
PROHIBITION OF TERRORISM DURING ARMED CONFLICTS

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Abstract. The problem of the definition of terrorism is controversial and relevant to international law. The universal definition is not yet reached in international treaties; thus the discussion of the question is important in distinguishing this phenomenon from other so called “regular” crimes. The aim of the article is to reveal the elements of the definition of terrorism, paying particular attention to the situations of armed conflict. The object of the research - norms of international law defining terrorism, enshrined in the provisions of international agreements concluded within the framework of various regional international organizations and the United Nations.

Keywords: terrorism, armed conflict, international conventions, definition of terrorism, terrorizing of civilians

INTRODUCTION

As the United Nations (hereinafter – UN) Special Rapporteur for human rights and terrorism has noted, “the issue of terrorism [is] one of the most controversial issues in the contemporary international legal and political arena. This has been apparent since 1937, when concerted international effort to promulgate the International Convention for the Prevention and Punishment of Terrorism, adopted under the auspices of the League of Nations, failed.”¹ Probably no word in modern language evokes as many different emotions, from believing in radical change to anger and condemnation, as terrorism. The popular saying “one man’s terrorist, another man’s freedom fighter” is also reflected in the debate on the definition of terrorism, a problem which contributes significantly to the complexity of the issue. This saying is especially relevant when evaluating the actions amounting to terrorization of civil population during armed conflict.

The term “terror” was first used to describe the policy of intimidation used during the French Revolution. As mentioned above, there were international efforts before World War II

¹ UN Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights. *Terrorism and Human Rights*. Progress report of the Special Rapporteur, Kalliopi K. Koufa. 27 June 2001. No. E/CN.4/Sub.2/2001/31. [accessed on 2020 10 15] Available at <https://www.refworld.org/docid/3d5a2cd30.html>

to adopt an International Convention for the Prevention and Punishment of Terrorism, but it did not come into force. It defined terrorism as “all criminal acts directed against a State with the aim of creating a state of fear in certain individuals, groups of individuals or the general public.”²

In 1972, a special *ad hoc* committee was set up in the UN General Assembly (hereinafter – GA) to consider the draft Comprehensive Convention on Terrorism and to define terrorism. This committee did not reach a final agreement on the definition of terrorism, but emphasized in its report that the main issue on which there was disagreement was whether or not the actions of national liberation movements should be included in the definition of terrorism. For further development of the definition of terrorism, the UN GA in 1996 in its resolution No. 51/210 set up a new *ad hoc* committee, one of the tasks of which was to reach an agreement on the definition of terrorism in the Comprehensive Convention on Terrorism (hereinafter – Draft Comprehensive Convention), it is still under deliberations of the states.

The aim of the article is to reveal the elements of the definition of terrorism, paying particular attention to the situations of armed conflict. The object of the research - norms of international law defining terrorism, enshrined in the provisions of international agreements concluded within the framework of various regional international organizations and the United Nations. The study used a variety of general and specific legal research methods: analytical, systematic analysis, analogies, comparative historical, linguistic, teleological, and critical.

1. THE ELEMENTS OF THE DEFINITION OF TERRORISM

The present situation about the definition of terrorism is that there is no universal international treaty, applicable in the whole world that would define terrorism. Regional organizations have their definitions of terrorism, which tend to adopt ‘list’ approach – that is, the terrorist acts are defined by listing particular criminal acts, labeling them terrorist. But during development of regional legislation, the new trend that is emerging is the definition of a general definition of terrorism.

Although the International Convention for the Suppression of the Financing of Terrorism³ covers only one aspect of the fight against terrorism, it provides a first abstract definition of

² *Convention for the Prevention and Punishment of Terrorism*. 1937 [accessed on 2020 10 15] Available at <https://dl.wdl.org/11579/service/11579.pdf>, Article 1(2).

³ *International Convention for the Suppression of the Financing of Terrorism*. 1999 [accessed on 2020 10 20] Available at <https://www.un.org/law/cod/finterr.htm>

terrorist act: “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”⁴

The Draft Comprehensive Convention, Article 2, defines terrorism as an unlawful and intentional act of a person by which he causes the death or serious bodily injury of any person, or serious damage to public or private property, including public places of use, public or governmental bodies, public transport system or infrastructure, or the environment, or damage above to such objects, if it is likely to cause significant economic damage, if the purpose of such action (judging by its nature or context) is to intimidate the public, or to compel a government or international organization to take or refrain from doing so. A serious threat to commit such acts, as well as an attempt to commit such an offense, aiding or abetting or organizing such an offense, shall also be considered a terrorist offense.⁵

Although a definition of global terrorism has not (yet) been adopted, some common elements in the definition of terrorism can be identified from the existing definitions of terrorism. It can be noted that in order to determine whether a terrorist attack has taken place, two elements are taken into account: the objective element – the criminal offense of a certain extent, and the subjective – the relevant motivation and goals of the perpetrators.

Objective element of terrorism. The range of acts that fall within the definition of terrorism is very wide. The Draft Comprehensive Convention defines that terrorist offenses cover acts which result in the death of or serious injury to property or serious damage to property, whereas the Convention on the Financing of Terrorism covers only the taking of life or serious bodily harm⁶. Other conventions, such as the Arab Convention on the Suppression of Terrorism⁷, this range is very wide, from the aforementioned crimes against human life and health to any damage to the environment or property or activities that could jeopardize national

⁴ *Ibid*, Article 2.

⁵ United Nations. *Draft Comprehensive Convention on International Terrorism*. 2000 [accessed on 2020 10 20] Available at <https://digitallibrary.un.org/record/422477>, Article 2

⁶ VASILIAUSKIENĖ, V. *Kova su terorizmu tarptautinės humanitarinės teisės kontekste [Fight Against Terrorism in the Context of International Humanitarian Law]*. Doctoral dissertation. Social Sciences: Law (01S). Vilnius, 2014, p. 45.

⁷ *The Arab Convention for the Suppression of Terrorism*. 1998 [accessed on 2020 10 15] Available at https://www.unodc.org/images/tldb-f/conv_arab_terrorism.en.pdf, Article 1(3).

resources. The same broad wording is given in the Convention of the Organisation of the Islamic Conference on Combating International Terrorism.⁸

In some documents, an attempt to carry out a terrorist attack is also considered a terrorist offense. C. Walter emphasized that there had been a recent trend in national legal systems to include acts of violence, whether violent or non-violent, which were destructive to public infrastructure.⁹ The same trend is observed internationally. However, the overly broad definition runs the risk that legitimate forms of protest against government decisions that commit the relevant crimes or simply harm the state (such as a general strike) could be described as terrorism, so the definitions of terrorism should include the criterion of serious harm, which would help to distinguish such acts from forms of peaceful protest, which also seek to change state policy on relevant issues, but do not cause damage equivalent to that caused during a terrorist attack.¹⁰

Aim and motive. This element consists of two elements, that is, the motive for the act may be either to intimidate the civilian population or to illegally compel a government or international organization to take or refrain from certain actions. Some definitions provide other, additional motives. The EU's definition refers to the aim (rather than the element of harm) of „seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.“¹¹ The Organisation of African Unity Convention on the Prevention and Combating of Terrorism identifies two further elements of terrorist aim, namely the disruption of any public service, the provision of any necessary service to the public or the creation of a state of emergency; or the desire to provoke a universal uprising in the state.¹² The Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism besides the aims of intimidation or compelling the government to take certain actions also lists as terrorist the aim of undermining public security.

⁸ *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*. 1999 [accessed on 2020 10 20] Available at <https://www.refworld.org/docid/3de5e6646.html>

⁹ WALTER, C. *Defining Terrorism in National and International Law*. WALTER, C. et. al. *Terrorism as a Challenge for National and International Law: Security vs. Liberty?* Berlin: Springer, 2003: p. 23-44, p. 34.

¹⁰ VASILIAUSKIENĖ, *op. cit.* 6, p. 45.

¹¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OL L 88, 2017 3 31, p. 6-21. Article 3.

¹² *OAU Convention on the Prevention and Combating of Terrorism* [accessed on 2020 10 20] Available at https://au.int/sites/default/files/treaties/37289-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf

Thus, the common denominator among all regional conventions in terms of the stated aim of the act would be two main optional elements - that is, to intimidate the population, and secondly, to force the government (and in some cases an international organization) to take or refrain from certain actions. By defining the purpose more broadly, there is a danger of equating the crime of terrorism with other crimes.¹³

2. ACTS OF TERRORISM DURING ARMED CONFLICT

2.1. Armed conflict and terrorist acts

The concept of armed conflict is important in the sense that when an armed conflict starts, the whole body of rules of international humanitarian law (hereinafter – IHL) comes into operation. The main sources of this branch of law are contained in four Geneva Conventions of 1949 and their three additional protocols.¹⁴ Those legal acts do not give a definition of an armed conflict.

One of the most widely used definitions of armed conflict was formulated in the *Tadić* case of the International Criminal Tribunal for the Former Yugoslavia (hereinafter – ICTY), where the tribunal stated: “we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”¹⁵

Common Article 2 of the Geneva Conventions states that an international armed conflict is “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹⁶ International armed conflict is also “all cases of partial or total occupation of the

¹³ VASILIAUSKIENĖ, *op. cit.* 6, p. 45.

¹⁴ The Geneva Conventions and their additional protocols may be found at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

¹⁵ International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Duško Tadić a/k/a „Dule“*. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995. Case No. IT-94-1-AR72. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, para. 178.

¹⁶ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365>, Article 2.

territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”¹⁷ Article 1(4) of I Additional Protocol to Geneva Conventions (hereinafter – AP I) states that the struggles of national liberation are also considered as international armed conflict.

Non-international armed conflicts are regulated by Common Article 3 of Geneva Conventions and by II Additional Protocol. Common Article 3 of Geneva Conventions is applicable in “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.¹⁸ Depending on the situation, hostilities take place either between one or more armed groups and the government, or between several such armed groups. The situation of armed conflict must be distinguished from situations that are not considered armed conflict, that is, incidents, border clashes, and the like. The definition of non-international armed conflict in AP II is narrower than in Common Article 3 of the Geneva Conventions. AP II is applicable to all armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”¹⁹ Thus it requires the organized armed group to exercise control over territory, whereas Common Article 3 is applicable also where such control is not present.

Both terrorist acts and armed conflicts are associated with the use of force and casualties of people. As E. Stepanova notes, „not all armed conflicts involve the use of terrorist means. At the same time, incidents of terrorism or even sustained terrorist campaigns can occur in the absence of open armed conflict, in an environment that would otherwise be classified as ‘peacetime’. Nonetheless, in recent decades terrorism has been most commonly and systematically employed as a tactic in broader armed confrontations.”²⁰

Terrorism is often carried out by the actors of contemporary armed conflicts. As the state-based conflicts decrease, and so has the number of battle-related deaths in state-based conflicts since 1950s. However, this positive trend is counterbalanced by the fact, that terrorism is

¹⁷ *Ibid.*

¹⁸ *Ibid.*, Article 3.

¹⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>, Article 1.

²⁰ STEPANOVA, E. *Terrorism in Asymmetrical Conflict. Ideological And Structural Aspects*. SIPRI Research Report No. 23. Oxford University Press, 2008, p. 1.

integral to many contemporary conflicts, and some of the worst trends in contemporary armed conflicts are related to the use of terrorism as standard tactic of conflict.²¹

“Whilst IHL does not recognize ‘terrorists’ as their own discrete category of actors during situations of armed conflict, it does recognize and prohibit “terrorist” activities. Any acts which would normally be categorized as ‘terrorist’ as understood within the context of the universal anti-terrorism instruments and criminal justice approaches during peacetime, such as the deliberate perpetration of acts of violence against civilians or civilian objects, constitute war crimes under IHL which should be prosecuted accordingly.”²²

2.2. Prohibition of terrorist acts in international treaties and customary international law

Terrorist acts in the context of armed conflict are prohibited both directly and indirectly. Terrorist acts against persons not involved in hostilities and their property, depending on their purpose and manner, may be considered as attacks on civilians and objects (Articles 51 (2) and 52 of Additional Protocol to Geneva Conventions, hereinafter – AP I, Article 13 of Additional Protocol to Geneva Conventions, hereinafter – AP II), non-discriminating attacks (Article 51 (4) of AP I), attacks against religious shrines (Article 53 of AP I, Article 16 of AP II), attacks on dangerous establishments and installations (Article 56 of AP I, Article 15 of AP II), hostage-taking (Common Article 3 (1) of the Geneva Conventions, Article 75 of AP I, Article 15 of AP II), the killing of persons who are not or are no longer involved in hostilities (Common Article 3 (1) of the Geneva Conventions, Article 75 of AP I, Article 4 (2) of AP II).²³

Terrorist acts committed against combatants are prohibited if they are committed using deception prohibited by Article 37 of AP I. However, especially in the context of the exception in Article 44 of the AP I, where combatants may not be distinguished from the civilian population due to the nature of the hostilities, the line between deception and legitimate military action against combatants is very unclear. However, it is clear that norms of international humanitarian law do not preclude terrorist acts against combatants, as intimidation of combatants for strategic purposes is probably the oldest tactic of war.²⁴

²¹ *Ibid.*

²² United Nations Office on Drugs and Crime. *Counter-Terrorism Module 6 Key Issues: International humanitarian law, terrorism and counter-terrorism*. July 2018. [accessed on 2020 10 25] Available at <https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/ihl-terrorism-and-counter-terrorism.html>

²³ JODOIN, S. Terrorism as a War Crime. *International Criminal Law Review*. 7 (2007): 77–115, p. 81.

²⁴ *Ibid.*, p. 82.

Although there have been attempts in the past to ban the terrorization of the civilian population, specific provisions on terrorism were first set out in Article 33 of the IV Geneva Convention, which states that “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”²⁵ Terrorism is also prohibited by Article 51 (2) of AP I, which states that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”²⁶ This prohibition is also repeated word per word in the International Committee of the Red Cross (hereinafter – ICRC) study on Customary international humanitarian law²⁷ as a customary norm of international humanitarian law. The same prohibition is also applicable during non-international armed conflicts and is enacted in Article 13(2) of AP II. Another provision applicable in this context is Article 4(2)(d) of AP II, stating that against people not (no longer) participating in hostilities “the following acts [...] remain prohibited [...]: acts of terrorism.”²⁸

It should be noted that the definition of terrorism is implicit in these provisions. Terrorism, in accordance with Article 51 of AP I and Article 13 of AP II, is to be defined, within the limits of IHL norms, as acts of coercion or threats against certain persons (civilians or non-combatants) whose primary, main purpose is to cause fear/terror in those persons.²⁹ This is an exception to the general regulation of terrorism in the sense that the crime of terrorism is criminalized within the meaning of IHL norms, but in the absence of a common definition of terrorism, this crime is not yet enshrined in general international law.³⁰

It should be noted that virtually all military action causes fear among the civilian population, as well as among the military. Attacks on the armed forces are sometimes purposefully carried out in a brutal manner in order to instil fear in the enemy soldiers and persuade them to surrender, but such intimidation is not addressed in these provisions. This provision prohibits acts the main purpose of which is to cause fear to the civilian population,

²⁵ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380>

²⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>

²⁷ HENCKAERTS, J.-M., DOSWALD-BECK, L. (eds.) *Customary International Humanitarian Law*. Vol. I – Rules. Vol. II – Practice. Cambridge University Press, 2005, p. 8

²⁸ Protocol II, *op. cit.* 19.

²⁹ JODOIN, *op. cit.* 23, p. 85.

³⁰ VASILIAUSKIENĖ, *op. cit.* 6, p. 57.

but without conferring virtually any military advantage.³¹ Thus, this subjective element (the aim to cause fear of the civilian population) must always be regarded as a necessary element and not merely as a side effect of the military action.³² It should also be noted that countermeasures cannot be applied regarding Article 51 of AP I.

Serious violations of the abovementioned provisions can be considered war crimes. War crimes are violations of IHL that can result in personal criminal responsibility. These include violations of the Geneva Conventions and their additional protocols, as well as serious violations of other rules and customs of war, such as the use of prohibited methods and means of warfare. This is confirmed by Article 85 of AP I, according to which terrorist acts which result in the death or serious injury of civilians are to be regarded as serious offenses of Geneva Conventions and are considered war crimes.³³

This was extensively analysed by the International Criminal Tribunal for the former Yugoslavia (hereinafter – ICTY) in case *Prosecutor v. Galic*. According to the ICTY, the prohibition of acts to intimidate the civilian population is a specific and separate prohibition in the context of a general prohibition of attacks on civilians³⁴. The ICRC Commentary on AP II states that “Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population. Thus, the Draft Rules of Aerial Warfare, prepared in The Hague in 1922, already prohibited such attacks. Air raids have often been used as a means of terrorizing the population, but these are not the only methods. For this reason, the text contains a much broader expression, namely “acts or threats of violence” so as to cover all possible circumstances.”³⁵

According to the ICTY, the prohibition of terrorism is a provision of customary IHL. The ICTY Appeals Chamber stated that the relevant provisions of the Additional Protocols prohibiting acts aimed at intimidating the civilian population had been adopted unanimously at

³¹ PILLOUD, C. (ed.) et al., ICRC. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987. (Protocol I), para. 1940, p. 618.

³² GASSER, H. P. Prohibition of Terrorist Acts in International Humanitarian Law. *International Review of the Red Cross*. July-August 1986, Vol. 26, No. 253: 200–212.

³³ *Ibid.*

³⁴ International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Stanislav Galić*. Trial Judgement of 5 December 2003. Case No. IT-98-29-T. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> para. 98.

³⁵ *Commentary on the Additional Protocols*, op. cit. 144, (Protocol II), para. 4785, p. 1453. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2C8494C2FCAF8B27C12563CD0043AA67>

the Diplomatic Conference for the adoption of the Additional protocols and had not been the subject of any objections³⁶. 150 States are parties to these Protocols. The Tribunal also carried out an extensive investigation and found that many states had enshrined in their legislation and military leaders a ban on terrorist measures, which in some cases was worded in exactly the same way as the provisions of AP I and AP II.³⁷

Another question arises – whether this provision may give rise to *individual* responsibility of the person having carried out such attacks. In examining whether this prohibition could be considered as a basis for individual responsibility, the ICTY noted that as early as 1919, The Commission of Responsibilities, set up at the Paris Peace Conference, had already mentioned “systemic terrorism” in its report on violations of the law of war.³⁸ Although no convictions were made under this provision, this shows that as early as 1919, the intent of the states was to criminalize the deliberate terrorization of civilians. In drafting the Statute of the International Military Tribunal in 1945, it was also proposed to include the crime of terrorism, which was not subsequently adopted in the text. 1945 The Australian War Crimes Act included the crime of “systemic terrorism” in the category of war crimes.³⁹

It should also be noted that in 1947 a military court in Makassar (Dutch East Indies, now Indonesia) in case *Motomura et al.* convicted individuals of “systemic terrorism against people suspected by the Japanese of crimes.” These acts of terrorism involved the repeated regular and prolonged torture and ill-treatment of individuals, the arrest of individuals on the basis of rumours, and the loss of many lives.⁴⁰ The ICTY has also reviewed the practice of many states, which showed that states criminalized the terrorization of civilians in armed conflict in their legislation.⁴¹ The Tribunal therefore concluded that customary IHL establishes personal criminal liability for breaches of the prohibition of civilian terrorism laid down in Article 51 (2) of AP I and Article 13 (2) of AP II⁴² and is therefore applicable in all states, notwithstanding their ratification or not of the Additional protocols.

The ICTY has identified the following elements of a terrorist offense:

³⁶ *Galić* Trial Judgement, *op. cit.* 34, paras. 99-101; International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Stanislav Galić*. Appeals Judgement of 30 November 2006. Case No. IT-98-29-A. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>, para. 87.

³⁷ *Galić* Appeals Judgement, *op. cit.* 36, para. 89

³⁸ *Ibid.*, para. 93.

³⁹ *Galić* Trial Judgement, *op. cit.* 34, para. 118.

⁴⁰ *Ibid.*, para. 115.

⁴¹ *Galić* Appeals Judgement, *op. cit.* 36, para. 94-95.

⁴² *Ibid.*, para. 98. VASILIAUSKIENĖ, *op. cit.* 6, p. 54.

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1. These are acts of violence against the civilian population or individuals who are not directly involved in hostilities resulting in the death or serious injury of the mentioned persons;
 2. The perpetrator deliberately directed these actions against civilians or persons not directly involved in hostilities.
 3. The main purpose of the act was to provoke the fear of the civilian population.⁴³

The Tribunal noted that it was not necessary to establish that civilians were in fact intimidated, nor was it necessary to prove a causal link between criminal acts and intimidation. The ICTY emphasized that only acts of violence against civilians and not against combatants are considered a crime of terrorism during armed conflict.⁴⁴

In the *Galic* case in particular, the tribunal found that “crime of terror within the meaning of Article 3 of the Statute [establishing the jurisdiction of the ICTY] was committed against the civilian population of Sarejevo during the Indictment Period. In relation to the actus reus of the crime of terror as examined above, the Trial Chamber has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period. The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of ABiH-held areas of Sarajevo with the primary purpose of spreading terror.”⁴⁵

2.3. The field of application of different provisions prohibiting terrorism

These provisions on terrorism have different scope. The prohibition in Article 33 of the Geneva Convention IV applies only to international armed conflicts, thus it is addressed only to members of the armed forces of a State and members of the armed forces of national liberation movements within the meaning of Article 1 (4) of AP I. The scope of Article 13 (2) of AP I would be the same. The prohibitions in Article 4 (2) (d) and Article 13 (2) of the AP II apply to the parties to this conflict, that is to say, to the armed forces of a State and to other participants in a non-international armed conflict who meet the requirements of Article 1 (1) of the AP II.⁴⁶ Persons protected under Article 33 of Geneva Convention IV are persons under the power of the Party to the conflict. They are protected from illegal acts of violence - collective

⁴³ *Galić* Trial Judgement, op. cit. 148, para. 133.

⁴⁴ *Ibid*, para. 134-135.

⁴⁵ *Galić* Trial Judgement, op. cit. 34, para. 597.

⁴⁶ VASILIAUSKIENĖ, op. cit. 6, p. 59

punishment and terrorism. Thus, the scope of this article would be the illegal use of terrorism to maintain public order in the occupied territory.

The scope of other provisions is wider. The provision of Article 51 (2) of AP I is in the article on the protection of all civilians, not only those in the power of a party to an armed conflict, and thus protects all civilians. This article prohibits not only the commission of such acts, but also the threat to commit such acts.

Article 51 of AP I is one of the most important articles of this protocol, and therefore the prohibition of terrorism must be regarded as an important, essential provision. Similarly, Article 13 of AP II also protects all civilians from the crime of terrorism. The prohibition of terrorism in Article 4 of AP II covers an even wider range of persons, as it applies not only to civilians but also to combatants who are no longer involved in hostilities (the scope of this article is “all persons not directly or no longer involved in hostilities”). Thus, the prohibition of terrorism is formulated in the latter article in the broadest of all provisions analysed⁴⁷.

Because terrorism is considered an attack on civilians, a legitimate military attack on military objects and combatants (or fighters in a non-international armed conflict) that provides a military advantage is not considered terrorism and is not prohibited.⁴⁸ The primary purpose of such attacks will be to gain a military advantage. Attacks on the civilian population will be seen as having the primary aim of intimidation of the civilian population, although their perpetrators and perpetrators claim to pursue military objectives.⁴⁹ However, the prohibition of terrorism would cover acts which, although directed against a military object, are carried out without distinction and unproportionally, and are carried out with the primary purpose to intimidate the civilian population. However, there is a problem of overlap in this respect: terrorist acts are covered by a more general ban on attacking civilians. Thus, this crime can be considered as a qualified crime of direct attack of civilians.⁵⁰

As already mentioned, the ICTY argues that these provisions should be considered as part of customary IHL. This was stated in 1973 by J. Paust, who quoted sources from the 20th

⁴⁷ *Ibid.*, p. 60

⁴⁸ JODOIN, *op. cit.* 23, p. 94.

⁴⁹ KALSHOVEN, P. “Guerrilla” and “Terrorism” in Internal Armed Conflict. *The American University Law Review*. Vol. 33, 1983: 67–81. p. 78-79. He gives two examples of such attacks: a military attack directed at a settlement of civilians working in a military factory, and the assassination of a high-level civilian officer working in a unit organizing resistance to the uprising.

⁵⁰ JODOIN, *op. cit.* 23, p. 95; KALSHOVEN, *op. cit.* 49, p. 80.

century and even earlier ones⁵¹. Therefore, it can be stated that the application of these provisions is much wider, especially in armed conflicts involving states that have not ratified AP I and AP II. According to Jodoin, despite their customary nature, their scope is linked to that set out in the Protocols.⁵² The question arises how to assess terrorist acts in conflicts that do not go beyond the threshold of armed conflict set out in AP II and hence where only Article 3 of Geneva Conventions applies. Is this prohibition applicable in those conflicts, or are only the conventions governing individual acts of terrorism applicable, or does the prohibition on terrorism not apply at all? Given the purpose of this ban, which is to protect the civilian population from physical and psychological violence caused by terrorist acts, which is one of the key objectives of IHL, this customary ban on terrorism should also apply to so-called Article 3 of Geneva Conventions conflicts, which do not qualify as armed conflict, set out in AP II.⁵³

While terrorist acts are regulated by IHL, most conventions governing terrorist acts stipulate that they do not apply in times of armed conflict. This issue is one of the outstanding issues in the negotiations on the Comprehensive Convention on Terrorism. We are talking here about the relationship between IHL and the so-called terrorist law (which would consist of the above-mentioned conventions governing specific terrorist acts). The proposal of the Coordinator on the Comprehensive Convention on Terrorism project also proposes to exclude situations of armed conflict from the scope of the Convention.

Thus, it can be stated that the IHL norms establish the prohibition of terrorism, and violations of this obligation must be considered as a war crime of terrorism. This ban on terrorism is part of customary IHL.

CONCLUSIONS

There is yet no universal definition of terrorism in international law. Earlier, regional conventions would adopt 'list' approach, that is, list the crimes (and corresponding international treaties outlawing them) which are considered terrorist. Lately, the trend of adopting a more general definition emerged.

The draft UN Comprehensive Convention on Terrorism defines terrorism using two elements, objective (act causing serious damage) and subjective (act having specific terrorist

⁵¹ PAUST, J. Terrorism and the International Law of War. *Military Law Review*, Vol. 64, Spring 1974: 1–36, p. 11.

⁵² JODOIN, *op. cit.* 23, p. 87.

⁵³ VASILIAUSKIENĖ, *op. cit.* 6, p. 60.

aim/purpose). This convention defines terrorism as an unlawful and intentional act of a person by which he causes the death or serious bodily injury of any person, or serious damage to public or private property, including public places of use, public or governmental bodies, public transport system or infrastructure, or the environment, or damage above to such objects, if it is likely to cause significant economic damage, if the purpose of such action (judging by its nature or context) is to intimidate the public, or to compel a government or international organization to take or refrain from doing so. The definitions of general nature in regional conventions tend to include these two elements as well.

Terrorism is often carried out by the actors of contemporary armed conflicts. As the state-based conflicts decrease, and so has the number of battle-related deaths in state-based conflicts since 1950s. However, this positive trend is counterbalanced by the fact, that terrorism is integral to many contemporary conflicts, and some of the worst trends in contemporary armed conflicts are related to the use of terrorism as standard tactic of conflict.

Terrorist acts in the context of armed conflict are prohibited both directly and indirectly. Terrorist acts against persons not involved in hostilities and their property, depending on their purpose and manner, may be considered as attacks on civilians and objects, non-discriminating attacks, attacks against religious shrines, attacks on dangerous establishments and installations, hostage-taking and similar.

Terrorism can also be distinguished as a separate war crime prohibited by Geneva Conventions and their additional protocols. During armed conflict it has a special meaning. Terrorism, in accordance with Article 51 of AP I and Article 13 of AP II, is to be defined, within the limits of IHL norms, as acts of coercion or threats against certain persons (civilians or non-combatants) whose primary, main purpose is to cause fear/terror in those persons. This provision prohibits acts the main purpose of which is to cause fear to the civilian population, but without conferring virtually any military advantage. Thus, this subjective element (the aim to cause fear of the civilian population) must always be regarded as a necessary element and not merely as a side effect of the military action. Serious violations of the abovementioned provisions can be considered war crimes. The prohibition of terrorism in armed conflict is not only established in international treaties establishing the rules of IHL, but is also considered to be part of customary IHL.

The ICTY has identified the following elements of a terrorist offense: 1) These are acts of violence against the civilian population or individuals who are not directly involved in

hostilities resulting in the death or serious injury of the mentioned persons. 2) The perpetrator deliberately directed these actions against civilians or persons not directly involved in hostilities. 3) The main purpose of the act was to provoke the fear of the civilian population.

REFERENCES

1. *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365>
2. *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380>
3. *Convention for the Prevention and Punishment of Terrorism*. 1937 [accessed on 2020 10 15] Available at <https://dl.wdl.org/11579/service/11579.pdf>
4. *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*. 1999 [accessed on 2020 10 20] Available at <https://www.refworld.org/docid/3de5e6646.html>
5. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OL L 88, 2017 3 31, p. 6-21.
6. GASSER, H. P. Prohibition of Terrorist Acts in International Humanitarian Law. *International Review of the Red Cross*. July-August 1986, Vol. 26, No. 253: 200–212.
7. HENCKAERTS, J.-M., DOSWALD-BECK, L. (eds.) *Customary International Humanitarian Law*. Vol. I – Rules. Vol. II – Practice. Cambridge University Press, 2005.
8. *International Convention for the Suppression of the Financing of Terrorism*. 1999 [accessed on 2020 10 20] Available at <https://www.un.org/law/cod/finterr.htm>
9. International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Stanislav Galić*. Trial Judgement of 5 December 2003. Case No. IT-98-29-T. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>
10. International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Stanislav Galić*. Appeals Judgement of 30 November 2006. Case No. IT-98-29-A. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>.
11. International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Duško Tadić a/k/a „Dule“*. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995. Case No. IT-94-1-AR72. [accessed on 2020 10 25] Available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>
12. JODOIN, S. Terrorism as a War Crime. *International Criminal Law Review*. 7 (2007): 77–115.
13. KALSHOVEN, P. “Guerrilla” and “Terrorism” in Internal Armed Conflict. *The American University Law Review*. Vol. 33, 1983: 67–81.
14. *OAU Convention on the Prevention and Combating of Terrorism* [accessed on 2020 10 20] Available at https://au.int/sites/default/files/treaties/37289-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf
15. PAUST, J. Terrorism and the International Law of War. *Military Law Review*, Vol. 64, Spring 1974: 1–36.
16. PILLOUD, C. (ed.) et al., ICRC. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987. (Protocol I).

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17. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>
 18. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. [accessed on 2020 10 25] Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>
 19. STEPANOVA, E. *Terrorism in Asymmetrical Conflict. Ideological And Structural Aspects*. SIPRI Research Report No. 23. Oxford University Press, 2008.
 20. The Arab Convention for the Suppression of Terrorism. 1998 [accessed on 2020 10 15] Available at https://www.unodc.org/images/tldb-f/conv_arab_terrorism.en.pdf
 21. UN Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights. *Terrorism and Human Rights*. Progress report of the Special Rapporteur, Kalliopi K. Koufa. 27 June 2001. No. E/CN.4/Sub.2/2001/31. [accessed on 2020 10 15] Available at <https://www.refworld.org/docid/3d5a2cd30.html>
 22. United Nations Office on Drugs and Crime. *Counter-Terrorism Module 6 Key Issues: International humanitarian law, terrorism and counter-terrorism*. July 2018. [accessed on 2020 10 25] Available at <https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/ihl-terrorism-and-counter-terrorism.html>
 23. United Nations. *Draft Comprehensive Convention on International Terrorism*. 2000 [accessed on 2020 10 20] Available at <https://digitallibrary.un.org/record/422477>
 24. VASILIAUSKIENĖ, V. *Kova su terorizmu tarptautinės humanitarinės teisės kontekste [Fight Against Terrorism in the Context of International Humanitarian Law]*. Doctoral dissertation. Social Sciences: Law (01S). Vilnius, 2014.
 25. WALTER, C. Defining Terrorism in National and International Law. In: WALTER, C. et. al. *Terrorism as a Challenge for National and International Law: Security vs. Liberty?* Berlin: Springer, 2003: p. 23-44, p. 34.