EXCLUDING ACTS OF ARMED FORCES IN ARMED CONFLICT FROM “TERRORISM” DEFINITIONS UNDER INTERNATIONAL LAW

Submission to the UN Special Rapporteur on Counter-Terrorism and Human Rights
Thomas Pepin — November 2025

Armed conflict and terrorism are governed by distinct legal frameworks that serve different purposes. International Humanitarian Law (IHL) regulates the conduct of warring parties, permitting certain acts of violence against lawful targets while absolutely prohibiting others, especially attacks targeting civilians. In contrast, “terrorism” in peacetime is universally criminal: acts of violence intended to instill fear or coerce populations or governments are forbidden without exception. As counter-terrorism laws proliferate, there is a growing risk of conceptual overlap between these regimes. States increasingly brand hostile armed forces or insurgents as “terrorists,” blurring the line between lawful acts of war and crimes of terror. This submission argues that acts committed by armed forces during armed conflict must be expressly excluded from definitions of terrorism in international law. Relying on IHL as the primary legal framework, and drawing on international jurisprudence (ICTY, ICJ, SCSL) and respected doctrine (Sassòli, ICRC, Melzer, Schindler), the paper contends that introducing “terrorism” as a legal concept in wartime contexts is unnecessary, dangerous, and legally redundant. IHL already sufficiently regulates conduct in war – including prohibiting atrocities against civilians – and ensures accountability through the well-developed regime of war crimes. Creating a parallel terrorism label for battlefield acts undermines IHL’s integrity and can erode protections for combatants and civilians alike. Instead, a clear exclusion clause should be adopted, stating that activities of armed forces during armed conflict, as governed by IHL, are not considered “terrorist” acts, without prejudice to individual or State responsibility for any violations of IHL or international criminal law.

This submission proceeds with an analysis of IHL’s approach to wartime conduct and its relationship to terrorism; an examination of jurisprudence and doctrine underscoring why conflating armed conflict with terrorism is both legally improper and harmful from a policy perspective; and a proposal for an exclusion clause to guide international definitions. In conclusion, a concise recommendation is offered to the Special Rapporteur, urging recognition of this exclusion as a critical safeguard of humanitarian law and human rights in counter-terrorism discourse.

IHL as the Governing Framework in Armed Conflict (Lex Specialis)

International humanitarian law is the lex specialis governing situations of armed conflict, as confirmed by the International Court of Justice (ICJ)[1]. IHL strikes a careful balance: it permits combatants to engage in hostilities against military objectives, while protecting civilians and hors de combat persons through rules of distinction, proportionality, and humane treatment. In essence, acts of war by armed forces that comply with IHL are lawful and even immunized from criminal prosecution in certain contexts, whereas violations of IHL (such as deliberately attacking civilians) are war crimes. This dichotomy does not exist in peacetime criminal law, where almost any serious violent act for a political or intimidatory purpose is labeled and punished as "terrorism." The difference in rationale is stark[2]:

> Acts of terrorism are by definition prohibited and criminal. IHL also prohibits certain acts… but at the same time permits acts that are characteristic of armed conflict, such as attacking military objectives.

In other words, what would be a terrorist crime in peacetime (e.g. bombing a building) might be a lawful act of war if the building is a military target and IHL's rules are respected. This special status for combat activity is not a moral endorsement of violence but a legal necessity to regulate war[3]. IHL's combatant privilege illustrates this: in international armed conflicts, lawful combatants (typically state armed forces) cannot be prosecuted for mere participation in hostilities, even if their actions would constitute grave crimes in peacetime (such as killing enemy soldiers or destroying military infrastructure). The ICJ observed that whether a killing in war is an "arbitrary deprivation of life" under human rights law must be determined by IHL's standards, not ordinary law[4]. Even in non-international armed conflicts, where fighters do not enjoy a combatant immunity, IHL contemplates that fighters should not be automatically treated as criminals if they adhere to the laws of war. Article 6(5) of Additional Protocol II encourages authorities at the end of hostilities to grant the broadest possible amnesty to those who participated in the conflict, so long as they did not commit war crimes[5]. This reflects a crucial incentive: if non-state fighters know they will be prosecuted as "terrorists" regardless of their compliance with humanitarian rules, they have little reason to restrain their conduct. If one side's soldiers are treated as lawful

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[1] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25. See also International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106.

[2] Vance C. Terrorist Offences and IHL: The Armed Conflict Exclusion Clause. Lieber Institute West Point. Published February 24, 2022. Accessed November 16, 2025.

[3] See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2022) 13–14; also International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention* (2016) Introduction, paras 137–139.

[4] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 25.

[5] See Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review*, vol. 78, no. 2 (1990): 449–513, at 462–470. The author notes that while amnesties are legitimate tools of transitional justice, they cannot cover serious international crimes without violating the State's obligation to investigate and prosecute.

combatants but the other side's fighters are automatically deemed terrorists, it violates the equal obligations and rights that IHL prescribes for all parties to a conflict. Marco Sassòli observes that if one nevertheless tries to shoehorn armed conflict behavior into anti-terrorism law, it is imperative that "only acts prohibited by IHL should be classified as terrorist" (and not those IHL permits), especially if state military operations are exempted from the terrorism definition[6]. In short, IHL already delineates the spectrum of lawful and unlawful conduct in war; overlaying a "terrorism" label onto this framework is both redundant and disruptive.

The Dangers of Calling Wartime Acts "Terrorism"

Introducing "terrorism" as a legal concept in armed conflict is not only unnecessary but affirmatively dangerous. First, it politicizes and confuses legal analysis. IHL deliberately avoids subjective terms like "terrorist" or "freedom fighter" : it focuses on conduct (lawful or unlawful) rather than identity or motive. Branding an adversary's armed forces as "terrorists" risks undermining IHL protections. For example, if a combatant is seen as a common terrorist rather than a POW, a detaining power may be tempted to deny them POW status or fair treatment. This is not a hypothetical concern: in contemporary conflicts, parties frequently label enemies as terrorists to deny them combatant privileges or even basic humanitarian protections. The post-9/11 era provides stark examples, such as the designation of Taliban or insurgent fighters as unlawful "terrorists" to justify indefinite detention or abusive interrogations, circumventing the Geneva Conventions. The ICRC has repeatedly warned against this erosion of IHL. It "condemns all acts of terrorism, whether committed within or outside armed conflict… Terrorism negates the fundamental principle of humanity and is contrary to the core principles of IHL."[7] But crucially, the ICRC insists that counter-terrorism measures must not override the legal limits of warfare: even in the name of security, IHL continues to apply where armed conflict exists. If "terrorism" is allowed to become the prism through which wartime actions are viewed, there is a grave risk that the delicate balance of IHL will be upended by populist rhetoric and unilateral definitions[8].

Secondly, misuse of the terrorism label in war can criminalize lawful acts of war and hinder conflict resolution. In war, horrifying acts occur : lives are lost, property is destroyed but not all violence in war is a crime. A lawful attack on a military airbase, for instance, might cause fear among the local population; under broad domestic terror laws, such fear-inducing violence could meet a "terrorism" definition. Without an armed-conflict exception, a State could prosecute enemy soldiers for terrorism purely for attacking military targets, even though IHL permits those attacks. This would directly contradict the combatant immunity in international conflicts and the logic of amnesty in civil wars[9]. It also closes the door to peace negotiations. If all acts of insurgency are treated as terrorism, it entrenches a punitive approach ill-suited for reconciliation. Fionnuala Ní Aoláin, a former Special

[6] Marco Sassoli. Terrorism and War. Journal of International Criminal Justice. 2006;4(5):959-981.
[7] ICRC recommends humane treatment for all detainees, not just specific groups. International Committee of the Red Cross. Published November 19, 2019. Accessed November 18, 2025.
[8] Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, pp. 202–206. Saul argues that applying terrorism discourse to armed conflict risks delegitimizing lawful combat and enabling selective enforcement driven by political motives rather than legal criteria.
[9] ICTY, Prosecutor v. Kordić and Čerkez, Judgment, IT-95-14/2-T, 26 February 2001, § 328.

Rapporteur, and scholars like Nils Melzer have cautioned that conflating armed conflict with counter-terrorism leads to perpetual emergencies and undermines humanitarian norms. Counter-terrorism frameworks often lack nuance whereas IHL's aim is to constrain violence, protect victims, and facilitate the restoration of peace[10].

Thirdly, introducing a parallel terrorism regime in war is legally redundant and risks double jeopardy or selective justice. Every act that would qualify as "terrorism" in war is already unequivocally prohibited by IHL[11]. These acts are war crimes or crimes against humanity and carry individual criminal responsibility under well-established international criminal law. For instance, murdering civilians, bombing a village to spread terror, or using tactics aimed at sowing fear are war crimes under the Geneva Conventions and Additional Protocols. The Geneva Conventions (GC IV, art. 33) prohibit "all measures of terrorism" against protected persons, and Additional Protocol I (art. 51(2)) and Protocol II (art. 13(2)) explicitly ban "acts or threats of violence the primary purpose of which is to spread terror among the civilian population." The label "terrorism" adds no new prohibition in such contexts, it merely repackages war crimes with emotive terminology. Prosecuting an atrocity as a war crime versus as "terrorism" should not yield different outcomes in terms of accountability or stigma; however, in practice, a "terrorist" charge may carry political baggage (special courts, exceptional sentences) that circumvent the rigorous due process of military or international courts. The danger is that a combatant might face cumulative or politically motivated prosecutions, being charged for war crimes and separately as a terrorist for the same conduct, undermining fairness.

War Crimes Jurisprudence: IHL Already Addresses "Terror" in Conflict

International criminal tribunals have reinforced that IHL is fully equipped to address atrocities that resemble terrorism, without needing a separate terrorism offence in armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) in the Galić case prosecuted a senior military commander for conducting a campaign of sniping and shelling against civilians during the siege of Sarajevo[12]. Crucially, General Galić was convicted of the war crime of "acts of violence the primary purpose of which is to spread terror among the civilian population." This was the first time an international tribunal expressly adjudicated "terror against the civilian population" as a war crime. The ICTY had to determine the elements of this offense under customary IHL, drawing from the prohibition in Protocol I, Article 51(2). The Trial Chamber confirmed that deliberate terrorization of civilians is unlawful in armed conflict and punishable as a violation of the laws and customs

[10] Fionnuala Ní Aoláin, *The UN Special Rapporteur and the Promotion and Protection of Human Rights while Countering Terrorism: The Role of International Law*, in Larissa van den Herik & Nico Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press, 2013), pp. 628–649, Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate-General for External Policies, EXPO/B/DROI/2012/12, May 2013, p. 14.

[11] Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 33, Protocol Additional I to the Geneva Conventions, 8 June 1977, Article 51(2), Protocol Additional II, 8 June 1977, Article 13(2), applicable in non-international armed conflicts.

[12] I*CTY, Prosecutor v. Galić*, Trial Judgment, IT-98-29-T, 5 December 2003, §§ 133–149 & ICRC Customary IHL Study, Rule 2: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." This rule is recognized as customary in both international and non-international armed conflicts

of war. In convicting Galić, the Tribunal affirmed that the prohibition on terrorizing civilians is a norm of customary international law applicable in all armed conflicts. Importantly, the ICTY treated these acts as war crimes, not as generic "terrorism," underscoring that the existing war crimes framework suffices to capture such conduct. Indeed, evidence of "terror" had been considered in earlier cases as part of other charges. Galić's case simply made explicit that terrorizing civilians is itself a war crime when used as a method of warfare. This ICTY jurisprudence fills any perceived gap that a terrorism charge might cover in war – the law of war itself criminalizes what is colloquially called "terrorism" against civilians, with no immunity for the perpetrators.

Likewise, the Special Court for Sierra Leone (SCSL) charged and convicted members of armed groups for the war crime of "acts of terrorism" under IHL. The SCSL's statute, applying Common Article 3 and Additional Protocol II, included "acts of terrorism" (meaning acts intended to spread terror among the civilian population) as a punishable offense[13]. In the RUF Case (Prosecutor v. Sesay et al.), leaders of the rebel Revolutionary United Front were found guilty of committing acts of terrorism among other war crimes, and this charge carried a heavy sentence (in one instance 50 years, concurrent with other sentences). Former SCSL prosecutor Stephen Rapp noted that in Sierra Leone's conflict, terrorizing civilians was a "hallmark of the conflict… its prohibition in international law has been given force by the Special Court." The SCSL explicitly acknowledged that what world leaders call the "war on terror" found a place in war crimes law[14]:

> The indictments at the Special Court have included charges for the war crime of 'acts of terrorism.' At a time when world leaders speak of a 'war on terror,' this is a historic development.

In other words, terrorism as a phenomenon was prosecuted, but strictly within the IHL paradigm. The elements required proof of a specific intent to spread terror among civilians, linking it firmly to IHL's protections of civilians. The SCSL's jurisprudence (as well as that of the ICTY and the ICC's Rome Statute, which implicitly covers terror against civilians via the prohibition on targeting civilians) demonstrates that there is no accountability vacuum in armed conflict that needs to be filled by "terrorism" offenses. Any atrocity that would merit being called "terrorism" is already addressed by war crimes (or crimes against humanity if part of widespread or systematic attacks on civilians).

Thus, from a legal accountability perspective, adding a "terrorism" label does nothing except create potential contradictions. It is notable that no international criminal tribunal has included a standalone charge of "terrorism" outside the context of war crimes or crimes against humanity. Even the Special Tribunal for Lebanon, dealing with the terrorist bombing that killed former Prime Minister Rafik Hariri, operated under a unique mandate and domestic Lebanese law; it did not blend its terrorism charges with armed conflict since the situation was not classified as war. Meanwhile, the International Court of Justice has weighed

[13] Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone (16 January 2002), Article 3(d): The Court has jurisdiction over "acts of terrorism" as serious violations of international humanitarian law, grounded in Common Article 3 and Additional Protocol II.

[14] *SCSL, Prosecutor v. Sesay, Kallon and Gbao* (RUF Case), SCSL-04-15-T, Judgment, 2 March 2009, §§ 731–743.

in on the periphery of this issue in cases like Armed Activities on the Territory of the Congo (DRC v. Uganda) and the Israeli Wall Advisory Opinion. The ICJ cautioned that states fighting non-state actors must still distinguish between wartime situations and peacetime situations. In the Wall opinion, the ICJ accepted Israel's security concerns about terrorist attacks but held that Israel's measures (the construction of a barrier through occupied Palestinian territory) had to comply with IHL and the law of occupation – self-defense or counter-terrorism could not justify violating IHL provisions (such as by disproportionate incursions on civilians' rights). Implicit in the ICJ's reasoning is the understanding that the correct legal framework must be applied: IHL for armed conflict, human rights law and domestic law for non-conflict terrorism. Mixing them leads to legal error.

The Armed Conflict Exclusion Clause : Existing Models

Fortunately, international law has already charted a path forward via "armed conflict exclusion clauses." Starting in the late 1990s, several sectoral anti-terrorism conventions incorporated clauses to exclude wartime acts. The 1997 International Convention for the Suppression of Terrorist Bombings was a trailblazer: Article 19(2) provides[15]:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

In simpler terms, if an explosion is caused by a lawful act of war during an armed conflict, the Bombing Convention does not apply to it. Similar clauses appear in at least five other global counter-terrorism treaties. These were hard-fought compromises. Some States feared such exclusions could create loopholes for "State terrorism" or for abuse by non-State groups. Others rightly argued that without the clause, lawful military operations or legitimate resistance against foreign occupation could be wrongfully criminalized as terrorism. The result was often ambiguous wording notably, the term "armed forces" is not explicitly defined to include non-State armed groups. During negotiations for a comprehensive terrorism treaty, most Western States argued "armed forces" meant only a State's forces, whereas a number of other States pushed for including insurgent armed groups as well (especially for wars of national liberation or against occupation)[16]. The prevailing contemporary view is mixed, but there is growing acceptance that the exclusion should cover all IHL-governed forces, including non-State armed groups, at least to the extent they respect IHL. Indeed, some States endorsed extending the exclusion to all parties' activities "in accordance with IHL."

At the regional and national level, we find examples of clear and robust exclusion clauses. The European Union's 2017 Directive on Combatting Terrorism contains a recital acknowledging that the Directive "does not govern activities of armed forces during armed

[15] International Convention for the Suppression of Terrorist Bombings, adopted by the UN General Assembly on 15 December 1997 (UN Doc. A/RES/52/164), entered into force 23 May 2001.

[16] UN General Assembly, Sixth Committee Reports, UN Doc. A/57/37, 2002, Annex IV, "Coordinator's Paper on Outstanding Issues Relating to the Comprehensive Convention on International Terrorism." The document shows that disagreements centered on whether to exclude all parties to an armed conflict under IHL or to limit exclusion to State actors.

conflict, which are governed by international humanitarian law" (echoing earlier Council of Europe language).

Proposed Exclusion Clause and Its Rationale

To solidify the boundary between armed conflict and terrorism in international legal instruments, this submission proposes that the Special Rapporteur endorse a universal armed conflict exclusion clause in the definition of terrorism. The clause should be formulated along these lines:

> Nothing in the definition of a terrorist act (or terrorism offense) shall be interpreted as applying to the acts or activities of armed forces during an armed conflict, where those terms are understood under international humanitarian law, and where such acts are governed by that law. This exclusion is without prejudice to the accountability of any person under international humanitarian law or international criminal law for war crimes, crimes against humanity, genocide, or other applicable offenses.

This formulation draws on established language (the 1997 convention and EU Directive) but adds clarity that all parties to conflict are included ("armed forces" in the sense of IHL includes State armed forces and organized non-State armed groups that are parties to the conflict). It also adds an explicit savings clause that being excluded from the "terrorism" label does not exempt conduct from punishment if it violates IHL. In other words, a soldier or fighter cannot evade justice by saying "this was an act of war, so you can't call it terrorism" if the act was unlawful by IHL standards, the individual can and should be prosecuted, but as a war criminal, not as a terrorist. Conversely, if the act was lawful under IHL, it should not be criminalized at all as a "terrorist" act. This preserves the integrity of combatant conduct and the combatant's privilege in applicable circumstances.

Without prejudice to State responsibility, the clause should also clarify that excluding armed forces' acts from "terrorism" definitions is not to condone any violations by States. States can still be held internationally responsible for breaches of IHL (e.g. through the ICJ or state-to-state claims) and individuals for international crimes. The exclusion simply ensures that the counter-terrorism regime (which often comes with its own intense sanctions and political stigmas) is not superimposed on top of armed conflict regulation. Notably, this would not prevent, for instance, the UN Security Council from condemning a State's deliberate bombing of civilians as a grave breach or even as an act of terror in the colloquial sense. But legally, the response would be grounded in IHL (sanctions for war crimes, etc.) rather than treating the situation as if it were mere peacetime terrorism[17].

[17] See ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, §§ 209–211, 345–345. The Court found Uganda internationally responsible for violations of IHL and human rights law, including attacks on civilians, despite the absence of a separate finding of terrorism.

By adopting a clear exclusion clause, States and international bodies can avoid the friction that has arisen in grey-zone cases. It upholds the “underlying rationales of IHL and criminal law instruments on terrorism while ensuring that war criminals and terrorists are prosecuted on the basis of the appropriate legal framework.” In sum, a terrorist in peacetime is dealt with by counter-terrorism laws; a violator of the laws of war is dealt with by IHL and war-crimes law. The two categories can be mutually exclusive with no gaps.