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Terrorist, war criminal, or both? Towards dual prosecutions of war crimes and terrorist offences

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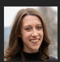

Natasha Floodgate
PhD Candidate and Teaching Assistant, University of Geneva

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A leading media figure and foreign fighter of a notorious group designated as terrorist was sentenced to life imprisonment for "conspiracy to provide material support to a foreign terrorist organization, resulting in death". Although outwardly appearing to quench the thirst of esteemed Lady Justice, the criminal charge reveals only part of the picture: in addition to having provided material support, the defendant was also filmed personally executing two kneeling soldiers, in other words, a foreseeably serious violation of international humanitarian law (IHL). Whilst these factual elements are mentioned with regard to the aggravated circumstances of the conduct and resulting consequences for sentencing considerations, the defendant was only charged with one single criminal count – the terrorist offence. Such is characteristic of the issues this post seeks to address, namely, the tensions that arise when such serious violations of IHL are apparently overlooked, and victims' calls for justice left unanswered.

In this post and as part of the Emerging Voices series, Natasha Floodgate, PhD candidate and teaching assistant at the University of Geneva, analyses current trends surrounding prosecutions of terrorist offences and war crimes before examining why such practice *occurs. In a bid to reconcile the latitude afforded by the international counter-terrorism framework with existing state obligations under IHL and international criminal law (ICL), the author calls for a dualistic approach in order to achieve comprehensive prosecutorial outcomes.* [1]

ICRC Humanitarian Law & Policy Blog · Terrorist, war criminal, or both? Towards dual prosecutions of war crimes and terrorist offencesWhat's in a name?

What's in a name?

According to this seemingly simple Shakespearian reference, it is the given content of speech that conveys meaning and significance, not the label by which it is known. Yet millennia of practice to the contrary shows an innate, and indeed important, endeavour to attribute specific means of identification – names. This is the reflection of judicial practice with significant weight assigned to both legal terms and the particularities of their definitions. Simply put, names matter. However, legislative overlaps and ambiguity regarding criminal liability of terrorist acts in armed conflicts call the paradoxical nature of this Shakespearian expression into question once again.

The interplay between IHL and counter-terrorism legislation

Of the two categories of armed conflict under IHL, hostilities involving armed groups designated as terrorist are predominantly *non-international in character*. Once armed violence between sufficiently organised groups, or between a state and such group(s), reaches a minimum level of intensity, a non-international armed-conflict (NIAC) is deemed to exist. This is the case regardless of whether the parties recognise the application of IHL or whether the group is *designated as terrorist (§906)*. "Isolated" terrorist acts having a nexus to ongoing armed conflicts are still regulated by IHL even if fighting does *not take place continuously* and is *not entirely uninterrupted*.

With regard to (prosecutions of) unlawful conduct, IHL specifically prohibits acts of "terror" and "terrorism" (*article 51(2) AP I*, *article 4(2)* and *article 13(2) AP II*). Moreover, acts, or even threats, of violence with the *primary purpose* to *spread terror among the civilian population* constitute a war crime.*[2]* Treaty law and *customary IHL* impose obligations on states to prosecute this, and other, war crimes, meaning *serious violations of the laws of war*. Examples include intentionally directing attacks against the civilian population, acts causing violence to life and person as well as the taking of hostages (*art. 8(2)(e)(i), art. 8(2)(c)(i) and (iii) Rome Statute*, respectively). However, such conduct, as well as the vast majority of acts prohibited under IHL, also qualify as terrorism offences under the counter-terrorism legal framework.

The *International Counter-Terrorism Framework* (ICTF), parallelly, contains *multiple legal instruments* that govern global counter-terrorism efforts and require states parties to criminalise certain conduct including, *inter alia*, the use of explosives and the taking of hostages. These acts, if conducted in the context of an armed conflict, could also amount to war crimes. However, nothing prevents states from designating such acts as terrorist offences in national legislation. Given that the specificities surrounding domestic criminalization of terror offences are left to the discretion of states, possible *instances of legislative overlap* are far from inconceivable.

Whilst most conventions in the ICTF contain *IHL exclusion clauses*, which exclude matters governed by IHL from the scope of the respective instrument, *domestic incorporation of such clauses is rare*. Such absence of exclusion clauses exacerbates questions of concurrent applicability of IHL and counter-terrorism laws (CTL) in armed conflicts with inherent risks of overlaps and tensions between applicable rules. This is the case *a fortiori* when states *contest the very application of IHL* when confronted with terrorism, hence resulting in a dichotomy between IHL and CTL.

Further tensions are evident when persons are prosecuted solely under CTL for crimes of inferior gravity despite also committing acts that would otherwise amount to war crimes. States are required to criminalise certain conduct under CTL, including the *financing, planning and preparation of terrorist acts*. However, cases of fighters being tried *only* for "lesser" crimes, such as criminal association with a terrorist organization*[3]* in spite of *attacking a school and terrorizing teachers*, for example, are not uncommon. As examined hereinbelow, whilst underlying reasons may account for such an approach, this can undermine the very legal framework prohibiting such conduct.

Additionally, and in accordance with the latitude afforded by the ICTF, states can go beyond the requirements contained in these legal instruments and criminalise conduct exceeding what is prohibited in domestic law as war crimes. Friction arises when *acts that are not prohibited by IHL* are criminalised, including *lawful* conduct under IHL, consequently resulting in conflicting state obligations and grounds for prosecution that are otherwise not invocable under IHL. This is notably the case when domestically criminalizing taking part in hostilities in NIACs or the targeting of military objectives when carried out by groups designated as terrorist.

Why states may prioritise counter-terrorism legislation

The key issue, therefore, is that, often as a matter of prosecutorial instruction, states tend to *prosecute under CTL not uncommonly for lesser offences* despite most terrorist acts committed during armed conflicts *constituting war crimes*. Although there is no legal requirement to always prosecute under IHL rather than CTL in cases of overlaps, in practice the latter is often prioritised. Given the *prevalence and scope* of jihadist armed group operations, often qualified as terrorist, understanding such practice is essential.

One potential reason could be the term "terrorism" itself. Research shows that this word provokes a *strong, systematic psychological reaction*. The terrorizing consequences inherent to the acts, arguably triggering a fearful reaction that influences policymakers, could explain why increasing participation of terrorist groups in armed conflicts is met with an expansion of *counter-terrorism operations*. Furthermore, stigmatizing connotations associated with the word "terrorist" may also account for CTL prevalence over war crime legislation.

With regard to hostilities, states ostensibly *do not want to legitimise* terrorist groups, in particular, by recognizing them as an (equal) adversary. The principle known as the "*equality of belligerents*" nevertheless affirms that the laws of war apply equally to all parties, irrespective of their status or cause for fighting. Prosecuting under CTL would therefore be favourable as such an approach inevitably puts the parties on uneven footing; indeed, by their very nature, *terrorist acts are always unlawful* whereas certain acts of violence are considered *lawful under IHL*. Additionally, but not uncoincidentally, this would also undermine the group in question.

Furthermore, the heightened focus on terror offences could draw attention away from state armed forces' own misconduct, thereby resulting in foregone prosecutions. Going one step further, immunity from prosecution of Special Forces has been *enshrined in the national laws* of some states which takes combatant privilege beyond the objective of IHL. One such law not only requires the *permission of military or political leadership* for *any* prosecutions of military personnel engaged in counter-terrorism operations, but, in addition, the immunity *applies retroactively*, consequently covering operations undertaken in the year prior to the new law being passed. Crucially, this practice can lead to *soldiers exploiting such immunity* by outwardly violating IHL whilst acting under the guise of counter-terrorism operations.

Judicial hurdles could further explain why investigations into international crimes are limited in some states while *terrorism prosecutions nevertheless increase*. The complexity of prosecuting war crimes, and therefore *relative "ease" in prosecuting under CTL*, as well as *misconceptions* regarding, and unfamiliarity with, IHL at a domestic level are commonly invoked to justify omitting IHL in criminal proceedings. This is particularly so when noting the *vast caseloads of the International Criminal Court (ICC)*. Moreover, *obstacles in obtaining (adequate) evidence* may account for a resort to CTL as well as factors outside a prosecutor's will or control, including *insufficient funding and resources*, *remote locations*, *security risks* and the protracted nature of some conflicts. Such practice can, however, lead to *accountability gaps* with recourse to CTL – as opposed to, and even *in lieu* of, war crime legislation – leaving serious violations of IHL *potentially unaccounted for*.

Political considerations are equally of note with multiple states contributing *hundreds of millions of dollars* to the fight against terror. This, coupled with *assistance from foreign troops*, could reinforce a certain *expectation* to prosecute under CTL.

An obligation to prosecute war crimes *per se*?

Even though there is no legal basis according to which prosecutors must always use IHL crimes over CTL offences in instances of overlaps, state obligations to prosecute war crimes nevertheless remain. In cases where the same conduct falls under both legal regimes, one may wonder whether an obligation to prosecute war crimes *per se* exists, namely, whether legislation governing "war crimes" *specifically* is required to satisfy state obligations, or whether proceedings under CTL would suffice. With instances of double jeopardy (*ne bis in idem*) and state sovereignty at stake – the latter referring to the *complementarity principle* where ICC prosecutions only occur if states are unwilling or unable to prosecute – further analysis is needed.

It has been suggested that prosecuting under "ordinary crimes" – *e.g.*, terror offences – *might not satisfy the complementarity principle* and could be interpreted as a state's inability to genuinely prosecute as stated in *Article 17(1) of the Rome Statute*. This is supported by the fact that the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) do not consider prosecutions of '*ordinary crimes*' in their *ne bis in idem* evaluations, thus demonstrating the legal value of prosecuting war crimes *per se* and potentially suggesting that prosecutions of "ordinary" offences are *not regarded "as valid responses to international crimes"*. The ICTR Appeals Chamber even went so far as to say that it could not "sanction the referral of a case to a jurisdiction for trial where the *conduct cannot be charged as a serious violation* of international humanitarian law."

However, there is no obligation incumbent upon states to *prosecute war crimes as such*. Although states are not strictly speaking required to qualify war crimes by the names attributed in international law, such qualification is instrumental in reflecting the *gravity of these crimes* with respect to the international community. Indeed, whilst criminalization under CTL that are equivalent in substance may *legislatively* fulfil the obligation to prosecute war crimes, even a conviction and sentence would plausibly *still only reflect the "ordinary crime"* rather than affirm the imperative need to enforce IHL.

Taken to an extreme, practice exists where the prosecutor has the possibility to *extend* investigations to international crimes only when *connected to terrorism-related offences*, thus treating them as ancillary. Independent prosecutions of international crimes are seemingly excluded by making them conditional upon parallel terrorism-related acts, hence *impeding victims' rights to justice*. In turn, this depreciates the gravity of war crimes by making prosecutions subsidiary; this is dangerous, however, and one might incorrectly infer that CTL prevails over IHL (as a legal framework) as a result, simply from the fact that CTL often predominate as a matter of prosecutorial choices in practice.

It is essential to respect IHL and the protections it affords at every level and point of procedure to ensure its credibility and adherence on the ground by all parties to armed conflicts. Given that terror offences and war crime legislation both protect different values, with certain crimes *drafted precisely to protect broader purposes* than those affected by the immediate objective of physical harm, a dualistic approach could be significant.

Towards a dualistic approach

In cases wherein domestic CTL and war crime legislation overlap, dualistic criminal procedures could provide pertinent solutions by using, and fostering complementarity between, both legal frameworks. The Security Council itself has repeatedly stated that those responsible for "*terrorist acts, and violations of [IHL]* [emphasis added]" must be held accountable. Despite limited jurisprudence, *caselaw* shows that such an approach is already effective in ensuring *holistic investigations and full criminal responsibility*, thereby improving justice for victims.

Electing to prosecute solely under CTL could undermine the protective regime of IHL with lack of redress for war crimes *weakening confidence in the justice system* and, potentially, the rules themselves.*[4]* Whilst true that some states have, alternatively, rejected qualifying crimes under CTL in favour of applying IHL as the *lex specialis*, the dualistic nature of criminal proceedings may actually prove persuasive in satisfying both legal regimes. Proof of terrorist acts could subsequently provide apposite *evidence of acts amounting to war crimes*,*[5]* hence granting CTL the power to reinforce IHL, not detract from it, should this instrument be wielded effectively. Further, full incorporation, implementation and respect of IHL exclusion clauses would *reduce legal uncertainty* and perhaps inspire comprehensive prosecutorial outcomes.

So, *what's in a name?* Be it the label attributed to provisions that are materially alike or the crimes under which suspects are tried, names hold decisive significance. The obligation to prosecute war crimes must persist as an intrinsic safeguard for the victims of war by virtue of respecting IHL as a body of law. Dual prosecutions, admittedly increasing litigation workloads, would ease tensions arising from legislative overlaps, neutralise questions surrounding prosecutions of war crimes *per se* and result in exhaustive verdicts.

Footnotes

[1] This blog post was written as part of the *Counter-Terror Pro LegEm* scientific research project at the University of Geneva; the author expresses her sincere gratitude and appreciation to the team.

[2] Prosecutor v. Galić, Trial Chamber, Judgment, Case No. IT-98-29-T, T. Ch. I., 5 December 2003, §122 and §138; and Prosecutor v. Galić, IT-98-29-A, Appeals Chamber, Judgment, Case No. IT-98-29-A, A.Ch., 30 November 2006, §87.

[3] Unofficial translation.

[4] This would arguably not be the case for states such as Israel, for example, that do not have war crime legislation but prosecute acts comprehensively under their domestic criminal code.

[5] *See* ICTY, *Prosecutor v. Galić*, Trial Court, Judgement, 5 December 2003.

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