Terrorism in International Humanitarian Law

A. INTRODUCTION

It is commonly asserted that terrorism ‘is not a discrete topic of international law with its own substantive legal norms’, and is even ‘a term without legal significance’.

Yet this orthodox position, expressed by two scholar-judges of the ICJ, has consistently overlooked the ‘absolute and unconditional ban on terrorism’ in armed conflict.

There is a long history of efforts to establish discrete concepts of terrorism in IHL, with specific and constitutive reference to the terms ‘terrorism’ and ‘terror’. The omission of these efforts from the orthodox analysis is perhaps due to the specialized branch of law from which these efforts derive—IHL. Yet even in the specialist legal literature, little attention has been paid to these efforts.

This chapter examines the emergence of the prohibition on terrorism in armed conflict, grounded in the First and Second World Wars and the inter-war period, as well as in the modern law of Geneva, as developed through modern tribunals and national laws. It also articulates the distinctive features of, and purposes behind, these prohibitions.

B. EARLY DEVELOPMENTS 1919–38

At the end of the First World War, the Paris Peace Conference established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to investigate violations of the laws and customs of

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war by Germany and its allies. In its 1919 report, the Commission identified 32 categories of war crimes, the first being ‘Murders and massacres; systematic terrorism’ of civilians. Given its pre- eminent position in the list, it is evident that the Commission considered ‘systematic terrorism’ among the most serious of war crimes committed during the war, although such a crime was not prosecuted at the ineffective Leipzig trials.

The Commission also gave as an example of this crime the ‘Massacres of Armenians by the Turks’, in particular the ‘More than 200,000 victims assassinated, burned alive, or drowned in the lake of Van, the Euphrates or the Black Sea’. Attempts to establish a tribunal to prosecute this conduct as violations of ‘the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience’ (reflecting the Martens clause in the preamble to the 1907 Hague Convention) were thwarted by US resistance.

The concept of terrorism in armed conflict next arose at the 1922 Washington Conference on the Limitation of Armaments, which created a Commission of Jurists to consider legal responses to new methods of warfare since the 1907 Hague Conference, and specifically to prepare rules on aerial warfare. The 1899 Hague Declaration and the succeeding 1907 Hague Declaration dealt largely with the use of balloons in warfare—such as launching of projectiles or explosives—although the 1907 Declaration also referred to ‘other new methods of a similar nature’, which could include aircraft. While binding, the 1907 Declaration was undermined by a lack of participation by major air powers, its temporariness, contrary State practice,
and the practical obsolescence of balloons.13 Existing prohibitions on wanton destruction in war also did not cover deliberate or purposive terror bombing.14 The 1907 Hague Regulations did, however, prohibit attacks on undefended locations ‘by whatever means’,15 which was intended to cover aerial bombardment.

The Commission of Jurists produced the 1923 Hague Draft Rules of Aerial Warfare, Article 22 of which prohibited, inter alia: ‘Aerial bombardment for the purpose of terrorizing the civilian population.’16 The prohibition was also implied in the doctrine of the military objective,17 and related to the prohibition in Article 24(3) on bombing military objectives if this would also result in the indiscriminate bombing of civilians.18 The prohibition of terror bombing was also linked to prohibitions on using poisonous gases (in the Washington Convention) and chemicals (in the Hague Declaration), given the potential for terrorizing civilians using such weapons.19

The emergence of ‘total war’ and large-scale civilian suffering in the First World War, brought about by new technology (including aircraft),20 was at the forefront of the Commission’s decision to ban indiscriminate bombing of civilians: ‘The conscience of mankind revolts against this form of making war in places outside the actual theater of military operations, and the feeling is universal that limitations must be imposed.’21 Italy was among the first countries to order aerial bombardment of civilians, bombing Arab villages in the Turko-Italian war of 1911–12.22 Britain used air power in policing its empire from the early 1920s, attacking tribal villages in Somaliland, Mesopotamia, the north-west frontier in India, Baluchistan, Palestine, South Arabia, and Southern Sudan.23 Air ‘frightfulness’ was intended to undermine the morale of any resistance to British rule.24 Such attacks were often justified as reprisals (preceeded by warnings), rather than based on any legal right to

13 ibid.
15 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Art 25.
18 1923 Hague Draft Rules, n 16, Art 24(3).
22 Royse, n 14, 211.
24 See sources quoted in Simpson, ibid, 72–73.
attack civilians or their property. They also invoked a theory of collective (tribal) responsibility for the acts of individuals.\textsuperscript{25}

In the First World War, despite official denials, a number of belligerents used aerial bombing for its moral, political, or psychological effect, rather than for its military effect.\textsuperscript{26} Germany ‘employed aerial bombardment for psychological purposes, as openly stated by both Hindenburg and Ludendorf’,\textsuperscript{27} bombing European and Russian cities to terrorize and demoralize the enemy population and hasten victory.\textsuperscript{28} German raids on England alone killed 1,413 persons and wounded 3,408, the majority being civilians.\textsuperscript{29}

The Allies followed a similar policy, bombing 305 German cities from the air and causing mainly civilian casualties.\textsuperscript{30} British raids in Germany ‘spread terror and panic through widespread areas far outside the actual objective of the attack’.\textsuperscript{31} and bombing to demoralize enemy civilians was advocated by some British officers.\textsuperscript{32} In 1917, Britain refused a Spanish initiative to develop restraints on aerial warfare.\textsuperscript{33}

Given the rudimentary technology of aerial bombardment in the First World War, bombing in populated areas was inherently indiscriminate.\textsuperscript{34} Officially, France claimed that it only bombed civilians in retaliation; Britain and Italy argued that they bombed only military objectives (and thus civilian casualties were incidental); and Germany presented both justifications, primarily bombing military targets but increasingly bombing in retaliation.\textsuperscript{35} As one jurist put it: ‘The right of general devastation for political or psychological ends . . . was not officially claimed by any of the belligerents in the late war.’\textsuperscript{36} Only the exceptional doctrine of reprisal provided a legal basis on which to deliberately bomb civilian centres, or terrorize civilians.\textsuperscript{37}

Thus, although aerial bombardment to terrorize civilians was practised by both sides during the First World War, \textit{opinio juris} did not exist establishing a legal right to bomb for this purpose. As early as 1918, one writer argued that bombing ‘for the purpose of terrorizing the population and not for a military object, is contrary to the universally recognised principles of the law of war’.\textsuperscript{38} This view was shared by a leading authority in 1924, who argued further that intentionally bombing civilian objectives was an individual criminal breach of international law, and should also be banned as means of

\textsuperscript{25} Simpson, ibid, 74.  \textsuperscript{26} Spaight, n 17, 5, 16.  \textsuperscript{27} Royse, n 14, 214.
\textsuperscript{28} ibid, 175–183; Spaight, n 17, 9–10; Hall, n 16, 631.  \textsuperscript{29} Royse, n 14, 181.
\textsuperscript{30} ibid, 183–184.  \textsuperscript{31} Spaight, n 17, 11; 10–12.
\textsuperscript{33} D Watt, ‘Restrains on War in the Air before 1945’ in M Howard (ed), \textit{Restrains on War} (OUP, Oxford, 1979) 57, 63.
\textsuperscript{34} Royse, n 14, 185–187; Spaight, n 17, 17.
\textsuperscript{35} Royse, n 14, 189–190; Spaight, n 17, 198–201.  \textsuperscript{36} Royse, n 14, 192.
\textsuperscript{38} F Smith, \textit{International Law} (5th edn, JM Dent and Sons, London, 1918) 214.
By late in the war, ‘The demand for some international agreement banning aerial bombardment of cities outside the war zone made itself heard with growing voice’ in German parliaments.

The Commission on Responsibilities was conscious that ‘the aircraft is a potent engine of war’ for States, which cannot risk fettering their ‘liberty of action’ in legitimately and effectively attacking an enemy. The Commission had great difficulty agreeing on legitimate objects of attack, which partly accounts for the refusal of States to adopt the 1923 Hague Draft Rules as a treaty. In contrast, the Commission had ‘no difficulty’ agreeing ‘that there are certain purposes for which aerial bombardment is inadmissible’, including terrorizing civilians.

The Commission’s report was not endorsed by States, some of which actively opposed its acceptance, and the 1923 Hague Draft Rules were never adopted as a treaty. Some States did not want to fetter their freedom of action to bomb civilians if necessary. In 1926, the US Air Service Tactical School stated that ‘bombardment is an efficient weapon to . . . weaken the morale of the enemy people by attacks on centers of population’, though only in reprisal. France expressed similar sentiments. Bombing to demoralize civilians continued after the war, with British air action over Somaliland in 1919, and bombing civilians was a policing method in the colonies. The Italian, Giulio Douhet, explicitly advocated deliberately targeting civilians.

Nevertheless, the 1923 Hague Draft Rules have come to be regarded as ‘an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war’. They carried the authority of the eminent jurists who drafted them; many of the rules reflected existing customary rules and principles; and others were transposed from existing maritime and land warfare rules. The rules affected subsequent State practice and soon gained acceptance by those States which declared that they would comply with them. Courts have also taken notice—in Shimoda, a case about the use of atomic weapons against Japan, the Tokyo District Court treated the 1923 Hague Draft Rules as equivalent to a binding treaty.

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39 Spaight, n 17, 19, 30, 44–46; see also Royse, n 14, 193.
40 Spaight, ibid, 10–11.
41 Commission of Jurists, n 21, 22; see also Royse, n 14, 193.
42 Commission of Jurists, ibid.
43 ibid, 23.
44 Roberts and Guelf, n 12, 140 (the Netherlands, France and Britain).
45 Quoted in Royse, n 14, 215.
46 Royse, ibid, 214–215.
47 Watt, n 33, 69.
49 Lauterpacht, n 37, 519.
51 Roberts and Guelf, n 12, 139.
52 Spaight, n 17, 36; see also Lauterpacht, n 37, 520.
53 Spaight, n 50, 42.
54 Roberts and Guelf, n 10, 140.
After 1923, inter-war efforts to create binding treaty norms on aerial bombardment came to nothing. Although one jurist proposed individual criminal liability for breaches, this was never established. In 1936, Britain expressed interest in a treaty on air warfare, but the Second World War intervened. Yet support for the 1923 Hague Draft Rules was expressed until the outbreak of war. In July 1932, a resolution of the General Commission of the Disarmament Conference stated that ‘air attack against the civilian population shall be absolutely prohibited’, and similar statements were issued by the US and Japan.

During the Spanish Civil War (1936–39), Picasso’s *Guernica* (1937) famously depicted the terror of an aerial attack by Germany’s Condor Legion, assisting Franco’s Nationalists, on a neutral Basque village in Spain. A League of Nations Council resolution of May 1937 condemned ‘methods contrary to international law and the bombing of open towns’ in Spain. The Council did not, however, formally discuss the lawfulness of bombardments such as Guernica and efforts towards ‘humanizing the war’ through the Council were sometimes rebuffed. Though condemned, aerial bombing was not declared a violation of international law by the League Council.

In contrast, in June 1937, the 27 governments comprising the International Committee for Non-Intervention in Spain urged belligerents to ‘abstain from the destruction of all open towns and villages . . . whether by bombardment from the air . . . or by any other means’. In September of that year, US Secretary of State Hull stated that the general bombing of large civilian populations is contrary to international law and humanity. Similarly, in 1938, the British Prime Minister condemned as unlawful any deliberate attack on civilian populations, in the aftermath of attacks by German and Italian air forces on civilians in Spain, and by Japanese air forces in China. In March 1938, British Prime Minister Chamberlain protested the bombing of Barcelona, stating in Parliament:

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The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal . . . the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature.67

Further, in September 1938, the League of Nations Assembly adopted a unanimous resolution in response to the Spanish and the Sino-Japanese wars, stating:

. . . on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations . . . [and] this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law . . .68

The Assembly called on States to conclude an agreement on the issue and declared a series of principles to guide the adoption of any regulations:

1. The intentional bombing of civilian populations is illegal;
2. Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
3. Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.69

To this effect, the 1938 Amsterdam Draft Convention for the Protection of Civilian Populations against New Engines of War had repeated verbatim the relevant language of Article 22 of the 1923 Hague Draft Rules.70 Overall, in the Tadic case the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that a prohibition of the intentional bombing of civilians was recognized during the Spanish war.71 The prohibition was not, however, universally recognized; in a work on the Spanish war published in 1939, one jurist wrote simply that there were ‘no universal or conventional rules of international law regarding aerial bombing even in time of international warfare’.72 The only limits on such bombing were said to arise from the rules of State responsibility concerning damage to neutral foreign property.73

67 333 House of Commons Debates, col 1177 (23 Mar 1938); see also 337 House of Commons Debates, cols 937–938 (21 June 1938): ‘it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.’
72 Padelford, n 62, 38. 73 ibid, 39.
In addition to the Spanish conflict, in the late 1930s deliberate or indiscriminate aerial bombing of civilians was committed in a number of other conflicts. In Ethiopia (1935–36), Italy dropped tear gas and mustard gas from aircraft onto vast areas of territory, ‘drenching not only soldiers but also women, children, cattle, rivers, lakes and pastures with this “deadly rain”, systematically killing all living creatures’. While the UN War Crimes Commission reluctantly agreed to consider 10 war crimes cases during this period, Ethiopia faced political pressure from Britain to abandon prosecutions. Ethiopia pressed ahead against two leading suspects—Marshal Pietro Badoglio (commander of Italian forces in East Africa) and Marshal Rodolfo Graziani (Viceroy of Ethiopia)—but was unable to obtain custody. The Ethiopian War Crimes Commission and the Ethiopian government considered these suspects most responsible for the Italian policy of ‘systematic terrorism’ in Ethiopia, including by using poison gas and aiming to destroy the Amhara and Abyssinian peoples. Following Japan’s invasion of China (1937–39), in the Tokyo Judgment the International Military Tribunal for the Far East also found that, in July 1939, Japan adopted a policy of indiscriminate bombing to terrorize the Chinese.

In the absence of a treaty on air warfare, the 1923 Draft Rules were important evidence of a customary prohibition on terrorizing civilians. Given the paucity of case law, however, the caution expressed in 1928 is still valid: ‘It remains for the future to determine the full meaning of terrorization as produced by aerial bombardment and to define more strictly the limitations to be placed upon such practices.’ The tactics of belligerents in that war sorely tested the normative pull of the 1923 Draft Rules.

C. THE SECOND WORLD WAR AND AFTERMATH 1939–48

1. State practice during the War

During the Second World War, the German air force inflicted large casualties on the civilian populations of major cities across Europe, the UK, and the Soviet Union. Japanese bombing in Burma was designed to ‘spread panic and alarm’ among the civilian population. British and US air forces attacked major German cities, often using incendiary devices and

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74 UN War Crimes Commission, n 4, 189. 75 ibid, 483.
77 B Röling and C Rüter (eds), The Tokyo Judgment: vol I (University Press Amsterdam, Amsterdam, 1977) 394.
78 Roberts and Guelff, n 12, 139. 79 Royse, n 14, 220–221.
80 R Overy, Russia’s War (Allen Lane, London, 1998) 89. 81 Spaight, n 50, 281.
delayed fuses to increase demoralization,\textsuperscript{82} killing 300,000 civilians and injuring 780,000.\textsuperscript{83} In Japan, the US firebombed Tokyo, killing 100,000 in March 1945, and used rudimentary (and thus indiscriminate) atomic weapons on Hiroshima and Nagasaki, killing 100,000 and injuring a further 100,000.\textsuperscript{84}

There is substantial historical evidence that the Allies deliberately adopted a policy of ‘terror bombing’ against Germany and Japan, without individually assessing the military necessity of attacking particular targets, the proportionality of the means used, or the minimization of civilian casualties. During the war, the British government shifted its policy from ‘precision’ to ‘area’ bombing, raining inaccurate incendiary bombs on highly populated urban areas to undermine the morale of industrial and munitions workers.\textsuperscript{85} In the view of Arthur Harris of British Bomber Command, ‘air frightfulness’—which ‘terrified German leaders’ (not to mention the German people)—was necessary to win the war: ‘In spite of all that happened at Hamburg, bombing proved a comparatively humane method . . . it saved the flower of the youth of this country and of our allies from being mown down by the military in the field.’\textsuperscript{86} For Harris, causing terror to demoralize the enemy was the aim—not merely an unintended side-effect—of bombing policy.\textsuperscript{87} Although he thought causing civilian casualties is ‘specially wicked’, ‘all wars have caused casualties among civilians’ and the blockade of Germany killed many more Germans (800,000) than aerial bombing (305,000).\textsuperscript{88} Bombing was also considered the only effective weapon available.\textsuperscript{89}

Similarly, US military documents suggest that the selection of Japanese targets for atomic attack was driven by the ‘great importance’ of ‘obtaining the greatest psychological effect against Japan’ and ‘making the initial use sufficiently spectacular for the importance of the weapon to be internationally recognized’.\textsuperscript{90} Any use of atomic weapons against a military objective was to be ‘located in a much larger area subject to blast damage

\textsuperscript{82}M Connelly, \textit{Reaching for the Stars} (IB Tauris, London, 2001) 90, 99–120.
\textsuperscript{83}M Walzer, \textit{Just and Unjust Wars} (3rd edn, Basic Books, New York, 2000) 255. Other estimates are higher, with 593,000 German civilians killed: Detter, n 67, 285.
\textsuperscript{85}A Harris, \textit{Bomber Offensive} (Collins, London, 1947) 76–77, 82, 89; Glover, n 84, 69–88. cf the UK Air Council’s official denial: ‘widespread devastation is not an end in itself but the inevitable accompaniment of an all-out attack on the enemy’s means and capacity to wage war’: quoted in Connelly, n 82, 116.
\textsuperscript{86}Harris, ibid, 176.
\textsuperscript{87}Connelly, n 82, 115.
\textsuperscript{88}Harris, n 85, 176–177; see also H Probert, \textit{Bomber Harris} (Greenhill, London, 2001) 339–340; Glover, n 84, 77, 88.
\textsuperscript{89}Harris, n 85, 112.
\textsuperscript{90}Target Committee, Minutes of 2nd mtg, Los Alamos, 10–11 May 1945; US National Archives, Record Group 77, Records of the Office of the Chief of Engineers, Manhattan Engineer District, TS Manhattan Project File 42–46, folder 5D Selection of Targets, 2 Notes on Target Committee Meetings, point 7A.
in order to avoid undue risks of the weapon being lost’. As Lauterpacht writes, the ‘main object’ of atomic weapons is ‘to wreak havoc, terror and devastation among vast centres of population as a means of winning the war’.

At first sight, the extensive use of ‘terror bombing’ by both sides suggests that the belligerents did not recognize any customary law prohibitions on aerial bombing to terrorize civilians. Indeed, ‘the practice of indiscriminate bombardment challenged the application of the most fundamental principles developed in respect of air warfare’. Harris believed that there was ‘no international law at all’ on air warfare, and reasoned analogously that it was common practice in war to besiege or bombard defended cities.

Yet ‘both Axis and Allies powers proclaimed their adherence to the 1923 Hague Draft Rules and made accusations of their violation’. There is some state practice supporting a prohibition on terror bombing. On 1 September 1939, US President Roosevelt requested that Britain, France, Italy, Germany, and Poland declare that their ‘armed forces shall in no event and under no circumstances undertake bombardment from the air of civilian populations or unfortified cities, upon the understanding that the same rules of warfare shall be scrupulously observed by all their opponents’. An Anglo-French declaration of 2 September 1939 accepted these conditions, while Germany similarly stated that it would confine its attacks to military targets. Germany characterized its air raids on London as reprisals for British raids on German cities, implying that such raids were ordinarily unlawful but for the prior illegality of Britain. Britain also claimed to be acting out of reprisal, or revenge.

In domestic debates, senior British officials expressed reservations about the lawfulness (and morality) of terror bombing. In the House of Lords in 1944, Bishop Bell of Chichester stated that the ‘progressive devastation of cities is threatening the roots of civilization’. The perceived illegality of terror bombing was also implied by the German response to Allied raids. Goering alleged that Hitler demanded the lynching of Allied ‘terror fliers’, while Himmler and Kaltenbrunner ordered police and security forces not to interfere. Even the High Command of the German Army ordered the

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91 ibid, point 8A. 92 Lauterpacht, n 37, 349. 93 Roberts and Guelff, n 12, 141. 94 Harris, n 85, 177. 95 ibid, 140. 96 Quoted in Spaight, n 50, 259. 97 Spaight, ibid, 259–260; Lauterpacht, n 37, 527–528. 98 Spaight, ibid, 48. 99 Walzer, n 83, 256–257. 100 ibid, 257. 101 Quoted in Glover, n 84, 87. 102 Nuremberg Judgment, International Military Tribunal, 1 Oct 1946 (1947) 41 AJIL 172, 313, and Spaight, n 50, 61 respectively.
military not to prevent civilian lynchings of ‘terror flyers’.\textsuperscript{103} There was a persistent post-war German view that defeat was due to Allied ‘terror flyers’.\textsuperscript{104} Captured US ‘terror flyers’ were also lynched by civilians in Japan and by Japanese military personnel in the Pacific.\textsuperscript{105}

According to Spaight, area bombing was not unlawful if it was the only means of destroying the enemy’s armament and munitions centres (often indistinguishable from worker housing), passed the test of military effectiveness, and there was no ‘direct intent’ to injure innocent civilians (other than incidental casualties).\textsuperscript{106} Area bombing also ended the horrors of the concentration camps sooner, possibly saved two million Allied combat casualties, and was publicly popular.\textsuperscript{107} The same author condemned atomic bombing as unlawful because it did not aim at military objectives, but disproportionately attacked whole cities without exhausting other means.\textsuperscript{108}

At a minimum, the terror bombing campaigns of the Second World War sorely tested the existence of any customary restraints on terrorizing civilians from the air, reducing ‘to the vanishing point the protection of the civilian population from aerial bombardment’.\textsuperscript{109} No defendant was charged at Nuremberg with indiscriminate bombing of civilians,\textsuperscript{110} probably because the victors feared being accused of double standards. The US Military Tribunal at Nuremberg incidentally observed in the \textit{Einsatzgruppen} case that the Allied bombing of German cities was merely a response to German raids; that cities were bombed for tactical military purposes with only collateral civilian casualties; and that atomic bombs aimed to overcome military resistance and not to kill non-combatants.\textsuperscript{111} For Lauterpacht, aerial bombing of cities obliterated the distinction between combatants and non-combatants in conflict.\textsuperscript{112}

Writers have noted that: ‘To the extent that such practices continue, the significance of certain principles embodied in the 1923 Hague Draft Rules will be called into greater question.’\textsuperscript{113} Soon after the Second World War, Britain continued to use air power in colonial policing in Malaya (1952), Kenya (1952–56), and Southern Arabia (in the 1950s),\textsuperscript{114} although targeting

\textsuperscript{103} Levi, n 3, 313. There were a number of post-war US military trials for such lynchings, including \textit{Erich Heyer (Essen Lynching case)}, UNWCC Law Reports, vol I (HMSO, London, 1947) 88; \textit{Wilhem von Leeb (German High Command case)}, UNWCC Law Reports, vol XII, 1; see also the cases of \textit{Albrecht, Borkum Island case}, Goetz, Schmidt, Kohn, Back, the \textit{Justice} case, the \textit{Ministries} case: all summarized in Levi, above, 314–318; Bury and Haftner, UNWCC Law Reports, vol III (HMSO, London, 1947) 62.

\textsuperscript{104} Spaight, n 50, 48.


\textsuperscript{106} Spaight, n 50, 271–272 (munitions workers were also not regarded as ‘innocent’).

\textsuperscript{107} ibid.\textsuperscript{108} Lauterpacht, n 37, 529.

\textsuperscript{108} ibid, 529–530; UNWCC Law Reports, vol XV, (HMSO, London, 1949) 110.

\textsuperscript{109} \textit{Einsatzgruppen case (Ohlendorf and others)} (1953) 15 Ann Dig 656.

\textsuperscript{110} Lauterpacht, n 37, 207, 350, 527.

\textsuperscript{111} Roberts and Guelf, n 12, 141.

\textsuperscript{112} Simpson, n 23, 74.
gradually became more discriminating and less directed against civilians. There are certainly egregious examples since the Second World War of States failing to comply with the prohibition on terror bombing. US ‘carpet bombing’ in the Viet Nam War (and in Cambodia) in the 1960s and 1970s is one notorious example,115 so too is the strafing and bombing of southern Sudanese villages by the northern Arab government in the 1980s and 1990s.

Yet these are relatively isolated examples in overall State practice since the Second World War—and examples which have been recognized as unlawful when they occurred. Most States have accepted a prohibition on deliberate air bombardment ‘for the purpose of instilling terror’,116 including in civil wars; as early as 1964, the Prime Minister of the Democratic Republic of the Congo declared: ‘For humanitarian reasons, and with a view to reassuring . . . the civilian population which might fear that it is in danger . . . the Congolese Air Force will limit its action to military objectives’.117 Despite the absence of a specific international agreement on air warfare, the increasingly detailed treaty regulation of armed conflict since the Second World War supplies general principles applicable to air action—including principles of distinction, military necessity, proportionality, humanity, and limits on means and methods of war.118 Indiscriminate area bombardment of populated civilian areas is ruled out in both international and non-international armed conflicts under treaty and customary law, and is forbidden by numerous military manuals.119

2. Legal efforts to confront terrorism during the War

Despite the frequent practice of terror bombing during the war, post-war international criminal trials did not attempt to prosecute individuals for such conduct. Nonetheless, the concept of terrorism occasionally appeared in Allied efforts to respond to war atrocities. On 25 October 1941, US President Roosevelt stated in London: ‘The Nazis might have learned from the last war the impossibility of breaking men’s spirit by terrorism. Instead, they develop their lebensraum and new order by depths of frightfulness which even they have never approached before . . . Frightfulness can never bring peace to Europe.’120 In 1942, nine European States issued a declaration on the

115 Detter, n 65, 285. 116 Lauterpacht, n 37, 526.
117 Quoted in Tadic (Interlocutory), n 71, para 105.
119 See Protocol I, Art 51(5)(a); Protocol II, Art 13(2); Amended Protocol II to the Convention on Certain Conventional Weapons, Art 3(9); ICRC Study, n 3, vol I, 43–45.
120 Punishment for War Crimes: The Inter-Allied Declaration, St James’s Palace, London, 13 Jan 1942 and Relative Documents (HMSO, Inter-Allied Information Committee), 15; in UN War Crimes Commission, n 4, 88.
punishment of German war crimes, alleging that Germany had ‘instituted in
the occupied territories a regime of terror characterized . . . by imprison-
ments, mass expulsions, the execution of hostages and massacres’. The
Moscow Declaration by Stalin, Churchill and Roosevelt on 1 November
1943 noted that under Hitler, Germany and occupied Europe ‘suffered from
the worst form of government by terror’. These usages of ‘terror’ and
‘terrorism’ were, however, descriptive, rhetorical, and political, rather than
legal.

In 1942–43, the quasi-governmental London International Assembly
(LIA) examined legal responsibility for war crimes during the war, including
the establishment of an international criminal tribunal. The LIA based its
work on the list of war crimes drawn up by the 1919 Commission on
Responsibilities. In its final draft of October 1943, the LIA proposed jurisdic-
tion over the crime of ‘systematic terrorism’, which had appeared in the
1919 list, where committed by heads of State, or in several countries, or
against the nationals of several countries. Apart from keeping the issue of
responsibility for war crimes alive during the war, the LIA did not have much
wider influence on the course of post-war prosecutions.

The 1919 list of war crimes, however, continued to prove durable, being
adopted as a working instrument of the UN War Crimes Commission in
December 1943—including the foremost crime of ‘Murder and massacres—
systematic terrorism’—although the list did not exhaustively enumerate
all violations of the laws and customs of war. In May 1944, the Legal
Committee recommended adopting the further crime of ‘Indiscriminate mass
arrests for the purpose of terrorising the population, whether described as
taking of hostages or not’. The official history states that this crime was duly
added to the 1919 list, although the appendix which reproduces the amended list of 2 December 1943 only includes the additional crime of ‘Indiscriminate mass arrests’.

The qualifying phrase (‘for the purpose of terrorising the population . . .’) was omitted—apparently widening the offence by eliminating the purposive requirement—though the qualifying element was intended in the drafting.

121 1942 Declaration of the Inter-Allied Commission on the Punishment of War Crimes (Bel-
gium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and
Yugoslavia), in UN War Crimes Commission, n 120, 90. The same States referred to the
‘invader’s acts of oppression in terrorism’ in a note of July 1942 to the British Government:
Punishment for War Crimes: Collective Notes to Great Britain, the USSR and the USA and
Relative Correspondence, in UN War Crimes Commission, above, 93.
122 Quoted in UN War Crimes Commission, n 121, 107.
123 The LIA was an unofficial body under the auspices of the League of Nations Union,
although its members were designated by Allied governments, to which they reported: UN
War Crimes Commission, n 121, 99. In 1942, the proceedings of the 1937 League of Nations
Terrorism Conference were drawn to the attention of the LIA: above, 102.
124 ibid, 100.
125 ibid, 103.
126 ibid, 171, 477–478.
127 ibid, 172.
After its investigation of war atrocities, on 16 May 1945 the UN War Crimes Commission recommended the seeking out of ‘the leading criminals responsible for the organisation of criminal enterprises including systematic terrorism, planned looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organisers of such crimes.’\(^{129}\)

In its approach to atrocities, the UN War Crimes Commission squarely regarded ‘systematic terrorism’ as an international legal concept, although the Commission’s mandate was primarily investigative, rather than judicial or prosecutorial.

### 3. 1945 Nuremberg Charter

The foremost judicial attempt to address atrocities involved the drafting of the Nuremberg Charter. In a preparatory report of June 1945, US Justice Jackson had descriptively referred to terrorism in accusing the Nazi leadership, the SS, and Gestapo of establishing themselves in Germany ‘by terrorism and crime’.\(^{130}\) On 20 July 1945, at the International Conference on Military Trials in London, the UK proposed that a post-war international military tribunal should, *inter alia*, try ‘Systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians’.\(^{131}\) The proposal derived from the 1919 notion of ‘systematic terrorism’.\(^{132}\)

No explanation of ‘terrorism’ accompanied the British proposal; there is no recorded discussion of its meaning; and it was not referred to in earlier or later drafts. In contrast, the crimes of atrocities, ill-treatment, and murder in the UK proposal were subsumed by the category of ‘crimes against humanity’ in the Charter.\(^{133}\) Although the USSR drew the 1937 League of Nations Convention on terrorism (signed by the USSR eight years earlier) to the attention of the International Conference,\(^{134}\) the Conference did not see fit to include its terrorism offences in the Nuremberg Charter.

The idea of terrorism did, however, cross-cut other categories of crime discussed at the International Conference. Nazi terrorism was viewed by the US and the UK as *evidence* of the common criminal plan or conspiracy

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\(^{129}\) ibid, 43 (emphasis added).

\(^{130}\) R Jackson, Report to the US President on Atrocities and War Crimes, 7 June 1945.


\(^{132}\) Galic, n 7, para 117.

\(^{133}\) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 Aug 1945, annexed Charter of an International Military Tribunal at Nuremberg, Art 6(c). In Galic, n 7, the ICTY suggests that the terrorism proposal was subsumed by the later notion of ‘atrocities’ and the subsequent category of war crimes.

\(^{134}\) Minutes of International Conference on Military Trials: London, 2 July 1945 (Nikitchenho).
of preparing, launching, and waging an aggressive war, including by eliminating domestic dissent. While ‘terrorism’ was rejected as a distinct crime, it underlay some of the thinking about the content, and proof, of aggression and crimes against humanity.

4. Nuremberg International Military Tribunal

Although terrorism was not established as a discrete crime in the Nuremberg Charter, numerous references to terrorism appear in the Nuremberg Indictment and Judgment. The 22 volumes of transcripts of the proceedings are littered with the term and its variants. These many references are typically used to describe Nazi activities, rather than as legal terms of art (or liability), although the 1919 crime of ‘systematic terrorism’ was cited in a discussion of the historical development of war crimes.136

In the Indictment, in alleging the particulars of a common plan or conspiracy to wage aggressive war, the Nazi use of ‘terrorism’ was asserted to be a first step in acquiring totalitarian control of Germany.137 The establishment and extension of a ‘system of terror’ allegedly consolidated Nazi control over Germany.138 Crimes of murder and ill-treatment of civilians were allegedly committed ‘for the purpose of systematically terrorizing the inhabitants’ of occupied territories, including a ‘premeditated campaign of terrorism’ in Denmark and a ‘program of terror’.139 The prosecution clearly believed that ‘terrorism’ was relevant for evidentiary purposes in proving criminal charges, notwithstanding that terrorism was not an offence. The concept of terrorism in the Indictment refers to indiscriminate attacks on civilians, intended to put them in grave fear, and thereby to subdue resistance to Nazi rule.

In the Nuremberg Judgment, frequent reference was made to Nazi terrorism.140 In relation to war crimes and crimes against humanity

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135 US Revised Draft Agreement and Memorandum, 30 June 1945 (terrorism was a manifestation of the master plan to attack international peace); US Memorandum, San Francisco, 30 Apr 1945: II(a) and (c); Memorandum to US President Roosevelt from the Secretaries of State and War and the Att-Gen, 22 Jan 1945, III; UK Illustrative Draft of Indictment, 17 July 1945; R Jackson, Reports to the US President, 6 June 1945 and 7 Oct 1946, point (6); Minutes of Conference Sessions, 29 June 1945 (Jackson) and 23 July 1945 (Maxwell Fyfe and Jackson); Planning Memorandum to Delegations at London Conference, June 1945, IV: Outlines of Proof: 6(a)(2).

136 Trial of German Major War Criminals, Nuremberg, 7–19 Jan 1946, 36th day, 17 Jan 1946, Part 8, 370.

137 Nuremberg Indictment, count 1: IV. Particulars of the Nature and Development of the Common Plan or Conspiracy: (D) The Acquiring of Totalitarian Control of Germany: Political: 1. First steps in acquisition of control of State machinery; see also Nuremberg Judgment, n 103, 222.

138 Nuremberg Indictment, count 1, ibid: 3. Consolidation of control: (b).

139 ibid, count 3: (A) Murder and Ill-Treatment of Civilian Populations of or in Occupied Territory and on the High Seas.

140 Lauterpacht, n 37, 576, also mentions German ‘terror’ in the Second World War.
(particularly murder and ill-treatment of civilians), the Judgment describes the Nazi dictatorship in Germany and occupied Europe as founded on a ‘reign of terror’; the ‘systematic rule of . . . terror’; ‘methods of terror’; the ‘organized use of terror’ (through killing hostages, destroying towns, and massacring civilians); and ‘terrorizing’ civilians’.\textsuperscript{141} The Judgment also describes a pre-war ‘policy of terror’ in Germany ‘carried out on a vast scale . . . [which] was organized and systematic’.\textsuperscript{142}

In discussing Nazi organizations, the Nuremberg Judgment found that the SS was created to ‘terrorise political opponents’, while the SA ‘played an important role in establishing a Nazi reign of terror in Germany’.\textsuperscript{143} The use of concentration camps is described as: ‘One of the most notorious means of terrorising the people in occupied territories’.\textsuperscript{144} The Judgment quotes Nazi documents specifically ordering the military to spread ‘terror’ or ‘terrorism’ to eradicate civilian resistance.\textsuperscript{145} The Judgment also attributes responsibility for ‘terror’ or ‘terrorism’ against civilian populations to a number of defendants, indicating that terrorist methods included the indiscriminate shooting of civilians and hostages, deportation of labour, use of concentration camps, mass killings of Jews, and stripping occupied territories of food and materials.\textsuperscript{146}

Linguistically, most of the uses of terms such as terror, terrorism, and terrorist in the Judgment are descriptive or evaluative, in the same way that the Judgment applies terms such as ‘horror’ or ‘cruelty’ to Nazi activities.\textsuperscript{147} They were not, however, used as legal terms to trigger criminal liability. Some of the physical acts causing terror in civilians were themselves crimes under the Charter, while conversely evidence of terrorism helped to prove the commission of Charter crimes.

The only tenuously legal notion of terrorism emerging from the Nuremberg Judgment is in reference to Nazi (national) law. For example, a Gestapo order of 12 June 1942 authorized the use of ‘third degree’ interrogation methods on ‘Communists, Marxists, Jehovah’s witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, anti-social elements, Polish or Russian loafers or tramps’.\textsuperscript{148} The Security Police and the SD executed without trial persons charged as terrorists and saboteurs.\textsuperscript{149} In July 1944 Hitler also ordered that resistance to German occupation should be combated as ‘acts of terror and of sabotage’.\textsuperscript{150} ‘Terror’ and terrorism in these senses referred to political opponents of, or militant resistance to, German

\textsuperscript{141} Nuremberg Judgment, n 103, 289, 229, 182, 231, 231 respectively.
\textsuperscript{142} ibid, 249.
\textsuperscript{143} ibid, 177 and 267 respectively.
\textsuperscript{144} ibid, 231.
\textsuperscript{145} ibid, 232, 283 (defendant Keitel).
\textsuperscript{146} ibid, 289–290 (Frank in Poland); 293 (Frick in Bohemia and Moravia); 319 (Seyss-Inquart in the Netherlands); 288 (Rosenberg in the Eastern Occupied Territories).
\textsuperscript{147} ibid, 224, 264.
\textsuperscript{148} ibid, 230 (emphasis added).
\textsuperscript{149} ibid, 260.
\textsuperscript{150} Terrorist and Sabotage Decree, 30 July 1944: see High Command case; Levy, n 3, 318–319.
occupation; thus one Nazi commander described the Jewish uprising in the Warsaw ghetto as the work of ‘Polish terrorists’.\textsuperscript{151} Members of the French resistance were also shot by the Germans as ‘terrorists’.\textsuperscript{152}

5. National post-war trials

In the \textit{Hostages} case, the US Military Tribunal at Nuremberg used the term ‘terrorism’ in similar ways to the International Tribunal. In the Indictment, German defendants allegedly ‘terrorized, tortured and murdered’ non-combatants in Greece, Yugoslavia and Albania in retaliation for attacks on German forces.\textsuperscript{153} These ‘acts of collective punishment’ were described as ‘part of a deliberate scheme of terror and intimidation . . . in flagrant violation of the laws and customs of war’.\textsuperscript{154} Executing hostages was the primary means of implementing a ‘scheme of terror and intimidation’ or ‘pacification-through-terror scheme’.\textsuperscript{155} The defendants were charged with war crimes and crimes against humanity under Article II of Control Council Law No 10, by ‘the murder, torture, and systematic terrorization . . . of the civilian populations’,\textsuperscript{156} and prosecutors frequently referred to terrorism in argument.

In its Judgment, the US Military Tribunal chiefly used ‘terrorism’ in descriptive rather than legal senses. It warned that shooting innocent civilians in reprisal ‘can progressively degenerate into a reign of terror’, and noted three times that ‘terrorism and intimidation’ were used to subjugate opposition. The Judgment concedes that the defendants protested against the ‘plan of terrorism and intimidation’, but notes that they were continually advised by subordinate units of ‘the policy of terrorism and intimidation’ carried out in the field. There is no discussion, however, of any distinct crime of terrorism in the Judgment, despite the charge being laid.

Terrorism was only referred to as a legal concept in the US Military Tribunal at Nuremberg in the cases of \textit{Becker} and \textit{Weber}. The defendants were convicted of the French crime of illegal arrests and the Tribunal incidentally observed that indiscriminate mass arrests may constitute ‘systematic terrorism’ where they are committed repeatedly and as part of a deliberate pattern.\textsuperscript{157} The Tribunal expressly invoked the linkage between indiscriminate mass arrests and systematic terrorism in the UN War Crimes Commission’s

\begin{footnotes}
\footnoteref{152}{Holstein, UNWCC Law Reports, vol VIII, 22, 26.}
\footnoteref{153}{List and others (Hostages case), US Military Tribunal at Nuremberg, 19 Feb 1948 (1953) 15 Ann Dig 632, indictment, count 1(2).}
\footnoteref{154}{ibid, count 1(3); see also count 1(4).}
\footnoteref{155}{ibid, counts 1(4) and 2(8), 3(12)(c) respectively.}
\footnoteref{156}{ibid, count 4(14).}
\end{footnotes}
1944 list of war crimes.\textsuperscript{158} Criminal liability in these cases did not, however, turn on the concept of ‘systematic terrorism’.\textsuperscript{159}

As in many post-war US trials,\textsuperscript{160} the term terrorism was also used descriptively in the trial of the Nazi leader Adolf Eichmann in Israel, following his abduction from Argentina. The court found that Eichmann had used threats of terror to force the emigration of Jews from Vienna, Prague, and Berlin, including threats to send them to concentration camps.\textsuperscript{161} The policy of forced emigration constituted a crime against humanity and ‘terror’ served a descriptive or evidentiary, but non-legal, purpose.

In contrast, the concept of ‘systematic terrorism’—stemming from the 1919 Commission, the proposals of the London International Assembly in 1943 and the UN War Crimes Commission in 1945, and the draft British proposal of 1945—produced a small number of post-war prosecutions in other tribunals. First, the former Governor of Crete, General Bruno Brauer, was charged with ‘systematic terrorism’ before a Greek military court in Athens, for the deaths of 3,000 persons in Crete under German occupation.\textsuperscript{162} The defendant was sentenced to death in December 1946 and shot in May 1947, although other charges contributing to this sentence included murders and massacres, deportations, pillage, wanton destruction, torture, and ill-treatment of civilians.\textsuperscript{163}

Second, a court martial in the Netherlands East Indies, established to prosecute Japanese war crimes in the region, had jurisdiction based on the war crimes specified by the 1919 Commission and the 1944 Commission, including over ‘[s]ystematische terreur’, which was listed as a crime separate from ‘murder and massacres’ (unlike in the 1919 list).\textsuperscript{164} In the Motomura case of 1947, 13 of 15 defendants were convicted of ‘systematic terrorism practiced against civilians’, achieved through (a) indiscriminate mass arrests for the purpose of terrorizing the population; and (b) the torture and

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\textsuperscript{158} See text to nn 127--128.

\textsuperscript{159} Similarly, in \textit{Buhler} the US Military Tribunal described various German orders in Poland as ‘systematic terrorism’: \textit{Buhler}, UNWCC Law Reports, vol XIV (HMSO, London, 1949) 23, 28.

\textsuperscript{160} \textit{Krausch (IG Farben)}, UNWCC Law Reports, vol X, 1, 5 (accused terrorized slave labourers); \textit{Krupp}, UNWCC Law Reports, vol X, 69, 74 (civilians ‘terrorised’ into working for Krupp industries); \textit{Zuehlke}, UNWCC Law Reports, vol XIV, 139, 140 (Jewish prisoners terrorized by warden); \textit{Greisner}, UNWCC Law Reports, vol XIII, 73 (Polish population persecuted by being kept in constant fear).

\textsuperscript{161} \textit{Att-Gen of the Government of Israel v Eichmann} (1961) 36 ILR 5 (Dist Ct Jerusalem), para 185; see also para 62 (Austrian Jews lived in an ‘atmosphere of terror’ following Hitler’s entry into Vienna) and para 64 (Jews were robbed of capital by ‘terrorist measures’).

\textsuperscript{162} Cited in UN War Crimes Commission, n 4, 525.

\textsuperscript{163} ibid.

\textsuperscript{164} Decree No 44 (1946), in \textit{Staatsblad van Nederlandsch-Indië}, 1946, Art 1(2); see also UNWCC Law Reports, vol XI, annex, 93. The decree also added the offence identified by the UNWCC of ‘Indiscriminate mass arrests for the purpose of terrorizing the population’: see text to nn 127--128.
ill-treatment of civilian internees. Mass arrests terrorized the population because ‘nobody, even the most innocent, was any longer certain of his liberty, and a person once arrested, even if absolutely innocent, could no longer be sure of health and life’. Torture was also a particular form of terrorism because it was systematically applied and involved ‘psychological and physical compulsion paralysing the resistance of the persons under interrogation . . . who were entirely innocent’.

A third prosecution took place before the Supreme National Tribunal of Poland in June and July 1948. In the Joseph Buhler case, the Deputy-Governor of German-occupied Poland was charged with being part of a government that ordered ‘systematic terrorism’ against the population. On conviction, Buhler was sentenced to death. Until 2003, these cases were the only recorded prosecutions for the crime of terrorism in armed conflict.

Other attempts to prosecute for terrorism were less successful. In August 1944, the French authorities sent a statement of charges to the UN War Crimes Commission alleging that a Gestapo leader in Lyon, Klaus Barbie, had committed ‘murder and massacres, systematic terrorism, and execution of hostages’. Barbie eluded capture by fleeing to South America and was convicted in absentia of war crimes by the Lyon military tribunal in 1952 and 1954. Following his expulsion to France, he was convicted of crimes against humanity in 1985, but not of war crimes. The crime of terrorism was not charged in any of these proceedings.

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165 Trial of Shigeki Motomura and 15 Others, UNWCC Law Reports, vol XIII, (HMSO, London, 1949) 138, 140, 143–144. Seven defendants were sentenced to death and the remainder imprisoned for between one and 20 years. The indictment alleged the following conduct: ‘systematic terrorism taking the form of repeated, regular and lengthy torture and/or ill-treatment, the seizing of men and women on the grounds of wild rumours, repeatedly striking them with the hand and with sticks during their interrogation, kicking them with the shod foot, hanging them up by the arm or leg, burning them with glowing cigarettes and bicycle bells, wrenching their knee joints apart, stripping women and exposing them in this condition to the public view, withholding food from arrestees . . . the aforesaid acts having led or at least contributed to the death, severe physical and mental suffering of many’.

166 ibid, 143.

167 ibid, 144.

168 In Levie, n 3, 124–125.

169 Galic, n 7, para 66.

170 UN Archives: UNWCC Charge Files 192/FR/Gi/40 and 184/FR/Gi/42.


The repeated references to terrorism in the context of war crimes suggest that freedom from terror was historically considered an international value worthy of protection. Another operative legal reference to terrorism in the immediate post-war period is found in the 1946 Constitution of the International Refugee Organization (IRO), which excluded from the IRO’s mandate persons who had ‘participated in any terrorist organization’ since the end of the Second World War\(^{173}\)—such as Zionist IRGUN members in Palestine\(^{174}\)—but the exclusion did not apply to wartime ‘terrorism’. While the British authorities in the mandate territory of Palestine were attacked by Jewish ‘terrorist’ groups in the 1940s (such as Irgun Tsai Leumi and the Stern Gang or ‘Lehi’),\(^{175}\) Britain responded using broad emergency powers and the criminal law,\(^ {176} \) without usually creating special legal categories or liabilities for ‘terrorism’ or ‘terrorists’. One exception is in the definition of an ‘unlawful association’ in regulation 84 of the Defence (Emergency) Regulations 1945, which included any body of persons which advocates, incites, or encourages ‘acts of terrorism’ against servants of the UK or Palestine government, or against the UK High Commissioner. The substance of those regulations continued to be used by the new Israeli State after independence.

in 1948 to combat Israel’s perceived ‘permanent emergency’. It was, however, in post-war IHL treaties that the tentative legal concept of terrorism in armed conflict was cemented in international law.


Article 33(1) of the Fourth Geneva Convention 1949 prohibits ‘collective penalties and likewise all measures of intimidation or of terrorism’ against protected persons in international armed conflict. The protection applies to persons ‘in the hands of a Party to the conflict’,\(^\text{177}\) but not to civilians in territory not occupied by the adverse Party. It protects civilians in occupied territory or detained by an adverse party, removing ‘all doubt as to the illegality of practices . . . applied widely in occupied territories during World War II’.\(^\text{178}\)

The meaning of ‘terrorism’ in Article 33(1) is not defined and there is little recorded debate from the Diplomatic Conference.\(^\text{179}\) The ICRC Commentary observes that in past conflicts, belligerents inflicted collective penalties and measures of intimidation and terrorism to prevent hostile acts by protected persons, although: ‘Far from achieving the desired effect . . . such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance.’\(^\text{180}\) Such acts ‘strike at guilty and innocent alike’ and ‘are opposed to all principles based on humanity and justice’.\(^\text{181}\) The specific prohibition in Article 33 is a particularization of, or complement to, the ‘general prohibition’ in Article 27 on violence and inhumane treatment against civilians.\(^\text{182}\) It is also part of a general movement in IHL towards limiting reprisals against civilians. Given its historical origins, the notion of ‘terrorism’ in the provision has ‘a narrower meaning than in present-day language’.\(^\text{183}\)

2. Developments in the 1950s and 1960s

Further development of the concept of terrorism in armed conflict took place in 1954, when the ICRC Board of Governors asked the ICRC to propose a

\(^{177}\) 1949 Fourth Geneva Convention, Art 4.
\(^{178}\) Kalshoven, n 3, 74; see also Gasser (2002), n 3, 558.
\(^{181}\) ibid. 1949 Fourth Geneva Convention, Art 27, states in part that protected persons ‘shall be protected especially against all acts of violence or threats thereof’.
\(^{183}\) Gasser (2002), n 3, 558; Gillard, n 179, 52.
text to protect civilian populations from atomic, chemical, and bacteriological warfare. In 1956, the ICRC produced Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, which restated and defined the limits on the use of armed force ‘by the requirements of humanity and the safety of the population’, complementing existing IHL.184

Article 6 of the ICRC Draft Rules prohibited: ‘Attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason.’ Although the meaning of ‘terrorizing’ was not defined, Article 6 further stated that ‘In consequence’ of the prohibition, ‘it is also forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population’. It appears, therefore, that such attacks were non-exhaustively listed as examples of acts which aim to terrorize civilians.

The Draft Rules were an attempt to extend the scope of protection under the Geneva Conventions, since it was proposed that they would apply in any armed conflict, including non-international ones.185 In 1957, the ICRC Draft Rules were submitted to the XIXth International Conference of the Red Cross in New Delhi, but there was little support from States to develop the text further.186 The Draft Rules were, however, influential in shaping the content of provisions in the 1977 Protocols.

In 1969, the Institute of International Law adopted a similar resolution stating that: ‘Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorise the civilian population.’187 There was no definition of what it meant to ‘terrorize’ the population, but the resolution is significant because it intended to state existing law and attracted wide support (60 votes to 1, with 2 abstentions). Less successful was a proposal abandoned at a 1972 Conference of Government Experts in Geneva, which sought to prohibit ‘acts of terrorism, consisting of acts of violence directed intentionally and indiscriminately against civilians taking no active part in the hostilities’.188

185 ibid, Art 2(a)–(b).
186 Conference Resolution XIII encouraged the ICRC to submit the text and amendments to States.
Ultimately, a limited concept of terrorism in armed conflict was included in Article 51(2) of 1977 Protocol I, and Article 13(2) of 1977 Protocol II. These identical provisions prohibit ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’. The innovative prohibition in Protocol I applies ‘to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’. It thus extends the protection available under the Fourth Geneva Convention, since it applies to civilians in international conflict (including self-determination conflicts) who are not ‘in the hands’ of the adverse Party. The protection in Protocol II applies to civilians in non-international armed conflicts. In both cases, there may be difficulties in determining when low-intensity, non-State violence (such as terrorism) crosses the threshold of armed conflict and triggers the application of IHL.

Both provisions are part of wider treaty prohibitions on attacking the civilian population or individual civilians, and terrorizing is just one type of ‘particularly reprehensible’ attack on civilians. In the first international decision applying Article 51(2) of Protocol I, in the Galic case the ICTY stated that ‘the prohibition against terror is a specific prohibition within the general prohibition of attack on civilians’, the latter of which constitutes ‘a peremptory norm of customary international law’. It includes bombardment (aerial or other) of civilians where ‘deliberately intended to intimidate the adversary and the enemy civilian population’. The ICRC Commentary on Article 51(2) acknowledges that violent acts in war ‘almost always give rise to some degree of terror among the population and sometimes also among the armed forces’, and that ‘attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender’. While violence ‘is inherent in war’, some violence is ‘licit’ and some ‘illicit’, depending on the legal status

189 Gasser (1986), n 3.
190 1977 Protocol I, Art 1(3); 1949 Geneva Conventions, common Art 2.
191 Galic, n 7, para 120; Gasser (2002), n 3, 559, 563.
194 1977 Protocol I, Art 51(2) and 1977 Protocol II, Art 13(2): ‘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.’ Y Sandoz et al (eds), Commentary on the 1977 Protocols (ICRC, Geneva, 1987) para 4785; Oeter, n 3, 169.
195 Galic, n 7, para 66. 196 ibid, para 98. 197 Oeter, n 3, 169; 219.
199 Gasser (2002), n 3, 554.
of the person committing it and compliance with restrictions on means and methods of warfare.\textsuperscript{201} Terrorism in armed conflict thus has a ‘different legal connotation’ to acts of terrorism in peacetime,\textsuperscript{202} because of the special rules regulating violence in armed conflict.

The prohibition on terror is not intended to address forms of accepted violence (and the inevitable terror they cause) in war, but rather refers to ‘acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage’.\textsuperscript{203} Proposals to limit the provision only to acts which actually spread terror were not accepted during the drafting.\textsuperscript{204} The prohibition also extends to threats of terror, recalling ‘proclamations made in the past threatening the annihilation’ of civilians.\textsuperscript{205}

Article 13(2) of Protocol II, which applies to non-international armed conflicts, is worded identically to Article 51(2) of Protocol I. The ICRC Commentary observes that attacks aimed at terrorizing ‘are particularly reprehensible’, occur frequently and ‘inflict particularly cruel suffering upon the civilian population’.\textsuperscript{206} The provision is intended to broaden the prohibition on terrorizing civilians by aerial bombardment in the 1923 Hague Draft Rules, by prohibiting ‘Acts or threats of violence’ in order ‘to cover all possible circumstances’.\textsuperscript{207} It particularizes the more general protection of civilians in Article 13(1) of Protocol II.\textsuperscript{208} Whereas an earlier draft had referred to an ‘intention’ to spread terror,\textsuperscript{209} that more subjective notion was replaced by the term ‘purpose’ in the final provision.\textsuperscript{210}

The decisive element in the identical prohibitions in Protocol I and II is the primary purpose to spread terror.\textsuperscript{211} While belligerents frequently claim responsibility for particular acts of violence and publicly proclaim their purposes,\textsuperscript{212} this element may give rise to difficulties. In some cases, evidence of the subjective purpose behind violent acts may be hard to discover, especially where motives are undeclared, or where practice departs from declared

\textsuperscript{201} ibid; even lawful combatants may become criminally liable for terrorism if they violate IHL.

\textsuperscript{202} Gasser (1986), n 3.


\textsuperscript{204} Galic, n 7, para 100. 205 Ibid; Gasser (2002), n 3, 556.

\textsuperscript{206} Sandoz et al (eds), n 195, para 4785 (1977 Protocol II, Art 13(2)).

\textsuperscript{207} Ibid.

\textsuperscript{208} 1977 Protocol II, Art 13(1): ‘The civilian population and individual civilians shall enjoy general protection against the dangers arising from military occupation’; see also Kalshoven, n 3, 75.


\textsuperscript{210} Kalshoven, n 3, 76.

\textsuperscript{211} Gasser (2004), n 182, 220; Gasser (2002), n 3, 556; Kalshoven, n 3, 76.

\textsuperscript{212} Kalshoven, ibid, 79.
motives. Where mixed purposes underlie violence, it may be difficult to weigh those purposes to uncover which is primary. Further, it is not clear whether the provisions prohibit violence against military objectives where the primary purpose is to spread terror among civilians. The randomness of indiscriminate attacks may also conceal underlying purposes.

Nevertheless, the ‘primary purpose’ standard is more appropriate than an ‘exclusive purpose’ standard. For example, Lauterpacht argued that Allied strategic bombing in the Second World War was not so objectionable because it was not done ‘for the exclusive purpose of spreading terror and shattering the morale of the population at large’. Demanding that causing terror must be the exclusive purpose of bombing sets the standard too high, given that attacks often have multiple aims.


Protocol II regulates a further limited concept of terrorism in Article 4(2)(d), which prohibits ‘acts of terrorism’ in non-international armed conflicts ‘at any time and in any place whatsoever’, as well as threats to commit such acts. The provision is modelled on Article 33 of the Fourth Geneva Convention, but applies to non-international conflicts. Article 4 is a fundamental guarantee in Protocol I, permitting no derogation. Thus, as the ICRC Commentary notes, ‘Even unlawful acts on the part of the adverse party cannot justify such measures’ and denunciation of the Protocol is ineffective until the end of the armed conflict. The provision is a further specific restriction on resort to reprisals against civilians.

An earlier ICRC draft had prohibited ‘acts of terrorism in the form of acts of violence committed against those persons’. The simpler language of the final provision extends its scope to cover ‘not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect’. Acts or threats of violence aimed solely at terrorizing civilians ‘constitute a special type of terrorism’ specifically prohibited in Article 13 of Protocol II. Contrary to Green’s assertion, the prohibition in Article 4 of Protocol II is not used in a non-technical sense equivalent to its

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213 eg the IRA and PLO have denied deliberately targeting civilians, claiming that civilians are incidental casualties of attacks on military objectives: AFP, ‘IRA says sorry for 30 years of killing’, Sydney Morning Herald, 17 July 2002; AFP, ‘Arafat condemns terrorist actions targeting civilians’, Sydney Morning Herald, 14 Apr 2002.
215 Kalshoven, n 3, 76–79.
216 ibid, 77, 79.
217 Lauterpacht, n 37, 528.
220 ibid, para 4784 (1977 Protocol II, Art 13(2)).
221 ibid, para 4538 (1977 Protocol II, Art 4(2)(d)).
222 ibid.
meaning in Article 13 of Protocol II.\textsuperscript{223} The Commentary makes plain that it was intended to be wider provision.

There is a further significant distinction between these provisions. Article 13(2) of Protocol II and Article 51(2) of Protocol I prohibit acts or threats ‘the primary purpose of which is to spread terror’, but there is no requirement that the act or threat actually result in terror. In contrast, Article 4(2)(d) of Protocol II prohibits actual ‘acts of terror’, so that acts which intend to terrorize but fail to do so are not prohibited. Consequently, Article 4(2)(d) is a wider provision in that it does not limit the prohibition on terror to people, but narrower in requiring the commission of actual terror.

The change in wording in the final Article 4(2)(d) of Protocol II was not, however, intended to remove the requirement in the original draft that an act of terrorism must be a violent one.\textsuperscript{224} At the Diplomatic Conference, the US had observed that ‘terrorism was an excessively vague word of which no satisfactory definition existed’ and insisted that it referred only to physical violence,\textsuperscript{225} although threats to commit physical violence were also ultimately prohibited.

In this sense, there is an intimate connection between Article 4(2)(d) of Protocol II and Article 4(2)(a), the latter prohibiting types of violence to life. Kalshoven argues that Article 4(2)(d) is not really ‘a separate category entirely independent of article 4(2)(a)’ and that no special legal consequences flow from a finding of terrorism, rather than of violence to life.\textsuperscript{226} The only difference is one of ‘gravity’, so that the vagueness of ‘terrorism’ is not of great concern.\textsuperscript{227}

This interpretation, however, renders Article 4(2)(d) nugatory and contradicts its plain textual meaning. Putting a person in extreme fear is distinct from any underlying physical violence, as a separate intention and in moral distinctiveness. Even a difference in gravity entails different legal consequences—at the very least, in the form of enhanced penalties; at most, in the greater stigma of conviction for a recognizably distinct (and possibly more serious) offence. Kalshoven’s admission that ‘if one so wishes, one may regard an act of terrorism as an aggravated form’ of violence to life\textsuperscript{228} is not an entirely satisfactory analysis.

5. General considerations

Referring to the various terrorism provisions in IHL, Cassese writes that:

\ldots if all these treaties speak of ‘terrorism’ or ‘acts of terrorists’ without specifying what is covered by this notion, it means that the draftsmen had a fairly clear idea of

\begin{itemize}
  \item \textsuperscript{223} L Green, The Contemporary Law of Armed Conflict (2nd edn, MUP, Manchester, 2000) 324.
  \item \textsuperscript{224} Official Records, n 209, vol 8, 412, paras 4–7; Kalshoven, n 3, 74.
  \item \textsuperscript{225} Official Records, n 209, 426, para 30 (USA); Kalshoven, n 3, 74.
  \item \textsuperscript{226} Kalshoven, ibid, 75, 80.
  \item \textsuperscript{227} ibid.
  \item \textsuperscript{228} ibid.
\end{itemize}
what they were prohibiting . . . they either deliberately or unwittingly were referring to a general notion underlying treaty provisions and laid down in customary rules.229

Any ‘general notion’ is, however, implicit, and must be understood according to the principles of treaty interpretation. There are few judicial decisions interpreting these provisions. The terms ‘terror’, ‘terrorizing’, and ‘terrorism’ must be given their ordinary textual meaning, in their context and in the light of their object and purpose.230 The ordinary meaning of ‘terror’ refers to ‘intense fear, fright or dread’; ‘terrorism’ refers to a ‘policy intended to strike with terror those against whom it is adopted; [or] the employment of methods of intimidation’.231

Significantly, however, there is no wider notion of terrorizing for an ulterior political purpose, objective, or motive,232 such as coercing a government or political institutions to do or refrain from doing something. There is similarly no requirement that terror be motivated by any political aims; it is sufficient that terror against civilians is committed or threatened. The meaning of terrorism in IHL is thus more limited than many definitions of terrorism outside the context of armed conflict.233

The case-by-case identification of particular acts which spread terror assists in the pragmatic interpretation of the prohibitions. The ICRC gives the example of the aerial carpet bombing of cities in the Second World War234 and some national military manuals expressly forbid bombardment for the purpose of terrorizing civilians.235 A Swiss military manual regards the ‘threat of nuclear attack against urban centres’ as a prohibited means of spreading terror among civilians.236

Further, in the Galic case the ICTY found that a campaign of deliberately sniping and shelling besieged civilians in Sarajevo violated the prohibition on spreading terror in Article 51(2) of Protocol I.237 Writers support the view that Serbian violence in Croatia (1991), Bosnia (1992), and Kosovo (1998–99), including ‘ethnic cleansing’ and mass expulsions, amounted to terrorism as understood in IHL.238 The US State Department asserted, in 1994, that Bosnian Serb militias were using rape to terrorize populations, while a UN

231 Oxford English Dictionary (online edition), definitions of ‘terror’ and ‘terrorism’.
232 Kalshoven, n 3, 76 (referring to 1977 Protocol II, Art 13(2)).
233 See Chs 3 and 4 above.
234 ICRC Report, n 179, 3.
237 See discussion below.
Special Rapporteur has characterized ‘the use of sexual violence . . . as an effective way to terrorise and demoralise members of the opposition’ during war. 239

Moreover, Oeter writes of terror that ‘this particularly barbarian variant of “total” warfare is unfortunately used regularly by military actors in practice’, 240 such as by the Soviet Union in Afghanistan in the 1980s, and by Iraqi ‘Scud’ missiles fired at Saudi Arabia and Kuwait in the 1991 Gulf War. 241 Gasser suggests additional examples from the Algerian war of independence; Soviet repression of independence movements; conflicts in Indochina and Northern Ireland; civil wars in Sri Lanka, Africa, and Colombia; and wars in the Middle East and Palestine. 242 The UN Sub-Commission on Human Rights has identified the use of ‘death squads’ in El Salvador as a means of terrorizing the population, 243 while Human Rights Watch criticized the spreading of terror among civilians by both sides in a conflict in Yemen. 244 The ICRC lists a variety of types of violence against civilians during conflicts which may cause terror and has specifically urged parties to respect the prohibition on terror in conflicts in the Middle East (1973), Yugoslavia (1991), Nagorno-Karabakh (1993), Angola (1994), and the Near East (2000). 245 The videotaping and beheading (‘exhibition killing’) of aid workers in Iraq in 2003–04, 246 and the bombing of UN headquarters, may also qualify, both designed to terrorize those groups of people.

The meaning of the terrorism provisions cannot be divorced from related IHL provisions, including the unequivocal, peremptory prohibition of reprisals against the civilian population and civilian objects, 247 and prohibitions on the use of incendiary weapons against civilians, or military objectives located within concentrations of civilians. 248 The terrorism provisions are further linked to stronger principles of distinction and discrimination. 249

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240 Oeter, n 3, 170.

241 ibid; Israel also claimed that SCUD missiles aimed to terrorize civilians and breached international law: Israel, Letter to UN Sec-Gen, UN Doc S/22160 (29 Jan 1991) 2.


243 UNSubComHR Res 1989/9, preamble.


247 1977 Protocol I, Arts 51(6) and 52(1); Oeter, n 3, 170; Gasser (2002), n 3, 556.


249 eg 1977 Protocol I, Arts 51(4) and 52; Oeter, n 3, 172–180; Gasser (2002), n 3, 255.
detailed rules on persons out of combat and enemy civilians,250 and on cultural property and installations containing dangerous forces.251

Clearly, certain acts prohibited as terroristic against civilians may be permissible acts of violence when committed against combatants during hostilities.252 However, as Gasser notes, ‘the right of parties . . . to choose methods or means of warfare is not unlimited’253 and certain weapons or methods of warfare—which might terrorize combatants—are prohibited.254 In particular, it is prohibited to use weapons or methods ‘of a nature to cause superfluous injury or unnecessary suffering’,255 while some acts regarded as terroristic may amount to the war crime of perfidy.256

A controversial application of terror tactics against military forces is the US doctrine of ‘Shock and Awe’ used in the Iraq war in 2003.257 Its architects in the Pentagon hope that shock and awe tactics will intimidate adversaries, overwhelm their perception and paralyse their will to fight.258 It draws expressly on precedents such as shell shock in the First World War, the atomic bombing of Hiroshima and Nagasaki, massive aerial bombardment and blitzkrieg in the Second World War, assassination and reprisals.259 Its authors argue: ‘While there are surely humanitarian considerations that cannot or should not be ignored, the ability to Shock and Awe ultimately rests in the ability to frighten, scare, intimidate, and disarm’.260

To the extent that such tactics respect the laws of war and human rights standards applicable in armed conflicts, there is nothing innately unlawful about terrorizing enemy combatants. However, the aggressive emphasis on psychological dominance and overwhelming force may result in an inexorable drift towards using excessive means or attacking protected targets. Further, although physical force is directed against military targets, it may also be designed to incidentally intimidate or overwhelm civilians and their support for the military effort.261

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252 Gasser (2002), n 3, 557.


254 Such as enemy civilians planting a bomb in an officers’ mess with the specific intent of spreading terror among combatants: Cassese, n 229, 127.


259 ibid.

260 ibid, 34.

E. INTERNATIONAL CRIMINAL TRIBUNALS SINCE 1993

1. Terrorism in tribunal statutes

Individual criminal liability for breaches of IHL prohibitions on terrorism have been expressly established in the statutes of some recent international criminal tribunals. Article 4(d) of the 1994 ICTR Statute embodies Article 13(2) of Protocol II, by conferring jurisdiction over ‘Acts of terrorism’ committed in Rwandan territory, or by Rwandan citizens in neighbouring States, between 1 January and 31 December 1994.\(^\text{262}\) Similarly, Article 3(d) of the Statute of the Special Court for Sierra Leone enables the prosecution of ‘Acts of terrorism’,\(^\text{263}\) which is listed among violations of common Article 3 of the four Geneva Conventions and of Protocol II.

In contrast, ‘terrorism’ appears in neither the 1993 ICTY Statute, nor the 1998 Rome Statute of the ICC. Its omission from the Rome Statute is normatively significant, since the Statute represents the most recent and ‘authoritative expression of the legal views of a great number of States’ on international criminal law.\(^\text{264}\) The Rome Conference rejected a broader proposed crime of terrorism outside the context of armed conflict,\(^\text{265}\) yet it also excluded a proposed war crime of terrorism.

The proposed war crime of terrorism was found in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind,\(^\text{266}\) drawn to the attention of the ICC Preparatory Committee by the UN General Assembly.\(^\text{267}\) Draft Article 20(f) described as a ‘war crime’ both the ‘taking of hostages’ and ‘acts of terrorism’, where committed in violation of IHL applicable in non-international armed conflict and ‘in a systematic manner or on a large scale’.\(^\text{268}\) The phrase ‘acts of terrorism’ was not defined, although the provision resembles that in Article 4(2)(d) of Protocol II.

Although the draft provision was not adopted, Article 10 of the Rome Statute declares that the Statute cannot limit or prejudice ‘in any way existing or developing rules of international law for purposes other than this Statute’.

\(^{263}\) Agreement between the UN and Sierra Leone pursuant to UNSC Resolution 1315 (2000), annexed Statute.
\(^{265}\) See Ch 3 above.
\(^{267}\) UNGA Resolution 51/160 (1996).
As the ICTY stated in the *Furundžija* case, the Statute is not a perfect expression of customary law but depending on the issue, ‘may be taken to restate, reflect or clarify customary rules or crystallize them, whereas in some areas it creates new law or modifies existing law’. Thus although violations of the terrorism prohibitions in the Geneva Conventions and Protocols cannot be tried in the ICC, prosecutions in customary law (or other tribunals) are not precluded. Still less does the exclusion of terrorism from the Statute prejudice the future development of such a customary crime.

2. *The Galic case in the ICTY*

This position is supported by ICTY practice. While the ICTY Statute does not mention terrorism, Article 3 allows prosecution of violations of ‘the laws and customs of war’, and jurisdiction is not limited to the offences listed—in contrast to the exhaustive enumeration of crimes in the Rome and ICTR Statutes. Thus in the *Galic* case, the ICTY prosecutor alleged multiple violations of the laws and customs of war by ‘unlawfully inflicting terror upon civilians’, under Article 51 of Protocol I and Article 13 of Protocol II. The prosecutor argued the ‘principal objective of the campaign of sniping and shelling of civilians [in Sarajevo] was to terrorize the civilian population’. The intent to spread terror was evident from the widespread targeting of civilian activities, the manner of the attacks, and their timing and duration.

Three judges of the Trial Chamber first considered the case in a decision on an acquittal motion of October 2002. The defence admitted that the civilian population had experienced terror, but contended that it was a consequence of urban warfare rather than specifically intended by the accused. Yet the ICTY rejected the defence argument that the prosecution had failed to offer sufficient evidence of specific intent to terrorize, and allowed that charge to proceed to trial.

In its merits judgment of December 2003, the ICTY found that a ‘crime of terror against the civilian population’, or more simply ‘the crime of terror’, was committed at Sarajevo. The legal basis of the crime was Article 51 of Protocol I, which applied to the Bosnian conflict by an international

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269 *Furundžija*, n 264, para 227.
272 ibid.
274 ibid.
275 ibid.
agreement of 22 May 1992. It was consequently unnecessary to decide if Protocol I applied due to its ‘inherent conditions of application’ (in Article 1), or if Protocol II also applied.277 The ICTY repeatedly emphasized that its judgment was based on the treaty crime of terror, and did not consider whether parallel customary rules existed, or constituted peremptory norms.278 Further, the ICTY did not decide whether it had jurisdiction over terrorism resulting from threats of violence, or violence not causing death or injury.279 In these respects, it avoided answering some of the most difficult questions in this area.

There was, however, significant discussion of the elements of the crime, which were found to comprise: (1) acts of violence against the civilian population or civilians not taking direct part in hostilities, causing death or serious injury to body or health; (2) wilfully making civilians the object of the violence; and (3) committing the offence ‘with the primary purpose of spreading terror among the civilian population’.280 On the facts, the actus reus consisted of violence against civilians, in particular ‘a campaign of sniping and shelling’ of civilians in Sarajevo.281

The distinctive feature of the crime of terror is its mens rea element: ‘the primary purpose of spreading terror’.282 The ICTY regards terror as a crime of ‘specific intent’, which excludes ‘dolus eventualis or recklessness from the intentional state specific to terror’.283 The perpetrator must have been aware of the possibility or likelihood that terror would result from acts of violence, and that such terror was the result specifically intended.284 This position accords with the view of the drafting committee at the 1974–77 Diplomatic Conference, which excluded unintended or incidental terror arising from lawful acts of warfare with another primary objective.285

Contrary to the prosecution’s argument, the ICTY found that the actual infliction or spreading of terror is not a necessary element.286 During the drafting of Article 51, some believed it preferable to prohibit particular methods which in fact spread terror, since proving intent to spread terror would be too difficult.287 That view did not gain acceptance. The ICTY also acknowledged that threats (rather than acts) of violence ‘could also involve grave consequences for the victim’, but did not address the matter because it was not at issue in the Galic case.288
3. The meaning of ‘terror’ in Galic

In interpreting the term ‘terror’, the ICTY accepted the prosecution’s definition of ‘extreme fear’. The prosecution drew this interpretation from a dictionary definition and the testimony of an expert witness (a psychiatrist), and nothing in the travaux préparatoires of Protocol I contradicted it. The defence unsuccessfully argued for more restrictive interpretation, submitting that ‘extreme fear’ understated the notion, which had to be ‘of the highest intensity’, ‘long term’, ‘direct’, and ‘capable of causing long-term consequences’. That view sets the bar too high, since terror will often be transient given the ebb and flow of hostilities.

Despite defining ‘terror’ as ‘extreme fear’, the decision does not satisfactorily explain how the courts will determine what kinds of acts are likely to cause extreme fear. Since proof of actual terror is not required, empirical evidence of terror adduced through the testimony of affected civilians (about their state of mind) may not be available. Even if it is available, the more difficult question remains as to how ‘terror’ is to be accurately measured. While both parties in the Galic case relied extensively on the expert evidence of psychiatrists to assist in measuring ‘terror’, the ICTY’s judgment neither evaluates this evidence nor assesses its significance.

Since the ICTY implicitly accepted the prosecution’s definition, it is important to examine its basis. The prosecution’s expert, a British psychiatrist, prepared a report on the relationship between events such as the shelling and sniping at Sarajevo and ‘the production of terror’. The report defined terrorism as ‘extreme fear’ and then investigated how psychiatry identifies and measures ‘fear’. The report considered ‘realistic’ terror rather than neurotic or phobic fear, and how terror affects people with ‘normally robust personality structures’. It found that deliberate disasters generated more fear than accidental ones; and that non-combatants were not as prepared for violence as combatants and thus experienced fear differently. It also noted that a range of factors affects the ability of civilians to cope with fear.

The report indicates that factors likely to induce terror in civilians include: violence which is intense and dangerous, repeated and continuing, and uncontrollable and unpredictable; attempts to disrupt sleep (including by loud noise) or essential services (such as food and water, transport, medicine, electricity, or communications); propaganda; interfering with grieving (such as by sniping at funerals); targeting cultural icons (such as mosques or Red Cross hospitals); and disrupting the daily lives of civilians (including...

289 ibid, para 137. 290 ibid, paras 75 and 137 respectively. 291 ibid, para 83. 292 ibid, para 137. 293 S Turner, Report for the ICTY Case No IT–98–29–T, Prosecution Exhibit P3716, 6 May 2002 (tendered 24 June 2002). 294 ibid, paras 13, 16.
shopping, schooling, or going to cafes). Such acts create a sense of helplessness and vulnerability. Fear may be expressed in different ways: panic, apathy, depression, detachment, disassociation, numbness, or hopelessness. It may also be manifested as acute stress disorder or post-traumatic stress disorder, or through increased drug use, suicide, and greater hostility among children.

The defence called a Serbian psychiatrist, who attacked the methodology used by the prosecution’s expert on a variety of grounds. The defence argued that that there was no common experience of fear in Sarajevo, but that individuals felt it differently and differences in the structure, age, gender, education, and mental condition of the population had to be taken into account. The defence argued that the fear felt was neither extreme (since there was no widespread panic, ‘shell shock’ or ‘bent man’ syndrome), nor experienced by the majority. It was asserted that fear in a civil war is normal in a siege situation, where civilians live among military objectives. It was also argued that civilian activities continued in Sarajevo, including schools, hospitals, and restaurants, with no major increases in suicide or malnutrition.

The defence’s arguments on the meaning and measuring of ‘terror’ made little impression on the ICTY, despite heavily contesting the findings of the prosecution’s expert. While the latter expert was a more qualified and highly regarded psychiatrist, it is troubling that the ICTY glossed over the critical issues of what causes ‘terror’ and how it should be measured. ‘Terror’ is not a concept known to psychiatry or psychology and simply interpreting ‘terror’ as a heightened form of ‘fear’ may not be analytically sound in the absence of further rigorous scientific investigation.

The crime of terror may be committed if terror is intended but does not actually result, and possibly even where terror is merely threatened. Judges must make speculative, predictive, and subjective judgments about what kinds of acts are likely to produce terror in a target population, in the absence of empirical testimony as to how that population actually felt. Since juries are absent in international criminal trials and most national military trials, the likelihood of terror is not being evaluated by what an ordinary or reasonable person in the community believes would cause terror. For this reason, judges are more reliant on expert testimony about terror (in addition to their own intuitive or ‘common sense’ views about what causes terror). This makes

Dr B Kuljic, Expert Opinion of 14 Jan 2002 and ICTY testimony in transcript of 4–6 Mar 2003. It was claimed that the prosecution’s report was flawed because it: failed to conduct interviews, surveys, or questionnaires of the affected population, or to consider their medical records; lacked random sampling or control questions; did not use tests for measuring PTSD or acute stress disorder, or consider comparative data; relied too heavily and selectively on secondary literature; and was tainted by dependence on selective extracts of witness testimony provided by the prosecution.
it all the more important for the courts to properly resolve conflicting expert evidence (and the many lingering questions) about the causes and symptoms of ‘terror’.

F. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR ‘TERRORISM’

The IHL terrorism provisions are textually framed as prohibitions, rather than as crimes. The prohibition in Article 33(1) of the Fourth Geneva Convention is not expressly included among the ‘grave breaches’ in Article 147 of that Convention. Nor are the prohibitions in Protocol I identified as grave breaches under Article 85 of that Protocol, while Protocol II contains no provisions establishing grave breaches.

Nonetheless, the Galic case confirms that serious violations of the prohibition on terrorism may attract individual criminal responsibility. Following the conditions established in the Tadic case, the ICTY found that spreading terror is both ‘serious’ (breaching a basic rule protecting important values and involving grave consequences for the victim) and entails individual criminal responsibility. Although the indictment did not charge spreading terror as a grave breach, the ICTY found that persons seriously violating the prohibition were criminally liable if it caused serious injury or death: ‘In such cases the acts of violence qualified, in themselves, as grave breaches of Protocol I. Therefore the violation seen in all its elements (attack plus intent to terrorize) could not have been qualified as less criminal than a grave breach.’ The ICTY believes that terrorism is a compound offence comprising other crimes or grave breaches under Article 85 of Protocol I, in particular wilfully ‘making the civilian population or individual civilians the object of attack’ and ‘causing death or serious injury to body or health’.

The universal acceptance of Article 85 at the Diplomatic Conference, combined with the ‘unanimous and unqualified condemnation’ of spreading terror, is ‘clear proof’ that relevant violations of Article 51(2) have been criminalized. Leading writers support the implicit grave breach theory, including in non-international armed conflict under Protocol II.

The argument that serious acts of terrorism implicitly amount to grave breaches is not entirely persuasive and misrepresents the legal character of the prohibition on terror. While the underlying physical acts may be grave breaches (such as unlawful killings), the distinctive feature of the prohibition

296 Gillard, n 179, 52.
298 Galic n 7, paras 106–108, 130; and 127, 130 respectively.
299 ibid, para 127.
300 ibid, para 128.
301 ibid.
302 Gasser (2002), n 3, 556, 560, 565; Oeter, n 3, 169.
303 Gasser, ibid, 562.
on terror is the special intent to commit physical violence for the purpose of spreading terror. IHL treaties do not treat terror, as such, as a grave breach and the ICTY conflates the distinct prohibition of terror with the physical acts partially comprising it. Ireland, for example, treats any ‘minor breach’ of Article 51(2) of Protocol I as still being an offence.\textsuperscript{304}

G. CUSTOMARY CRIMES OF TERRORISM IN ARMED CONFLICT

A better legal argument is to avoid artificially characterizing terrorism as an implied grave breach, and instead to regard the prohibition as a crime in customary law. As the US Military Tribunal stated in the\textit{Hostages} case: ‘It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally.’\textsuperscript{305} The penal aspect of IHL is ‘still rudimentary’ and ‘When treaties fail to clearly define the criminality of prohibited acts . . . customary law and internal penal law . . . supply the missing links’.\textsuperscript{306} The system of grave breaches in more recent IHL treaties does not exclude the existence of other war crimes in customary law, just as the absence of grave breaches in earlier treaties did not preclude criminal liability.\textsuperscript{307} The notion of grave breaches may be more relevant to treaty-based obligations concerning jurisdiction, prosecution and extradition than to criminality\textit{per se}.\textsuperscript{308} In the\textit{Galic} case, the ICTY majority refrained from examining whether the treaty prohibitions also constituted customary rules, as argued by the prosecution. In dissent, Judge Nieto-Navia found that the limited criminalization of terrorism in State practice was insufficient to establish individual criminal liability in customary law, and as a result, the offence of terrorizing civilians was not within the ICTY’s jurisdiction.\textsuperscript{309} The ICRC study of customary IHL accepts the existence of a customary prohibition on ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’,\textsuperscript{310} but does not examine whether it also constitutes a customary crime.

\textsuperscript{304} Geneva Conventions Act (1962, as amended) (Ireland), s 4.
\textsuperscript{305} \textit{Hostages} case, n153, 634–635; see also \textit{Nuremberg Judgment}, n 102, 221; Green, n 223, 303.
\textsuperscript{306} T Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 AJIL 554, 563.
\textsuperscript{307} ibid, 564; see also Greenwood, n 297, 279.
\textsuperscript{308} Meron, n 306, 566.
\textsuperscript{309} \textit{Galic} (dissent of Judge Nieto-Navia), n 7, paras 108–113 (the 1992 agreement was not considered sufficient).
Determining the existence of customary humanitarian law requires consideration of States’ official pronouncements, military manuals and judicial decisions, particularly where observation of States’ actual practice is rendered difficult by lack of independent access to the theatre of hostilities. The practice of international organizations such as the ICRC is also important. The legal significance of the practice of non-State actors is unclear, although in the Tadic case the behaviour of ‘insurgents’ was a relevant consideration.

As the majority in Galic admitted, there are few examples of national or international criminal prosecutions for violations of treaty or customary prohibitions on terrorizing civilians. Ordinarily, more than a few isolated cases are necessary to establish a customary crime, and widespread evidence of prosecutions in State practice and the attendant opinio juris is required. Where the case law and statutes are silent, recourse to military manuals, national legislation and judicial practice, and general principles of justice assumes greater importance. The observation in the Galic case that ‘evidence of terrorization of civilians has been factored into convictions on other charges’ in international tribunals only marginally supports an argument that terrorism is a customary war crime.

Nevertheless, there is some evidence that the treaty prohibitions on terrorism are emerging as customary crimes. First, the origins of liability for terrorism in IHL extend as far back as the 1919 list of war crimes adopted by the Commission on Responsibilities. Second, these provisions influenced a number of attempts to establish criminal liability during the Second World War, and provided the basis for a number of national post-war prosecutions.

Third, there was widespread support for the terrorism provisions during the drafting of the 1949 Geneva Conventions and the 1977 Protocols, which have been widely ratified. During the drafting of Article 51(2) of Protocol I,

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311 Tadic (Interlocutory), n 71, para 99; see also ICRC Study, n 3, vol 1, xxx–xlv.
312 Tadic (Interlocutory), n 71, para 99.
313 ibid, para 109; ICRC Study, n 3, vol 1, xxxv.
314 ibid, vol 1, xxxvi.
315 Tadic (Interlocutory), n 71, para 108.
316 Cassese, n 229, 51.
317 ibid.
318 Galic, n 7, para 66. eg the ‘atmosphere of terror’ in detention camps was evidence of war crimes such as torture, cruel or inhuman treatment (Delalic ICTY–96–21–T (16 Nov 1998), paras 976, 1056, 1086–1091, 1119; Blaškic ICTY–95–14–T (3 Mar 2000), paras 695, 700, 732–733) and the crime against humanity of persecution (Nikolic (Rule 61 Decision) ICTY–94–2 (20 Oct 1995), paras 67, 109, 111, 119, 177, 206). The terrorizing of civilians by intensive shelling was evidence of crimes of ‘unlawful attack’ on civilians, and persecution and inhumane acts (Blaškic, above, paras 630, 505, 511 and Krstic ICTY–98–33–T (2 Aug 2001) paras 533, 122 respectively). Terrorizing civilians, through threats, insults, looting and burning houses, beatings, rapes, and murders, was also evidence of persecution and inhumane acts (Krstic above, paras 150, 607). In Martic, the use of cluster bombs was not designed to hit military targets, but to terrorize civilians in Zagreb (Martic (Rule 61 Decision) ICTY–95–11 (8 Mar 1996) paras 23–31), while the shelling of civilian targets in Sarajevo allegedly had a similar purpose in Dukić, Initial Indictment (29 Feb 1996) para 7, count 2. See ‘B (5) National Post-War Trials’ above.
319 There are 188 Parties to each of the four 1949 Geneva Conventions; 155 Parties to 1977 Protocol I; and 148 Parties to 1977 Protocol II: Roberts and Guelff, n 12, 362, 498.
the ICRC stated that it ‘merely reaffirmed existing international law’, and Article 51 as a whole was adopted by 77 votes to 1, with 16 abstentions.321 Byelorussia stated that ‘spreading terror among the civilian population is well known to be one of the infamous methods widely resorted to by aggressors seeking to attain their criminal ends’.322 Mexico rejected reservations to Article 51 as inconsistent with the object and purpose of Protocol I, while the UK regarded Article 51(2) as a reaffirmation of customary law.323

Fourth, some of the treaty prohibitions on terrorism are reflected in the Statutes of the ad hoc criminal tribunals for Rwanda and Sierra Leone, and the practice of the ICTY. The statutes of international criminal tribunals may be evidence of a customary crime, despite a paucity of prosecutions.324 Up to the end of 2005, all 13 indictments in the Special Court for Sierra Leone contained charges of ‘acts of terrorism’ or ‘terrorizing the civilian population’, as war crimes arising under common Article 3 of the 1949 Geneva Conventions and Protocol II.325

In the indictment of Charles Taylor, it is asserted that as leader of the National Patriotic Front of Liberia and Liberian President, Taylor supported, encouraged, organized, and led a campaign to terrorize the civilian population of Sierra Leone, and did terrorize them.326 The acts comprised in the campaign included many of the other charges: unlawful killings, sexual and physical violence, use of child soldiers, abductions and forced labour, looting, and burning.327 The indictments against many other defendants are similarly structured, with other war crimes or crimes against humanity supplying the actus reus of the overarching war crime of terrorism.

Fifth, national legislation and case law lends support to a customary crime of terror. At least 23 national military manuals prohibit acts or threats of violence designed to terrorize the civilian population in international conflicts, while 18 States make breaches of the prohibition an offence.328 As early as 1945, Australia had criminalized ‘murder or massacres—systematic

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321 Galic, n 7, para 99; Official Records, n 209, vol XIV, 36 and vol VI, 163 respectively.
322 Official Records, ibid, vol VI, 177; see also 201 (Ukraine); Galic, n 7, para 103.
323 Official Records, vol VI, 193 (Mexico); 164 (UK).
324 Cassese, n 229, 51.
327 ICRC Study, n 3, vol I: Rules, 8–9; vol II: Practice, 69–72 (offences in Argentina, Australia, Bangladesh, Bosnia and Herzegovina, China, Colombia, Côte d’Ivoire, Croatia, Czech Republic, Ethiopia, Ireland, Lithuania, the Netherlands, Norway, Slovakia, Slovenia, Spain, and Yugoslavia). At least 17 military manuals prohibit terror in non-international conflict, while 12 States make it an offence: ibid, vol I, 9–10.
terrorism’, \(^{329}\) while a 1946 Chinese Law defined war crimes to include ‘Planned slaughter, murder or other terrorist action’. \(^{330}\) By 1995, the Colombian Constitutional Court had accepted the customary status of Article 13 of Protocol II, including its prohibition of terror. \(^{331}\) In 1997, in the *Radulovic* case the Split County Court in Croatia convicted Serbian fighters for ‘a plan of terrorising and mistreating the civilians’, ‘with the goal to terrorise’, under Article 33 of the Fourth Geneva Convention, Article 51 of Protocol I, and Article 13 of Protocol II. \(^{332}\) The acts included indiscriminately firing at civilian areas and threats to demolish, and demolishing, a dam with the intention of drowning 30,000 people.

Plainly not all violations of IHL attract individual criminal liability, \(^{333}\) such as certain administrative or regulatory matters. \(^{334}\) As a matter of policy, factors relevant in determining whether an international prohibition also gives rise to criminal liability include: ‘The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interest of the international community.’ \(^{335}\) Applying these criteria, the terrorism prohibitions in IHL treaties, which are not specifically listed as grave breaches, are: (a) addressed to individual conduct; (b) unequivocal, since terrorism is not even permitted in reprisal; (c) responding to extremely grave violence against civilians; and (d) safeguarding a vital international interest—the protection of civilians from violence in armed conflict. \(^{336}\) Moreover, the imposition of international criminal responsibility ‘is also fully warranted from the point of view of substantive justice and equity’. \(^{337}\)

### H. US MILITARY COMMISSIONS AND TERRORISM

In April 2003, the US Department of Defence issued an Instruction specifying the criminal jurisdiction of US military commissions in the US ‘war on

\(^{329}\) War Crimes Act 1945 (Australia), s 3, crimes as defined in a 1945 Board of Inquiry Instrument: see (1950–II) ILCYB 253, 265; (1950–II) ILCYB 253, 265; UNWCC Law Reports, vol V, annex, 95.

\(^{330}\) Chinese Law, 24 Oct 1946, art III(1); see (1950–II) ILCYB 253, 266.

\(^{331}\) Ruling No C–225/95, excerpted in M Sassoli and A Bouvier (eds), *How Does Law Protect in War*? (ICRC, Geneva, 1999) 1366, para 30; see also Colombian Penal Code, art 144.

\(^{332}\) *Radulovic et al*, Split County Court, Rep Croatia, K–15/95, 26 May 1997. Terrorizing civilians was a crime under the 1960 and 1976 Yugoslavian Criminal Codes and was prohibited by 1988 Yugoslavian military regulations: *Galic*, n 7, paras 121–123.

\(^{333}\) Tadic (Interlocutory), n 71, para 94; Cassese, n 242, 50–51.

\(^{334}\) Meron, n 306, 570.

\(^{335}\) ibid, 562.

\(^{336}\) The UN Secretary-General has identified the interests protected in *Galic* as among the fundamental standards of humanity: UNComHR (60th Sess), Report of the Secretary-General: Fundamental Standards of Humanity, 25 Feb 2004, UN Doc E/CN.4/2004/90, para 17.

\(^{337}\) Tadic (Interlocutory), n 71, para 135.
The listed crimes ostensibly ‘derive from’ and ‘constitute violations of’ the law of armed conflict, or are offences ‘consistent with that body of law’. The Instruction purports to be ‘declarative of existing law’ and so allows trials for conduct prior to the date of the Instruction, but not for offences which did not previously exist. The crimes are divided into three overarching categories of ‘war crimes’ (eighteen offences), ‘other crimes triable by military commissions’ (eight offences), and ‘other forms of liability and related offences’ (seven inchoate or ancillary offences).

The crime of ‘terrorism’ is listed in the Instruction as a substantive offence within the second category of ‘other offences triable’. Although no definition of terrorism is provided, the Instruction outlines its ‘elements’ as: (1) intentionally or recklessly killing or inflicting bodily harm, or destroying property; (2) such conduct was ‘intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion’; and (3) the conduct occurred ‘in the context of and was associated with armed conflict’.

The elements are not cumulative, since: ‘Each element need not be specifically charged.’ However, the offence would not be coherent as a distinct offence of ‘terrorism’ if the elements are not cumulative. Unless the second element always comprises part of the offence, the offence becomes indistinguishable from other war crimes such as unlawful killing or inflicting bodily harm on civilians.

The offence in the Instruction departs from the more limited crime of terror in IHL. Mere ‘intimidation’ or ‘coercion’ of civilians by violence falls well short of the standard of ‘extreme fear’ established in the Galic case, and inferred from the ordinary meaning of ‘terrorism’. Moreover, the prohibition of terror in IHL aims solely to protect civilians in armed conflict, not to a wider insulation of government policy from influence by coercion or intimidation—notwithstanding the Instruction’s exclusion of attacks on lawful military objectives, by State military forces exercising official duties.

As a result, the US Military Instruction exceeds its self-imposed limitations. Its offence of terrorism does not derive from the law of armed conflict, or declare existing law, and thus permits punishment for an offence which

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339 ibid, 1.
340 ibid.
341 ibid, 13. The other offences in this category include: hijacking or hazarding a vessel or aircraft; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice related to military commissions.
342 ibid, 12–13 (emphasis added). Element (1) includes causing death or bodily harm, even indirectly.
345 ibid, 1.
Terrorism in International Humanitarian Law

1. NO SEPARATE CATEGORY OF TERRORIST

The prohibitions on terror in armed conflict do not give rise to any special legal status for suspected violators. The legal status of ‘terrorists’ in IHL has been exhaustively discussed in connection with the ‘war on terror’ and is not considered here. It is sufficient to note that—unlike for spies and mercenaries—there is no distinct legal category of ‘terrorist’ in IHL, just as those who commit the war crimes of pillage or rape are not separately categorized as ‘pillagers’ or ‘rapists’.

Rather, combatants and non-combatants (including unlawful participants in hostilities) are equally bound by the prohibitions on terror. They may be...
criminally liable for terrorist acts amounting to war crimes, while non-combatants are also liable for terrorist violations of national law. Persons who unlawfully participate in hostilities by committing terrorist acts become legitimate objects of attack during the course of armed engagements, although once hors de combat, they regain protected status.\(^3\) It is necessary, however, to distinguish terrorist acts during hostilities from other terrorist acts committed in wartime, but unrelated to the conflict, or outside the theatre of hostilities.\(^3\)

**J. CONCLUSION: PROVING TERROR, AVOIDING DUPLICATION**

Fear is endemic in war, and instilling fear in enemy combatants through lawful methods is normal, even expected.\(^3\) At the same time, the violence of any conflict—even one strictly fought between combatants—inevitably produces psychological insecurity in civilians. But the international community has agreed that deliberately terrorizing civilians warrants condemnation, as it rises above the ordinary level of fear tolerated in war as an incident of military necessity.

After a series of early efforts before 1949, there are now well-established—if infrequently invoked—prohibitions of ‘terrorism’ and ‘terror’ in IHL, which derive meaning from their ordinary textual interpretation, drafting history and historical usage, and relevant case law. Developments in customary law have also given rise to individual criminal responsibility for breaches of some of these prohibitions.

In an essay on fear, Montaigne wrote: ‘I have hardly any idea of the mechanisms by which fear operates in us.’\(^3\) Despite the subjectivity of an emotional state such as ‘terror’, justiciable methods of proving the existence, or likelihood, of a state of grave fear are available. Just as national tort laws cope with concepts of nervous shock, emotional distress, mental suffering, post-traumatic stress, psychosis, and other psychological conditions, diagnosing ‘terror’ (and identifying acts that produce it) is not beyond medical science.

As in the *Galic* case, expert witnesses may assist in determinations; while in

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\(^3\) Dinstein, n 203, 64; Koufa (2001), n 193, 21–22. Consider the conflicts in Sri Lanka, Chechnya, and Kashmir, which involve territorial armed conflicts and terrorist acts outside the theatre of hostilities.


the Nikolic case, the mental trauma suffered was evidence of terror in detention.\footnote{Nikolic, n 318, para 69; also paras 109, 177.} In a civil analogy, in 2002 a US court held a Bosnian Serb responsible for intentionally inflicting emotional distress.\footnote{Decision of Dist Ct of Northern District of Georgia, 29 Apr 2002, in ‘National Implementation of International Humanitarian Law: Biannual Update: Jan–Jun 2002’ (2002) No 847 IRRC 701, 713.} Since different people have different thresholds of terror,\footnote{P Wilkinson, Terrorism and the Liberal State (Macmillan, London, 1977) 47.} courts should consider the degree of fear that a reasonable person, of ordinary firmness of mind, might be expected to resist; as well as any cultural (or other relevant) differences affecting the ability of particular populations or sub-populations to cope with fear.

A doctrinal question remains as to whether prohibiting terror is superfluous in the light of more direct prohibitions on violence against civilians.\footnote{eg 1949 Fourth Geneva Convention, Art 27; 1977 Protocol I, Art 51(2); 1977 Protocol II, Art 13(2).} An intent to spread terror will almost always only exist in connection with other unlawful acts or threats, such as sniping and shelling in the Galic case, or aerial bombing in both world wars. Proof of intentional physical attacks does not require showing a further underlying purpose, which may be difficult to prove. The variety of motives includes: reaching combatants hiding among civilians; depopulating or capturing territory; undermining civilian support for the military; terrorizing civilians into submission; reprisal or punishment; discrimination or persecution; extermination or genocide; even sadism or base cruelty.

Yet it is the business of IHL and criminal law to draw precise distinctions between different types of attacks on civilians. Simple protections against physical attacks do not capture the idea that the some attacks are deliberately designed to achieve more than their immediate objective of physical harm. A range of other crimes and prohibitions address ulterior purposes behind physical attacks on civilians, including discrimination, persecution, extermination, genocide, reprisal, and collective punishment. These too are already covered by simple prohibitions on attacking civilians, but still exist to protect other values infringed by such attacks.

In the same way, there is something profoundly disturbing or shocking to moral sensibility about acts or threats of violence which deliberately seek to put civilians in grave fear for their lives or safety. Spreading terror among non-combatants is a particular kind of cruelty and viciousness which deserves explicit and specific condemnation. This is an inherently moral position which may not be shared by all. But it does seem borne out by the experience of civilian suffering in war.