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Terrorism is a concept with a colloquial meaning that lacks a consensus definition under international law. An omnibus definition of the crime of terrorism has eluded the international community to date largely because of the now trite adage: "One man's terrorist is another man's freedom fighter." Indeed, many international instruments condemning terrorism seem to carve out exceptions for national liberation movements and groups struggling for self-determination in the context of a history of colonialism and oppression. For example, a 1991 UN General Assembly Resolution denounced terrorism, but in virtually the same breath, reaffirmed "the inalienable right to self-determination and independence of people under colonial and racist and other forms of alien domination and foreign occupation."[1] As a result of this normative ambivalence, codification efforts have yielded a number of treaties that require states to criminalize only specific terrorist acts (such as aircraft hijacking or attacks against internationally protected persons).

Due in part to these definitional challenges, the architects of the International Criminal Court (ICC) excluded the crime of terrorism from the ICC Statute altogether. Nonetheless,

vocal support for the crime's eventual inclusion in the Court's subject matter jurisdiction remains. A number of terrorism prosecutions are proceeding in domestic courts around the world, and a hybrid court in Lebanon will be devoted to adjudicating terrorist crimes. As a result of the catastrophic attacks of September 11, 2001, and subsequent events, countering the threat of terrorism remains high on the agendas of individual states and the international community. For these reasons, we include this category of crimes within the "canon" of international criminal law (ICL).

This chapter endeavors to identify the elements of terrorism that distinguish it from other international crimes. It also considers the way in which the phenomenon of terrorism at times implicates and intersects with international humanitarian law (IHL) and the prohibitions against war crimes. Finally, it explores the extent to which terrorism crimes might be prosecutable before the ICC, notwithstanding that these crimes were purposefully excised from the Court's subject matter jurisdiction.

Terrorism under International Law

Although there have been efforts to codify a global prohibition against terrorism under international law for decades, there is no universal treaty or international instrument that defines the crime of terrorism writ large. The League of Nations embarked on the first major attempt in the modern era to prohibit the crime of terrorism after the 1934 assassination by Croatian separatists of King Alexander of Yugoslavia and others. The treaty — the Convention for the Prevention and Punishment of Terrorism (1937) — defined terrorism as follows: "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular

persons or a group of persons or the general public."[2] The treaty attracted 24 state signatories; only India ultimately ratified the Convention. The onset of World War II scuttled any further efforts to bring the treaty into effect. After the dissolution of the League of Nations, the treaty was never revived.

From this abortive start, the international community has proceeded in a piecemeal fashion by criminalizing various manifestations of terrorism (such as offenses committed on board aircraft, crimes against internationally protected persons, hostage taking, crimes involving maritime navigation, crimes involving nuclear material, and the financing of terrorism), often in response to particular terrorist incidents. In addition to providing penal definitions, many of these treaties obligate state parties to incorporate the relevant prohibitions into their domestic criminal codes, to treat enumerated acts of terrorism as extraditable offenses, to grant mutual legal assistance in the investigation and prosecution of the proscribed acts, and to either extradite or prosecute offenders pursuant to broad principles of extraterritorial jurisdiction. In this regard, the crimes of terrorism have been largely responsible for the greater acceptance of passive personality jurisdiction in international law, as states increasingly assert jurisdiction over extraterritorial acts of terrorism committed against their nationals.

This proliferation of definitions has led courts and commentators to conclude that there is no established definition of terrorism under customary international law. Nonetheless many definitions of terrorism share certain basic structural elements:

1. The perpetration of violence by enumerated or unenumerated means;
2. The targeting of innocent civilians or elements of the civilian infrastructure;
3. Conduct is undertaken:

a. With the intent to cause violence or with wanton disregard for the act's consequences;
b. For the purpose of causing fear or terror, coercing a government, or intimidating an enemy;
c. To achieve some political, military, ideological, or religious goal.

As you review the various definitions of terrorism provided in your primary text or in the literature, try to identify common and divergent elements. You will see that although many instruments and penal codes addressing terrorism do not list prohibited acts with specificity, most contain one or more specific intent or motive element requiring proof of the existence of some mental state over and above the general intent to commit acts of violence.* In some cases, this mental element is aimed at the civilian population (the intent to cause terror) or a government (the intent to influence a government). This emphasis on the perpetrator's motive markedly distinguishes crimes of terrorism from other domestic and international crimes.

Many multilateral instruments limit their application to terrorism committed by nonstate actors, implicitly or explicitly failing to recognize any notion of state terrorism. Thus, some

* In these formulations, it is often unclear if this mental element is the equivalent of a specific intent requirement (along the lines of the definition of genocide) or simply a required motive. Specific intent is generally defined as the purpose that the perpetrator intends to accomplish by committing a specific criminal act. Specific intent is usually a special mental element that is required above and beyond any mental state associated with the underlying *actus reus* of the crime. (For example, burglary — the breaking and entering into of a dwelling of another — requires a showing of the specific intent to commit a felony therein.) The concept of specific intent often elides with that of motive, which is the guiding purpose or goal behind an individual's criminal action. Normally, proof of motive is not required for a criminal conviction, although proving the defendant's motive is often an integral part of any prosecution and is often relevant at the time of sentencing. By contrast, the prosecution must prove the existence of specific intent if it is an element of a crime. One exception to this general rule involves hate crimes, which require proof that the defendant was motivated by animosity toward a protected group.

definitions — such as the one contained in the 1997 Terrorist Bombing Convention — prohibit acts committed, *inter alia*, against governmental facilities or public installations.[3] Other treaties limit their application to acts of "international terrorism," thus implicitly excluding jurisdiction over acts of terrorism committed by substate actors operating solely within a state. The Nuclear Terrorism Convention, for example, provides at Article 3 that

> This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has [grounds to assert territorial, nationality, and passive personality jurisdiction].

By contrast, others treaties include no specific place or manner restrictions.

The 1999 International Convention for the Suppression of the Financing of Terrorism in certain respects unifies these various terrorism treaties. Article 2(1) of that treaty incorporates a number of extant treaties in its annex by providing that

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [any violation of an annexed treaty].

In addition, the treaty prohibits

> [a]ny other 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]

This latter provision comes close to an omnibus definition of the phenomenon. The Financing Convention is bolstered by a Chapter VII Security Council Resolution passed in the weeks following the attacks of September 11, 2001, requiring all states to, *inter alia*, suppress the financing of acts of terrorism and freeze financial assets of persons or entities involved in terrorism.[5]

Since the 1990s, members of the United Nations have been pushing for a truly Comprehensive Convention on International Terrorism with a definition of terrorism that would reconcile and harmonize the disparate definitions in prior treaties. Such a convention, however, has yet to come to fruition. More recently, the UN Security Council adopted a resolution condemning the incitement of terrorist acts as well as the justification or glorification thereof.[6] It called on "all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

> (a) Prohibit by law incitement to commit a terrorist act or acts;
>
> (b) Prevent such conduct;
>
> (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct."

Additionally, the resolution called on all states to strengthen security at international borders and passenger screening facilities, promote tolerance, and "prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters."

None of the functioning international criminal tribunals includes terrorism in its subject matter jurisdiction. The Special Tribunal for Lebanon (STL), which is still under construction, will be the first.[7] The STL is a hybrid tribunal

established by the United Nations and Lebanon to investigate and prosecute those "responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others."[8] The Tribunal has a mandate to apply only the domestic laws of Lebanon "relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy." Article 314 of the Lebanese Penal Code, one of several terrorism-related provisions that may be litigated before the STL, "defines 'terrorist acts' as all 'acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents likely to create a public hazard.'"[9] The *mens rea* element requires knowledge and a will to commit the terrorist act along with a specific intent to create a state of alarm or fear. The STL is thus a quasi-international tribunal effectively specializing in the law of terrorism. As such, although it will be interpreting Lebanese domestic law, the STL's jurisprudence will no doubt be persuasive as other tribunals consider terrorism crimes in the future.

Terrorism Within the ICC Statute

As originally envisioned, the ICC's constitutive statute was to be primarily procedural in nature, incorporating the "core" international crimes of genocide, crimes against humanity, and war crimes by reference and as defined by customary international law along with certain "treaty crimes" set forth in discrete multilateral treaties already in existence, such as treaties

addressing terrorism, drug trafficking, money laundering, and the like. To that end, nine of the terrorism treaties referenced earlier (for example, those addressing terrorism against aircraft, ships, hostages, and diplomats) were included in an annex to the original ICC Statute.

Early on, delegates expressed concern that customary international law alone would not define the relevant crimes as clearly as would be necessary to provide adequate notice to an accused pursuant to the principle of *nullum crimen sine lege*. In addition, with respect to treaty crimes, delegates anticipated that it would be necessary to confirm that the treaty was in force with respect to the relevant states (e.g., the territorial and nationality state) for a treaty crime prosecution to proceed. These concerns led states to agree to set out the operative definitions of all the crimes in the Statute (and later adopt Elements of Crimes) rather than to incorporate such crimes by reference to preexisting treaties or customary international law.

As the negotiations proceeded at the 1998 Rome Conference, the treaty crimes eventually either fell out of the Statute, as was the case with terrorism *stricto sensu* and drug trafficking, or were incorporated into the core crimes, as was the case with respect to crimes against internationally protected persons (which are enumerated as war crimes at Article 8(2)(b)(iii)) and apartheid (which is listed as a crime against humanity at Article 7(1)(j)). With respect to terrorism crimes, drafters articulated several reasons for eventually excluding these crimes from the Statute altogether: (1) terrorism has no universally accepted definition; (2) terrorism was not considered to be one of "the most serious crimes of international concern" as contemplated by Article 1; (3) at the time, terrorism was not clearly recognized as a crime under customary international law; (4) including crimes of terrorism would unnecessarily politicize the ICC; and (5) there are alternative domestic venues for

terrorism prosecutions such that establishing international jurisdiction would be unnecessary or duplicative. In addition, delegates at the Rome Conference were committed to concluding the treaty in five weeks, and the inclusion of terrorism was proving to be a sticking point in the negotiations.

With respect to the politicization argument, states contended that the inclusion of terrorism would impede ratification of the Rome Statute for fear of politicized prosecutions and proceedings, especially in cases in which states were battling subversive groups or internal rebellions. As one scholar has noted, terrorism "is not only a phenomenon, it is also an invective, and there are many examples of States using this invective in a most subjective manner to de-legitimize and demonize political opponents, associations or other States."[10] This argument overlooks the fact that many of the crimes within the jurisdiction of the Court have significant political ramifications, not the least of which is the crime of aggression.

Terrorism was also excluded under the rationale that effective systems of national and international cooperation are already in place for the prosecution of terrorism crimes. Because governments are usually the direct or indirect target of terrorist acts, states are highly motivated to prosecute criminally acts of terrorism, to cooperate with each other toward this end, and to encourage the pursuit of civil actions by victims. Indeed, as compared to the "atrocity crimes," terrorism crimes are more often incorporated into domestic penal codes and are more frequently prosecuted by states. Given this observation, it was argued that the principle of complementarity would likely prevent the prosecution of acts of terrorism before the ICC in many cases.* Moreover, it was argued that effective

* The principle of complementarity is fundamental to the ICC framework and provides that the Court will exercise jurisdiction only where the relevant domestic authorities (for example, the territorial and nationality states) are either unwilling or unable to prosecute offenders. Notably, complementarity is not triggered, at least according to the plain text of Article 17, where the domestic

counterterrorism requires "long-term planning, infiltration into the organizations involved, the necessity of giving immunity to some individuals involved, and so forth"[11] — all functions more effectively exercised by national jurisdictions than an international court far from the events in question and the relevant political milieu.

In the end, the final ICC Statute supports jurisdiction over only the four core crimes, namely genocide, crimes against humanity, war crimes, and the undefined crime of aggression. Some drafters remained uneasy with this result and managed to secure the adoption of Resolution E at the Rome Conference, which recommended that a review conference assemble in 2009 or 2010 to consider the inclusion of the crime of terrorism in the ICC Statute. As this Conference approaches, many states and scholars continue to argue that terrorism should eventually be included within the Court's jurisdiction. In particular, these advocates question the assumption made during the Rome Conference — which occurred in 1998 prior to the attacks of September 11, 2001 — that terrorism is not a serious crime of international concern. They argue that terrorism represents a substantial and growing threat, especially given the possibility of attacks with nuclear, chemical, or biological weapons of mass destruction.

Although there is no question that the threat of terrorism enjoys a greater level of international recognition and concern since the Rome Conference, the question of how best to address terrorist crimes as a legal matter is still very much an open one. One of the fundamental issues is whether the more established international crimes currently within the jurisdiction of the ICC adequately provide redress for terrorist acts, or whether there is a jurisdictional lacunae that needs to be filled.

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courts are overly zealous toward prosecutions or where the defendant's due process rights are potentially in jeopardy — two risks for terrorism prosecutions where the state is the target of the acts in question.

The Interface Between Terrorism and War

One of the challenges to creating a penal regime for acts of terrorism stems from the fact that the crimes encompassed within the concept of terrorism sit at the intersection of the *jus ad bellum* (governing the legality of the resort to armed force *ab inicio*) and the *jus in bello* (governing the legality of the use of armed force and the conduct of hostilities once an armed conflict has been initiated). As was discussed in Chapter 6 on the legal regulation of war, contemporary international law treats these two bodies of law as conceptually distinct. Yet acts of terrorism are often justified by the justness of the cause on behalf of which they are committed. Indeed, there remains a deep-seated unwillingness within segments of the international community to fully relinquish the idea that certain forms of otherwise prohibited violence are legitimate if they are employed in opposition to a colonial, racist, alien, occupying, or oppressive regime by a group seeking independence or self-determination. In such situations of asymmetrical power, an armed conflict fought "according to the rules" would undoubtedly result in a military victory for the dominant power; thus, the apparent inevitability of terrorism. This also explains the rhetorical persistence of the bromide "One man's terrorist is another man's freedom fighter."

Likewise, a certain degree of uncertainty surrounds the interface between the law governing the crimes of terrorism and IHL. This is especially true where terrorists' organizational capabilities and destructive potential rival that of conventional militaries. Acts that would be criminal under domestic law, or would constitute acts of terrorism under the various treaty prohibitions against terrorism, may be lawful acts of war under IHL when committed within the context of an armed conflict. This section attempts to untangle these two bodies of law based on a series of scenarios.

Violent Acts Committed Within International Armed Conflicts

Imagine two signatories to the 1949 Geneva Conventions and their Protocols, Alpha and Beta, at war with each other. Alpha's troops launch two attacks against Beta's troops: one on a traditional battlefield along the border between the two states and one against a military barracks within Beta's territory in the dead of night while Beta's troops are asleep. Both attacks by Alpha's combatants against Beta's combatants are legitimate acts of warfare. Combatants representing nation states at war with each other are deemed "privileged belligerents," which is to say that under IHL they are entitled to use force against each other. Combatants and military installations are lawful objects of attack. Assuming the only individuals deliberately targeted are combatants, and that appropriate levels of force and types of weaponry are utilized, this attack generates no prosecutable event by Beta, Alpha, or the international community. Presumably, if Beta attempted to prosecute either of these acts as war crimes or as violations of domestic law, the defendants would have a strong defense of combat immunity that would find support in IHL and trump domestic law as the *lex specialis*. Thus, although we often think of the laws of armed conflict as limiting the use of force, the same laws provide legal justification for certain acts of violence that would otherwise be illegal outside of an armed conflict.

By contrast, imagine an attack by Alpha's troops against a civilian hospital that contained no Beta military personnel and served no military purpose. A deliberate attack by Alpha's combatants on Beta's civilians (that is, noncombatants) and on a civilian object in the context of an international armed conflict is the quintessential war crime. The perpetrators of this act remain privileged belligerents, but they become war criminals when they deliberately misuse their military might against a

protected class of persons or target. Alpha's combatants may be prosecuted for the war crimes of willfully killing protected persons or the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," within the lexicon of the 1949 Geneva Conventions.[12]

Violent Acts Committed Outside of Armed Conflict

Now, remove the state of war between Alpha and Beta, but imagine there exists a nonviolent political conflict between the two states over contested territory in Beta that is inhabited by individuals who practice the same religion as the inhabitants of Alpha. A deliberate armed attack on civilians hailing from Beta by a radical group hailing from Alpha whose members are motivated by some political or ideological purpose is the quintessential terrorist act. Under current international treaties governing terrorism, only the Terrorist Bombing Convention is implicated by this scenario, and even then only if a "place of public use," "state or government facility," "transportation system," or "infrastructure facility" is intentionally targeted using an "explosive or other legal device" as those terms are defined by the treaty. An attack on a civilian neighborhood would likely not qualify.

Either Alpha or Beta would be entitled to prosecute this act as the crime of murder, or attempted murder, under their domestic penal codes pursuant to the territorial or nationality principles of jurisdiction, respectively. If the penal codes of Alpha and Beta codify any crimes of terrorism or crimes against humanity, the attack may also be prosecutable as such under domestic law if the elements of those crimes are met. Without the existence of an armed conflict between the two states, IHL is not implicated and no war crimes have been committed. Likewise, the perpetrators

from Alpha are not entitled to prisoner of war status when captured or any form of combatant immunity if prosecuted.

The distinction between war crimes and acts of terrorism seems relatively comprehensible under these scenarios. As demonstrated later, once we start altering the operative variables, however, this categorization gets murkier.

The Initiation of an International Armed Conflict

Going back to our situation involving the radicalized group from Alpha, depending on how catastrophic the initial attack by Alpha was, how organized the perpetrators were, and whether the group was under the overall control of the government of Alpha, this violence may constitute the initiation of an international armed conflict between the two states, thus triggering the application of the IHL governing international armed conflicts and a right of Beta to engage in self-defense within the meaning of Article 51 of the UN Charter. (An attack by an organized militia not under the overall control of Alpha might constitute the initiation of a noninternational armed conflict within Beta, as discussed more fully later.)

Determining when IHL is initiated, and whether the rules governing international or noninternational armed conflicts apply, returns us to a topic in Chapter 6. Recall that the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadić* concluded 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."[13] The ICTY also noted that IHL applies "from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached."[14] In terms of conflict classification, an armed attack by the formal

armed forces of Alpha would constitute the initiation of an international armed conflict within the meaning of Article 2 of the Geneva Conventions. Likewise, an attack by an informal militia under the "overall control" of Alpha — the test devised by the ICTY to establish the existence of an *international* armed conflict — would also trigger the Geneva Conventions.* This brings us full circle to our original IHL scenarios discussed earlier. Once the IHL governing international armed conflicts applies, acts that would otherwise be criminal under international or domestic law may become legitimate acts of war. A deliberate attack on civilians, however, is never a lawful act of war and could be prosecuted as a war crime.

Violent Acts Committed Within Noninternational Armed Conflicts

Another obvious amendment to our scenario involves entirely internalizing the conflict. Imagine a civil war within Beta in which citizens of Beta who practice the same religion as inhabitants of Alpha seek secession from Beta to achieve irredentist aspirations to join Alpha. In the dark of night, the secessionists attack Beta's military barracks and a civilian hospital.

The Geneva Conventions (by common Article 3) and Protocol II regulate military conduct in civil wars and other noninternational armed conflicts. The attack on the civilian

* These militia might not qualify for prisoner of war treatment, however, if captured. Article 4 of Geneva III contemplates the involvement of "militias . . . belonging to a [High Contracting] Party to the conflict and operating in or outside their own territory" in addition to formal forces. To qualify as privileged belligerents, and to be entitled to prisoner of war treatment, these militia must (a) be commanded by a person responsible for his or her subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war.

hospital is prohibited by common Article 3* and Articles 4 and 13 of Protocol II, which protect persons who do not take direct part in hostilities, including the civilian population. By contrast, neither instrument prohibits the attack on the military barracks. (The penal consequences of these acts are discussed later). Under IHL, Beta's combatants remain legitimate objects of attack even when they are not actively engaged in combat. In other words, once the fact of an armed conflict is established, members of the armed forces of a state are combatants, always considered to be taking a direct part in hostilities and thus targetable. It is only once they are officially *hors de combat* as a result of illness, injury, capture, or surrender that combatants may not be targeted. In our scenario, Beta's combatants have certainly "laid down their arms" for the night, but that terminology is not meant to cover combatants who have simply retired for the night. Indeed, the billeting of these combatants in the barracks is not dispositive; these individuals could conceivably be attacked in their homes as well, although IHL would condemn the deaths of any civilians deliberately targeted or the unintentional deaths of civilians if the force

* Common Article 3 reads in relevant part:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

used was disproportional to any military advantage to be gained by attacking off-duty troops.

A rather unintuitive asymmetry in IHL reveals itself if we alter our facts a bit. Imagine that as our secessionists attack government troops, the government troops advance around the perimeter and attack the secessionists from behind, causing them to disband and scatter. Under IHL, this is a lawful act of war. The secessionists are taking direct part in hostilities and, as such, are lawful objects of attack. Further imagine that during this confrontation, government troops identified particular individuals during the attack who subsequently escaped capture. Can government troops later track these individuals down and kill them in their homes? The answer according to Protocol II is no. Unlike the government troops mentioned earlier, who are always considered to be taking direct part in hostilities and are thus always targetable, our secessionists are not technically combatants. As noncombatants, they may be targeted only when they are taking direct part in hostilities pursuant to Article 13(3) of Protocol II, which states "[c]ivilians shall enjoy the protection afforded by this part [not to be targeted], unless and for such time as they take a direct part in hostilities." This answer might change, however, if the secessionists were billeted in a rebel camp somewhere in the territory of the state, because this might still qualify as participation in hostilities. The thorny question of when precisely noncombatants "take a direct part in hostilities" is the subject of ongoing discussions within the International Committee of the Red Cross pursuant to a joint initiative with the T.M.C. Asser Institute in the Netherlands.

The Initiation of a Noninternational Armed Conflict

To alter our scenario somewhat again, imagine the same situation as given previously in which a group of individuals

in Beta who practice the same religion as inhabitants of Alpha desire secession from Beta to join Alpha. Assume that, for the moment, this is merely a political and not an armed conflict. Imagine that the group in Beta radicalizes and eventually decides to utilize violence within Beta to draw attention to their cause. Eventually, the group becomes more and more organized and the violence escalates in terms of the frequency and severity of attacks. At a certain point, the IHL governing a noninternational armed conflict will begin to apply.

Recall from Chapter 6 that common Article 3 and Protocol II have different thresholds of applicability.* The former requires simply an armed conflict "occurring in the territory of one of the High Contracting Parties," with the ICTY defining "armed conflict" as "protracted armed violence between governmental authorities and organized armed groups." The latter (at Article 1(1)) requires an armed conflict within the territory of a party to the Conventions in which the nonstate actors are under responsible command and exercise a degree of control over the state's territory that enables them "to carry out sustained and concerted military operations and to implement [the] Protocol." The Protocol at Article 1(2) makes clear that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." If our secessionists do not meet this standard — for example, if they possess no territory or are not under responsible command — their acts of violence will be governed only by common Article 3.

* In *Hamdan v. Rumsfeld* (548 U.S. 557 (2006)), for example, the U.S. Supreme Court determined that common Article 3 applied to the armed conflict between the United States and al Qaeda.

The Penal Consequences of Violent Acts Committed Within Noninternational Armed Conflicts

Classic IHL, as derived from the four Geneva Conventions of 1949 and their Protocols, would treat all these events quite differently than would modern IHL in terms of their penal consequences. Most important, although the Geneva Conventions identify a list of "grave breaches" that constitute war crimes under IHL, neither common Article 3 nor Protocol II creates or mandates the domestic creation of a penal regime for noninternational armed conflicts. As a result, if we consider only the Geneva Conventions and their Protocols, any penal liability for acts of violence committed within a noninternational armed conflict would be governed by domestic law.

So, assuming that Beta has domestically incorporated the Geneva Conventions and their Protocols, but gone no further, the killing by the secessionists of civilian patients in the hospital and members of Beta's military quartered in their barracks would be treated as acts of ordinary murder by Beta's authorities. The crimes against both targets may thus be treated exactly the same; it is of no moment that the military barracks would be a lawful object of attack within the context of an international armed conflict. The classic treaty law governing noninternational armed conflicts entitles states to treat our secessionists as common criminals rather than privileged belligerents. Individuals who are not considered privileged belligerents under IHL are not entitled to combatant immunity for what would otherwise be lawful acts of war. Nor, for that matter, need they be treated as prisoners of war when they are captured, but the state's standard constitutional and human rights protections would still apply.

Some states have gone beyond their treaty obligations and domestically penalized certain violations of the Geneva treaty provisions governing noninternational armed conflicts. The

United States did so with the passage of the 1996 War Crimes Act.* The original version of that statute defined war crimes to include acts that constitute "a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict." Common Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds" when committed against a person "taking no active part in the hostilities, including members of armed forces who have laid down their arms." As codified as a war crime in U.S. law, this provision would render the secessionists' attack against the civilian hospital the war crime of violence to life and murder. (The attack could also be prosecuted as ordinary murder under U.S. law.) Because common Article 3 does not prohibit the attack on the government barracks, it would generate no criminal liability under the U.S. war crimes statute. It, too, however, could be prosecuted under the domestic penal code.

Modern developments in IHL have significantly expanded the concept of war crimes. In particular, the statutes of the two ad hoc criminal tribunals, and the jurisprudence thereunder, significantly collapsed the distinction between international and noninternational armed conflicts in terms of the penal consequences of acts of violence within the latter. In so doing, the tribunals now regularly prosecute violations of treaty provisions that are not identified as crimes by the treaties

* The original version of the War Crimes Act of 1996 criminalized all violations of common Article 3 of the Geneva Conventions so long as they were committed by or against a member of the Armed Forces of the United States or a national of the United States. 18 U.S.C. § 2441(3). A subsequent amendment to this statute by the Military Commission Act of 2006 decriminalized certain violations of common Article 3, namely "(c) outrages upon personal dignity, in particular humiliating and degrading treatment" and "(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

themselves. For example, the general prohibition against inflicting terror on a population appears in the Additional Protocols to the 1949 Geneva Conventions at Article 51(2) in Additional Protocol I and Article 13(2) in Additional Protocol II.* In *Prosecutor v. Galić*, the ICTY had occasion to interpret these provisions when the prosecution charged the defendant with "inflicting terror on the civilian population" as a war crime under Article 3 of the ICTY Statute (providing for jurisdiction over an exemplary list of "violations of the laws and customs of war"). Even though neither of these provisions contemplates individual criminal liability or defines "spreading terror" as a criminal offense, the ICTY nonetheless convicted the defendants of the charged crime. In particular, the ICTY identified the following elements of the crime of inflicting terror on the civilian population:

> (i) Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
>
> (ii) The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
>
> (iii) The above offence was committed with the primary purpose of spreading terror among the civilian population.[15]

The tribunals' approach to war crimes in noninternational armed conflicts was largely adopted and codified by the ICC Statute at Article 8.* This suggests an emergent customary

* These provisions identically provide that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Article 4(2) of Protocol II also prohibits "acts of terrorism" against civilians or others *hors de combat* as a Fundamental Guarantee.

* Domestic war crimes statutes are increasingly following suit as states adjust their penal codes after ratification of the ICC Statute. This suggests that customary international law now recognizes the possibility of war crimes being committed within noninternational armed conflicts.

international law set governing the commission of war crimes in noninternational armed conflicts. Most states, however, could not prosecute for such acts without first incorporating these prohibitions into their domestic penal codes.

Prosecuting Acts of Terrorism Before the ICC

Despite the clear omission of terrorism from the Rome Statute, arguments exist that the Court could adjudicate certain acts that one might also consider acts of terrorism within its existing subject matter jurisdiction. This is because in certain situations, acts of terrorism may satisfy the elements of other international crimes. As exemplified earlier, the high degree of intersection between acts of terrorism and war crimes suggests that the former may be prosecutable before the ICC and other international tribunals with jurisdiction over war crimes.

Considering our scenarios involving states Alpha and Beta, the ICC could consider Alpha's attack on the hospital, if committed during an international armed conflict, to qualify as the following war crimes, *inter alia*, within the Rome Statute:

- Willful killing (Article 8(2)(a)(i));
- Violence to life and persons (Article 8(2)(a)(iii);
- Extensive destruction of property . . . not justified by military necessity (Article 8(2)(a)(iv));
- Intentionally attacking civilians (Article 8(2)(b)(i));
- Intentionally directing attacks against civilian objects (Article 8(2)(b)(ii)); or
- Intentionally directing attacks against hospitals (Article 8(2)(e)(iv)).

Likewise, if the attack on the hospital occurred within the context of a noninternational armed conflict, the following provisions may be applicable:

- Violence to life and person, in particular murder (Article 8(2)(c)(i));
- Intentionally directing attacks against civilians (Article 8(2)(e)(i)); or
- Intentionally attacking hospitals (Article 8(2)(e)(iv)).

Note that neither Article 51(2) of Additional Protocol I nor Article 13(2) of Additional Protocol II was included in these lists.

None of the provisions of Article 8 penalizes the attack on the military barracks, whether committed in an international or noninternational armed conflict. The targeting of a military objective is generally a lawful act of war; however, it becomes a war crime where disproportionate force is used such that there is an incidental loss of life, long-term or severe environmental damage, or superfluous injury.* Absent this, any prosecution of the barracks attack would have to occur before domestic courts under domestic law.

In addition to these war crimes, where violent acts (such as murder, torture, or kidnapping) are committed within the context of a widespread or systematic attack against a civilian population, they may constitute crimes against humanity under Article 7. The definition of crimes against humanity in the ICC Statute requires proof that the attack was "pursuant to or in furtherance of a State or organizational policy to commit such attack" (Article 7(2)(a)). Presumably many terrorist groups could be shown to possess such a policy to attack civilians. Terrorist attacks may also implicate the prohibition against genocide, where the acts target a protected group with the intent to destroy that group. Although there are many instances of acts of terrorism being directed against a

* Article 8 prohibits the use of weapons that cause unnecessary or superfluous suffering, such as poison or poisoned weapons, asphyxiating gases, or so-called dum dum bullets (bullets that expand on impact). *See* ICC Statute, Articles 8(2)(b)(xvii)-(xx).

protected group (such as those committed during "the troubles" in Northern Ireland or even the attacks of September 11, 2001), it may be difficult to prove the specific intent to commit genocide as opposed to the intent to intimidate or coerce a government — the hallmark of terrorism.

Isolated or exceptional violent acts, committed in times of peace (or without any nexus to an armed conflict) and absent more systemic repression might not be considered a war crime or a crime against humanity. Prosecuting such acts at the international level may require the existence of a stand-alone crime of terrorism. As you review the terrorism materials in your course, and the degree of normative redundancy in ICL, reflect on whether terrorism crimes should be expressly included within the Rome Statute or whether such acts are better prosecuted before domestic courts. In addition, given the clear intent of the majority of drafters to exclude crimes of terrorism from the ICC, consider to what extent the ICC should apply its existing crimes to acts that would otherwise be considered acts of terrorism under the terrorism treaties or pursuant to an emerging customary international law prohibition.