms and light weapons

In the same year as the adoption of the Firearms Protocol, in 2001, the General Assembly, in its resolution 61/66, adopted the United Nations Programme of Action to Combat the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, which addresses the illicit trade, manufacture, diversion and trafficking in such weapons. In its preamble, the Programme specifically mentions concern about “the close link between terrorism, organized crime, trafficking in drugs and precious minerals and the illicit trade in small arms and light weapons” (see para. 7).

The Programme of Action encourages all States Members of the United Nations to adopt measures at the national, regional and global levels to prevent, combat and eradicate the illicit trade in these weapons. It contains concrete suggestions for improved national legislation and controls, and international assistance and cooperation.

FOCUS BOX WHAT ARE SMALL ARMS AND LIGHT WEAPONS?

The United Nations Programme of Action does not define small arms and light weapons, but a definition is provided in the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (International Tracing Instrument of 2005) (sect. II, para. 4),^a adopted within the framework of the Programme of Action:

“For the purposes of this instrument, ‘small arms and light weapons’ will mean any man-portable lethal weapon that expels or launches ... a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas.”

“(a) ‘Small arms’ are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, submachine guns, assault rifles and light machine guns;

“(b) ‘Light weapons’ are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres.”

^a A/60/88 and Corr. 2, annex.

The Programme of Action encourages States to adopt a number of key measures in relation to small arms and light weapons, including:

- Regulating to exercise effective control over SALW within their jurisdiction and over their production, export, import, transit and retransfer, to prevent their illegal manufacture, illicit trafficking, or diversion to unauthorized recipients (sect. II, paras. 2 and 12);
- Criminalizing the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their jurisdiction (sect. II, para. 3);
- Marking, record-keeping and tracing of small arms and light weapons;

- Strictly regulating export authorizations and the risk of diversion into the illicit trade; and establishing or maintaining an effective system of export and import licensing or authorization, and measures on international transit (sect. II, para. 11);
- Regulating brokering (sect. II, para. 14);
- Destroying all confiscated, seized or collected weapons (sect. II, para. 16) as well as surplus stocks;
- Ensuring the security of stocks held by armed forces, police or other authorized bodies (sect. II, para. 17);
- Effectively collecting, controlling, storing and destroying arms as part of disarmament, demobilization and reintegration programmes, particularly in post-conflict situations;
- Identifying and taking enforcement action against groups and individuals engaged in the illegal manufacture, trade, stockpiling, transfer, possession, and financing for acquisition, of illicit small arms and light weapons (sect. II, para. 6).

The Programme of Action also encourages various measures of regional and international cooperation and assistance, including in identifying individuals and groups involved in illicit activity, to allow national authorities to proceed against them in accordance with their national law (sect. II, para. 37) or where it is linked to drug trafficking, organized crime and terrorism (sect. III, para. 15). At a review conference, held in 2018, it was recommended that specific measures be taken to prevent the diversion of small arms and light weapons to unauthorized recipients, including terrorists. These measures include the irreversible deactivation or destruction of small arms and light weapons in conflict and post-conflict situations.³³

The International Tracing Instrument, which was adopted by the General Assembly in 2005 in its decision 60/519, supplements the Programme of Action. Building on the legally binding marking and record-keeping requirements of the Firearms Protocol, the Tracing Instrument commits all States to ensure the adequate marking of and record-keeping for small arms and light weapons and to strengthen cooperation in tracing illicit small arms and light weapons, including through international cooperation. As defined in the International Tracing Instrument, “tracing” means “the systematic tracking of illicit small arms and light weapons found or seized on the territory of a State from the point of manufacture or the point of importation through the lines of supply to the point at which they became illicit” (sect. II, para. 5). The corresponding definition in the Firearms Protocol (article 3, subpara. (f)) is similar, but focuses more on operational aspects of tracing and its purpose: “the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking”.

As mentioned above, in some regions there are binding regional standards, which can include additional obligations relating to marking and tracing.³⁴

³³ Report of the third United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 18–29 June 2018 (A/CONF.192/2018/RC/3, paras. 26–34 and 46).

³⁴ See ECOWAS, Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials 2006, article 19.

FOCUS BOX MAINSTREAMING GENDER INTO MEASURES TO CONTROL SMALL ARMS AND LIGHT WEAPONS

The United Nations has issued guidance on “Women, men and the gendered nature of small arms and light weapons”, which recognizes that:⁹

Eradicating the illicit trade in small arms and light weapons, in all its aspects, and addressing the misuse of both illegally and legally owned small arms, requires paying attention to the human factors behind the supply, demand and misuse of such weapons at all levels of society. It also requires mobilizing and building the capacity of all actors and institutions that can contribute to collective solutions.

Looking at the uncontrolled proliferation and misuse of small arms and light weapons through a gender lens is to recognize that these weapons do not involve and affect men and women in the same way and that men and women have equal rights to participate in initiatives to control these weapons.

Marginalized young men frequently perceive violence – especially small arms violence – as a way to attain positions of social and economic status to which they feel entitled but which are otherwise closed off to them. By offering empowerment in the face of exclusion from socially defined masculine roles, small arms can represent potent symbols of power for marginalized young men.

Small arms can enable marginalized young men, who would otherwise have little influence in their communities, to exert considerable control, even over traditional figures of authority. ...

Although only a small share of small arms-related misuse is committed by women, who also represent a minority of SALW owners, women do also engage in violent behaviours, including with small arms, but tend to do so less frequently and for different reasons.

Female combatants and women or girls associated with non-State armed groups are common in armed conflicts throughout the world. In addition to engaging directly in armed conflict, women and girls also fulfil essential support functions in such groups (e.g., as spies, smugglers, paramedics, teachers, couriers, mechanics, drivers, etc.).

Like men and boys, women and girls sometimes join armed groups voluntarily and sometimes are forcibly recruited.

“Gender mainstreaming” means ensuring that the impact – on females and males – of all small arms and light weapons control initiatives is considered at every stage of assessment, planning, implementation, monitoring and evaluation. Gender mainstreaming allows for a better understanding of the roles that men and women play in relation to small arms and light weapons, in times of conflict, post-conflict reconstruction and peace.

Promoting gender-balanced participation in small arms and light weapons control protects men’s and women’s rights to participate in decision-making on an issue that affects everyone’s security. As this has traditionally been seen as a male domain, ensuring equal participation by women requires a strong focus on the inclusion of women, especially from affected communities and civil society, and a commitment to gender-sensitive monitoring and evaluation.

The integration of gender perspectives into small arms and light weapons control processes, as well as being mandated by international instruments, allows for a better understanding of the factors driving the demand for and misuse of small arms and light weapons, as well as their impact on everyone's human rights, development and security. As a result, gender mainstreaming makes possible the development of responses that increase the level of welfare provision, reinforce security and strengthen the political legitimacy of the peacebuilding process – in sum, responses that are holistic, better targeted and more effective.

^e United Nations, Modular Small-arms-control Implementation Compendium (MOSAIC), Women, men and the gendered nature of small arms and light weapons (2018) (www.un.org/disarmament/mosaic) (www.un.org/disarmament/wp-content/uploads/2018/10/MOSAIC-06.10-2017EV1.0.pdf).

3. Convention on the Marking of Plastic Explosives for the Purpose of Detection

One of the international counter-terrorism conventions, the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) (“MARPLEX Convention”), was adopted in response to the terrorist-type bombing of an international civilian passenger aircraft over Lockerbie, Scotland in 1988, killing 270 people.

To suppress the use in such attacks of plastic explosives whose source cannot be traced, the Convention aims to ensure that plastic explosives are “marked” by chemical detection agents which allow the source to be identified. In relation to unmarked plastic explosives, each State party must:

- Prohibit and prevent their manufacture in its territory;
- Prevent their movement into and out of its territory;
- Exercise strict and effective control over the possession of any existing stocks of unmarked explosives;
- Destroy, consume, mark or render them permanently ineffective within certain time periods.

4. Addendum to the Madrid Guiding Principles on Foreign Terrorist Fighters

In the context of the Security Council's efforts to stem the flow of foreign terrorist fighters, the 2018 addendum to the 2015 Madrid Guiding Principles provides guidance concerning the illicit trafficking in small arms and lights weapons.

FOCUS BOX THE SECURITY COUNCIL'S MADRID GUIDING PRINCIPLES ON FOREIGN TERRORIST FIGHTERS^a

The Madrid Guiding Principles on Foreign Terrorist Fighters, as amended by the 2018 addendum, are intended as a practical tool to enable Member States to better address the evolving threat posed by foreign terrorist fighters. The Addendum recalls that “in resolution 2370 (2017), the Security Council urged States to fully implement the Programme of Action and the International Tracing Instrument in order to assist in preventing terrorists from acquiring small arms and light weapons, in particular in conflict and post-conflict areas”.^b

Guiding Principle 52 lists measures to be taken by Member States of direct relevance to countering the acquisition of small arms and light weapons by foreign terrorist fighters. With particular focus on the role of legislation and criminal justice these include:

“(a) Maintain, develop or establish, and effectively implement, national laws, regulations and administrative procedures to ensure effective control over the production, export, import and transit of SALW, including by establishing as a criminal offence their illicit manufacture, online trade or diversion to the illicit market through corruption;

...

(d) Provide national law-enforcement authorities with mandates and resources to assist them in preventing and combating illicit SALW that are imported into, exported from, or transiting through their territories;

...”

^a Addendum (2018) to the Madrid Guiding Principles on Foreign Terrorist Fighters (2015) (S/2018/1177, annex) (www.un.org/sc/ctc/wp-content/uploads/2019/09/Security-Council-Guiding-Principles-on-Foreign-Terrorist-Fighters.pdf); Madrid Guiding Principles on Foreign Terrorist Fighters, S/2015/939, annex II.

^b *Ibid.*, para. 59.

D. Regulation of international arms transfers

One treaty and two key initiatives regulate international arms transfers (trade or otherwise):

- Arms Trade Treaty, 2013;³⁵
- Wassenaar Arrangement on Export Controls for Conventional Arms;
- United Nations Register of Conventional Arms.

In the area of small arms control, these instruments are complemented by the provisions related to the import, export and transfer authorizations of the Firearms Protocol, the Programme of Action and the International Tracing Instrument.

1. Arms Trade Treaty of 2013

The Arms Trade Treaty (2013) is a multilateral treaty that regulates the international trade in conventional weapons which was adopted by the General Assembly in 2013 and entered into

³⁵ Arms Trade Treaty (adopted by the General Assembly on 2 April 2013, entered into force on 24 December 2014) (A/CONF.217/2013/L.3, annex).

force in 2014. Its ultimate purpose is to: contribute to international and regional peace, security and stability; reduce human suffering; and promote cooperation, transparency and responsible action by States in the international trade in conventional arms, thereby building confidence among States parties.³⁶

The Arms Trade Treaty applies not only to small arms and light weapons and their ammunition (as under the Programme of Action), but also, more widely, to all conventional weapons. The Treaty also covers the ammunition/munitions of conventional weapons and parts and components which provide the capability to assemble conventional weapons.³⁷

The Firearms Protocol and the Programme of Action remain, however, more comprehensive than the Arms Trade Treaty in other respects. While the Treaty focuses on international arms transfers, as mentioned above, the Firearms Protocol and the Programme also address issues such as manufacturing, marking, record-keeping, tracing, stockpile management, surplus identification and disposal, public awareness, disarmament, demobilization and reintegration (DDR) and children.

FOCUS BOX HAT WEAPONS DOES THE ARMS TRADE TREATY COVER?

In line with article 2 of the Arms Trade Treaty, the following weapons are covered:

“Article 2: Scope

“1. This Treaty shall apply to all conventional arms within the following categories:

- (a) Battle tanks;
- (b) Armoured combat vehicles;
- (c) Large-calibre artillery systems;
- (d) Combat aircraft;
- (e) Attack helicopters;
- (f) Warships;
- (g) Missiles and missile launchers; and
- (h) Small arms and light weapons.^a

“2. For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as ‘transfer’”.

^a These categories reflect those included in the United Nations Register of Conventional Arms (as discussed in sect. C. 2), which provides descriptions of each category.

³⁶ Ibid., article 1.

³⁷ Ibid., articles 3 and 4, respectively.

Under the Treaty, States parties commit to establishing and maintaining a national control system,³⁸ and regulating export, import, trans-shipment and brokering;³⁹ and are further encouraged to regulate the transit of weapons through their territories.⁴⁰

States are further required to take measures to prevent the diversion of arms.⁴¹ While diversion is not defined in the Arms Trade Treaty, it is understood to mean the unlawful rerouting or appropriation of a transfer which potentially changes who owns or has effective control of the arms.⁴² It can include instances where arms enter the illicit market or are redirected for an unauthorized end use or unlawful end-user.⁴³ It could thus cover the transfer of arms to a terrorist group.

States must also take appropriate measures to enforce the laws duly established.⁴⁴

In the area of controlling the import, export and transit of small arms and light weapons, the complementarity of the international legal instruments becomes particularly evident: While the Firearms Protocol establishes procedural requirements for arms transfers, it does not contain export criteria against which to assess a potential licence or authorization for security or arms control purposes. These criteria, however, are contained in the Arms Trade Treaty, which also sets out the circumstances under which a transfer must be prohibited.

During the negotiations on the Arms Trade Treaty, the question as to whether its provisions should also apply to the transfer of arms to non-State actors was contentious. In the end, no provision specifically mentioning the transfer of arms to non-State actors was included. The preferable interpretation is that transfers to any actor by a State party are subject to the Treaty's provisions.

Firstly, a State is prohibited from authorizing arms transfers if:

- The transfer would breach a Security Council arms embargo;
- The transfer would violate the State's international treaty obligations (including on the transfer or illicit trafficking of weapons); or
- The State has knowledge that the arms would be used to commit genocide, crimes against humanity, or war crimes.⁴⁵

Secondly, in addition, even where a transfer is not prohibited, a State must assess whether it:

- Would contribute to or undermine peace and security;
- Could be used to commit or facilitate a serious violation of IHL or international human rights law;
- Could be used to commit or facilitate an act constituting an offence under conventions or protocols relating to terrorism or transnational organized crime (to which the exporting State is a party).⁴⁶

³⁸ Arms Trade Treaty (2013), article 5 (2).

³⁹ *Ibid.*, articles 7–10, respectively.

⁴⁰ *Ibid.*, article 5.

⁴¹ *Ibid.*, article 11.

⁴² Wood, Brian, and Holtom, Paul, "The Arms Trade Treaty: Measures to Prevent, Detect, Address and Eradicate the Diversion of Conventional Arms" (UNIDIR, Policy Brief, 2020), see p. 3.

⁴³ *Ibid.*, (drawing on the preamble to the Arms Trade Treaty).

⁴⁴ Arms Trade Treaty, 2013, article 14.

⁴⁵ *Ibid.*, article 6.

⁴⁶ *Ibid.*, article 7 (1).

States must not authorize a transfer if there is an “overriding risk” of any of these consequences,⁴⁷ taking into account possible mitigating measures as well as the risk of serious acts of gender-based violence or serious violence against women and children.⁴⁸ In addition, authorizations that have been granted should be reassessed if new information comes to light.⁴⁹

FOCUS BOX

The United Nations High Commissioner for Human Rights has highlighted how the diversion of arms and unregulated or illicit arms transfers fuel the commission of gender-based violence against women and girls and impact on all of their human rights.^a This includes risks of conflict-related sexual and other violence as well as enslavement, gang violence, and violence against displaced persons, as well as domestic violence involving weapons. Further, not only their use but their mere presence at home or in the community, and the threat or implied threat of their use, can severely impact on human rights. Weapons are also often linked to expressions of masculinity related to control, power, domination and strength, contributing to social acceptance of and impunity for gender-related violence.

^a A/HRC/44/29, paras. 12–19.

2. Wassenaar Arrangement on Export Controls for Conventional Arms

Another important initiative to regulate transfers in conventional arms and dual-use goods and technologies is the Wassenaar Arrangement. The Arrangement currently has 42 participating States. It covers SALW, tanks and military vehicles, armoured and protective equipment, aircraft and drones, listed dual-use goods and technologies and listed munitions. One of its explicit objectives is to use export controls as a means to combat terrorism. Participating States pledge to prevent terrorist groups, organizations and individuals from acquiring such weapons.⁵⁰

Accordingly, States must not issue licenses to export SALW where there is a clear risk that they might “[s]upport or encourage terrorism”.⁵¹ In considered exports of SALW, States must also take into account the recipient State’s record of compliance with its international obligations, particularly on the suppression of terrorism; as well as the risk of diversion or re-export to terrorists.⁵²

There are also guidelines on export controls for Man-Portable Air Defence Systems (MANPADS), which recognize the threat posed by their unauthorized proliferation.⁵³ The International Civil Aviation Organization (ICAO) has urged States to apply the Wassenaar

⁴⁷ The term is not defined: a declaration by New Zealand interprets it to mean a “substantial risk”; declarations by Liechtenstein and Switzerland indicate that the risk must be “more likely to materialize than not”, even after the expected effect of any mitigating measures.

⁴⁸ Arms Trade Treaty, 2013, article 7(4).

⁴⁹ *Ibid.*, article 7(7).

⁵⁰ Wassenaar Arrangement, Guidelines and Procedures, including the Initial Elements, July 2014, I (5).

⁵¹ Wassenaar Arrangement, Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) (agreed at the 2002 Plenary and amended at the 2007 Plenary), para. 2 (a).

⁵² *Ibid.*, paras. 1(c) and (j), respectively.

⁵³ Wassenaar Arrangement, Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS) (agreed upon at the 2003 Plenary and amended at the 2007 Plenary).

standards on MANPADS, and to exercise strict and effective controls on their import, export, transfer or re-transfer, in part because of its concerns about terrorist threats.⁵⁴

3. United Nations Register of Conventional Arms

The United Nations Register of Conventional Arms is a transparency mechanism by which States can voluntarily report to the United Nations their arms transfers to other States (but not to non-State actors). It covers heavy conventional weapons and, optionally, small arms and light weapons (reporting on which is encouraged as good practice).⁵⁵

The Register can create trust and evidence if excessive or destabilizing accumulations of arms is occurring. It thus contributes to early warning and preventive diplomacy. About 60 States report annually to the Register and over 170 States have reported since its creation in 1991.⁵⁶

ACTIVITY SCENARIO REGARDING ARMS DEALING WITH A TERRORIST GROUP

Ms. B, a citizen and resident of your country, is a businesswoman specialized in acting as an intermediary bringing together buyers and sellers of arms. According to information the prosecutor's office has received from an intelligence agency, Ms. B has recently successfully facilitated a deal between a former rebel commander in country A and an armed group that is listed by the United Nations ISIL (Da'esh) and Al-Qaida Sanctions Committee. The armed group operates in country C and directs its attacks primarily against the military of country C. It occasionally also commits massacres of civilians in country C. The leader of the armed group has sworn fealty to Al-Qaida, but the group is not known to have ever acted outside country C.

According to the information received, the former rebel commander (who has recently signed a peace agreement with the government of country A) contacted Ms. B. The rebel commander sought a buyer for machine guns and portable anti-tank missile systems he had diverted from the stocks of the rebel group during the peace process. Ms. B, through other middlemen, identified the Al-Qaida affiliated buyer and assisted the parties in agreeing on the price (\$50 million) and establishing delivery and payment modalities. She reportedly received a 10 per cent commission for her efforts.

Analyse:

- *Which of the international instruments discussed above are relevant to these facts?*
- *What laws in your country (which is Ms. B's country of residence) are applicable to the facts and specifically to Ms. B's conduct?*
- *What offences may Ms. B have committed under your country's laws (assuming the facts alleged above can be proved)? What additional elements would need to be proven to convict her for those offences?*

⁵⁴ International Civil Aviation Organization (ICAO), ICAO Assembly resolution A35-11, Threat to civil aviation posed by man-portable air defence systems (MANPADS) (see: www.icao.int/publications/pages/assembly-archive.aspx).

⁵⁵ General Assembly, report on the continuing operation of the United Nations Register of Conventional Arms and its further development (A/74/211, para. 115).

⁵⁶ UNODA, "Transparency in Armaments" (www.un.org/disarmament/convarms/transparency-in-armaments).

TOOLS

Comparative analysis of instruments

UNODC, “Comparative Analysis of Global Instruments on Firearms and other Conventional Arms: Synergies for Implementation” (2016)

(see: www.unodc.org/e4j/fr/firearms/module-5/core-reading.html).

United Nations Register for Conventional Arms
(www.un.org/disarmament/convarms/register/).

Small arms and light weapons

UNODC, Legislative Guide (2004) to the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.

UNODC, Technical Guide to the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and components and ammunition, supporting the United Nations Convention against Transnational Organized Crime, supporting Member States in the implementation of the Firearms Protocol.

UNODC, Model Law on Firearms

(see: www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html).

United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001).

International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (2005).

United Nations High Commissioner for Human Rights, “Human Rights and the regulation of civilian acquisition, possession and use of firearms” (A/HRC/32/21).

Office of the United Nations High Commissioner for Human Rights (OHCHR), Impact of arms transfers on the enjoyment of human rights (A/HRC/35/8).

United Nations High Commissioner for Human Rights, Impact of arms transfers on human rights (A/HRC/44/29).

INTERPOL, Illicit Arms Records and tracing Management System (iARMS) (www.interpol.int/en/Crimes/Firearms-trafficking/Illicit-Arms-Records-and-tracing-Management-System-iARMS).

INTERPOL, Firearms Reference Table

(www.interpol.int/en/Crimes/Firearms-trafficking/INTERPOL-Firearms-Reference-Table).

Modular Small-arms-control Implementation Support Compendium (MOSAIC)

(www.un.org/disarmament/mosaic).

UNIDIR, The International Tracing Instrument: Examining options to support operationalization (2018).

Ammunition

UNODA, International Ammunition Technical Guidelines (IATG)
(www.un.org/disarmament/convarms/ammunition/).

United Nations SaferGuard Programme
(www.unsafeguard.org).

Wassenaar Arrangement

Wassenaar Arrangement, Elements for export controls of Man-Portable Air Defence Systems (MANPADS).

Wassenaar Arrangement, Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW).

Wassenaar Arrangement, Elements for Effective Legislation on Arms Brokering.

Wassenaar Arrangement, Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons (SALW) through Air Transport.

Other sources

ICAO, Assembly resolution A35-11, Threat to Civil Aviation Posed by Man-Portable air Defence Systems (MANPADS) (see: www.icao.int/publications/pages/assembly-archive.aspx).

UNODA, National Legislation on Transfer of Arms, Military Equipment and Dual-use Goods and Technology (information provided by Member States and collated by UNODA in accordance with General Assembly resolution 57/66) (www.un.org/disarmament/convarms/nldu/).

E. Regulation of weapons under international humanitarian law

International humanitarian law (IHL) is a set of rules which, for humanitarian reasons, aim to limit the effects of armed conflict. To that end, IHL attempts to protect persons who are not, or are no longer, taking part in the hostilities, and to restrict the means and methods of warfare. It does so through a combination of general principles and prohibitions or restrictions on specific weapons. Even where a weapon itself is considered lawful, the core IHL principles of humanity, distinction, proportionality and military necessity must be followed in relation to its use. War crimes liability also exists for certain serious violations of IHL.

CROSS-REFERENCE Chapter III of the present module examines the relationship between counter-terrorism law and international humanitarian law.

One of the main frameworks for prohibiting or restricting weapons in armed conflict is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons) of 1980 and its five Protocols (each addressing particular weapons).⁵⁷ Aimed at addressing new developments in armed conflicts and in weapon technologies, the Convention on Certain Conventional Weapons is a framework convention that allows the negotiation and adoption of new protocols. An amendment to article 1

⁵⁷ Convention on Certain Conventional Weapons: Protocol I on Non-Detectable Fragments, 1980; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, 1980, as amended on 3 May 1996; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 1980; Protocol IV on Blinding Laser Weapons, 1995; and Protocol V on Explosive Remnants of War, 2003 (United Nations, *Treaty Series*, vol. 2260, No. 22495).

of the Convention regarding the scope of application of the Convention and its Protocols was decided upon in 2011. By joining the amendment to article 1 of the Convention, High Contracting Parties will ensure that the Convention and its Protocols apply to situations of non-international armed conflicts.

1. Prohibition on weapons causing superfluous injury or unnecessary suffering

IHL prohibits the use of weapons and methods of warfare “of a nature to cause superfluous injury or unnecessary suffering”.⁵⁸ The rule refers to the effects of certain methods or means of warfare. The International Court of Justice defined unnecessary suffering as “harm greater than that unavoidable to achieve legitimate military objectives”.⁵⁹ One indication is the inevitability of death (such as through poison and exploding or expanding (“dum-dum”) bullets), or permanent disability,⁶⁰ such as by using blinding lasers,⁶¹ anti-personnel land mines⁶² or incendiary weapons in some situations. An example of the latter would be the use of napalm, flamethrowers or white phosphorous directly against military personnel, as opposed to their use against vehicles, bunkers or fortifications in which personnel may be incidentally burnt.⁶³ Some weapons with such effects have been regulated by specific IHL rules.

2. Prohibition on indiscriminate weapons

As mentioned in chapter III of the present module, the IHL prohibition on indiscriminate attacks includes a prohibition on the use of weapons which are “of a nature to strike military objectives and civilians or civilian objects without distinction”.⁶⁴ This could include, for example, an IED activated indiscriminately by contact with any person, whether civilian or military. Many States have specifically prohibited anti-personnel land-mines and cluster munitions (discussed below) by treaty in part because of their indiscriminate effects.

3. Martens clause

The so-called “Martens clause” provides that, wherever a specific treaty or customary rule does not cover an issue, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.⁶⁵ Thus, whenever terrorist groups or States countering terrorism devise new weapons or methods of fighting, these considerations must be borne in mind.

⁵⁸ International Committee of the Red Cross (ICRC), Customary IHL, rule 70.

⁵⁹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996 para. 78.

⁶⁰ ICRC, Customary IHL, rule 70.

⁶¹ See specifically, the Convention on Certain Conventional Weapons, Protocol IV on Blinding Laser Weapons, 1995.

⁶² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) (“Anti-Personnel Mine Ban Convention”) (United Nations, *Treaty Series*, vol. 2056, No. 35597).

⁶³ United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004), p. 112.

⁶⁴ Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977, article 51 (4); ICRC, Customary IHL, rule 71; and, to similar effect, the Statute of the International Criminal Court (ICC), article 8 (2)(b)(xx).

⁶⁵ Additional Protocol I, article 1 (2); see also Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977, fourth preambular para.; and Convention with Respect to the Laws and Customs of War on Land (Second Hague Convention), 1899, preamble.

4. Prohibited weapons

IHL prohibits the use of certain weapons in armed conflict, including:

- Expanding⁶⁶ or exploding⁶⁷ bullets;
- Poison and poisoned weapons⁶⁸ (including, for example, against water supplies);
- Chemical⁶⁹ and biological⁷⁰ weapons: the relevant conventions prohibit not only the use but also the development, production, stockpiling, acquisition and transfer of such weapons;
- Weapons that injure by fragments which escape detection by X-rays⁷¹ (such as those containing wood, glass or plastic);
- Laser weapons that are specifically designed to cause permanent blindness⁷² (but not laser systems used against military optical equipment and which cause incidental blindness).

In addition, States parties to specific treaty regimes have agreed to prohibit:

- Anti-personnel land mines (meaning a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill a person);⁷³
- Cluster munitions (meaning a conventional munition that is designed to disperse or release explosive submunitions under a certain weight);⁷⁴
- Nuclear weapons.⁷⁵

Where a State is not a party to a treaty prohibiting the above weapons and the weapon is not prohibited by customary international law (as in the case of nuclear weapons), the general rules of IHL still apply regarding distinction, proportionality, prohibitions on attacks on civilians and indiscriminate attacks and precautions.

Some of the treaties prohibiting weapons apply not only in armed conflict but also in peacetime, including those on anti-personnel land mines, cluster munitions and biological, chemical and nuclear weapons.

⁶⁶ ICRC, Customary IHL, rule 77; see also Hague Declaration concerning the use of expanding bullets (1899).

⁶⁷ ICRC, Customary IHL, rule 78; see also Declaration of Saint Petersburg on the use of explosive projectiles (1868).

⁶⁸ Regulations respecting the Laws and Customs of War on Land (Hague Regulations), 1907, article 23 (a); see also ICRC, Customary IHL, rule 72.

⁶⁹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925 (Geneva Protocol of 1925); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 3 September 1992, entered into force 29 April 1997) (Chemical Weapons Convention); and ICRC, Customary IHL, rule 74.

⁷⁰ Geneva Protocol of 1925; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 16 December 1971, entered into force 26 March 1975) (United Nations, *Treaty Series*, vol. 1015, No 14860); and ICRC, Customary IHL, rule 73.

⁷¹ ICRC, Customary IHL, rule 79; Protocol I (1980) to the Convention on Certain Conventional Weapons.

⁷² ICRC, Customary IHL, rule 86; Protocol IV (1995) to the Convention on Certain Conventional Weapons.

⁷³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Anti-Personnel Mine Ban Convention), 1997, article 2 (1) (with 164 States Parties).

⁷⁴ Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010), article 2 (2) (with 110 States Parties) (United Nations, *Treaty Series*, vol. 2688, No. 47713).

⁷⁵ Treaty on the Prohibition of Nuclear Weapons (2017) (with 50 States Parties) (A/CONF.229/2017/8).

5. Restricted weapons

Some weapons are not considered unlawful per se under IHL, but their use is subject to specific restrictions. In addition, the general principles of IHL apply to their use, including distinction, proportionality, precautions and the prohibition on attacks on civilians, indiscriminate attacks or weapons, and weapons or methods which cause superfluous injury or unnecessary suffering.

Booby-traps⁷⁶ are devices or material designed, constructed or adapted to kill or injure and which function unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act (such as opening a door).⁷⁷ While booby-traps may be used against combatants, there are a number of important restrictions on their use⁷⁸ which aim to reduce incidental risks to civilians. Most of the restrictions on booby-traps also apply to “other devices” and munitions that are manually emplaced and designed to kill, injure or damage,⁷⁹ such as IEDs. These can be manually, remotely or automatically detonated.

Landmines are munitions placed on or under the ground and designed to explode by the presence, proximity or contact of a person or vehicle.⁸⁰ The use of such mines is subject to restrictions to protect civilians under Protocol II to the Convention on Certain Conventional Weapons,⁸¹ although, as mentioned above, anti-personnel land mines (as opposed to, for example, anti-vehicle mines) are prohibited for States parties to the Anti-Personnel Mine Ban Convention of 1997.

Incendiary weapons are defined as weapons or munitions primarily designed to set fire to objects or cause burn injury to persons through the action of flame, heat, or combination thereof, and produced by a chemical reaction.⁸² Incendiary weapons can take the form of, for example, flamethrowers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.⁸³ Incendiary weapons may be used against military objectives and military personnel (only if it is not feasible to use less harmful weapons to render a person “hors de combat”),⁸⁴ but it is prohibited to use them in certain ways that endanger civilians and civilian objects.⁸⁵

⁷⁶ Convention on Certain Conventional Weapons, Protocol II (1980), as amended in 1996.

⁷⁷ *Ibid.*, article 2 (4).

⁷⁸ *Ibid.*, articles 3, 7 and 9.

⁷⁹ *Ibid.*, article 3, 7 and 9.

⁸⁰ *Ibid.*, article 2 (1).

⁸¹ *Ibid.*, articles 3 (5); 3 (6); 5 and 10; 6; 3; 3 (10) and 12; 9 (1); and 3 (2) and 10 and 11, respectively.

⁸² Convention on Certain Conventional Weapons, Protocol III (1980), article 1(1).

⁸³ *Ibid.*, article 1 (1) (a).

⁸⁴ ICRC, Customary IHL, rule 85, The Use of Incendiary Weapons against Combatants.

⁸⁵ Convention on Certain Conventional Weapons, Protocol III (1980), articles 1 and 2; see also ICRC, Customary IHL, rule 84: The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons (“If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects”).

ACTIVITY WOULD THE USE OF THE FOLLOWING WEAPONS BREACH ANY IHL RULES?

1. In the face of approaching government soldiers, insurgent forces have evacuated their headquarters in a disused government administrative building in a small town. As they leave, they place explosives behind the doorways and windows on the ground floor, which are wired to automatically detonate if the door or window is opened from the outside. The building is inside a compound of government buildings that is closed off from nearby civilian houses by a high concrete blast wall. After the insurgents depart, and before government forces close in, some curious civilians enter the compound to loot the empty buildings. The explosive device is filled with a mixture of hundreds of steel ball bearings.
2. Insurgent forces plant an improvised explosive device (IED) on a highway used by government military convoys as well as civilian traffic. The device can be activated in two different ways: first, by a pressure plate which detects the weight of objects on the road and explodes when the average weight of a government tank is detected; and secondly, by remote control when an insurgent, upon seeing an approaching target, sends a mobile phone signal to it.

6. Explosive remnants of war

Unexploded ordnance left behind after an armed conflict can kill or injure people and animals and damage property for many decades. It can also have serious adverse effects on post-war reconstruction and development, such as by denying or impeding the use of agricultural land. Protocol V on Explosive Remnants of War (2003) to the Convention on Certain Conventional Weapons seeks to address these problems.

7. Development of new weapons

When studying, developing, acquiring or adopting new weapons, means or methods of warfare, States are required to consider whether their use would be in some or all circumstances prohibited by IHL or other international laws⁸⁶ in order to ensure their compliance with such laws.

This requirement applies, for example, to the development of new autonomous weapons systems, which may be loosely described as “weapons systems that, once activated, can select and engage targets without further human intervention.”⁸⁷ Such weapons could be potentially used by States against terrorist groups or by terrorist groups themselves.

Autonomous weapons systems can be sophisticated or rudimentary. While it is unlikely, for the time being, that terrorists have the capability to access the advanced technologies being developed by States, they already use existing, rudimentary autonomous technologies (such as mines). There are also risks of such groups, for example, learning to programme uncrewed aircraft systems (discussed below) to engage targets.

⁸⁶ Convention on Certain Conventional Weapons, Protocol I (1980), article 36.

⁸⁷ United Nations Office for Disarmament Affairs (UNODA), “Fact Sheet: Autonomous Weapons Systems”, with citation to the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/23/47, summary): note that most lethal uncrewed aircraft systems, discussed below, are controlled remotely by human operators and would therefore not qualify as fully autonomous or semi-autonomous weapons systems.

Non-binding guiding principles agreed upon in the framework adopted by a group of governmental experts suggest that, when developing autonomous weapons, States should ensure appropriate physical and cybersecurity measures to safeguard against the risk of acquisition by terrorist groups.⁸⁸

The use of autonomous weapons systems is also covered and restricted by other IHL rules, such as the principles of distinction and proportionality, the prohibition of attacks on civilians or indiscriminate attacks and the duty to take precautions before and during an attack. However, a specific legal framework to prohibit or specifically regulate such systems has not yet been developed.

Depending on the technology, such weapons can potentially enhance compliance with IHL – for instance, by increasing precision in targeting or including self-deactivation or self-destruction mechanisms in munitions.⁸⁹ On the other hand, the nature and degree of a weapon’s “autonomy” in selecting and engaging targets can risk non-compliance with IHL. The International Committee of the Red Cross (ICRC) suggests that human operators must always retain and exercise responsibility for the use of such weapons.

8. Uncrewed aircraft systems (“drones”)

At least 20 non-State armed groups have reportedly obtained armed or unarmed uncrewed aircraft systems, including terrorist organizations (such as ISIL (Da’esh), Harakat Tahrir al-Sham and the Palestinian Islamic Jihad).⁹⁰ They have used commercial drones as well as drones sold by States, or have developed their own drones.⁹¹ Most prominently, their use by ISIL (Da’esh) is well documented:

- By 2017, ISIL (Da’esh) had developed modified IEDs that could be dropped from drones to fulfil an anti-personnel function and IEDs modified with high-explosive dual-purpose grenades to fulfil anti-personnel and anti-tank functions;⁹²
- ISIL (Da’esh)’s use of drones has been prolific: for example, in a single day in Iraq, 82 drones were used in Mosul against Iraqi, Kurdish, United States and French forces;⁹³
- In 2017, Member States reported to the ISIL (Da’esh) and Al-Qaida Sanctions Committee that ISIL (Da’esh) was developing the ability to design and construct larger drones enabling the group to weaponize these technologies and increase its capacity to strike at a distance;⁹⁴

⁸⁸ Group of Governmental Experts established by the High Contracting Parties to the Convention on Certain Conventional Weapons, Guiding Principles on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (CCW/MSP/2019/9, annex III, principle (f)).

⁸⁹ United States Department of Defence, *Department of Defense Law of War Manual* (June 2015, updated December 2016), section 6.5.9.2.

⁹⁰ Human Rights Council, report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the use of armed drones for targeted killings (A/HRC/44/38, para. 9).

⁹¹ *Ibid.*; see also S/2018/14/Rev.1, para. 87 (ISIL (Da’esh) use of commercial drones).

⁹² Conflict Armament Research, “Frontline Perspective: Islamic State’s Multi-Role IEDs”, April 2017, p. 2 (results of a field investigation in Iraq) (see www.conflictarm.com/publications/).

⁹³ Human Rights Council, report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the use of armed drones for targeted killings (A/HRC/44/38, para. 9).

⁹⁴ S/2017/573, para. 96.

- ISIL (Da'esh) is known to have used commercially available unmanned aircraft systems (UAS) to conduct surveillance and reconnaissance in conflict zones, allowing them to gather intelligence through aerial photography and videography and to survey potential targets;
- The use of drones by ISIL (Da'esh)-affiliated militants during the conflict in Marawi, the Philippines, has also been reported.⁹⁵

The “Berlin Memorandum on Good Practices for Countering Terrorist Use of Unmanned Aerial Systems” of the Global Counterterrorism Forum (2019) highlights that “[p]ossible misuses of UAS by terrorists extend beyond physical attacks and include conducting intelligence collection, surveillance, and reconnaissance; monitoring targets, security protocols, and patterns of behaviour; using UAS to make indirect fire more accurate; collecting footage for use in terrorist propaganda; disrupting law enforcement operations; disrupting, interfering with or paralyzing key infrastructure, air traffic and economic assets; smuggling illicit goods across borders or into sensitive areas; intimidation and harassment; and inciting panic in mass gatherings. Terrorist attacks by UAS could be directed against a variety of targets, governmental, economic, and other critical infrastructure as well as other public targets (sometimes referred to as ‘soft targets’).”⁹⁶

In the introduction, the Berlin Memorandum also notes that “[t]o date, terrorist use of UAS outside of the context of armed conflicts has been relatively rare”. In the conclusion, the Memorandum, warns, however, that “[t]here is little doubt that [terrorists] will attempt to utilize UAS also outside of the context of armed conflicts”.

Lawfulness of and controls on uncrewed aircraft systems

Drones are not prohibited weapons under international law. Key concerns about the use of armed drones in conflict include the risks of: disproportionate civilian casualties even when military objectives are properly identified; indiscriminate attacks causing civilian casualties; or deliberate attacks on civilians.

The use of drones by non-State actors must accordingly comply with all applicable rules of IHL and human rights law. These rules are discussed in detail in chapter I, section D.3, of the present module (in relation to state use of drones, but similar considerations apply to armed groups), while IHL generally is discussed in chapter III of the present module. The Special Rapporteur on extrajudicial, summary or arbitrary executions also recommended that non-State actors that use armed drones should investigate all allegations of violations and produce regular reports tracking drone strikes and casualties.⁹⁷

While armed drones are not prohibited weapons, international efforts are directed towards preventing their acquisition by terrorist groups. In its resolution 2370 (2017), the Security Council encouraged Member States to prevent and disrupt procurement networks for such weapons, systems and components between ISIL (Da'esh), Al-Qaida and associated individuals and groups.

⁹⁵ S/2018/14/Rev.1, para. 58.

⁹⁶ See Global Counterterrorism Forum, “Berlin Memorandum on Good Practices for Countering Terrorist Use of Unmanned Aerial Systems”, p. 1 (see: www.thegctf.org/About-us/GCTF-framework-documents).

⁹⁷ A/HRC/44/38, para. 96.

The Berlin Memorandum also urges States to create robust, clear and enforceable national legal and policy frameworks, which:

- Deter and minimize the potential for proliferation and misuse of UAS by terrorists;
- Enable effective detection, mitigation and countermeasures against UAS;
- Enable effective investigations, prosecutions and sanctions following UAS incidents.⁹⁸

CROSS-REFERENCE Uncrewed aircraft systems are also used for counter-terrorism operations, including to track and kill suspected terrorists. All such uses must comply with the international law on self-defence, human rights, and IHL. This topic is discussed in chapter I, section D.3.

TOOLS

UNIDIR, *Increasing Transparency, Oversight and Accountability of Armed Unmanned Aerial Vehicles* (2017) (<https://unidir.org/publication/increasing-transparency-oversight-and-accountability-armed-unmanned-aerial-vehicles>).

In 2016, at its Fifth Review Conference, the High Contracting Parties to the Convention on Certain Conventional Weapons established a Group of Governmental Experts to examine the possible challenges posed by emerging technologies in the area of lethal autonomous weapons systems. In 2019, the Group of Experts affirmed 11 Guiding Principles on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (CCW/MSP/2019/9, annex III).

Global Counterterrorism Forum, *Berlin Memorandum on Good Practices for Countering Terrorist Use of Unmanned Aerial Systems* (2019) (see www.thegctf.org/About-us/GCTF-framework-documents).

UNODA, *Fact sheet: Humanitarian approaches to disarmament* (<https://front.un-arm.org/wp-content/uploads/2020/07/Humanitarian-Approaches-to-Disarmament-Fact-Sheet-July2020.pdf>).

UNODA, *Study on Armed Unmanned Aerial Vehicles*, 2015 (www.un.org/disarmament/publications/more/drones-study/).

⁹⁸ See Global Counterterrorism Forum, *Berlin Memorandum on Good Practices for Countering Terrorist Use of Unmanned Aerial Systems*, pp. 1–3 (see: www.thegctf.org/About-us/GCTF-framework-documents).

Self-assessment questions

1. Name three Security Council resolutions through which the Council seeks to suppress the supply of conventional weapons to terrorists.
2. List at least three obligations of Member States related to weapons under the ISIL (Da'esh) and Al-Qaida sanctions regime.
3. Name at least three international law instruments of particular relevance to the use of improvised explosive devices (IEDs) by terrorists. Briefly summarize their contents.
4. Name the three key international framework instruments focused on preventing, combating and eradicating illicit dealings in small arms and light weapons.
5. What is the main purpose of the Firearms Protocol of the United Nations Convention against Transnational Organized Crime? List four types of measures States are required to take under the Firearms Protocol that are particularly relevant in the context of counter-terrorism.
6. Name three differences between the Firearms Protocol and the United Nations Programme of Action to Combat the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.
7. What does the “tracing” of small arms/firearms mean? Why is it important in countering terrorism?
8. Why is it important to mainstream a gender perspective into measures to control small arms and light weapons? Name at least three reasons.
9. What constitutes the “diversion” of arms?
10. Describe the scope of the Arms Trade Treaty and name three key obligations it imposes on States parties.
11. List five prohibitions or restrictions on specific weapons under international humanitarian law.
12. Which rules of international law govern the use of uncrewed aerial vehicles (drones) by terrorist groups and by Member States in counter-terrorism operations? List at least five relevant rules.



V.

Criminal justice responses to terrorism and the international law framework against organized crime

Objectives

By the end of chapter V, readers will be able to:

- 1 Describe the international legal framework for combating transnational organized crime through the United Nations Convention against Transnational Organized Crime (UNTOC), its three Protocols and other international legal instruments.
- 2 Name the elements of offences established under UNTOC and its Protocols, as well as other international treaties related to organized crime and its manifestations and discuss linkages with and differences in comparison to terrorism offences.
- 3 Discuss the UNTOC provisions on international cooperation, including extradition and mutual legal assistance, and compare them to related provisions in the international legal instruments against terrorism.
- 4 Identify ways in which criminal justice measures developed against transnational organized crime are relevant to the criminal justice responses to terrorism, including with regard to investigation approaches, financial investigations, specialized investigation techniques and witness protection procedures.

INTRODUCTION

Terrorism and organized crime are two phenomena that affect the stability, development and well-being of societies. While terrorism and organized crime are different phenomena, both terrorist organizations and organized criminal groups may exploit and benefit from many common factors, including conflicts, access to small arms and light weapons, instability, lack of rule of law, porous borders, high levels of corruption and weak law enforcement.¹

In addition to these common factors conducive to organized crime and terrorism, linkages between transnational organized crime and terrorism are a significant threat facing the international community. Terrorists can benefit from organized crime, whether domestic or transnational, as a source of financing or logistical support, through the trafficking in arms, persons, drugs, cultural property, the illicit trade in natural resources and wildlife, laundering of proceeds of criminal activity, including kidnapping for ransom, extortion, bank robbery, as well as transnational organized crime at sea.

In its resolution 2482 (2019), the Security Council emphasized that “the combined presence of terrorism, violent extremism conducive to terrorism, and organized crime ... may exacerbate conflicts in affected regions and may contribute to undermining affected States” and complicate conflict prevention and resolution efforts.²

As noted in the report of the Secretary-General on action taken by Member States and United Nations entities to address this subject, the nature and scope of the linkages between transnational organized crime and terrorism varies by context and region. At times these linkages can be opportunistic alliances potentially based upon shared territory, a desire for profit, or personal connections potentially developed in prisons or through shared networks. In other regions, linkages between terrorism and organized crime have not been confirmed and may not exist. In some contexts, criminal organizations avoid cooperation with terrorist groups to avoid heightened scrutiny from national authorities.³

The Security Council, in its resolution 2482 (2019), called upon States to strengthen the “global response to linkages between international terrorism and organized crime, whether

¹ Global Counterterrorism Forum (GCTF), Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice (2020), p. 1 (see www.thegctf.org/About-us/GCTF-framework-documents).

² Security Council resolution 2482 (2019), preamble.

³ S/2020/754, paras. 4–6.

domestic or transnational, which constitute a serious challenge and a threat to international security”⁴

Already in 2000, in adopting the United Nations Convention against Transnational Organized Crime (UNTOC), the General Assembly stated that it was “[s]trongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, ... the growing links between transnational organized crime and terrorist crimes”.⁵

At the same time, many Governments and researchers have stressed that the nature, scope and existence of linkages between terrorism and organized crime vary by context and have warned against generalizing. As noted in the Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism published by the Global Counterterrorism Forum (GCTF):

“Terrorism and transnational organized crime are generally criminalized by different laws and may require different criminal justice responses. When terrorism and transnational organized crime do not intersect, the linkage should not be overstated. When terrorism and transnational organized crime do intersect, a thorough understanding of the nature of the linkages between terrorism and transnational organized crimes is important in order to formulate an appropriate criminal justice response.”⁶

Governments, United Nations bodies, as well as experts, have further warned that it is necessary to differentiate the international legal frameworks regarding terrorism and organized crime, “each with its own institutional scaffolding”,⁷ and have warned against the risk that conflating the responses to terrorism and organized crime may pose to human rights.⁸

The purpose of the present chapter is to examine ways in which the international legal framework against organized crime is relevant to criminal justice responses to terrorism.

Section A provides a very brief overview of the elements of offences typically committed by organized crime groups, highlighting aspects that are relevant to counter-terrorism. The offences considered include participation in an organized crime group, money-laundering, corruption, trafficking in persons, migrant smuggling, illicit trafficking in firearms, illicit drug trafficking, illicit trafficking in cultural property, illicit exploitation of natural resources and environmental crimes, kidnapping for ransom, and cybercrime.

Section B provides a brief overview of the provisions of the United Nations Convention against Transnational Organized Crime (UNTOC) regarding international cooperation in criminal matters.

⁴ Security Council resolution 2482 (2019), para. 1; previous Security Council resolutions that noted with concern linkages between international terrorism and transnational organized crime include 1373 (2001), 2322 (2016) and 2368 (2017).

⁵ General Assembly resolution 55/25.

⁶ GCTF, Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice (2020) (see www.thegctf.org/About-us/GCTF-framework-documents).

⁷ S/PV.8569, p. 23, statement of Mexico during the Security Council debate on linkages between international terrorism and organized crime, 9 July 2019.

⁸ S/2020/754, para 107.

Section C examines selected issues relevant to the criminal justice responses to organized crime and terrorism. While terrorism and organized crime are different phenomena governed by distinct international and, in most cases, domestic legal frameworks, criminal justice authorities dealing with them face certain common challenges, related among others to the gravity of the offences and the continuous, highly organized and covert nature of the criminal activity.

It is important to stress that, while the present chapter mentions examples of linkages between the activities of organized crime groups and terrorists from numerous countries and regions, its purpose is not to provide an overview of the important research that is being done in this field from a social science and criminology perspective, nor even less to add to it.

TOOLS

UNODC, Education for Justice initiative, University Module Series, *Linkages between Organized Crime and Terrorism* (2019); the module provides an overview of research on the linkages between organized crime and terrorism, including theoretical frameworks on the linkages and numerous case studies.

(www.unodc.org/e4j/en/organized-crime/module-16/index.html).

A. Organized crime offences

1. United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime of 2000 (“UNTOC”, also referred to as the “Palermo Convention”)⁹ is the sole global instrument in the fight against transnational organized crime. Its purpose is to “promote cooperation to prevent and combat transnational organized crime more effectively” (article 1). As of January 2021, the Convention had 190 States Parties, reaching almost universal adherence. The Convention is supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Trafficking in Persons Protocol”, 178 States Parties),¹⁰ the Protocol against the Smuggling of Migrants by Land, Sea and Air (“Smuggling of Migrants Protocol”, 150 States Parties)¹¹ and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (“Firearms Protocol”, 119 States Parties).¹²

⁹ United Nations Convention against Transnational Organized Crime 2000 (adopted 15 November 2000, entered into force 29 September 2013 (United Nations, *Treaty Series*, vol. 2225, No. 39574)).

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2237, No. 39574).

¹¹ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2241, No. 39574).

¹² Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2326, No. 39574).

Under the Convention, States parties are required to criminalize participation in an organized criminal group (article 5), laundering of proceeds of crime (article 6), corruption (article 8) and obstruction of justice (article 23),¹³ and to make them subject to sanctions that take into account the gravity of the offences (article 11). The three Protocols to UNTOC further require States parties to criminalize trafficking in persons (article 5 of the Trafficking in Persons Protocol), smuggling of migrants (article 6 of the Smuggling of Migrants Protocol), and the illicit manufacturing of and trafficking in firearms (article 5 of the Firearms Protocol), as well as other acts related or linked to them.

UNTOC also requires that each State party “adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23” (article 10).

The Convention does not include an exhaustive list of organized crime offences since such a list would have quickly become outdated and would hardly serve the purpose of a legally binding agreement that needs to cover present and future needs in the fight against transnational organized crime. For instance, cybercrime was not a real concern at the time of adoption of the Convention but, with technological advancements, became widespread around the world. Similarly, it is hard to predict how organized crime will evolve in the future.

Instead, to further broaden the scope of application of UNTOC and to invoke its international cooperation provisions, the drafters opted for the concept of “*serious crimes*”. These are defined as offences punishable – under a State party’s national law – by a maximum deprivation of liberty of at least four years (article 2 (b)).

Another concept central to UNTOC is that of the “organized criminal group”. UNTOC focuses on defining the offender rather than the fluid concept of “organized crime” itself (see focus box below).

FOCUS BOX DEFINITION OF AN ORGANIZED CRIMINAL GROUP

UNTOC uses four criteria to define an organized criminal group (article 2 (a)):

1. A structured group of three or more persons;
2. The group exists for a period of time;
3. It acts in concert with the aim of committing at least one serious crime;
4. To obtain, directly or indirectly, a financial gain or material benefit.

A structured group is defined as one “that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure” (article 2 (c)).

¹³ These offences are examined in parts A.2 (criminalization of participation in an organized criminal group), A.3 (money-laundering), A.4 (corruption) and C.7 (providing security for criminal justice officials, witnesses and victims) of the present chapter.

Under its article 3, UNTOC can be invoked for the following types of crime:

(a) Offences established at the domestic level under the requirements of articles 5, 6, 8 and 23 of the Convention (that is, offences relative to participation in an organized criminal group, money-laundering, corruption and obstruction of justice, if they are transnational in nature and involve an organized criminal group);

(b) Serious crimes (as defined in the focus box above), if they are transnational in nature and involve an organized criminal group.

Under article 1 (3) of each Protocol, the offences established in accordance with the respective provisions of each Protocol shall be regarded as offences established in accordance with the Convention.

An offence is transnational in nature (see UNTOC, article 3 (2)) if:

- (i) It is committed in more than one State;
- (ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (iii) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;
- (iv) It is committed in one State but has substantial effects in another State.

TOOLS

- UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017) (www.unodc.org/documents/treaties/Legislative_Guide_2017/Legislative_Guide_E.pdf).
- UNODC, *Model Legislative Provisions against Organized Crime* (2012) www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf).

2. Criminalization of participation in an organized criminal group

The definition of an “organized criminal group”, in accordance with UNTOC, requires that the group aim “to commit serious crimes to obtain, directly or indirectly, a financial or other material benefit”.¹⁴ This would not, in principle, include terrorist groups, provided that their goals are purely non-material. However, UNTOC may still apply to crimes committed by those groups in

¹⁴ National legislation implementing UNTOC does not necessarily require the material profit aim as an element of the criminal association offence; see, for example, article 129 of the German Criminal Code, which makes it an offence to form or participate in a criminal organization without including the aim of obtaining material profit in the definition: in other cases, the element of “material benefit” is not prescribed in the description of the basic offence of “criminal organization”, but can be considered, under certain conditions, as an aggravating factor (see article 187 of the Greek Criminal Code). Neither option is opposed in the Convention; they are intended to broaden the scope of application of article 5 of the Convention and, according to article 34, para. 3, “each State party may adopt more strict or severe measures than those provided for by the Convention for preventing and combating transnational organized crime”.

the event that they commit crimes covered by UNTOC in order to raise financial or other material benefits.¹⁵

On the other hand, most international counter-terrorism instruments, such as the International Convention for the Suppression of the Financing of Terrorism of 1999 (“Terrorist Financing Convention”), and some national laws, do not require a political motive in defining acts of terrorism. Article 2 (1) of the Terrorist Financing Convention instead focuses on acts specified within the scope of the Conventions listed in its annex or violent acts intended to intimidate the public or coerce a government or international organization. Some activities of organized criminal groups also display these characteristics, such as when the mafia seeks to intimidate law enforcement, judges, governments or local populations.

Article 5 of UNTOC requires that States criminalize participation in an organized criminal group. States are required to criminalize either or both:

- (a) A conspiracy-type offence, i.e., agreeing to commit a serious crime;
- (b) A participatory type of offence (criminal association), i.e., actual participation in the activities of an organized criminal group, whether criminal or non-criminal.

Article 5 of UNTOC further requires that States criminalize “organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group”.

The international counter-terrorism conventions and protocols do not require States parties to establish conspiracy-type offences or offences criminalizing participation in the activities of a terrorist group, although many national counter-terrorism laws do contain these types of offences. The more recent international terrorism conventions, however, require States to criminalize participating in the commission of a terrorist act as an accomplice, organizing and directing others, and contributing to the commission of an offence by a group of persons acting with a common purpose.¹⁶ At the regional level, article 2 of the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism requires that States parties punish “participating in an association or group for the purpose of terrorism” as a criminal offence under their domestic law.

ACTIVITY CRIMINALIZING PARTICIPATION IN A CRIMINAL GROUP

- *Does your country’s legislation criminalize participation in an organized crime group? In what terms? Compare the domestic definition to the UNTOC definition of an “organized criminal group” and to the offences set forth in article 5 of UNTOC.*
- *Does your country’s legislation criminalize participation in a terrorist group? In what terms? Compare the definition of a terrorist group with the definition of an organized crime group.*

¹⁵ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017), para. 33 (www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html).

¹⁶ International Convention for the Suppression of Terrorist Bombings (1997), article 3 (United Nations, *Treaty Series*, vol. 2149, No. 37517).

3. Money-laundering and terrorist financing

Money-laundering and terrorist financing activities are extremely complex and broad in scope: this section highlights key aspects of how these criminal activities may be linked. There is an extensive body of specialized resources available on these subjects, including those provided by the Financial Action Task Force (FATF), FATF-style regional bodies, the World Bank and the International Monetary Fund (IMF).

Widely acknowledged as the international standard setting body for anti-money-laundering, FATF describes “money-laundering” as the processing of criminal proceeds to disguise their illegal origin. It adds that “[t]his process is of critical importance, as it enables the criminal to enjoy these profits without jeopardizing their source”.¹⁷

Article 6 of UNTOC, article 23 of the United Nations Convention against Corruption and article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances define the “laundering of proceeds of crime” as an offence and oblige States parties to criminalize it. These instruments are supplemented by international standards and guidelines related to anti-money-laundering provided by bodies such as the 40 FATF recommendations (first adopted in 1990).¹⁸

Money-laundering may be related to terrorism and terrorist financing in a number of ways. Moreover, money-laundering that is linked to terrorist offences qualifies as a predicate offence, and is thus a “serious crime”. There is clear evidence that terrorists commit criminal offences in order to raise funds to support their terrorist activities. Activities linked to raising, converting, transferring, concealing, disguising or using the unlawful proceeds of criminal offences committed by terrorists, such as kidnapping for ransom, arms and drug trafficking, illicit exploitation of natural resources or illicit trafficking in cultural property, constitute money-laundering. Other common crimes committed by terrorists include bank robbery, the smuggling of goods, credit card fraud, insurance and loan fraud and tax crimes.¹⁹

¹⁷ FATF, “What is Money Laundering?” (www.fatf-gafi.org/faq/moneylaundering/).

¹⁸ FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, 2019 (updated 2020)) (www.fatf-gafi.org/recommendations.html).

¹⁹ FATF, *Emerging Terrorist Financing Risks*, (Paris, October 2015), pp.15 and 16.

CASE STUDY LINKS BETWEEN TERRORISM AND MONEY-LAUNDERING

Legitimate businesses, money-laundering and terrorism in Africa^a

According to a member of the Eastern and Southern Africa Anti-Money-Laundering Group, used-car dealerships imported cars from countries such as Japan, Singapore and the United Kingdom of Great Britain and Northern Ireland, and the revenue generated from the sale of these cars as part of a complex money-laundering scheme was then funneled to terrorist groups. The owners of the car dealerships were from areas where there is a high risk of terrorism.

Several law enforcement investigations and prosecutions have found a nexus between commercial enterprises, including used-car dealerships and restaurant franchises, and terrorist organizations: in such cases, revenue generated from commercial enterprises was routed to support terrorist organizations. One case involved the shipment of used cars to Western Africa. In another instance, the shipment of cars to the Middle East was considered to be a fund-raising scheme for a specific terrorist organization.

^a FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, 2019 (updated 2020)) (www.fatf-gafi.org/recommendations.html), p. 19.

Terrorist financing distinguished from money-laundering

Article 2 of the Terrorist Financing Convention of 1999 defines terrorist financing as the unlawful and willful provision or collection of funds, directly or indirectly, with the intention or knowledge that they be used to finance a terrorist act.

Security Council resolutions require States to prohibit “making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training or travel, *even in the absence of a link to a specific terrorist act*” [emphasis added].²⁰

In money-laundering schemes, funds from illegal activities are injected into the legal economy using numerous techniques and vulnerable sectors of the economy. In relation to terrorism, funding may be derived from criminal activities and origins, but also from perfectly legal activities or origins. The main concern is to identify those sources so as to eradicate them.²¹

²⁰ Security Council resolution 2462 (2019), para. 3.

²¹ UNODC, *Guidance manual for Member States on terrorist financing risk assessments* (2018), chap.1, sect. 1.2 (www.unodc.org/documents/terrorism/Publications/CFT%20Manual/Guidance_Manual_TF_Risk_Assessments.pdf).

FOCUS BOX FATF RECOMMENDATION 5

FATF recommends that countries ensure that terrorism financing offences are designated as predicate offences for money-laundering.

“Countries should criminalize terrorist financing on the basis of the Terrorist Financing Convention, and should criminalize not only the financing of terrorist acts but also the financing of terrorist organizations and individual terrorists even in the absence of a link to a specific terrorist act or acts. Countries should ensure that such offences are designated as money-laundering predicate offences.”

Measures against money-laundering and terrorist financing

While there are differences between money-laundering and terrorist financing activities, mainly related to associated objectives and the origin of the funds involved (i.e., illicit or legitimate), there are similarities in the methods used by criminals and terrorists to raise, conceal, store, move and use their funds, in particular when there are links between organized criminal and terrorist groups.

The characteristics of specific activities might require, at a national level, the use of different policies, laws and institutional responses, but the overriding objective is to ensure comprehensive policy, legislative and institutional frameworks that provide effective responses to prevent, investigate and prosecute crimes related to either money-laundering or terrorist financing activities.

FOCUS BOX FATF RECOMMENDATIONS

FATF is an intergovernmental body. Its mandate is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money-laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, and other related threats to the integrity of the international financial system. In collaboration with other international stakeholders, FATF also works to identify vulnerabilities at the national level, with the aim of protecting the international financial system from misuse.^a

The FATF recommendations set out a comprehensive framework of measures to effectively combat money-laundering and terrorist financing, both of which remain significant challenges. The 40 FATF recommendations originally contained nine special recommendations focused on terrorism financing. Most of those measures, which were focused on terrorist financing, are now integrated throughout the recommendations. However, there are some recommendations that are unique to terrorist financing, which are set out in section C of the FATF recommendations, including: recommendation 5 (the criminalization of terrorist financing); recommendation 6 (targeted financial sanctions related to terrorism and terrorist financing); and recommendation 8 (measures to prevent the misuse of non-profit organizations).^b

In its resolution 2462 (2019), the Security Council strongly urged “all States to implement the comprehensive international standards embodied in the 40 revised FATF Recommendations on Combating Money Laundering, and the Financing of Terrorism and Proliferation and its interpretive notes”.^c

^a FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2018, updated 2020), p. 8 (www.fatf-gafi.org/recommendations.html).

^b *Ibid.*, p. 6.

^c Security Council resolution 2462 (2019), para. 4.

4. Corruption

As noted by the Secretary-General in his Plan of Action to Prevent Violent Extremism, violent extremism “tends to thrive in an environment characterized by poor governance, democracy deficits, corruption and a culture of impunity for unlawful behaviour engaged in by the State or its agents”.²² In addition to undermining public support for, and the legitimacy of, a government, and fuelling support for armed groups, corruption can relate to terrorism in a number of other ways:

- Terrorists may bribe public officials (including police, justice and military personnel, and civil servants and politicians) to turn a blind eye to their illegal and terrorist activities, and thus enjoy impunity;
- Public officials may take bribes from corporate intermediaries, such as arms dealers, financial entities or mining companies, who themselves deal with terrorists;
- Corrupt public officials may divert military equipment or humanitarian relief supplies to terrorist groups, and thus support or facilitate their activities;
- Terrorist groups may bribe private companies, for instance, not to report suspicious transactions, including terrorist financing, to regulators, or to transport weapons in a trucking business. Terrorist sympathizers may also infiltrate businesses and embezzle funds.

Under UNTOC, States parties are required to criminalize corruption involving public officials, in the form of a bribery offence and to consider criminalizing the bribery of foreign public officials or international civil servants (article 8).

The United Nations Convention against Corruption (UNCAC) is the only international legally binding instrument in the fight against corruption. It entered into force in 2005 and, as of January 2021, had 187 States Parties, thus enjoying almost universal adherence. The Convention covers five main areas: preventive measures; criminalization and law enforcement; international cooperation; asset recovery; and technical assistance and information exchange.

²² A/70/674, para. 27.

Under UNCAC, countries are called upon to establish criminal offences to cover a much wider range of acts of corruption than UNTOC:

- Bribery, not only of national public officials but also foreign and international public officials (articles 15 and 16);
- Embezzlement of public funds (article 17);
- Trading in influence (article 18);
- Abuse of functions (article 19);
- Illicit enrichment (article 20);
- Offences in support of corruption, such as laundering or concealing its proceeds (articles 23 and 24) and obstruction of justice (article 25);
- Bribery and embezzlement in the private sector (article 21);
- Ancillary offences of participation and attempt (article 27).

In order to take into account differences in domestic law, States are legally obliged to establish some of the above offences, while in other cases (articles 16, 18, 19, 20, 21 and 24) they are required to consider doing so.

ACTIVITY

M is a customs official at a border post of country X.

Country X's intelligence service has recently detected that M has entered into an agreement with a person whose identity she does not know. She has agreed that she will ensure that certain trucks can pass through the border without being checked in exchange for payments amounting to twice her monthly salary.

The trucks are transporting firearms and ammunition for a terrorist group active in country X. However, M has no relationship with the terrorist group, whose attacks on civilians and policemen in fact she abhors. She does not know for a fact what the shipments contain or who they are destined for. Nevertheless, under the circumstances, she would have every reason to assume that the trucks are supplying weapons to the terrorist group.

- *What offences should M be charged with under your country's law?*
- *Could she be charged with offences related to supporting or facilitating terrorism in addition to offences related to corruption?*
- *What measures should the authorities of country X take to prevent any future occurrence of such a case after M's dealings were discovered?*

TOOLS

UNODC, Education for Justice (E4J) University Module Series, Module 11, Corruption, Peace and Security (www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-11/index.html).

5. Trafficking in persons

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing UNTOC (“Trafficking in Persons Protocol”), article 3 (a), defines the offence of trafficking in persons as comprising three elements:

- (a) An “act” (recruitment, transportation, transfer, harbouring or receipt of persons);
- (b) A “means” by which that act is committed (threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person);
- (c) A “purpose” to exploit, regardless of what type of exploitation.

The Trafficking in Persons Protocol does not specifically define exploitation, but stipulates that the types of exploitation “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (article 3 (a)).²³ Additionally, the intent to exploit the person using the acts and means established in article 3 (a) is sufficient to substantiate the offence of trafficking in persons.²⁴

The consent of a victim to exploitation is irrelevant where the victim has been threatened, coerced or deceived, or the trafficker has abused a position of power or taken advantage of the victim’s position of vulnerability (article 3 (b)). Consent is always irrelevant in situations where the victim is a child, as the “means’ element is not required to establish the trafficking of a child as an offence (article 3 (c)).

²³ For more detail on the concept of exploitation, see UNODC, Issue Paper, The Concept of Exploitation in the Trafficking in Persons Protocol (2015) (www.unodc.org/documents/human-trafficking/2015/UNODC_IP_Exploitation_2015.pdf).

²⁴ UNODC, Thematic Paper, Countering Trafficking in Persons in Conflict Situations (2018), p. 7.

FOCUS BOX EXAMPLES OF TRAFFICKING IN PERSONS IN CONFLICT AND POST-CONFLICT SITUATIONS

<i>Act</i>	<i>Means</i>	<i>Exploitative purpose</i>
Receipt of boy or girl under age 18 by an armed group operating in a conflict area in Latin America	Not required: victim is a child	Exploitation as a child soldier
Woman harbors young Yazidi girls and women abducted by armed groups while they are auctioned online	If under age 18: not required If over age 18: use or threat of use of force, abuse of a position of vulnerability or other means as described above are applied	Sexual exploitation, sexual slavery

Note: Adapted from UNODC, Thematic Paper, Countering Trafficking in Persons in Conflict Situations (2018), p. 9 (see: www.unodc.org/documents/human-trafficking/2018/17-08776_ebook-Countering_Trafficking_in_Persons_in_Conflict_Situations.pdf).

The Security Council has addressed trafficking in persons by terrorist groups from two perspectives: in resolutions on linkages between terrorism and organized crime and as part of the Women, Peace and Security agenda. It first recognized that terrorist groups in some regions engage in trafficking in persons as a form of transnational organized crime in its resolution 2195 (2014). In its resolution 2482 (2019), the Security Council called upon:

“Member States, where appropriate, to review, amend and implement legislation, including for acts of sexual and gender-based violence, to ensure that all forms of trafficking in persons, including when it is committed in situations of armed conflict or by armed and terrorist groups for the purpose of financing terrorism or to serve any strategic goals of terrorist groups are addressed, and to consider establishing jurisdiction to end the impunity of offenders.”²⁵

The nexus between trafficking in persons and the activities of terrorist groups has been most prominently identified in Security Council resolutions 2331 (2016) and 2388 (2017), adopted as part of the United Nations Women, Peace and Security agenda.

FOCUS BOX SECURITY COUNCIL RESOLUTION 2331 (2016)

“The Security Council,

...

“8. Stresses that acts of trafficking in persons in armed conflict and sexual and gender-based violence in conflict, including when it is associated to trafficking in persons in armed conflict, can

²⁵ Security Council resolution 2482 (2019), para. 8.

be part of the strategic objectives and ideology of, and used as a tactic by certain terrorist groups, by, inter alia, incentivizing recruitment; supporting financing through the sale, trade and trafficking of women, girls and boys; destroying, punishing, subjugating, or controlling communities; displacing populations from strategically important zones; extracting information for intelligence purposes from male and female detainees; advancing ideology which includes the suppression of women's rights and the use of religious justification to codify and institutionalize sexual slavery and exert control over women's reproduction; ...

"10. *Affirms* that victims of trafficking in persons in all its forms, and of sexual violence, committed by terrorist groups should be classified as victims of terrorism ..."

The Secretary-General has also reported that trafficking in persons is used to generate revenue as part of the "shadow economy of conflict and terrorism", including through sexual exploitation and sexual slavery.²⁶ In addition, refugees, internally displaced persons and other persons on the move can be particularly vulnerable to trafficking,²⁷ particularly where strict border controls and immigration laws impede their ability to find safety through regular channels.

Legal and criminal justice responses to trafficking in persons can be relevant to counter-terrorism in a number of ways.

First, in situations where it is difficult to charge and prosecute members of terrorist groups for the exploitation of persons (such as the commission of sexual and gender-based crimes) under national counter-terrorism legislation, and a nexus between this conduct and trafficking exists, it may be possible to use anti-trafficking legislation to achieve accountability.²⁸ This will also ensure that victims of trafficking enjoy the protection afforded to them under the Trafficking in Persons Protocol.

Second, the principle of non-punishment of victims of trafficking in persons may be a relevant consideration in these circumstances. This principle holds that victims of trafficking in persons should not be punished or sanctioned for crimes committed as a consequence of, or in close connection to, their trafficking, including as a result of compulsion.²⁹

In its resolution 2388 (2017), the Security Council invoked that principle with specific reference to the counter-terrorism context, urging Member States to thoroughly assess the individual situation of persons released from the captivity of armed and terrorist groups so as to enable prompt identification of victims of trafficking, their treatment as victims of crime and to consider, in line with domestic legislation, *not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having being subjected to trafficking* [emphasis added].

²⁶ Report of the Secretary-General on conflict-related sexual violence (S/2017/249, para. 8).

²⁷ See Human Rights Council, report of the International Commission of Inquiry on the Syrian Arab Republic (A/HRC/30/48 and Corr.1, para. 87).

²⁸ UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019), chap.5, sect. B.3.

²⁹ See UNODC, *Model Legislative Provision against Trafficking in Persons* (2020), article 13 (www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf).

Finally, it is relevant to note that expertise developed in the field of trafficking in persons through the conduct of child-sensitive and gender-sensitive and trauma-informed interviewing and witness protection activities may benefit the efforts of investigators and prosecutors working on counter-terrorism cases to protect the rights of victims and witnesses and to achieve successful prosecutions, particularly when dealing with children exploited by terrorist groups and victims of sexual violence by terrorist groups.³⁰

CROSS-REFERENCES Depending on the context, trafficking in persons by terrorist groups may amount to the international crimes of genocide, war crimes or crimes against humanity examined in chapter VI of the present module, as exemplified by the findings of the Independent International Commission of Inquiry on the Syrian Arab Republic regarding the crimes committed by ISIL (Da'esh) against the Yazidis in Iraq and the Syrian Arab Republic.

(See also the discussion of prosecuting sexual and gender-based violence perpetrated by terrorist groups in chap. VI, sect. C.5)

TOOLS

Counter-Terrorism Executive Committee Executive Directorate (CTED), *Identifying and Exploring the Nexus between Human Trafficking, Terrorism, and Terrorism Financing* (2019) (www.un.org/sc/ctc/wp-content/uploads/2019/02/HT-terrorism-nexus-CTED-report.pdf).

UNODC, Issue Paper, *Countering Trafficking in Persons in Conflict Situations* (2018) (www.unodc.org/documents/human-trafficking/2018/17-08776_ebook-Countering_Trafficking_in_Persons_in_Conflict_Situations.pdf).

UNODC, Issue Paper, *The International Legal Definition of Trafficking in Persons* (2018) (www.unodc.org/unodc/en/human-trafficking/webstories2018/new-issue-paper-on-the-international-legal-definition-of-trafficking-in-persons.html).

UNODC, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2020) (www.unodc.org/documents/human-trafficking/2020/TiP_LegislativeGuide_Final.pdf).

UNODC, *Handbook on Children Recruited and Exploited by Terrorist Groups: The Role of the Justice System* (2017) (www.un.org/victimsofterrorism/en/node/4662).

UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019) (www.unodc.org/unodc/en/frontpage/2019/July/unodc-addresses-gender-dimensions-of-criminal-justice-responses-to-terrorism.html).

³⁰ See UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019), chaps. 3 and 5, part D.

6. Smuggling of Migrants Protocol

The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing UNTOC (“Smuggling of Migrants Protocol”) defines the smuggling of migrants as the “*procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident*” (article 3).

The Smuggling of Migrants Protocol requires that States parties criminalize, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, the following offences:

- The smuggling of migrants (article 6 (1)(a));
- Producing, procuring, providing or possessing a fraudulent travel or identity document, when committed for the purpose of enabling the smuggling of migrants (article 6 (1)(b));
- Enabling by illegal means a person who is not a national or permanent resident to remain in a State illegally (article 6 (1)(c));
- Attempting to commit, participating as an accomplice or organizing or directing others to commit any of the above offences (article 6 (2)).

States must also regard the offences as aggravated where they endanger, or are likely to endanger, the lives or safety of migrants, or entail the inhuman or degrading treatment, including for exploitation, of migrants (article 6 (3)).

Migrants who have been smuggled are not necessarily considered to be victims of a crime, unless the smuggling is aggravated or they become victims of other crimes (for example, kidnapping for extortion) during the smuggling process. They cannot be criminally prosecuted for the simple fact of having been smuggled, as prohibited by article 5 of the Smuggling of Migrants Protocol, but they may be charged on other grounds (notably illegal entry or stay in a country), and this is left to the discretion of the State (article 6 (4)). Importantly, persons who have been smuggled should be considered as key witnesses to the smuggling offence and States parties should take necessary measures to preserve and protect the rights accorded to smuggled migrants under international law (article 16)

Terrorist violence, armed conflicts involving terrorist groups and related humanitarian crises force persons to move across borders to seek safety, survival or better living conditions. These persons may seek the services of migrant smuggling networks, particularly where strict border controls and immigration laws impede their ability to find safety through regular channels.

The existence of links between terrorism and migrant smuggling is not well established. Some countries and organizations have, however, expressed concerns about this potential nexus.³¹ Further research, in particular into the financial flows deriving from migrant smuggling, could confirm whether links may emerge, for example in the following situations:

- A terrorist group may rely upon migrant smugglers for logistical support, including the provision of stolen, blank, false or forged documents (including fake passports). In one case, a migrant smuggling network on the border of the Syrian Arab Republic and Iraq was

³¹ See EUROPOL, European Union Terrorism Situation and Trend Report (2017) (www.europol.europa.eu/tesat/2017/).

reportedly used to provide logistical support to Al-Qaida, including passports, weapons, money, guides and safe houses to foreign terrorists trying to enter Iraq;³²

- Smuggling operations could be a source of funds for terrorist groups, either through the use of the fees paid by migrants for being taken across borders or by taking advantage of their vulnerability to hold them in order to extort money from them or from their families;³³
- Terrorists, including returning foreign terrorist fighters, may circumvent border controls by using existing channels for smuggling of migrants;³⁴
- Former terrorists could become involved in smuggling as a new criminal enterprise on an opportunistic basis.³⁵

CROSS-REFERENCE The interaction between the international legal framework with regard to migration and counter-terrorism measures is discussed in chapter II of the present module.

TOOLS

UNODC, *Issue Paper, “The Concept of ‘Financial or other Material Benefit’ in the context of the Smuggling of Migrants Protocol”* (2017)

(www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf).

7. Illicit trafficking of firearms

Terrorist organizations evidently rely on a supply of weapons to carry out their attacks. Firearms are among the most common weapons used by terrorists, and the most readily available. Moreover, arms also enable terrorists to engage in various types of illicit trafficking activities and other crimes (including extortion and kidnapping for ransom) in order to generate funds, and thus increase their ability to control the territory and routes used by trafficking networks to impose fees on trafficked goods.

³² United States Department of the Treasury, “Treasury Designates Members of Abu Ghadiyah’s Network: Facilitates Flow of Terrorists, Weapons and Money from Syria to Al-Qaida in Iraq”, press release, 28 February 2008.

³³ UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications*, January 2011, 10, and FATE, *Financial Flows from Human Trafficking*, July 2018, paras. 42–43 (www.fatf-gafi.org/media/fatf/content/images/human-trafficking-2018.pdf).

³⁴ CTED, *Identifying and Exploring the Nexus between Human Trafficking, Terrorism and Terrorism Financing* (2019), para. 127 (www.un.org/sc/ctc/wp-content/uploads/2019/02/HT-terrorism-nexus-CTED-report.pdf).

³⁵ UNODC, *Smuggling of migrants into, through and from North Africa A thematic review and annotated bibliography of recent publications* (2010), p. 33 (www.unodc.org/documents/human-trafficking/Migrant_smuggling_in_North_Africa_June_2010_ebook_E_09-87293.pdf).

While terrorists sometimes use lawfully obtained firearms – particularly in jurisdictions without strict regulatory controls – illicit production, diversion of firearms from legal to the grey and subsequently to the black market, and illicit trafficking in firearms account for a significant portion of terrorists’ arsenals. The United Nations Working Group on Firearms has acknowledged that firearms trafficking is a transnational threat that is oftentimes linked to other organized crime, and that the availability and accessibility of firearms provides them with the material and financial means to pursue their goals and to perpetuate their existence.³⁶ In the preamble to its resolution 2370 (2017), the Security Council recognized that “the illicit transfer, theft from national stockpiles and illicit craft production can be a source of small arms and light weapons which can enable terrorist groups to considerably increase their armed capabilities”.

CASE STUDY

Arms trafficking to the Revolutionary Armed Forces of Colombia (FARC)^a

FARC bought firearms (including AK-47s, rifles and shotguns) on the “gray” and “black” markets, including by using the profits of its own drug trafficking, or paying for arms with cocaine or heroin. On the gray market, the initial sale and distribution is done through legal channels by an authorized State or private actor, but the final destination is an illegal actor. Grey market sales to FARC have come from the diversion of surplus foreign State military weapons by corrupt foreign State officials in Latin America, working through illegal intermediary traffickers, as well as movements of arms from the United States domestic private market, often using false identification documents.

On the black market, the whole transaction – the sale, distribution and final destination – is illegal because it involves unauthorized actors or channels. On the international black market, FARC has obtained arms from Latin American government officials who have illegally transferred military stocks; stocks remaindered after conflicts in Central America; and arms produced in factories in countries in Eastern Europe and Central Asia in the post-Cold War period. On occasion, FARC has also obtained arms on the domestic black market from local traffickers connected to international traffickers or from corrupt security or corporate personnel.

^a UNODC, *Violence, Crime and Illegal Arms Trafficking in Colombia*, December 2006, pp. 28–33, 107 and 108 (see www.unodc.org/unodc/en/press/releases/press_release_2006_12_20.html).

The Firearms Protocol aims to promote, facilitate and strengthen cooperation among States to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (article 2). The Protocol establishes the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, as well as the tampering with the markings on firearms as criminal offences (article 5). These offences are intended to ensure that States parties establish a legal framework within which the legitimate manufacturing and transfer of firearms can be conducted, while illicit transactions are identified and offenders prosecuted.

³⁶ Report on the meeting of the Working Group on Firearms, Vienna, 2 and 3 May 2018 (CTOC/COP/WG.6/2018/4, general recommendation 1).

The scope of application of the criminal offences established under the Firearms Protocol is limited to offences that are transnational in nature and involve an organized criminal group. It does not apply to State-to-State transactions or State transfers done in the interests of national security (article 4).

CROSS-REFERENCE The Firearms Protocol and other international instruments important to eliminating the supply of weapons to terrorists are considered more fully in chapter IV of the present module, dealing with international controls on weapons.

8. Illicit drug trafficking

Since the late 1980s, the General Assembly has expressed its alarm at “the growing connection between drug trafficking and terrorism” in numerous resolutions.³⁷ In the outcome document of the 2016 special session on the world drug problem, the Assembly highlighted the need to respond to the serious challenges posed by the increasing links between drug trafficking and terrorism, including money-laundering, in connection with terrorist financing.³⁸ In its resolution 2482 (2019), the Security Council called on Member States to strengthen their efforts and international cooperation against “the threat to the international community posed by the illicit cultivation, production, trafficking and consumption of narcotic drugs and psychotropic substances, which can significantly contribute to the financial resources of terrorist groups”.³⁹

Illicit drugs (those not used for legitimate medical or scientific purposes) are controlled by three key treaties: the Single Convention on Narcotic Drugs of 1961 (as amended by its Protocol of 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The Conventions address the key links in the illicit drug supply chain: production, transportation and distribution. Article 36 (1)(a) of the Single Convention requires that each States party, “subject to its constitutional limitations”, “adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs ... shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”

Similar conduct is proscribed under article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which further criminalizes the possession, purchase or cultivation of illicit drugs for personal consumption (article 3 (2)). The Convention also targets activities further down the supply chain. It criminalizes the manufacture, transport, distribution or possession of equipment, materials and precursor substances used in illicit drug production and supply.⁴⁰ The Convention also makes it an offence to

³⁷ See General Assembly resolutions 46/103, 47/102 and 48/112.

³⁸ Outcome document of the special session of the General Assembly on the world drug problem, General Assembly resolution S-30/1, annex.

³⁹ Security Council resolution 2482 (2019), para. 4.

⁴⁰ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, articles 3 (1) (a)(iv) and 3 (1)(c) (United Nations, *Treaty Series*, vol. 1019, No. 14956).

organize, manage or finance the supply of illicit drugs (article 3 (1)(a)) and to launder the proceeds of such crimes (article 3 (1)(b)).

The international drug control conventions do not specifically address terrorist organizations. However, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances identifies aggravating factors for the purpose of punishment, including the involvement of an organized criminal group, the offender's involvement in other organized transnational crime or other illegal activities related to the drug offence and the use of violence or arms (article 3 (5)).

Terrorism and drug trafficking may be linked in a number of ways:⁴¹

- Terrorist groups may generate revenue by “taxing” the illicit production, transportation or distribution of drugs by others. For instance, the Taliban operates a sophisticated protection racket for poppy farmers and drug traffickers, collecting taxes from the farmers and pay-offs from the traffickers for transporting the drugs through insurgent-controlled areas;⁴²
- Terrorist groups may provide protection for drug facilities, producers and traffickers, thereby sustaining or expanding their operations. For instance, the Taliban is paid for protecting labs where opium paste is turned into heroin;⁴³
- Terrorist groups may use illicit drugs directly as a currency, for example in the Madrid train bombings in 2004, where drugs were swapped and sold for explosives (a convicted drug trafficker was successfully prosecuted in Morocco for involvement in the bombings);⁴⁴ or in 2008, when a Honduran prisoner arranged to exchange weapons for cocaine from FARC;⁴⁵
- Terrorist groups may themselves use drugs to increase their members' individual physical capability to engage in fighting;⁴⁶
- Terrorist groups originally inspired by political, religious or ideological aims may transform over time into organized criminal groups focusing on drug trafficking, after initially using the drug trade to finance their political goals.

Some groups rely heavily on drug revenue. UNODC estimated that in 2016 terrorist and insurgent groups raised about \$150 million from the Afghan opiate trade by levying taxes on the cultivation of opium poppy and trafficking of opiates.⁴⁷ In 2014, FATF reported that the Kurdistan Workers' Party (PKK) earns an estimated \$200 million annually from heroin trafficking.⁴⁸

The links between terrorism and drug trafficking involve many jurisdictions, following the routes of supply, transport, distribution and related financial flows. A Malian national, for

⁴¹ UNODC, *Regions Under Stress: When TOC Threatens Governance and Stability* (2010), pp. 221 and 248 (www.unodc.org/documents/data-and-analysis/tocta/11.Regions_under_stress.pdf); see also UNODC, *World Drug Report 2017, Booklet 5, The Drug Problem and Organized Crime, Illicit Financial Flows, Corruption and Terrorism*, pp. 27–35 (www.unodc.org/wdr2017/index.html).

⁴² FATF, *Financing Flows Linked to the Production and Trafficking of Afghan Opiates*, June 2014, pp. 42 and 43.

⁴³ *Ibid.*

⁴⁴ UNODC, *Digest of Terrorist Cases* (2010), p. 49 (www.unodc.org/documents/terrorism/Publications/Digest_of_Terrorist_Cases/English.pdf).

⁴⁵ *United States v. Jamal Yousef*, 750 F.3d 254 C.A.2 (NY), 2014.

⁴⁶ International Narcotics Control Board, Annual Report 2016, para. 655, referring to reports about the use of counterfeit pills marketed as “captagon” (www.incb.org/incb/en/publications/annual-reports/annual-report-2016.html).

⁴⁷ UNODC, *World Drug Report 2017, Booklet 5*, p. 37 (www.unodc.org/wdr2017/index.html).

⁴⁸ FATF, *Financing Flows Linked to the Production and Trafficking of Afghan Opiates*, June 2014, p. 48.

instance, was convicted in the United States in 2011 for providing material support to terrorist entities by transporting cocaine through West and North Africa with the intent to supply Al-Qaida and FARC.⁴⁹

9. Illicit trafficking in cultural property

The Security Council, in its resolution 2199 (2015), highlighted that ISIL (Da'esh), the Al Nusra Front and other groups associated with Al-Qaida generate income from the looting and smuggling of cultural heritage items in Iraq and the Syrian Arab Republic and decided that all Member States should take appropriate steps to prevent the trade in such items, including by prohibiting cross-border trade.⁵⁰ In its resolution 2347 (2017), the Security Council once again stated that any engagement in trade in cultural property involving ISIL (Da'esh), Al-Nusra Front and all other individuals or groups associated with Al-Qaida, could constitute financial support for terrorist entities.

The prohibitions on attacking or pillaging cultural property in armed conflict under international humanitarian law are discussed in chapter III of the present module. In peacetime, the key instruments are the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the complementary International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects of 1995. These conventions can also supplement international humanitarian law (IHL) rules governing conflict. For example, those who steal cultural property during conflicts in violation of IHL may sell such items to persons or entities outside the conflict, who are not parties to the conflict or covered by IHL.

The UNESCO Convention of 1970 aims to suppress peacetime trafficking in cultural property. It expansively defines cultural property (article 1) and requires States to prohibit the illicit import, export or transfer of ownership (article 3). Exporting States must certify that cultural property is authorized for export (article 6) and prohibit the import of illegally exported or stolen property (article 7). Illegally imported property must be recovered and returned, and innocent purchasers or owners compensated (articles 7 and 13). Dealers must also keep registers recording details of supplies and sales (article 10). In addition, there is a provision for international cooperation, including to control import/export in the event of pillage (article 9).

The UNIDROIT Convention of 1995 does not establish criminal offences but provides detailed rules addressing the restitution of stolen cultural objects and the return of objects removed from a State contrary to its cultural heritage export laws.

In 2014, the General Assembly adopted the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences.⁵¹

⁴⁹ Breuner, Lanny, "Questions for the Record: Combating International Organized Crime: Evaluating Current Authorities, Tools, and Resources", prepared testimony of the Assistant Attorney General, Criminal Division, to the Subcommittee on Crime and Terrorism of the Committee on the Judiciary, 1 November 2011, p. 37.

⁵⁰ Security Council resolution 2199 (2015), para. 17; the Analytical Support and Sanctions Monitoring Team has described the ways in which ISIL (Da'esh) generates funds from the illicit trafficking in cultural property (see S/2018/705, para. 72 onwards).

⁵¹ General Assembly resolution 69/196, annex.

In order to prevent and suppress the efforts of terrorist groups to profit from the looting and illicit trafficking of cultural property, cooperation between governments and private actors (including art dealers and auction houses) is essential.⁵²

TOOLS

UNODC, *Practical assistance tool to assist in the implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences* (2016) (www.unodc.org/documents/organized-crime/Publications/16-05585_eBook_English_UPDATED.pdf).

10. Illicit exploitation of natural resources and environmental crimes

Armed groups, including some designated as terrorist entities, have often financed themselves by the illicit exploitation and trafficking in natural resources. In its resolution 2482 (2019), the Security Council expresses concern “at the illegal exploitation and trafficking of natural resources, such as precious metals and minerals like gold, silver, copper and diamonds, as well as timber, charcoal and wildlife, by armed groups, terrorist groups and criminal networks supporting them”. In its resolution 2482 (2019), the Security Council encouraged Member States to “continue efforts to end the illicit trade in natural resources, in particular in the gold sector, and to hold those complicit in the illicit trade accountable, as part of broader efforts to ensure that the illicit trade in natural resources is not benefiting sanctioned entities, terrorist groups, armed groups or criminal networks”.⁵³

In its 2015 report on emerging terrorist financing risks, FATF noted that the illicit exploitation of natural resources sectors may appeal to terrorist groups not only because of its profitability, but also because of the low level of detection, prosecution and lower penalties associated with criminal activity involving natural resources.⁵⁴

In addition, companies exploiting natural resources may be subject to attack or extortion, or their employees may be kidnapped for ransom by terrorist groups.⁵⁵ There are also instances of companies being corrupted by terrorist groups. For example, senior executives from a foreign company building an oil pipeline in Colombia not only made extortion payments to FARC and the National Liberation Army (ELN), but also requested ELN to threaten competitor oil companies in the area.⁵⁶

⁵² GCTF, Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice (2020), Good Practices 2 and 3 (see www.thegctf.org/About-us/GCTF-framework-documents).

⁵³ Security Council resolution 2482 (2019), paras. 13 and 14.

⁵⁴ FATF, *Emerging Terrorist Financing Risks*, October 2015, p. 39 (www.fatf-gafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. 40.

Treaties preventing environmental and natural resources crimes

There is no comprehensive international treaty addressing all crimes that affect the environment. Instead, certain transnational problems are regulated by agreements or informal arrangements, such as:

- Illegal trade in endangered species and timber; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- Illegal, unreported and unregulated (“IUU”) fishing: the United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the Food and Agriculture Organization of the United Nations (FAO);
- Pollution and hazardous wastes: Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).

The environmental instruments generally focus on prevention and cooperation, but some also require States parties to enact criminal offences. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES) penalizes trade in or possession of endangered species (article 8) and requires their confiscation and return.

The frequent transnational nature of the illicit exploitation of natural resources makes UNTOC applicable to these activities when they are criminalized as serious offences under national law. Additionally, activities such as illegal, unreported and unregulated fishing, are often closely linked to other illegal activities that may occur at one or more stages of the fisheries value chain. These activities, which may include fraud and forgery, corruption and tax crimes, frequently meet the criteria of UNTOC.

Security Council measures

In addition to encouraging States to hold those involved in the illicit trafficking of natural resources accountable,⁵⁷ the Security Council has adopted situation-specific measures to address the illicit exploitation of natural resources by terrorist groups. For example, the Security Council:

- Banned charcoal exports from Somalia (resolutions 2036 (2012) and 2498 (2019));
- Condemned the illicit oil trade by ISIL (Da’esh), Al Nusra Front and other Al-Qaida associates in Iraq and the Syrian Arab Republic as violations of sanctions and terrorist financing regimes (Security Council resolution 2199 (2015)).

11. Kidnapping for ransom

The Security Council has repeatedly condemned kidnapping for ransom and expressed concern that “ransom payments to terrorist groups are one of the sources of income which supports their recruitment efforts, strengthens their operational capability to organize and carry out terrorist attacks, and incentivizes future incidents of kidnapping for ransom.”⁵⁸ A number of terrorist groups have raised substantial funds through kidnapping for ransom, including ISIL (Da’esh),

⁵⁷ Security Council resolution 2482 (2019), para. 14.

⁵⁸ Security Council resolutions 2133 (2014), para. 7, and 2199 (2015).

Abu Sayyaf in the Philippines, the Movement for Unity and Jihad in West Africa (MUJAO), Boko Haram, Ansaru and Al-Qaida in the Islamic Maghreb (AQIM).⁵⁹ Payments made to ISIL as ransom for kidnappings were estimated to amount to between \$35 million and \$45 million in 2014.⁶⁰

While no international treaty specifically addresses kidnapping for ransom, a number of international treaties requiring the establishment of offences are relevant to suppressing it, including:

- International Convention against the Taking of Hostages, 1979 (“Hostages Convention”);
- United Nations Convention against Transnational Organized Crime, 2000;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973;
- Convention on the Safety of United Nations and Associated Personnel, 1994;
- Instruments related to civil air and maritime safety,⁶¹ insofar as kidnapping on board an aircraft or a ship will constitute violence against a person on board;

The Hostages Convention of 1979, in its article 1 (1), defines the offence of hostage-taking as follows:

“Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person 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.”

Hostage-taking under the Convention is not limited to the making of political demands, but also covers any intention to compel a third party, to do or abstain from doing any act, including the payment of ransom, as a condition for the release of hostages. Third parties include not only States or international organizations, but any natural or juridical person, which could include, for example, the family members or corporate employer of a person kidnapped by a terrorist group. The Convention thus provides an appropriate legal framework for addressing kidnapping for ransom in peacetime. The principal limitation of the Hostages Convention is that it only applies to transnational cases and does not apply to purely domestic cases (article 13).⁶² Moreover, the Convention does not apply to hostage-taking in armed conflict (article 12), which is covered instead by international humanitarian law.

⁵⁹ Security Council, 7351st meeting (S/PV.7351, 19 December 2014) (Permanent Observer of the African Union to the United Nations), p. 5; O’Brien, McKenzie, “Fluctuations Between Crime and Terror: The Case of Abu Sayyaf’s Kidnapping Activities”, (2012), *Terrorism and Political Violence*, pp. 320–336.

⁶⁰ UNODC, *Countering Trafficking in Persons in Conflict Situations* (2018), p. 33.

⁶¹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988.

⁶² “This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.”

While UNTOC does not specifically mention kidnapping, States have been encouraged to make more effective use of the Convention in the context of kidnapping for ransom.⁶³ Kidnapping for ransom could also be a form of “exploitation” under the UNTOC Protocol on Trafficking in Persons⁶⁴ and could constitute an aggravated form of smuggling of migrants.⁶⁵

The Security Council has condemned kidnapping for ransom by terrorist groups in a number of its resolutions.⁶⁶ Its principal response has been its commitment to “secure the safe release of hostages without ransom payments”.⁶⁷ To that end, in its resolution 1373 (2001), the Council emphasized the obligation of States to prevent terrorist financing and thus to “prevent terrorists from benefiting directly or indirectly from ransom payments”.⁶⁸ It has also called on States “to encourage private sector partners to adopt or to follow relevant guidelines and good practices for preventing and responding to terrorist kidnappings without paying ransom”.⁶⁹ In its resolution 2199 (2015), the Security Council reaffirmed that the asset freezing obligations apply to the payment of ransoms to individuals and entities on the ISIL (Da’esh) Al-Qaida Sanctions List.

The Terrorist Financing Convention of 1999 may also apply where a ransom payment to terrorist kidnappers is made “in the knowledge” that it is to be used to carry out a terrorist act (article 2 (1)). Security Council resolution 2462 (2019)⁷⁰ and the ISIL (Da’esh) Al-Qaida sanctions regime, are wider in operation because they also cover the provision of funds to terrorist groups and not just to fund terrorist acts.

There is controversy about whether paying ransom amounts to terrorist financing, and practice in this regard is variable.⁷¹ A prohibition on payments may be desirable from a strict law enforcement perspective, including to deter future kidnapping, however, the Human Rights Council Advisory Committee has observed that preventing ransom payments could violate the right to life of hostages and that strategies designed to target terrorist kidnapping must “be centred on the needs and interests of individual and collective victims”.⁷²

International humanitarian law prohibits and criminalizes hostage-taking in armed conflict.⁷³ While IHL treaties themselves do not define hostage-taking, the *Elements of Crimes* requires an intent “to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the

⁶³ Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, 12–19 April 2015 (A/CONF.222/5); the Congress adopted the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation (General Assembly resolution 70/174, annex).

⁶⁴ Working Group on Trafficking in Persons, background paper by the Secretariat on forms of exploitation not specifically mentioned in the Protocol (CTOC/COP/WG.4/2013/4, para. 8).

⁶⁵ Protocol against the Smuggling of Migrants, art. 6 (3)(b) (General Assembly resolution 55/25).

⁶⁶ Security Council resolutions 2133 (2014); 2195 (2014); and 2199 (2015).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Security Council resolution 2199 (2015).

⁷⁰ In its resolution 2462 (2019), the Security Council expressly stated that the terrorism financing offence applies to provision of funds “for any purpose” and “even in the absence of a link to a specific terrorist act” (para. 5).

⁷¹ Human Rights Council, Human rights and issues related to terrorist hostage-taking: report of the Human Rights Council Advisory Committee (A/HRC/24/47, para. 46).

⁷² *Ibid.*

⁷³ Four Geneva Conventions 1949, common article 3 (1)(b); Fourth Geneva Convention 1949, articles 34 and 147; Additional Protocol I 1977, article 75 (2)(c); Additional Protocol II 1977, article 4 (2)(c); Rome Statute of the International Criminal Court (ICC) 1998, article 8 (2)(a)(viii) (international conflicts) and article 8 (2)(c)(iii) (non-international conflicts); International Committee of the Red Cross (ICRC), Customary IHL Study, rule 96.

release of such person or persons”,⁷⁴ essentially following the approach of the Hostages Convention of 1979. Hostage-taking in IHL would thus encompass both political coercion as well as compulsion for financial gain.⁷⁵

FOCUS BOX

Global Counterterrorism Forum: Algiers Memorandum

The GCTF Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists (2012), supplemented by the Addendum to the Algiers Memorandum (2015) (see: www.thegctf.org/About-us/GCTF-framework-documents), set forth good practices related to:

- Government actions and programmes, including travel advice and public awareness campaigns;
- Investigation;
- Prosecution;
- Seizing proceeds of kidnapping;
- National and international cooperation;
- Capacity-building;
- Media strategy.

TOOLS

- United Nations Counter-Terrorism Committee/Counter-Terrorism Committee Executive Directorate (CTED), special meeting side-event on kidnapping for ransom and hostage-taking committed by terrorist groups (2014).^a
- GCTF, Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists (2012).
- GCTF, Addendum to the Algiers Memorandum on the Effective Implementation of Certain Good Practices Aimed at Preventing Kidnappings by Terrorists (2015).^b
- Organization for Security and Cooperation in Europe (OSCE), Declaration on the OSCE Role in Countering Kidnapping and Hostage-Taking by Terrorist Groups in the Context of the Implementation of UN Security Council Resolution 2133 (2014).^c

^a Security Council, Counter-Terrorism Committee, special meeting of the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate, side-event on kidnapping for ransom and hostage-taking committed by terrorist groups (www.un.org/sc/ctc/news/2014/11/24/special-meeting-of-the-of-the-ctc-cted-side-event-on-kidnapping-for-ransom-and-hostage-taking-committed-by-terrorist-groups/).

^b GCTF, Addendum to the Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists, see www.thegctf.org/About-us/GCTF-framework-documents.

^c OSCE, “Declaration on the OSCE Role in Countering Kidnapping and Hostage-Taking by Terrorist Groups in the Context of the Implementation of UN Security Council Resolution 2133” (2014) (www.osce.org/cio/130551?download=true).

⁷⁴ ICC, *Elements of Crimes*, adopted at the Assembly of States Parties to the Rome Statute of ICC, First Session, (2002): common element 3, article 8 (2)(a)(viii) and (c)(iii).

⁷⁵ *Prosecutor v. Blaškić* (ICTY-95-14-T) (3 March 2000), para. 158.

12. Cybercrime, cyberterrorism and use of the Internet for terrorist purposes

“Cybercrime” is a term that has been used not simply as a legal term of art, but rather as an aggregate term for a collection of acts committed against or through the use of computer data or systems.⁷⁶ A distinction is sometimes made for pedagogical purposes between:

- **Cyber-dependent** crime, which normally requires an ICT infrastructure and implies the coding, creation, dissemination and deployment of a malware on a specific target (including DDoS (distributed denial of service) attack/ransomware attack);
- **Cyber-enabled** crime, which can be facilitated by ICT infrastructure but can occur offline (e.g., online frauds, purchases of illicit items, money-laundering).

When it comes to terrorism, “[i]nformation and communication technology (ICT) can be used to facilitate the commission of terrorist-related offences (a form of cyber-enabled terrorism) or can be the target of terrorists (a form of cyber-dependent terrorism).”⁷⁷

UNODC has defined cyberterrorism as the “deliberate exploitation of computer networks as a means to launch an attack... intended to disrupt the proper functioning of targets, such as computer systems, servers or underlying infrastructure.”⁷⁸ The United Nations has also described cyber terrorism as “remotely altering information on computer systems or disrupting the flow of data between computer systems” in order to commit terrorist attacks.⁷⁹ Examples include: the manipulation of computer systems to dangerously release flood water from a dam; disabling of sewerage systems to endanger public health; disruption of transport signals, causing a train or aircraft to crash; or the cut-off of essential energy or gas supplies to hospitals or homes in winter.

Cyberterrorism intended to harm people or property and intimidate populations or compel a government can be distinguished:

- From ordinary cybercrime (possibly including malicious “hacking”, such as theft of information, industrial espionage, defacing of websites or “denial of service” attacks, distribution of “malware”, “ransomware” or “phishing” e-mails);
- From the use of the Internet for terrorist purposes or to facilitate terrorist groups (both discussed below).

It is useful to distinguish between cyberterrorism (the commission of terrorism by cybermeans or against cyber targets) and the more general use of the Internet by terrorist groups.

Information and communication technology are regularly incorporated into the execution of “conventional” terrorist attacks. For example, in 2008, to coordinate and execute the shooting and bombing attacks in Mumbai, India, terrorists used technology including global positioning

⁷⁶ UNODC, Draft Comprehensive Study on Cybercrime (2013), p. 12 (www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf).

⁷⁷ UNODC, University Module Series, Cybercrime, Module 14, Hacktivism, Terrorism, Espionage, Disinformation Campaigns and Warfare in Cyberspace (2019).

⁷⁸ UNODC, “The Use of the Internet for Terrorist Purposes” (2012), p.11 (www.unodc.org/unodc/en/terrorism/news-and-events/use-of-the-internet.html).

⁷⁹ Counter-Terrorism Implementation Task Force (CTITF), “Countering the Use of the Internet for Terrorist Purposes” (Working Group Report, CTITF Publication Series, February 2009).

system (GPS) equipment, mobile phones, satellite imagery and Voice over Internet Protocol (VoIP) phone numbers.⁸⁰

Terrorist organizations may use the Internet to radicalize, recruit and train new members, facilitate the travel of foreign terrorist fighters, organize and coordinate their activities, finance their operations, including by soliciting cryptocurrency donations, incite terrorism and spread fear.⁸¹

Member States therefore need to “find ways of intensifying and accelerating the exchange of operational information, especially regarding ... use of communications technologies by terrorist groups”,⁸² and to intensify their cooperation with the private sector and civil society to prevent terrorists from exploiting technology and communications for terrorist acts.⁸³

TOOLS

UNODC, *Draft Comprehensive Study on Cybercrime* (2013)
(www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf).

UNODC, *The Use of the Internet for Terrorist Purposes* (2012)
(www.unodc.org/unodc/en/terrorism/news-and-events/use-of-the-internet.html).

United Nations Institute for Disarmament Research (UNIDIR), *The United Nations, Cyberspace and International Peace and Security* (2017)
(<https://unidir.org/publication/united-nations-cyberspace-and-international-peace-and-security-responding-complexity>).

B. United Nations Convention against Transnational Organized Crime as the basis for international cooperation in criminal matters

No country can tackle transnational organized crime in isolation since, by its very nature, activities related to transnational organized crime span the jurisdiction of more than one State. In a world of nearly 200 sovereign countries with their own legal systems and traditions, and with varying capacities and rule of law perceptions, cooperation, while challenging, remains critical. Countries and their criminal justice and law enforcement authorities have to join forces and assist each other.⁸⁴

As in the case of the international counter-terrorism conventions and protocols, UNTOC aims to assist States in addressing the challenges they face when they are cooperating internationally, and thereby to deny safe haven to criminals. States parties to UNTOC commit themselves not

⁸⁰ Wax, Emily, “Mumbai Attackers Made Sophisticated Use of Technology”, *The Washington Post*, 3 December 2008.

⁸¹ Security Council resolutions 2129 (2013), para. 14, and 2178 (2014), preamble.

⁸² Security Council resolution 1373 (2001), para. 3 (a).

⁸³ Security Council resolution 2396 (2017), preamble.

⁸⁴ UNODC, Education for Justice (E4J) University Module Series, Organized Crime, Module 11, *International Cooperation to Combat Transnational Organized Crime* (www.unodc.org/e4j/en/organized-crime/module-11/index.html).

only to the establishment of criminal offences at the domestic level, but also to the fostering of efficient and effective frameworks for international cooperation in criminal matters, including, inter alia, extradition, mutual legal assistance and law enforcement cooperation.

This section presents a summary of some key features of the legal framework for international cooperation in criminal matters established by UNTOC.

1. Extradition

Extradition is governed by article 16 of UNTOC. Article 16 (1) defines the scope of the obligation to extradite. It applies to offences established under UNTOC itself (participation in an organized criminal group, money-laundering, corruption and obstruction of justice), to serious crimes punishable by a maximum deprivation of liberty of at least four years or by a more severe penalty, and to the offences covered under its Protocols, provided that they are transnational in nature and involve an organized criminal group.

In addition, subject to the dual criminality requirement, the extradition obligation also applies in cases in which the offences involve an organized criminal group and the person whose extradition is requested is located in the territory of the requested State, without a need for the transnational nature of the alleged offence. In this sense, the scope of application of article 16 of the Convention is broader than the scope of application of the Convention itself, since this provision could also be applicable in cases of domestic offences in which the offender is apprehended in the territory of another State party.⁸⁵

UNTOC requires States parties to regard the offences covered by article 16 as extraditable under domestic law.

Article 16 of UNTOC contains 17 paragraphs, which can be broadly grouped into seven categories:

- Article 16 (1) and (2) set out the scope of application of article 16;
- Article 16 (3) and (17) concern the interplay of article 16 with other extradition treaties, existing and/or future ones;
- Article 16 (4–6) relate to the legal bases for extradition, treaty-based or not;
- Article 16 (7) and (8) relate to conditions and requirements of extradition;
- Article 16 (9) concerns custody or other measures against a person whose extradition is sought in a requested State party;
- Article 16 (10–12) set out special provisions concerning the non-extradition of nationals and alternatives provided for in lieu of their extradition;
- Article 16 (13) concerns the treatment and rights of persons whose extradition is sought during extradition proceedings in requesting States;
- Article 16 (14–16) deal with situations in which extradition may (anticipated discriminatory treatment or punishment) or may not (fiscal offences) be refused and relevant consultations involved.

⁸⁵ UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012), paras. 58 and 59 (www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf).

Article 16 (4) allows, but does not require, States parties to use the Convention as a treaty basis for extradition if such a treaty basis is a prerequisite to extradition. In these circumstances, UNTOC may serve as a “surrogate extradition convention”⁸⁶

The use of UNTOC as a legal basis for extradition is optional. The law of some States prevents the use of the Convention as a legal basis for extradition in the absence of other relevant treaties between the requesting and requested States. Under article 16 (5)(a), States parties for which a treaty basis is a prerequisite to extradition are required to notify the Secretary-General as to whether or not they will permit UNTOC to be used as a treaty basis for extradition.

FOCUS BOX THE RULE OF SPECIALTY

Article 16 (7) of UNTOC specifies that “extradition shall be subject to the conditions provided for by the domestic law of the requested State party or by applicable extradition treaties”. One of those conditions, prescribed in terms of domestic legislation, both as a condition to be respected prior to extradition (requested State) and as a procedural requirement that prohibits compulsory measures against persons sought other than those specified in the extradition request after their surrender (requesting State), is that of the rule of specialty.

According to the rule, a person sought to be extradited from the requested State to the requesting State shall not be proceeded against, sentenced, detained or re-extradited to a third State for any offence committed prior to his/her surrender other than that for which he/she was extradited.

The rule of specialty ensures that requested States are aware of what they are consenting to when they order the extradition of persons in their jurisdiction to requesting States and that suspects are aware, both before and during extradition hearings, what the allegations against them are.^a

Accordingly, persons extradited to face organized crime charges could not later be charged with terrorism offences and vice versa. It is thus important to ensure that extradition requests include all relevant charges and are made at a time when investigations are advanced enough to identify all possible criminal offences.

^a UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012), para. 105 (www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf).

Extradition and exercise of jurisdiction

The exercise of jurisdiction over organized crime under UNTOC is more limited than under the terrorism-related instruments, under which “quasi-universal” jurisdiction must be established and an alleged offender must be either extradited or prosecuted under all circumstances:

- Article 16 (10) of UNTOC provides that where a requested State party does not extradite a person found in its territory on grounds that the person is its national, that State shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. The States parties

⁸⁶ Boister, Neil, *An Introduction to Transnational Criminal Law* (2nd ed., 2018), p. 358.

concerned are to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions;⁸⁷

- Article 16 (11) refers to the possibility of temporary surrender of the person on condition that he or she will be returned to the requested State party for the purpose of serving the sentence imposed. This option can serve as a tool to overcome the reluctance of some States to extradite their own nationals;
- Article 16 (12) calls upon a State party that has denied, on the ground of nationality, a request by another State party to extradite a fugitive to serve a sentence, to consider enforcing the sentence itself.

CROSS-REFERENCE The “extradite or prosecute” principle is discussed in chapter VI.B.1, on national suppression of international crimes, of the present module.

Module 4 of the Counter-Terrorism Legal Training Curriculum, *Human Rights and Criminal Justice Responses to Terrorism*, discusses human rights law relevant to the international transfer of persons suspected of terrorism offences in its chapter 7 (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf).

2. Mutual legal assistance

Article 18 of UNTOC, which is devoted to mutual legal assistance, consists of 30 paragraphs, and is the longest article of the entire Convention. It is regarded as “best practice” and is often referred to as a “mini-treaty” of its own. The provisions of UNTOC on mutual legal assistance are much more detailed than the basic mutual legal assistance obligation under the international counter-terrorism instruments. They also provide default rules where specific mutual legal assistance agreements do not exist between the States parties concerned and thus help to facilitate cooperation.

Article 18 of UNTOC addresses:

- Types of assistance;
- Form and content of assistance requests;
- Optional grounds for refusal of assistance on various grounds (including, inter alia, double criminality);
- Grounds not to decline assistance (bank secrecy, offences involving fiscal matters);
- Postponement of assistance if it interferes with a current investigation, prosecution or judicial proceeding;
- Provision of reasons for refusal, or prompt execution of a request;
- Assistance upon conditions, after consultation;
- Transfer of witnesses and their safe conduct;
- Testimony by videoconferencing;

⁸⁷ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017), paras. 499–506 (www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html).

- Limitations on the use and transmission of information or evidence furnished through mutual legal assistance;
- Liability for costs;
- Record-keeping.

Article 18 of UNTOC (unlike the counter-terrorism conventions) also requires States parties to designate a central authority with responsibility and power to receive and execute mutual assistance requests for mutual legal assistance submitted in accordance with the Convention.⁸⁸

Keeping track of all of the agreements, treaties, memorandums of understanding, police liaison services, legal regimes, developments in domestic and international law and various enforcement and investigative services that are the source of the requests, along with all of the incoming and outgoing requests themselves, requires legal and administrative expertise and authority in order to be effective. This area of law is growing increasingly complex, with many different instruments utilized among many different countries. A designated central authority provides a necessary mechanism to maintain the necessary control and supervision over these matters.⁸⁹

Article 18 of UNTOC, paragraph 13, further states that, in urgent circumstances, mutual legal assistance requests can be channelled through the International Criminal Police Organization (INTERPOL). The INTERPOL national central bureaux created pursuant to article 32 of the Constitution of INTERPOL are mandated as focal points of each INTERPOL member State for the purpose of liaising internally with other departments of that State, with national central bureaux in other States and with the General Secretariat of INTERPOL.

Joint investigations

Article 19 of UNTOC encourages States parties to consider “concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies”. In article 19, UNTOC encourages a type of international cooperation that goes beyond “traditional measures”, such as mutual legal assistance and law enforcement cooperation.

In general terms, article 19 requires States parties to consider concluding agreements or arrangements on the establishment of joint investigative bodies. Technically, the expression “shall consider” in the article makes this requirement semi-mandatory, which means that States parties are asked to seriously consider adopting specific measures and to make a genuine effort to see whether adopting such measures would be compatible with their legal systems.

Article 19 further grants legal authority to conduct joint investigations on a case-by-case basis, even in the absence of a specific agreement or arrangement. This requirement is of a non-mandatory nature (“joint investigations may be undertaken”). The domestic laws of most States already permit such joint activities and, for those few States whose laws do not so permit, this provision would be a sufficient source of legal authority for case-by-case cooperation of this sort.

⁸⁸ UNTOC, article 18 (13).

⁸⁹ UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012), para. 69 (www.unodc.org/unodc/en/international-cooperation/publications.html).

FOCUS BOX MAKING JOINT INVESTIGATIONS WORK IN PRACTICE

Two models of joint investigations are commonly used in practice. Either model can be used as a basis for the implementation of article 19:^a

(a) The first model consists of parallel, coordinated investigations with a common goal assisted by a liaison officer network or through personal contacts and supplemented by formal mutual legal assistance requests in order to obtain evidence. The officials involved may be relocated and able to work jointly on the basis of longstanding cooperative practices and/or existing mutual legal assistance legislation, depending on the nature of the legal system(s) involved;

(b) The second model consists of integrated joint investigation teams with officers from at least two jurisdictions. These teams can be further divided and characterized either as passive or active. An example of a passively integrated team could include the situation where a foreign law enforcement officer is integrated with officers from the host State in an advisory or consultancy role or, in a supportive role based on the provision of technical assistance to the host State. An actively integrated team could include officers from at least two jurisdictions with the ability to exercise (equivalent or at least some) operational powers under the control of the host State in the territory or jurisdiction where the team is operating.

^a UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2nd ed., 2016), p. 597; Boister, Neil, "The Cooperation Provisions of the UN Convention against Transnational Organized Crime: A 'Toolbox' Rarely Used?", *International Criminal Law Review*, vol. 16, Issue 1 (2016), pp. 39 and 50.

Requesting electronic evidence across borders

Since terrorists and organized criminals are increasingly using the Internet, social media and encrypted messaging applications to advance their criminality, securing evidence from providers of these services is vital. This often involves a transnational element, and it is essential in any criminal investigation that consideration be given at an early stage to requesting evidence from service providers in other countries, as such investigations can be time-consuming, complex and costly. As noted in the *Practical Guide for Requesting Electronic Evidence Across Borders* developed by UNODC, the Counter-Terrorism Committee Executive Directorate and the International Association of Prosecutors, this:

“often means reliance on mutual legal assistance (MLA), which is increasingly becoming overwhelmed, resulting in lengthy delays. This does not resonate with the quick paced nature of terrorism or organized crime, where the Internet has no borders. Practitioners in a requesting State, namely law enforcement officers, prosecutors and judicial authorities, need to understand how to preserve e-evidence, obtain data to avert an emergency, how and when to use alternatives to MLA and how to draft a compliant MLA request (MLAR) for e-evidence.”

3. Law enforcement cooperation

Article 27 of UNTOC requires States parties to enhance the effectiveness of law enforcement cooperation, including:

- Enhancing and, where necessary, establishing channels of communication between law enforcement authorities in order to facilitate the secure and rapid exchange of information concerning the offences covered by UNTOC, including links with other criminal activities;
- Cooperating with other States parties in conducting inquiries concerning, inter alia, the identity, whereabouts and activities of suspects, and the movement of proceeds of crime;
- Exchanging information on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;
- Facilitating effective coordination between their competent authorities, including the posting of liaison officers;
- Considering entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies.

TOOLS

UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012)
(www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf).

UNODC, CTED and International Association of Prosecutors, *Practical Guide for Requesting Electronic Evidence Across Borders* (2019)
(<https://sherloc.unodc.org/cld/en/publications/practical-guide/practical-guide.html>).

C. Selected considerations for the investigation and prosecution of organized crime and terrorism offences

Terrorism and organized crime are different phenomena governed by distinct international and, in most cases, domestic legal frameworks. However, criminal justice responses to terrorism and criminal justice responses to organized crime need to respond to a number of shared challenges, including, inter alia: the gravity of the impact of the offences on individual victims and public security; the continuous, highly organized and covert nature of the offences; the use of information technology; and the risks that offenders may continue to pose once imprisoned. This section describes selected linkages between the criminal justice responses to terrorism and organized crime and highlights ways in which the criminal justice response to organized crime may be relevant to counter-terrorism.

1. Proactive investigations

Conventional policing is primarily *reactive*, meaning that police generally respond to crimes after they have been committed and reported. Any successful investigation of organized crime requires a *proactive* approach. Many crimes committed by organized criminal groups are not reported to authorities, and thus searches through financial records and interviews with

informants, citizens and surveillance activities are often required to determine whether a crime has occurred.⁹⁰

Proactive investigation approaches are also essential elements of preventive criminal justice strategies against terrorism that seek not only to identify and punish the perpetrators of terrorist attacks after an attack has taken place, but also to detect, investigate and prosecute the activities of terrorist groups, with a view to disrupting terrorist plots before an attack occurs.

As stated in the GCTF Rabat Memorandum, “[i]f terrorist violence is to be reduced and attacks are to be thwarted before they occur, authorities must be able to focus their attention on proactive intervention when terrorist suspects are at the planning and preparation stages.”⁹¹

The criminalization of the participation in organized crime groups and conspiracy-type offences, the use of special investigation techniques, financial investigations and witness protection are all measures that are essential to a proactive, “forward-leaning” response to organized crime and terrorism.

The use of “criminal intelligence”, a further element of the proactive investigation approach developed in the context of the fight against organized crime, is also highly relevant to the criminal justice response to terrorism. Criminal intelligence analysis permits law enforcement authorities to establish a proactive response to crime by identifying criminal groups and understanding their habits, to assess current trends in their criminal activities and to hamper the development of perceived future criminal activities.⁹² Gathering and analysing financial intelligence is as relevant to countering organized crime as it is to terrorism because it “can reveal the structure of terrorist groups, the activities of individual terrorists, and their logistics and facilitation networks.”⁹³

2. Promoting inter-agency coordination

Strengthening national coordination to promote inter-agency collaboration is essential to the investigation of organized crime and terrorism offences and to ensuring a coordinated response to linkages between terrorism and organized crime.

Member States adopt different mechanisms to promote inter-agency cooperation:

“In some jurisdictions, operational coordination takes place through task forces on specialized issues or joint investigative teams. The task forces may be established formally through national regulations or policies or operate informally. They allow information to be exchanged on specific cases and the development of criminal analysis and joint investigation and prosecution strategies. Other Member States utilize different approaches to promoting cooperation: one tasks senior prosecution officials with monitoring ongoing cases,

⁹⁰ UNODC, Education for Justice (E4J), University Module Series, Organized Crime, Module 8, *Law Enforcement Tools and Cooperation* (www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/intro.html).

⁹¹ GCTF, Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector, Good Practice 13 (see www.thegctf.org/Activities/Activities/ArtMID/493/ArticleID/10/Criminal-Justice-and-Rule-of-Law-Working-Group-Plenary-Meeting).

⁹² UNODC, *Criminal Intelligence – Manual for Analysts* (www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf).

⁹³ FATF, Consolidated FATF Strategy on Combating Terrorist Financing (<http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Terrorist-Financing-Strategy.pdf>).

ensuring common strategies and promoting cooperation, linking different units if necessary; another tasks its counter-terrorism investigative unit with ensuring cooperation between specialized units dealing with organized crime; and a third expanded the mandate of its organized crime unit to incorporate terrorism and enlarged the role of its district prosecutors to include organized crime and terrorism.”⁹⁴

3. Parallel financial investigations

As stated above (sect. A.3), the methods and techniques used to launder the proceeds of crime or to finance terrorism are often the same. As such, the General Assembly, the Security Council and FATF encourage States to combat both money-laundering and terrorist financing by adopting and applying related international instruments and standards.⁹⁵ The FATF Recommendations state that countries “should ensure that designated law enforcement authorities have responsibility for money-laundering and terrorist financing investigations within the framework of national AML [anti-money-laundering]/CFT [combating the financing of terrorism] policies.”⁹⁶

In addition to investigation and prosecution of terrorism financing offences, Member States are called upon to conduct financial investigations in terrorism related cases.⁹⁷ FATF recommends that “[a]t least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a *proactive parallel financial investigation* when pursuing money-laundering, associated predicate offences and terrorist financing.”⁹⁸ [emphasis added]. The interpretive note to recommendation 30 explains that:

“A ‘parallel financial investigation’ refers to conducting a financial investigation alongside, or in the context of, a (traditional) criminal investigation into money-laundering, terrorist financing and/or predicate offence(s). Law enforcement investigators of predicate offences should either be authorized to pursue the investigation of any related money-laundering and terrorist financing offences during a parallel investigation, or be able to refer the case to another agency to follow up with such investigations.”

Financial investigations are often led by specialized financial investigators. However, inter-agency collaboration is of particular importance to financial investigations: “Terrorism financing coordination committees or task forces bring together representatives of various agencies, including prosecution, interior, finance, foreign affairs, law enforcement and the central bank, to find common solutions and raise awareness of Financial Action Task Force recommendations, including among local investigators and prosecutors”.⁹⁹

- FATF recommendation 4 requires countries to enable their competent authorities to freeze or seize and confiscate not only property laundered and proceeds from, or instrumentalities used in money-laundering or predicate offences, but also “property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations”.

⁹⁴ S/2020/754, para. 42.

⁹⁵ Security Council resolution 2462 (2019), para. 4; United Nations Global Counter-Terrorism Strategy, General Assembly resolution 60/288, annex, part II, para. 10; Security Council resolution 1617 (2005), para. 7.

⁹⁶ FATF, recommendation 30.

⁹⁷ Security Council resolution 2462 (2019), para. 7.

⁹⁸ FATF, recommendation 30.

⁹⁹ S/2020/754, para. 43.

4. Parallel firearms investigations

Firearms are essential to the operations of many terrorist groups. In order to obtain intelligence on illicit arms flows and the trafficking networks behind the arms supply to terrorists, criminal justice authorities need to initiate proactive investigations on the origins of illicit firearms, their parts or components and ammunition. Countries need to systematically collect, centralize and analyse data on the items seized and the contextual circumstances of such seizures, which would help authorities to increase their understanding of sources, trends and patterns regarding the diversion and illicit trafficking in firearms and develop comprehensive responses,¹⁰⁰ including from a counter-terrorism perspective. To that end, the competent national authorities should also exchange with their counterparts in other countries information on organized criminal groups taking part in the illicit manufacturing or trafficking in firearms, means of concealment and routes customarily used.¹⁰¹

Firearms seizures present unique investigative opportunities that are still insufficiently exploited in many parts of the world. First, coordinated investigations aimed at determining where illicit weapons originate can contribute to revealing the supply and facilitation networks of terrorist groups. Second, the cumulative prosecution of firearms-related offences and terrorism-related offences can ensure convictions and commensurate sentences, including in instances when the prosecution of terrorism charges is not successful or succeeds only on minor charges.

TOOLS

UNODC, *Guiding Templates for Firearms Related Investigations* (2020) (www.unodc.org/documents/firearms-protocol/2020/UNODC-GFP-GUIDLINES-ENGLISH_final.pdf).

5. Special investigative techniques

The clandestine nature of organized crime and of terrorist activities and the mode of operation of organized crime and terrorist organizations require specialized investigative methods, in particular, techniques for gathering information and evidence in ways that do not alert the targets of such investigations.

There is no universally accepted definition or list of “special investigative techniques” (“SITs”); the constant evolution of the technologies used makes it difficult to draw up a comprehensive list. In 2005, the Council of Europe adopted recommendations for its member States on SITs,

¹⁰⁰ UNODC, *Guiding Templates for Firearms Related Investigations* (2020), Introduction (www.unodc.org/documents/firearms-protocol/2020/UNODC-GFP-GUIDLINES-ENGLISH_final.pdf).

¹⁰¹ Firearms Protocol, article 12(2).

and in that context defined them as follows: “ ‘Special investigation techniques’ means techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.”¹⁰²

With developments in modern technology, many different forms of covert surveillance are possible, covering all of the modern forms of communication, as well as the visual surveillance of suspects or the audio surveillance of premises in which they live or meet. The use of covert human intelligence, whether undercover agents or informants, remains a common method used in preventing, detecting and prosecuting organized crime offences and acts of terrorism.

While these and other investigative techniques are useful and often necessary to prevent and suppress organized crime and terrorism, their very aim, i.e., to gather information about persons in such a way as not to alert the target, means that the use of SITs nearly always involves an interference with the right to private life of the target as well as other persons. Moreover, investigative agencies making use of SITs may feel the need to prevent disclosure at the pretrial and trial stages with regard to how SITs were used. This can raise difficult questions from the point of view of the right to a fair trial. Additional human rights concerns surrounding the use of SITs include the risk of discriminatory use in racial, political or religious profiling practices, including the impact of covert surveillance on the fundamental freedoms of religion, thought, expression, assembly and association. For all of these reasons, the use of SITs must be regulated and carefully overseen, including judicially, and must respect the principles of necessity and proportionality in order to ensure that human rights are respected.¹⁰³

Under article 20 of UNTOC, States parties are encouraged to establish a legal framework for the use of special investigative techniques, such as controlled delivery, undercover operations and electronic or other forms of surveillance.

Article 20 (1) of UNTOC promotes the use of special investigative techniques at the national level if they are permitted under the basic principles of the domestic legal system. The use of investigative techniques should therefore have a proper basis in national legislation, that is, publicly accessible law or laws with an authorization regime that is judicial (or, at least, incorporates judicial oversight). The interference with certain human rights, such as the right to a fair trial and the right to privacy, should be taken into account (see above).

Article 20 (2–4) provides for measures to be taken at the international level: paragraph 2 of article 20 accords priority to international agreements on the use of special investigative techniques and encourages States parties to conclude bilateral or multilateral agreements or arrangements to foster cooperation in this field, with due respect to national sovereignty concerns. The smooth conduct of international covert operations may be facilitated through the use of special investigative techniques, for which the cooperation and collaboration of multiple law

¹⁰² UNODC, Education for Justice (E4J) University Module Series E4J Counter-Terrorism, Module 12, *Privacy, Investigative Techniques and Intelligence Gathering* (www.unodc.org/e4j/en/terrorism/module-12/key-issues/special-investigative-techniques.html).

¹⁰³ UNODC, Counter-Terrorism Legal Training Curriculum, Module 4, *Human Rights and Criminal Justice Responses to Terrorism* (2014), chapter 3.7; see also the 2020 report of the Secretary-General on measures to address the linkages between organized crime and terrorism highlights the risk that restrictive counter-terrorism legislation and measures may be broadly applied to other criminal acts, including with regard to the use of special investigatory powers (S/2020/754, para. 107).

enforcement agencies of different countries is essential. It is important to note that, while some forms of covert investigations may be legal in some jurisdictions, they may be unacceptable in others.

TOOLS

- UNODC, *Education for Justice (E4), University Module Series, Organized Crime, Module 8 Law Enforcement Tools and Cooperation* (www.unodc.org/e4j/en/organized-crime/module-8/key-issues/special-investigative-techniques/intro.html).
- UNODC, *Counter-Terrorism Legal Training Curriculum, Module 4, Human rights and criminal justice responses to terrorism* (2014); discusses, in chapter 3.7, human rights in the context of the use of special investigative techniques (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf).

6. Encouraging the cooperation of persons who have participated in crimes

Article 26 (1)(a) of UNTOC states that: “[e]ach State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups to supply information”.

Article 26 (2) adds that: “[e]ach State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention”.

The use of insider informants and witnesses is a common investigative tool in cases of organized crime; such methods are cost-effective and – because of the hidden nature of many organized crime activities – often unavoidable in the securing of evidence that can sustain convictions. The legal manner in which these informants are rewarded for their collaboration varies depending on the legal system, with some legal traditions giving prosecutors great latitude not to bring charges or to enter into plea bargains, while others allow prosecutors much less discretion.

While acknowledging the need to incentivize the supply of information by persons who participate in organized criminal groups, UNTOC also requires that States parties ensure that discretionary powers in relation to the prosecution “are exercised to maximize the effectiveness of law enforcement measures ... and with due regard to the need to deter the commission of such offences” (article 11 (2)).

The universal counter-terrorism instruments require States to make the offences “punishable by appropriate penalties which take into account the grave nature of those offences”.¹⁰⁴ The latter provision mirrors article 11 (1) of UNTOC, under which States parties are required to make the

¹⁰⁴ See article 4 (b) of the International Convention for the Suppression of Terrorist Bombings; in para. 2 of its resolution 1373 (2001), the Security Council similarly decided that “... all States shall ... (e) Ensure that ... the punishment duly reflects the seriousness of such terrorist acts”.

commission of Convention offences “liable to sanctions that take into account the gravity of that offence”.

The international legal instruments against terrorism do not contain provisions analogous to article 26 of UNTOC. However, as acknowledged in the GCTF Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector:

“Without adequate incentives, those with knowledge of or involvement in terrorist activity may have little reason to cooperate with law enforcement authorities, especially given the fear of retribution by members of a terrorist organization. Accordingly, adequate incentive programmes to encourage terrorist suspects and others to provide accurate and useful information to competent authorities about terrorist activities and plots should be adopted.”¹⁰⁵

The Rabat Memorandum also recommends that:

“[w]ith respect to those involved in planning or undertaking terrorist activities, legal systems should have the flexibility to take into account cooperation with authorities, including testimony in other criminal proceedings, and early admissions of guilt to mitigate punishment. Formal cooperation agreements or ‘plea agreements’ are one way but not the exclusive way to accomplish this objective, as are sentencing rules that address the impact of cooperation.”¹⁰⁶

The GCTF Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism links terrorism and transnational organized crime prosecutions in this regard: “If appropriate, States should adopt incentives for the accused to cooperate with authorities in terrorist-related or transnational organized crime-related offences. If a person has voluntarily provided cooperation, prosecutors may, in accordance with domestic legislation, provide leniency or grant immunity from prosecution. Prosecutors should take factors including the gravity and the nature of the crimes into consideration when exercising [prosecutorial] discretion.”¹⁰⁷

In organized crime and in terrorism cases, criminal justice authorities must be vigilant in order to ensure that incentives for cooperation do not lead suspects to provide false information to law enforcement authorities.

Criminal justice authorities need to be vigilant regarding the human rights implications of non-prosecution or mitigation of punishment in the case of persons who are responsible for very serious crimes and human rights abuses. Impunity can violate victims’ rights and undermine the rule of law. At the same time, the impact of the use of informants on the rights of the accused needs to be kept in mind, particularly where informants enjoy far-reaching witness protection measures that can have a serious impact on an accused’s right to a fair trial.¹⁰⁸

¹⁰⁵ GCTF, Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector, Good Practice 5 (see www.thegctf.org/Activities/Activities/ArtMID/493/ArticleID/10/Criminal-Justice-and-Rule-of-Law-Working-Group-Plenary-Meeting).

¹⁰⁶ Ibid.

¹⁰⁷ GCTF, Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice (2020), Good Practice 17 (see www.thegctf.org/About-us/GCTF-framework-documents).

¹⁰⁸ UNODC, Counter-Terrorism Legal Training Curriculum, Module 4, *Human Rights and Criminal Justice Responses to Terrorism* (2014); sect. 3.7.1.

7. Providing security for criminal justice officials, witnesses and victims

In the GCTF's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses, it is noted that:

“Given the history of violence and acts of intimidation that have accompanied terrorism cases in many countries, providing the necessary security for judges, court personnel, victims, and witnesses, is essential to ensure a fair and effective criminal justice system that is free from intimidation, retaliation, and obstruction of justice. It also increases the likelihood that victims and witnesses will more consistently trust the criminal justice system to resolve disputes and protect those already traumatized by acts or threats of violence.”¹⁰⁹

These considerations made with regard to terrorism cases are equally relevant to the investigation and prosecution of organized crime cases. It is all too common for members of organized criminal groups to eliminate witnesses, use physical force against police investigators and threaten judges and prosecutors.¹¹⁰

Obstruction of justice offences

Under UNTOC, States parties are required to adopt legislative and other measures to suppress “obstruction of justice”. Article 23 requires the criminalization of efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence, both through the use of corrupt means (such as bribery) and of coercive means (such as threats or violence). Article 23 also requires the criminalization of conduct intended to pervert the course of justice by the use of coercive means, including physical force, threats or intimidation against law enforcement and judicial officials.

It is important that legislation also criminalizes attempted obstruction of justice. For the offence to be committed, it suffices to show that accused persons have acted with the intention of inducing false testimony or interfering in the giving of testimony or the production of evidence; it should not be necessary to prove that, because of their conduct, false testimony or evidence was actually induced or provided. It is also not required to show that the exercise of the official's duties was actually interfered with; any intention to do so fulfils the elements of the offence.¹¹¹

Witness protection

Under UNTOC, each State party is required to “take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them” (article 24). The Convention also extends the witness protection guarantees to victims insofar as they are witnesses (article 24 4)).

¹⁰⁹ GCTF, *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses*, Good Practice 7.

¹¹⁰ UNODC, Education for Justice (E4J) University Module Series, Organized Crime, Module 2, *Organizing the Commission of Crimes* (www.unodc.org/e4j/en/organized-crime/module-2/index.html).

¹¹¹ For a detailed discussion of the “obstruction of justice” offences in UNTOC, see *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017), paras. 222–240 (www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html).

Witness protection may involve the provision of a police escort to the courtroom or a separate waiting room. Other judicial protection measures may include providing for confidentiality of information about the protected witness, closing the court, sealing records of the trial, offering temporary residence in a safe house, the use of voice distortion and facial disguise, or the use of videoconferencing for testimony. There are also cases, however, where cooperation by a witness is critical to the prosecution, but the power and control of the organized criminal group involved are so far-reaching that additional measures are required through a formal witness protection programme.¹¹²

Witness protection measures require clear criteria and policies, adequate resources and strict measures to ensure the integrity of all involved. They also need to be coordinated with measures to encourage cooperation from persons associated with organized crime and terrorist groups through mitigation of punishment or immunity from prosecution, since experience shows that in many countries a significant number of witnesses needing protection are (former) participants in criminal activities related to the case. Witness protection measures in organized crime and terrorism cases need to be informed by awareness of the human rights implications of such measures, both for the rights of the persons to be protected and for the right of the accused to a fair trial.

As noted at the outset of this section, effective criminal justice responses to organized crime and terrorism also require the provision of adequate security for investigators, prosecutors, judges, court personnel and the physical premises in which they work. Coordination between different parts of the justice system in collaboratively addressing the issue of security is essential.

Witness protection is an area in which counter-terrorism efforts can greatly benefit from the expertise developed and lessons learned in combating organized crime. The tools listed in the box below provide a starting point.

TOOLS

- UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008) (www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings__Involving_Organized_Crime.pdf).
- UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017), paras. 384–401 (www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html).
- UNODC, Education for Justice (E4J) University Module Series, Organized Crime, Module 9, *Prosecution Strategies* (www.unodc.org/e4j/en/organized-crime/module-9/key-issues/witness-protection.html).

¹¹² UNODC, Education for Justice (E4J) University Module Series, Organized Crime, Module 9, *Prosecution Strategies* (www.unodc.org/e4j/en/organized-crime/module-9/key-issues/witness-protection.html); for an in-depth discussion, see UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2017), paras. 384–401 (www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html).

- UNODC, Counter-Terrorism Legal Training Curriculum, Module 4, *Human Rights and Criminal Justice Responses to Terrorism* (2014), chapter 3.7 (www.unodc.org/documents/terrorism/Publications/Module_on_Human_Rights/Module_HR_and_CJ_responses_to_terrorism_ebook.pdf).
- GCTF, *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses* (www.thegctf.org/documents/10162/140201/14Sept19_GCTF+The+Hague+Memorandum.pdf).

8. Prison management

Both prisoners charged with or convicted of organized crime-related offences and those charged with or convicted of terrorist offences are potentially high-risk prisoners posing specific challenges to prison management and requiring prison administrations to adopt certain measures to ensure prison security, safety and order and to protect society from criminal activity directed from within the prison.

Moreover, there are challenges arising from the possible interaction in prison between members of organized crime groups and violent extremist offenders.

In this regard, in its resolution 2482 (2019), the Security Council encouraged States to explore ways to:

- Promote rehabilitation and reintegration of convicted terrorists;
- Prevent, within their prison systems, radicalization to violence, “including where perpetrators of petty crime may be exploited or recruited by terrorists”;
- Impede cooperation and transfer of skills and knowledge between terrorists and other criminals.¹¹³

A well-designed and properly managed classification process is a cornerstone of an effective prison system and is fundamental to the protection of human rights, the ability to individualize case and sentence planning and the efficient use of limited correctional resources.

Dynamic security and prison intelligence, as well as intelligence from other law enforcement agencies, also have an important role to play in identifying risks of relationships developing between violent extremist offenders and inmates from organized crime groups, as well as risks of radicalization to violence.¹¹⁴

¹¹³ Security Council resolution 2482 (2019), paras. 18 and 20.

¹¹⁴ GCTF, Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice (2020), Good Practices 23 and 24 (www.thegctf.org/About-us/GCTF-framework-documents).

Prison administrations need to decide how to house violent extremist prisoners, including with regard to prisoners who are members of organized crime groups. This decision revolves around a number of questions, including whether violent extremist prisoners should be separated from the general prison population (separation) and, if so, whether they should be isolated from each other (isolation), held in one place (concentration) or dispersed across a small number of prisons (dispersal). The alternative is to integrate violent extremist prisoners with the general population (integration). A mix of these approaches can be seen among States and, in reality, a hybrid approach is often adopted. There is no single right answer and national prison administrations will need to determine the best approach to accommodation based on specific factors within their countries.¹¹⁵

The management of high-risk prisoners and measures to address risks posed by the interaction between members of organized crime groups and violent extremist offenders in prison require careful consideration of human rights aspects, including:

(a) Restrictive policies and measures should be applied only to those high-risk prisoners who have undergone a proper risk assessment process and who have been found to require such measures strictly on the grounds of prison security, safety and order or to protect society:¹¹⁶ such policies and measures should be necessary and proportionate to the risks to be mitigated and must always respect absolute human rights, such as the prohibition of torture, cruel, inhuman and degrading treatment or punishment;

(b) Measures to address violent extremism or organized crime must respect prisoners' human rights and fundamental freedoms of thought, belief, religion and expression;

(c) Challenges posed by high risk prisoners must be addressed in full compliance with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and other relevant international standards and norms, including from a gender perspective;

(d) All measures must take into account the heightened vulnerability of women prisoners;¹¹⁷

(e) Legislation should be in place to govern prison information and intelligence, including the type of information prison staff may hold, the purpose for which it may be held and how it should be handled. Legislation should also establish effective public oversight mechanisms to prevent human rights violations in prisons.

¹¹⁵ UNODC, Criminal Justice Handbook Series, *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons* (2016), para. 4.3.

¹¹⁶ UNODC, Criminal Justice Handbook Series, *Handbook on the Management of High-Risk Prisoners* (2016), Introduction, p. 2 (www.unodc.org/documents/justice-and-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf).

¹¹⁷ UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism*, Chapter 4 (www.unodc.org/documents/terrorism/Publications/GENDER/17-08887_HB_Gender_Criminal_Justice_E_ebook.pdf); *Handbook on Women and Imprisonment*, Criminal Justice Handbook Series, 2nd ed. (United Nations publication, Sales No. E.14.IV.3), p. 7; and *Training Curriculum on Women and Imprisonment* (Version 1.0), Criminal Justice Handbook Series (Vienna, 2015), pp. 7 and 8.

TOOLS

UNODC, *Handbook on the Classification of Prisoners* (2020)

(www.unodc.org/documents/dohadeclaration/Prisons/HandBookPrisonerClassification/20-01921_Classification_of_Prisoners_Ebook.pdf).

UNODC, *Criminal Justice Handbook Series, Handbook on the Management of High-Risk Prisoners* (2016)

(www.unodc.org/documents/justice-and-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf).

UNODC, *Criminal Justice Handbook Series, Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons* (2016)

(www.unodc.org/pdf/criminal_justice/Handbook_on_VEPs.pdf).

UNODC, *Handbook on Dynamic Security and Prison Intelligence* (2015)

(www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf).

GCTF, *Addendum to the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism: Focus on Criminal Justice* (2020) (see www.thegctf.org/About-us/GCTF-framework-documents). GCTF, *Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders* (see www.thegctf.org/About-us/GCTF-framework-documents).

Self-assessment questions

1. Name the four criteria that define an organized criminal group under the United Nations Convention against Transnational Organized Crime (UNTOC).
2. Which offences are States parties required to criminalize under UNTOC?
3. There are similarities and differences between the offences of money-laundering and terrorist financing. Name at least four elements that are either common to the two offences or that distinguish them.
4. Name at least two recommendations of the Financial Action Task Force that are relevant to the suppression of the financing of terrorism.
5. Name three ways in which corruption can relate to terrorism.
6. Which are the three elements of the offence of trafficking in persons under the UNTOC Trafficking in Persons Protocol?
7. What do Security Council resolutions 2331 (2016) and 2388 (2017) say regarding the nexus between trafficking in persons and the activities of terrorist groups?
8. Explain the concepts of the “black” and “grey” market for firearms.
9. Name three international instruments relevant to the suppression of illicit trafficking of cultural property, including by terrorist groups.

10. Name at least four international instruments relevant to the suppression of kidnapping for ransom by terrorist groups.
11. Discuss the difference between the concepts of “(ordinary) cybercrime”, “cyberterrorism” and “use of the Internet for terrorist purposes”.
12. Explain the rule of specialty in extradition law. How is it relevant to the criminal justice response to linkages between organized crime and terrorism?
13. With regard to mutual legal assistance, compare measures in UNTOC to those contained in the counter-terrorism conventions and protocols.
14. Explain the concept of “proactive investigations” and discuss its relevance to counter-terrorism and the fight against organized crime.
15. Explain the term “parallel financial investigation” and its importance to the investigation of organized crime and terrorism offences.
16. Name at least two advantages of investigations based on firearms seizures from terrorist groups.
17. Discuss article 26 of UNTOC. What is its relevance to counter-terrorism?
18. Name at least three human rights considerations with regard to the use of special investigative techniques and of measures to encourage persons who have participated in organized crime or terrorism to collaborate with criminal justice authorities.



VI.

International crimes and terrorism offences

Objectives

By the end of chapter VI, readers will be able to:

- 1** Describe the circumstances in which terrorist acts, or the activities of terrorist groups, may constitute the core international crimes of genocide, war crimes and crimes against humanity.
- 2** Discuss the concept of universal jurisdiction over core international crimes and international mechanisms for accountability for core international crimes, including prosecution before the International Criminal Court.
- 3** Identify key strategic approaches to prosecuting international crimes committed by terrorist groups and related evidentiary requirements.
- 4** Discuss the importance of international crimes to holding members of terrorist groups accountable for sexual and gender violence offences.

INTRODUCTION

International criminal law seeks to protect all people from particularly grave forms of violence, including genocide, war crimes and crimes against humanity, advancing the fundamental values of the international legal community, including international peace and security and human rights. All States have an interest in ensuring accountability for international crimes – impunity for such crimes is considered incompatible with human rights.

In some cases, acts of terrorism or other violent activities of members of terrorist groups, may qualify as international crimes. When prosecuting members of terrorist groups, the Secretary-General has called upon national justice systems to take into consideration “the full body of international criminal law, including crimes against humanity and genocide, and not be limited to only the terrorist crimes”, particularly with regard to sexual and gender-based crimes.¹

Furthermore, international criminal law offers a number of legal provisions, institutions, practices and experiences that may be relevant for criminal justice practitioners seeking to hold perpetrators of acts of terrorism accountable. These include: universal jurisdiction; international accountability mechanisms; criminal law approaches to ensure that commanders and superiors can be held accountable for offences committed by their subordinates; and procedures to ensure that admissible evidence is collected even under the challenging conditions imposed by armed conflict.

Chapter VI is divided into three sections: section A contains a discussion of the “core international crimes”, the crimes of genocide, war crimes, and crimes against humanity, all of which are explained from the perspective of their relevance to accountability for acts committed by members of terrorist groups. Other international crimes are also briefly discussed in section A.

Section B examines ways in which States and international bodies may exercise jurisdiction to pursue accountability for international crimes. Section C examines key considerations in investigating and prosecuting international crimes committed by members of terrorist groups: the concept of “system crimes” involving very high numbers of perpetrators and victims and strategic approaches to the prosecution of such crimes; “modes of liability” under international criminal law and the responsibility of commanders and civilian superiors for crimes committed by their subordinates; the use of information collected by the military as evidence; accountability for sexual and gender-based violence by members of terrorist groups; and the advantages of cumulative prosecution of terrorism offences and international crimes.

¹ S/2017/861, para. 61; see also Security Council resolution 2396 (2017), paras. 18 and 19.

A. The core international crimes

1. Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the Genocide Convention)² makes genocide “a crime under international law”, which States must prevent and punish in peace or war (article I). Article II of the Convention defined genocide as various acts intended to destroy specified groups:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

The mental element of the crime of genocide is twofold: (a) an intention to commit a listed physical act; and (b) a special intention to do so for the purpose of destroying one of the listed groups.

States must criminalize acts of genocide as well as conspiracy, direct and public incitement, attempt, and complicity (article III), by whomever committed (article IV).

The International Criminal Court (ICC) has jurisdiction with respect to the crime of genocide, which is defined in article 6 of its Statute adopted in Rome in 1998 in the same terms as in the Genocide Convention of 1948.

The crime of genocide is most commonly committed by persons acting on behalf of States because States have the resources and organizational capacity to destroy selected groups within populations under their control. As is evident in the case study below, however, it is nonetheless possible that leaders and members of organized non-State groups, including terrorist groups, are capable of committing the crime of genocide, particularly if a terrorist group controls territory and populations.

² General Assembly resolution 260 A (III).

CASE STUDY INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC: FINDINGS ON GENOCIDE COMMITTED BY THE ISLAMIC STATE IN IRAQ AND THE LEVANT (ISIL) (DA'ESH) AGAINST THE YAZIDIS IN IRAQ AND THE SYRIAN ARAB REPUBLIC^a

“201. ISIS has committed, and continues to commit, the crime of genocide, as well as multiple crimes against humanity and war crimes, against the Yazidis.

“202. The genocide committed against the Yazidis has not primarily been accomplished through killings, though mass killings of men and women have occurred. Rather ISIS seeks to destroy the Yazidis in multiple ways, as envisaged by the drafters of the 1948 Genocide Convention. ISIS has sought, and continues to seek, to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment, and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis. The public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, in whole or in part.”

^a Human Rights Council, “They came to destroy”: ISIS Crimes against the Yazidis (A/HRC/32/CRP.2).

2. War crimes

Chapter III of the present module explains how IHL governs armed conflicts involving terrorist groups. As discussed in chapter III, most terrorist acts committed in armed conflict are prohibited by IHL and constitute war crimes, calling for individual responsibility. The following focus box shows how war crimes already cover many terrorist acts, based on the contemporary list of war crimes in the Rome Statute of International Criminal Court (ICC). War crimes in non-international conflict are particularly relevant in situations involving non-State armed terrorist groups.

FOCUS BOX WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICT WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ICC STATUTE, ARTICLE 8, PARAS. 2 (c) AND (e)

“(c) ... serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

“(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character...:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against [medical personnel or objects];
- (iii) Intentionally directing attacks against [humanitarian assistance or peacekeeping personnel or objects];
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place...;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, ... enforced sterilization, and any other form of sexual violence...;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments ... which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (xiii)–(xv) [Employing prohibited weapons, including poison, chemical or biological weapons, expanding bullets, weapons which cannot be detected in the human body by X-ray or laser weapons designed to cause permanent blindness].”

CROSS-REFERENCE Under the ICC Statute and in most other codifications of war crimes, the law distinguishes between war crimes committed in international armed conflicts and in non-international armed conflicts. It is therefore important for criminal justice actors to correctly classify the armed conflict in which the alleged crimes were committed. This area of law is explained in chapter III of the present module.

War crimes can be committed by members of a government or dissident armed forces, irregular forces belonging to States, organized non-State armed groups (whether aligned with States or autonomous and whether politically described as rebels, insurgents, guerillas or terrorists). The following two case studies illustrate how the same set of facts can concurrently be qualified as terrorism offences, war crimes and crimes against humanity.

CASE STUDY PRELIMINARY EXAMINATION OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT ON THE SITUATION IN NIGERIA, 2015–2020

The possible overlap between terrorism offences, war crimes and crimes against humanity is illustrated by the discussion of acts allegedly committed by Boko Haram in the 2015 report of the Prosecutor of the International Criminal Court (ICC) on preliminary examination activities.⁹ Boko Haram has been subject to counter-terrorism sanctions imposed by the Security Council since 2014 and has been frequently condemned by the Council for committing terrorist acts.

The report identifies “eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the ICC Statute: six for conduct by Boko Haram and two for conduct by the Nigerian Security Forces” (para. 195).

The potential cases for alleged Boko Haram conduct concern:

- “Attacks against civilians perceived as ‘disbelievers’ ” (para. 196).
- “Abductions and imprisonment of civilians, leading to alleged murders, cruel treatments and outrages upon personal dignity” (para. 199).
- “Attacks on buildings dedicated to education, teachers and students ...” (para. 201).
- “Recruitment and use of children under the age of 15 years to participate in hostilities” (para. 203).
- “Attacks against women and girls ... rapes, sexual slavery and other forms of sexual violence, forced marriages, the use of women for operational tasks and murders” (paras. 205 and 206).
- “The intentional targeting of buildings dedicated to religion, including churches and mosques...” (para. 208).

The potential cases for conduct by the Nigerian Security Forces relate to:

- “Alleged mass arrests of boys and young men suspected of being Boko Haram members or supporters, followed by large scale abuses, including summary executions and torture” (see para. 219).
- Alleged “attacks against civilians” (para. 212).

In 2018 the Prosecutor reported that she was investigating additional crimes committed by the Nigerian Security Forces, including sexual violence against women and girls in internally displaced persons camps.

In 2020 the Prosecutor concluded her preliminary examination, finding that there was a reasonable basis to believe that Boko Haram and the Nigerian Security Forces had committed the above crimes. The Prosecutor further indicated that the Nigerian authorities had not executed their primary responsibility to ensure accountability at the national level, inter alia, because the prosecutions of Boko Haram fighters were primarily against low-level fighters for membership in a terrorist organization, not for international crimes. The Prosecutor plans to request authorization from the judges of the ICC Pre-Trial Chamber to open formal investigations.

^a See statement of the Prosecutor (www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement).

CASE STUDY PROSECUTION OF WAR CRIMES PERPETRATED BY MEMBERS OF THE ISLAMIC STATE IN IRAQ AND THE LEVANT (ISIL) (DA'ESH) AT THE NATIONAL LEVEL

Germany has prosecuted a number of German nationals for international crimes committed in the context of the conflict in the Syrian Arab Republic.

In the case of *Prosecutor v. Abdelkarim El-B.*,^a the defendant, a German national, travelled from his home in Germany to the Syrian Arab Republic in 2013 in order to join and fight with ISIL (Da'esh) and was a registered member of the group. He was arrested in Turkey as he was travelling back to Germany and was extradited to Germany.

In 2013, a group of ISIL (Da'esh) fighters mutilated the corpse of a member of the Syrian armed forces. The defendant did not directly commit the degrading act but filmed it and verbally encouraged the other fighters to mutilate the corpse. He was charged with: committing a war crime by treating a protected person in a gravely humiliating or degrading manner; membership in a terrorist organization abroad; and illegal possession of a Kalashnikov weapon. The court convicted the defendant on all three charges. With regard to the war crimes charge, the court found that the defendant had committed a war crime by participating in the actions of the group.

^a *Prosecutor v. Abdelkarim El-B.*, Frankfurt am Main, Higher Regional Court, Case No. 5-3 StE 4/16-4-3/16, Judgment of 8 November 2016.

ACTIVITY

(a) Referring to article 8 of the ICC Statute: which of the acts constituting war crimes for the purposes of article 8 have been committed by members of terrorist groups in situations of armed conflict in your country or in other countries that you are aware of?

(b) The *Elements of Crimes*, adopted by the ICC Assembly of States Parties, supplements the definition of the offences in the Statute of ICC:^a compare the elements of the offence of hostage taking in a non-international armed conflict under article 8, para. 2 (c)(iii), of the Rome Statute, as set forth in the *Elements of Crimes*, with the definition of hostage taking contained in the 1979 International Convention against the Taking of Hostages.

^a International Criminal Court (ICC), *Elements of Crimes*, The Hague (revised 2011), article 7, Crimes against humanity (www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx).

The war crime of intending to spread terror among the civilian population

IHL also specifically prohibits a certain kind of “terrorism” in armed conflict, which is different from ordinary terrorism offences in peacetime.³ For example, in both international and non-international conflicts, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” are prohibited.⁴

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international tribunal to find that these prohibitions are also the basis for the crime (under treaty and custom)⁵ of “terror as a violation of the laws or customs of war”, in the case of *Prosecutor v. Galić* (2003).⁶ The elements of the crime as stated in that case are as follows:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.⁷

“Acts of violence” against civilians include direct attacks or indiscriminate or disproportionate attacks,⁸ but do not include attacks that are lawful under IHL (such as proportionate attacks on military objectives). The crime encompasses both attacks and threats of attacks against civilians.⁹ Furthermore, “extensive trauma and psychological damage form part of the acts or threats of violence”.¹⁰

The distinctive feature of the war crime of terror is its mental elements: in addition to a general intent to willfully make civilians the object of acts or threats of violence,¹¹ there must be a “specific intent” to commit such acts with the primary purpose to spread terror amongst civilians.¹²

Terror was defined simply as “extreme fear”.¹³ The offence is concerned with acts or threats that are specifically undertaken to spread terror, and not with the incidental fear civilians experience in war as a result of lawful military actions.¹⁴ Furthermore, the intent to spread terror need not be the only purpose of the act or threat, as long as the intent to spread terror “was principal among the aims”.¹⁵

³ See Fourth Geneva Convention relative to the protection of civilian persons in time of war (adopted 12 August 1949, entered into force 21 October 1950) (United Nations, *Treaty Series*, vol. 75, No. 973) article 33 (prohibiting “all measures of intimidation or terrorism against civilians” in international conflict); and Additional Protocol II 1977, article 4, para. 2 (d), prohibiting “acts of terrorism in non-international conflict”.

⁴ Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978), United Nations, *Treaty Series*, vol. 1125, No. 17512, article 51, para. 2; and Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978), United Nations, *Treaty Series*, 1125, No. 17513), article 13, para. 2.

⁵ International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Galić*, Trial Chamber, Judgment, Case No. IT-98-29-T, T. Ch.I., 5 December 2003, paras. 91–98; see also, ICTY, *Prosecutor v. Galić*, Appeals Chamber, Judgment, Case No. IT-98-29-A, A. Ch., 30 November 2006, para. 86 and following.

⁶ *Prosecutor v. Galić*, Trial Chamber, Judgment, Case No. IT-98-29-T, T. Ch. I., 5 December 2003, para. 138; and *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, Judgment, Case No. IT-98-29-A, A.Ch., 30 November 2006.

⁷ ICTY, *Prosecutor v. Galić*, Trial Chamber, Judgment, 5 December 2003, para. 133.

⁸ ICTY, *Prosecutor v. Galić*, Appeals Court, Judgment, 30 November 2006, para. 102.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ ICTY, *Prosecutor v. Galić*, Trial Chamber, Judgment, 5 December 2003, para. 136.

¹² *Ibid.*, see also ICTY, *Galić*, Appeals Court, Judgment, 30 November 2006, para. 103.

¹³ ICTY, *Prosecutor v. Galić*, Trial Court, Judgment, 5 December 2003, para. 137.

¹⁴ ICTY, *Prosecutor v. Galić*, Appeals Court, Judgment, 30 November 2006, para. 103.

¹⁵ *Ibid.*, para. 104.

CASE STUDY PROSECUTOR V. GALIĆ: WAR CRIME OF SPREADING TERROR AMONG THE CIVILIAN POPULATION

Based on the facts in the case of *Prosecutor v. Galić*, the war crime of spreading terror was found to have been committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, and as a result of “the nature of the civilian activities targeted, the manner in which the attacks on civilians were carried out and the timing and duration of the attacks on civilians”. The ICTY found that civilians were targeted “while engaged in typical civilian activities” throughout the city, including attending funerals; in ambulances and hospitals; on trams and buses; when driving, cycling or walking; at home or in school; while shopping; or collecting water or firewood; and at public festivals and funerals. The vulnerable were especially targeted, including women, children and the elderly. Hundreds of civilians were killed and thousands injured.^a

The attacks were found to have no military significance and could not be accounted for by targeting errors or crossfire. They were also not designed to exterminate or deplete the population. Rather, the pattern of fire was random and indiscriminate, at unexpected places and times, calculated to achieve surprise and maximize the psychological effects. Civilians responded by closing schools, hiding by day and living at night, rarely moving around and setting up barricades. The International Tribunal concluded that the aim was to “very clearly” send the message “that no Sarajevo civilian was safe anywhere, at any time of day or night”. It found that “the only reasonable conclusion, in light of the evidence in the Trial record, is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear”.^b

^a ICTY, *Prosecutor v. Galić*, Trial Court, Judgement, 5 December 2003, paras. 569, 584 and 592–597.

^b *Ibid.*, paras. 563–573, 586, 592, 593 and 598.

The Rome Statute of ICC does not explicitly include the war crime of terrorism within its jurisdiction. However, as noted by ICTY in the case of *Prosecutor v. Galić*, such acts may be regarded as specific instances of the general prohibition of attacks on civilians, breaches of which are within the jurisdiction of ICC.¹⁶ As such, acts of terrorism could be relevant evidence of the commission of intentional attacks against the civilian population.

3. Crimes against humanity

There is no comprehensive treaty in force which is dedicated to crimes against humanity, although the International Law Commission (ILC) adopted “draft articles” on the topic in 2019¹⁷ and such crimes were historically prosecuted in international trials in Europe and in the Asia-Pacific region at the end of the Second World War. A broadly accepted contemporary definition of crime is found in article 7 of the Rome Statute, as presented in the following focus box. Many of the enumerated acts are methods commonly used by terrorists when targeting civilians.

¹⁶ See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), United Nations, *Treaty Series*, vol. 2187, No. 38544, article 8, paras. 2 (b)(i)–(v) (international conflicts) and article 8, paras. 2 (e)(i)–(v).

¹⁷ International Law Commission (ILC), draft articles on prevention and punishment of crimes against humanity (A/74/10 and Corr. 1, chap. IV.E).

FOCUS BOX ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Crimes against humanity: article 7, para. 1

“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

As specified in article 7, a crime against humanity includes:

- The commission of certain serious acts (the physical element).
- Acts committed as part of a widespread or systematic attack against any civilian population (the contextual element).
- Acts committed with knowledge that the acts were part of or with the intention to further such an attack (the mental element).

As a result of historical circumstances, crimes against humanity were originally limited to attacks: (a) committed in armed conflict; and (b) with a nexus to State policies. However, under contemporary international law, as reflected in the Rome Statute, such crimes may also be committed: (c) in peace time or in armed conflict; and (d) by individuals acting on behalf of States and also by members of non-State organizations committing grave criminal acts, including organized terrorist or criminal groups.

Contextual elements

An “attack directed against a civilian population” means conduct involving the commission of multiple acts that target civilians, pursuant to a State or organizational policy to commit such an

attack.¹⁸ An attack need not be one using military weapons or tactics, but civilians must be the intended primary target rather than incidental victims.¹⁹ A “policy to commit such an attack” requires that the State or organization actively promote or encourage such attack.²⁰

A “widespread” attack is one which is large scale, serious and involves repeated acts affecting multiple victims.²¹

A “systematic” attack means an organized and continuing or regular pattern of acts (rather than isolated or random acts), based on a policy or plan, and utilizing significant resources.²²

Occasional or sporadic terrorist acts by individuals or small, clandestine terrorist groups are unlikely to meet the threshold requirements of a crime against humanity.²³ These could include, for instance, a single aircraft hijacking or bombing, or a one-off assassination or suicide bombing. On the other hand, it is certainly possible for terrorist groups to mount either a widespread or systematic attack on a civilian population, including through a series of violent acts over time (such as a campaign of repeated bombings against civilian targets), although not all such campaigns will qualify. Even a single coordinated attack on a large scale could – according to many experts – constitute a crime against humanity, such as the attacks on the United States of America on 11 September 2001.²⁴

In armed conflict, the “civilian population” excludes military personnel, even when they are *hors de combat* (out of combat), for instance if they are wounded or are held prisoner.²⁵ While crimes against humanity must involve an overarching attack on the civilian population, individual victims of particular crimes can include military personnel *hors de combat*.²⁶

In peacetime, there is a greater level of uncertainty as to whether the “civilian population” includes military personnel. The International Criminal Tribunal for Rwanda (ICTR) found that military, police and security personnel are included as part of the civilian population, except when they are armed and can defend themselves at the time they are attacked.²⁷ In contrast, ICTY has maintained that the “civilian population”, for the purposes of defining crimes against humanity, has the same meaning as under IHL,²⁸ implying that even in peacetime military personnel would be excluded from it. However, ICTY cases have all concerned factual situations involving armed conflict and the Tribunal has not directly addressed the issue in peacetime.

¹⁸ ICC, *Elements of Crimes*, The Hague, 2011, article 7, Crimes against humanity (www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx).

¹⁹ *Prosecutor v. Kunarac et al.*, Judgment, Trial Chamber, Case No. IT-96-23/1-T. Ch, 22 February 2001, para. 421; the ICC Trial Chamber adopted the same interpretation in the *Prosecutor v. Katanga*, Judgment, Trial Chamber II, ICC01/04-01/07, 7 March 2014, para. 1104.

²⁰ ICC, *Elements of Crimes*, article 7, Crimes against humanity (www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx).

²¹ International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Trial Chamber, Judgment, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, para. 580.

²² *Ibid*; see also ICTY, *Prosecutor v. Tadić*, Trial Chamber, Case IT-94-1, Judgment, 7 May 1997, para. 646; and ICC, *Prosecutor v. Katanga*, Judgment, Trial Chamber II, ICC01/04-01/07, 7 March 2014, para. 1123.

²³ Arnold, Roberta, “The Prosecution of Terrorism as a Crime against Humanity”, *Heidelberg Journal of International Law*, 64 (2004), No. 4, pp. 979 and 995–998.

²⁴ See Antonio Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *European Journal of International Law*, vol. 12, No. 5, pp. 993, 994–995.

²⁵ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, Case No. IT-95-14-A, 29 July 2004, para. 114.

²⁶ ICTY, *Prosecutor v. Martić*, Appeals Chamber, Judgment, Case No. IT-95-11-A, 8 October 2008, para. 313.

²⁷ ICTR, *Prosecutor v. Kayishema*, Judgment, Trial Chamber, Case No. ICTR-95-1-T, 21 May 1999, para. 127.

²⁸ ICTY, *Prosecutor v. Martić*, Appeals Chamber, Judgment, Case No. IT-95-11-A, 8 October 2008, paras. 297 and 299.

Physical elements

Many of the physical acts comprising crimes against humanity are commonly used by terrorists, including murder, torture, hostage taking, abduction, enforced disappearances, enslavement, persecution and inhumane acts. An example of a combination of such acts potentially constituting crimes against humanity is provided by the attacks of ISIL (Da'esh) on minority religious communities in Iraq.

CASE STUDY INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC: FINDINGS ON CRIMES AGAINST HUMANITY COMMITTED BY ISIL (DA'ESH) AGAINST THE YAZIDIS IN IRAQ AND THE SYRIAN ARAB REPUBLIC^a

“166. ISIS’s August 2014 attack on Sinjar and its subsequent abuse of captured Yazidis, including the sexual and physical violence directed against Yazidi women and children transferred into Syria, constitute a direct attack on the Yazidis, a civilian population who was the primary target of the attack.

“167. The ISIS attack was widespread, encompassing hundreds of villages across the Sinjar region, and Mount Sinjar itself. The attack was also systematic, with organized acts of violence committed in a near-identical manner by fighters across Sinjar and later, across ISIS-controlled areas of Syria and Iraq. The attacks on the Yazidis, which continue until the present day, are committed pursuant to an explicit ideological policy of the terrorist group, whose radical religious interpretation does not permit the existence of Yazidism within the territory it controls. The fighters’ abuse of the Yazidis closely follows and is supported by ISIS’s stated organizational policy.

“168. In its killing of Yazidi men, women and children, ISIS has committed the crime against humanity of murder and extermination. In its sexual enslavement, enslavement, and beating of Yazidi women and girls, ISIS has committed the crimes against humanity of sexual slavery, rape, sexual violence, enslavement, torture, other inhumane acts, and severe deprivation of liberty. By forcing Yazidi men and boys to labour on ISIS projects and by beating them for refusing to do so, ISIS has committed the crimes against humanity of enslavement, torture, and other inhumane acts. These crimes were committed against the Yazidis on discriminatory grounds based on their religion, and as such they also amount to the crime against humanity of persecution.”^b

^a Human Rights Council, “They came to destroy”: ISIS Crimes against the Yazidis (A/HRC/32/CRP.2).

^b ICTY, *Prosecutor v. Galić, Trial Chamber, Opinion and Judgment*, Case. No. IT-94-1-T, 7 May 1997, paras. 704–710.

4. Other international crimes

In addition to the “core” international crimes – genocide, war crimes and crimes against humanity – there are some other crimes under customary international law, many of which are also criminalized by treaties, imposing more specific obligations of prevention, suppression, and international cooperation, including:

- **Piracy**, meaning “any illegal acts of violence or detention... committed for private ends” on the high seas by persons on one private ship or aircraft against persons on another private ship or aircraft;²⁹
- **Slavery**, meaning that “any or all of the powers attaching to the right of ownership are exercised” over a person;³⁰
- **Torture**, meaning that severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for a specified purpose (obtaining a confession, punishment, intimidation or coercion, or discrimination) by a public official or other person acting in an official capacity (or at their instigation or with their consent or acquiescence);³¹
- **Aggression**, meaning the use of armed force by one State against another State contrary to the Charter of the United Nations.³² A perpetrator of the crime of aggression before ICC must be a **political official or military leader of a State**, that is, a “person in a position effectively to exercise control over or to direct the political or military action of a State”.³³ It is therefore unlikely to be committed by a member of a terrorist group.

Enslavement and torture can also constitute war crimes or crimes against humanity, or underlying acts of the crime of genocide, if certain conditions are met, as discussed above.

International crimes are distinguishable from “transnational crimes” established by treaties, which States must also implement as offences in domestic law, but which do not create individual liability directly under customary international law. Examples include offences under the international counter-terrorism treaties, transnational organized crime, corruption, apartheid and enforced disappearances. Some of these are discussed in chapter V of the present module.

B. Jurisdiction, international cooperation and international accountability mechanisms

The primary means of enforcing accountability for international crimes is through the criminalization, investigation, prosecution and punishment of the offences established in international crime conventions in national law, together with transnational cooperation through extradition and mutual legal assistance under such conventions, as is done in instances of acts of terrorism and organized crime offences (discussed in chapter V of the present module).

Two additional elements must be considered in relation to international crimes: the concept of “universal jurisdiction” under international law; and the existence of international mechanisms for the prosecution of international crimes.

²⁹ United Nations Convention on the Law of the Sea, 1982, article 101 (United Nations, *Treaty Series*, vol. 1833, No. 31363).

³⁰ Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Slavery Convention), 1926, article 1(1), United Nations, *Treaty Series*, vol. 266, No. 3822.

³¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), General Assembly resolution 39/46, 1984, article 1.

³² See General Assembly resolution 3314 (XXIX), entitled “Definition of Aggression”, annex, articles 1–3.

³³ Under article 8 *bis* of the Statute of ICC.

1. National suppression of international crimes

Whether an act of terrorism which also qualifies as an international crime can be prosecuted by a national court depends on whether and in what manner international law regarding such crimes has been implemented by that State. The treaties codifying international crimes require that States parties take domestic measures to suppress them. These chiefly include obligations to:

- Diligently prevent the crimes;³⁴
- Domestically criminalize offences³⁵ and establish “effective penalties”³⁶ for them (or “appropriate” penalties, which take into account the grave nature of offences);³⁷
- Investigate alleged offences/offenders,³⁸ and apprehend alleged offenders as necessary for trial or prosecution;³⁹
- Prosecute alleged offenders or extradite them to another State with jurisdiction;⁴⁰
- Afford mutual assistance to other States parties in their criminal proceedings.⁴¹

Jurisdiction

Under international law, jurisdiction refers to the competence of a State to regulate the conduct of persons and entities within its own territory or abroad. Two types of jurisdiction are relevant:

- Prescriptive jurisdiction means the power to make laws. International law recognizes the right of a State to make laws in relation to crimes committed: (a) in its territory, (b) by its nationals, (c) against its nationals (but only for serious crimes such as terrorism), or (d) affecting its national security. It also recognizes “universal jurisdiction” over international crimes (discussed below). Treaties can also specify other grounds of jurisdiction.
- Enforcement jurisdiction means the power of the executive or the judiciary (“adjudicative jurisdiction”) to enforce those laws (for instance, through criminal investigations, arrests, prosecutions, conviction, punishment, extradition and mutual assistance). In general, the enforcement jurisdiction is exclusively limited to a State’s own territory, unless a foreign State consents to another State exercising jurisdiction on its territory.

³⁴ Geneva Conventions of 1949, common article 1; Genocide Convention, articles 1 and 8; and Convention against Terrorism, article 2 (1).

³⁵ Geneva Conventions I–IV, articles 49, 50, 129 and 146, respectively; Genocide Convention, article 5; and Convention against Terrorism, article 4.

³⁶ Geneva Conventions I–IV, articles 49, 50, 129 and 146, respectively; and Genocide Convention, article 5.

³⁷ Convention against Terrorism, article 4.

³⁸ Geneva Conventions I–IV, articles 49, 50, 129 and 146, respectively; and Convention against Terrorism, article 6.

³⁹ Convention against Terrorism, article 6: this requirement is not explicit in the Genocide Convention nor in the Geneva Conventions of 1949.

⁴⁰ Genocide Convention, articles 4 and 7; Geneva Conventions I–IV, articles 49, 50, 129 and 146, respectively; and Convention against Terrorism, article 7.

⁴¹ Convention against Terrorism, article 9: there is no such obligation under the Genocide Convention or Geneva Conventions 1949, although mutual assistance agreements between States may separately facilitate it.

Universal jurisdiction

Universal jurisdiction refers to the competence of a State, under customary international law or treaties, to criminalize and to prosecute international crimes even in the absence of a link between the State and the crime (for example, when a crime is committed abroad, does not involve its nationals as alleged offenders or victims and does not affect national security). However, in treaties or in national law the exercise of such jurisdiction may depend upon the offender being physically present in the State's territory.

Universal jurisdiction applies to international crimes such as piracy, slavery, war crimes, genocide, crimes against humanity and torture.⁴² It can also apply under treaties to crimes other than international crimes, including under the counter-terrorism conventions.

Since there is no convention in force on crimes against humanity (other than the Rome Statute of ICC, as discussed below), universal jurisdiction under customary international law is an important basis for the national criminalization of such crimes.

While States have a right to exercise universal jurisdiction under customary law, certain treaties require that States formally establish and exercise such jurisdiction through national legislation. Customary universal jurisdiction does not entail the specific obligations in some conventions, particularly as regards the duty to “prosecute or extradite” (discussed below), facilitation of extradition or mutual assistance.

The four Geneva Conventions of 1949, which provide an example of universal jurisdiction under a treaty, require States parties to prosecute individuals alleged to have committed “grave breaches” of the Conventions (that is, war crimes under the Conventions in international conflict) “regardless of their nationality”⁴³ or any other link to the State (for example, to its territory, security or the nationality of the victims). The provision is understood to require that States parties establish universal jurisdiction.⁴⁴ In practice, prosecution normally depends on the alleged offender being present within the State's territory, except in the rare case of trial *in absentia*. Since their adoption in 1949, the Geneva Conventions have influenced the development of customary universal jurisdiction.⁴⁵

⁴² See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment, International Court of Justice (I.C.J.) Reports 2002*, paras. 27, 51 and 52; International Committee of the Red Cross (ICRC), Customary IHL, Rule 157 (Jurisdiction over War Crimes) (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule157); and Crawford, James, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019), p. 452.

⁴³ Geneva Conventions I-IV, articles 49, 50, 129 and 146, respectively.

⁴⁴ ICRC, Commentary of 2016 to article 49 (Penal sanctions) of the First Geneva Convention of 1949, paras. 2846 and 2863–2867.

⁴⁵ ICRC, Customary IHL, Rule 157; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment, I.C.J. Reports 2002*, para. 46.

CASE STUDY UNIVERSAL JURISDICTION FOR WAR CRIMES UNDER FINNISH LAW

According to its national law, Finland can exercise universal jurisdiction over genocide, crimes against humanity, war crimes and torture.^a Investigations and prosecutions in Finland of such international crimes committed abroad by a foreign national do not require that the suspect be present or a resident in Finnish territory. In practice, however, this element is taken into consideration by prosecutors before starting a prosecution. If a suspect is a permanent resident of Finland at the time of the offence or at the beginning of the court proceedings, he/she is treated in the same way as a Finnish citizen: as a consequence, Finnish authorities have jurisdiction over foreigners for crimes committed abroad.^b

The first case of prosecution under Finland's universal jurisdiction provisions was against François Bazaramba, a Rwandan citizen who arrived in Finland in 2003 as an asylum seeker. During background checks, Finnish immigration authorities found his name in the report of a non-governmental organization about international crimes committed in Rwanda in 1994. The Finnish authorities arrested Bazaramba in April 2007. Rwanda requested his extradition, but the request was refused on grounds related to concerns about whether genocide suspects would receive a fair trial in Rwanda. The Finnish public prosecutor subsequently charged Bazaramba with genocide and 15 counts of murder in connection with the events of 1994 in Rwanda. In July 2010, François Bazaramba was convicted and sentenced to life imprisonment for genocide and murder.^c

More recently, Finland has prosecuted two Iraqi citizens who arrived in Finland as asylum seekers. On charges related to their alleged participation in a massacre in 2014, the two brothers were indicted for murder with terrorist intent and/or aggravated war crimes for the murder of persons protected under the Geneva Conventions. In June 2014, an estimated 1,700 young, unarmed and mostly Shiite Iraqi recruits and soldiers from the Camp Speicher army base were captured and killed by ISIS fighters in a massacre in Tikrit (Iraq). The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD) provided evidence about the massacre to the Finnish authorities. The indictments were dismissed, however, both by the District Court and the Court of Appeal due to insufficient evidence regarding the defendants' involvement.^d

^a Open Society Justice Initiative and TRIAL International, briefing paper. "Universal Jurisdiction Law and Practice in Finland" (February 2020), p. 4 (<https://trialinternational.org/wp-content/uploads/2020/03/Universal-Jurisdiction-Law-and-Practice-in-Finland.pdf>).

^b *Ibid.*, p. 12.

^c District Court of Itä-Uusimaa, press release, 11 June 2010, Judgment in a criminal case of genocide, *Prosecutor v. François Bazaramba* (R09/404) (www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba_Press_Release_EN.pdf).

^d European Network of National Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes and EUROJUST report, "Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences" (The Hague, 2020), p. 24 (www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related).

Prosecution and extradition

The four Geneva Conventions also strengthen prospects for accountability for war crimes in international armed conflict by requiring a State party to either prosecute or, "if it prefers", to extradite the alleged offender to another State party with jurisdiction.⁴⁶ The choice whether to "prosecute or extradite" is left to the State that has custody of the alleged offender, as is the

⁴⁶ Geneva Conventions I–IV, articles 49, 50, 129 and 146, respectively.

choice of which State to extradite a person to in cases where multiple extradition requests are received. The option of prosecution is not dependent on the refusal of an extradition request⁴⁷ (as it is under the more restrictive United Nations Convention against Transnational Organized Crime, which is discussed in chapter V of the present module).

The option to prosecute does not require actual prosecution in all cases, but that the case be submitted to prosecutorial authorities to consider prosecution in the same way as other criminal cases. Prosecutors may decide not to prosecute because there is insufficient evidence to obtain a conviction.

This “prosecute or extradite” obligation, coupled with the extraterritorial jurisdiction under the Geneva Conventions, ensures that, under those Conventions, there are no gaps in accountability for war crimes in international armed conflicts. War crimes committed abroad must always be prosecuted or an alleged offender extradited. If extradition is refused, or no extradition request is received, the custodial State must prosecute; if the custodial State does not wish to prosecute, it must extradite if a valid request is received.

The fact that the Geneva Conventions have no provisions facilitating the legal arrangements for extradition between States parties is a limitation. The availability of extradition depends on whether national laws (of both the requesting and requested State) and any extradition treaties (if they exist) provide for it. In practice, war crimes (as well as other international crimes) are often included in extradition treaties between States.⁴⁸

Another limitation is that the “prosecute or extradite” obligation in the Geneva Conventions applies only to war crimes in international armed conflict. Nonetheless, customary IHL requires that States cooperate in war crime proceedings relating to all armed conflicts, including non-international ones.⁴⁹ This includes an obligation on States of custody to duly consider an extradition request and, if it is refused, to prosecute in their own courts.

The Convention against Torture imposes a “prosecute or extradite” obligation⁵⁰ of a similar scope to that in the Geneva Conventions, as well as provisions facilitating extradition, which is not left up to whatever national laws and extradition treaties may provide. These provisions fill certain gaps or overcome certain restrictions in existing national laws or extradition treaties. The provisions on extradition of the Convention against Torture resemble those found in the majority of the international counter-terrorism conventions.⁵¹

In other respects, extradition is still subject to national and treaty law governing extradition, which can still present barriers to extradition, which may include rules on the non-extradition of

⁴⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, paras. 89–95 (www.icj-cij.org/en/case/144/judgments).

⁴⁸ ICRC, Customary IHL, Rule 161, International Cooperation in Criminal Proceedings (“There is uniformity of practice, both in treaty law and national law, to the effect that war crimes are subject to extradition under extradition treaties”) (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule161).

⁴⁹ *Ibid.*

⁵⁰ Convention against Torture, article 7 (1).

⁵¹ See United Nations Office on Drugs and Crime (UNODC), Module 2, *Universal Legal Framework against Terrorism*, Counter-terrorism Legal Training Curriculum (New York, 2017), paras. 67 and 68.

nationals, double criminality, specialty, fair trial, double jeopardy, non-retrospectivity, non-discrimination, *non-refoulement*, the interests of justice and humanitarian concerns.⁵²

Political offence exception to extradition

The “political offence” exception in national law and some extradition treaties allows a requested State to refuse an extradition request on the basis of the political character of an offence. It aims to ensure that the requested State does not interfere in an internal political struggle in the requesting State by taking the side of the government, and to protect political asylum. It typically applies to crimes such as treason, espionage and sedition, but it can also apply to political crimes involving certain kinds of violence.

The Genocide Convention requires States parties not to treat genocide as a “political” crime for the purpose of extradition (article 7). Its elimination recognizes that, even though genocide may be politically motivated or form part of a political struggle, it is so heinous that it must not be precluded from extradition just because it may have a political aspect.

No such provision is found in the four Geneva Conventions of 1949 or the Convention against Torture. However, in State practice it is widely accepted that war crimes⁵³ and other international crimes cannot be regarded as political offences for the purpose of refusing an extradition request. The exclusion of the political offence exception as a barrier to extradition is also an important element of the contemporary counter-terrorism conventions and protocols.⁵⁴

CROSS-REFERENCE The principle of *non-refoulement*, which requires that States must not extradite or otherwise return a person to a country where there is a well-founded fear of persecution or a real and foreseeable risk of other serious human rights violations, is discussed in chapter II of the present module.

Mutual assistance in criminal proceedings

The four Geneva Conventions do not explicitly require that States provide mutual assistance in criminal proceedings (such as in obtaining evidence or witnesses). However, such an obligation is found in Additional Protocol I of 1977 (article 88) and is also part of customary international law in relation to war crimes.⁵⁵ The Convention against Torture requires such assistance in relation to torture,⁵⁶ and bilateral or multilateral mutual assistance agreements may also provide for it.⁵⁷

⁵² See UNODC, Module 3, *International cooperation in criminal matters: counter-terrorism*, Counter-terrorism Legal Training Curriculum (New York, 2012), paras. 52–64; UNODC, *Manual on International Cooperation in Criminal Matters related to Terrorism* (New York, 2009), paras. 52–63.

⁵³ See ICRC, Customary IHL, Rule 161, International Cooperation in Criminal Proceedings (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule161).

⁵⁴ See 1997 Terrorist Bombings Convention, article 11, and 1999 Terrorism Financing Convention, article 14.

⁵⁵ ICRC, Customary IHL, Rule 161, International Cooperation in Criminal Proceedings.

⁵⁶ Convention against Torture, article 9.

⁵⁷ Adoption of the draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, part III (articles 16–32) would impose detailed mutual assistance requirements (see www.gov.si/en/registries/projects/mla-initiative).

National suppression related to the International Criminal Court

The 1998 Rome Statute established the ICC with jurisdiction to prosecute international crimes. It provided that the jurisdiction of ICC would be “complementary” to national criminal jurisdiction (article 1) and that the Court would not consider a case unless a State was unable or unwilling to genuinely investigate or prosecute (article 17 (1)(a)). Although the Statute does not require States parties to domestically enact or prosecute its international crimes, doing so is prudent and desirable since it enables States parties to:

- Enact the most recent rules on international crimes, including with regard to: the list and definition of crimes, modes of liability, exclusions from liability (such as no jurisdiction over children under the age of 18), no statutes of limitations, and defences (including the restriction of the defence of “superior orders”).
- Take primary responsibility for prosecuting international crimes, to do justice locally, so that it is unnecessary for ICC to exercise its complementary role.
- Facilitate specific obligations under the Statute to cooperate with ICC in investigations, arrest and transfer of suspects, removal of State immunity, and enforcement of sentences

ACTIVITY

Examine the following questions with regard to your national law:

- *Has your country incorporated the international crimes examined herein into domestic criminal law?*
- *What are the criteria for exercising jurisdiction over international crimes committed outside the territory of your country (for example, extraterritorial criminal jurisdiction)?*
- *Do the criteria for extraterritorial jurisdiction over international crimes differ from those for extraterritorial criminal jurisdiction over terrorism related offences? In what respect?*

2. International suppression of international crimes

In addition to domestic avenues of accountability for international crimes, a number of international accountability mechanisms have been established by States. No international court has universal jurisdiction to prosecute all international crimes. International criminal tribunals are historically rare and often limited to addressing specific conflicts (such as the Nuremberg and Tokyo tribunals formed to address crimes committed during the Second World War, or the creation of international tribunals by the Security Council for the conflicts in the former Yugoslavia and Rwanda in the 1990s). Although ICC is a permanent body, its jurisdiction is limited in different ways, as discussed below.

International Criminal Court

Under the Rome Statute, ICC can exercise subject matter jurisdiction over genocide, war crimes, crimes against humanity, and aggression⁵⁸ (article 5) committed after 1 July 2002 (article 11), but it has no jurisdiction over other crimes (including terrorism). Important preconditions pertaining to the jurisdiction of ICC include:

- The crime took place on the territory of a State party or a State accepting jurisdiction (article 12 (2)(a));
- The accused is a national of a State party or a State otherwise accepting its jurisdiction (article 12 (2)(b));
- The Security Council refers a situation to the Prosecutor, irrespective of the nationality of an accused or the place of the crime (article 13 (b)).

The jurisdiction of ICC thus primarily depends on the consent of States parties. Under normal circumstances, the Court cannot prosecute international crimes committed exclusively within the territory of a non-party State, unless the accused is a national of a State party or the Security Council has referred the matter to the Court (a power which is subject to the veto of each of the five permanent States members of the Council).

Investigations and prosecutions may be initiated by a State party referring a situation to the ICC prosecutor (articles 13 (a) and 14); or by the prosecutor investigating on his or her own motion (articles 13 (c) and 15), based on information provided by reliable sources.

The complementarity principle

Even in cases where ICC technically has jurisdiction, a case will only be admissible if a State (with jurisdiction) that is investigating or prosecuting the case “is unwilling or unable genuinely to carry out the investigation or prosecution” (article 17). This “complementarity” principle aims to ensure that national criminal justice systems are primarily responsible for bringing to justice those who commit international crimes. ICC will only step in where national legal systems are unable (for lack of capacity or a collapse in the local justice system) or unwilling (because they are shielding a perpetrator) to act. Other relevant factors include whether there has been an unjustified delay in national proceedings, or where the proceedings are not conducted independently and impartially.

In addition, a case may be declared inadmissible if it is not of “sufficient gravity” to justify action by ICC (article 17 (1)(d)), since the Court does not have the resources or capacity to prosecute every international crime within its jurisdiction worldwide. As a matter of policy, the ICC prosecutor focuses on cases of individuals who bear the greatest responsibility for crimes.

Cooperation of States with the International Criminal Court

ICC relies on the cooperation of States parties, and the Rome Statute provides for extensive general and specific obligations of cooperation and judicial assistance in proceedings

⁵⁸ As of 17 July 2018, ICC also has jurisdiction over the fourth crime under the Rome Statute, the crime of aggression, which deals with acts by persons “in a position effectively to exercise control over or to direct the political or military action of a State”. Different procedural rules regarding the jurisdiction of ICC apply for the crime of aggression (see articles 15bis and 15ter).

(articles 86–102) and the enforcement of sentences (articles 103–107). The Security Council may also require non-party States to cooperate with the Court.

The Office of the Prosecutor has reinforced the importance of national jurisdictions combined with ICC prosecutions within a “complementary system of criminal justice”. To that end it has adopted a strategy to cooperate with States who are investigating and prosecuting individuals who have committed or facilitated the commission of crimes under the Rome Statute or a serious crime under national law, including terrorism.⁵⁹ Such cooperation is made pursuant to article 93 of the Statute, which specifies the type of assistance as including, inter alia, the transmission of evidence obtained through an investigation or trial conducted by the Court, or the questioning of any person detained by the Court.

Unlike before national courts, where certain State immunities persist for serving heads of State and Government and other senior State leaders, an individual’s official capacity is not relevant before ICC (article 27). As discussed in more detail below, ICC also provides for the responsibility of commanders and other superiors (article 28) and restricts the scope of any defence of “superior orders” (article 33).

FOCUS BOX INTERNATIONAL CRIMINAL COURT CASES WITH A LINK TO TERRORISM

Mali

In the ICC case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, the defendant was a member of Ansar Dine, a group listed by the Security Council Committee concerning ISIL (Da’esh) and Al-Qaida and associated individuals, groups, undertakings and entities as a terrorist entity pursuant to Council resolution 2083 (2012). The case concerned the destruction of several historic mausoleums and mosques in Timbuktu, Mali, in 2012. ICC found Mr. Al Mahdi guilty, as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in June and July 2012 and was sentenced to nine years’ imprisonment.

Uganda

The ICC case of the *Prosecutor v. Dominic Ongwen* concerns a former commander of the Lord’s Resistance Army (LRA), an armed group listed as a terrorist entity by Uganda and the African Union.^a Mr. Ongwen has been convicted by the ICC Trial Chamber of war crimes and crimes against humanity covering attacks against camps for internally displaced persons, murder, torture, sexual violence and the conscription of child soldiers.^b

Afghanistan

In March 2020, the ICC Appeals Chamber authorized the Prosecutor to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan. The investigation concerns alleged crimes against humanity and war crimes by members of the Taliban and its affiliate, the Haqqani Network, listed as terrorist organizations by the Security Council pursuant to resolution 1988 (2001). The investigation also concerns alleged war crimes of torture

⁵⁹ ICC, Office of the Prosecutor, “Policy Paper on Case Selection and Prioritisation”, September 2016, para. 7 (www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf).

and cruel treatment, outrages upon personal dignity, rape and other forms of sexual violence by United States forces against conflict-related detainees suspected of being members of, or cooperating with, the Taliban and Al-Qaeda.

Nigeria

The ICC Prosecutor’s preliminary examination of the situation in Nigeria, involving crimes allegedly committed by Boko Haram members (see case study in section A above).

^aAfrican Union Peace and Security Council, communique, Addis Ababa, 22 November 2011, PSC/PR/COMM. (CCXCIX), para. 10 (www.peaceau.org/en/article/the-peace-and-security-council-of-the-african-union-au-at-its-299th-meeting-held-on-22-november-2011-adopted-the-following-decision-on-the-operationalization-of-the-au-led-regional-cooperation-initiative-against-the-lord-s-resistance-army-lra).

^b *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Judgment of 4 February 2021. At the time of writing, the trial judgment was still subject to appeal.

Special tribunals

On occasion, special hybrid tribunals have been established to deal with national or international crimes in specific conflicts, including conflicts in Cambodia, East Timor, Kosovo and Sierra Leone. The international community has also been involved in establishing or facilitating two tribunals to prosecute, under domestic law, two serious acts of terrorism: the “Lockerbie bombing” of an aircraft that crashed onto a street in the town of Lockerbie, Scotland, in 1988 and the Hariri bombing in Beirut, Lebanon, in 2005.

The Lockerbie bombing and a Scottish court sitting in the Netherlands

An early example of Security Council involvement in special terrorism prosecutions concerned the Lockerbie airline bombing over Scotland in 1988, which killed 270 persons, most of them citizens of the United States and the United Kingdom. In its resolution 731 (1992), the Security Council condemned Libya’s failure to cooperate in establishing responsibility for these “terrorist acts”.⁶⁰ In its resolution 748 (1992), the Council demanded that Libya comply with requests from France, the United Kingdom and the United States that it surrender the suspects for national trial.⁶¹

While Libya invoked its right to prosecute rather than extradite the suspects under the Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, the Security Council insisted on the surrender of the suspects out of concern over the involvement of the Libyan State in the bombing and the risk that a trial held in Libya would not be genuine. Its demand was upheld by the International Court of Justice in a preliminary proceeding. Following a negotiated settlement, formalized by the Security Council in its resolution 1192 (1998), Libya handed over two suspects for trial before a Scottish court sitting in the Netherlands, which applied domestic law to convict one suspect of 270 counts of murder.⁶²

⁶⁰ Security Council resolution 731 (1992), paras. 2 and 3.

⁶¹ Security Council resolution 748 (1992), para. 1 and paras. 4–7, respectively.

⁶² *Her Majesty’s Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah*, High Court of Justiciary at Camp Zeist, The Netherlands, Case No. 1475/99, 31 January 2001 (www.scotcourts.gov.uk/search-judgments/judgment?id=040987a6-8980-69d2-b500-ff0000d74aa7).

The Hariri bombing and the Special Tribunal for Lebanon

The Special Tribunal for Lebanon was established to bring to justice those responsible for a massive car bombing in Lebanon in 2005, which killed former Prime Minister, Rafik Hariri, and 21 others. It was created by the Security Council in 2007,⁶³ after Lebanon's parliament failed to ratify an agreement between the United Nations and Lebanon to create it. While the Special Tribunal has a mixture of Lebanese and international judges, and is seated in the Netherlands, its jurisdiction is limited to the crime of terrorism under Lebanese domestic law⁶⁴ and it has no jurisdiction over international or transnational crimes. In 2020, following a trial in absentia, it convicted one person of committing a terrorist act, conspiracy to commit a terrorist act, homicide against 22 people and attempted homicide of 226 injured persons.⁶⁵ Three co-accused were acquitted. The Court is still investigating related attacks on other Lebanese politicians.

Other international accountability mechanisms

States Members of the United Nations have established other, subjudicial mechanisms to contribute to accountability for the most serious crimes under international law, including by collecting and analysing evidence and preparing case files to facilitate eventual national (and possibly international or regional) prosecutions.

Syrian Arab Republic

In 2016, the General Assembly established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM). As its name suggests, its purpose is to assist in the investigation and prosecution of genocide, crimes against humanity and war crimes committed in the Syrian Arab Republic.⁶⁶

The IIIM has a dual mandate: (a) it first is tasked to collect, consolidate, preserve and analyse evidence of violations of IHL and human rights violations and abuses, whether from other actors or through interviews, witness testimony, documentation and forensic material;⁶⁷ and (b) to prepare case files, share information and facilitate criminal proceedings against the most responsible alleged offenders (including State officials) in national, regional or international courts and tribunals, which have or may have jurisdiction over these crimes.⁶⁸

Iraq

The United Nations Investigative Team to Promote Accountability for Crimes Committed by of Da'esh/Islamic State in Iraq and the Levant (ISIL) (UNITAD) was created by the Security Council, pursuant to its resolution 2379 (2017), at the request of Iraq, to support the Iraqi authorities in holding ISIL (Da'esh) to account for war crimes, crimes against humanity and

⁶³ Security Council resolution 1757 (2007).

⁶⁴ *Ibid.*, annex, attachment, statute of the Special Tribunal for Lebanon, article 2 (a).

⁶⁵ Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al.*, Judgment, (STL-11-01/T/TC) (18 August 2020) (www.stl-tsl.org/en).

⁶⁶ General Assembly resolution 71/248.

⁶⁷ Report of the Secretary-General on the implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) (A/71/755, annex).

⁶⁸ *Ibid.*

genocide.⁶⁹ UNITAD works in cooperation and consultation with Iraq.⁷⁰ Similar to IIIM, its investigative focus is on those most responsible for the atrocities committed by ISIL (Da'esh), including those who ordered such crimes. Its functions focus on:

- The collection of existing documentary and testimonial evidence obtained from Iraqi national authorities, other national governments, victims and witness groups, civil society and international and regional organizations.
- The compilation and analysis of this evidentiary material.
- Field-based investigations to obtain physical, forensic and testimonial evidence.
- The preservation and storage of evidence.
- Producing case files to support domestic proceedings in Iraq and in other Member States.⁷¹ To give one example, UNITAD facilitated the war crimes prosecution in Finland of two persons accused of participating in the “Camp Speicher” massacre committed by ISIL in Iraq in 2014,⁷² where 1,700 military prisoners were murdered.

Regional jurisdiction and prosecution

No criminal courts have yet been established by regional organizations. A 2014 treaty of the African Union, not yet in force, proposes to confer “international criminal jurisdiction” to a reformed regional court of the African Union.⁷³ The Court would have jurisdiction over a combination of transnational and international crimes, including terrorism. The terrorism offence (article 28 G) is modelled closely on the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism 1999.⁷⁴ It is proposed that cases could be submitted to the Court by African States parties; the African Union Assembly, Parliament, Peace and Security Council and other authorized organs; the prosecutor; and accredited African individuals or non-governmental organizations (articles 15 and 16).

C. Strategic and practical considerations for the prosecution of international crimes perpetrated by members of terrorist groups

International crimes and terrorism offences, particularly when committed in the context of armed conflict or widespread violence, can share certain characteristics which make their investigation and prosecution highly complex. Attention to these common challenges is essential to

⁶⁹ In response to the call from Iraq for international assistance in ensuring that members of ISIL (Da'esh) are held accountable for their crimes in Iraq; see S/2017/710, annex.

⁷⁰ First report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (S/2018/1031, paras. 8–17).

⁷¹ *Ibid.*, para. 30.

⁷² Tenth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security (S/2020/95, para. 70).

⁷³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of 2014, annex (<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>).

⁷⁴ Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism, 1999 (adopted 14 July 1999, entered into force 6 December 2002) (United Nations, *Treaty Series*, vol. 2219, No. 179).

enable the prosecution of conduct as international crimes or terrorist offences. These include that:

- Crimes may be committed by large numbers of offenders, organized in structured organizations; and behind those directly perpetrating violence there may be an apparatus of military or political leaders, organizers, financiers, recruiters, aiders and abettors. An investigation and prosecution strategy that only brings to justice those directly engaged in carrying out specific attacks will fall short in terms of justice and deterrence.
- The gravity of the crimes results not only from the underlying acts, but also from contextual elements, such as being part of a widespread or systematic attack against a civilian population in the case of crimes against humanity, the link to armed conflict in the case of war crimes, the special intent to destroy a group in the case of genocide, or the terrorist purpose of intimidating a population or coercing a government or an international organization in the case of terrorism.
- Oftentimes, a significant number of victims may require assistance, support and justice, among them particularly vulnerable victims, such as victims of sexual violence and child victims.
- Evidence of the crimes and involvement of specific perpetrators may be located in conflict zones or foreign jurisdictions and be difficult to access for criminal investigators.
- Investigations and prosecutions can be lengthy and expensive, involve uncertainties in the jurisprudence and require specialized expertise and resources.
- The crimes committed may be linked to longstanding intercommunal political, ethnic or religious conflicts, or other structural conditions conducive to violence, requiring political solutions and reconciliation in addition to justice.

The following section explores several legal and practical issues – linked to these common characteristics of international crimes and terrorist offences – which investigators, prosecutors, judges and criminal justice policymakers should take into account in responding to situations where crimes committed by terrorists may also constitute core international crimes. These include some of the advantages or disadvantages of considering different types of charges.

1. International crimes as “system crimes”

International crimes, particularly genocide and crimes against humanity, differ from many ordinary crimes in that they are generally of such a scale that they require a degree of organization or system to perpetrate. “System crimes ... are generally characterized by a division of labour between planners and executants, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish. ... The crimes usually affect large numbers of victims, and these issues of scale and context make investigations more logistically difficult.”⁷⁵

⁷⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (New York and Geneva, 2006), p. 12 (www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf).

In some contexts, the offences committed by members of terrorist groups, particularly when the group exercises control over territory and a population, or when committed in the context of armed conflict, or when undertaken as part of an organizational policy to attack a target group, also share the characteristics of “system crimes”. In these cases, it is important for countries to have a strategic approach to investigations and prosecutions that takes into account the characteristics of this type of criminality.

Counter-terrorism conventions and protocols take into account that acts of terrorism are mostly committed not by individuals acting on their own, but by groups of persons with different roles in the commission of the crimes. They therefore require Member States to ensure that not only the immediate perpetrators of acts of terrorism are brought to justice, but also anyone who “organizes or directs others to commit an offence”, “participates as an accomplice”, or “in any other way contributes to the commission of one or more offences ... by a group of persons acting with a common purpose”.⁷⁶ Moreover, terrorist financing is a particular type of preparatory support for terrorism which is specially criminalized, even if a terrorist act does not actually occur. Some of the more recent conventions also establish the liability of legal entities (such as corporations or non-governmental organizations), in addition to natural persons.

2. Prosecutions focusing on those with the greatest degree of responsibility and “modes of liability” for international crimes

Prosecutorial strategy

To respond to the nature of system crimes it is important to prosecute those with the greatest degree of responsibility, not only their subordinates. Perpetrators of international crimes and of acts of terrorism often attempt to justify their crimes in ideological terms. Arguably, therefore, the goals of prosecuting such crimes should be broader than effecting retribution on those who physically committed the crimes. Condemning and deterring international crimes will be most effective if those responsible for the formulation of the policies and strategies that led to the crimes are also held to account.⁷⁷ It can sometimes be difficult, however, to obtain sufficient evidence to prove the responsibility of senior leaders and doing so may require considerable efforts.

Prosecutorial strategies may differ between national and international courts. Whereas national prosecutions may seek to hold as many perpetrators as possible to account, ICC focuses on those most responsible for international crimes.⁷⁸ This is because it is not feasible for ICC to prosecute all international crimes and its limited resources are best deployed to punish and deter those most responsible.

Modes of liability

In international criminal law, the law regarding the so-called “modes of liability” is an important tool to ensure that a wide range of persons beyond low-level executants can be held responsible

⁷⁶ See International Convention for the Suppression of Terrorist Bombings, article 2 (3) (United Nations, *Treaty Series*, vol. 2149, No. 37517).

⁷⁷ OHCHR, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (2006), p. 8 (www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf).

⁷⁸ ICC, Regulations of the Office of the Prosecutor, Regulation 34(1) (ICC-BD/05-01-09).

for international crimes, particularly those in positions of command or other superior responsibility.

This area of law differs across ICC, the ad hoc international courts and tribunals and in customary international law, but it is useful to illustrate some fundamental concepts on the basis of the Rome Statute, which recognizes two forms of criminal responsibility: direct individual responsibility; and command or superior responsibility.

Under article 25 (3)(a) of the ICC Statute, an individual person may be held directly responsible as a principal. This form of liability may be attributed not only to those who physically carry out an offence as an individual or jointly with another, but also to those who are involved in controlling whether and how the offence is carried out, despite not physically being involved in its commission.

Accessory liability may be attributed to those who order, solicit or induce the commission of a crime (article 25 (3)(b)), who facilitate, aid, abet or otherwise assist with the commission of a crime (article 25 (3)(c)), or intentionally contribute in any other way to the commission of a crime by a group of persons acting with a common purpose (article 25 (3)(d)).

Military or civilian superiors can also be held criminally responsible for failing to prevent or punish offences committed by their subordinates through the doctrine of command or superior responsibility. Article 28 of the Rome Statute distinguishes between the responsibility of: (a) military commanders, or those effectively acting as military commanders, and (b) superiors who do not fall within the scope of (a), which could include civilian leaders. Contrary to direct individual responsibility, command or superior responsibility derives from the responsibility held by superiors given the powers of control they exercise over their subordinates.⁷⁹

Command or superior responsibility links a leader to crimes committed by members of that group without the need to prove the leader's direct or personal involvement in or planning of these crimes.⁸⁰ For example, a military commander may be responsible where they knew, or should have known, that subordinates were committing or were about to commit international crimes, but "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission."⁸¹ This is wider than other modes of liability, including those which may apply to national terrorist offences. It may also provide a means to target multiple levels of culpability within a single chain of authority or command.⁸² Subordinates ordinarily remain responsible for their own crimes even if acting on superior orders.⁸³

In the case of terrorist groups, the application of command responsibility will have to be based on the specific facts of the case. It will depend on whether the group has a chain of command through which its leaders are able to exercise the requisite kind of authority over its members.⁸⁴ Its use in domestic prosecutions will also depend on whether it has been incorporated into domestic law, as many States have done in their criminal laws and military manuals.

⁷⁹ See ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, para. 172 (www.icc-cpi.int/car/bemba).

⁸⁰ Mettraux, Guénaél, *The Law of Command Responsibility* (Oxford University Press, 2009), p. 117.

⁸¹ Rome Statute, article 28 (a)(ii); the test for civilian superiors is somewhat less stringent (Rome Statute, article 28(b)).

⁸² Rome Statute, article 28 (b).

⁸³ *Ibid.*, article 33.

⁸⁴ Mettraux, Guénaél, *The Law of Command Responsibility*, pp. 114 and 115.

3. Strategic and comprehensive collection of evidence to prove all elements of international crimes

Investigators and prosecutors seeking to prove international crimes must be aware of the need to gather evidence to establish beyond a reasonable doubt:

- The underlying act, for example, murder, torture and rape.
- The contextual elements of a war crime, a crime against humanity or a genocidal act (as discussed above under section A).
- The “mode of liability”.
- The mental elements (including any special intent elements).

With regard to higher level suspects, it is essential to gather evidence that may assist in establishing the responsibility of those who ordered or directed those acts or tolerated and failed to prevent crimes committed by their subordinates. This could include information indicating a chain of command or hierarchy, reporting procedures or communications within a group or evidence of the suspect’s ability to issue orders and such orders being relied upon.

ACTIVITY

Armed group X, which is designated as a terrorist group by the government of Blue Country, is engaged in a guerrilla type armed conflict with the army of Blue Country in the poor mountainous southern region of the country.

Three months ago, elements of group X entered a village in the southern region, seized 30 villagers and summarily executed them. Following the execution, the leader of group X released a statement on social media stating that the killings were the deserved punishment for the village’s collaboration with the army.

Subsequently, the leader of group X was captured in a remote hideout, where he seems to have been in hiding for at least a year.

The chief prosecutor of Blue Country wants to hold the leader of group X accountable for the killing of the 30 villagers. She asks you to advise her on what elements the prosecution would need to prove the liability of the group leader for the killings under (a) international criminal law, (b) terrorist offences and (c) general criminal law.

Assume that Blue Country has incorporated the crimes and modes of liability under the Rome Statute into its domestic law and that the Blue Country’s terrorism offences and other criminal law are the same as in your jurisdiction.

4. Use of information collected by the military as evidence

To enable the successful prosecution of crimes committed by members of terrorist groups, including international crimes, it is increasingly necessary to collect, handle, preserve and share information in challenging conflict or post-conflict environments, in accordance with relevant domestic and international law. In some exceptional situations where civilian law enforcement

officials may not be able to investigate terrorism-related crimes due to active conflicts, frontline military personnel may exceptionally undertake tasks conventionally assigned to law enforcement, such as the collection of sources of information that may have evidentiary value when used at later stages for pursuing investigations and prosecutions.

The possibility of evidence collection may arise, for example, where the military is the first responder to the scene of a terrorist attack, in the course of a military mission aimed at collecting intelligence or in the course of routine surveillance. Military personnel may be required to secure and investigate a site, bag and tag physical material or interview persons who appear to have knowledge about an attack. A failure to collect and share material and information properly, in accordance with the rule of law and human rights, may compromise subsequent criminal investigations and prosecutions, since their value as evidence may be contaminated or destroyed before civilian criminal justice officials can arrive at the scene (if they are able to come at all).

The following recommendations are contained in the “Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences” (“Military Evidence Guidelines”):

- A clear national legal authorization should be provided for the military to assist in the collection, handling, preservation and sharing of information that may subsequently be relevant to investigation and prosecution.
- Military personnel must respect international law, including the principle of sovereignty, international human rights and humanitarian law, when collecting information that may be used as evidence in court.
- Inter-agency cooperation and coordination between the military and civilian law enforcement actors and prosecutors is critical in order to facilitate the collection, identification, preservation and sharing of information that may be used as admissible evidence in court.
- States should provide skills training to military personnel with a mandate to collect, identify, handle, preserve and share information, particularly in sensitive interviewing of victims and witnesses, in a gender-sensitive and child-sensitive way, in order to prevent revictimization.
- Arrest and detention of suspects must be carried out in accordance with the rule of law, international human rights and humanitarian law. This includes the prohibition of torture, inhuman and degrading treatment (information obtained by these methods would, in any event, be inadmissible in criminal proceedings), and obligations to ensure adequate conditions of detention and access to counsel.
- Standard operating procedures should be developed to guide the military on all procedures related to collection, preservation and sharing of different types of sources of information, including, inter alia, digital material and biometric data.
- Military personnel should assess, in cooperation with law enforcement, how best to respect chain of custody principles in the collection, identification, handling, preservation and sharing of sources of information that can be used later as evidence.

5. Prosecuting sexual and gender-based violence perpetrated by terrorist groups

As stressed by the Security Council, “acts of sexual and gender-based violence in conflict can be part of the strategic objectives and ideology of, and used as a tactic by certain parties to armed conflict, including non-State armed groups, designated as terrorist groups...”⁸⁵ In a number of United Nations reports, it has been established that this type of violence is carried out by terrorist groups, including ISIL (Da’esh), Boko Haram, Al-Shabaab, Ansar Dine, Al-Qaida in the Islamic Maghreb and the Al-Nusra Front.⁸⁶

The documented egregious forms of sexual and gender-based violence include rape and other forms of sexual assault of women and girls, as well as men and boys; forced marriage, including forced child marriage, sexual slavery, forced pregnancy and forced abortion. Women have also been victims of gender-based killings, subjected to violence for failing to conform to discriminatory gender roles and coerced to act as human shields or to detonate bombs. In some contexts, this conduct is associated with trafficking in persons undertaken by terrorist groups, as discussed in chapter V of the present module on transnational organized crime.⁸⁷

Sexual and gender-based violence by members of terrorist groups may constitute war crimes, crimes against humanity or acts of genocide. Indeed, because most counter-terrorism legislation does not criminalize sexual and gender-based violence offences, prosecution as international crimes may be the best avenue to hold perpetrators accountable. In his 2017 report on women and peace and security, the Secretary-General called upon national justice systems to investigate and prosecute such crimes:

Moreover, in the prosecution of members of terrorist and violent extremist groups, consideration must be given to the gender-related nature of crimes and indeed the full body of international criminal law, including crimes against humanity and genocide, and not be limited to only the terrorist crimes themselves.⁸⁸

Sexual and gender-based violence as genocide

The definition of genocide in article II of the Genocide Convention includes imposing measures intended to prevent births within a group, which was interpreted by ICTR in the *Prosecutor v. Akayesu* case to encompass sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriage.⁸⁹ In that case, the Tribunal recognized rape and sexual violence as an act of genocide.

As discussed, in section A above, sexual and gender-based crimes were found by the Independent International Commission of Inquiry on the Syrian Arab Republic to be among the underlying acts of genocide committed by ISIL (Da’esh) against the Yazidis.

⁸⁵ Security Council resolution 2467 (2019), para. 28.

⁸⁶ See reports of the Secretary-General on conflict-related sexual violence, S/2015/203, S/2016/361/Rev.1, S/2017/249 and S/2018/250.

⁸⁷ See Security Council resolutions 2195 (2014), 2331 (2016) and 2388 (2017).

⁸⁸ S/2017/861, para. 61.

⁸⁹ See ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Case No. ICTR-96-4-T, T.Ch.I, Judgment of 2 September 1998, para. 507.

Sexual and gender-based violence as a war crime

Under article 8 of the Rome Statute, sexual and gender-based offences constituting underlying acts of war crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other forms of sexual violence constituting a serious violation of common article 3 of the four Geneva Conventions.

Sexual and gender-based violence as a crime against humanity

Furthermore, under the Rome Statute, sexual and gender-based offences constituting underlying acts of crimes against humanity include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity (article 7 (1)(g)). Other forms of crimes against humanity that may be perpetrated using sexual violence or on the basis of gender include murder (article 7 (1)(a)), torture (article 7 (1)(f)), persecution (article 7 (1)(h)), other inhumane acts (article 7 (1)(k)), enslavement (article 7 (1)(c)) and imprisonment (article 7 (1)(e)). The sexual and gender-based crimes were found by the Independent International Commission of Inquiry on the Syrian Arab Republic to be an underlying act of crimes against humanity committed by ISIL (Da'esh) against the Yazidis that are discussed in section A.3 above.

ACTIVITY PROSECUTING SEXUAL AND GENDER-BASED VIOLENCE BY MEMBERS OF TERRORIST GROUPS

As reported by the United Nations High Commissioner for Human Rights:

“Since 2009, Boko Haram subjected women and girls to widespread and severe abuses, including sexual slavery, sexual violence, forced marriages, forced pregnancies and forced conversions. The group justifies such practices by its conception of the role of women and girls in society. In one video message in which the group claimed responsibility for the abduction of the Chibok girls..., Shekau stated that ‘God instructed me to sell them, they are his properties and I will carry out his instructions’. In another message, he spoke of abducted girls as ‘spoils of war’.”^a

Discuss:

- *What offences could a member of Boko Haram involved in the above sexual and gender-based violence be charged with under your country’s laws (assuming jurisdictional requirements are met)?*
- *What would be possible advantages and disadvantages of prosecuting a suspect on international crimes charges, on charges related to terrorism offences or for ordinary crimes such as kidnapping and rape?*

Note: These questions are discussed in more detail in UNODC *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019).

^a See A/HRC/30/67, para. 38.

6. Choice of charges and cumulative prosecution for terrorism offences and international crimes

Where a person is suspected to have committed both terrorism offences and international crimes, and international crimes are criminalized under national law, prosecutors may be able to charge either terrorism offences, or international crimes, or both cumulatively.

In making this decision, they should take into account:

- The evidence available to prove the elements of a particular offence, including whether the contextual elements of international crimes can be proven, such as the existence of an armed conflict, or of a widespread or systematic attack against a civilian population in the case of crimes against humanity. Likewise, the contextual elements of certain terrorist offences (such as a specific intent to intimidate a population or compel a government or international organization) may present their own evidentiary and legal challenges.
- The relatively clear, internationally accepted definitions of international crimes and of offences under counter-terrorism conventions, and associated jurisprudence, compared with divergent or ambiguous definitions of other terrorist offences under national law and potential uncertainties in their interpretation;
- The importance of acknowledging – symbolically and practically (through higher penalties) – the full gravity of the crimes committed and of the harm caused to victims. In this regard, while some terrorism-related offences such as membership in a terrorist group, supporting a terrorist group or travelling for terrorist purposes may be more easily proved, they may lack the gravity of charges such as murder or rape as a war crime or crime against humanity. Most importantly, they may fail to adequately reflect the harm inflicted upon victims and the national and international community, and thus fail to adequately denounce and stigmatize the conduct or vindicate victims' rights.
- The broader scope to hold high-level suspects accountable for crimes committed by subordinates offered by certain “modes of liability” under international criminal law (especially the doctrine of command responsibility and the absence of limitation of a defence of superior orders). At the same time, terrorist offences may offer their own advantages in establishing wider preparatory liability (as in relation to terrorist financing, travel or support, or various crimes related to terrorist organizations).
- The availability of remedies for victims that may be specifically linked to either international crimes or terrorism, including rights to truth, justice and reparation (including compensation), and wider collective aims of non-repetition and reconciliation, including through transitional justice mechanisms and processes.
- Any jurisdictional advantages or limitations involving the different crimes, bearing in mind that international crimes attract universal jurisdiction, whereas terrorist offences may sometimes be more jurisdictionally limited (whether under counter-terrorism conventions or under national law).
- Possible differences between the tools available for international collaboration in criminal matters, depending on whether individuals are charged with terrorism or international crimes, including as regards exchange of information, law enforcement cooperation, mutual assistance, and extradition.

- The principle of *ne bis in idem*, which limits the possibility of a defendant being prosecuted several times on charges related to the same acts, although this will generally not be a bar to cumulative prosecutions since international crimes and terrorism offences tend to have distinct elements.
- The consistency of using terrorist offences, on the facts of specific cases, with international human rights law and international humanitarian law.
- Any comparative resource implications and expertise in prosecuting certain offences.

Where feasible, cumulative charging of both terrorism offences and international crimes can offer significant advantages, as observed in a study regarding the prosecution of foreign terrorist fighters in European countries:

“Some EU Member States have already demonstrated that it is possible to cumulatively prosecute and bring to justice FTFs for both sets of criminal acts – core international crimes and terrorism-related offences. Prosecuting terrorism offences combined with acts of war crimes, crimes against humanity, genocide or other criminal acts brings numerous advantages and ensures the full criminal responsibility of perpetrators, delivers more justice for victims, and results in higher sentences. Additionally, the statute of limitations is not applicable to core international crimes and perpetrators could be held responsible for these crimes in future decades.”⁹⁰

The case of *Abdelkarim El-B.* (see case study in section A. above) illustrates the advantages of cumulative prosecution. In that case, the German prosecutors brought charges for a terrorism related offence, a war crime and an offence related to illicit possession of weapons.

Whether terrorism offences and international crimes are prosecuted cumulatively, or one category of offences is preferred over the other, Member States should establish mechanisms to ensure close collaboration between investigators and prosecutors specializing in terrorism cases and those specializing in international criminal law.

TOOLS

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⁹⁰ European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes and EUROJUST, *Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences* (2020), p. 5 (www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related).

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Self-assessment questions

1. List the two elements of the crime of genocide.
2. What are the elements of the war crime of spreading terror among civilians? What distinguishes this offence from terrorism related offences?
3. List the elements of crimes against humanity.
4. Explain universal jurisdiction over war crimes under the 1949 Geneva Conventions.
5. Explain the requirements for the International Criminal Court to exercise jurisdiction over crimes committed by members of terrorist groups.
6. How is the concept of “system crimes” relevant to the prosecution of crimes committed by members of terrorist groups?
7. Describe the difference between liability for ordering the commission of a crime under article 25 of the Rome Statute of ICC and responsibility of military or civilian superiors under article 28 of the Rome Statute.
8. List three recommendations related to the role of the military in securing evidence of international crimes and terrorism offences.
9. Why is international criminal law particularly important in efforts to hold members of terrorist groups accountable for sexual and gender-based violence offences?
10. List three advantages of cumulative prosecution of terrorism offences and international crime.



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