



Panel IV

Commentary—Terrorism and the Problem of Different Legal Regimes

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The multi-faceted nature of “terrorism” along with the lack of a commonly agreed understanding of the term gives rise to numerous questions on how the problems should be tackled. Such questions include determining whether additional or different norms may be necessary (including deciding which acts should be considered as international crimes) and how to combat terrorism while respecting the requirements imposed by existing law.

The following observations essentially relate to the relationship between different legal regimes, in particular international human rights law, international humanitarian law (IHL) and international criminal law.² All three, but

1. Daniel Helle is the Deputy Head of the ICRC Delegation to the United Nations.

2. When discussing the relationship between IHL and international criminal law, I think of “international criminal law instruments” as encompassing those conventions which have been specifically aimed at preventing and repressing terrorism. I do not wish to label the Geneva Conventions or their Additional Protocols as “international criminal law instruments,” in spite of the fact that these conventions contain obligations on all state parties to prosecute or extradite persons suspected of having committed “grave breaches,” several of which can cover terrorist acts. This is because the primary aim of IHL instruments is to highlight the rights and obligations of the parties to a conflict; whereas the regulation of how cases of non-implementation should be dealt with is treated on a separate, “second” level.

also other branches of international law, are relevant when addressing various aspects of “terrorism.” While they share the common aim of seeking to protect human dignity and security, each have their strengths and weaknesses, and thus should be reserved to address the areas for which they are most suited.

The concurrent application of different legal regimes in any given situation is normally an advantage, notably because it helps ensure that various manifestations of terrorism can be addressed, taking into account who has committed the act (was it a private individual, a member of a party to an armed conflict, a representative of a state); who the act was committed against (a civilian, a member of the armed forces); and the related question of the context in which the act was committed (was it committed during an armed conflict or in “peace-time”).

In some cases, such a concurrence may help prevent the occurrence of “gaps” in the system. For instance, if during an armed conflict, individuals who do not belong to any of the parties to the conflict commit a terrorist act (whatever the motive), humanitarian law may not adequately address the issue at the penal level and there is a need for international criminal law to “kick in.”³

It is not necessarily a significant drawback that different legal regimes apply to the same event, if they all point toward a similar result, or the protection provided by one legal regime is “subsumed” by the other. Such may be the case, for instance, with respect to fair trial guarantees provided in human rights and humanitarian law.

There are, however, instances where different legal regimes point to different results, so that their simultaneous application to the same subject matter is difficult to reconcile, or they are simply incompatible with each other. In such cases, to achieve an acceptable result, it may be necessary to draft or interpret the scope of application of the relevant instruments as mutually exclusive.

One potential problem arises when the logic of criminal repression encroaches excessively onto that of humanitarian action and/or humanitarian law. The preservation of the latter two is an important reason why the International Committee of the Red Cross (ICRC) has been attentively following the drafting of international criminal law instruments at the United Nations.

3. The parties do have a general responsibility to protect civilians under their control, but this duty of diligence cannot be taken so far as to impose a criminal liability for failing to prevent every single act of violence which may occur. In any event, there also remains the separate need to punish the direct perpetrators of such acts.

An illustration of this possible tension was seen during the drafting of the International Convention for the Suppression of the Financing of Terrorism.⁴ The Convention covers more than just the transfer of “funds” as this term is normally understood, so as to include notably “assets of every kind, whether tangible or intangible, movable or immovable.”⁵ It criminalizes the provision of funds in the knowledge that they are to be used for a terrorist act.⁶ In the context of an armed conflict, what then would be the possibility of an organization such as the ICRC to carry out a large-scale humanitarian assistance program, if it were to assume that even a small portion of the assistance might be diverted by rebel groups who are labelled as terrorists by the government? Could it, in so doing, be accused of committing an international crime? The ICRC raised its concerns with government representatives, who amended the text of the draft convention (by better qualifying the crime), so as to preserve the possibility of delivering humanitarian assistance in conflict situations.

As a second example, it may be that an act (such as killing a person) is labelled as a crime in an international criminal law instrument, whereas the same act (such as killing a soldier) is not considered unlawful per se under international humanitarian law. Unless these two situations are distinguished, there is a risk that members of one of the parties will be labelled as international criminals, for the mere fact of having participated in hostilities, which may in turn be a disincentive for them to comply with the demands of humanitarian law (such as respecting and protecting detainees under their control). If one side ceases to comply with its obligations, there is a further risk that the opposite side will soon cease to comply also. The potential consequences for all those finding themselves in the power of a party to the conflict and/or exposed to the dangers of military operations should be evident.

A part of the problem is that “one man’s terrorist is another man’s freedom fighter,” as was observed several times during the conference proceedings. This challenge has been a recurring one; for more than a century, there have been divergent views between government representatives on who has the right to take up arms against one another. It must be recalled, in this connection, that disagreement in 1899 on the resistance movement’s right to fight enemy occupation led to the adoption of the Martens Clause, a provision which in its contemporary version ensures that no person is ever left

4. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 6th Comm., 54th Sess., 76th Mtg., Agenda Item 160, U.N. Doc. A/54/109 (1999), reprinted in 39 I.L.M. 270 (2000) [hereinafter *Suppression of Financing Convention*].

5. *Id.*, art. 1.

6. *Id.*, art. 2.

to the arbitrary treatment of authorities, but remains under the protection of the law.⁷

Excluding an issue from the scope of international criminal law and leaving it to the domain of IHL does not necessarily mean that it will be left unaddressed, but rather that a different set of rules takes over. It should be noted in this regard that numerous acts of “terrorism” are already squarely prohibited by IHL, whether as such or as acts subsumed under numerous other qualifications, such as hostage-taking, deliberate attacks against civilians, or indiscriminate attacks. However, as suggested above, it must be acknowledged when considering what falls within the notion of “terrorism,” that some acts which are lawful under IHL are clearly unlawful in peacetime.

When the core characteristics of human rights law, humanitarian law and criminal law are put in contrast, there is often no real problem to distinguish their different nature and thus to assess which legal regime should be relied upon to guide how terrorism should be countered. There are some areas, however, where the delimitation between these branches of international law is imprecise or uncertain, in which case one must carefully seek to establish the boundaries of each legal regime. In this process, it can be useful sometimes to approach “the border” from both sides, considering for each those arguments that speak for inclusion and those that speak for exclusion of the regime being considered. In this regard, it should be noted that there are risks associated not only with an excessive scope of application of international criminal law, but also of international humanitarian law. Thus, if there is doubt as to whether various persons can be considered as taking an active/direct part in hostilities, it may be relevant to approach the matter not only from the angle of IHL, but also to analyze the question from the perspective of human rights (including the right to life) and international criminal law.

The question of bringing “terrorists” before the right tribunal may be a function of how one looks at the subject-matter rather than one of terminology. One example can be found in Article 5 of the Third Geneva Convention, where the drafters, according to the records of the proceedings, seemed to have treated broadly, as one issue, the question of how doubts as to the status of POWs were to be resolved. This issue masks the fact that there may be vastly different questions being considered. In one case it may be, for instance, that the detaining authorities consider whether the person concerned should be sent to a POW camp or to a camp for civilian internees. This question is not entirely without importance, since treatment provided by the Third

7. For a discussion of the Martens Clause, see Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000).

Convention is not identical to that provided by the Fourth Convention. It is however an entirely different matter to decide whether the person concerned should be punished for having taken part in hostilities. In the event that the death penalty can be imposed, any absence of available fair trial guarantees—including with respect to the composition of the tribunal and the procedure adopted, and whether these originate from humanitarian law or from human rights law—opens up the possibility for arbitrary execution. Since the above two questions are of a quite different nature, they should also be dealt with as separate matters; notably so that any initial decision with respect to where the person should be detained should have no impact on the question of criminal liability and punishment.

Lastly, it is clear that terrorism must be countered through a multitude of means, including diplomatic efforts, international cooperation to exchange information and freeze assets, public debate and awareness-raising, to name but a few. In this regard, IHL neither should be asked to perform more than what it was made for, nor should it be discredited on erroneous grounds, such as allegedly opposing criminal repression simply because it mandates humane treatment and judicial guarantees. Conversely, IHL should be respected in all cases where armed conflict occurs, whether or not the purpose of the conflict is related to terrorism and in regard to all persons involved in or affected by the conflict.

According IHL its appropriate place will help secure, on the one hand, that various branches of international law have sufficient vitality to bring terrorists to justice, while at the same time preserving other approaches aimed at protecting human dignity and public safety.