

Acts of terror, “terrorism” and international humanitarian law

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Since time immemorial civilians have been victims of terrorist acts. Ordinary people going to work by bus or having coffee on the sidewalks are the usual target of indiscriminate violence, not well-known players on the domestic or international scene but bystanders. It may, however, also happen that an act of terrorism strikes persons in the limelight: government officials, opposition leaders, military or police personnel. Such recourse to unchecked and indiscriminate violence has always been deemed contrary to fundamental rules of law, whether enshrined in international treaties protecting the human being or codified by domestic law, in particular criminal law. No civilization, no creed — and no decent human being —condones acts of terrorism. Moreover, terrorists have always been prosecuted for their crimes.

Terrorist attacks on human lives and property have not only brought suffering and distress to the individual victims, but have often had far-reaching consequences for the life of a nation or even the course of history. In 1914, for example, the killing in Sarajevo of the Austrian Crown Prince triggered the outbreak of the First World War. That event and the revolution which in 1917 disrupted the Russian Empire signalled the end of a long period of stability in nineteenth-century Europe. The twentieth century has seen a spate of terrorist acts all over the world. Few recent conflicts have not been characterized by appalling acts of cruelty against civilians, perpetrated with the sole aim of terrorizing the civilian population of a country at war. To mention only a few examples, there was the war which led to an independent Algeria, the crushing of independence movements by the Soviet Union, the various armed conflicts in Indochina, in particular during the involvement of American and Allied forces in Vietnam, the mass murder of the Cambodian people, the civil war in Sri Lanka and in several African

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countries, the armed conflict in Colombia, the events which have shaken Northern Ireland for years and, of course, the wars in the Middle East, in particular the ongoing tragedy in Palestine.

A cursory look at the contexts in which these events took place shows that acts of terrorism are usually part of or indirectly linked in some way to an armed conflict, i.e. a situation in which peaceful ways of settling disputes among contending groups have failed to end the conflict. It should not, however, be overlooked that acts of terrorism have also been committed in (apparently?) "normal" times.

The 1970s witnessed a large number of terrorist acts against civilians, the more spectacular of which were linked to the conflict between Israel, the Palestinian people and some Arab States. That was also the time when "terrorism" in general and the international response to such events were placed on the agenda of the United Nations and international governmental organizations. Scholars and the media likewise took up the subject. Moreover, under the headings of "wars of national liberation" and guerrilla warfare, terrorism became a dominant issue for the Diplomatic Conference which brought about the adoption, on 8 June 1977, of the two Protocols Additional to the Geneva Conventions of 12 August 1949. Having launched the process of updating international humanitarian law, the International Committee of the Red Cross was suddenly confronted with the problem.

The destruction, by hijacked passenger planes, of the World Trade Centre's Twin Towers in New York and part of the Pentagon in Washington D.C. on 11 September 2001, and the subsequent armed campaign led by the United States against Afghanistan "to destroy terrorism", have once again thrust "terrorism" to the forefront of international concern. The worldwide reaction to these events has been particularly intense, among other things because of the obvious link between them and the more than thirty years' conflict in the Middle East over the destiny of the Palestinian people. The world is seeing the use of a considerable amount of violence to support or counter the goals of the contending parties. Suicide attacks by Palestinians against civilians on Israeli territory and retaliatory incursions by the Israeli armed forces into the territories of the West Bank and Gaza, with casualties among the civilian population and destruction of the civilian infrastructure, particularly housing, have generated an incredible degree of hatred between two peoples which history and geography have condemned to live side by side.

In an article published in 1986, I examined the response of international law, in particular international humanitarian law, to terrorist acts and those who commit them.¹ The main conclusion was that existing humanitarian law prohibits any conceivable form of terrorism committed in an armed conflict and that, at first sight, there was no reason to propose amendments to the 1949 Geneva Conventions. The analysis made in 1986 appears to be still valid today. Yet the world has changed in many respects in the last two decades and a fresh look at the response of international humanitarian law to terrorism may be useful.

The following major developments have no doubt had a substantial impact on the context in which international humanitarian law operates:

- Bipolarity, in which one superpower checks and counterbalances all the movements of the other superpower, has ceased to be the main characteristic of the world order. The Cold War is over. Today there is but one State with the power to control, or at least influence, events all over the world, namely the United States. At the same time, so-called "wars by proxy" have become less important.
- The fight against the remnants of colonialism is no longer an issue today. This means that sometimes painful debate along the lines of "your terrorist is my freedom fighter" (and vice versa) has almost disappeared.
- The development of information techniques has made possible instant communication worldwide.
- At the same time, the international community has shown a new concern for respect for the fundamental human rights of individuals and has strengthened international control mechanisms to guarantee such respect, *inter alia* by creating judicial bodies to bring perpetrators to justice, and in particular by adopting the Rome Statute establishing the International Criminal Court (ICC).

These developments have a bearing on our topic, not so much on the rules prohibiting terrorism as on the measures taken to counter terrorist violence. Indeed, never before have governments engaged their armed forces on foreign territory with the intent to combat and even liquidate what they perceive as "terrorists". In other words, "war against terrorism" has become a justification for the use of armed force against another country. While the notion of "war" against terrorism is a political slogan — comparable to the

¹ See Hans-Peter Gasser, "Prohibition of terrorist acts in international humanitarian law", *International Review of the Red Cross*, July/August 1986, No. 253, 1986, p. 200.

"war" against poverty or the "war" against AIDS — the attack on a third country transforms such a campaign into an armed conflict in the sense of the laws of war. On the other hand, the jurisdiction of the ICC to try persons accused of serious acts of terrorism makes prosecution of terrorists an international concern, while at the same time exerting pressure on States to prosecute such individuals under their domestic criminal jurisdiction.

This is not the place to examine whether the use of force against another State "to combat terrorism" is compatible with existing international law on the right to use force, in particular with the Charter of the United Nations.² The United States has based its armed intervention in Afghanistan on its inherent right of self-defence as confirmed by Article 51 of the Charter, a legal position which seems to be generally accepted. It is undisputed that counter-terrorist actions transcend individual national jurisdictions and thus go beyond domestic law enforcement. It may even be argued that such campaigns transcend law enforcement as such. Is it the perceived "national interest" of a State which primarily dictates the response to terrorist actions, if the alleged perpetrators of the crime are beyond the reach of its jurisdiction?

This article first discusses the provisions of international humanitarian law which prohibit acts of terrorism. In the second part, some legal issues raised by responses to terrorist acts, i.e. by counter-terrorist operations or, as politicians and the media have come to call it, the "war on terrorism", will be considered. Finally, it will be asked whether existing international rules are sufficient to ban terrorism at the international level.

Prohibition of terrorism by international law

International treaty law

There is at present no universal treaty which comprehensively prohibits terrorism and applies in all circumstances. The only attempt to elaborate such a treaty, the *Convention for the Prevention and Punishment of Terrorism* drafted in 1937 by the League of Nations, never entered into force.

Over the last few decades the United Nations has adopted a number of treaties dealing with specific aspects of terrorism, of which the following conventions are the most important:³

2 A lively debate among international lawyers has already produced abundant literature on the subject.

3 A comprehensive list of treaties on terrorism can be found at <<http://untreaty.un.org/English/Terrorism.asp>>.

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973
- Convention against the Taking of Hostages, 1979
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
- International Convention for the Suppression of Terrorist Bombings, 1997
- International Convention for the Suppression of the Financing of Terrorism, 1999

In recent years, an ad hoc committee established by the United Nations General Assembly has been working on the text of a *Comprehensive Convention on International Terrorism*.⁴ At the time of writing, negotiations are still under way.

Initiatives to combat terrorism by adopting international instruments have also been taken at a regional level: the *European Convention on the Suppression of Terrorism*, of 1977, deals with aspects of the fight against terrorism in Europe, and in June 2002, States party to the Organization of American States (OAS) adopted an *Inter-American Convention against Terrorism*.

The main treaties of international humanitarian law which have a bearing on the issue are the four *Geneva Conventions of 12 August 1949 for the protection of war victims*,⁵ supplemented by their two 1977 Additional

⁴ UNGA Res. 51/210, 17 December 1996. For information on the work of the Ad Hoc Committee established by Resolution 51/210 see its yearly reports. At the time of writing, the most recent source of information is: *Measures to Eliminate International Terrorism*, Report of the Working Group, A/C.6/56/L.9, 29 October 2001.

⁵ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. 190 States are party to these Conventions (at 30 June 2002).

Protocols.⁶ Many other treaties deal with aspects of armed conflict and thereby indirectly with terrorism, such as the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954).

It should, of course, not be forgotten that all States (supposedly) prohibit recourse to terrorist acts by domestic legislation, in particular criminal law.

Definition

None of the aforesaid treaties has established a definition of “terrorism” or “terrorist acts”. Terrorism is a social phenomenon with many aspects which vary from case to case. Neither experts in international law nor government representatives have yet agreed on a comprehensive and widely acceptable definition. The only text dates back to the 1937 *Convention for the Prevention and Punishment of Terrorism*, which defined acts of terrorism as

“criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public”.

This definition is not very explicit, as the text refers only to “criminal acts” and does not specify which acts are illegal in the context of terrorism.

The draft UN *Comprehensive Convention on International Terrorism* as formulated by the Ad Hoc Committee and its Working Group ventures the following definition of terrorist acts (Article 2):

“Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

- Death or serious bodily injury to any person; or
- Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”⁷

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (160 and 153 States parties respectively as at 30 June 2002).

⁷ Report of the Working Group – see note 4.

Whether this text will become a universally accepted reference for coming to grips with the phenomenon of terrorism remains to be seen.

There is no intention in the present article to work out a definition of terrorism or terrorist acts. The many attempts to do just that have shown that the issue is fraught with political considerations which do not lend themselves to reasonable and broadly acceptable legal definitions. Moreover, the notion of terrorism is changing with the passage of time. It has been broadened of late to cover such phenomena as cyber-terrorism and illegal financial transactions across national borders. As long as there is no consensus on how to respond to the phenomenon, agreement on definitions is unlikely to emerge.

However, we all know more or less what we mean by the notion, even in the absence of a clear-cut definition. It can be assumed that this common perception of terrorism is made up of the following elements:

- Terrorism is violence or the threat of violence against ordinary civilians, against their life, their property, their well-being. Terrorist acts do not distinguish between an intended target and bystanders, or between different groups of bystanders. Terrorists strike indiscriminately.
- Terrorism is a means to attain a political goal which allegedly could not be attained by ordinary, lawful means, within the context of the established constitutional order.
- Terrorist acts are usually part of a strategy. They are carried out by organized groups over a longer period of time.
- Terrorist acts are often perpetrated against persons who have no direct influence upon or connection with the intended result of those acts, i.e. ordinary civilians.
- The purpose of terrorist acts is to create fear in order to establish conditions which, in the perpetrators' opinion, should further their cause.
- Terrorism is intended to humiliate fellow human beings.

Acts of terrorism are perceived as crimes by the large majority of people. In certain circumstances, however, some persons may attempt to justify such acts as allegedly helping to achieve a goal which, in their view, is more important than the prohibition of indiscriminate violence against civilians.

In order to further clarify the topic under consideration here, a closer look should be taken at the notion of "terrorist act" or "act of terrorism". "Terrorism" is not a legal notion. It is much more a combination of policy goals, propaganda and violent acts — an amalgam of measures to achieve an

objective. In a nutshell, however, terrorism is criminal behaviour. Conversely, "war on terrorism" is the sum of all forms of action taken to combat terrorists. Counter-terrorist measures may differ widely, ranging from action taken by the United Nations Security Council to prosecution of presumed terrorists at the domestic level.

In particular: the ban on terrorism by international humanitarian law

International humanitarian law deploys its effect in armed conflict. Thus the 1949 Geneva Conventions deal with acts of terrorism only insofar as they occur in the context of an armed conflict or, in plain language, of a war.

Violence against persons and destruction of property are inherent in warfare. The use of deadly force against persons and objects is contrary to international humanitarian law only if such acts transgress the limits established by the international rules. Violence is also one of the salient features of terrorism. International law must therefore draw a line to distinguish the violence which is legitimate in war from acts of terrorism, i.e. illicit recourse to violence. How is this distinction achieved?

International humanitarian law approaches the problem from two angles. First, the right to use force and commit acts of violence is restricted to the armed forces of each party to an armed conflict. Only members of such armed forces have the "privilege" to use force against other armed forces, but their right to choose methods or means of warfare is not unlimited. On the other hand, only members of armed forces and military objectives may be the target of acts of violence. Second, other categories of persons, in particular the civilian population, or of objects, primarily the civilian infrastructure, are not legitimate targets for military attacks — they are, in the words of the Geneva Conventions, "protected" and must in all circumstances be spared.

International humanitarian law does not grant unfettered licence to use any conceivable form of violence against the other party to an armed conflict. Since time immemorial international rules have drawn a line between methods and means of warfare which are legitimate and those which are not, such as the use of chemical weapons or the assassination of civilians not taking part in the hostilities. To resort to illegal methods and means violates the legal order and, in aggravated circumstances, can be prosecuted as a crime under domestic law or as a war crime. Consequently, members of armed forces, though entitled to commit acts of violence, may be held responsible for violations of rules protecting persons or civilian property. In

other words, officers and ordinary soldiers may (or must) be prosecuted at the domestic or international level and punished for terrorist acts they are found to have committed.

Rules applicable to *international* armed conflict

The 1949 Geneva Conventions and their 1977 Additional Protocols refer only twice in a specific manner to acts of terrorism: in Article 33 of the Fourth Geneva Convention and Article 51, para. 2, of Protocol I.

Under the heading “Protection of the civilian population”, Article 51 of Protocol I codifies the basic rules to be respected in military operations. Article 52 adds precise rules banning the destruction of civilian objects, in particular those which are part of the civilian infrastructure.⁸ After a reminder of the obligation to protect the civilian population against dangers arising from military operations, an obligation firmly anchored in customary law, paragraph 2 of Article 51 reads:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Paragraph 4 of the same provision prohibits indiscriminate attacks⁹ in warfare. This provision covers military operations (or any acts of violence) which

- are not directed at a specific military objective,
- employ a method or means of combat which cannot be directed at a specific military objective, or
- employ a method or means of combat the effects of which cannot be limited as required by the law,

and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. In other words, attacks or acts of violence which, though intended to hit a military target, in fact kill or wound civilians or destroy civilian objects, including the civilian infrastructure, in disproportionate manner are prohibited.

⁸ As at 30 June 2002, 160 States are party to Protocol I. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not bound by Protocol I, which prohibits attacks against civilians and the civilian infrastructure.

⁹ “‘Attacks’ means acts of violence against the adversary...”, Article 49 of Protocol I.

Beyond all doubt, these rules ban terrorist activities insofar as they are directed against civilians. By definition, terrorist acts are acts “the primary purpose of which is to spread terror among the civilian population” (Article 51, para. 2). Acts of terrorism are always either attacks against civilians or indiscriminate attacks which usually strike civilians. However, terrorist acts *need* not necessarily or exclusively strike civilians or the civilian infrastructure. It must be stressed that threats of violence intended to spread terror among the civilian population are also prohibited. The *intention* to spread terror among civilians is a necessary element for defining acts of terrorism, for the simple reason that in war any use of deadly force may create fear among bystanders, even though the attack may be directed at a lawful target (e.g. aerial bombardment of a military target close to a civilian area).

As a first conclusion on this basic point it can be seen that terrorist acts causing harm to civilians or civilian property are clearly prohibited by modern international law governing international armed conflict, in particular by Articles 51 and 52 of the 1977 Protocol I additional to the Geneva Conventions. These prohibitions cannot be bypassed by claiming a right to resort to reprisals;¹⁰ they are absolute. Terrorist acts causing death or serious injury to civilians are grave breaches of the Fourth Geneva Convention, in other words, war crimes.¹¹ As such, they require that perpetrators thereof be prosecuted and, if guilty, punished by domestic tribunals. Under the conditions laid down by the Rome Statute, those persons may be subject to the jurisdiction of the International Criminal Court. Terrorist acts committed in times of armed conflict most probably will be prosecuted as war crimes (Article 8 of the Rome Statute), while in other situations such acts may be qualified as crimes against humanity (Article 7).¹²

In addition to the general prohibitions established by Articles 51 and 52 (the main parts of which give expression to customary law rules), several other provisions of humanitarian law are also relevant in a discussion on the response of international humanitarian law to terrorism. They usually cover

¹⁰ Protocol I, Articles 51, para. 6, and 52, para. 1.

¹¹ Article 147.

¹² Statute of the International Criminal Court (ICC), adopted in Rome on 17 July 1998, Article 7 (crimes against humanity) and Article 8 (war crimes), in particular para. 2 (a) and (b). — After ratification by more than 60 States the Rome Statute entered into force on 1 July 2002. The United States, Israel, Afghanistan and some other States, including Iran, Iraq and the Democratic People's Republic of Korea, are not party to the Court established to prosecute persons accused of serious war crimes, such as terrorist acts, “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Rome Statute, Article 8, para. 1).

specific needs for protection, such as the rules on the protection of cultural property from any hostile act,¹³ or the legal protection given to installations containing dangerous forces (such as dams, dykes and nuclear power plants).¹⁴

While we have hitherto examined the protection afforded by international humanitarian law to civilians and civilian property in times of armed conflict, we now turn to the question whether international rules also confer legal protection against terrorist acts targeting members of armed forces. The answer is not self-evident, because soldiers are allowed to shoot and can be shot at. Members of armed forces are unquestionably active participants in, and simultaneously a legitimate target of, military operations. And what appears to be a terrorist act in a civilian context may well be a legitimate act of war if carried out against enemy personnel. However, “the right of parties to the conflict to choose methods or means of warfare is not unlimited”, says a fundamental rule of the laws of war. As codified by Article 35, para. 1, of Protocol I, this rule imposes upon warfare limits for the benefit of those who participate in the war effort, i.e. members of the armed forces. Article 35 goes on to state in its second paragraph that “it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. One example of such illegal behaviour vis-à-vis members of armed forces is perfidy. Article 37 of Protocol I prohibits acts of perfidy, which are acts of violence that betray the trust of the other side. For example, use of violence while feigning civilian, non-combatant status constitutes perfidy. Specific acts of terrorism may well be of a perfidious nature.

This short presentation clearly shows that terrorist acts may be considered a crime if committed against members of the armed forces.

After analysing those parts of international humanitarian law which set limits to the conduct of military operations, we shall now consider the rules dealing with the fate of persons who have stopped fighting and find themselves in the hands of the adverse party, either as wounded or sick, as detainees or as inhabitants of an occupied territory.

The First and Second Conventions reiterate the customary rules that wounded and sick persons who are *hors de combat* — out of action — must be “respected and protected in all circumstances”. In particular, “they shall not be murdered or exterminated”.¹⁵ “Wilful killing” of a protected person is a

¹³ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, Article 4. See also Protocol I, Article 53.

¹⁴ Protocol I, Article 56.

¹⁵ First Convention, Article 12, para. 2; Second Convention, Article 12, para. 2.

grave breach of the First and Second Geneva Conventions, i.e. a war crime.¹⁶

By virtue of the Third Geneva Convention of 1949, members of armed forces captured and detained by the adverse party as prisoners of war must be dealt with in accordance with a detailed code of rules which ensure their humane treatment. Any life-threatening treatment or other form of violence to their person is strictly forbidden; they must at all times be treated humanely.¹⁷ The law gives special attention to the conditions under which detained persons may be interrogated: "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."¹⁸ Serious violations of these commitments are grave breaches of the POW Convention, and are thus war crimes.¹⁹

Of particular importance is the legal regime set up by international humanitarian law to protect enemy civilians held by or otherwise under the control of the adverse party, be it on its own territory or in an occupied territory. The goal of the Fourth Geneva Convention is to ensure humane conditions for civilians living under foreign control. The rules codified by that Convention leave no doubt: terrorist acts committed by civilians who find themselves under the control of a party to conflict are illegal. Article 33 is, incidentally, the only provision in the 1949 Conventions which uses the word "terrorism". It reads: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Article 33 refers to situations where a person in the power of the enemy is in particular danger of becoming the victim of "measures of intimidation or of terrorism" while in detention or in an occupied territory. The term "terrorism" as used by the Fourth Convention seems, however, to have a narrower meaning than in present-day language. Wilful killing, torture or inhuman treatment, the taking of hostages or "extensive destruction (...) of property" are grave breaches of the Fourth Geneva Convention: such acts are war crimes.²⁰

¹⁶ First Convention, Article 50; Second Convention, Article 51.

¹⁷ Third Convention, Article 13.

¹⁸ Third Convention, Article 17, para. 4.

¹⁹ Third Convention, Article 120.

²⁰ Fourth Convention, Article 147.

Protocol I considerably reinforces international standards for the protection of civilians insofar as they are directly exposed to the dangers of military operations. The basic rule stipulates that civilians shall not be the target of hostilities. A serious violation of that prohibition constitutes a war crime.²¹ The treaty also introduces new rules for the benefit of persons who find themselves under enemy control. Under the heading "Fundamental guarantees", Article 75 codifies those basic standards with which all authorities must comply — as a minimum and in all circumstances — in their dealings with persons belonging to the adverse party. It is a safety net applicable in circumstances where the persons concerned do not benefit from more favourable treatment under more detailed provisions. In its Article 75, Protocol I clearly "borrows" universally accepted standards from the body of international rules on human rights.

It should be recalled at this point that international law addresses the behaviour of persons who act on behalf of a party to an *international armed conflict*, i.e. a State. Entities other than States cannot become parties to such a conflict, with the exception of a national liberation movement, which may qualify as a party to an international armed conflict provided that movement fulfils the strict conditions set up by Protocol I.²² If these conditions are met, the liberation movement assumes the same rights and the same obligations in an armed conflict as those of a State, except for those rights which are linked to the status as a signatory to an international treaty.

It can thus be concluded that in an international armed conflict terrorist acts are prohibited without exception or reservation. In particular, reprisals cannot be justified as a reaction to terrorist acts. Reprisals against civilians are, anyway, prohibited in all circumstances.²³

Violations of the more important rules are considered to be grave breaches of the Geneva Conventions or of Protocol I. In other words, such violations are war crimes. Under certain strictly worded conditions, the International Criminal Court (ICC) has jurisdiction to try persons suspected of having committed the more serious forms of crimes. But the ICC has only a subsidiary role to play. Both under the provisions of the Geneva Conventions and those of the Statute of Rome, the State which has jurisdic-

²¹ Protocol I, Article 85, para. 3.

²² Protocol I, Article 1, para. 4, and Article 96, para. 3.

²³ Protocol I, Article 51, para. 6. — Some States party to Protocol I have made a reservation to the rules prohibiting reprisals. The United States has expressed its rejection of that rule through other means.

tion over the person concerned has priority over the powers of the international tribunal.²⁴

It is particularly important to note that members of armed forces who have committed terrorist acts amounting to a grave breach of the Geneva Conventions may be brought to justice and prosecuted for their acts. This is also true if they are in the hands of the adverse party and have the benefit of POW status. Combatant or POW status does not grant immunity from criminal prosecution for acts contrary to international law. Nor does the Fourth Geneva Convention, in any circumstances, grant civilians the right to use force. Therefore, any person suspected of having committed violent acts may be prosecuted.

International rules applicable to *non-international* armed conflict

International humanitarian law applicable in non-international armed conflict is the result of a compromise between the concept of sovereignty and humanitarian concerns. In an internal armed conflict at least one party is not a State; it is usually an insurgent group determined to overthrow the government, or a rebel movement fighting for autonomy or secession. It is generally accepted today that internal conflicts with a high intensity of violence cannot remain beyond the reach of international law protecting persons from the effects of hostilities, whether those persons are actively involved in acts of violence or not. Indeed, civil wars often have the same devastating effects as armed conflict between States. Since 1949 and 1977 respectively, Article 3 common to the four Geneva Conventions and Additional Protocol II have set the basic standards intended to limit violence and suffering in non-international armed conflict. Customary law confirms and supplements the fundamental Article 3 and the fifteen articles of Protocol II.

It is not our intention to blur the dissimilarities between the two types of armed conflict. And yet it can be seen that the norms prohibiting acts of terrorism in non-international armed conflict are basically identical with those applicable in international armed conflict. Article 3 common to the four Geneva Conventions prohibits acts of terrorism with the following words, though without actually using the word "terrorism":

"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de*

²⁴ Rome Statute, Articles 1 and 17.

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;

- (...)"

Protocol II reaffirms and develops these rules. Under the heading "Humane treatment" of those who do not, or no longer, take part in military operations, Article 4, para. 2 (d) even condemns "acts of terrorism" outright as contrary to the law. Moreover, Protocol II — and in this respect it breaks new ground — also codifies standards for the conduct of military operations in internal conflicts. The basic provision is, of course, the obligation to distinguish between those who take an active part in hostilities and those who do not, in particular civilians, the wounded and the sick. Article 13 specifically prohibits attacks on the civilian population as well as on individual civilians. It furthermore states in paragraph 2 that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". These same words are to be found in Article 52, para. 2, of Protocol I, which deals with international armed conflict.

Neither Article 3 nor Protocol II has a provision similar to Article 35 of Protocol I, which, for international armed conflict, codifies the long-established principle that parties to an armed conflict are not free to choose methods or means of combat to their liking and, in particular, that weapons which cause superfluous injury or unnecessary suffering are outlawed. However, the fourth preambular paragraph of Protocol II restates the message of the Martens Clause for non-international armed conflict. The Martens Clause says that, in the absence of a specific prohibition, a rule must be found which is compatible with "the principles of humanity and the dictates of the public conscience".²⁵

Neither common Article 3 nor Protocol II of 1977 contains any provision on criminal responsibility for (mis)behaviour in an internal armed con-

²⁵ For the full text of the updated Martens Clause see Protocol I, Article 1, para. 2.

flict. It is up to domestic jurisdictions to deal with persons who have committed a crime in such a context. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded, in an important decision, that the more egregious crimes committed in a non-international armed conflict are to be considered as international crimes. Therefore, international rules do apply in the trial of a person prosecuted for a crime committed in a non-international armed conflict.²⁶ This means that acts of terrorism committed in a non-international armed conflict may indeed be equated with grave breaches as defined by the 1949 Geneva Conventions. The same rules regarding the jurisdiction of States or the ICC are applicable.

What distinguishes non-international armed conflict from armed conflict between States is the fact that on one side there is a State and on the other one or more groups of individuals who oppose the government's authority. While it is no surprise to learn that State contenders are under an obligation to comply with the international obligations binding for that State (*pacta sunt servanda*), Article 3 and Protocol II also impose obligations on dissident forces and their members, which are non-State contenders. Thus members of those forces must heed the ban on terrorist acts, and commanders of dissident forces are under an obligation to enforce compliance with the international rules. In other words, they must take all necessary steps to enforce the prohibition of terrorist acts, including appropriate measures if that prohibition is violated.

To sum up, it can safely be said that the prohibition of recourse to terrorist acts is as firmly anchored in the law applicable in non-international armed conflict²⁷ as it is in the rules governing international armed conflict. Acts of terrorism are banned, without exception. This conclusion is important, as non-international armed conflicts are particularly prone to wanton violence.

Wars of national liberation and guerrilla warfare: weakening the ban on acts of terrorism?

While negotiating Protocol I, delegates at the Diplomatic Conference in Geneva had to find solutions for two controversial issues, namely, the sta-

²⁶ *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR 72, ICTY Appeals Chamber, 2 October 1996.

²⁷ See also the International Law Committee's Draft Code of Crimes against Peace and Security of Mankind (1996) whose Art. 20(f)(iv) makes serious acts of terrorism committed in a non-international armed conflict a war crime.

tus of wars of national liberation and the legal regime applicable to guerrilla warfare. Acceptable solutions were found for both, and on 8 June 1977 the conference adopted Protocol I by consensus. The two issues have a certain importance for the debate on the law applicable to terrorism.

Article 1, para. 4, of Protocol I declares wars of national liberation to be international armed conflicts. This means that the whole body of law elaborated for international armed conflict also applies to a war in which a people fight against a colonial power in the exercise of their right of self-determination. International humanitarian law must consequently be respected in its entirety by any group which claims to be a liberation movement in the sense of Article 1, para. 4, and Article 96, para. 3. Thus the ban on terrorist acts applies without any doubt to wars of national liberation.

Article 44 of Protocol I slightly modifies one of the age-old conditions a combatant must fulfil in order to be recognized by international law as a member of an armed force. That condition requires a combatant to be identifiable as such, i.e. he must distinguish himself from his civilian surroundings. According to the new law of 1977, a member of an armed force will, however, not necessarily lose his status as a combatant if, in narrowly defined circumstances of combat, he does not distinguish himself from the civilian environment. This new rule has no bearing on the ban on terrorism, which remains unchanged. Any combatant who chooses to engage in guerrilla warfare remains bound to respect all rules on the conduct of military operations and the protection of civilians. There will be no excuse if he combines (legitimate) guerrilla warfare with a (criminal) terrorist campaign.

Controversy over these two issues subsided after the end of the Diplomatic Conference in 1977. Moreover, no party to any armed conflict has ever invoked either of these two provisions. In 1987, however, President Reagan submitted Protocol II, on non-international armed conflict, to the Senate "for [its] advice and consent" with a view to ratification.²⁸ The same Letter of Transmittal spelled out the reasons why the United States rejects Protocol I, though this treaty was signed by the U.S. in 1977. During the same period, the main architects of the Administration's negative position on Protocol I published their views in various journals.

²⁸ Text of the Letter of Transmittal published in "AGORA: The U.S. decision not to ratify Protocol I to the Geneva Conventions on the Protection of War Victims", *American Journal of International Law*, Vol. 81, No. 4, October 1987, p. 910. See also a comment by the author of the present paper: Hans-Peter Gasser, "An appeal for ratification by the United States", *ibid.*, p. 912.

All arguments used to demolish Protocol I appeared to revolve around Article 1, para. 4 — wars of national liberation — and Article 44 — on guerrilla warfare. Douglas J. Feith, at that time Deputy Assistant Secretary in the Department of Defense, came to the somewhat astonishing if not nonsensical conclusion that the new law of Protocol I was in the service of terror,²⁹ and that it “lays waste the legal and moral achievement of ages”. For his part, Abraham D. Sofaer, then Legal Advisor at the State Department, equated a people’s armed struggle for self-determination with terrorism.³⁰ Hence his refusal to accept Protocol I, which, he claims, by including a clause on wars of national liberation, justifies such wars – an argument which has no merits, as neither Protocol I nor any other treaty on international humanitarian law ever justifies recourse to force. With the benefit of hindsight it may be argued that instead of being the results of analysis, the conclusions advanced by these authors are much more the premises for the decision not to ratify Protocol I. Is it far-fetched to believe that by rejecting Protocol I the U.S. kept its options open for any subsequent “war on terrorism”?

Security Council Resolution 1373

In the wake of the events of 11 September 2001 the United Nations Security Council adopted Resolution 1373, also called the *Anti-Terrorism Resolution*, on 28 September 2001. Does this text in any way affect international humanitarian law or give any clues how existing law should be amended? A careful reading shows that Resolution 1373 mainly proposes a considerable number of preventive measures for combating terrorism which ought to be taken by States at the domestic level. It deals with criminal prosecution of alleged terrorists and in particular also with cooperation between States in that regard. There is nothing in the paragraphs on criminal prosecution of alleged terrorists that is not already covered by the Geneva Conventions and their Additional Protocols on situations of armed conflict. While Resolution 1373 is important for inter-State cooperation in the fight against terrorism, the text is not intended to amend the law codified by international humanitarian law treaties.

²⁹ Douglas J. Feith, “Law in the service of terror: The strange case of the Additional Protocol”, *The National Interest*, No. 1, Fall 1985. During the “war on terror” Feith was Under Secretary of Defense for Policy in the Bush Administration.

³⁰ Abraham D. Sofaer, “Terrorism and the law”, *Foreign Affairs*, Summer 1986, p. 901.

International humanitarian law and “war on terror”: some preliminary remarks

Every act of terrorism is incompatible with international humanitarian law applicable in armed conflict. Like any other violation of the 1949 Geneva Conventions, of another humanitarian law treaty or of international customary law, such acts call for action by States party to those treaties to redress the situation. They not only have a legitimate interest in stopping criminal behaviour and thereby protecting their own citizens, they are also legally obliged to monitor compliance with the law, to prosecute and punish offenders and to prevent any further act contrary to humanitarian law.³¹

The Geneva Conventions and their Additional Protocols of 1977 have laid down a number of measures and procedures to ensure compliance with their provisions. In particular, serious violations of the more important provisions are international crimes — “grave breaches” in the words of the Geneva Conventions — and all States parties have jurisdiction to prosecute offenders (universal jurisdiction). As has been abundantly shown in this paper, acts of terrorism are grave breaches of international humanitarian law. Moreover, the Geneva Conventions do not exclude action by third States with a view to responding to grave breaches or preventing further violations, especially if the State concerned does not take appropriate action itself. Whether such third-party involvement includes the right to use force is not a question for international humanitarian law but for the law of the UN Charter.³²

Under the shock of the events of 11 September 2001, a number of States have taken steps to prevent terrorist acts from being committed on their territory. These steps include *inter alia*:

- tightening police surveillance, particularly of foreign residents;
- adopting more “vigorous” interrogation procedures, which may amount to inhumane treatment or even to torture;
- curtailing the right of alleged terrorists to a fair trial by e.g. establishing limits to access to witnesses and to the exercise of other rights of the

³¹ Article 1 common to the four 1949 Geneva Conventions recalls this basic truth with the following words: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

³² Hans-Peter Gasser, “Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations”, Hazel Fox and Michael A. Meyer (eds), *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49, esp. p. 27 ff.

defendant, measures which may sometimes be equivalent to abolishing the presumption of the defendant's innocence;

- toughening attitudes vis-à-vis asylum-seekers, refugees and migrants e.g., by ignoring the prohibition on returning such persons against their will to a country where they have to fear for their lives (principle of *non-refoulement*).

While not necessarily illegal as such, these measures may amount to clear violations of a government's commitment to respect international human rights and humanitarian law obligations.

Adam Roberts has the following to say about the difficulties international humanitarian law has to face in counter-terrorist operations:

"In military operations with the purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subjected to mistreatment or torture. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it. External states supporting the government have sometimes contributed to such excesses. Applying pressure on a government or army to change its approach to anti-terrorism, to bring it more into line with the laws of war and human-rights law, can be a difficult task."³³

The following brief analysis is based on two assumptions — or rather convictions. First, international humanitarian law is not an obstacle to effectively combating terrorism. It has, however, been argued that the Geneva Conventions impose overly stringent limitations on interrogation of detainees. The danger of such an argument is more than evident, and the international community should not weaken its endeavours to protect the physical and mental integrity of even the worst criminal. Second, alleged terrorists remain under the protection of international humanitarian law, whether they are members of an armed force or civilians ("illegal fighters"). They are and remain "protected persons" in the sense of the Geneva Conventions. When captured and detained for whatever reason, they must be dealt with in accordance with the provisions of the Third or Fourth Geneva Convention respectively, in particular those rules which regulate the detention regime. They may be prosecuted for acts of violence, but they are entitled to a number of judicial guarantees if put on trial for their deeds.

³³ Adam Roberts, "Counter-terrorism, armed force and the laws of war", *Survival*, Vol. 44, Spring 2002, p. 13.

The U.S. government's decision on the status and treatment to be given to prisoners captured during the military campaign in Afghanistan and held at the U.S. base of Guantánamo and elsewhere sparked worldwide controversy. The main question was which legal status should be attributed to the different categories of prisoners, some of whom arguably were members of the Afghan armed forces (the *Taliban*), while others were not (members of *al-Qaeda* or other groups). The U.S. government decided not to give POW status to any of them and left the question of their legal status open. While practical difficulties may have made it hard to ascertain each prisoner's affiliation, this decision is nevertheless astonishing, because it ignores a precedent. Indeed, the United States had to solve similar problems during the Vietnam War, where captured enemy personnel either belonged to the North Vietnamese Armed Forces or were members of the Vietcong and thus not recognized as combatants within the meaning of the law of war. The U.S. Military Command in Vietnam adopted the following guidelines: captured military personnel belonging to the North Vietnamese Armed Forces were to be granted POW status, in accordance with the Third Geneva Convention; members of Vietcong guerrilla units were to be treated as if they were POWs — though without being granted POW status as defined by the Third Convention — provided they were caught while actually engaged in a military operation and, at the same time, were carrying their arms openly. They were thus considered to be "illegal fighters" who were recognizable as persons taking part in hostilities. The wearing of a uniform was not required by the U.S. guidelines. A Vietcong arrested while throwing a grenade into a downtown Saigon café was handed over to the Vietnamese authorities for prosecution as a criminal or "terrorist".³⁴

This policy seems to have worked to the U.S. authorities' satisfaction. In particular, nothing precluded criminal proceedings for war crimes against any prisoner or detainee, of whatever category. This fine-tuned attitude of the U.S. Military Command towards a highly sensitive issue was no doubt also influenced by the fact that North Vietnam held a number of American servicemen, especially pilots. There were no U.S. prisoners in Afghan hands during the campaign against terrorism.

The Third Geneva Convention, with its comprehensive set of rules determining the treatment and material conditions of detention of members

³⁴ United States Military Assistance Command, Vietnam, "Criteria for classification and disposition of detainees", Annex A of Directive No. 381-46 (Dec. 27, 1967), reprinted in *American Journal of International Law*, Vol. 62, 1968, p. 766. See also Gasser, *op. cit.* (note 28), p. 921.

of the armed forces taken prisoner, is perhaps the best known and strongest pillar of the international legal system which protects victims of warfare. The POW Convention best serves the interests of armed forces and of their members, officers and men, and has consequently never been a subject of controversy. A weakening of it would be a tragedy for members of armed forces who have to fight in future conflicts. The law which protects them in captivity should not be undermined by any "war against terrorism".

A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons. If they are not nationals of the adverse party to the conflict but citizens of third States, they keep the status of foreign nationals. Civilian detainees have to be treated according to the rules set out in the Fourth Geneva Convention. Civilian detainees suspected of having committed a serious crime can and must be put on trial. The Fourth Geneva Convention does not grant them any immunity from prosecution for acts of terrorism, but it does establish the obligation to grant them a fair trial.³⁵

The ICRC has said in this connection that it "remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime. International humanitarian law grants the detaining power the right to legally prosecute prisoners of war suspected of having committed war crimes or any other criminal offence prior to or during the hostilities."³⁶

Concluding remarks: is international humanitarian law adequate to combat terrorism?

The 1949 Geneva Conventions, their 1977 Additional Protocols, other international treaties and customary law prohibit without any exception terrorist acts committed in the course of an international or non-international armed conflict. Treaty law has established procedures which enjoin States to take measures to prevent and repress violations and allows the international community to react under the United Nations Charter. In particular, serious violations of international humanitarian law are international crimes which entail the obligation of States to bring the alleged

³⁵ Article 5 of the Fourth Geneva Convention curtails the rights of a person who "is definitely suspected of or engaged in activities hostile to the security" of the State concerned. The right to be treated with humanity and to a fair trial as guaranteed by the Convention is not affected.

³⁶ ICRC Press release of 9 February 2002.

offender to justice before their own courts, the courts of another State party or an international criminal court.

Measures to combat terrorism and to bring alleged terrorists to justice must comply with international humanitarian law whenever such acts are committed in the course of an armed conflict. In view of the increased danger of even fundamental humanitarian obligations being disregarded in “wars on terrorism”, there appears to be a special need to emphasize that all those who, in some way or other, are involved in the fight against terrorism have a duty to respect international humanitarian law. Scrupulous respect for IHL in military campaigns to eradicate terrorism helps to strengthen determination to abide by the law in all circumstances.

The purpose of international humanitarian law is to protect and assist victims of armed conflict. The 1949 Geneva Conventions and the other IHL treaties do not provide essential or indispensable tools for the fight against terrorism. International humanitarian law cannot eradicate terrorism, among other things because terrorism has multiple and complex causes. Only civil society can attain that goal by concerted effort and patient action at home and abroad. Conflicts of a political nature must be settled by political means, in such a way as to open the door to more justice for all. It must become clear to every player on the domestic and international scene that recourse to indiscriminate violence is illegal and reprehensible – and ultimately useless. Full respect for international humanitarian law in counter-terrorist operations is a positive contribution to the eradication of terrorism.

Immediately after the atrocious events of 11 September 2001 the question was raised whether international humanitarian law is up to the task of combating terrorism. No law is perfect and immutable, certainly not international humanitarian law, which has to adapt to changes in the conduct of armed conflict. Constant evaluation is necessary to determine whether the rules are adequate or not, and all constructive proposals for amendments must be taken seriously. It is remarkable that no ideas have yet been put forward on how to strengthen the Geneva Conventions or the Additional Protocols and increase their effectiveness in the fight against terrorism. The denial of prisoner-of-war status to “terrorists” misses the target and risks losing ground in the fight to ensure protection for members of armed forces.

It is also surprising that doubts have been expressed in the United States about the adequacy of the law, although the United States has not ratified Protocol I of 1977. As has been shown, it is that very treaty which reinforces the legal arsenal for the fight against terrorism. By ratifying it,

160 States, including U.S. friends and allies (with the exception of Israel), have underscored its importance for the protection of victims of violence. Protocol I must first be accepted before new initiatives are taken to amend provisions which, in actual practice, prove satisfactory. Moreover, in the present circumstances few people believe in the successful outcome of a lengthy revision procedure, which would entail convening of a diplomatic conference and require subsequent ratification of the new treaty or amendments by all States party to the Geneva Conventions.

Finally, it should be borne in mind that international law guarantees humane treatment for persons who have committed a crime, be they military or civilian, but does not obstruct criminal justice in the accomplishment of its task. On the contrary, bringing suspected criminals to justice is an essential part of ensuring respect for humanitarian commitments. By creating the International Criminal Court, the international community has made an important contribution both to the policy of prosecuting and punishing alleged terrorists and to the prevention of acts of terrorism. The Statute of Rome and the Geneva Conventions of 1949 enshrine the right of all persons to a fair trial – hardly an unacceptable claim at the beginning of the twenty-first century.

Résumé

Actes de terreur, «terrorisme» et droit international humanitaire

Hans-Peter Gasser

Le droit international humanitaire interdit sans exception tout acte terroriste commis lors des conflits armés internationaux et non internationaux. Il demande aussi aux États de prévenir et punir les violations de ce droit. Les actes de terrorisme peuvent être des crimes de guerre soumis à la juridiction universelle et la Cour pénale internationale peut être compétente en la matière. Inversement, le combat contre le terrorisme et la poursuite des personnes suspectées d'avoir commis des actes terroristes sont régis par le droit humanitaire s'ils ont lieu lors d'un conflit armé. Ce droit n'est pas un obstacle pour combattre le terrorisme et les terroristes suspectés peuvent être poursuivis pour leurs actes de terreur. Mais même les membres de forces armés ou les «combattants illégaux» suspectés d'avoir commis des actes de terreur sont des personnes protégées par les Conventions de Genève et ont droit à des garanties judiciaires s'ils se trouvent devant un tribunal.