



The various normative fronts in the fight against terrorism and the limitations surround the concept

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1 INTRODUCTION

The term "war on terrorism" is not a legal term, since by international law, for there to be a war, belligerent states must engage in armed conflict with each other. Therefore, although many states are engaged in the fight against terrorism, this fight only qualifies as war if and when there is a fighting state on the side of the terrorist organization, so there is nothing to prevent the "war on terrorism" from turning into an interstate war (CORDESMAN, 2018).

Moreover, the fact that the Taliban sheltered the perpetrators of the attack against the United States on September 9, 2001, although it was not behind the armed attack, constituted a violation of the norms of international law, as well as binding Security Council resolutions adopted before and after September 11 (STEWART, 2018). Considering the omission of Afghanistan, specifically the Taliban, in the face of the US government's ultimatum demanding that al-Qaeda bases be closed and their leaders handed over, the US and allies went to war in 2001 against the Taliban. Considering the peculiarities of the case, especially the relationship between the Taliban and al-Qaeda, the interstate war in Afghanistan was mixed with the fight against terrorists (WEDGWOOD, 2002). Thus, it is observed that in this case *ius in bello*, that is, International Humanitarian Law should be observed, as it aims to regulate the conduct of hostilities. However, actions against various terrorist groups in other parts of the world are not governed by the *ius in bello* (WATKIN, 2004).

Currently, there is no coherent and universal legislation on the definition of terrorism applicable to all in a binding way, since there are several United Nations Security Council resolutions and treaties that address the issue differently (DUGARD, 1973). Thus, it is observed that the main obstacle is due to the difficulty of establishing a definition of the term terrorism that is accepted by all. The international community itself has chosen a fragmented approach by adopting numerous conventions dealing with specific acts of terrorism. Therefore, there is a set of norms governing counterterrorism contained in several overlapping rules (DEBARRE, 2018; STEWART, 2018).

In practical counter-terrorism terms, the definition of terrorism is a problem in international law, which includes international humanitarian law (IHL). Different norms present different examples of



terrorist acts without including a conceptualization, since the norms that define the term are not consensual among themselves (WATKIN, 2004). A better understanding of the concept of terrorism involves the analysis of normative instruments of various scopes, such as regional and international conventions of global scope, especially those of the United Nations. Without much detail, the norms of IHL also include terrorism, thus, gaps remain even with the combination of understandings present in different international normative instruments (DUGARD, 1973).

Therefore, the lack of a universal and binding definition of what terrorism is makes it necessary to understand the possible interaction, and the risks of overlap, between international law and other legal frameworks for combating terrorism. In other words, this article aims to present the legal framework that governs the fight against terrorism, and the possible convergence with IHL. Thus, initially, the complexity of the concept of terrorism will be presented. Subsequently, the regional conventions will be presented, as well as the documents of the United Nations and other legal instruments that protect counterterrorism. Finally, the scope of the fight against terrorism will be analyzed in light of International Humanitarian Law.

2 TERRORISM IN INTERNATIONAL LAW

The concept of terrorism is complex and has multiple aspects. However, one can arrive at a minimal definition that cuts across several perspectives, namely: the indiscriminate use of violence against civilians with the intention of creating a sense of fear and insecurity. This definition does not include political motivation, which is not a consensual element among the different views of terrorism. There is also the analogy with war crime, due to the use of cruel offensive methods on innocent targets or targets with no military relevance (FILIPPO, 2014).

One definition that includes political purpose is that which considers terrorist groups to have political objectives (which can be considered ideological or subversive), while ordinary crimes target material goods. A variant definition notes that the political element consists of violence aimed at exerting coercion on public authorities (regardless of ideology or political project to be developed on a large scale) (DUGARD, 1973).

Not all aspects of the concept of terrorism are marked by subjectivity. Some authors identify an objective element that complements the subjective element of the definition. For Filippo (2014), the objective element is the *modus operandi* (mode of operation or method), understood as attacks on people or property with symbolic value, creating insecurity for the civilian population and public authorities, often involving innocent victims. The subjective element, for the same author, is the *dolus specialis* (special intention), that is, the motivation or political purpose.

According to Frías (2020), the objective element is the *actus reus* (guilty act), that is, the violent act or threat of such an act against civilians or other persons not directly participating in the armed hostilities. According to the same author, the subjective element is the *mens rea* (guilty mind), which means spreading



terror among the civilian population or other protected persons, with the purpose of coercing public or private authority to take a certain course of action or inaction (DUGARD, 1973).

However, the definition of terrorism remains insufficient. For example, during an occupation situation, those who use violent actions to confront occupying forces can be classified as resistance, insurgent, liberation, guerrilla, or terrorist groups, depending on the perspective (PÉREZ-GONZÁLEZ, 2009). In light of this, different regional and international conventions have been drafted with the aim of making the fight against terrorism possible. However, the excess of legislation and binding documents makes the relationship between them a little confusing, depending on the scope in which they are to be applied, as observed in a scenario of armed conflict.

The Regional Conventions

Terrorism is the central object of several international conventions. However, not all of them have entered into force, such as the *Convention for the Prevention and Punishment of Terrorism of the League of Nations*, opened for signature on November 16, 1937. The difficulty of broader intercontinental consensus was ameliorated by the establishment of many region-wide conventions throughout the 20th century, such as: *Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance* (1971); *European Convention on the Suppression of Terrorism* (1977); *SAARC Regional Convention on Suppression of Terrorism* (1987); *Arab Convention on the Suppression of Terrorism* (1998); *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism* (1999); *Convention of the Organization of the Islamic Conference on Combating International Terrorism* (1999).

The *Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance* (1971) was established to prevent and punish acts of terrorism, in particular murder, kidnapping, and other attacks against the life or physical integrity of persons whom the state has a duty to provide special protection under international law, as well as extortion in connection with the aforementioned crimes. Criminal acts against persons entitled to special protection under international law occurred frequently and were of international relevance because of the possible consequences in the relationship between states. Persons charged with or convicted of the crimes listed above should be subject to extradition under the provisions of the extradition treaty between the parties. However, any person deprived of liberty through the application of the convention in question must enjoy the guarantees of due process of law (ORGANIZATION OF AMERICAN STATES, 1971).

The Organization of American States Convention has a feature that is different from other counter-terrorism conventions. A person accused of committing a terrorist act has rights, such as due process of law. This device goes in the opposite direction of political doctrines such as the War on Terror promoted



by President George W. Bush, who kept thousands of individuals imprisoned during the armed conflicts in Afghanistan and Iraq as a result of military operations, without applying the International Humanitarian Law (BORELLI, 2005).

The *European Convention on the Suppression of Terrorism* (1977) was established out of concern over the increase in acts of terrorism. It states that extradition is an effective measure to ensure that perpetrators of such acts do not escape trial and punishment. Although it does not define terrorism, it is understood that terrorist acts are those that the Convention subjects to extradition among the signatory states, such as: kidnapping, hostage-taking or illegal detention; the use of bombs, grenades, rockets, automatic weapons, letters or packets to endanger persons; attempting, aiding, abetting or participating in any of the acts mentioned. All of the mentioned actions need to have political motivation to fall under the agreed upon norm (TURNER, 2016).

Furthermore, the European Convention established in 1977 is a response to the constant terrorist attacks that took place in Europe in the 1970s. From the year 1972 to the year 1976 there were between 200 and 300 attacks with at least one death. Political motivation is expressly mentioned in the Convention because most attacks came from separatist and extremist groups in Western European countries such as Spain and Northern Ireland (WASHINGTON POST, 2022).

The *SAARC Regional Convention on Suppression of Terrorism* (1987) also seeks measures to ensure that perpetrators of terrorist acts do not escape prosecution and punishment allowed by extradition established among the contracting states. For the signatories, the spread of terrorism is a threat to peace, cooperation, sovereignty, territorial integrity, and good relations among neighboring countries (GORDON, 2009). According to the Convention, acts of terrorism include murder, manslaughter, attacks with bodily harm, kidnapping, hostage-taking, offenses with firearms, explosives, and the use of dangerous substances to perpetrate indiscriminate violence against persons or property (MALIK, 2009).

Political motivation must also be present in the acts listed above. For the purpose of extradition among SAARC members, two or more contracting states may include serious acts of violence that are not politically motivated. Thus, the South Asian Association for Regional Cooperation (SAARC) includes political motivation in its definition of terrorism, which brings subjectivity to the analysis. Among the acts listed as terrorist there is no exhaustion, since it is a list of examples (not exhaustive) (GORDON, 2009). Extradition is a measure used in the fight against terrorism, which can be used even for crimes without political motivation. Therefore, the Convention aims to deal with extradition not only for terrorist acts (MALIK, 2009).

The *Arab Convention on the Suppression of Terrorism* (1998) considers terrorist attacks to be actions such as attacks against kings and heads of states or their families, princes, vice-presidents, prime ministers, ministers of state, persons with diplomatic immunity (including diplomats and ambassadors); premeditated murder and robbery accompanied by indiscriminate use of force against individuals or authorities of means of transportation or communication; acts of sabotage and destruction of public property



or property in the service of the public; the illicit manufacture, trade, or possession of weapons, ammunition, or explosives that can be used to commit terrorist attacks (TURNER, 2016). Political motivation is not required and actions are concerning authorities to individuals and property of member countries. The Convention at hand makes it clear that actions of struggle, including with the use of weapons, against foreign occupation forces and aggression for freedom and self-determination are not considered terrorist attacks, provided that they are in accordance with international law. The intention is not to damage the territorial integrity of any Arab state. Finally, it should be noted that the aforementioned document stresses that extradition is also a measure indicated for combating terrorism (TURNER, 2016).

The Arab Convention does not include political motivation in the definition of terrorism. The focus of the concept is on attacks against authorities, although it also includes damage to public property and the use of weapons. Combating foreign occupations and aggression are outside the definition probably due to groups such as Hamas. For example, for Yemeni President Ali Abdullah Saleh, Hamas was not a terrorist group, but a group fighting for Palestinian independence (CHEN, 2010). The U.S. State Department, on the other hand, includes Hamas on the list of terrorist organizations (STATE, 2022).

The *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism* (1999) defines terrorism as an illegal act, punishable under criminal law, committed for the purpose of undermining public security, influencing the decision-making process, or terrorizing the population, adopting various forms (STEWART, 2018). Among the acts expressly considered terrorist by the Treaty are violence or the threat of violence against natural and legal persons; the destruction or threatened destruction of property endangering people's lives; substantial damage to property so as to provide dangerous consequences for society; threatening the lives of statesmen or other public figures with the purpose of destroying the state or its public activities; attacks on representatives of foreign states or members of protected international organizations; other acts classified as terrorism in the national legislations of the states parties to the Convention or in instruments of international law aimed at combating terrorism (MCDERMOTT, 2004). The treaty also addresses "technological terrorism," which includes the use or threatened use of nuclear, radioactive, chemical, or biological weapons if they are used to undermine public safety or influence decisions of authorities to achieve a political objective. Cooperation among signatory states includes the extradition of persons who commit the listed criminal acts (MCDERMOTT, 2004).

The *Commonwealth* is an interregional organization, with 53 members spread over five continents. The Convention of that organization made a mistake in defining terrorism by using the verb "*terrorizing*" (Article 1). To say that terrorism "terrorizes" is like saying that the government "governs" and does not contribute to the explanation of the term. However, the *Commonwealth* Convention also introduces innovations such as introducing the concept of "technological terrorism," which meets international security concerns aimed at the spread of weapons of mass destruction such as nuclear, biological, chemical, or radioactive weapons (CENTER ON GLOBAL COUNTERTERRORISM COOPERATION, 2008).



The *Convention of the Organization of the Islamic Conference on Combating International Terrorism* (1999) defines terrorism as any act of violence or threat, regardless of its motives, with the aim of terrorizing persons, causing injury to them or threatening their lives, honor, liberties, security or rights, occupying or endangering national resources or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent states (HÜBSCHLE, 2011). The crime of terrorism is conceptualized by executing, initiating, or participating in the carrying out of a terrorist act. Persons fighting, including by armed means, against foreign occupation, aggression, colonialism and hegemony, aiming at freedom and self-determination are not considered terrorist crimes by the Convention, provided that the principles of international law are observed. The contracting states must extradite those indicted or convicted of terrorist crimes, when extradition is requested by any signatory country in accordance with the rules and conditions stipulated by the Convention (DOBROT, 2007).

The Islamic Convention highlights the error of any attempt to link terrorism to Islam, since several Islamic countries undertake efforts to combat terrorism. It is worth noting that the Convention expressly considers terrorism a threat to freedoms and rights, unlike other international instruments on the subject (HÜBSCHLE, 2011). The Islamic Convention, like the Arab Convention, does not include motivation as a defining element of terrorism and makes exceptions for armed acts against foreign occupation aiming at self-determination, as long as international law is respected. However, the norms that would limit the aforementioned armed acts are not made explicit. In addition, armed acts against hegemony are also not considered terrorist acts, leaving even more open the margin for interpretation (DOBROT, 2007).

The United Nations conventions and resolutions

Efforts to combat terrorism are not limited to regional efforts. In the late 1990s, two conventions on terrorism were approved at the United Nations, namely: *Convention for the Suppression of Terrorist Bombings* (1997) and *International Convention on the Suppression of the Financing of Terrorism* (1999). The United Nations Security Council also passed three resolutions on terrorism: *UNSC Resolution 1373* (2001), *UNSC Resolution 2178* (2014), and *UNSC Resolution 2242* (2015).

The *Convention for the Suppression of Terrorist Bombings* (1997) aims to increase international cooperation among states in adopting practical and effective measures to prevent terrorist acts and to prosecute and punish perpetrators. According to the Convention, a terrorist attack is committed by any person who unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal device in public places, government facilities, public transportation systems, or infrastructure installations, with the intent to cause death or serious bodily injury, or with the intent to cause intense destruction likely to result in greater economic damage (WITTEN, 1998). A person who has committed a terrorist attack is considered to be any person who attempts or participates in attacks listed above, organizes or commands others to commit attacks, or otherwise contributes to an attack carried out by a group or persons acting with a common purpose. Signatory states are required to make persons who commit the



described attacks susceptible to punishment under domestic law, as well as deem them extraditable (O'CINNEIDE, 2008).

The UN Convention for the Suppression of Bombings does not expressly include political motivation in the definition of terrorist. However, a presence of political purpose is inferred by the exemplified locations where bombs could be detonated, such as public places and government facilities. Governments are likely to be compelled to act or omit to act by such attacks perpetrated by terrorist groups. The focus in combating terrorism is on multilateral cooperation, including punishment by domestic law and the practice of extradition (WITTEN, 1998).

The *International Convention on the Suppression of the Financing of Terrorism* (1999) was established due to concern over the escalation of international terrorism, as well as to promote cooperation among states for the maintenance of international peace and security. For the purposes of the Convention, a financier of terrorism is considered to be any person who directly or indirectly, unlawfully and willfully provides or collects funds with intent or knowledge that they will be used (in part or in full) to carry out acts causing death or serious injury to civilians, or to any person not party to the hostilities in an armed conflict, when the purpose of such act is to intimidate the population or compel a government or international organization to perform a certain act or to refrain from acting (BANTEKAS, 2003). Funds are defined as assets of any kind, tangible or intangible, movable or immovable, acquired by any instrument (including electronic or digital), and may be bank credits, traveler's checks, bank checks, money orders, stocks, bonds, securities, drafts, letters of credit, among other assets (ROSAND, 2003).

The United Nations Convention for combating the financing of terrorism considers that the reduction of terrorist attacks is achieved through the suppression of funds for such acts. Due to the costs of terrorist attacks, the measures proposed by the Convention are important in confronting this threat to international security (ROSAND, 2003). For example, the September 11, 2001 attacks took eight years of preparation, including the participation of terrorists in aviation courses, training in flight simulators, and several trips to observe the structures and activities of airports and airlines (G1, 2022).

UNSC Resolution 1373 (2001) expressly condemned the terrorist attacks in New York and Washington on September 11, 2001, reaffirming that any act of international terrorism is a threat to international peace and security (FINLAY, 2012). One of the goals of the Resolution is to find ways to intensify and accelerate the exchange of operational information, regarding: the actions and movements of terrorist persons and networks; document forgery; trafficking in weapons, explosives, and sensitive materials; use of technological communications by terrorist groups; threat posed by the possession of weapons of mass destruction by terrorist groups (HEUPEL, 2007). Among the measures to prevent and combat terrorism is the freezing of funds and other financial assets or economic resources of persons who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts.

Resolution 1373 was passed as a result of the attacks that occurred in the United States in 2001 (FINLAY, 2012). It is inferred that the sophistication of terrorist acts influenced the focus of the document,



which includes combating networking, counterfeiting, and trafficking. While other instruments mention individuals and groups, the Resolution in question deals with the complex relationships that involve different terrorist activities (FINLAY, 2012). Therefore, the proposed cooperation between states highlights the relevance of the exchange of information, such as that collected by intelligence agencies from different countries. The financial aspect of the fight against terrorism is also reinforced with the measure to freeze funds, continuing what was proposed by the 1999 Convention on the suppression of terrorist financing (HEUPEL, 2007).

UNSC Resolution 2178 (2014) defines *foreign terrorist fighters* to be individuals who travel to a state other than that of their resident or nationality, for perpetrating, planning, preparing, or participating in terrorist acts, or providing or receiving terrorist training, including connection to armed conflict (KOEHLER; FIEBIG, 2019). The concern is with *foreign terrorist fighters* who were being recruited by the *Islamic State in Iraq and the Levant* (ISIL) and *Al-Nusrah Front* (ANF) and other cells, affiliates, splinter groups or derivatives of *Al-Qaida*, which also poses a threat. The Resolution also highlights the activities carried out by entities established within the United Nations, such as the *Counter-Terrorism Implementation Task Force* (CTITF), the *United Nations Office of Drugs and Crime* (UNODC), the *United Nations Centre for Counter-Terrorism* (UNCCT), and the *Counter Terrorism Committee Executive Directorate* (CTED), which provide technical assistance and coordinate with other organizations at the regional and international level to implement the *United Nations Global Counter-Terrorism Strategy* (KOEHLER; FIEBIG, 2019).

The definition of *foreign terrorist fighters* contributes to a more consensual conceptualization of what a terrorist would be, but with an emphasis on the foreign individual. As already evidenced by both empirical reality and counterterrorism instruments, the actions of terrorists often occur transnationally, that is, across state borders (FLORES-HERRERA; PENEV, 2018). For example, a terrorist network can recruit individuals in country "A", to be trained in country "B", to carry out an attack in country "C", as resources come from country "D". The transnational activities of groups such as *ISIL*, *ANF* and *Al-Qaida* were mentioned in the Resolution. One criticism that can be made is the mention of terrorist groups that have committed attacks on Western powers (CHARNEY, 2001).

UNSC Resolution 2242 (2015) recognizes the differential impact of terrorism and extremist violence on the human rights of women and girls, including the context of health, education, and participation in public life. Acts of sexual and gender-based violence are known to be part of objectives and ideology of certain terrorist groups, who practice such acts as a tactic to increase their own power and destroy communities, as described in the *Secretary-General's Report on Sexual Violence in Conflict* and the *Global Counterterrorism Forum's good practices on Women and Countering Violent Extremism*. Among other measures, the Resolution proposes increased participation of women in leadership positions in the United Nations, taking into account geographic representation, accompanied by an increase in the number of



women military and police officers employed in UN *peacekeeping* missions (BUCHAN, 2017; ARONSSON, 2021)

Resolution 2242 innovates by including the gender variable in the fight against terrorism, since the specific violence women suffer from terrorist acts was not mentioned in other instruments. According to feminist studies (AYDIN, 2016), the exclusion/invisibility of women occurs because of gender-based divisions of responsibilities and rights, which place women in the private sphere and men in the public sphere, as decision-makers and occupants of instances of power in the state and in the conduct of international politics. Thus, the suggestion of the Resolution in question to propose a greater female presence in leadership positions, both in political and military posts, is important (BUCHAN, 2017).

Other Legal Instruments

However, in international law, terrorism is not only addressed when it is the central theme of conventions or resolutions, there are several mentions also in other instruments, such as: Report of the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920), *Hague Rules of Air Warfare* (1923), *Fourth Geneva Convention* (1949), *Additional Protocol I* (1977), *Additional Protocol II* (1977), *Statute of the International Tribunal for Rwanda* (1994), *Draft Code of Crimes against the Peace and Security of Mankind* (1996), among others.

There are only two occurrences of the term "*terrorism*" in the Report of the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920), namely:

Violations of the rights of combatants, of the rights of civilians, and of the rights of both, are multiplied in this list of the most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of **terrorism** carefully planned and carried out to the end" (COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, 1920, p. 113, emphasis added).

The Commission, impressed by their number and gravity, thinks there are good grounds for the constitution of a special commission, to collect and classify all outstanding information for the purpose of preparing a complete list of the charges under the following heads: The following is the list arrived at: (1) Murders and massacres; systematic **terrorism** (COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, 1920, p. 114, emphasis added).

The aforementioned Report does not define terrorism, but represented a first effort to address the issue by including the term in the list of war crimes. It is understood that the emphasis is on attacks carried out in a systematic way, due to the expressions "*system of terrorism*" or "*systematic terrorism*". However, a single attack had already proved to have enormous disastrous consequences a few years before the Report was written, namely, the attack that killed Franz Ferdinand, then heir to the throne of the Austro-Hungarian Empire, triggering World War I (DEBARRE, 2018).

Only one article of the *Hague Rules of Air Warfare* (1923) addresses the subject of terrorism and using yet another expression from the same semantic field: "CHAPTER IV - Hostilities. ARTICLE XXII Aerial bombardment for the purpose of **terrorizing** the civilian population, of destroying or damaging



private property not of a military character, or of injuring non-combatants is prohibited" (HAGUE RULES OF AIR WARFARE, 1923, emphasis added). This instrument has a clear goal of protecting civilians from bombing by prohibiting air strikes intended to terrorize or injure the non-combatant population (DEBARRE, 2018).

The *Statute of the International Tribunal for Rwanda* (1994) only addresses the term terrorism in Article 4: "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations [...]. These violations shall include, but shall not be limited to: [...] (d) Acts of terrorism". The Statute does not include a definition of the term, which may have made it difficult to apply punishments based on the said subsection. However, because this is a case of genocide, there is an overlapping of acts of human rights violations, since in addition to terrorist actions (subsection "d"), acts of violence against life, such as torture and mutilation (subsection "a"), offenses to people's dignity, such as degrading treatment and rape (subsection "b"), and other violent acts provided for in the same article are also punishable (DEBARRE, 2018).

The *Draft Code of Crimes against the Peace and Security of Mankind* (1996) at the 48th session of the *International Law Commission* and submitted to the United Nations General Assembly as part of the Session Report.

Article 20: War crimes - Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: [...] (f) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character: [...] (iv) acts of **terrorism** (DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, 1996, emphasis added).

The document, besides including terrorism as a war crime, considers it as a crime against the peace and security of mankind, involving the context of International Humanitarian Law (IHL), but only in Non-International Armed Conflict (NICC). There is a reservation regarding two aspects, one related to the systematic character marked by the expression "*systematic manner*", and the other related to the proportion indicated by the term "*large scale*". With this, it is possible to interpret that not all terrorist attacks would be crimes against humanity, but only those carried out in a systematic manner or on a large scale (VANHULLEBUSCH, 2015).

3 TERRORISM UNDER INTERNATIONAL HUMANITARIAN LAW

Considering the founding norms of International Humanitarian Law (IHL), terrorism is present in both International Armed Conflict (IAC) and Non-International Armed Conflict (NICC) (MURPHY, 2004). In IAC, Article 33 of the Fourth Geneva Convention expressly states that terrorism is prohibited: "*Collective penalties and likewise all measures of intimidation or of terrorism are prohibited*". Furthermore, article 51, clause 2 of the I Additional Protocol uses the term "terror" to indicate a threat to the civilian population: "*The 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"* (emphasis added).

Regarding the IACC, Article 4.2 d of the Second Additional Protocol states that "*acts of terrorism*" are prohibited at any time and in any place. Furthermore, Article 13 (2) of the same Protocol also includes acts of "terror" as prohibited: "*Acts or threats of violence the primary purpose of which is to spread **terror** among the civilian population are prohibited"* (emphasis added). The alternation between the terms "terrorism" and "terror", from the same semantic field, evidences the intention to reinforce the prohibition of violent and indiscriminate acts against civilian populations (DEBARRE, 2018).

For the application of the Law of War or armed conflict between states and transnational terrorist groups or networks, these groups or networks need to be brought under international humanitarian law with the same rights and obligations as the states parties to the conflicts, which states are reluctant to accept. Only combatants have the right to participate directly in hostilities. However, states deny combatant status to terrorists and treat them as criminals for their illegal participation in hostilities, so terrorists are also denied "prisoner of war" *status* (MURPHY, 2004).

Furthermore, the definition of a terrorist attack as an "act of war" and the consequent "war on terror" or "war on terrorism" are political rhetoric, with relevant practical implications, but which do not correspond to concepts of international law. The "Deterritorialization" of war, i.e., responses to terrorists in any state where they are instigated, and the "Privatization of war," i.e., the participation of private groups (with terrorist networks), also do not conform to international norms. This does not mean that terrorist acts cannot occur during an armed conflict, a situation in which International Humanitarian Law is applicable (PÉREZ-GONZÁLEZ, 2009).

As per *United Nations Security Council Resolution 1566* (2004):

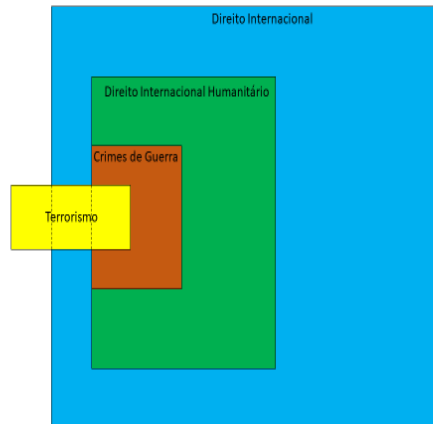
That they must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law (UNITED NATIONS SECURITY COUNCIL RESOLUTION, 1566).

Failure to consider norms of international law or international humanitarian law in combating terrorism can provoke resistance from other states to develop cooperation. A counter-terrorism campaign involves multiple measures, not necessarily including the military, such as information gathering (intelligence actions), legal and police cooperation, extradition, criminal sanctions, diplomatic and economic pressure, financial investigations, freezing of assets, efforts to control the proliferation of weapons of mass destruction, etc. Armed action at the expense of intelligence procedures can undermine counterterrorism efforts (PÉREZ-GONZÁLEZ, 2009).

On the one hand, the norms of International Humanitarian Law (IHL) are a subset of the norms of international law, on the other hand, the norms on war crimes are a subset of the norms of IHL. It follows from the above that the concept of terrorism in part is present in IHL as a war crime, either for an

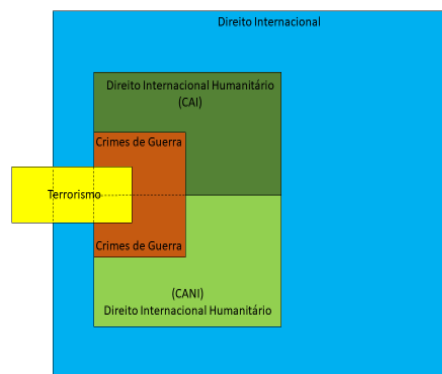
International Armed Conflict or for Non-International Armed Conflict (DEBARRE, 2018). In the case of the absence of an armed conflict, terrorism can still be identified in international law norms, as to the objective aspect of the definition of the concept, as per the figures below:

Figure 1: Terrorism And International Humanitarian Law



Fonte: elaboração própria com base em informações de Filippo (2014), Frias (2020) e Pérez-González (2009)

Figure 2: Terrorism And International Armed Conflict And Non-International Armed Conflict



Fonte: elaboração própria com base em informações de Filippo (2014), Frias (2020) e Pérez-González (2009)

However, gaps persist due to the lack of precision of the subjective element of the term concerning political motivation not defined by the norms of international law. The same can be said about scenarios in which the parties to a political dispute consider the same group with opposite qualifications: "terrorists" or "liberators. This doubt does not exist if this group carries out indiscriminate attacks against civilians, because they would be terrorists falling under the objective criterion. However, in the situation where the group carries out attacks against oppressive armed targets, the doubt tends to remain, since it becomes more reasonable to identify the said group as liberators (DEBARRE, 2018).

4 CONCLUDING REMARKS

Terrorism is still an important phenomenon in the international environment, challenging the international community to face it. The situation remains delicate, since there is no consensus on the concept of terrorism, mainly due to the lack of interest of States, as well as the complexity of the phenomenon.



Therefore, the United Nations has opted for the fragmentation of normative texts that dictate the rules to combat terrorism, without removing the primary role of States in undertaking efforts regarding the necessary measures to accomplish counterterrorism.

In this way, the article aimed to present the various normative fronts - regional and international conventions, Security Council resolutions, besides the special norm that regulates warlike hostilities, that is, the International Humanitarian Law - to combat terrorism. The consequence of the fragmentation of norms based on counterterrorism is their overlapping, as well as the apparent difficulty in reconciling them, essentially because States do not find a consensus on the definition of the concept of terrorism, both in the legal space and in political affairs.

The definitions in the different normative frameworks reflect the interests of state actors that hinder cooperation on the issue in question. Therefore, a binding and universally accepted conceptual construction on terrorism is necessary as a legitimate counterterrorism instrument, through the establishment of clear procedures. Only in this way will it be possible to legitimize the actions of states in a clear and objective manner in order to guarantee the effective combat against terrorist organizations.

Finally, although we can see dozens of regional and international conventions in the international community, in addition to the resolutions of the Security Council of Nations, as well as norms aimed at regulating war activities and fighting terrorism - International Humanitarian Law -, we can also see that without a clear legal and political scope, the objective of fighting terrorism is harmed. In short, the unilateral interests of state actors put in check how counterterrorism should be conducted, especially due to the political ideologies that influence state policy.



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