

THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW, TERRORISM AND THE “FOREIGN TERRORIST FIGHTER” REGIME

doi:10.1017/amp.2019.26

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There seems to be a natural connection between armed conflict and terrorism: both involve acts of violence by nonstate armed actors. The acts of armed groups during armed conflicts are frequently labeled as acts of terrorism. Similarly, both international humanitarian law (IHL) and the international legal regime governing terrorism address acts of violence committed by nonstate armed actors. Yet, these superficial similarities obscure the significant conceptual differences between acts of violence in armed conflicts and those outside armed conflicts as well as the differences in the legal regimes governing them. Before turning to an analysis of UN Security Council (UNSC) Resolution 2178 (2014), it is necessary to briefly explain how IHL addresses acts of terrorism, followed by a brief description of the international treaty regime governing terrorism, including how this regime regulates its relationship with IHL.

INTERNATIONAL HUMANITARIAN LAW AND ACTS OF TERRORISM

Without necessarily labeling them as “terrorist,” IHL prohibits all acts that one normally qualifies as “terrorist” if committed outside an armed conflict, such as hostage taking, or direct and deliberate attacks against civilians or civilian objects.¹ IHL qualifies acts as “terrorist” in two instances: first, during the conduct of hostilities, IHL prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”² Second, without providing a definition of terrorism, IHL prohibits acts of terrorism against persons not or no longer taking part in hostilities.³ Finally, IHL not only prohibits acts of terrorism, whether labeled as terrorist or not, but also provides for their repression.⁴

However, IHL does not prohibit every act of violence committed by an armed group, including armed groups that are designated terrorist groups: as the legal regime governing armed conflict, IHL is predicated upon the occurrence of acts of violence and seeks to regulate such acts by

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¹ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, REPORT, 31st INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT 49 (2011); Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 IRRC 547–70, 559, 562 (2010).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 51(2), June 8, 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), Art. 13(2), June 8, 1977, 1125 UNTS 609. According to the ICRC Customary International Humanitarian Law Study, this rule is also a norm of customary international law applicable in both international and non-international armed conflicts, see ICRC, *Customary International Humanitarian Law*, Rule 2, *Violence Aimed at Spreading Terror Among the Civilian Population*. See also ANDREA BIANCHI & YASMIN NAQVI, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM* 196–99 (2011); Sandra Krähenmann, *Foreign Fighters Under International Law*, 7 GENEVA ACAD. BRIEFING 24–26 (2014).

³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), Art. 33, Aug. 12, 1949, 75 UNTS 287; AP II, *supra* note 2, Art. 4(2)(d). See also Marco Sassóli with Lindy Rouillard, *La définition du terrorisme et le droit international humanitaire*, REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 29–48 (2007); Krähenmann, *supra* note 2, at 26–30.

⁴ Gasser, *supra* note 1, at 547–70, 559–62 (2010). See also Roberta Arnold, *Terrorism, War Crimes and the International Criminal Court*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 282–97 (Ben Saul ed., 2014).

distinguishing between lawful and unlawful acts of violence. Certain acts of violence, whether committed by state forces or armed groups, are lawful, namely proportionate attacks against enemy forces and military objectives. In contrast, every act of violence designated as terrorist is unlawful.⁵ Hence, the same act may be qualified differently, depending on the context and the applicable legal regime.

THE INTERNATIONAL TREATY REGIME GOVERNING TERRORISM AND ITS RELATIONSHIP WITH IHL

There is no universal comprehensive convention on terrorism due to intractable disagreements over the definition of terrorism, including how such a definition would relate to acts committed during times of armed conflict, including in relation to the acts of national liberation movements.⁶ Under the so-called sectoral approach, nineteen universal treaties address specific acts of terrorism, such as aircraft hijacking, hostage taking, terrorist bombings, or financing of acts of terrorism. In general, these treaties provide for the criminalization of these acts of terrorism under domestic law and seek to ensure that perpetrators of such acts of terrorism are not able to escape trial and punishment by absconding to another country.⁷

The most recent treaties, namely the 1997 Terrorist Bombing Convention and the 1999 Terrorist Financing Conventions specifically address their relationship with IHL. First, they include a safeguard provision that “nothing in this Convention shall affect other rights, obligations and responsibilities of states and individuals under international law,” including “international humanitarian law.”⁸ Second, they exclude the “activities of armed forces during an armed conflict, as those terms are understood under IHL, which are governed by that law.”⁹ The scope of these provisions is subject to debate; in particular because there remains disagreement whether the term “armed forces” includes members of non-state armed groups.¹⁰ However, at the very least these provisions provide a basis for a contextual and teleological interpretation that these conventions do not apply to lawful acts of war by armed groups during times of armed conflict, including designated terrorist groups.

Yet, the so-called “foreign terrorist fighter” phenomenon brought to the forefront two so far largely unexplored issues in relation to the scope of these exclusion provisions. First, accepting that the term “armed forces” includes members of nonstate armed groups, it remains an open question how to determine membership. So far, attention has focused on determining membership for the purposes of targeting where the decisive criteria is functional, namely whether a person assumes a continuous combat function. Second, what is meant by “governed by international humanitarian law” remains uncertain. For example, IHL undoubtedly governs participation in hostilities or the provision of medical care. But does it cover travelling abroad for the purposes of participation in hostilities or provision of medical care?

⁵ ICRC, *supra* note 1, at 49.

⁶ Mahmoud Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention*, 14 J. INT’L CRIM. JUST. 1039, 1035–36 (2006).

⁷ C. L. Lim, *The Question of a Generic Definition of Terrorism Under General International Law*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 38, 45–47 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005).

⁸ International Convention for the Suppression of Terrorist Bombings, Art. 19(1), *entry into force* May 23, 2001.

⁹ *Id.* Art. 19(2).

¹⁰ Sassóli, *supra* note 3, at 44; Kimberley Trapp, *The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 173 (Derek Jinks, Jackson N. Maogoto & Solon Solomon eds., 2014).

SECURITY COUNCIL RESOLUTION 2178 (2014)

Since 9/11, the Security Council established a detailed normative and institutional framework with the purpose of strengthening the criminal repression of acts of terrorism and curtailing support to designated terrorist groups. With the adoption of UNSC Resolution 2178 (2014) and Resolution 2396 (2017), the UNSC added to the existing counterterrorism framework a regime that specifically addresses “foreign terrorist fighter.” UNSC Resolution 2178 (2014) provides a comprehensive framework to suppress the mobilization of “foreign terrorist fighters.” Amongst others, UNSC Resolution 2178 (2014) requires states to adopt legislation to allow the prosecution of those who travel or attempt to travel abroad for terrorist purposes or those who fund or otherwise facilitate such travel.¹¹ While travelling abroad for terrorist purposes was already covered in many states’ domestic terrorism legislation under material support statutes or broad notions of preparatory acts, no universal treaty on terrorist acts included travel or attempted travel as a prosecutable offense. Hence, the Security Council required states to establish terrorist offenses beyond what is provided for in any universal treaty, which is a significant difference with UNSC Resolution 1373 (2001), which was based on the 1999 Terrorist Financing Convention. UNSC Resolution 2178 (2014) significantly blurs the lines between armed conflict and terrorism without taking into account the conceptual differences between the legal regimes governing these situations.

First, UNSC Resolution 2178 (2014) blurs the lines rhetorically with the term “foreign terrorist fighter.” Defined 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,”¹² UNSC Resolution 2178 (2014) explicitly includes situations of armed conflict, in contrast to the universal terrorist acts treaty, which provide at least an arguable exclusion. The usage of the term “fighter” conveys the idea that these are individuals who travel abroad to participate in insurgencies, which is misleading. On the one hand, under IHL, individuals commonly labeled fighters are individuals who directly participate in hostilities. Yet, the current usage of the term “foreign terrorist fighters” covers broader forms of association with armed groups than participation in hostilities. On the other hand, “fighter” is not normally used to describe alleged perpetrators of terrorist acts without any link to an armed conflict. Yet, the definition in the resolution refers to act “in connection with an armed conflict,” implying that there may be “foreign terrorist fighters” without connections to armed conflicts. Similarly, the operative paragraphs are not limited to armed conflict contexts or to individuals who join armed groups abroad. The reference to the term “fighter” may serve to extend the application of IHL, namely its rules governing detention and targeting, to non-armed conflict situations; a phenomenon that has been a marked feature of the so-called “war on terror.”

Beyond rhetoric, the resolution attaches legal consequences to the conduct of being a “foreign terrorist fighter” by requiring states to adopt the necessary legislation to prosecute the travel or attempted travel abroad for terrorist purposes. The resolution generically refers to “terrorism,” “terrorists,” “terrorist acts,” and “terrorist training,” yet does not provide a definition of terrorism nor limit its reach to international terrorism. Consequently, the implementation of the resolution depends to a significant extent on states’ definitions of terrorism and their list of designated terrorist groups. With its explicit references to “foreign terrorist fighters” recruited by the Islamic state group, al-Nusra and other Al Qaeda associates listed under the 1267 sanctions regime, UNSC Resolution 2178 (2014) undoubtedly requires states to ensure that travel or attempted travel to such groups may be prosecuted under their domestic legislation. Yet, UNSC Resolution 2178

¹¹ SC Res. 2178, para. 6 (Sept. 24, 2014).

¹² SC Res. 2178, preambular para. 8 (Sept. 24, 2014).

(2014) is not limited to these groups. Other groups not listed as Al Qaeda associates under the 1267 sanctions regime may be included, depending on the respective state's often politicized understanding of who is a "terrorist" group. The lack of clarity will not only lead to a haphazard, discretionary implementation of the obligations in UNSC Resolution 2178 (2014), but also jeopardizes legal security for individuals as it may not be clear whether they face the risk of prosecutions. For example, many have reportedly joined Kurdish militia to fight against the Islamic state group in Iraq and Syria. Some of the Kurdish militia have links with the Turkish PKK, which is still on the list of terrorist groups in many countries, including the United Kingdom¹³ and the United States.¹⁴ Individuals fighting with such groups may thus also be covered by the term "foreign terrorist fighter."

CONCLUSIONS

Many have highlighted that the sweeping obligations in UNSC Resolution 2178 (2014) endanger the protection of human rights. Yet, due to its conflation between terrorism and armed conflict, UNSC Resolution 2178 (2014) also presents challenges for IHL. Although UNSC Resolution 2178 (2014) provides that it shall be implemented in accordance with IHL, it is unclear how this is to be done. The conflation between armed conflict and terrorism is mirrored in the dual purposes pursued by UNSC Resolution 2178 (2014), two different purposes which may require different measures. On the one hand, UNSC Resolution 2178 (2014) aims to protect the national security interests of the states of origin of "foreign terrorist fighters" on account of the linkages between foreign fighting and terrorism.¹⁵ On the other hand, the destination state, i.e. the state where the armed conflict takes place, and its population are to be protected, including because experience suggests that the influx of foreign fighters tends to have a negative effect on domestic insurgencies.¹⁶

THE UN FOREIGN (TERRORIST) FIGHTER REGIME AND INTERNATIONAL CRIMINAL LAW

doi:10.1017/amp.2019.27

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TERRORISM AS A CRIME

I am going to consider the UN Foreign (Terrorist) Fighter FTF regime from a different perspective, by exploring how the regime interacts with both the international law relating to terrorism and

¹³ See the list of proscribed groups and organizations: www.gov.uk/government/publications/proscribed-terror-groups-or-organisations-2.

¹⁴ See the list of designated foreign terrorist organizations: www.state.gov/j/ct/rls/other/des/123085.htm.

¹⁵ Thomas Hegghammer, *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice Between Domestic and Foreign Fighting*, 107 AM. POL. SCI. REV. 1 (2013).

¹⁶ 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, §§ 22–24, UN Doc A/70/330 (Aug. 19, 2015); Kristin M. Bakke, *Help Wanted? The Mixed Record of Foreign Fighters in Domestic Insurgencies*, 38 INT'L SEC. 150 (2014); Ben Rich & Dara Conduit, *The Impact of Jihadist Foreign Fighters on Indigenous Secular-Nationalist Causes: Contrasting Chechnya and Syria*, 38 STUD. CONFLICT & TERRORISM 113 (2014).

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