

Terrorism has dramatically shaped the international scene, all the more since the dawns of the 21st century, making States and international organizations react in accordance through counterterrorism (CT) legislation and operations. While preventing and countering terrorism is a legitimate and necessary effort for States to ensure security at national, regional and international levels, it must respect existing international legal frameworks, including international humanitarian law (IHL).

VERSION FRANCAISE (PDF) => CLIQUEZ SUR LE LIEN SUIVANT: Coup de projecteur sur Terrorisme, lutte contre le terrorisme et DIH disponible sur le site du blog *Quid Justitiae* de la Clinique de droit pénal et humanitaire (traduction de l'Université Laval).

In practice though, the adoption of exception regimes has brought new legal challenges and important humanitarian consequences: the so-called status of “unlawful combatant” or “unprivileged belligerent”, the disputed notion of targeted killings, unlawful and undisclosed detention, deprivation of judicial guarantees, torture and other types of ill-treatment, stigmatization of individuals and their families, in particular spouses and children, nationality withdrawal leading to statelessness and stripping of basic rights, and criminalization of humanitarian activities.

Given its relevance, CT has become a regular topic in international fora, such as the United Nations' Security Council, and while much has been said on its implications for human rights, it's worth assessing CT operations and national legislations through the lens of IHL as well. Main challenges in that regard relate to maintaining the integrity of IHL vis-à-vis CT frameworks and preserving the humanitarian space that allows impartial humanitarian assistance to populations affected by armed conflict.

IHL Integrity

Even if some are, not all “terrorist” groups are organized armed groups parties to an armed conflict in the sense given to this term by IHL of non-international armed conflicts. At the same time, not all organized armed groups engaged in such a conflict are “terrorist”, although governments against which they are fighting nearly always classify them so. IHL applies only to situations of armed conflict, including those in which some prohibited acts (e.g. attacks against civilians, indiscriminate attacks, acts or threats whose main aim is to spread terror among the civilian population and acts of “terrorism” aimed against civilians in the power of the enemy) or actors are labelled as “terrorist”. Accordingly, CT measures taken during armed conflicts must acknowledge the existence of such situations and preserve the integrity of IHL obligations States have agreed to respect and ensure respect for.

In short, CT and IHL frameworks must be articulated in a way which is compatible with IHL obligations. Thus, even when acting under CT national laws and/or policies, States parties to an armed conflict must respect the rules and principles at the core of IHL, such as non-reciprocity and equality of belligerents, rules on the conduct of hostilities (e.g. distinction, proportionality and precautions), rules protecting those who do not or no longer fight, such as civilians, wounded and sick, and detainees, as well as respect and support humanitarian organizations and individuals bringing impartial humanitarian aid and care to those IHL protects. This means that rules governing the conduct of hostilities and detention are fully applicable and legal statuses such as combatant, POW and concepts such as direct participation in hostilities remain unaltered, even during CT operations. They require that States make sure CT national laws and measures comply with those rules, as per what the UN Security Council urged in its Resolution 2462 (2019). This can be done by integrating “IHL exemption” clauses in such frameworks.

Humanitarian space

IHL foresees a specific framework for humanitarian relief operations (AP I 70; AP II 18 (2), CIHL Rules 55 and 56) according to which even CT measures must preserve humanitarian space as per IHL requirements, meaning that States must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. Thus, this “humanitarian exemption” requires States to adapt their CT measures so as to ensure that humanitarian and impartial organizations can carry on their activities without any sort of repression, as reaffirmed in UN Security Council Resolution 2462 (2019). This can be done by integrating “humanitarian exemption” clauses in such frameworks.

The Law

More detailed developments and explanations about civilians, their rights, obligations and protection under IHL even in relations to persons or acts labelled as “terrorist” can be found in the “The Law”, “Fundamentals” chapter. III. International Humanitarian Law: a branch of international law governing the conduct of States and individuals; section d. **Acts of terrorism?**

The Practice

A selection of related case studies from The Practice further illustrates:

The issue of CT and IHL integrity:

- ICRC, IHL and the Challenges of Contemporary Armed Conflicts, IV. IHL and the Fight against terrorism
- Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)
- Iraq/Syria/UK, Drone Operations against ISIS
- United Kingdom, The Government's Policy on the Use of Drones for Targeted Killings
- US, Combatant Immunity and Recognition of belligerency
- Belgium, Prosecution of Terrorist Crimes in the context of Armed Conflict

The issue of CT and humanitarian space:

- United States of America, Holder v. Humanitarian Law Project
- Kenya, Civilian Carnage

The issue of CT concepts, such as “War on terror” and “Unlawful combatants”:

- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part IV]
- United States, The Obama Administration’s Internment Standards
- General Assembly, The use of drones in counter-terrorism operations
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan

A to Z

Conduct of hostilities, Detention, Detainees, Direct Participation in Hostilities, Drones, Fighters, Conditions of detention, Humanitarian assistance, Humane treatment, Interrogation, Judicial Guarantees, Prisoners of war, Targeted Killings, Terror (spreading of), Terrorism and terrorists, Unlawful Combatants, Unprivileged belligerent, War on terror.

Teaching resources

- ICRC, “CT, Sanctions and IHL 'Myth busting'”, Questionnaire, 2021.

To go further

- ICRC, “International humanitarian law and the challenges of contemporary armed conflicts”, Report, 2019, Chapter 5: Terrorism, Counterterrorism Measures and IHL.
- ICRC, “International humanitarian law and the challenges of contemporary armed conflicts in 2015”, Report, 2015, paras 63, 70-95.
- ICRC, “International humanitarian law and the challenges of contemporary armed conflicts in 2011”, Report, 2011, Chapter VI.
- ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, 2009.
- ICRC, “Counter-terrorism measures must not restrict impartial humanitarian organizations from delivering aid”, Statement, 2021.
- ICRC, “Counterterrorism, IHL and Humanitarian Action”, Advanced IHL Learning Series, 2018.
- ICRC, “Terrorism”, Web page, 2021.
- ICRC, “Challenges for IHL – terrorism”, Web page, 2021.
- ICRC, “Statement by ICRC president upon ending 5-day visit to Syria”, 2019.
- “Terrorism, Counter-Terrorism and International Humanitarian Law”, 17th Bruges Colloquium Proceedings, College of Europe Bruges-Natolin/ICRC, 2016.
- P. Wynn-Pope, Y. Zegenhagen, F. Kurnadi, “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation”, *International Review of the Red Cross*, 2016, Vol. 97, No. 897/898, pp. 235–26.
- J. S. Burniske and N. Modirzadeh, “Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action”, Harvard Law School Program on International Law and Armed

Conflict (HLS PILAC), 2017.

- Norwegian Refugee Council, "Principles under Pressure: The Impact of Counter-Terrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action", 2018.

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