THE CRIME OF 'TERROR' UNDER INTERNATIONAL HUMANITARIAN LAW

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By

Qurat Ul Ain

School of Law

Middlesex University London

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Contents

Abstract

The objective of this thesis is to investigate the status of the crime of 'terror' as a war crime under international humanitarian law. Included in Article 51 (2) of Additional Protocol I and in Article 13 (2) of Additional Protocol II to the Geneva Conventions of 1949, the crime prohibits the 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. The thesis is structured in two parts. The first traces the historical development of the prohibition on spreading terror among the civilian population. It surveys the evolution of state practice and scrutinises the drafting history of the Additional Protocols. The second part focuses on the prosecution of the crime before international courts and tribunals. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia is given particular attention as the first international tribunal to prosecute the offence as a violation of laws and customs of war. Despite the case-law of the ad hoc Tribunals confirming the crime of 'terror' as an international crime in customary law, it was not included in the Rome Statute of International Criminal Court. The thesis explores the reasons for this and advances an argument for extending the subject-matter jurisdiction of the International Criminal Court to include the crime of 'terror'. In doing so, the thesis examines the conflation of 'terror' as a war crime with the offence of 'terrorism' in order to add clarity to the conceptualization of the former under international humanitarian law.

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Table of Abbreviations

USAAF – United States Army Air Forces
ABiH – Army of Bosnia and Herzegovina
AFRC– Armed Forces Revolutionary Council
CCIT– Comprehensive Convention on International Terrorism
CDF– Civil Defense Forces
CERD– International Convention on the Elimination of All Forms of Racial Discrimination
DPR– Donetsk People's Republic
ECHR – European Convention on Human Rights
EJIL – European Journal of International Law
EU – European Union
HRW– Human Rights Watch
HVO – Croatian Defence Council
ICC – International Criminal Court
ICD-International Crimes Database
ICCPR – International Covenant on Civil and Political Rights
ICJ – International Court of Justice
ICRC – International Committee of the Red Cross
ICSFT – International Convention for the Suppression of the Financing of Terrorism
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
ILC – International Law Commission
IMT– International Military Tribunal
IRRC – International Review of the Red Cross
JCE– Joint Criminal Enterprise
IRRC – International Review of the Red Cross
ISIL– Islamic State of Iraq and the Levant
ISIS– Islamic State in Iraq and Syria
LIA– London International Assembly
LOAC– Law of Armed Conflict
LPR– Luhansk People's Republic
NEI – Netherlands East Indies (NEI)
NIAC - Non-international Armed Conflict
NFPL– National Patriotic Front of Liberia
MICT– Mechanism for International Criminal Tribunals
NATO– North Atlantic Treaty Organization
OHCHR – Office of the United Nations High Commissioner for Human Right
OIC– Organisation of Islamic Cooperation
RAF– Royal Air Force
RUF– Revolutionary United Front
SCSL– Special Court for Sierra Leone
SDS – Serb Democratic Party
SHAEF– Supreme Headquarter Allied Expeditionary Force
SRK– Sarajevo Romanija Corps
SS– Schutzstaffel
STL– Special Tribunal for Lebanon
UN – United Nations
UNGA – United Nations General Assembly
UNTS – United Nations Treaty Series

UNSC – United Nations Security Council
VRS – Army of Republika Srpska

Introduction

The aim of this study is to clarify the status of crime of terror under international humanitarian law. This is achieved by first investigating the origins of crime of terror, including a study of the *travaux preparatoires* of the Additional Protocols to the Geneva Conventions of 1949. After exploring developments leading up to the prohibition of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' in the Additional Protocols, the jurisprudence of international criminal tribunals is scrutinized. Highlighting the contribution of these institutions in development of this crime, this study presents an argument for the incorporation of terror as a war crime in the Rome Statute of the International Criminal Court.

The approach adopted is one that considers the offence of 'terror' within the established framework of the international humanitarian law. Currently, the Hague Regulations, the four Geneva Conventions and three Additional Protocols[1] form the main corpus of treaty law making up international humanitarian law. This body of law seeks to limit and prevent unnecessary suffering in times of armed conflict: violence in warfare, though a necessity, should be restricted and a balance preserved between the interests of military necessity and humanity.

Terrorism is integral to many contemporary conflicts, so it is important to enforce international humanitarian law where the acts of terrorism are committed during an armed conflict. Any act which could be classified as terrorist (including attacks against of civilians, hostage taking, and the spreading of terror among the civilian population) is prohibited as both a means and methods of warfare during international and non-international armed conflict.[2] The spreading of terror as a method of warfare has been used in situations where the military objective is to crush the enemy and prevent resistance from the population, without regard to the law of armed conflict. Terror is also used by non-state armed groups where there is military occupation,

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 U.N.T.S. 609, 1977; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

[2] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 2011, p. 49; Hans-Peter Gasser, 'Acts of terror, 'Terrorism" and international humanitarian law' (2011) 84 *International Review of Red Cross* 547, 559 and 562.

insurrection, or lack of symmetry between conflicting parties, making direct military confrontation more difficult to sustain.[3]

From the outset, it is important to distinguish between the crime of terror, acts of terrorism and terrorism as a crime under international law. Civilians in international conflict are protected by the rule codified in Article 51(2) of Additional Protocol I of 1977, which prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. The same acts are prohibited in non-international conflict by Article 13(2) of Additional Protocol II. The ICRC Commentary on Article 51(2) explains: 'This rule is aimed at those acts which have as their primary objective spreading terror among the civilian population, without offering substantial military advantage'.[4] Terror is inherent in war, even the legitimate acts of warfare are likely to spread terror among the civilians; therefore, this provision provides a narrow and balanced definition of offence of terror, taking into account the principle of military necessity under international humanitarian law. Although this rule was not included among the war crimes over which International Criminal Court has jurisdiction, the International Criminal Tribunal for the Former Yugoslavia (ICTY) characterized attacks with the primary purpose of spreading terror as war crimes.[5]

Besides prohibiting attacks whose primary purpose is to spread terror, and threats of such attacks, international humanitarian law also prohibits 'acts of terrorism'. Article 33(1) of the Fourth Geneva Convention IV 1949 prohibits 'collective penalties and likewise all measures of intimidation or terrorism' against protected civilians in the hands of a Party to the conflict. Moreover, under the fundamental guarantees for persons who do not or longer directly participate in hostilities during a non-international armed conflict, Article 4(2)(d) of Additional Protocol II prohibits 'acts of terrorism'. Article 3 of the Statute of the Special Court for Sierra Leone, modelled on Article 4 of the 1977 Additional Protocol II, confirms that 'acts of terrorism' are war crimes. According to Special Court for Sierra Leone, Article 13(2) of Additional Protocol II is a narrow derivative of Article 4(2)(d).[6] The Court has interpreted

[3] Francoise Bouchet-Saulnier, *The practical guide to humanitarian law* (Rowman & Littlefield Publishers, 2013), p. 653.
[4] Claude Pilloud, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1940.
[5] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 769
[6] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para. 111.

'acts of terrorism' as being a charge under Article 13(2) of Additional Protocol II.[7] Applying International Criminal Tribunal for the former Yugoslavia jurisprudence on crime of 'terror', the Special Court for Sierra Leone has held that the primary purpose of 'acts of terrorism' must be to spread terror among the civilian population, even though the primary purpose requirement is not expressly included in the prohibition of 'acts of terrorism'. Further, the Special Court for Sierra Leone also concluded that crime of 'acts of terrorism' can also be committed by attacks against the property if the primary purpose of the attack is to spread terror among the civilian population. Chapter three addresses the difference between crime of 'acts of terrorism' and crime of 'terror'.

The concept of 'terrorism' under international humanitarian law has a specific meaning, different from the 'terrorism' outside an armed conflict. The relationship between provisions of international humanitarian law related to terrorism and general notion of terrorism in international law is of importance due to the consequences attached to the labelling of an individual or group as 'terrorist'. Definitions of 'terrorism' outside an armed conflict often include the idea that terrorist acts are designed to spread fear in the population in order to compel a state or international organization to take some sort of action. No such element is to be found in the definition of 'terror' or 'acts of terrorism' under international humanitarian law.[8] There is currently no comprehensive, universally accepted treaty prohibiting terrorism which could apply in all circumstances. Instead, a more sectoral approach has been taken through the adoption of treaties dealing with specific aspects of terrorism under the auspices of the United Nations.[9]

The application of existing terrorism conventions can result in labelling of any act performed by non-state party to an armed conflict as 'terrorist', regardless of its compliance with international humanitarian law. Terrorism conventions have tried to deal with the issue of characterisation in different ways. For example, Article 19(2) the 1997 International Convention for Suppression of Terrorist Bombing provides that its provisions do not cover activities performed by armed forces, in the context of an armed conflict whenever covered by

[7] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para. 111
[8] Geneva Academy, 'Foreign Fighters under International Law', Academy Briefing No. 7, Geneva Academy, October 2014, p. 31.
[9] For a list of international instruments for the prevention of terrorist acts, see: <https://www.un.org/en/counterterrorism/legal-instruments.shtml,> last visited: 3 December 2019.

international humanitarian law.[10] To ensure clarity exists concerning the applicable law, this study argues more coordination is required between different regimes for combating terrorism under international law.

The existing literature addressing the concept of terrorism during an armed conflict does not include a distinct substantive analysis of the crime of terror. Instead, the offence has often been conflated with the peace time concept of international terrorism. This study seeks to elucidate war crime of terror as an offence that is distinct from the crime of international terrorism. If in the future the law is developed to link these offences, it is argued that this should be done in a manner which could enhance rather than subvert the protection of civilians under international humanitarian law.

The study contributes to the existing knowledge by scrutinizing the process leading to the creation of crime of terror through *travaux preparatoires* of the Additional Protocols and the investigation of historical efforts to codify a crime of terror. An important part of this contribution is the detailed study of how the crime of terror has been developed through the jurisprudence of international criminal tribunals. The study confirms the status of the crime of terror as a crime under customary international law and concludes that to secure better enforcement of the protections provided to the civilians by international humanitarian law, the Rome Statute should be amended to incorporate the crime of terror under Article 8 or in a separate provision dealing with all forms of terrorism during the armed conflicts.

While addressing the argument that the crime of terror may be prosecuted as a war crime under the Rome Statute, this study underscores the implications of including it under the Rome Statute as a separate provision. It will also review the fundamental differences between crime of terror and terrorism as a treaty crime in order to delineate the overlap that has resulted in blurring of boundaries between different legal regimes dealing with the concept of terrorism in times of peace and war. The conflation of regimes has resulted in discrepancies and incoherence in the decisions of domestic and international judicial organs. The difference between counter-terrorism and crime of terror, and the inability of states to agree on a

[10] International Convention for the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force 23 May 2001.

comprehensive definition of terrorism, will be examined to explore the ramifications that exist for the concept of terrorism during armed conflict.

To clarify the origins of the crime of terror, the first chapter will review the status of protections afforded to civilians from direct attacks with the aim of spreading terror, since the beginning of the World War I. This chapter investigates the perspectives on the terror bombing campaigns undertaken during the two world wars. Scholars during this period observed a wide gap between theory and practice in relation to spreading of terror among the civilians. The refusal of belligerents to acknowledge that the intended targeting of civilian populations was to spread terror and shatter their morale, signifies that such attacks were considered reprehensible and potentially unlawful. The trials by international military tribunals, which laid the basis for the future prosecution of crime of terror, are also examined.

The shocking breakdown of constraint in the deliberate targeting of civilian populations during the World War II necessitated the creation of new rules for the protection of civilians during the war. The existing rules had completely failed to provide any relief to civilians. The second chapter evaluates the normative foundations of the offence of spreading terror under international humanitarian law. The history of efforts to devise a prohibition on the intentional spreading terror among the civilian population is explored. This chapter also examines what *travaux perpartoires* of the two Additional Protocols reveal about this prohibition. National practice, national legislation and the practice of international organisations will be discussed to elucidate the scope and status of the offence of terror under international law. Overall, this chapter sets out to illuminate scope, status and significance of the offence of terror through its evolutionary history and the process of codification.

To understand the status of crime of terror under international criminal law, it is necessary to analyse the contemporary prosecution of 'terror' as a war crime. In this context, chapter three examines that how the offence of terror was developed into a crime by international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone have considered, prosecuted and developed jurisprudence on the crime of spreading terror. The landmark decisions delivered by these tribunals will be investigated in this chapter in order to understand the contextual elements of the crime of terror. It will also identify the areas where the crime of terror needs more coherence and clarity.

Mindful that the war crime of terror was not included in the Rome Statute of the International Criminal Court, it is important to note that some acts which have elements of the crime of terror may fall under the jurisdiction of Court. The fourth and final Chapter will assess different methods by which International Criminal Court could exercise jurisdiction over such acts. The intricate relationship between international humanitarian law and various international counter-terrorism laws will also be analysed, dissecting issues surrounding the conflation between of different legal regimes. The absence of a comprehensive definition of terrorism will also be discussed along with its impact on the future development of crime of terror.

While recognised as a distinct offence, the crime of terror serves to reinforce other rules of international humanitarian law. It is a heinous crime which should be condemned and punished accordingly. The enforcement of international humanitarian law in relation to the offence of terror will provide greater protection to the civilian population, which is one of the main aims of the law of armed conflict. In light of these arguments advanced in this study, in the final part, concludes that the Rome Statute should be amended to include the crime of terror in order bring greater clarity and uniformity to the prosecution of this crime.

Chapter 1. The Historical Development of the Crime of 'Terror'

1.1 Introduction

This chapter explores the evolution of the prohibition on spreading terror among the civilian population under the law of armed conflict. The chapter will examine the development of the offence of terror during the two world wars and the interwar period. It will analyse how the 'moral bombing' campaigns of the two world wars influenced the development of the rule. The International Military Tribunal war crime trials will also be examined in order investigate various ways in which terror was used against civilians in the wars and the legal positions that were adopted at the time in relation to the spreading of terror among the civilian population.

1.2 Legality of 'Terror Bombing' During World War I

The protection of civilians is the cornerstone of international humanitarian law.[11] In 1868, the Saint Petersburg declaration affirmed that the only legitimate object of warfare is to weaken the enemy's military capacity.[12] There have been various attempts by the states to humanise the laws of war in order to protect the civilian population from the menace of war. This section will analyse the rules relating to intentional targeting of the civilian population for the purpose of creating terror and the rhetorical use of the law of war to justify the intentional targeting of civilians. It will further demonstrate how, in the conduct of military operations, the line between legitimate action and violation was exploited using the law.

The protection of civilians during war was not a new concept by the end of 19th century. However, the development of new technology, military techniques and aerial warfare underscored the need for creation of more specific rules to reduce human suffering during the war. Commission II of the First Hague Peace Conference, convened on 18 May 1899, was assigned responsibility for the codification of the law of war, which it completed with adequate success.[13] The Conference adopted Convention II with Respect to the Laws and Customs of

[11] See generally: Jean Pictet, *Development and Principles of International Humanitarian Law* (Nijhoff 1985).
[12] Declaration of St. Petersburg of 11 December 1868, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. St. Petersburg, 29 November–11 December 1868.
[13] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899; W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1, 9.

War on Land.[14] Article 25 of Convention II stated: 'The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited'.[15] This Article did not create any new rule but only codified the existing practice. The scope of attacking defended cities was further restricted by the inclusion of Martens Clause in the preamble, which provided: 'inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience'.[16]

By 1907, it became obvious that aviation was likely to play a substantial role in future wars.[17] Keeping that in consideration, The Hague Regulations of 1907 amended Article 25 to add the words 'by whatever means', to include aerial bombardment, on the initiative of France.[18] Hence, The Hague Regulations of 1907 prohibit attacks on undefended locations 'by whatever means'.[19] Article 25 did not define the term 'undefended' although it was well defined in practice as 'a town or city lacking military defences and open to physical occupation by the enemy'.[20] The lack of definition of the term 'undefended' under the treaty caused a lot of problems during the war. The use of long-range bombing aircraft created a problem in understanding the term 'undefended'. British and American military manuals suggested that the occupation of a town by military force or the transit of forces through a town would make it defended, however, some authorities disagreed with this view.[21] The question arose that if a town was not defended from air attack, would military supplies, munitions, and other military objectives be legally immune from attack?[22] German representative Colonel Gross Von Schwarzhoff at the sub commission of the International Peace Conference (The Hague 1907) commented: 'Article 25 was not intended to prohibit the intentional destruction of any

[14] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
[15] Hague Regulations Respecting the Laws and Customs of War on Land, Art, 25, 28 July 1899
[16] Preamble of 1899 Hague Regulations
[17] Burrus M. Carnahan, 'The law of air bombardment in its historical context' (1975) 17 *The Air Force Law Review* 39, 47
[18] *Ibid.*
[19] 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Art, 25
[20] W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1,15
[21] Burrus M. Carnahan, 'The law of air bombardment in its historical context' (1975) 17 *The Air Force Law Review* 39, 43
[22] *Ibid.*

buildings, when military operations rendered it necessary'.[23] There was no objection to his comment in the sub commission.

At the beginning of World War I, Kaiser Wilhelm wrote to the Austrian Kaiser Franz Joseph that 'everything must be put to fire and sword: men, women and children and old men must be slaughtered and not a tree or house left standing'.[24] The Kaiser was of the opinion that 'methods of terrorism' would conclude the war in two months, while 'considerations of humanity' would unreasonably prolong it. The infamous German war manual of 1902 'Kriegsbrauch im Landkriege' expressly advocated terror attacks.[25] A translation of the manual by J. H. Morgan reveals that according to German writers terrorizing the civilian population was the main principle of the Art of War.[26] The manual also suggested that 'the belligerent should seek to break the spirit of the civil population, terrorize them, humiliate them, and reduce them to despair'.[27]

During World War I each party to the war claimed respect for laws of war and condemned violation of laws by the enemy.[28] However, each party adopted the policy of deliberate 'morale bombing' of civilians to spread terror in the population and discourage its support for the war.[29] The laws of war were used by governments to legitimise their actions and to denounce their adversaries without providing any relief for civilians. The rules protecting state interests were accepted, and laws were interpreted in a way to justify unrestrained conduct.[30] The warring parties validated their recourse to the aerial bombardment of civilian populations by interpreting the protected 'undefended areas' as areas without military objectives.[31] Once

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[23] James Brown Scott, (Eds),*The Proceedings of The Hague Peace Conferences, The Conference Of 1899* , Translation of the Official Texts (Oxford University Press,1920), p.425.; Hague Regulations Respecting the Laws and Customs of War on Land, Art 25, W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1,15.

[24] William Adams, The American Peace Commission and the Punishment of Crimes Committed During War, (1923) 39 *Law Quarterly Review* 245, 248 (quoting a letter from Kaiser Wilhelm to Austrian Kaiser Franz Joseph). As cited in Matthew Lippman, 'Aerial attacks on civilians and the humanitarian law of war: technology and terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1,2

[25] J. H. Morgan, The War Book of The German General Staff Being 'The Usages of War On Land' Issued by The Great General Staff of The German Army Translated with A Critical Introduction By J. H. Morgan, M.A. 2016 (New York , McBride, Nast & Company March, 1915) ,p. 6. Available at: <http://www.gutenberg.org/files/51646/51646-h/51646-h.htm> Last accessed : 10 December 2019

[26] *Ibid.*

[27]*Ibid.*, p. 69.FN; (*Ibid*, FN, p. 46) Professor Dr. C. Liider, Das Landkriegsrecht, Hamburg, 1888. writes in Holtzendorff's *Handbuch des Völkerrechts* (IV, 378) 'the terrorism is so often necessary in war'.)

[28] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 222, 223.

[29]Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p.192.

[30] Chris AF Jochnick and Roger Normand, 'The legitimation of violence: A critical history of the laws of war' (1994) 35 *Harvard International Law Journal* 49, 80

[31] *Ibid.*

the bombing behind enemy front lines was 'legalised' it resulted in the authorisation of direct attacks against civilians. Moreover, the belligerents concluded that there was great military value in terrorizing the civilians, so they used it as a military objective.[32] Therefore, in rhetoric, they condemned the attacks with the sole purpose of terrorising civilians but used the same as a military objective to break the morale of civilian population. Allied countries also allowed a policy of deliberate terror bombing. The French and American pilots were ordered to conduct bombardments for the purpose of demoralising the population.[33] It was thought that the spreading terror among civilians would discourage them from carrying on with war and that it would help to bring about a quick surrender.[34] Similarly, the Chief of the British Air Staff Major General Sykes commended the effectiveness of the 'wholesale bombing of densely populated industrial centres'.[35] After the First World War, the first head of the RAF, Hugh Trenchard claimed that only a lack of resources had stopped him from destroying Germany's industrial centres.[36]

It has been argued:

> Civilians derived little solace from the malleable distinction between the intent to terrorize and the use of terror in weakening morale. Moreover, the distinction does not provide a useful standard of legality for prosecuting violators. Since it is difficult for a commander to know before an attack whether its terror will produce a military advantage, the attack's legality rests either on the commander's subjective intent or on an objective assessment of what his expectation reasonably should have been. Prosecuting a commander under such a standard would be next to impossible.[37]

Spaight asserted that when civilians were killed during the bombing there was no proof that the bombing airman did not try to limit the attack to military objective.[38] However it was clear that during reprisal bombing no cautions were taken to protect civilians from the attacks.[39]

There was a thin line between the lawful bombing economic and industrial targets with an 'intentional but incidental' effect on the morale of the civilian population and the bombing of

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[32] *Ibid.,* p. 81
[33] *Ibid.,* p. 82.; Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p. 214.
[34] Chris AF Jochnick and Roger Normand, 'The legitimation of violence: A critical history of the laws of war' (1994) 35 *Harvard International Law Journal* 49, 82, Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p. 214.
[35] Charles Kingsley Webster & Noble Frankland, *The Strategic Air Offensive Against Germany: 1939-1945* (HM Stationery Office, 1961), p. 46.
[36] *Ibid.*
[37] *Ibid.,* p. 82.
[38] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 224.
[39] *Ibid.,* p. 222.

the civilian population of the enemy solely for the purpose of terrorizing it. Only the former was considered permissible by air power advocates. This indicates that 'in denying that attacks on civilian morale had as their purpose terrorization of the civilian population, advocates acknowledged that attacks to terrorize the civilian population were illegal'.[40] But supporters of 'morale bombing' blurred that line.[41]

States have on occasion argued that they have not violated the rule but used their rights of reprisal. In 1915, the Germans launched zeppelins against British cities, causing death of 208 British civilians, terrorizing the population and undermining morale.[42] Germany justified these aerial raids on civilians on the ground that it constituted permissible acts of reprisal for the British naval blockade of Germany, which allegedly starved and killed innocent civilians.[43] Allies did not challenge the legality of the German attacks but reacted by bombing cities in the Reich.[44] The acceptability of 'terror' bombing also gained a degree of support from the customary rule of siege warfare, which allowed a sieging army to bombard non-combatant portions of a city to induce surrender.[45] It validated the bombardment of non-combatants to persuade the opposition to surrender. As 'terror bombing/morale bombing' was considered permissible, it became more difficult to differentiate between bombing a military objective and directly targeting civilians for the purpose of spreading terror and destroying their morale. This would lead to confusion and reprisals as a belligerent would simply mistake inaccurate bombing for a terror attack and call for reprisals.[46]

According to Hersch Lauterpacht:

> In the War of 1914–1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents, – although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military

[40] Hays Parks, 'The Conduct of Hostilities Revisiting the Law of Armed Conflict 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocols' (2007) Proceedings at International Institute of Humanitarian Law edited by Gian Luca Beruto, p. 75, Available at < http://iihl.org/wp-content/uploads/2019/03/The-conduct-of-hostilities_2007.pdf> Last Accessed: 10 December 2019
[41] *Ibid.*
[42] Matthew Lippman, 'Aerial attacks on civilians and the humanitarian law of war: technology and terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1,9
[43] *Ibid*
[44] *Ibid.*
[45] Burrus M. Carnahan, 'The law of air bombardment in its historical context' (1975) 17 *The Air Force Law Review* 39, 50
[46] *Ibid.*

objectives situated therein.[47]

Lauterpacht held that new problems arising from air warfare could not change the legal status of the principle of non-combatant immunity.[48]

> They are not such as to provide a legal justification for offensive action which, although disguised under the cloak of attack upon a military objective or as a measure of reprisals, is directed in fact exclusively and deliberately against the civilian population. Non-combatants are not, under existing International Law, a legitimate military objective. On the other hand, they do not enjoy absolute immunity. Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without indirectly causing injury to the non-combatants. International Law protects non-combatants from deliberate bombardment from the air directed primarily against them for the purpose of instilling terror or for similar reasons; recourse to such bombardment is unlawful.[49]

No one was held accountable for the intentional bombing of civilian population during the war. However, terrorism was considered as a war crime for the first time after the war. The Preliminary Peace Conference at Versailles (which ultimately drafted the Treaty of Peace between the Allied and Associated Powers and Germany which legally terminated World War I) created a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was composed of 15 members.[50]

The purpose of the Commission was to inquire into breaches of the laws and customs of war committed by Germany and its allies in World War I. The Commission found evidence of the existence of 'systematic terrorism' and included it among a list of war crimes.[51] The Commission's report determined that:

> In spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage. Violations of the rights of combatants, of the rights of civilians, and of the rights of both, are multiplied in this list of the most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end.[52]

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[47] Hersch Lauterpacht, (eds) *Oppenheim's international law. A Treatise*: vol II (8th edn,Longmans, Green and Co, London, 1955), p.414 as cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol. II (Cambridge: Cambridge University Press, 2004), p. 77.

[48] Hersch Lauterpacht, (eds) *Oppenheim's international law. A Treatise*: vol II (8th edn,Longmans, Green and Co, London, 1955), 525.

[49] *Ibid*., p. 526.

[50] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report to the Preliminary Peace Conference, 29 March 1919, (1920)14(1/2) *The American Journal of International Law* 95,113

[51] *Ibid.*; UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p. 33, 34.

[52] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report to the Preliminary Peace Conference, 29 March 1919, (1920)14(1/2) *The American Journal of International Law,* 95,113

The Commission further stated 'not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance'[53] The systematic use of terror was manifested in various different ways. While protesting the transportation of civilians to Germany for forced labor, Belgium spoke about the 'unspeakable suffering inflicted on thousands of innocent people in the camps where the German Government has caused them to be huddled together, in order that this herd of pitiable human cattle may be sorted out and enslaved for the ends of despotism'.[54] The deliberate bombardment of undefended places was also listed as a war crime by the Commission. The use of terror bombing or 'systematic terrorism' were not tried in the ineffective Leipzig trials. Out of a total of 901 cases, 888 accused were acquitted or summarily dismissed. Thirteen were convicted and given inadequate sentences which were never served.[55]

A group conducting the investigation of Germany's control of Belgium in World War I concluded: 'a deliberate system of general terrorization of the population to gain quick control of the region was contrary to the rules of civilized warfare, and that German claims of military necessity and reprisal action were unfounded'.[56] The group also found 'evidence of mass killings, looting, house-burning and wanton destruction of property', the purpose of which 'was to strike terror into the civil population and dishearten the Belgian troops, so as to crush down resistance and extinguish the very spirit of self-defense'.[57] Jordan Paust noted that 'the pre-World War I German Staff and jurists had openly favored terrorization of civilians in war zones to hasten victory or in occupied territory to ensure control of the population; but these views and implementary actions during the War were widely denounced as unlawful strategies'.[58]

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[53] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948) 34,35

[54] Memoire of the Belgian Government in Regard to the Deportation and Forced Labor of the Belgian Civil Population Ordered by the German Government, (1917) 11The American Journal of International Law, 99, 111

[55] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948) 48

[56] Report of the Bryce Committee, 1914, in Ellery Stowell & Henry Munro, International Cases (Boston: Houghton Mifflin Company, 1916), p.172, 173.; Jordan J. Paust, 'Terrorism and the International Law of War' (1974) 64 *Military Law Review* 1,12

[57] Report of the Bryce Committee, 1914, in Ellery Stowell & Henry Munro, International Cases (Boston: Houghton Mifflin Company, 1916) 172 at 173, as cited in Sebastien Jodoin, 'Terrorism as a War Crime' (2007) 7 *International Criminal Law Review* 77,100

[58] Report of The Bryce Committee, 1914, Extract at E. Stowell, H, Munro, International Cases 173 (1916) as cited in Jordan J. Paust, 'Terrorism and the International Law of War' (1974) 64 *Military Law Review* 1,12

Ben Saul asserts that 'although aerial bombardment to terrorize civilian was practiced by both sides during the First World War, *opinio juris* did not exist establishing a legal right to bomb for this purpose'.[59] In October 1917 Winston Churchill, then minister of munitions, stated:

> It is improbable that any terrorization of the civil population which could be achieved by air attack would compel the Government of a great nation to surrender…. In our own case, we have seen the combative spirit of the people roused, not quelled, by the German air raids. Nothing that we have learned of the capacity of the German population to endure suffering justifies us in assuming that they could be cowed into submission by such methods.[60]

Spaight argued that, in the First World War, a number of belligerents used aerial bombing for its moral, political or psychological effect, rather than its military effect.[61] The invention of new technology resulted in the massive indiscriminate bombing of civilian populations during the war.[62] Royse states: 'Air Bombardment, in the last half-year of the war, was thus in reality directed against places, against cities and towns rather than against individual objects'.[63]

A memorandum issued in January 1919, by Chief of Imperial General Staff, shows that British policy was to attack important German towns repeatedly in order to shake the morale of workmen and produce sustained anxiety in the civilian population.[64] During the peace conference after the First World War, a memorandum produced by British Air Council noted:

> These German officers and men are to be tried in time of peace before a court exclusively composed of their ex-enemies for acts which do not differ from those ordered to be carried out by the Royal Air Force upon German towns. The orders given included directions to bomb German towns (where any military objective was situated), to destroy the industrial activities there by bombings during the day, and to weaken the morale of the civilian inhabitants (and thereby their 'will to win') by persistent bomb attacks which would both destroy life (civilian and otherwise) and should, if possible, originate a conflagration which would reduce to ashes the whole town and thereby delete a whole centre of industrial activity.[65]

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[59] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press), p. 274

[60] Howard Winchel Koch, 'The Strategic Air Offensive against Germany: The Early Phase, May–September 1940' (1991) 34(1) *The Historical Journal* 117, 119

[61] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 213.

[62] Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p.185.

[63] *Ibid*.; Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p.188.

[64] Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 40.

[65] Quoted in, Klaus A. Maier, 'Total War and German Air Doctrine before the Second World War, in Wilhelm Deist' (ed.), *The German military in the age of total war* (Oxford, Berg 1985), p. 211.
As cited in, Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014). p. 40

As a result of this memorandum the British Cabinet decided not to indict German military officers for war crimes related to Germany's aerial attacks on Great Britain.[66]

The intentional attacks against civilians during the war suggested that the technological advancement in air warfare was a challenge for the existing laws of war. As a consequence, many efforts were made after that war to regulate the conduct of air warfare. There was an immense need to clarify the extent of protection available to civilians under the laws of war. As Royse stated:

> The extent to which civil populations are legally protected against bombardment has never been precisely determined; there is no agreement among jurists as to the extent of violence on the plea of military necessity. The law of war is based upon the practice of nations. In that regard, during World War I demoralization of the enemy by means of widespread bombardment was accepted by the military services as part of the functions of the aviation bombardment groups, as it was for artillery.[67]

The practice of indiscriminate bombing and terror attacks against civilians was condemned by several authors after the First World War. Garner observed that one of the leading motives of the perpetrators of terror attacks was the psychological effect that the terrorization of the civilian inhabitants would cause, believing this could result in demands for peace.[68] Even the editors of some German newspapers agreed with this approach.[69] According to Garner, however, it was doubtful that attacks of this type would yield such effects. In his opinion the barbarity of such attacks was more likely to increase hatred and motivate victims to intensify support against the adversary who had recourse to such practices. 'Inevitably they lead to reprisals and thus tend to cause the war to degenerate into a struggle of reciprocal barbarism'.[70]

Nippold believed that the law of reprisals has been misused mainly because the military system adopted terrorization and reprisals as its main methods, discounting all legal and

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[66] Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 40.
[67] Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p. 185.73,74,79.
[68] James W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *American Journal of International Law* 56, 65
[69] 21 See, for example, an editorial so declaring, in the Essener Volkszeitung of March 15, 1918, reproduced in Clunet's Journal de Droit International, t. 45, p. 622. As cited in James W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *American Journal of International Law* 56, 65
[70] James W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *American Journal of International Law* 56, 65

moral constraints.[71] He contended that terrorization cannot win the war and it does not serve the aim of war because it is not decisive in terminating the war and only escalates the conflict.[72] Similarly, Herbert Manisty was of the opinion that the main purpose of legislating to regulate the conduct of aerial warfare should be to prohibit 'the bombardment, by airships or aeroplanes, of towns or places inhabited by civilians, for the purpose of terrorizing the civil population and thereby weakening the morale of the whole community, including merchant seamen at sea or in port'.[73] He also noted that the large number of civilians casualties compared to the small number of casualties to soldiers and sailors prove that 'the primary object of the air attacks was apparently to terrorize and demoralise the civil population'.[74] The suffering of civilians during the war necessitated the revision of rules on protection of civilians. Efforts were made to address this issue during the interwar period. The following section will scrutinize the different approaches taken towards legal regulation of air warfare and the intentional targeting of civilians considered in the years following World War I.

1.3 Development of Law During the Interwar Period: Draft Rules of Aerial Warfare

The extreme suffering of non-combatants during World War I resulted in huge debates about the protection of civilians from aerial bombardment. The need for the codification of air warfare regulations was clear. There was demand for an international agreement to ban the aerial bombardment of cities outside war zones.[75] Less than 4 years after the war, taking into account the horror evoked during World War I, the Washington Disarmament Conference of 1922 adopted a resolution to appoint a commission of jurists to consider amendments to the laws of war.[76]

The Commission (each national delegation composed of one or two jurists and various technical advisors), met in the Hague from 11 December 1922 to 19 February 1923.[77] Keeping

[71] Otfried Nippold, '*The Development of International Law After the World War*' translated from The German By Amos S. Hershey, Ph.D. Oxford: at The Clarendon Press London, Edinburgh, New York, Toronto, Melbourne, Bombay p. 79.
[72] *Ibid.,* p. 143.
[73] Herbert F. Manisty, 'Aerial Warfare and the Laws of War' (1921) 7 *Transactions Grotius Society* 33, 33
[74] *Ibid.,* 39
[75] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 11.
[76] Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at The Hague, December 1922 - February 1923
[77] Heinz Marcus Hanke, 'The 1923 Hague Rules of Air Warfare—A contribution to the development of international law protecting civilians from air attack' (1993) 33(292) *International review of the Red Cross* 12,15

in view the violations committed during the war, the Commission of Jurists pointed out: 'The conscience of mankind revolts against this form of making war in places outside the actual theatre of military operations, and the feeling is universal that limitations must be imposed'.[78]

On the conclusion of its meetings on 19 February 1923, the Commission adopted the Draft Rules for Aerial Warfare (also known as the 1923 Hague Rules of Air Warfare). The origin of current prohibition of spreading terror among the civilian population may be traced back to this document.[79] Article 22 of The Hague Rules of Air Warfare prohibited: 'Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character or of injuring non-combatants is prohibited'.[80] The Final Report of the Commission was 'opposed by the Netherlands, France, and great Britain some of which for a variety of reasons'.[81] The Report of Commission says that no difficulty was observed in developing the consensus on Article 22.[82] During the debate about aerial bombardment at the commission, there was much importance attached to the concept of intent. The British delegation submitted a draft stating that an attack must always be directed exclusively against the military objective itself.[83] The Italian and American draft of 12 February 1923 also made clear that bombing cannot be legal unless only the legitimate target is intended to be hit;[84] an attack's legality depended on the attacker's intention. What distinguished such attacks as these from direct attacks on the civilian population (as prohibited by Article 22) was the fact that the attacker was not actually trying to harm the civilian population, as opposed to terror bombing or attacks on an entire urban area as such.[85] However, if the attacker knew but did not care that the civilian population would be harmed by attacking a military objective it could potentially be illegal.

Roberts and Guelff underlines Article 22 as one of the 'most important provisions of the Hague

[78]Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare' (1938) 32 *The American Journal of International Law* p. 1, 22

[79] Rules Relating to Aerial Warfare and Rules Concerning the Use of Radio in Time of War, drawn up by the Commission of jurists which was given the task of examining and reporting on the revision of the laws of war, Article 22.

[80] Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at The Hague, December 1922 - February 1923, Art.22

[81] Adam Roberts & Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), p.140.; 'France, some said, had refused to sign The Hague Rules on Air Warfare because it considered the existing rules for land and naval warfare as sufficient to cover air warfare as well. 15 Others claimed that the Anglo-Americans were already so geared to air warfare that they could not accept restrictions on it'.

[82] Report of the Commission of Jurists, The Hague,1923, p. 250.

[83] Heinz Marcus Hanke, 'The 1923 Hague Rules of Air Warfare—A contribution to the development of international law protecting civilians from air attack' (1993) 33(292) *International review of the Red Cross* 12,25

[84] *Ibid.*

[85] *Ibid.*

Rules'.[86] Royse argues: 'Terrorization was formally associated with devastation and devastation was interpreted as wanton destruction'.[87] Nonetheless, due to various disagreements 'these rules were never adopted in legally binding form'.[88] Hays Parks illustrates in part the following reason for the failure of the Hague Rules.

> In the practice of land and naval warfare, destruction of civilian objects was regarded as lawful as a psychological means for impressing upon an enemy nation the prudence of surrender. While a line between the attack on morale and terrorization existed-the former being ancillary, the latter intentional the principal distinction lay in military efficiency. It would be inefficient to shell or bomb merely to terrorize, but an attack on morale ancillary to the bombardment of military targets was efficient, lawful, and an accepted practice. Article 22 was perceived as limiting this practice with respect to airplanes, but not for land artillery or naval bombardment. Such a proposal doubtless was viewed at the time as not only a constraint on air operations, but by land and naval warfare authorities as a dangerous precedent for their operations.[89]

It can be argued that in banning indiscriminate attacks and attacks aimed at terrorising civilians, The Hague rules prohibited the use of such methods against the morale of an enemy's civilian population. The non-adoption of these rules was affected by unwillingness of States to compromise on the means and methods of warfare. States did not want to confine their freedom of combat, limit the scope of military arrangements or their use of new technology.[90] It was also difficult to develop a consensus on legitimate objects of attack.[91] The Commission members did not take into account political, economic, and military realities underlying wartime practices.[92] Moreover, the assumption that lawful targets in populated areas could be protected from attack was an apparent reason for the failure of the Hague Rules to secure ratifications.[93]

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[86] Adam Roberts & Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), p. 140.
[87] Moe William Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal,1928), p. 214.
[88] Adam Roberts & Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), p. 122.
[89] W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1, 31,32
[90] Matthew Lippman, 'Aerial attacks on civilians and the humanitarian law of war: technology and terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1,11
[91] W. Hays Parks, 'Air war and the law of war' (1990) 32 The Airforce Law Review 1, 31,32; 24(2)'Military objectives: Such bombardment is legitimate only when directed exclusively against the following objectives: military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes'.
[92]Chris AF Jochnick and Roger Normand, 'The legitimation of violence: A critical history of the laws of war' (1994) 35 *Harvard International Law Journal* 49, 84; Richard D Rosen, 'Targeting enemy forces in the war on terror: Preserving civilian immunity' (2009) 42, *Vanderbilt Journal of Transnational Law*, 683, 708
[93] W. Hays Parks, 'Air war and the law of war' (1990) 32 The Airforce Law Review 1, 31,32

Commenting on the Hague Rules in 1925, Elbridge Colby noted that the draft articles did not state that 'the bombardment of the civilian population is prohibited, merely that the indiscriminate bombardment of civilians is prohibited'.[94] The rules were flexible enough to allow an attack to be defended on the basis of inaccuracy resulting in unwanted civilian losses.[95] He also mentioned that 'the draft articles do not say that the bombs must fall exclusively on military objectives, only that they must be directed exclusively at such'.[96] Colby contended that attacks by way of aerial bombardment could reduce the manpower of the enemy nation, damage the manufacturing industry and lower the morale of the nation. However, 'the strategic statesman and the commander who orders his planes out will speak only of military objectives and will waive the document as his justification'.[97] Professor Garner remarked: 'The rules proposed by the commission undoubtedly leave a large discretionary power to aviators. To a much larger degree than in land and naval warfare they are made the judges of the legitimacy of their attacks'.[98]

Although the rules never attained the status of a treaty, they became a guide in the study of international law between the wars.[99] The Rules were considered by some authors as a useful basis for future treaties and as an embodiment of customary law, due to the absence of any other treaty on air warfare. [100] Accordingly, Article 22 was soon generally accepted as a key point of reference.

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[94] Elbridge Colby, 'Aerial Law and War Targets' (1925) 19 *American Journal of International Law* 702, 714
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid*.
[98] James W. Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *American Journal of International Law* 56, 74; *Ibid.,* 'It is altogether probable that in the majority of cases aviators will take large chances, that they will interpret broadly their rights and consider whatever damage may result to the civil population from their bombarding operations as being merely incidental to the accomplishment of a military advantage, and therefore justifiable. For this reason the rules proposed may not prove to be a very effective limitation upon their conduct'.;*Ibid* 'Several of the projects laid before the commission proposed to establish the personal responsibility of aviators who were guilty of violating the rules and to subject them to punishment as war criminals. But no such rule was adopted. The commission, however, admits in its report that the absence of such a rule will not prevent the punishment of aviators who are guilty of infractions against the laws of aerial warfare. The Dutch delegation proposed that belligerents should be held responsible for all acts in violation of the rules, committed by aviators in their service, and that in case of differences regarding responsibility for such violations, they should be submitted to the Permanent Court of International Justice. -While declining to embody the proposal in a rule, the commission incorporated the suggestion in its report in order to bring it to the attention of the governments concerned' (p.74, FN.46).
[99] Heinz Marcus Hanke, 'The 1923 Hague Rules of Air Warfare—A contribution to the development of international law protecting civilians from air attack' (1993) 33(292) *International review of the Red Cross* 12,28
[100] Roberts and Guelff, Documents on the Laws of War (Oxford: Oxford University Press, 2002), p. 139.

In contrast to the rule contained in Article 22 of the Hague Rules, a number of theorists during the interwar period supported the idea that 'terror' bombing would bring a quick end to war by destroying the enemy's morale. Attacks on civilian morale were used as a justification for airpower development to help in winning a war. Italian theorist Guilio Douhet believed that air offensive would be decisive for the outcome of war. He stated:

> No longer can areas exist in which life can be lived in safety and tranquility, nor can the battlefield be limited to actual combatants... All of [a country's] citizens will become combatants since all of them will be exposed to aerial offensives of the enemy. There will be no distinction any longer between soldiers and civilians.[101]

Ferenc Szentnemedy agreed with Dohet with regard to the importance of terror in quickly ending the war. He mentioned that panic, in dense populations, can develop into mass hysteria and revolution which can undermine the enemy's will to resist.[102] According to Douhet terror bombing was not inhumane but 'the decision will be quick [. . .] since the decisive blows will be directed at civilians, that element of the countries at war least able to sustain them', hence resulting in quick end of war and less suffering as compared to past conflicts.[103] The utilitarian defence was also provided by British strategist Liddell Hart who suggested that area bombing could result in less overall causalities and that the weakest point of the enemy was its civilian populations' will to fight. Demoralizing the civilian population could result in surrender of the whole nation.[104]

According to Neville Jones, the 1917 morale bombing of German cities led to the embodiment of this philosophy in the policy of the post-war Air Force. He stated:

> In the post-war plans the aim of that policy (that is, the terrorization of the civilian population) was to be achieved by selecting targets that were located in densely populated industrial areas, so that all the bombs which failed to hit the aiming points (ostensibly industries supporting the enemy war effort) would strike at the morale of the civilian population by destroying their lives and homes and disrupting the services (transport, gas, water and so on) on which they depended.[105]

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[101] Giulio Douhet, *The Command of The Air*, Translated by Dino Ferrari Air Force History and Museums Program Washington, D.C. 1998, p. 10.
[102] Ferenc Szentnémedy, *A repülés*. (Magyar Szemle Társaság, 1933), p. 29., As cited in Stephen L. Renner., Broken Wings: The Hungarian Air Force, 1918-45 (*Indiana University Press*, 2016), p.123.
[103] Giulio Douhet, The Command of the Air, translated by Dino Ferrari (New York: Coward McCann 1942), p. 54, 55
[104] Basil Henry Liddell Hart, Paris or the Future of War (London: E. P. Dutton and Co 1925), p. 10.
[105] Neville Jones, *The Beginnings of Strategic Air Power: A History of the British Bomber Force 1923-1939*. (Routledge, 2012), p. 16-17.

Smith argued that it was widely believed by the interwar Air Staff that civilians would form the main bombing target in wartime. However, they refrained from advocating publicly for 'terror bombing' as it would have been a form of 'political kamikaze' during the interwar period.[106]

The Royal Air Force Air Marshal Lord Trenchard proclaimed that the morale effects of bombing (including bombing the civilian population), outweighed the physical by a factor of twenty to one.[107] However, this position was rejected by others.[108] In the interwar period Sir Hugh Trenchard prioritised strategic bombing. Trenchard advocated the idea of attacking enemy's industrial and civilian centres, in order to destroy their morale. He claimed that the purpose of this was to destroy the enemy's technical capability to continue the war and to weaken his will to do so.[109] The RAF War Manual in 1935 also admitted this approach by stating that:

> Moral [sic] effect _ Although the bombing of suitable objectives should result in considerable material damage and loss, the most important and far-reaching effect of air bombardment is its moral[sic] effect [. . .] The moral [sic] effect of bombardment is always severe and usually cumulative, proportionately greater effect being obtained by continuous bombing especially of the enemy's vital centres.[110]

The British Chief of Air staff, Trenchard, while addressing the problem of aerial bombardment in 1928, stated:

> Among military objectives must be included the factories in which war material (including aircraft) is made, the depots in which it is stored, the railway terminal and docks at which it is loaded or troops entrain or embark, and in general the means of communication and transportation of military personnel and material. Such objectives may be situated in centres of population in which their destruction

[106] Malcolm Smith, *British Air Strategy Between the Wars*. (Oxford University Press, USA, 1984), p. 62-3,306-22.
[107] Primoratz, Igor, *Terror from the sky: The bombing of German cities in World War II* (Berghahn Books, 2010). p.23.; Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, History of the Second World War, United Kingdom Military Series (London: Her Majesty's Stationery Office 1961), Vol 4, p. 72.
[108] *Ibid.*
[109] Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, May 2, 1928, quoted in Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945, History of the Second World War*, United Kingdom Military Series (Londons Her Majesty's Stationery Office91961), Vol 4, p, 72.
[110] Richard Overy, Allied Bombing and the Destruction of German Cities, in: Roger Chickering Stig Förster, Bernd Greiner (Eds.) A World at Total War: Global Conflict and the Politics of Destruction, 1937-1945, (Cambridge: Cambridge University Press, 2005), p. 282.

> from the Air will result in casualties also to the neighbouring civilian population, in the same way as the long-range bombardment of a defended coastal town by a naval force results also in the incidental destruction of civilian life and property. The fact that air attack may have that result is no reason for regarding the bombing as illegitimate provided that all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city. . . . What is illegitimate, as being contrary to the dictates of humanity, is the indiscriminate bombing of a city for the sole purpose of terrorising the civilian population. [111]

Trenchard's memorandum of 1928 about the role of air force in time of war suggests that he proposed to attack defined military objectives (including centres of communication, centres for the production of war munitions, or depots for the transportation of munitions), to help in winning the war.[112] He stated: 'It will be harder to affect the morale of an Army in the field by air attack than to affect the morale of the Nation by air attacks on its centres of supply and communications as a whole'.[113] While addressing the compatibility of these attacks with the law of war and other moral objections he argued that the primary purpose of such attacks would not be to kill civilians but to attain the legitimate objective of destroying the enemy's means of waging war.[114] He stated that the blind bombing of a town with the only aim of terrorising the civilian population would be illegitimate. He claimed that it was an entirely different matter to terrorise munition workers, with the aim of getting them to lay down their work. Trenchard's

[111]Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, May 2, 1928, quoted in Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, History of the Second World War, United Kingdom Military Series (London: Her Majesty's Stationery Office 1961), Vol 4, p 72 ; Charles Webster & Noble Frankland, The Strategic Air Offensive Against Germany (1961), p.73., Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review*. 93, 99 Trenchard noted: 'It is an entirely different matter to terrorise munition workers (men and women) into absenting themselves from work or stevedores into abandoning the loading of a ship with munitions through fear of air attack upon the factory or dock concerned. Moral effect is created by the bombing in such circumstances, but it is the inevitable result of a lawful operation of war – the bombing of a military objective. The laws of warfare have never prohibited such destruction as is 'imperatively demanded by the necessities of war' (Hague Rules, 1907) and the same principle which allows a belligerent to destroy munitions destined to be used again him would justify him also in taking action to interrupt the manufacture and movement of such munitions and thus securing the same end at an earlier stage'.

[112] Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, May 2, 1928, quoted in Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, History of the Second World War, United Kingdom Military Series (London: Her Majesty's Stationery Office 1961), Vol 4, p. 72.;Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p.42.

[113] Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, May 2, 1928, quoted in Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945*, History of the Second World War, United Kingdom Military Series (London: Her Majesty's Stationery Office 1961), Vol 4, p 72; Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 42.

[114] *Ibid.*; Primoratz, Igor, *Terror from the sky: The bombing of German cities in World War II* (Berghahn Books, 2010), p.23.

main argument was that a state's capacity to engage in war depended on its industries. Targeting the workers in the industry was legitimate. The effect on morale was an unpreventable consequence of such legitimate action which was necessary to win the war.[115] The same conclusion was reached in a 1928 inquiry by the heads of the British armed forces.[116]

Some officials did not agree with the idea that morale bombing was of military interest. The British chief of naval staff contended that there was little evidence to suggest that enemy civilian morale would break under such bombardment. Such attacks can act as a strengthening factor.[117] Indeed, Lloyd George stated, 'the undoubted terror inspired by the death-dealing skies did not swell by single murmur the demand for peace. It had quite the contrary effect. It angered the population of the stricken towns and led to fierce demand for reprisals'.[118] The Chief of the Imperial General Staff Milne criticised Trenchard's opinion by labelling it as a support of indiscriminate bombing of undefended towns and civilians. He drew attention to Article 24 of The Hague Rules which prohibits bombardment of any military objective away from fighting areas if such objectives cannot be bombarded without the indiscriminate bombardment of the civilian population.[119] The War Office and Admiralty issued a memorandum criticizing Trenchard's 1928 document and stated that it could be advocating 'what might be termed the indiscriminate bombing of undefended towns and of their unarmed inhabitants'. The memorandum also argued that it was the government and not the bomber command that should decide whether to adopt a policy the conduct of which could be equivalent to 'unrestricted warfare' against the civilian population.[120]

Writing in 1924, Spaight believed that treating civilian population as a military objective (for the purpose of destroying an enemy's morale), would indisputably be a breach of international

[115] Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, May 2, 1928, quoted in Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939-1945,* History of the Second World War, United Kingdom Military Series (London: Her Majesty's Stationery Office 1961), Vol 4, p. 72.

[116] Richard Overy, Allied Bombing and the Destruction of German Cities, in: Roger Chickering, Stig Förster, Bernd Greiner (Eds.) A World at Total War: Global Conflict and the Politics of Destruction, 1937-1945, (Cambridge: Cambridge University Press, 2005), p. 281.

[117] Lloyd George, War Memoirs II, (London: Odhams Press) P, 1105, as cited in Primoratz, Igor, *Terror from the sky: The bombing of German cities in World War II* (Berghahn Books, 2010), p. 24.

[118] Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 41.

[119] Paul, J.Goda, The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 Military Law Review. 93, 99

[120] Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity*, (Oxford University Press, 2012), p. 137.

law. He called for ban on such attacks as means of reprisals.[121] If not outlawed, Spaight argued that the approach taken in future could be very different: 'The bombing of civilian objectives will be a primary operation of war, carried out in an organised manner and with forces which will make the raids of 1914-1918 appear by comparison spasmodic and feeble'.[122] The British general Frederick Maurice was also unconvinced about the bombing of 'civil populations', because of the danger of reprisals and threat to one's own population. He argued that collateral damage could not be avoided by targeting objects of military significance 'but such [an] attack will be different in nature and effect from one which makes the civil population its chief target'.[123] In his publication 'air power and war rights', Spaight stated in 1924:

> your purpose is the destroying of your enemy's morale and will to resist. That purpose can be achieved by other means than mass slaughter. It can be achieved by methods which international law can approve, as it never will approve the destruction of innocent lives for such an end. Let your object be to destroy the enemy's inanimate rather than his human resources, his wealth and business rather than his citizens' lives. In brief, I will give you property to destroy if you will give me life to save.[124]

The Disarmament Conference of 1932 also tried to address the issue of deliberately attacking civilians.[125] 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'.[126] Japan and the United States of America also issued similar statements.[127] During the Spanish Civil War, the Spanish Prime Minister stated: 'it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations.'[128] In 1938, this prohibition was also incorporated into Article 4 of the Draft Convention for the Protection of Civilian Populations against New Engines of War.[129] It is a verbatim copy of the

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[121] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 9-12.
[122] *Ibid*., p. 12.
[123] Frederick Maurice, British Strategy, (London Constable, 1925, Reprindted 1940) p, 70, as cited in Heuser, Beatrice and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014). p. 39.
[124] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 20.
[125] The Benes Resolution, James Maloney Spaight, Air Power in The Next War (London, 1938), p. 68.
[126] Lon Doc 1932. IX. 63, (1932) Docs 179,268, James Maloney Spaight, Air Power in The Next War (London, 1938), p. 68.
[127] Hersch Lauterpacht (eds) *Oppenheim's international law. A Treatise*: vol II (8th edn, Longmans, Green and Co, London, 1955), p. 523.
[128] 337 House of Commons Debates, cols. 937-38 (21 June 1938).) as cited in *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 100.
[129] D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Leiden: Martinus Nihjoff Publisher, 1988), p. 223-229; Draft Convention for the Protection of Civilian Populations Against New Engines of War, (Amsterdam, 1938), Article .4

Article 22 of the 1923 Hague Draft Rules.[130]

The principles enunciated in The Hague Rules of Aerial Warfare were also invoked when Japanese forces attacked China resulting in the deaths of a number of women, children and refugees. In September 1937, the United States Secretary of State, Cordell Hull, forwarded a communiqué to the League of Nation Assembly stating that the general bombing of an area with a civilian population is 'unwarranted and contrary to the principles of law and of humanity'.[131] The Committee of Imperial Defence issued a secret memorandum on 1 March 1938 stating that The Hague Rules provided a sufficient basis for a revision of the law of air warfare; specifically, it was possible to accept, among other rules, the prohibition of terror bombing under Article 22.[132] Even when the war broke out, The Hague Rules of Air Warfare maintained their influence.

While debating the bombing of Gernika, the UK Secretary of State for Foreign Affairs asserted that 'direct, deliberate and intentional bombing of non-combatants, as such, is illegal'.[133] This was also affirmed by Prime Minister Chamberlain on 21 June 1938. He asserted that '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.'[134] This applies in all forms of warfare including 'warfare from the air … war at sea or on land'.[135] He further argued that targets of aerial attacks must be 'legitimate military objectives … capable of identification'.[136] Furthermore, 'reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed'.[137] In addition, Chamberlain declared in House of Commons that,

> [W]e cannot too strongly condemn any declaration on the part of anybody [. . .] that it should be part of a deliberate policy to try and win a war by demoralising the civilian population through a process of bombing from the air. That is absolutely contrary to

[130]D Schindler and J Toman, The Laws of Armed Conflicts (Dordrecht: Martinus Nihjoff,1988), p. 223-229
[131] Records of the 18th Ordinary Session of the League Assembly, Plenary Meetings, League of Nations O.J. Spec. Supp. 169, at 83, 90 (9th Plenary Mtg., Sept. 28, 1937).
119. Id. at 91 (10th Plenary Mtg., Sept. 30, 1937).
[132] Matthew Lippman, 'Aerial attacks on civilians and the humanitarian law of war: technology and terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1,33
[133] 331 H.C. DEB. (5th ser.) 339 (1938); Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review* 93, 97
[134] 337, House of commons debates, cols, 937-938 (21 June 1938); Gabriel Sweney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' (2005) 39 *The International Lawyer* 733, 739
[135] *Ibid.*
[136] *Ibid.*
[137]John Cotesworth Slessor, *The central blue: recollections and reflections* (London: Cassell & Co, 1956), p. 44.

> international law, and I would add that, in my opinion, if any such policy is followed, it is a mistaken policy from the point of view of those who adopt it, for I do not believe that deliberate attacks upon the civilian population will ever win a war for those who adopt them.[138]

After the launch of terror raids by Luftwaffe against the Spanish republic during the civil war,[139] a cross-party group of British MPs concluded that the bombardment of non-military objectives was intended to terrorise the civilian population of Madrid as a means of breaking down their resistance. The report further highlighted that 'Certain objectives of obvious military importance have, in fact, not been bombed. The attempt to break the morale of the people has been unsuccessful'.[140] The British Government protested to General Franco in a note mentioning that deliberate attacks upon civilian populations are contrary to 'the principles of international law as based on the established practices of civilised nations, to the laws of humanity and to the dictates of public opinion'.[141]

The bombing of unprotected towns in Spain, resulting in the slaughter of the elderly, women and children was protested by the Cuban delegate to the Assembly of the League of Nations in June 1938. Such acts were described by Cuban representatives as 'the deeds of uncivilised people dominated by primitive tribal passions'.[142] Spain also raised the question about the protection of civilian non-combatant populations against aerial bombing. This was backed by the Commission of Investigation founded by the United Kingdom, which determined that non-military targets were intentionally targeted in Spain. The Spanish representative, Mr. Pablo de Azcdrate, mentioned that there were more than one thousand air attacks directly against civilian populations resulting in seven thousand civilian dead and eleven thousand injured.[143] The Third Committee of the League of Nations drafted a resolution about the prohibition of targeting civilians under international law, which was also endorsed by the League of Nations Assembly.[144] On 30 September 1938 at Britain's initiation, the League of Nations Assembly

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[138] Cited in Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity*, (Oxford University Press, 2012), p. 134.; Tom Harrison, *Living Through the Blitz* (London: Collins 1962), p. 33.
[139] Messerschmidt, M., *Strategic* Air War and International Law, in Horst Boog (Eds.) *The Conduct of the Air War in the Second World War*, (Oxford: Berg 1992), p. 303.
[140] James Maloney Spaight, *Air Power in The Next War* (London, 1938), p. 81.
[141] *Ibid.*, p. 82.
[142] Letter, dated June 2, 1938, from the Permanent Delegate of Cuba to the Secretary-General (C.210.M.116.1938.IX), 19 League of Nations O.J. 880 (1938)
[143] *Ibid.;* Matthew Lippman, 'Aerial attacks on civilians and the humanitarian law of war: technology and terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1,13
[144] Protection of Civilian Populations against Bombing from the Air in Case of War, Resolution of the League of Nations Assembly, League of Nations, O.J. Spec. Supp. 182, at 16 (1938)

unanimously adopted the resolution based on Chamberlain's statement with same phraseology and the Third Committee's draft.[145] The Preamble to the Resolution refers to the bombing of civilian populations as a practice 'for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under the recognised principles of international law'.[146]

While commenting on the use of deliberate terror attacks against civilians in China and Spain wars, Spaight remarked that 'terrorisation as a policy has been proved to be a failure'.[147] He noted that despite the terrible devastation of cities, with men, women and children slain and mutilated, the war was not ended and the will to fight was not destroyed.[148] Despite the intentional targeting of civilians during these wars, the international community had failed to produce any binding rules for the protection of civilians from deliberate attacks and terror bombings.

Predicting the dangers of future war, Spaight asserted in 1938:

> The danger seems rather to be that the attacks will be directed, or will be claimed to be directed, against points where military objectives exist, and that, the objectives in question being in many instances situated in populated districts, the bombardment of them may at times be not very different in its results from the intentional bombardment of the civilian population.[149]

The subject of terror bombing was also raised when the Italians used terror bombing against Abyssinians. In the Sixteenth Assembly of the League of Nations on 4th July 1936, the Emperor of Ethiopia explained that attacks had taken place against civilian population using tear gas and then mustard gas, systematically killing women, children.[150]

In May of 1941, the U.S. Navy Manual included 'Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare' providing that 'Aerial bombardment

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[145] *Ibid.*
Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) *33 Military Law Review* 93, 97

[146] Protection of Civilian Populations Against Bombing from The Air in Case Of War Unanimous resolution of the League of Nations Assembly, September 30, 1938 Available at: <http://www.dannen.com/decision/int-law.html#d> Last Accessed: 11 December 2019

[147] James Maloney Spaight, *Air Power in The Next War* (London, G.Bles.1938), p. 92.

[148] *Ibid.*

[149] *Ibid.*

[150] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p. 189.

for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited'.[151] Similarly, Paragraph 186 of the Luftwaffe service directive stated that 'Attacks on cities for the purpose of terrorizing the civilian population are absolutely forbidden'.[152] However, it distinguished terror attacks from attacks on the enemy population's will to resist and provided that one of the most important tasks of Luftwaffe was to attack the enemy's will to resist.[153] The distinction, employed by both sides during the war, afforded legal cover to conduct air massacres of civilians.[154] Similar to Germany, the British also tried to distinguish between 'useful and gratuitous terror, allowing unlimited discretion to bomb civilians for the useful purpose of breaking their morale'.[155] However the practical importance of such rules proved to be very limited once the war started. The next section will review how efforts made during the interwar period to regulate the war proved futile and how international humanitarian law was ignored during the war.

1.4 'Terror Bombing' during World War II

The existing rules for the protection of civilians 'could not prevent the extensive saturation bombardment of German cities in World War II, which resulted in 24 million civilian deaths, and 'half of the civilian deaths (12 millions) were caused by air raids'.[156] Arthur Harris states that during World War II 'both Axis and Allies powers proclaimed their adherence to the 1923 Hague Draft Rules and made accusations of their violation'.[157] Harris illustrated that there was

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[151] 'Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare'; p. 229-30. As cited in W. Hays Parks, 'Air war and the law of war' (1990) 32 The Airforce Law Review 1,30

[152] Air Force Manual: 'Air Warfare' (*LDV 16) May 1936 , p198* As cited in Irving, David, *The rise and fall of the Luftwaffe* (Weidenfeld & Nicolson, 1973).p. 54.; W. Hays Parks, 'Air war and the law of war' (1990) 32 The Airforce Law Review 1, 39

[153] W. Hays Parks, 'Air war and the law of war' (1990) 32 The Airforce Law Review 1,39

[154] Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review* 93, 101 to 103

[155] *Ibid.*,105,110; Chris AF Jochnick and Roger Normand, 'The legitimation of violence: A critical history of the laws of war' (1994) 35 *Harvard International Law Journal* 49, 88; The British Chief of Air Staff was also condoned area bombing, Stating that:

... if you are bombing a target at sea, then 99 per cent of your bombs are wasted, but not only 99 per cent of your bombs are wasted but pilots (etc.). So, too, if the bombs are dropped in Norway, Holland, Belgium or France, 99 per cent. do Germany no harm, but do kill our old allies, or damage their property or frighten them or dislocate their lives.... If, however, our bombs are dropped in Germany, then 99 per cent. which miss the military target all help to kill, damage, frighten or interfere with Germans in Germany and the whole 100 per cent. of the bomber organization is doing useful work, and not merely 1 per cent. of it.; Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review* 93, 105,103

[156] Howard S. Levie, *When Battle Rages, How Can Law Protect?* (New York: Oceana Publications,1971), p. 24.

[157] Arthur Travers Harris, Bomber Offensive (London: Collins,1947), p. 177.

'no international law at all' and it was common practice in war to bombard defended cities.[158] The reliable authorities of the Third Reich even claimed that 'large-scale deportations and concentration camps were not illegal under the conventional laws of war'.[159] Additionally, the use of terror is well demonstrated by Hitler's opinion of terror as one of the most effective political instruments. He remarked: 'I shall not permit myself to be robbed of it because a lot of stupid bourgeois mollycoddles choose to be offended by it. The most horrible warfare is the kindest. I shall spread terror by the surprise employment of all my measures'.[160]

Spaight pointed out that area bombing passed the test of military effectiveness when there was no direct intent to injure innocent civilians.[161] The practice of terror bombing during the Second World War challenged the legal and customary limitations on terrorizing civilians from the air, and 'reduced to the vanishing point the protection of the civilian population from aerial bombardment'.[162] Lauterpacht explains that aerial bombardment of cities obliterated the distinction between combatants and non-combatants in conflict.[163] The legality and status of rules relating to the protection of civilians from deliberate attacks were thrown in doubt. Although all the warring parties denied the intentional bombing of civilian populations for the purpose of spreading terror, a study of the perspectives of policy makers and air strategists indicates that they were considered a legitimate target. Targeting the enemy's civilian population was often deemed a surer means of victory than a fully-fledged war between the armies.

At the beginning of war UK and France declared their strong desire to protect civilians from bombardment by defining the military objectives in the narrowest way. However, in practice none of the belligerents followed these rules due to reciprocal reprisals.[164] Targeting the civilian morale by city bombardment or so called 'strategic bombing' was explicitly criticised by some on the basis of moral and practical reasons.[165] There was a prevalent expectation

[158] *Ibid.*
[159] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, 202
[160] Hermann Rauschning, *The Voice of Destruction. Adolf Hitler* (Putnam's, New York 1940) p. 83.; James Molony Spaight, *Bombing vindicated* (G. Bles, 1944), p. 107.
[161] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), pp. 271-272
[162] Hersch Lauterpacht (eds.) *Oppenheim's International law: a treatise* (London: 1955, Vol. II), p. 529.
[163] *Ibid.*, p. 207,350,527.
[164] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Yearbook of International Law* 360, 365
[165] Beatrice Heuser and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 48.

among the British strategists that the axis power would use terror bombing. This was due to a strong belief on the part of strategists in efficacy of such bombing. Soon after the declaration of war, the bombing command requested the relaxation of rules related to bombing. Chamberlain, declared that while initiating the air action on a large scale it was absolutely important to do so in 'the most effective way and against those objectives which we consider will have the greatest effect in injuring Germany, unhampered by the inevitable fact that there is bound to be incidental loss, and possibly heavy loss of civilian life'.[166]

Germany also wanted to attack London in raids of terror bombing to create hysteria.[167] When Luftwaffe Chief of Staff, Hans Jeschonnek, suggested the intentional targeting of residential areas on 14 September 1940, Hitler rejected it stating that terror raids on purely residential areas should only be a last resort to exert pressure.[168] Targeting the civilian morale by city bombardment or so called 'strategic bombing' was also explicitly criticised by some on the basis of moral and practical reasons.[169] The term 'strategic bombing' was introduced into Germany terminology from British and American writings.[170] The 1935 Luftwaffe Regulation described that its mission was to break enemy's will which is embodied in its armed forces.[171] It stated that attacks against civilians made for the purpose of creating terror in the civilian population should be avoided on principle. However, they can be used in retaliation if the enemy executes terror attacks upon defenceless cities.[172] Nevertheless, during the war civilians were deliberately targeted with terror strikes by all sides in clear contradiction of all the declarations and claims. The main purpose of the Blitz, the German strategic air offensive lauched in September 1940, was to knock Britain out of the war by terrorising the population and destroying industrial objectives.[173]

The American Policy in Europe was to affect morale of civilians indirectly by attacking the economic systems of other Axis powers. Plans to crush the German will to resist by concentred

[166] PRO AIR 14/194, Note on the question of relaxing the bombardment instructions, 7 September 1939., as cited in Alex J. Bellamy The Ethics of Terror Bombing: Beyond Supreme Emergency, (2008)7 *Journal of Military Ethics* 41-65 ,47
[167] Alexander B. Downes., *Targeting civilians in war* (Cornell University Press, 2008), p. 149.
[168] *Ibid.*
[169] Beatrice Heuser and DBG Heuser, *The Bomb: nuclear weapons in their historical, strategic and ethical context* (Routledge, 2014), p. 48.
[170] *Ibid.*, p. 58.
[171] *Ibid.*
[172] Stephen L. Renner., Broken Wings: The Hungarian Air Force, 1918-45 (*Indiana University Press*, 2016).118
[173] Alexander B. Downes., Targeting civilians in war (*Cornell University Press, 2008*). 142

attacks on the civilian population were opposed by Arnold, Spaatz, and other top US commanders in the United States Army Air Forces (AFF) for being contrary to their doctrines of precision bombing.[174] The project HURRICANE, of the of the autumn of 1944, with the aim to shock the German people with a terrifying display of Allied air power had met objections based on opposition to terror bombing.[175] There was a conflict between RAF and AAF with regard to an operation on Berlin on 21 June 1944. In response to area bombing and suffering from the cruel V-I bombardment of London, the British government suggested sending 1,000 heavies along with every available American bomber to smash Berlin in a daylight raid. Spaatz was dissatisfied with this proposal. He strongly condemned projects to break German morale 'through what he considered terror bombing'. He gained the support of Eisenhower and AAF Headquarters in his resolve to use his powers only against legitimate military objectives.[176] All suggestions about terrorising the Germans into capitulation were opposed by Spaatz.[177] Towards the end of the war, the Americans reviewed their policy of precision bombing and adopted the British model of targeting civilians.[178] Morale bombing was also used against Japan. The US Government post-war bombing survey revealed that the main purpose of incendiary bombings in urban areas of Japan was to secure the heaviest possible moral and shock effect on the Japanese civilian population, to break their will in order to force Japan to surrender.[179]

An examination of scholarly writing indicates that at the end of the First World War the deliberate targeting of civilian populations for the purpose of terrorization was considered unlawful.[180] However, as the war progressed these standards were eroded and the intentional

[174] Wesley Frank Craven and James Lea Gate, *The Army Air Forces in World War II: Europe, argument to VE Day, January 1944 to May 1945* (eds.) (Office of Air Force History, 1948, Vol. 3.), p. 14, 284.
[175] *Ibid.*, p.733.
[176] *Ibid.*, p.284.
[177] The Army Air Forces in World War I1(Volume Three) Edited by: Wesley Frank Craven and James Lea Gate, (The University of Chicago Press), p.305.
[178] Eric Markusen & David Kopf, *The Holocaust and Strategic Bombing: Genocide and Total War in The Twentieth Century* (Routledge 1995). P167; The Army Air Forces in World War I1(Volume Three) Edited by: Wesley Frank Craven and James Lea Gate, (The University of Chicago Press) p.16. In volume three of The Army Air Forces in World War II, 'it was stated that Their concern with public opinion in America and in Germany and with what "history" would say contrasts strikingly with the nonchalance with which area bombing was introduced in Japan, and it is interesting to speculate as to whether the practice in the Pacific war was responsible for the change in policy for Germany during the months just before V-E Day'. p. 15
[179] Jacob Neufeld, *Pearl to VJ Day: World War II in the Pacific* (DIANE Publishing, 2009), p. 125.
The United States Strategic Bombing Surveys (Air University Press ed., 1937) (1945), p, 37, 38, Robert Pape, Bombing to Win: Air Power and Coercion in War. NY: Cornell University Press 1996), p. 92.
[180] James Maloney Spaight, *Air Power and War Rights* (London: Longmans, green& co.,1924), p. 277.; David HN Johnson, *Rights in air space* (Manchester University Press, 1965), p. 51.;Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Year Book of International Law* 360, 364; Hans Blix, Area

targeting of civilians was resorted to in order to bring a quick end to the war.[181] The fire bombings of Berlin, Dresden, and Tokyo killed nearly half a million civilians.[182] Chris AF Jochnick and Roger Normand rightly noted: 'The logic of terror bombing led inexorably to the use of atomic bombs in Hiroshima and Nagasaki. These bombings starkly portrayed the irrelevance of the laws of war to the protection of civilians'. [183] When the civilian morale became an admissible target, it was hard to condemn terror bombing.[184]

In January 1943, President Roosevelt and Prime Minister Churchill met in Casablanca to review the war policy and issued the Casablanca Directive which endorsed direct and intentional targeting of German civilian morale.[185] At Casablanca, there was a disagreement between Britain and American officials about the method of bombing Germany. Americans favoured precision strikes while British officials were of the opinion that such strikes were unproductive and costly. It was decided that each would pursue their respective approach and that Britain would be allowed to use area bombing. They agreed that the objective of strategic bombing 'will be the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of morale of the German people to a point where their capacity for armed resistance is fatally weakened'. [186] Harris interpreted it as an unconditional order for 'the progressive destruction and dislocation of the German military, industrial and economic system aimed at undermining the morale of the German people'.[187]

Bombardment: Rules and Reasons,(1978) 49 British Year Book of . International Law. 31, 37; Judith Gail Gardam, Proportionality and Force in International Law, (1993) 87 *American Journal of international law*, 391, 401; David HN Johnson, *Rights in air space* (Manchester University Press, 1965)

[181] Judith Gail Gardam, *Non-combatant Immunity as a Norma of International Humanitarian Law* (Martinus Nijhoff Publishers, 1993), p. 24.

[182] Chris AF Jochnick and Roger Normand, 'The legitimation of violence: A critical history of the laws of war' (1994) 35 *Harvard International Law Journal* 49, 88

[183] *Ibid.*

[184] *Ibid.*

[185] Gabriel Sweney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' (2005) 39 *International l Law*. 733, 740, The Objective of the was 'the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened'.

[186] Extracts from the response of Chief of Air Staff Charles Portal to Churchill's letter on area bombing, 5 April 1945, Available at<https://www.nationalarchives.gov.uk/education/heroesvillains/transcript/g1cs3s4t.html> Last Accessed: 11 December 2019

; Charles Kingsley Webster & Noble Frankland, *The Strategic Air Offensive Against Germany: 1939-1945* (HM Stationery Office, 1961 VOL II), p.22.

[187] Extracts from the response of Chief of Air Staff Charles Portal to Churchill's letter on area bombing, 5 April 1945, Available at<https://www.nationalarchives.gov.uk/education/heroesvillains/transcript/g1cs3s4t.html>

The bombing of residential areas, even if the object was to reduce military or industrial activity, was regularly questioned when it became clear that in most of the attacks by Bomber Command had been aimed at the centres of residential areas.[188] Hitler and German press branded British air attacks as 'terror raids' for the purpose of killing women, children and non-combatants.[189] The deputy press chief in Berlin, while talking to neutral journalists on 4 March 1943 remarked that what the 'British had begun and to which Hitler had made no reply for six months, would never break the morale of the German civil population'.[190] In 1943, a German paper noted:

> This war has taken on a new aspect which is represented above all by Bolshevism. The Bolshevisation of the war proves that the principle of terror, by which Bolshevism directs its internal policy, has become a method of warfare too. The manner in which the British and Americans plan and carry out their terror raids on German towns shows that these countries are under the influence of Bolshevism in many spheres. Today they are already Bolshevised, above all in one sphere, that of fighting ethics.[191]

In a broadcast from his headquarters on 10 September 1943, Hitler stated: 'Only from the air is the enemy able to terrorise the German homeland. But here, too, technical and organisational conditions are being created which will not only break his terror attacks but which will also enable us to retaliate effectively'.[192] Germans described British air attacks as random 'terror raids' against civilian population, having the purpose of slaughtering women, children and other non-combatants.[193] Goebbels wrote in the German newspaper Voelkischer Beobachter, in May 1945 that 'nowadays, it is no longer disputed by anyone that the enemy air-terror pursues almost exclusively the aim of breaking the morale of the German civil population'. He gave reference to English newspapers advocating the targeting of German civilians.[194]

David Johnson stated that by 1941 the British Chiefs of Staff had included the morale of the enemy population as one of the targets of aerial bombardment.[195] A couple of days after the destruction of Dresden, C.M. Grierson, an intelligence officer attached to SHAEF (the Supreme Headquarter Allied Expeditionary Force) briefed the press about the new allied bombing strategy, which was aimed at accelerating the German collapse. A dispatch issued by an

[188] Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review* 93, 106
[189] James Molony Spaight, *Bombing vindicated* (G. Bles, 1944), p.103.
[190] *Ibid.*, p. 109.
[191] *Ibid.*, p. 110.
[192] *Ibid.*, p. 46
[193] Nazi Conspiracy and Aggression, Volume 4, (Washington 1946), p. 186.
[194] *Ibid.*, p. 187.
[195] David HN Johnson, *Rights in air space* (Manchester University Press, 1965), p. 51.

Associated Press correspondent Howard Cowan, following on from Grierson's press briefing caused a great distress at SHAEF and in the US. The dispatch stated: [196]

> 'Allied air chiefs have made the long-awaited decision to adopt deliberate terror bombings of German population centres as a ruthless expedient of hastening Hitler's doom' was read by Richard Stokes in the House of commons. Mr Stokes further expressed: 'leaving aside strategic bombing, which I question very much, and tactical bombing with which I agree, if it is done with a reasonable measure of accuracy, there is no case whatever under any conditions, in my view, for terror bombing'.[197]

In response to Stokes speech, the Under-Secretary of State for Air, on behalf of the Government, mentioned that 'we are not wasting our bombers on purely terror tactics' but doing our job of focusing on targets to destroy the enemy.'[198] The dispatch caused great embarrassment for the American administration as there was strong revulsion in public against such attacks.[199] As a result of the dispatch, the story that senior American air commanders had 'determined to terrorize the German people into submission' got extensive coverage in the press. General Arnold was disconcerted about the publicity and contacted Spaatz to make sure that Americans had not departed from their historical policy of precision bombing in Europe.[200]

The British government never publicly admitted its policy of deliberate targeting of civilian populations. There was a fear that the public would strongly protest against such approach. The Marquis of Salisbury requested clarification from UK Secretary for Air, Archibald Sinclair, in relation to Harris's bragging about destruction of German cities. In response, the Deputy Chief of the Air Staff, Sir Norman Bottomley, reported on Sinclair's request, that the main objective of such attacks was the gradual destruction and dislocation of the German military, industrial and economic system and *the weakening of the morale of the German people*. 'There is no need to inform Lord Salisbury of the underlined [emphasised] phrase, since it will follow on success

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[196] *Ibid.*
[197] *Ibid.*
[198] *Parliamentary Debates, Commons* (1944-45), Vol. 408, Cols. 1900-1, 1989-90. David HN Johnson, *Rights in air space* (Manchester University Press, 1965), p. 51.
[199] Biddle, Tami Davis Biddle, *Rhetoric and reality in air warfare: the evolution of British and American ideas about strategic bombing, 1914-1945* (Princeton University Press, 2009). P, 258; R.H.S. Crossman, 'Dresden - Eleven Square Miles of Hell Apocalypse at Dresden' Esquire Magazine November 1963, 2-16-1, available at <https://rense.com//general20/11.htm>Last Accessed; 11 December 2019
[200] Wesley Frank Craven and James Lea Gate, *The Army Air Forces in World War I1 (eds.)* (Volume Three) (The University of Chicago Press) p, 727.

of the first part of the stated aim'.[201] The morale of the German people was not mentioned as an object of the attacks.

Nonetheless, Arthur Harris clearly defined terror bombing and criticized the hypocritical attitude of the government, arguing that it effected the morale of his crews whose strategy the government is not willing to defend publicly. In a memorandum issued in October 1943, Harris noted that the objective of the bombing was 'the destruction of German cities, the killing of German workers and the disruption of civilized community life throughout Germany'. He asserted that:

> It should be emphasized that the destruction of houses, public utilities, transport and lives; the creation of a refugee problem on an unprecedented scale; and the breakdown of morale both at home and at the battle fronts by fear of extended and intensified bombing is accepted and intended aims of bombing policy. They are not by-products of attempts to hit factories.[202]

The Air Ministry responded by saying that the destruction of cities was 'the inevitable accompaniment of an all-out attack on the enemy's means and capacity to wage war and was not the primary purpose of the attacks.'[203] Harris, however, suggested that distinction between deliberate destruction of cities and accepting such destruction as the unavoidable result of area attacks was academic one. The German economic system which he was instructed by his directive to destroy, included 'workers, houses and public utilities, and it is therefore meaningless to claim that "wiping out German cities is not an end in itself"'.[204] He argued that the cities of Germany were being attacked because they were at the heart of Germany's 'war potential'.[205]

After the criticism and uproar raised against such attacks, Winston Churchill wrote to the Chief of the Air Staff: 'It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing the terror, though under other pretexts, should

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[201] Max Hastings, *Bomber Command* (New York: The Dial Press, 1979), p. 172,173.
[202] Richard Overy, Allied Bombing and the Destruction of German Cities, in: Roger Chickering, Stig Förster, Bernd Greiner (Eds.) *A World at Total War: Global Conflict and the Politics of Destruction*, 1937-1945, (Cambridge: Cambridge University Press, 2005), p.290.
[203] Alex J. Bellamy The Ethics of Terror Bombing: Beyond Supreme Emergency, (2008)7 *Journal of Military Ethics 41,56*
[204]Richard Overy, Allied Bombing and the Destruction of German Cities, in: Roger Chickering, Stig Förster, Bernd Greiner (Eds.) A World at Total War: Global Conflict and the Politics of Destruction, 1937-1945, (Cambridge: Cambridge University Press, 2005), pp. 277-296, pp. 290-91 (Documents Cited).
[205]*Ibid.;* Alex J. Bellamy The Ethics of Terror Bombing: Beyond Supreme Emergency, (2008)7 *Journal of Military Ethics* 41-65

be reviewed'.[206] He further stated: 'I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction, however impressive'.[207] The Chief of Air Staff, Portal, protested against Churchill's memorandum and clarified that the purpose of allied bombing had never been to terrorise civilians but to destroy transportation and industrial facilities of German cities.[208] He demanded withdrawal of the memorandum. Churchill responded with an amended text by removing the word 'terror'.[209] It is clear that strategists avoided referring to the deliberate targeting of civilians and no one wanted to take responsibility for such acts. This approach reinforces the notion that the intentional targeting of civilians for the purpose of terrorising them was deemed prohibited and that this prohibition also had force of customary international law.

Lauterpacht argued that 'terrorization of the civilian population as a whole, independently of military objectives, and aiming at producing utter chaos, disorganization, and eventual rebellion as a means of defeating the enemy, has occasionally been represented as constituting in itself a legitimate military purpose'. Moreover, he stated 'the terrorization of the civilian population, however real in intention and effect, can plausibly be represented as being incidental to attack upon military objectives. It is because in most of the cases centres of civilian population are located in the locality of some objectives considered to be of the military importance by the attacking belligerent.[210] Lauterpacht contended: 'It is also probable that till the end of the War the aerial bombardment by the Allies did not assume the complexion of

[206]Two drafts of a letter from Churchill on area bombing, 28 March 1945 and 1 April 1945; Available at: <http://www.nationalarchives.gov.uk/education/heroesvillains/transcript/g1cs3s3t.htm> Last Accessed: 12 December 2019; R.H.S. Crossman, 'Dresden - Eleven Square Miles of Hell Apocalypse at Dresden' Esquire Magazine November 1963, 2-16-1, Available at: <https://rense.com//general20/11.htm> Last Accessed: 12 December 2019

[207] Two drafts of a letter from Churchill on area bombing, 28 March 1945 and 1 April 1945 <http://www.nationalarchives.gov.uk/education/heroesvillains/transcript/g1cs3s3t.htm> > Last Accessed: 12 December 2019

Paul J. Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 Military Law Review 93, 107

[208]See Redding, Tony, *Bombing Germany: The Final Phase: The Destruction of Pforzhelm and the Closing Months of Bomber Comman's War* (Pen and Sword, 2015).

[209] *Ibid*; Amended memorandum stated: 'It seems to me that the moment has come when the question of the so called "area bombing" of German cities should be reviewed from the point of view of our own interests. If we come into control of an entirely ruined land, there will be a great shortage of accommodation for ourselves and our Allies: and we shall be unable to get housing materials out of Germany for our own needs because some temporary provision would have to be made for the Germans themselves. We must see to it that our attacks do not do more harm to ourselves in the long run than they do to the enemy's immediate war effort. Pray let me have your views'.

[210] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Yearbook of International Law* 360, 368

bombing for the exclusive purpose of spreading terror and shattering the morale of the population at large-though this was the inevitable concomitant of strategic target-bombing'.[211] Discussing the terrorisation attacks he remarked that 'non-combatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them'.[212] He propounded:

> There is only one principle in this sphere which has remained unchallenged by civilized states and which must remain undisputed as a dictate both of law and of humanity. That unchallenged principle is embodied in the rule that non-combatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them.[213]

Lauterpacht also differentiated attacks directed individually or exclusively against civilians from attacks against military objectives in the civilian vicinity. He held that it could not be asserted 'that absolute respect for the life of the enemy civilian is a rule so fundamental, so overriding, and so uncontroversial as to render immune from direct military attack objects and localities whose destruction the belligerent considers vital for his purpose'.[214]

It can be argued that before the start of the Second World War there was much concern about terror bombing among the public of the USA and Britain. Some politicians even lobbied to prohibit such bombing; however, the strategists considered the morale bombing of civilians as a utilitarian and effective method of warfare and widely used it during the war. Despite the large-scale use of terror bombing during the war, the governments of these countries were not willing to publicly accept or justify the use of terror bombing. The main reason for this public denial was their belief that public would not lend them any support for such policies, which would eventually result in inadequate domestic support for war. The governments kept denying their involvement in intentional bombing of civilian population and alternatively proclaimed that civilians' deaths were the collateral damage resulting from the targeting of military objectives. This attitude of the governments indicates that there existed an incongruity in the approach of these nations towards the terror bombing and civilian immunity. As Bellamy states that there was 'the emergence of a paradox in liberal thinking about civilian immunity: on the one hand, a belief in the strategic utility of terror bombing and, on the other, a commitment to

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[211] Hersch Lauterpacht (ed) *Oppenheim's International Law: a treatise* (London: 1955, Vol. II), p. 528.
[212] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Yearbook of International Law* 360,365
[213] *Ibid*., p. 364-365
[214] *Ibid., p.* 365

the principle of civilian immunity which forbids such bombing'.[215] This approach of governments, and the influence of public opinion in different states, played a significant role in shaping the law of civilian protection and the prohibition on deliberate targeting of civilians (intentionally causing terror among civilians) in the Post-World War era.

The staggering violence against civilians during the war made the civilized world revisit the rules of warfare and punish offenders. As both the allies and axis aerial conduct was in violation of the laws of war, the offence of bombardment against civilians was not prosecuted in any of the trials held after World War II. However, there were many references and indictments to terror and terrorism in relation to Germany's conduct in the occupied territories. The next section will investigate the trials of different tribunals in order to understand the prosecution of terrorism as a crime.

1.5 Pots World War II Initiatives

In the St. James declaration of 13 January 1942, the Inter-Allied Commission on Punishment of War Crimes declared that Germany was spreading terror in the occupied territories through massacres, mass expulsions, imprisonment and execution of hostages.[216] In 1942-43, the quasi-governmental London International Assembly (LIA) assessed legal responsibility for war crimes and the possibility of establishing an international criminal tribunal.[217] The work of LIA was based on the war crimes listed by the 1919 Commission on Responsibilities. In its final Draft, the LIA proposed jurisdiction over the crime of 'systematic terrorism'.[218] The United Nations War Crimes Commission was established by the meeting of the Allied and Dominions representatives held in London on 20th October 1943,[219] as an international intergovernmental agency for the purpose of investigation of war crimes and 'the detection, apprehension, trial and punishment of persons responsible for war crimes'.[220] It adopted the list prepared by the 1919 Commission on Responsibilities and, on the suggestion of the Legal Committee, added

[215] Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity*, (Oxford University Press, 2012), p. 133.
[216] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p. 89,90.
[217] Punishment for War Crimes: The Inter-Allied Declaration, St James' Palace, London,13 Jan 1942 and Relative Documents (HMSO, Inter-Allied Information Committee), p. 99.
[218] Punishment for War Crimes: The Inter-Allied Declaration, St James' Palace, London,13 Jan 1942 and Relative Documents (HMSO, Inter-Allied Information Committee), p.100.
[219] *Ibid.*,125, 127
[220] *Ibid.*,124

'indiscriminate mass arrest for the purpose of terrorising the population, whether described as the taking of hostages or not'.[221] Although it was officially added to the list by the Commission,[222] the appendix only states indiscriminate mass arrest without adding 'for the purpose of terrorising the population'.[223] According to Ben Saul, omission of the phrase 'for the purpose of terrorising the population' was apparently for 'widening the offence by eliminating the purposive requirement— though the qualifying element was intended in the drafting'.[224] However, in the post war trials at Netherlands East Indies (NEI) a few of the accused were convicted of the crime of systematic terrorism, including on the basis of indiscriminate mass arrests for the purpose of terrorizing the population.[225] It has been mentioned in the law reports prepared by the United Nations War Crimes Commission that the decision to include this crime was made based on the Preamble of the 4th Hague Convention concerning the Laws and Customs of War, 1907, which is based on Martens Clause.[226] The report further states that repeated pattern of illegal arrests display a case of 'systematic terrorism'.[227] The United Nations War Crimes Commission found evidence of indiscriminate arrests and detentions of inhabitants, without due process of law, from occupied countries, with a pattern deliberately executed by the Nazis for the purpose of terrorizing the population.[228]

Committee I of the UN commission could not decide on facts and evidence whether the bombardment from the air of undefended places in the course of military operations constituted a war crime or not. A few months before the Commission's dissolution, a Polish charge was filed, alleging that various Nazi generals were responsible for the bombing of the civilian population in undefended places in the initial days of the invasion of Poland. The majority of Committee I's members concluded that this issue was too complicated to be resolved in the short time left of the Committee's existence.[229] Therefore, this question was left undecided, despite being on the mind of authorities on international law. The UN War Crimes Commission also considered 'systematic terrorism' as an international legal concept, although the

[221] *Ibid.*, 172
[222] *Ibid.*, 173
[223] *Ibid.*, 478
[224] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press), p. 283.
[225] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London: H.M.S.O., 1947-1948), vol.7, p. 39.
[226] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (HM Stationery Office, 1948). Vol 7, p. 68
[227] *Ibid.*, 69
[228] *Ibid.*
[229] United Nations War Crimes Commission, *History of the united nations war crimes commission and the development of the laws of war* (HM Stationery Office, 1948). p.492

Commission's mandate was mainly investigative.[230] To address the 'novelty of mass criminality' as practised by the Nazis, the UN war commission, on 16th May 1945, adopted among others the following proposal: 'To seek out 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'.[231]

1.5.1 International Military Tribunal and the Nuremberg Trials

In pursuant to the agreement signed on the 8th August 1945 by the Government of allied nations, an International Military Tribunal was established for the just and speedy trial and punishment of the major war criminals of the European Axis.[232] There is no express mention of the terms terror or terrorism in the IMT Charter. However, it was mentioned in several indictments and judgements.[233] Ben Saul notes: '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'.[234] The terms 'systematic terrorism', 'reign of terror' and 'terrorising civilians' were used to describe other crimes and activities of the Nazis. The Tribunal considered different forms of terrorism for evidentiary purposes. In his Report to the President of the United States on the plans and scope of the task of prosecuting the Axis war criminals, Justice Jackson stated that the 'Nazi party, the S.S., and the Gestapo, had firmly established themselves within Germany by terrorism and crime'[235] and that the 'destruction of all potential resistance to the defendants' plans by terrorising, confining, and destroying opposition elements will be proved'.[236] The report also mentioned: 'The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany, in the satellite Axis countries, and in the occupied countries of Europe'.[237]

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[230] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (HM Stationery Office, 1948). Vol 13, p. 43; United Nations War Crimes Commission, *History of the united nations war crimes commission and the development of the laws of war* (HM Stationery Office, 1948). p. 296.
[231] *Ibid.*
[232] Trial of German Major War Criminals, Nuremberg, volume 1, Nuremberg 14 November 1945 -1 October 1946
[233] *France et al. v Goring et al.,* Trial of German Major War Criminals, Nuremberg, volume 1 Nuremberg 14 November 1945 -1 October 1946, p. 32
[234] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press,2006), p. 285.
[235] Robert Jackson, Report to the US President on Atrocities and War Crimes, 6 June 1945.p. 49.
[236] *Ibid*., p. 66.
[237]*Ibid.,* p. 49.

Overall, the indictment's references to terror or terrorism were used as means of describing the unlawful acts committed by the Nazis to achieve desired ends. Count one stated that: 'In order to make their rule secure from attack and to instil fear in the hearts of the German people, the Nazi conspirators established an extended system of terror against opponents and supposed or suspected opponents of the regime'.[238] Count three of the Indictment related to the commission of war crimes: 'Throughout the period of their occupation of territories overrun by their armed forces the defendants, for the purpose of systematically terrorizing the inhabitants, murdered and tortured civilians, and ill-treated them, and imprisoned them without legal process'.[239] The tribunal found overwhelming evidence of systematic use of terror in complete violation of laws of war in the occupied territories.[240]

The massacres of Oradour-sur-Glane in France and Lidice in Czechoslovakia were manifestations of terror used to destroy any opposition.[241] The Night and Fog decree was also used as a method of intimidating and terrorising people in occupied territories, who had not committed any offence against the Reich. These people were secretly taken to Germany for trial or punishment and were not permitted to contact their families; even on their death, the families were not informed.[242] According to the defendant Keitel, Hitler's purpose in issuing this decree was that: 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany'.[243] The tribunal noted that the whole process was kept secret to terrorize the victims' relatives and associates.[244] Due to the secrecy involved in the whole process, others had no knowledge of the offence committed by the victim and so they could avoid committing the same offence. 'This secrecy of the proceedings was a particularly obnoxious form of terroristic measure and was without parallel in the annals of history'.[245]

[238] *France et al. v Goring et al.,* Trial of German Major War Criminals, Nuremberg, (volume 1 Nuremberg 14 November 1945 -1 October 1946), p. 32.
[239] *Ibid*., p. 43
[240]*Ibid*., p. 232.
[241] *Ibid.*, p. 234
[242] *Ibid.*, p. 232
[243] *Ibid.*, 233
[244] The Justice Case, Trial of German Major War Criminals, Nuremberg, volume 3, Nuremberg 1945 October 1946- April 1949, p.21
[245] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.6, p. 59

The Tribunal noted that the defendant Keitel also signed another order that 'legal punishment was inadequate and troops should use terrorism'.[246] In the *Frank* judgement, the Tribunal noted: 'A reign of terror was instituted, backed by summary police courts which ordered such actions as the public shootings of groups of 20 to 200 Poles, and the widespread shootings of hostages'.[247] The use of terror as a method of curbing resistance and controlling the civilian population is clear from the statement of the defendant Keitel which he made on 23 July 1941. He stated that due to the massive size of the occupied areas in the East, the forces responsible for ascertaining security in these areas will be adequate only if all opposition is penalized, not through lawful 'prosecution of the guilty, but by the spreading of such terror by the Armed Forces as is alone appropriate to eradicate every inclination to resist among the population . . . Commanders must find the means of keeping order by applying suitable Draconian measures'.[248] The use of concentration camps was also considered as 'one of the most notorious means of terrorizing the people in occupied territories'.[249] The Tribunal mentioned that 'the policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic'.[250]

The indiscriminate bombing of cities by the allies was considered an act of terrorism by the Germans. German authorities had discussed the trial instead of the summary execution of allied airman, since the allies had forbidden their airmen to target the civilian population.[251] In the defense of Joachim Von Ribbentrop , defense counsel Dr. Martin Horn while addressing the lynching of allied airman referred to by Germans as 'terror aviators' or 'terror flyers'. He also mentioned that Ribbentrop and foreign office personally had pledged themselves in principle for the preservation of the Geneva Convention. However, he further noted:

> Hereby it must never be overlooked that especially in cases of terror fliers, where so-called terror attacks in the form of air bombardments were involved, which were characterized by an indiscriminate attack upon cities without attacking military and armament objectives, such attacks then undeniably constituted a war crime in themselves. It must be taken into account in the reaction throughout Germany towards the conduct of air warfare of the western powers, that according to

[246] *France et al. v Goring et al.,*Trial of German Major War Criminals, Nuremberg, volume 1 Nuremberg 14 November 1945 -1 October 1946, p.290
[247] *Ibid.*, p. 297
[248] *Ibid.*, p. 235, 236
[249] *Ibid.*, p. 234
[250] Trial of German Major War Criminals, Nuremberg volume 7 (Nuremberg, 5 February 1946 -19 February 1946), p. 254.
[251]*Ibid.*, p. 91

> established and traditional conceptions of an armed conflict between nations, the attack on the civilian population is prohibited. This thought is not only expressed in the Hague Convention on land warfare but constitutes a stipulation by contract of general international law, binding for all, which is valid not only in the theater of operations on land. Acknowledging this, the Hague rules of air warfare, although permitting air attacks of military objectives in undefended cities, do not permit the bombing of dwellings of the civilian population. Although the Hague rules were not ratified, they were in practice followed by all belligerents, and acknowledged as common law. These measures became especially acute after complete air superiority had been achieved by the Allies and the resulting constant low level attacks with weapons on board on the civilian population took place. These particular events led for the first time to the discussion, whether in the face of a warfare which was undeniably violating international law, it was still of any use to uphold the Geneva Convention in its substance.[252]

Commenting on the law of Charter, the Nuremberg tribunal stated:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.[253]

The words 'such violations (i.e. of the laws or customs of war) shall include, but not be limited to' in Article 6(b) of the Charter[254] indicate the tribunal had jurisdiction to try any violation of law or custom of war, not expressly included in the Charter.[255]

The 'terror bombing' or indiscriminate bombing of civilians were not tried by the Tribunal. However, it does not signify that the tribunal conferred legality to such bombing. According to Laucterpacht: 'It is compatible with the explanation that the Tribunal declined to hold the accused criminally responsible for a method of warfare which, whether by way of reprisals or otherwise, was subsequently followed by their opponents on a very extensive scale'.[256]

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[252] Nazi Conspiracy and Aggression Supplement B, Office of United States Chief of Counsel for Prosecution of Axis Criminality (Washington, 1948), p. 177.
[253] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p. 220.
[254] Article 6 of the IMT Charter, War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity
[255] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p.221
[256] Hersch Lauterpacht (eds) *Oppenheim's international law. A Treatise*: vol II (Longmans, Green and Co, London, 1955), p.529.

The Chief Counsel for War Crimes at the Nuremberg War Crimes Trials, Telford Taylor, stated that many provisions of The Hague conventions of 1907 were completely disregarded during the war so the indictments of 'combat crimes' would not be very significant. He stated:

> If the first badly bombed cities-Warsaw, Rotterdam, Belgrade, and London suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore witness that aerial bombardment of cities and factories has become a recognized part of modem warfare as carried on by all nations. The indictment in the first Nuremberg trial, accordingly, contained no charges against the defendants arising out of their conduct of the war in the air.[257]

One reason for absence of any charges related to the terror bombing of civilian populations could be the complexity involved in proving the intention of the attack. Although one of the war crimes listed in Article 6 of the Charter of the International Military Tribunal prohibited 'the wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', none of the accused were convicted of deliberately ordering the bombardment of civilian populations. In the Einsatzgruppen Trial, the Tribunal's judgment states:

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.[258]

Lauterpacht admitted that '[i]n most cases centres of civilian population will in any case constitute centres of communication or contain or be located in the vicinity of some objectives which the attacking belligerent will claim to be of military importance. In these cases the terrorization of the civilian population, however real in intention and effect, can plausibly be represented as being incidental to attack upon military objectives'.[259]

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[257] Telford Taylor, Final Report to The Secretary of The Army on The Nuremberg War Crimes Trials Under Control Council Law (Washington, 1949) (1949). p. 65.

[258] *U. S. v. Otto Ohlendorf et al* Trials of War Criminals 4 (1949), p. 467.

[259] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Year Book of International Law* 360, 368

Daniel Thürer reckoned that the bombing of Hiroshima and Nagasaki resulted in no military advantage as the indiscriminate and unnecessary killing of the civilians was not necessary to win the war. [260] In the *International Military Tribunal for the Far East* Bert Röling noted:

> I sometimes had contact with Japanese students. The first thing they always asked was: 'Are you morally entitled to sit in judgement over the leaders of Japan when the Allies have burned down all of its cities with sometimes, as in Tokyo, in one night, 100,000 deaths and which culminated in the destruction of Hiroshima and Nagasaki? Those were war crimes.' I am strongly convinced that these bombings were war crimes. It was terrorizing the civilian population with the purpose of making war painful beyond endurance so that the civilian population would urge the government to capitulate. It was terror warfare, 'coercive warfare.' And that is forbidden by the laws of war, for sure. So why discuss it with the General [i.e. Douglas MacArthur]? That would have been only embarrassing, I think (…) Of course, in Japan we were all aware of the bombings and the burnings of Tokyo and Yokohama and other big cities. It was horrible that we went for the purpose of vindicating the laws of war, and yet saw every day how the Allies had violated them dreadfully. [261]

In the *Erhard Milch* case, the US Military Tribunal at Nuremberg tried the accused responsible for the slave labour and the deportation to slave labour of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorisation of such persons, and found him guilty of war crimes.[262]

The judgements of IMT and other tribunals about different methods of terror/terrorization used by the respondents in cases dealt by the tribunals, have considerably influenced the International Criminal Tribunals in dealing with the crime of 'terror'. This will be examined in chapter three. In addition to the trials at international tribunal one of the cases which played a considerable role in the development of crime of terror is a case from a court martial in Netherlands East Indies. It will be examined in the following section.

1.5.2 The Trial of Shigeki Motomura

The *Motomura* case was the first war crimes trial which delivered a conviction for terror against a civilian population.[263] Shigeki Motomura and 15 others were prosecuted by the Netherlands

[260]Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (Martinus Nijhoff Publishers 2011), p. 107,108.
[261] Bernard Victor Aloysius Röling, and Christiaan F. Rüter (eds.), *The Tokyo Judgment: the International Military Tribunal for the Far East*, (APA-University Press Amsterdam 1977), p. 84,87.
[262] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.7, p. 39.
[263] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 114

Temporary Court-Martial at Macassar for 'systematic terrorism as unlawful mass arrests', torture, and ill-treatment.[264] The defendants were members of Special Japanese naval police, in Macassar, during the time of the Japanese occupation, and were tried as members of a criminal group which had committed offences as a single unit.[265] The indictment stated:

> the said unit having by means of its members, contrary to the laws and customs of war, carried out unlawful mass arrests and/or exercised *systematic terrorism* against persons suspected by the Japanese of punishable acts and, therefore, for that or other reasons, arrested, this *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, compelling them to put their thumb print on blank sheets of paper, or one or more of the aforesaid acts, or else ordered, encouraged or allowed them to be committed knowing that one or more of the said acts were being committed by those under them, the afore said acts having led or at least contributed to the death, severe physical and mental suffering of many and the condemning to death or imprisonment of several innocent persons.[266] [Emphasis added]

The offence referred to above was part of the comprehensive list of war crimes which was based on the list drawn up by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The offence of mass arrests was added to the list by the United Nations War Crimes Commission in 1944. Article 1 of the N.E.I. Statute Book Decree No. 44 of 1946, which gives a definition of war crimes punishable by the N.E.I courts, includes it under its list of war crimes as 'Indiscriminate mass arrests for the purpose of terrorising the population, whether described as taking of hostages or not'.[267] The Court noted that

> among war crimes comprised by the 1919 list and adopted in Art. 1 of the above Decree, figures 'systematic terrorism' which, in the above description of 'indiscriminate mass arrests' is in directly referred to by the words 'for the purpose of terrorising the population'. In this connection 'indiscriminate mass arrests' appear to constitute a particular form of systematic terrorism'. However, when it was added to the 1919 list by the United Nations War Crimes Commission it was thought more advisable to specify the issue under a separate de nominator than to leave it to uncertain and differing jurisprudence. [268]

[264] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.13, p. 138.
[265] *Ibid.*
[266] *Ibid.;* p.138-139.
[267]United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.13, p.142.
[268] *Ibid.,* p.142.

The court defined unlawful arrests as: 'Unlawful mass arrests are to be understood as arrests of groups of persons firstly on the ground of wild rumours and suppositions, and secondly without definite facts and indications being present with regard to each person which would justify his arrest'.[269] The court further noted that such arrests terrorised the population as even an absolutely innocent person had no surety of his life, liberty and health.[270] The torture and ill-treatment of the arrested civilians by the defendants was considered a form of systematic terrorism by the court.[271] Moreover, the psychological and physical compulsion of the victims was also considered a form of systematic terrorism. The Court stated:

> Terrorism, as reflected in the charge, is to be considered as systematic, as the ill-treatment and tortures were not only similar as regards the various accused, but were also similar to those applied everywhere by the members of the Kempeitai a single object being sought, namely the forcing of a confession. . . . In order to obtain this confession in the quickest and easiest manner the lines of least, resistance were followed, namely . . . psychological and physical compulsion paralysing the resistance of the persons under interrogation . . . who were entirely innocent. [272]

13 out of 15 accused were found guilty of carrying out of "unlawful mass arrests" and of "systematic terrorism practised against civilians".[273] Motomura, Sakai and seven other defendants were sentenced to death while the remaining four received prison sentences of 20, 15, 5 years and 1 year.[274] The understanding concept of systematic terror played a significant role in the creation of offence of terror under international humanitarian law. It will be discussed in more detail in the subsequent chapter. Wilhelm Gerbsch was given 15 years' imprisonment after he was found guilty of a crime against humanity for intentionally committing terrorism against Netherlanders and 'against persons through whom the interest of the Netherlands was or could be harmed'.[275] Willy Zuehlke was also found guilty of, among others, taking part in systematic 'terrorism and brutality' by ill-treating prisoners, by The Netherlands Special Court in Amsterdam and Netherlands Special Court of Cassation.[276]

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[269] *Ibid.*, p.143.
[270] *Ibid*
[271] *Ibid.*, p.144.
[272] *Ibid.*, p.144.
[273] *Ibid.*, p. 28,67.
[274] *Ibid.*, p. 140.
[275] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.13, p, 132.; The Special Court in Amsterdam, First Chamber (Judgment Delivered On 28th April, 1948)
[276] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol.7, p. 141.

In the case of *Gust A V Becker, Wilhelm Weber and others*, the Permanent Military Tribunal at Lyon referred to 1919 List of war crimes and concluded that 'illegal arrests, when carried out repeatedly, represent a clear case of 'systematic terrorism'.[277] The case notes state that: 'The decision of the United Nations War Crimes Commission was made on the face of the evidence collected from occupied countries, that indiscriminate arrests and detentions of inhabitants, without due process of law, was a pattern deliberately implemented by the Nazis for the purpose of terrorizing the population and suppressing what the Nazis considered to represent an obstacle to their rule'.[278]

The Australian War Crimes Act of 1945 included 'systematic terrorism' under the category of war crimes[279] and stated that it was based on the list of war crimes drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919.[280] In the Trial of Dr. Joseph Buhler (Staatssekretiir and Deputy Governor-General), the Supreme National Tribunal of Poland murder, torture, ill-treatment, plunder, deportation to forced labour or concentration camps, were categorized as 'systematic terrorism'.[281]

There were no prosecutions for 'terror/morale bombing' of the civilians in the post-world war trials. The recognition of offence of terror as a treaty rule was a lengthy process due to lack of clarity about the prohibition of attacks against civilians for the purpose of terrorising them. Nevertheless, these trials laid a foundation for prosecuting terror or terrorism against civilians in other forms as explained in the preceding section.

1.6 Conclusion

'When conflicting doctrines and policies clashed, they were judged by the pragmatic test of military efficacy and the degree to which they would contribute to the victory'.[282] After each of the two world wars it was not uncommon for belligerents to deny involvement in 'terror

[277] *Ibid.*, p. 68.
[278] *Ibid.*, p. 69.
[279] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol. 5, p. 95.
[280] *Ibid.*, p. 97.
[281] United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1947-1948), vol. 14, p. 28.
[282] Gary Shandroff, *The Evolution of Area Bombing in American Doctrine and Practice*, PhD dissertation, New York University, 1972, p. 99, as cited in Alexander B. Downes., *Targeting Civilians in War* (Cornell University Press, 2008), p. 154-155.

attacks'. However, there was a huge divergence in theory and practice. During the two world wars, the line between strategic bombing and bombing for the purpose of terrorising was shattered by the practice of warring parties. Some strategists preferred morale bombing while other supported the targeting of military objectives and tactical bombing. Collateral damage to civilian objects and the civilian population was accepted as a part of armed conflict but the bombing of civilians for the sole purpose of causing terror was recognised as unacceptable by all belligerents. This conviction on the part of states indicates that prohibition on attacks against civilians for the sole purpose of spreading terror had achieved customary status. Nevertheless, the practice of belligerents during both world wars raises a question mark over such status.

The advent of new technology and the intentional targeting of civilians during the first world war necessitated the creation of new rules of warfare to protect civilians from deliberate targeting. During the interwar period, there were many failed attempts to create some binding rules for the protection of civilians. Due to absence of any specific prohibition relating to the protection of civilians from terror attacks, there existed a big gap in the protection of civilian population and hence a need for the codification of rules acceptable to all states, taking into account military necessity, distinction and proportionality.

This chapter examined the status of the prohibition of spreading terror among the civilian population during the first world war and until the end of second world war. The different forms of terror which constituted the offence of 'systematic terrorism' were also examined. Although trials by the International Military Tribunal were a great step forward, those who were responsible for 'terror bombing' were not held accountable. However, the system of terror used by the German Reich in occupied territories formed part of several indictments. This was the first time that individuals were held responsible for terror in different forms against civilians. These trials provided a basis for future development of international criminal law in relation to the crime of terror, which will be explored in detail in chapter three. The next chapter will explore various attempts to codify exhaustive rules for the protection of civilian population, In doing so, it will examine developments in the law of war with respect to deliberate attacks against civilians and the efforts led by the ICRC and other members of the international community which eventually resulted in the codification of the prohibition of terror in the additional protocols to the Geneva Conventions.

Chapter 2. The Drafting History of the Crime of Terror

2.1 Introduction

This chapter examines the development of different legal instruments prohibiting the spread of terror and their role in the development of the crime of terror. It traces the codification and development of the prohibition as a universally recognized rule. In doing so, it also evaluates the normative foundations of the rule under international humanitarian law. It will look into the post-world war efforts by ICRC to codify a binding rule prohibiting the intentional spreading of terror among the civilian population. In addition, the chapter will scrutinize discussions at diplomatic conferences of 1977 and state practice relating to the offence of terror. The customary status of provisions from the Additional Protocols relating to the offence of terror will be assessed with the help of related state practice and scholarly writings. In doing so, the scope, significance and rationale of the offence of terror will be identified by scrutinising the evolutionary process which followed the Post World War II period.

2.2 Post World War II Period

As mentioned in the previous chapter, terror bombing was widely used during World War II either by way of reprisal or to shatter the morale of the civilian population. However, all the belligerents denied and condemned it as a method of warfare. Although the governments publically expressed disapproval for terror bombing, after the war there was reluctance in prohibiting the practice. Over time a consensus emerged that a legally binding rule protecting the civilian protection from terror attacks was needed in order to prevent such conduct in future conflicts. Hersch Lauterpacht believed that it was unlawful to resort to the bombing of the civilian population for the mere purpose of terrorising them.[283] However, he also acknowledged that the practical importance of such prohibition was limited because of its role in achieving the ultimate military purpose of defeating the enemy.[284] He stated:

> Nevertheless it is in that prohibition, which is a clear rule of law, of intentional terrorization - or destruction - of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to

[283] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Year Book of International Law* 360, 368
[284] *Ibid.*

> the licence and depravity of force. If stark terror and panic dissolving all bonds of organized life are an object at which the belligerent can legitimately aim, there is no reason why he should stop short of murdering the inhabitants of occupied territory - for such action is certain to create terror both in the occupied territory and in territory which he threatens to occupy. It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object per se would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law.[285]

Although many authors suggested that the deliberate use of terror was prohibited under customary law of war,[286] it was realised after the World War II that 'the survival of the human race depended on its ability to effectively regulate warfare'.[287] A few questions still needed to be answered: How in practice does one differentiate the causalities that follow the intentional targeting civilians from the collateral damage that would follow an attack against a military objective? How is it possible to distinguish an attack for the purpose of spreading terror among civilians from an attack intended to destroy civilian morale? Are terror attacks against civilians lawful as a form of reprisal?

Paust observed that 'since World War II distinguished authorities have recaptured the need for a peremptory norm which prohibits the intentional terrorization of the civilian population as such or the intentional use of a strategy which produces terror that is not 'incidental to lawful' combat operations'.[288] Keeping this and the destruction caused by World War II in mind, the existing Geneva Conventions were revised after the war and a new convention was created relating to the protection of civilian persons in the time of war.

2.3 The Prohibition of Terrorism under the Geneva Conventions of 1949

The need for more effective regulation of warfare resulted in the creation of a new Geneva Convention in 1949 to protect civilians during armed conflict.[289] France proposed a draft

[285] *Ibid*., p. 360, 369
[286] Jordan Paust, 'Terrorism and the International Law of War' (1974) 64 *Military Law Review* 1, 11; Quincy Wright, 'The Bombardment of Damascus' (1926) 20(2) The American Journal of International Law 263, 273; James Wilford Garner, International law and the World War (Longmans, Green, 1920). 283
[287] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, 202
[288] Jordan J. Paust, 'Terrorism and the International Law of War' (1974) 64 *Military Law Review* 1,14
[289] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287)

including a prohibition of terrorism in the preamble. However, this was not accepted.[290] As collective penalties and, terrorisation of the civilian population of the occupied territory were used to prevent the civilian population from committing hostile acts and to subdue them, Article 30 of the ICRC Draft Convention for the Protection of Civilian Person in Times of War, submitted to the XVIIth International Red Cross Conference in Stockholm in 1948, proposed a ban on 'all measures of intimidation or of terrorism'.[291] Article 30 eventually became Article 33 of the fourth Geneva Convention and was adopted unanimously.

Article 33(1) of the Fourth Geneva Convention 1949 states 'Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.'[292] However, the scope of this provision is limited as it applies only to protected persons in the hands of an adversary in an international conflict.[293] The definition of a protected person under article 4 further narrows the scope of article 33. Persons protected by the Convention are 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying Power of which they are not nationals'.[294]

The ICRC commentary on Article 33 states:

> During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be.[295]

Article 33 prohibits the use of terror for maintenance of peace in the occupied territory. Measures of terror had been used in different ways by occupying powers to force the submission of civilian populations. Examples include the use of 'curfew, not responding to security exigencies, but preventing the inhabitants from fulfilling their daily duties, punishment

[290] Final record of the diplomatic conference of Geneva of 1949, vol 3, p. 97.
[291] ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (Geneva: ICRC, May 1948), p. 166.
[292] Geneva Convention (IV) Relative the Protection of Civilian persons in time of War (12 August,1949), Article, 33(1)
[293] Geneva Convention IV, Article 4
[294] Geneva Convention IV, Article 4
[295] Jean S. Pictet (ed.), *Commentary IV Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 225,226.

or detention of several members of a group or family for an alleged offence by one of their members, or the destruction of the house belonging to the family of an alleged offender'.[296] Article 33 prohibits the use of all such means and methods. Gasser asserts, 'Article 33 GC IV ensures this for civilians in the hands of an adverse party; the rules on the conduct of hostilities prohibit all acts that would be deemed terrorist when committed outside armed conflict'.[297] This provision is complementary to the general rule in Article 27 that belligerents shall treat humanely the civilians of the adverse party who are in their power.[298] According to ICRC commentary, Article 33 is derived from Article 50 of The Hague Regulations which states: 'No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible'. This shows that the collective penalty is a form of reprisal or is in response to a previous act. According to Kalshoven, the article 'derives its main importance from the effect it has on occupation law, in which it resolutely removes all doubt as to the illegality of practices such as those applied widely in occupied territories during World War II'.[299]

The drafting history of Article 33 does not provide any detail about the term terrorism or its purpose in the Article**.** It seems that the aim of Article 33 was to protect civilians from the acts of violence and that terrorism was one of such unlawful act. There were other specific prohibitions of violent acts against civilians, for instance, violence to life and person, cruel treatment, torture, the taking of hostages, summary executions, murder and punishment without judicial safeguards.[300] As Paust notes, that these specific prohibitions can also be considered as 'means or strategies employed during a terroristic process in order to produce the desired outcome; and, thus, torture and inhumane treatment prohibitions become extremely relevant in limiting the possible methods one might seek to employ in carrying out a terroristic process'.[301] Although article 33 did not define terrorism, it helped in framing the prohibitions of terrorism in future international humanitarian law treaties. It was also significant in the criminalisation of terror under International Criminal law.

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[296] Hans-Peter Gasser and Knut Dormann, *Protection of the civilian population*' in Dieter Fleck and Michael Bothe (eds.) *The handbook of international humanitarian law* (Oxford University Press, 2013), p. 278.
[297] *Ibid*., p. 237
[298]*Ibid*., p. 206
[299]Frits Kalshoven, *Reflections on the Law of War. Collected Essays* (Martinus Nijhoff Publishers, 2007), p. 504.
[300] Common Article 3, Article 16, 27, 31-34 and 147
Common article 3 contains each of these.
[301] Jordan Paust, 'Terrorism and the International Law of War' (1974) 64 *Military Law Review* 1,15

Certain forms of violence which would be considered terroristic outside the armed conflict, are allowed against combatants during the armed conflict, but such acts are prohibited against civilians in different forms. However, there was no explicit prohibition in the Geneva Conventions aside from that contained in Article 33. The Geneva Conventions classified the categories of victims and provided a set of specific rules to address the dangers encountered during war. Nevertheless, there were issues with the protection available to civilians during the conduct of hostilities. Many gaps in the protection of the civilian population remained despite the creation of a new convention in 1949. The ICRC continued its efforts to provide civilian populations with more protection. The following section will highlight the endeavours made by the ICRC to increase the protection available to civilians during armed conflict, focusing in particular on the prohibition of terror.

2.4 The New Delhi Draft Rules and subsequent efforts

The ICRC, considering the rapid development of new methods of warfare, continued its efforts to adopt treaty rules for the protection of the civilian population.[302] With the assistance of a group of experts, the ICRC started preparing revisions to The Hague Regulations in the early 1950s.[303] The ICRC was of the opinion that the Geneva Conventions were inoperative in dealing with the means and methods of war.[304] The rules regulating conduct of hostiles were not in the jurisdiction of Geneva Conventions but belonged to Hague Law. Hence, the ICRC worked towards improving the protection of persons not participating in hostilities. For this purpose, a meeting experts was called in April 1954 and documents were prepared with the aim of making improvements to the Hague law.[305]

The ICRC sent preliminary documents, including 'the legal protection of the population from the dangers of aerial warfare and blind weapons'; 'Commentary on the provisional agenda submitted to the Experts in March 1954' and a 'Summary of the opinions expressed by the Experts' on points in the above mentioned documents.[306] It drafted the Rules for the Protection

[302] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), p. 3.
[303] Richard D Rosen, 'Targeting enemy forces in the war on terror: Preserving civilian immunity' (2009)42, *Vanderbilt Journal of Transnational Law*, 683,716
[304]ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), p. 3.
[305] *Ibid*, p. 18
[306] *Ibid*, p. 29

of the Civilian Population from the Dangers of Indiscriminate Warfare in 1955 and sent it to national red cross societies. There was no reference to 'terror' or 'terror attacks' in the 1955 draft of this document. Some experts in 1954 emphasized that 'it is extremely difficult to prove that there is any intention of terrorising the population, particularly as most such attacks might in practice be considered as bound up with operations against military objectives'.[307] On the other hand, some Red Cross Societies stressed the psychological importance of explicitly prohibiting terror attacks, in order to reassure the population.[308]

A commentary on the rules of 1955 was also published by the ICRC. Article 3 of the rules, titled, 'immunity of the civilian population', stated that 'Attacks directed against the civilian population, as such, are prohibited. This prohibition applies both to attacks directed against groups and to those on individuals'.[309] Article 3 of the draft rules did not address deliberate targeting of civilians or terror against civilians. However, the commentary on this rule described the reason for absence of such provision. The commentary noted that the intentional bombing of population was mentioned in some codes such as 'Principles formulated by the League of Nations in 1938'.[310] However, the committee was of the opinion that this is not 'a constitutive element of the offence, but a factor to be weighed when appreciating its degree of gravity'.[311]

With regard to terror attacks, the ICRC reckoned that although such attacks were expressly prohibited in several codes and rules, it was not necessary to have special rule about such cases.[312] The ICRC mentioned that 'the opinion of National Societies on this point will, however, be of great value'.[313] The studies by national societies were helpful in the inclusion of an express provision prohibiting terror attacks in the updated set of rules.

Addressing the difficulty of proving terror attacks, the commentary on the rules of 1955 states:

> Indeed, as certain Experts showed, it is extremely difficult to prove the intention to terrorize during attacks on the civilian population, particularly as such attacks, when they have taken place, have very often been linked with attacks on military objectives located

[307] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, New Delhi, January 1957, (Geneva: ICRC, 1956), p. 57.
[308] *Ibid.*, p. 58.
[309] Draft Rules for the Protection of The Civilian Population from The Dangers of Indiscriminate Warfare, The International Committee of the Red Cross, (Geneva, June 1955), p. 7.
[310] *Ibid*, p. 38.
[311] *Ibid*, p. 38.
[312] *Ibid*, p. 38
[313] *Ibid*, p. 39

> in the middle of a populated area (1). On the other hand, the terrorization of civilians as a means of achieving one's object - a method of doubtful efficacy according to military men themselves (2) and one of which the Red Cross at all events cannot but disapprove - is not the only case where the offence of attacking the civilian population is aggravated by the motives which dictate it. If express provision is made in this case, it should also be made in the others. It would thus appear preferable, in the last analysis, to rest content with the general rule, which in any case covers terror attacks. On the other hand, those called upon to establish and deal with acts contrary to the rule will be able to bear in mind this particular aspect.[314]

A study published by a US Naval war college in 1955 also asserted that attack for the purpose of terrorizing the civilian population is forbidden.[315] It noted that such attacks were prohibited under customary international law and despite new developments in the conduct of warfare the prohibition remains valid.[316] The study also contended that the practical significance of this prohibition in relation to aerial attacks was limited as compared to naval or land forces. Robert Tucker argued that although the law relating to the deliberate targeting of civilians on land was different from that of the unintentional targeting of civilians through aerial attack, non-combatants are likely to be in more danger as a result of 'the "unintentional" injury inflicted by aerial bombardment than intentional acts committed by land forces'.[317] He further claimed that there were no practical method of discerning when the civilian population was made the deliberate object of attack by aerial bombardment.[318]

Tucker stated:

> In bombardment by land or by naval forces it may still prove possible to determine with some degree of assurance when the civilian population deliberately has been made the object of direct attack, such attack being unrelated to a military objective. In aerial bombardment the difficulties involved in reaching a similar determination are obviously far greater; so much greater, in fact, that in the absence of specific rules commanding the general agreement of states, and providing for the detailed regulation of aerial bombardment, the mere attempt to apply directly the general principle distinguishing

[314] Draft Rules for the Protection of The Civilian Population from The Dangers of Indiscriminate Warfare, The International Committee of the Red Cross, (Geneva, June 1955), p. 39.
[315] Law of Naval Warfare, Article 611 b, c.—Article 7.2. of the 1923 Rules of Aerial Warfare stated: 'Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited'. The principles embodied in Article 2.2. were subsequently reaffirmed on several occasions prior to World War II by the League of Nations and other international bodies. Further, they were given prominent expression in the military manuals of many states. During World War II the belligerents never failed to render verbal service to these principles, if only by resolutely denying that aerial raids were taken against non-military objectives or in
order to terrorize the civilian population.
[316] Robert W. Tucker, The Johns Hopkins University Consultant, Naval War College, 1955, *The Law of War and Neutrality at Sea* (International Law Studies, 1955), p. 365, 371.
[317] *Ibid.*, p. 147.
[318] *Ibid.*

between combatants and non-combatants must prove in its effects far more apparent than real.[319]

The Red Cross societies after studying the rules concluded that the rules were beyond the bounds of ICRC. Therefore, with the help of experts and advisory working party the ICRC reconsidered the Rules in May 1956 in Geneva.[320] As a consequence of this, the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War were produced.[321] Article 6 of the Draft Rules stated: 'Attacks directed against the civilian population as such, whether with the object of terrorizing it or for any other reason, are prohibited'.[322] It further provided that 'It is forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, or occupied by, the civilian population'.[323] The article is of great significance for prohibiting intentional attacks against objects which are for the exclusive use of the civilian population. In doing so, it recognized 'the legality of attack on civilian objects, the potential use of which may be of value to a nation's war effort or which may be used simultaneously for military and civilian purposes'.[324] Moreover, the article also prohibits such attacks in non-international armed conflict.[325]

Article 6 paragraph 1 was considered a basic rule unanimously recognised by the experts.[326] The ICRC asserted that this rule was 'generally accepted in the teaching of qualified writers and previous attempts to codify the matter'.[327] Moreover, it was also included in the instructions given to certain air forces during the World War II.[328] While the ICRC endorsed this position of Red Cross societies on the inclusion of an express prohibition of terror attacks in Article 6, it was 'careful not to give the banning of terror attacks precedence over the general

[319] *Ibid.*
[320] Josef L. Kunz, The 1956 Draft Rules of The International Committee of The Red Cross
At the New Delhi Conference, 53(1949) *The American Journal of International Law*, p. 132, 134
[321] *Ibid*; ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956)
[322] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), Article, 6
[323] *Ibid*
[324] W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1, 65
[325]ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), Article 2(b)
[326] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), p. 57.
[327] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), p. 58.; such as the Monaco Draft**,** Article l, the draft of the International Law Association
[328] *Ibid.*

rule and turn it into a special prohibition'.[329] Hence, the question arises that if the attacks against civilians as such are prohibited then what value does the prohibition of attacks for the purpose of terrorising add? It seems that this express prohibition was added in light of the bombing campaigns of the World War Two, where terror bombing was used to achieve the military objective of defeating the enemy. Prohibiting an attack which would cause terror among the civilians without any other harm, provides a greater degree of protection for civilians. The prohibition would address the purpose of any attack intended to terrorize the civilian population.

The ICRC commented:

> The vital point is that the population should not be attacked directly, whatever the motives for such attacks. In fact, the efficacy of terrorisation of civilians as a means of achieving the desired ends is, in the opinion of the military experts themselves, very doubtful and one which the Red Cross cannot but condemn. This is not the only case in which attacks on the population are made more serious by perverse intentions. These intentions might possibly be adopted as aggravating circumstances by those passing judgment on acts running counter to the rule we are commenting on.[330]

The provision does not prohibit terror caused among civilians as a result of an otherwise lawful attack against military target. As mentioned in the ICRC commentary on the Draft Article: 'Attacks directed against a military objective but such as to cause serious injury to the population because the attacking side has failed to take the necessary precautions come under Article 9 rather than the present Article'.[331]

While many previous instruments used 'intentional bombing' of the civilian population, the word 'intentional' was not used in Article 6. It was considered that the words 'directed against civilian population' met that desideratum to some extent.[332] Taking into account military necessity, the ICRC stated that it would often be difficult for an airman to distinguish between 'civilians' and 'military personnel' because the two categories are in some cases closely intermingled.[333] 'The absence of the word 'intentional' may, therefore, lead to the authors of attacks being burdened with a greater measure of responsibility'.[334] Experts were of the opinion

[329] *Ibid.*
[330] *Ibid.,*
[331] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War,* New Delhi, January 1957, (Geneva: ICRC, 1956), p. 59.
[332] *Ibid.*, p. 59
[333]*Ibid.*
[334] *Ibid.*

that it was essential for violations of this Article to be judged on the basis of different circumstances such as 'intentions, factual errors, orders from superior officers', etc., 'which may aggravate, attenuate or even dispose of the offender's guilt'.[335]

The second sentence of Article 6 states: 'This prohibition applies both to attacks on individuals and to those directed against groups'. Accordingly, it is clear that the article expressly protects individual civilians from terror attacks. In addressing the issue of distinguishing and sparing isolated civilians, the ICRC commentary states:

> the Draft Rules, like the Geneva Conventions, are based on the respect due to the human personality, and whenever those engaged in military operations can or should recognise that the person involved is a civilian, even a single person, they should refrain from attacking. That is the meaning of the second sentence. The memory of civilians, indeed women and children, machine-gunned during the second World War is still too much with us to make a provision on these lines anything but indispensable.[336]

The ICRC submitted the Draft Rules to the XIXth International Conference of the Red Cross in New Delhi, in 1957.[337] Although a few amendments were suggested to Article 6, none were proposed in relation to the terrorization of civilians. A number of delegates suggested the removal of the words 'as such' from the first sentence of Article 6.[338] The Rules were referred to governments for consideration along with the amendments proposed during the conference. Due to a lack of interest and reaction from governments, further improvements could not be made.[339] States were not prepared to accept the Rules in relation to the dissemination of weapons. Baxter states: 'Many governments saw the Rules as too stringent, making the use of nuclear weapons impossible and conventional bombardment questionable, if the Rules were to be taken seriously and observed'.[340] However, the Draft Rules contributed to shaping the

[335] ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, New Delhi, January 1957, (Geneva: ICRC, 1956), p. 59
[336] *Ibid*, p. 58
[337]ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, New Delhi, January 1957, (Geneva: ICRC, 1956)
[338] *Ibid.*, p. 178
[339] Richard R. Baxter 'Humanitarian Law or Humanitarian Politics-the 1974 Diplomatic Conference on Humanitarian Law' (1975)16 Harvard International Law Journal 1,3; International Committee of the Red Cross, Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, (1956) available at<https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument> Last Accessed: 20 November 2019
[340] Richard R. Baxter 'Humanitarian Law or Humanitarian Politics-the 1974 Diplomatic Conference on Humanitarian Law' (1975)16 *Harvard International Law Journal* 1,3; W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1, 67

provisions adopted in the 1977 Additional Protocols.[341] According to Hans-Peter Gasser, 'The legal staff of the ICRC built largely on this text - and on the experience of its rejection - while drafting the new text which eventually became Protocol I'.[342] The ICRC reintroduced the Draft Rules at the 20th International Conference of the Red Cross in Vienna in October 1965. The conference adopted a resolution about the protection of civilians during armed conflict but did not mention terror or terrorism.[343]

After the failure of New Delhi Draft Rules, the next initiative for the protection of civilians during armed conflict came from International Conference on Human Rights at its meeting in Teheran, Iran, on May 12, 1968. The conference passed a resolution, requesting the Secretary-General to consider, among other things, 'the need for additional humanitarian international conventions or possible revision of existing Conventions to ensure better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare'.[344] Seven months later the United Nations General Assembly adopted a Resolution inviting the Secretary-General to take on the recommendations of the Tehran Conference, including working with the ICRC to develop additional international humanitarian conventions to protect, among other things, non-combatants in armed conflict.[345] In 1969, the XXIst International Conference of the Red Cross, in Istanbul adopted a resolution calling upon ICRC to convene a conference to review documents prepared by the ICRC to develop rules to supplement existing humanitarian law.[346] According to Parks, 'This resolution not only had an effect on the overall shape of the treaty that was to become the 1977 Protocol I, but also was related directly to the language drafted in those articles that affect aerial bombardment'.[347] The Arab Israel war in June 1967 and the

[341] International Committee of the Red Cross, Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, (1956) available at <https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument> last accessed: 20 November 2019
[342] Hans-Peter Gasser, 'A Brief Analysis of the 1977 Geneva Protocols' (1985) 19 Akron Law Review 525.
[343] The XXth International Red Cross Conference (Vienna, (1965) *International Review of Red Cross*, Res XXVIII, p. 589.
[344] Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights. (Teheran, 12 May 1968). Available at<https://ihl databases.icrc.org/applic/ihl/ihl.nsf/INTRO/430?OpenDocument> Last accessed: 20 November 2019
W. Hays Parks, 'The 1977 Protocols to the Geneva Convention of 1949' (1996) 68(1) *International Law Studies* 465, 469
[345]Respect for human rights in armed conflicts, UNGA Res 2444 (19 December 1968) UN Doc A/7433;
Richard D rosen, 'Targeting enemy forces in the war on terror: Preserving civilian immunity' (2009) 42 *Vanderbilt Journal of Transnational Law* 683, 718
[346] ICRC Resolution XIII (Istanbul 1969), in Resolutions Adopted by the XXIth International Conference of the Red Cross, 9 (1969) *International Review of Red Cross* 608, 615-16
[347]W. Hays Parks, 'Air war and the law of war' (1990) 32 *The Airforce Law Review* 1,69

American intervention in Vietnam war also highlighted the lack of civilian protection from the conduct of hostilities.[348] Civil wars in different countries and the advent of new technology also made it important to revise the rules of warfare.[349]

The question of including a specific prohibition in relation to the use of terror against civilians arose time and again in various discussions. In the conference, the ICRC submitted questions to a group of experts including: 'Is it expedient to state explicitly, as is sometimes done, that attacks intended to terrorize the civilian population are forbidden? It is often difficult to prove the intention to terrorize, but there may be a psychological advantage to a special condemnation of such practices'.[350] The experts gave the following opinion:

> As regards attacks to 'terrorize', several experts called to mind the theories of dissuasion and threats of total nuclear war, problems already debated in connection with atomic weapons. In the event of nuclear war, they were of opinion that principles of Resolution No. 2444 and the more detailed rules developing them could not be observed. The Red Cross should not however set out from these extreme hypotheses to decide on the rules for the protection of populations, as otherwise it would get nowhere. It should rather take present conflicts, conducted without atomic weapons.
> In the event, an obvious lesson was to be drawn from the armed conflicts which had taken place to date, as military experts had declared, thus confirming what the ICRC had learnt in the course of previous consultations: not only did bombardments to terrorize cause great suffering, but they also were to a large extent ineffective; they often even strengthened the moral resistance of the enemy and consequently, far from shortening the conflict, prolonged it.
> The majority of experts thus approved the idea of specially condemning attacks to terrorize the civilian population by means of weapons. On the other hand, they felt that terrorization by psychological means tending to weaken the moral resistance of the adversary could not be condemned.[351]

While addressing the protection of civilian population in internal armed conflicts, one expert mentioned that such conflicts, and wars of national liberation, are largely backed by civilians. For this reason, civilians are victims of acts of terrorism on both sides and it is difficult to impose humanitarian solutions in such cases.[352]

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[348] *Ibid*., p.1, 68
[349] See in general ICRC, *Reaffirmation and Development of The Laws and Customs Applicable in Armed Conflicts*, Istanbul, September 1969, (Geneva: ICRC, 1969); Richard R. Baxter 'Humanitarian Law or Humanitarian Politics-the 1974 Diplomatic Conference on Humanitarian Law' (1975)16 Harvard International Law Journal 1,4; Recent conflicts included the Nigerian civil war, Cypriot civil war, and the Sino-Indian war.
[350] ICRC, *Reaffirmation and Development of The Laws and Customs Applicable in Armed Conflicts*, Istanbul, September 1969, (Geneva: ICRC, 1969), p. 67.
[351] *Ibid.*, p.68.
[352] *Ibid.*, p.103.

Discussing the use of terrorism by Guerrillas, one expert argued that the only arm available to guerrillas at the start of their struggle is terrorism: banning terrorism would deprive them of their only means of combat, and would accordingly lack practicality.[353] With regards to terrorism, the ICRC concluded that 'While this cannot be proscribed in absolute terms (the word itself, like guerrilla warfare, has several different meanings) should be forbidden when it is inflicted indiscriminately against civilian population (whatever the means employed: "violence, bombardments etc.").'[354] This shows that some acts of violence by Guerillas might not be considered terrorism under international humanitarian law even though such acts are categorized as terroristic under international law in general. The narrow concept of terrorism under international humanitarian law applies to guerrilla warfare and such conduct was considered prohibited according to the experts' opinions.

The ICRC while reviewing the 'international law rules concerning the protection of civilian populations against the dangers of indiscriminate warfare' mentioned that a major rule deriving from the general norm is that 'distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible' and that 'bombardments directed against the civilian population as such, especially for the purpose of terrorizing it, are prohibited'.[355] It further noted that, 'This rule is widely accepted in the teachings of qualified writers, in attempts at codification and in judicial decisions; in spite of many violations, it has never been contested. The XXth International Conference of the Red Cross, moreover, did not omit to re-state it'.[356] A resolution adopted by the Institute of International Law at its Edinburgh Session in 1969 reiterated that 'existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population'.[357] The resolution did not provide any detail about the meaning of 'terrorising the population' However, it did provide

[353] *Ibid.*, p. 120.
[354] *Ibid.*, p. 121.
[355] *Ibid.*, p. 54.; Formulated by 1965 the International Conference of the Red Cross in Vienna formulated (in its Resolution XXVIII) the following requirement as one of the principles affecting civilians during war and to which governments should conform.
[356] ICRC, *Reaffirmation and Development of The Laws and Customs Applicable in Armed Conflicts*, Istanbul, September 1969, (Geneva: ICRC, 1969), p. 54.
[357] Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, p, 2, section 6

an indication of the existing law and got 60 votes to 1 with two abstentions. [358] All these instruments collectively made a convincing contribution to the eventual prohibition and criminalisation of terror against civilians under international law. The following section will analyse the role of the conferences of government experts in elaborating and clarifying the offence of terror.

2.5 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts

The two conferences of government experts held in 1971 and 1972, played a valuable role in the formation of the offence of terror under the Additional protocols. Different aspects of the offence were explored during the second conference, which subsequently resulted in the inclusion of the offence of terror in the ICRC draft which was presented before the diplomatic conference of 1974. This section will assess the contribution of these two conferences in formulating the provisions of draft Additional Protocols relating to the offence of terror. It will illuminate the importance of different terms used in the provisions, their substance, and the views of government experts which are indicative of positions of different states.

In September 1969, at Istanbul, the XXIST International Conference of the Red Cross adopted Resolution No. XIII named 'Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts'. The resolution requested the International Committee of the Red Cross (ICRC) to pursue actively its efforts with a view to proposing, as soon as possible, concrete rules to supplement humanitarian law.[359] The conference also urged the ICRC to invite government experts to meet for consultation with the ICRC on those proposals. As a result, the ICRC convened its Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva from May 24 to June 11, 1971. Before the Conference of government experts, the ICRC also conducted a Conference of Red Cross Experts in The Hague from March 1-6, 1971, in which the ICRC described its plan and shared drafts with members of national Red Cross Societies.[360]

[358] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press), p. 292.
[359] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May -12 June 1971) Report on the Work of the Conference, p. 1
[360] *Ibid.*, p. 1

In advance of the Geneva Conference of Government Experts, the ICRC sent governments detailed documentary material, including the opinions gathered during private consultations with some fifty experts throughout the world, the Report on the work of the Conference of Red Cross Experts which met in The Hague, and reports by the U.N. Secretary-General on Respect for Human Rights in Time of Armed Conflicts.[361] The purpose was to assess where progress would be possible in the further development of the law after reviewing the documents. Almost 200 experts from 41 nations, attended the conference in Geneva.[362]

As regards the question of bombardments, the representative of the ICRC invited the experts to give their views on the scope of the relevant provisions of the Hague Conventions of 1907, Articles 10 and 6 of the Draft Rules of 1956, and Articles 8 and 6 of Resolution No. I of the Institute of International Law. All of these provisions related to the bombardment of zones and to terrorization.[363] The Brazilian Government experts suggested adding to the provisions relating to the choice of weapons and methods of inflicting injury on the enemy, among others, paragraphs 6 of the resolution adopted by the Institute of International Law at Edinburgh in September 1969.[364]

Article 23 of the tentative working paper submitted by the experts of Mexico, Sweden, Switzerland, United Arab Republic and Netherlands, on 'the protection of the civilian population against the dangers of hostilities' stated that *'*Any action whatsoever, irrespective of the type of weapon or method used, designed to terrorize the civilian, population is prohibited'.[365] One expert stated that 'the provisions of the Draft Rules of 1956 regarding zone bombardment and terrorization should be included in the fundamental rules; they would cover what are known as *free-fire zones'.*[366]

On the subject of terror bombardments, the ICRC also reflected on other potential methods which could be used to spread terror, as terror was repeatedly associated with aerial bombardments. In addressing this issue it was noted that 'This is also a case in point, firstly

[361]*Ibid.*
[362]*Ibid.*
[363]*Ibid.,* p. 83.
[364]ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May -12 June 1971) Report on the Work of the Conference, p. 94., which stated that 'Existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population'
[365] *Ibid.,* p. 97,98.
[366] *Ibid.,* p. 83.

because there are all kinds of attacks which are intended to terrorize the civilian population (not only in the form of bombardments) and secondly, because there is only one specific case of attack involved, the motif for which an attempt has been made to discern'.[367] It was also mentioned that Article 22 of the Draft Rules on aerial warfare of 1922 prohibited this type of bombardment and that Article 6, paragraph 1 of the Draft Rules expanded this conception by proposing the 'prohibition of all attacks of terrorization directed against the civilian population'.[368] Moreover, the ICRC mentioned the background discussion of the resolution of which the Institute of International Law had adopted referring the use of words 'all actions'. It noted that 'one can terrorize through other means than that of bombardment and this is why the resolution, in Art. 6, employs the terms 'all actions' instead of 'by means of combat''.[369] The experts consulted by the ICRC recognised the specific character of this type of prohibition and felt that it should be affirmed by an existing legal instrument.[370]

This discourse eventually played an invaluable role in shaping the provisions of the Additional protocols relating to terror. Although the ICRC was of the opinion that the profusion of specific rules could diminish the value of the basic rules, it proposed to include, among others, the interdiction of deliberate terrorization of the civilian population as a basic rule. ICRC suggested: 'the ideas generally expressed by Arts. 6 and 8 of the Resolution of the Institute and Art. 6, para. 1 of the Draft Rules of 1956, with respect to attacks, might serve as a point of reference and be included in a basic rule on the protection of the civilian population, or in the regulations of execution of the protocol'.[371] While experts agreed on the need to protect the civilian population from terror, the debate on the issue at the first Conference of Government Experts was brief. The second conference played more significant role in the development of the offence of spreading terror against civilian population.

The experts at the first Conference of Government Experts also deliberated about the use of terror in guerrilla warfare. On the 'rules applicable in guerrilla warfare', one expert mentioned that 'terrorization of civilians and the systematic intimidation of innocent populations must be

[367]ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May -12 June 1971), Protection of The Civilian Population Against Dangers of Hostilities, vol 3, p. 108.
[368] *Ibid.,* p. 108.
[369]*Ibid.*
[370]*Ibid*
[371] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May -12 June 1971), Protection of The Civilian Population Against Dangers of Hostilities, vol 3, p. 109.

reproved and censured'.[372] Article 14 of the Canadian Draft Protocol to the Geneva Conventions of 1949 relative to conflicts not international in character prohibited all measures of intimidation or of terrorism.[373] However there were no discussions relating to acts of terror, attacks aimed at spreading terror, or terror bombardments in relation to the non-international armed conflicts. This was despite the fact that terror against civilians in guerrilla warfare and other non-international conflicts was widely used and was generally considered a prohibited method of warfare.[374] Although it was a tremendous influence, the meeting failed to deal with all the subjects before it. Hence the ICRC was requested to draw up a new draft and a second session was agreed to.

The second session of the Conference of Government Experts was held in Geneva from May 3 to June 2, 1972. The main aim of the second session of the Conference of Government Experts was to develop two draft protocols addressing international and internal armed conflict, for consideration by a Diplomatic Conference. After decolonisation, internal conflicts became a dominant and prevalent political force. Tactics of terrorism had been directed at civilians and an increasing lack of clarity in the identification of belligerents in internal wars had put stress on the existing body of humanitarian law. These challenges, and the concern over noncompliance with the existing law, had led to two separate lines of activity designed to supplement the 1949 Geneva Conventions for the Protection of War Victims.[375] All the Parties to the Geneva Conventions of 1949 had been invited to send their experts in the second session of the Conference of Government Experts. It was attended by 400 experts from 77 States.[376] The subjects of terror and terrorism were reviewed in context of different articles. The ICRC made strong efforts to include the prohibition of terror against civilian population.

During the general discussion, one expert argued that 'the civilian population should also be secure against threats proffered or attacks carried out by guerrilla fighters, who could terrorize

[372]ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May -12 June 1971) Report on the Work of the Conference, P.98; CE/Com.III/44

[373] *Ibid*, CE/Plen. 2 bis p. 58 Annexes

[374] Jordan J.Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility' (1972) 57 *Military Law Review*, 99,128

[375] Charles L. Cantrell, Civilian Protection in Internal Armed Conflicts: The Second Diplomatic Conference (1976)11 *Texas International Law Journal* 305, 306

[376]Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972 Report on the Work of The Conference, Vol 1, p. 1

it or use it as a shield'.[377] Moreover, under the heading of general protection of the civilian population, the ICRC had in particular proposed express prohibitions on terror attacks, indiscriminate attacks, and reprisal attacks. The ICRC Draft of Article 5(1) of Draft Additional Protocol to Article 3 common to the four Geneva Conventions of August 12, 1949 (Draft Protocol II) on Protection of victims of non-international armed conflict stated: 'Acts of terrorism, as well as reprisals against persons and objects indispensable to their survival, are prohibited'.[378] One expert considered the word 'terrorism' ambiguous, stating that it should be defined as it has not the same meaning everywhere.[379] The ICRC proposed that 'terrorism covered acts of violence deliberately directed against the population and indiscriminate in their effects'.[380] Whereas in some parts of the world it was used to describe 'any opposition to the existing situation, for example, action by workers demanding wage increases or by students demanding the reform of institutions, in other words, simple opposition which was not necessarily violent'.[381]

Another expert asserted that Article 5 should prohibit terrorism by both parties to an armed conflict.[382] The representatives of Egypt, and US also suggested to include prohibition of acts of terrorism.[383] The drafting committee took into account various proposals and reformulated Article 5. The new draft, Article 5 b, prohibited, 'acts of terrorism, consisting of acts of violence directed intentionally and indiscriminately against civilians taking no active part in the hostilities'.[384]

The ICRC draft of Article 15 of Draft Additional Protocol to Article 3 common to the four Geneva Conventions of August 12, 1949, relating to Respect for and safeguarding of the civilian population provided:

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[377] *Ibid.,* 1, p. 28
[378] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session) 3 May -3 June 1972 Report on the Work of The Conference, vol, 1, p. 74 & vol 2, p. 16
[379] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972 , Report on the Work of The Conference, vol 1, p. 75
[380] *Ibid.*
[381] *Ibid.*
[382] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972 Report on the Work of The Conference, vol 1, p.75
[383]*Ibid.,* Egypt CE/COM ll/22 p. 37; United States CE/COM II/15, p. 36
[384]Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972, Report on the Work of The Conference, vol 1, p. 75

1.The civilian population as such, as well as individual civilians, shall never be made the object of attack.

2.In particular, terrorization attacks shall be prohibited.[385]

The Swiss expert proposed the reconsideration of paragraph 2 stating that the paragraph as it stood was likely to weaken the force of the general rule contained in the first paragraph and that terrorism is already prohibited by Article 5(1).[386] Some experts agreed with the Swiss proposal, while one disagreed. Objections were also made to the words 'terrorization attacks'. It was considered preferable to use the words 'attacks with the sole object of spreading terror'.[387] Some experts agreed while one stated that 'it would be better to say too much rather than too little, and declared that he supported the text submitted by the ICRC'.[388] The French expert suggested replacing 'terrorization attacks' by the phrase 'attacks for the sole purpose of causing terror'.[389] In another proposal, France suggested using the words, 'In particular, attacks whose sole object is to spread terror shall be prohibited'.[390]

In contrast, the US experts' proposal for amending draft Article 15 stated: 'The civilian population as such, as well as individual civilians, shall never be made the object of attack. In particular, attacks intended to terrorize the civilian population shall be prohibited'.[391] The concept of intention proved to be consequential in the later discussion and evolvement of the offence of terror. It helped in addressing the concerns about the terror caused from lawful military attacks or the natural consequences of armed conflicts. While formulating Article 15, paragraph 2, the drafting committee took into account different proposals and selected two options: either to keep the existing text drafted by ICRC or to replace it by 'the words, '*In particular, attacks intended [solely] to terrorize the civilian population shall be prohibited*'.[392]

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[385] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972, Report on the Work of The Conference, vol 1, p. 114

[386] *Ibid.*, and *CE/COM II/11*, vol 2 p. 35,

[387] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (Second Session)3 May -3 June 1972, Report on the Work of The Conference, vol 1, p. 114

[388] *Ibid.*

[389] Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972; vol 2, p. 40, *CE/COM II/43*

[390]*Ibid*., p. 48, *CE/COM II/76*

[391] Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. vol 2, p. 49, CE/COM II/81

[392]Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972, vol 1, p. 115

Article 45 of Draft Additional Protocol to the four Geneva Conventions of August 12, 1949 (Draft Protocol I), relating to the *protection of the civilian population against dangers resulting from hostilities stated that*

1. The civilian population as such, as well as individual civilians, shall never be made the object of attack.
2. In particular, terrorization attacks shall be prohibited.

Various amendments were suggested to draft Article 45(2). It was recommended to add the criterion of deliberate intention by replacing the term 'terrorization attacks' by the expression 'attacks the sole purpose of which is to spread terror'.[393] The experts of Czechoslovakia, the German Democratic Republic and Hungary, submitted the following text as alternative to draft Article 45(2): 'Attacks by way of reprisals as well as terrorization attacks directed against the civilian population as such and individual civilians are prohibited'.[394]

French experts added a sole purpose requirement by stating that 'Attacks, the sole purpose of which is to spread terror, shall be in particular prohibited'.[395] Australian experts also proposed a similar amendment: 'In particular, attacks solely to terrorise the civilian population shall be prohibited'.[396] A proposal submitted by the experts of Australia, Belgium, Canada, the Federal Republic of Germany, the United Kingdom and the United States of America stated: 'The civilian population as such, as well as individual civilians, shall never be made the object of attack. In particular, attacks intended to terrorize the civilian population shall be prohibited'.[397] On the other hand, the Romanian experts proposed to prohibit 'acts of terrorism' and 'acts which are likely to harm civilians and military objectives alike'.[398] They drafted article 45(1) as follows: 'The civilian population, and individual civilians, shall never, in any circumstances, be made the object of military operations, attacks, acts of terrorism, acts which are likely to

[393] Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972, vol 2 p. 74, CE/COM III/PC 51
[394] *Ibid.*, p. 70, CE/COM III/PC 33
[395] *Ibid.*, p. 74, CE/COM III/PC 51
[396] *Ibid.*, p.37, 81, (CE/COM III/PC) 93
[397] *Ibid.*, p. 83, CE/COM III/PC 106
[398] Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. p. 73, CE/COM III/PC 46

harm civilians and military objectives indiscriminately or reprisals, and shall be spared the dangers resulting from military operations'.[399]

Frits Kalshoven states:

> [T]he proposed formulas differ most conspicuously in that the former is objective in character whereas the latter is made dependent on the subjective element of intention of the attacking party. While a lawyer might be inclined to prefer the objective definition as that would prevent the attacker from all too easily escaping responsibility by merely denying intention, one can on the other hand have every understanding for the wish to introduce the element of intention because this would, the other way round, diminish the possibilities for the attacked party to make propagandists abuse of the emotionally loaded terms of 'terrorism' and 'indiscriminate attack'.[400]

As the term 'terrorism' is broad and includes a diverse range of activities, it did not seem to serve the purpose of this article. The use of term 'acts' instead of 'attacks' was more inclusive as the term 'attack' is more specific. The addition of requirement of intention in the provision excluded the prohibition of lawful attacks that could create terror among the civilians.

Another similar suggestion referred to attacks 'whose sole purpose was to terrorize civilians'.[401] According to Frits Kalshoven, 'The principle of these prohibitions was widely accepted, but their formulation gave rise to quite some difference of opinion'.[402] There were also deliberations about prohibiting attacks against civilian objects which could potentially spread terror among the civilian population. While defining objects of a civilian character under Article 42, some experts considered as 'unacceptable targets those objects whose destruction would spread terror among the civilian population and cause the death of thousands of innocent people'.[403]

After the conference, the ICRC published the definitive text of two draft Additional Protocols. These were sent to all governments in June 1973. The ICRC also produced a commentary on the draft protocols to ease the task of those who were to study them, in October 1973. The

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[399] *Ibid.*
[400] Frits Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. p. 37
[401] Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. vol 1 p. 149
[402] Frits Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. p. 36
[403]Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May - 2 June 1972. vol .1 p. 146

purpose was to provide a basis for discussion at the forthcoming Diplomatic Conference convened by the Swiss Federal Council, the Government of the State depositary of the Geneva Conventions. The draft Additional Protocols were also submitted to the XXIInd International Conference of the Red Cross which met Teheran in November 1973. The *Commentary* is important for the understanding of the provisions of these instruments.

Article 46 (1) of the draft Additional Protocol I stated that 'The civilian population as such, as well as individual civilians, shall not be made the object of attack. In particular, methods intended to spread terror among the civilian population are prohibited'. The commentary on this draft provision states that the rule affirmed the immunity of the whole of the civilian population. The protection granted to civilians does not depend on their number whether they are taken singly, in groups or as a whole.[404] Due to the increased number of attacks against the civilians in contemporary conflicts, it was necessary to stress this aspect in particular. The Commentary further explained that 'civilians who are within or in the immediate vicinity of military objectives run the risk of 'incidental' effects as a result of attacks launched against those objectives. In such cases, other provisions of the draft would be applicable (see para. 3 *(b)* of the present article and Art. 50 (1) *(a)* and *(b)* concerning proportionality)'. [405] The word 'methods' has been used in order to include all possible cases that might arise.

Many objections were raised by the experts in relation to the concept of intention. However, according to the ICRC commentary:

> [B]y way of exception, it was retained here (in the expression 'methods *intended*'), as any attack, even if it were of strictly limited to a specific military objective, would by its very *nature* 'spread terror' among the neighbouring civilian population. The omission of any mention regarding intention, in this case, would have meant that any attack which only had a psychological effect on the civilian population would be *a posteriori* unlawful. On the other hand, the element of intention is generally held to be one of those constituting a penal breach. It, therefore, seemed that it was more appropriate to consider this problem in the context of the Section of Part V relating to repression of breaches of the Conventions and of the Protocol.[406]

[404] Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, (Geneva: October 1973) p. 57
[405] *Ibid*.
[406] Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, (Geneva: October 1973, p. 57

The inclusion of requirement of intention excluded the incidental causation of terror among the civilian population from the scope of the provision. Keeping in mind the principle of military necessity, it was not feasible to forbid any act or attack which would cause terror among the civilian population. The use of term 'terrorisation attacks' could imply that the article prohibits deliberate causation of terror, but the express mention of 'intention' is more pragmatic. Nonetheless, this draft was open to more deliberations and the contents of these provisions were far from settled at by the end of the second Conference of Government Experts. With reference to paragraph 3 of Article 46, which prohibited indiscriminate and disproportionate attacks, the ICRC commentary stated that the aim of this provision was to proscribe 'area bombing' or 'carpet bombing' which has 'been resorted to in order to spread terror among the population as well as to hit a few military objectives suspected to lie *somewhere or other* within an area that might be very extensive and densely populated'.[407]

With regard to the prohibition acts of terrorism under fundamental guarantees (concerning Humane Treatment of Persons in the Power of the Parties to the Conflict) provided under Article 6 (2) (c) of the draft Additional Protocol II, the ICRC commentary stated that:

> The prohibition of acts of terrorism in sub-paragraph *(c)* is based on Article 33 of the Fourth Convention. Sub-paragraph *(c)* prohibits all acts of violence committed against protected persons with the object of exerting pressure upon them. A distinction should be made between acts of terrorism and attacks intended to spread terror. The latter are prohibited under Article 26 (1). The present provision prohibits acts of terrorism committed by the parties to the conflict against all persons who, in one way or another, are in their power.[408]

Article 26(1) of the draft Additional Protocol II (which was part of Article 15 in the previous draft) contained an identical provision to Article 46 paragraph 1 of the draft Additional Protocol I. The commentary on draft Article 26(1) was identical to Article 46(1) of the draft Additional Protocol I.[409]

After publishing these works and completing other formalities, in 1974, the Swiss Government convened a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The first session of the Diplomatic

[407] *Ibid.*, p. 56, 57
[408] *Ibid.*, p. 137
[409] *Ibid*, p. 158

Conference met in Geneva from February 20 to March 29, 1974. Almost 700 delegates representing 126 states, the UN and its agencies, intergovernmental and non-governmental organisations, and representatives of some fourteen liberation movements attended the Conference. The next section will scrutinize the *travuax préparatoires* of the Diplomatic Conference to deduce the objective and essence of the terror related provisions of the Additional Protocols.

2.6 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)

The work of ICRC and the Conferences of Government Experts served as the basis for the work at the diplomatic conference as it considered the two draft protocols prepared by the ICRC to develop the international humanitarian law. The section highlights the contribution of different states in reaching a consensus through deliberations on definition of the offence of terror. The aim is to examine the understanding of the drafters of this provision and the purpose of its inclusion in the two Additional Protocols. Various amendments proposed by states and the ensuing debates provide valuable insight into the different aspects of the offence of terror. Initially, states proposed to prohibit acts capable of spreading terror among the civilian population. However, there was no consensus on this approach. Eventually, with the help of proposals from the Iranian and French delegations, an agreement was reached to prohibit intentional spreading of terror, which in final draft was replaced with a 'primary purpose' requirement.

The subject of general protection of the civilian population against the effects of hostilities (including article 46 of the draft Protocol I and article 26 of draft Additional Protocol II) was dealt by the Committee III at the diplomatic conference.[410] Article 46 was discussed in the Committee III and then referred to the Working Group at the first session of the Conference. During the first session, several delegates sought to amend the ICRC draft. In the discussions of Article 46(1), some delegations in Committee III called for an interpretation of 'methods intended to spread terror'. The issue of 'propaganda' was also raised. In addition, use of term 'intended to' gave rise to debate. Some delegations were of the opinion that 'the substantive element of intent would be too difficult to determine and that methods that in fact spread terror

[410] *Official Records,* vol. XIV, p. 7

should be prohibited'.[411] Other delegations focused on the problem of imposing responsibility for acts that might cause terror without terror having been intended.[412]

Addressing the importance of protecting the civilian population from threats of terror, the Byelorussian Soviet Socialist Republic stated:

> Also, very important from the standpoint of increasing the protection afforded to the civilian population is the provision in Article 46 concerning the prohibition of the use of force or threat of the use of force for the purpose of intimidating the civilian population. Intimidating peaceful citizens and 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 at whatever price. To us as representatives of the Bylorussian Soviet Socialist Republic, which during the Second World War made terrible sacrifices, losing 2.2 million lives, or one in four of the population, this is particularly familiar. Accordingly, we energetically support the development of rules of humanitarian law designed to give the civilian population greater protection and, in particular, those rules contained in Article 46. [413]

The Ukrainian delegate asserted that the prohibition of spreading terror among the civilian population was in line with generally recognized rules of international law that parties to armed conflict shall not make the civilian population an object of attack: 'Article 46 widens the scope of protection for the civilian population and individual civilians, who under no circumstances shall be the object of attack'.[414] The representative of Vietnam stated that the methods of warfare used in South Vietnam were primarily intended to terrorize and massacre the civilian population. He argued that such a form of combat was proscribed by the Geneva Conventions, and was justified by the aggressor in terms of an ideology completely alien to the traditions of individual liberty of the people of Vietnam.[415]

Paragraph 4 of the draft amendment proposed by Romania stated that 'Reprisals against the civilian population or civilians and methods intended to spread terror among the civilian population are prohibited'.[416] When introducing the amendment, Mr. Cretu from the Romanian delegation stated that it was designed to ensure greater protection of the civilian population.[417] Another amendment, submitted jointly by Brazil, Canada, Federal Republic of

[411] *Official Records*, vol. XV, CDDH/50/Rev.l, p. 241
[412] *Official Records*, vol. XV, CDDH/50/Rev.l, p. 241
[413]*Official Records*, vol.VI, CDDH/.41 p. 177
[414] *Official Records*, vol.VI, CDDH/.41 p. 201
[415] *Official Records*, vol.V, CDDH/.19. p. 197
[416] *Official Records*, vol. III, CDDH/III/I0 p. 201
[417]*Official Records*, vol XIV, CDDH/III/SR.7, p. 57

Germany, Nicaragua, suggested the substitution of the word 'method' for the word 'attacks'.[418] Mr Texeira Starling, speaking on behalf of Brazil, said that the proposal had been made in the interests of consistency and precision of language.[419] Introducing amendment CDDH/III/27, the representative of the Federal Republic of Germany stated that 'while article 46 of draft Protocol I as well as article 26 of draft Protocol II, as drafted by the ICRC, should be adopted in substance, the intention of the amendment was to make the provisions of article 46 clear and applicable for the serving soldier'.[420] This proposal was also supported by the Soviet Union on the basis that 'they would make the text more comprehensive'. [421] Mr Thomsen from Denmark expressed support for this proposal,[422] and the representative of Ghana Mr Crabbe stated that they were also ready to work out an agreed text on this amendment.[423] Mr. Cameron from the Australian delegation stated that 'The efficacy of the proposal to replace the word 'methods' in paragraph 1 by the word 'attacks' would depend entirely on the definition to be given to the word 'attack'. Reference to neither term could adequately limit what some regarded as permissible and others as reprehensible'.[424] He further mentioned that 'in determining the final form of article 46, the fundamental principles of criminal law should be kept in mind and the provisions of the article should be precise and clear'.[425]

On the other hand, the delegation of Finland preferred the word 'methods' used in the ICRC text to the word 'attacks'. They believed that the ICRC text struck a reasonable balance between the protection of the civilian population and military interests.[426] Expressing its approval for document CDDH/III/27, the US delegate Mr. Aldrich said that 'attacks on the civilian population intended to spread terror should be prohibited'. He also mentioned that 'Article 46 was important for giving, general guidance to military commanders in the conduct of their operations'. Mr. Aldrich stated that 'The amendments in document CDD/III/27 set out the maximum protection that could be provided'.[427] Mr. Fleming (Poland) expressed disagreement with this proposal stating that: 'The proposal in document CDDH/III/27 to substitute the word 'attacks' for 'methods' in paragraph 1 was not acceptable to his delegation,

[418] *Official Records*, vol. III, CDDH/III/27, P201
[419] *Official Records*, vol XIV, CDDH/III/SR.7, p. 54
[420] *Official Records*, vol XIV, CDDH/III/SR.7, p. 51
[421] *Official Records*, vol XIV, CDDH/III/SR.7, p. 56
[422] *Official Records*, vol XIV, CDDH/III/SR.7, p. 55
[423] *Official Records*, vol XIV, CDDH/III/SR.7, p. 53
[424] *Official Records*, vol XIV, CDDH/III/SR.8, p. 62
[425] *Official Records*, vol XIV, CDDH/III/SR.8, p. 62,
[426] *Official Records*, vol XIV, CDDH/III/SR.8, p. 66
[427] *Official Records*, vol XIV, CDDH/III/SR.8, p. 67

which held the view that certain methods designed to spread terror, including acts of psychological warfare, should be prohibited. The ICRC text was acceptable, subject perhaps to certain drafting improvements'.[428]

An amendment proposed by Ghana stated: 'In paragraph 1 after the word 'methods' insert the words 'including propaganda in whatever form'.[429] Mr Crabbe from Ghana stated that the main purpose of this amendment was to prevent the use of propaganda as a means of spreading terror among the civilian population. However, since submitting the amendment his delegation had consulted the delegations of Nigeria, Uganda and Tanzania, and it had been agreed that the provision should cover not only propaganda, but all acts calculated to spread terror among the civilian population. Hence, they supported the amendment proposed in document CDDH/III/38.[430] Ghana, Nigeria, Uganda, United Tanzania submitted that: 'In paragraph 1, after the words "In particular" at the beginning of the second sentence, delete the words "methods intended to spread" and substitute the words "acts capable of spreading".'[431] Mr Ajayi (Nigeria) remarked that the purpose of the amendment was to improve the ICRC text so that the rule could be interpreted as widely as possible.[432] Mr. Ogola (Uganda) stated the object of this Amendment was to 'obtain recognition of the role of propaganda in spreading terror'.[433] This amendment also received support from the delegation of Norway.[434] The Finnish delegation was of the opinion that it would not be appropriate to deal with the question of propaganda in draft Additional Protocol I.[435] The American delegation expressed its disapproval of the prohibition of the free flow of information: 'The task of the Conference was not to prevent the consequences of war, but to moderate them as much as possible. The rules should be capable of acceptance by Governments and of practical application'.[436]

Some nations suggested broader protection for civilians and to prohibit all attacks which were capable of spreading terror. Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Kuwait, Libyan Arab Republic, Morocco, Sudan, Syrian Arab Republic, United Arab Emirates

[428] *Official Records*, vol XIV, CDDH/III/SR.8, p. 61
[429] *Official Records*, Vol 3, CDDH/III/28, p. 202
[430] *Official Records*, vol XIV, CDDH/III/SR.7, p. 52
[431] *Official Records* Vol 3, CDDH/III/38, p. 203
[432] Official Records, vol XIV, CDDH/III/SR.7, p. 58
[433] *Official Records*, vol XIV, CDDH/III/SR.8, p. 61
[434] *Official Records*, Vol XIV, CDDH/III/SR.8 p. 59
[435] *Official Records*, Vol XIV, CDDH/III/SR.8, p. 66
[436] *Official Records*, Vol XIV, CDDH/III/SR.8, p. 67

suggested to delete the words 'intended to' and replace them with the word 'that'.[437] Mauritanian delegation supported and wished to co-sponsor this amendment on the condition that the word 'methods' was replaced by the word 'acts', as it wished for a more objective term to be used.[438] The Philippines recommended paragraph 1 be redrafted as follows: 'It is prohibited to attack, or commit acts capable of spreading terror amongst the civilian population and individual civilians'.[439] This amendment was also supported by Mexico.[440] Speaking on behalf of Iraq, Mr. Al-Adhami criticised the idea of intention as drafted by the ICRC as subjective and vague. He suggested replacing the words 'intended to spread terror' by the words 'which spread terror'.[441]

Indonesian delegate Mr. Tranggono stated:

> [H]is delegation believed that attack on the civilian population and the spreading of terror should be given almost the same emphasis, and the words 'in particular' were therefore unnecessary. Moreover, the words 'methods intended' were not sufficiently specific and a clearer formulation was needed. The second sentence of paragraph 1 should be amended to read 'The spreading of terror among the civilian Population is prohibited.[442]

Mr. El Ibrashy of the Egypt delegation asserted that it was difficult to establish intention so the words 'intended to' should be replaced by some other expression.[443] Addressing the question of air warfare, Mr. Blix of Swedish delegation stated:

> [T]he history and literature of air warfare since the First world war presented much evidence which tended to show that terror raids and area bombardments had limited military value, while causing enormous losses in civilian lives and civilian objects. That should make it possible for the Conference to adopt rules along the line proposed in article 46, which his delegation could support either in the form submitted by the ICRC, or in an improved form which would give even more protection. With regard to paragraph 1, his delegation agreed with the view that intent was difficult to prove. On the other hand, the alternative suggested by the delegation of the Soviet Union, namely, 'acts capable of spreading terror', covered a very broad category indeed. Perhaps the Working Group could find a compromised solution such as, for example, 'acts likely to spread terror'.[444]

[437] *Official Records*, Vol 3, CDDH/III/48/Rev.1, p. 205
[438] *Official Records*, Vol XIV, CDDH/III/SR.8, p. 62
[439] *Official Records*, Vol 3, CDDH/III/51, p206
[440] *Official Records*, Vol XIV, CDDH/III/SR.8, p. 63
[441] *Official Records*, Vol XIV, CDDH/III/SR.7, p. 54
[442] *Official Records*, Vol XIV, CDDH/III/SR.7, p. 55
[443] *Official Records*, Vol XIV, CDDH/III/SR.7, p. 56
[444] *Official Records*, vol XIV, CDDH/III/SR.8, p. 60

Mr. Ahmadi of the Iranian delegation raised an important issue. He stated that 'although objections had been raised to the phrase 'methods intended to spread terror' in paragraph I, methods of war undoubtedly did spread terror among the civilian population, and those used exclusively or mainly for that purpose should be prohibited'. He preferred ICRC text over the amendment proposed in document CDDH//III/38.[445]

Sir David Hughes-Morgan of the United Kingdom recognised that Article 46 was of the highest importance and so required very precise wording. He asserted that the use of qualifying adjectives such as 'general and effective' and expressions such as 'under any circumstances', would weaken an absolute prohibition and for this reason he did not approve the Romanian amendment to paragraph 1. Moreover, his delegation was opposed to the amendments in CDDH/III/38 and CDDH/III/51, which referred to 'acts capable of spreading terror' without limiting the form such acts might take. However, he preferred the word 'attacks' suggested in document CDDH/III/27 to the word 'methods' proposed by the ICRC.[446] The view of UK delegation was also shared by the delegation of the Netherland.

Mr. Girard of France stated that 'in traditional wars attacks could not fail to spread terror among the civilian population: what should be prohibited in paragraph 1 was the intention to do so'.[447] Mr. Dixit of India said:

> [I]n his delegation's opinion, the prohibition of spreading terror among the civilian population should also extend to psychological or propaganda warfare. Since that point had not been covered in the ICRC commentary, it must be provided for explicitly in article 46 itself. The method of spreading such terror was of secondary importance. His delegation was in general agreement with the amendment in document CDDH/III/38.[448]

By the end of the first session of the Conference Article 46 was still under the consideration of the working group. After prolonged discussions in the working group, a text was drafted.[449] Paragraph 1 reproduced in its first sentence the same text as paragraph 1 of the ICRC draft. Committee III arrived at a consensus that the prohibition should be limited to intentional conduct specifically directed toward the spreading of terror and that it should exclude terror

[445] *Official Records*, vol XIV, CDDH/III/SR.8, p. 64
[446] *Official Records*, vol XIV, CDDH/III/SR.8, p. 66
[447] *Official Records*, vol XIV, CDDH/III/SR.8, p. 65
[448] *Official Records*, Vol XIV, CDDH/III/SR.8, p. 67
[449] *Official Records*, Vol. XV, CDDH/215/Rev.l, p. 273

which is merely an incidental effect of attacks 'which have another primary object and are in all other respects lawful'.[450] It stated:

> The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection; the following rules in addition to other applicable rules of international law shall be observed in all circumstances:
>
> 1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.[451]

On the basis of texts recommended by the Working Group, Paragraph 1 was adopted by consensus along with other paragraphs at the twenty-fourth meeting of the Committee on 25 February 1975.[452]

The content of Paragraph 1 may be taken as a reaffirmation of existing customary law, which was thrown into doubt during the period between the two world wars when some air power theorists advocated that the terrorizing civilian populations through aerial bombing would be the way to victory in future wars.[453] However, it went beyond the existing law in several ways. For example, 'it ends the ancient rule that allows bombardment of civilian areas of a city to terrorize people into forcing a defending commander to surrender'.[454] The original ICRC draft of article 46 prohibited methods intended to spread terror among the civilian population and it was discussed to replace the words 'methods' with 'attacks on the civilian population' however this would still have allowed terror produced by leaflets, newscasts, and many other traditional means of conducting psychological operations. The original ICRC draft of article 46 prohibited 'methods intended to spread terror among the civilian population'. Committee III replaced this by the phrase 'acts or threats of violence which have the primary object of spreading terror'. If there was no prohibition of threats of violence the terror prohibition under draft of article 46 would still have allowed 'terror produced by leaflets, newscasts, and many other traditional means of conducting psychological operations'.[455]

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[450] *Official Records*, Vol. XV, CDDH/215/Rev.l, p. 274
[451] *Official Records*, Vol. XV, CDDH/215/Rev.l, p. 304
[452] *Official Records*, Vol. XV, CDDH/215/Rev.l, p. 275
[453] Captain Burrus M. Carnahan, Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry, (1976)18 *Air Force Law Review* 32, 38
[454] *Ibid.*
[455] *Ibid.*, p. 39

In discussing the substitution of the phrase 'have the primary object of' for 'intended' by the Committee III delegates, Captain Burrus Carahan observed that:

> This change suggests that, under the Protocol, an attacker may still consider the possible impact on civilian morale when he decides to attack a lawful military target. If the primary object of the attack is to destroy a legitimate military objective, then he may consider the lowering of civilian morale as a secondary objective. However, recognition of the attackers' right in this regard does not represent an important change because an attacking force must also respect the limitations of Article 50. Included in these limitations is the rule that the attacker should select the target that presents the least danger to the civilians when destruction of any one of several possible targets would offer the same military advantage. Similarly, the Protocol would allow an attacker to threaten the enemy's civilian population with direct attack if the primary objective is to accomplish something besides the creation of terror, such as the diversion of defensive resources. Thus, during World War II, Germany succeeded in diverting significant elements of Allied air power by building V-I missile sites in France and Belgium. Even with the implied threat to the civilian population of London, the Protocol would have permitted the building of these sites for the primary purpose of causing the diversion. Of course, it would have prohibited the actual launching of the missiles after the sites had been completed.[456]

From the protracted discussion of Article 46 in the Working Group, the Rapporteur mentioned the issues raised by the delegates in the introductory paragraph phrase, 'To give effect to this protection'. It was argued that there were also other rules in this Protocol and in instruments which helped give effect to the protection and this phrase could possibly result in restriction of the protections to military operations. However, finally it was concluded that the phrase was satisfactory since it stated clearly that there are other relevant rules of law and that these rules must be respected in all situations and in all types of operations by regular and irregular forces alike, in the time of an armed conflict[457]

The final text of article 46, paragraph 1, as adopted by Committee III during the fourth session (Geneva, 17 March -10 June 1977) used the words 'primary purpose'. It stated: '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'. Article 46 was adopted by consensus at the fifty-ninth meeting of the Diplomatic Conference, on 10 May 1977.[458]

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[456] *Ibid.*, p. 32, 39 and 40
[457] *Official Records*, vol. XV, CDDH/III/224/Rev.l, p. 329
[458] *Official Records*, vol. XV, CDDH/407 /Rev.l, p. 482

Various amendments were submitted with regard to the ICRC text of article 26 of draft Additional Protocol II.[459] The debate about article 26 in the Committee was similar to that of article 46 of draft Additional Protocol I. However, some delegations were of the opinion that parts of the article were not suitable for non-international conflict and that there was a need to make it simple in order to make the Protocol more practical.[460] The Norwegian delegate believed that the adoption of identical texts for article 46 of draft Protocol I and article 26 of draft Protocol II would avoid differences of interpretation.[461] Several states reserved the comments about article 26 until the scope of the Additional Protocol II was decided.[462]

The introductory paragraph of Article 26 is identical to its counterpart provision in article 46 of Protocol I. The words 'in addition to other applicable rules of international law' were deleted from the introductory paragraph as article 3 common to the four Geneva Conventions of 1949 did not contain any provision pertinent to the subject matter of this provision of draft Protocol.[463] The language of paragraphs 1 and 2 is the same as that of paragraphs 1 and 2 of article 46 of draft Protocol I. Paragraph 1 was adopted by consensus. Charles L. Cantrel notes that:

> Article 26(1) attempts to eliminate the guerrillas' most advantageous weapon-terrorism. While traditional guerrilla strategies direct terrorism only toward military-industrial targets and encourage assassinations of leaders of opposing forces, practice has shown that guerrillas seldom limit their activities to these. Furthermore, governments have shown an inclination to use terrorism when it has served their purposes. Rather than being limited to kidnapping and assassination, the prevalent governmental terrorist tactics include torture, summary executions and annihilation of suspected guerrilla hide-outs in inhabited villages or towns'. Probably the majority of internal armed conflicts in the future will involve heavy guerrilla warfare. The notion that an insurgent guerrilla force will maintain and exercise effective control of an area of territory as required by article 1(1) is inconsistent with the basic tactics of quick attack and retreat that are central to the guerrillas' strategy.[464]

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[459] Romania: CDDH/III/l2 ,Ghana: CDDH/III/28 , Canada: CDDH/III/36 ,Australia: CDDH/III/42 ,Sweden: CDDH/III/45 , Algeria, Arab Republic of Egypt, Democratic Yemen, Iraq, Libyan Arab Republic, Mali, Mauritania, Morocco, Kuwait, Sudan, Syrian Arab Republic, United Arab Emirates: CDDH/III/4A/Rev.l and Ad.l and 2 Philippines~ CDDH/III/5l , Brazil: CDDH/III/68 , German Democratic Republic: CDDH/III/88

[460] *Official Records*, vol. XV, CDDH/50/Rev.l, p. 245

[461] *Official Records*, vol XIV, CDDH/III/SR.9, p. 72

[462] *Official Records*, vol XIV, CDDH/III/SR.8, p. 63, 65

[463] *Official Records*, vol XIV, CDDH/III/SR.30, p. 291

[464] Charles L. Cantrel, 'Civilian Protection in Internal Armed Conflicts: The Second Diplomatic Conference' (1976) 11 *The Texas International Law Journal* 305, 316

Article 26 was adopted by Committee III at the second and fourth sessions and by the Conference as a whole at the fifty-second plenary meeting on 6 June 1977.[465] In the final form of Additional Protocol I, Article 46 became Article 51. In Additional Protocol II, Article 26 became Article 13.

The two Additional Protocols successfully codified fundamental values of civilian protection, including the prohibition of spreading terror among civilians during armed conflict. In order to add more clarity for the purpose of practical application and enforcement, it is important to define the scope, function and limitations of these provisions. The following section will inspect the terror related provisions of the Additional Protocols to clarify the conditions and scope of their applicability.

2.7 Article 51(2) of Additional Protocol I and Article 13(2) of the Additional Protocol II: Conditions Determining Applicability

This section spells out the contents of Article 51(2) of the Additional Protocol I and Article 13(2) of the Additional Protocol II in order to study the scope of these provisions, informed by the ICRC commentary on the Additional Protocols. Article 51(2) contains a rule drawn up specifically for the protection of the civilian population against the direct effects of military operations and other acts of hostility. The offence of spreading terror among the civilian population in the context of international armed conflict is contained in article 51(2). Article 13(2) 0f the Additional Protocol II contains a similar provision for non-international armed conflict. Before going into the details of this offence, it is necessary to briefly mentions the conditions under which this rule would apply. Articles 2 and 3 common to the 1949 Geneva Conventions are the provisions that determine the applicability of international humanitarian law depending on the existence of an armed conflict. However, the applicability of law has been further developed by the two additional protocols and international case law.

The applicability of international humanitarian law is prompted by the existence of an armed conflict, the presence of which can be determined only on a case to case bases by assessing the facts on the ground. An international armed conflict occurs when one or more States have recourse to armed force against another State, irrespective of the causes or the intensity of this

[465] *Official Records*, Vol XIV, CDDH/III/SR.9, p. 75

conflict.[466] Rules of international humanitarian law may apply even if there are no actual hostilities. A formal declaration of war or recognition of the situation is not required. According to the commentary of Jean Pictet on the Geneva Conventions 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place'.[467] Additional Protocol I extended the definition of international armed conflict to the conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.[468] Secondly, the provision will apply to the armed forces belonging to States which have ratified them. According to Common article 2, paragraph 3, a non-party may also be bound by and obtain the benefits of the Fourth Geneva Convention and Additional Protocol I by making a declaration accepting their application and abiding by their provisions.[469]

Article 51(2) does not define the content of the term 'terror' however the wording indicates that it only means violent acts.[470] Terror includes 'indiscriminate bombardment, attacks against the civilian population or civilian objects, persecutions, acts of violence designed to spread terror among the population, acts of terrorism, pillage, rape, arbitrary arrests and extrajudicial executions, hostage taking and enforced disappearances, and ethnic cleansing that forcibly displaces the civilian population'. [471] Some other practices which can spread terror among the civilians include sexual violence, massacres, harassment, expulsion, forced transfer and looting, and the deliberate denial of access to water, food and health care.[472]

A lawful military attack does not constitute the offence of spreading terror. Under Article 51 of Additional Protocol I, a lawful act of warfare will normally be an attack against a military

466 Jean S. Pictet (ed.), *Commentary IV Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 20.; *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ICTY Case No. IT-94-1-AR72, para. p. 70

467 Jean S. Pictet (ed.), *Commentary IV Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 20.

468Article 1(4) of Additional Protocol I; Anthony Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law*, (Cambridge: Cambridge University Press, 2010), p. 64.

469 Jean S. Pictet (ed.), *Commentary IV Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 23.; (2016 ICRC Commentary Para 195)

470 Marja Letho, '*Indirect Responsibility for Terrorist Acts'* (Brill Nijhoff, 2009), p. 82.

471 Francoise Bouchet-Sauliner, The practical Guide to humanitarian law, (USA. Rowman and Littlefield publishers, INC), p. 653.

472 Marco Sassóli, Antoine A. Bouvier (eds.), *How Does Law Protect in War*; vol. I (2nd ed.; Geneva: ICRC, 2006), p. 358.

objective offering a definite military advantage without causing damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. Attacks the primary purpose of which is to spread terror among the civilian population cannot be a lawful attack because of the absence of legitimate military target or advantage. However, the prohibition could still apply to an unlawful attack directed towards a military objective, i.e. an attack which indiscriminately, disproportionably or intentionally harmed civilians, committed with the primary purpose of spreading terror. The rule would apply as long as the attack not the incidental to the creation of terror but was conducted with the primary purpose of spreading terror .

Kalshoven raised the question whether the attacks against military objectives with the primary purpose of spreading terror will be considered unlawful.[473] He states:

> It seems clear that without an indication to the contrary, those attacks will normally be regarded as having served first and foremost, if not exclusively, the definite military purpose of gaining a distinct military advantage. In this respect, they are the exact opposite of attacks on the civilian population. While the latter may in fact have been conceived by their perpetrators as serving a military purpose, they will normally be regarded as primarily designed to spread terror among the civilian population.[474]

Terror is often used to destroy morale of the civilian population and to prevent resistance. It is also used in cases of asymmetric warfare where direct military confrontation between parties is difficult. Terror is used by both Armed forces of government and non-state armed groups. Human Rights watch has stated that Article 51 of Additional Protocol I:

> Also prohibits bombing to attack civilian morale. Although technically there may be a distinction between morale and terror bombing, they are in practice treated the same. It has often been observed that what is morale bombing to the attacking force is terror bombing to the civilians who are targeted. Attacks intended primarily to induce the civilian population to rebellion or to overthrow its leadership would be examples of unlawful attacks.[475]

Article 51(2) not only prohibits large scale, long distance bombing, it includes small scale terror acts such as, small scale terrorist attack on the inhabitant of a village or house carried out by a

[473] Frits Kalshoven, 'Guerrilla' and 'Terrorism' in Internal Armed Conflict' *American University Law Review* (1983) 33 67 ,74.
[474] *Ibid.*, at p. 33, 67, 78
[475] Needless deaths in the Gulf War: *Civilians Causalities During the Air Campaign and Violations of The Laws of War* (Human Rights Watch 1993), p. 32.

band of guerrilla fighters.[476] The prohibition of terror can also apply to cyber-attacks against civilian with the aim of terrorising them. However, if such an attack is not intentionally directed against civilians then it may under certain circumstance be justified as international humanitarian law does not prohibit the incidental suffering of the civilians. The terror provisions of the additional protocols take into account the nature of modern warfare and are broad enough to include different forms of acts or threats which can potentially spread. The provisions are also well balanced as they do not infringe the principle of military necessity. If the rules incorporated in the provisions are respected, they can provide great protection and relief to the civilian population during an armed conflict.

Arnold K. Amet states that 'the application of the provisions is a function of the intention or objective of the military in carrying out the supposedly terrorist acts in question and is independent of the consequences of the acts on the civilian population'. [477] Acts that are objectively assessed to possess the primary purpose of spreading terror are considered to be prohibited. The creation of terror does not prove that terror was the primary purpose of an attack; it can only be established by examining the facts and evidence.[478] Aerial bombardments against military targets, destroying military objectives and destroying civilian morale, for instance, the bombing campaign of the US against Iraq in 2003, are not considered illegal as they were not executed with the primary purpose of spreading terror.[479] Moreover, the prohibitions set forth in Article 51 cannot be avoided by way of reprisals. Reprisals against the civilian population presuppose some form of unlawful conduct of the opponent, of which they are a reaction. Kalshoven states that 'while "acts of violence the primary purpose of which is to spread terror among the civilian population" need not be reprisals, 'attacks against civilian population by way of reprisals' will always be acts of terror'.[480]

The prohibition of terror in the Additional Protocols is broader than the previous instruments banning the use of terror; it applies to different types of attacks such as 'land, aerial or naval bombardment, the launching of missiles, mortar fire or snipping'.[481] Moreover, the prohibition

[476] Frits Kalshoven, *Reflections on the Law of War. Collected Essays* (Martinus Nijhoff Publishers, 2007), p. 217
[477]Sir Arnold K. Amet, 'Terrorism and International Law: Cure the Underlying Problem, Not Just the Symptom' *Annual Survey of International & Comparative Law* 19 (2013), p. 9
[478] Frits Kalshoven, *Reflections on the Law of War. Collected Essays* (Martinus Nijhoff Publishers, 2007), p. 445.
[479] Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press, 2016), p. 146.; Jan Wouters, Philip De Man, Nele Virlenden, *Armed Conflict and the Law*, (Intersentia Ltd, 2016), p. 279
[480] Frits Kalshoven, *Reflections on the Law of War. Collected Essays* (Martinus Nijhoff Publishers, 2007), p. 217.
[481] *Ibid.*, p. 444.

of threats of violence can be interpreted as threats of attacks. The element of threat is rarely used in the provisions of Additional Protocol I (apart from Article 51(2) and the preamble, it only features in Article 40 and Article 75(2)(e)) In all these provisions, 'the threat signifies a communication to the adverse party and emphasizes the psychological impact that such a declaration may have - and may be intended to have - on the morale of the enemy and, in case of Article 51(2) specifically on (part of) its civilian population'.[482] Warning of an impending attack can also create terror among the civilian population. Hence the question arises if such warning and the resulting terror could count as a threat.[483] However, it can be argued the warning of an attack against a military objective may not possess the primary purpose of creating terror among civilians. Waldemar Solf argues that article 51(2) 'prohibits only actual or threatened attacks directed against the civilian population'. As the requirement of advance warning is to avoid 'possible collateral damage resulting from Attacks directed against military objectives, there is no inconsistency between the two provisions'.[484]

According to Arnold K. Amet, unprivileged combatants actively engaged in armed conflict cannot benefit from the protection provided by article 51(2).[485] Terrorist acts perpetrated in the course of hostilities may be directed against combatants and use certain forms of violence which may be acceptable in the context of armed conflict but would be categorised as terrorist acts outside the context of an armed conflict.[486] Gasser notes that 'attacks against other objects for the purpose of spreading terror among civilians are prohibited by special rules'.[487] For instance, Article 56 of Protocol I prohibits attacks against works or installations containing dangerous forces (such as dams, dykes and nuclear plants) and Article 53 protects cultural objects and places of worship.

According to ICRC commentary on Article 51(2), 'it explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general

[482] *Ibid.*
[483] Article 57(2c) of Additional Protocol I
[484] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Hague: Martinus Nijhoff, 1982), p. 300,301.
[485] Sir Arnold K. Amet, 'Terrorism and International Law: Cure the Underlying Problem, Not Just the Symptom' Annual Survey of International & Comparative Law 19 (2013) p. 8
[486] Manuel Pérez-González, Combating Terrorism: An International Humanitarian Law Perspective in Fernández-Sánchez, Pablo Antonio, ed. *International legal dimension of terrorism*. (Brill, 2009), p. 263.
[487] Hans- Peter Gasser, 'Prohibition of Terrorist Acts in International Humanitarian law' (1986) 26 *International Review of Red Cross* 200, 205

protection against danger arising from hostilities'.[488] In the first sentence, Article 51(2) codifies 'for the first time the fundamental customary principle of international law applicable in armed conflict that the civilian population and individual civilians shall not be the object of attack'.[489] In this context, Emily Crawford considers it a more 'specific rule on targeting'.[490]

The offence of terror is also based on the principle of distinction between military objectives and civilian objectives, as the acts or threats of violence which affect the civilian population are prohibited. Even though there is an absolute prohibition on the intentional use of terror against civilians, use of terror against combatants and incidental causation of terror among the civilian population are not prohibited. As Sibastien Jodoin states, 'the prohibitions on terrorism fall within the classical understanding of the main purpose of the international humanitarian law: the mitigation of the suffering caused by the conduct of armed conflict without eliminating the abilities of the parties to secure victory in this conflict'.[491]

The rule prohibiting the spreading of terror among civilians has a strong base in customary international law.[492] It is applicable to all situations of international armed conflict (including situations of occupation); situations of 'armed conflict not of an international character'; and in armed conflicts between 'armed forces [of a High Contracting State] and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Additional Protocol II]'.[493] Although the prohibition on spreading terror is also covered by the general prohibition on attacking the civilian population, Gasser notes that 'the subjective factor of intent to spread terror among the civilian population is always an indispensable element'.[494] Furthermore, the provision indicates to the drafter 'the

[488]ICRC Commentary AP I, para. 1923
[489] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Hague: Martinus Nijhoff, 1982), p. 299.
[490] Emily Crawford and Alison Pert, International Humanitarian Law (Cambridge: Cambridge University Press, 2015), p.142.
[491] Sibastien Jodoin, 'Terrorism as a War Crime' (2007)7 *International Criminal Law Review* 77, 97
[492] Manuel Pérez-González, Combating Terrorism: An International Humanitarian Law Perspective in Fernández-Sánchez, Pablo Antonio (eds.) *International legal dimension of terrorism*. (Brill, 2009), p. 254, 261.
[493] Toni Pfanner, Scope of Application, Perpetrators of Terror, And International Humanitarian Law in Fernández-Sánchez, Pablo Antonio, ed. *International legal dimension of terrorism*. Brill, 2009. pp. 258 and 275, 278.
[494] Hans- Peter Gasser, 'Prohibition of Terrorist Acts in International Humanitarian law' (1986) 26 *International Review of Red Cross* 200, 205

specific intention to spread terror was even more crucial than the level of fear actually inspired'.[495]

It may sometimes be challenging to prove whether a specific act of violence had a primary purpose of spreading terror. If the attacker proclaims that the purpose of the attack was to spread terror among civilians, but the attack was actually against a lawful military objective, such attack would not violate article 13(2) of Additional Protocol II unless the other elements of the offence were fulfilled.

Kalshoven notes that:

> Once again, without an express statement to that effect on the part of its perpetrators, the chance that an act would be recognized as an act designed to spread terror seems extremely remote. On the other hand, it is not clear why the propagandistic exploitation of an otherwise irreproachable act of warfare as an element of psychological warfare would be so reprehensible as to make an otherwise lawful act unlawful.[496]

In the presence of multiple purposes, it is crucial to establish the primary purpose of the attack in order to apply the rule contained in Article 51(2). The protection from terror granted to the civilian population rests on whether or not an act is primarily intended to terrorize civilians. If a combatant carries out a military action close to the neighbourhood of a civilian population, with a purpose other than to terrorize the civilians, the provisions of Article 51(2) will not be breached. The aim of the provision seems to be not only prohibiting terror caused by an act but an act against civilian population for the specific purpose of producing this effect (creating terror).[497] It implies that even if terror is not caused as a result of an attack the offender can be punished for his intention in carrying out that attack.

The introductory paragraph of article 51 confirms the principle of the general protection of civilians against dangers arising from military operations.[498] The dictionary meaning of 'military operations', also mentioned in the ICRC commentary, refers to 'all the movements and activities carried out by armed forces related to hostilities'. At the Diplomatic Conference, the term 'zone of military operations' was defined as: 'in an armed conflict, the territory where

[495] Frits Kalshoven, *Reflections on the Law of War. Collected Essays* (Martinus Nijhoff Publishers, 2007), p. 445.
[496] Frits Kalshoven, 'Guerrilla' and 'Terrorism' in Internal Armed Conflict' (1983) 33 *American University Law Review* 67,80
[497] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Hague: Martinus Nijhoff, 1982), p.300,301.
[498]ICRC Commentary AP I, para. 1935

the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located'.[499]

Stefan Oeter states:

> The prohibition against attacks on civilian persons and on the civilian population as such (the principle of non-combatant immunity) is the logical consequence of the fundamental principle of limited warfare and of the rule ensuing from this basic foundation, namely the principle of distinction between military objectives and the civilian population. Since only attacks on military objectives are admissible under the rule of military necessity, it is clear that neither the civilian population nor individual civilians can ever be permissible objects of attack. As a fundamental maxim of customary international law, this rule has been undisputed for decades; Article 51, para. 2, AP I is therefore a reaffirmation of established principles of customary law.[500]

The second sentence of article 51 refers to the 'other applicable rules of international law'. According to the ICRC commentary, these include other relevant provisions of the Protocol, and rules of customary international law which are mainly reflected in the Hague Regulations annexed to Hague Convention IV of 1907 and the Fourth Geneva Convention of 1949. The ICRC commentary states that the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, as well as the Hague Convention of 1954 for the Protection of Cultural Property can have a beneficial impact on the fate of the civilian population during an armed conflict.[501] The Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons also includes corresponding provisions with regard to the civilian population.[502]

The first sentence of Paragraph 2 of Article 51 sets out the basic principle of protection of civilians: 'Civilian population as such, as well as individual civilians, shall not be the object of attack'. The ICRC Commentary states 'By using the words 'directed' and 'as such', it emphasizes that the population must never be used as a target or as a tactical objective'.[503] It is pertinent to mention that 'attacks' have been defined under Article 49 of the Additional Protocol I: 'Attacks means acts of violence against the adversary, whether in offence or in

[499] ICRC Commentary AP I, para. 1936
[500] Stefan Oeter, Methods and Means of Combat in Dieter Fleck (eds.) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 2013), p. 187.
[501] ICRC Commentary AP I, para. 1937
[502] ICRC Commentary AP I, para. 1937
[503] ICRC Commentary AP I, para. 1938

defence'.[504] The term 'attacks in offence or in defence' is used to dispel the confusion between aggression and attack. The term 'Attacks' 'does not cover only acts by those who have initiated the offensive; it is a technical term relating to a specific military operation limited in time and place'.[505]

The general prohibition in the first sentence is then supplemented by the second sentence of the paragraph, 'acts of threats of violence the primary purpose of which is to spread terror among the civilian population'. Acts of violence during war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. Often the attacks on armed forces are deliberately conducted in a brutal manner in order to intimidate the enemy to surrender.[506] However, this provision does not relate to these kind of acts. The ICRC Commentary explains: 'This rule is aimed at those acts which have as their primary objective spreading terror among the civilian population, without offering substantial military advantage'.[507] Causing terror among the civilian population is not prohibited as such. The prohibition concerns the use of measures that are executed with the primary intention of spreading terror. According to Oeter,

> An attack solely designed to spread terror among the civilian population constitutes a special case of unlawful attack on the civilian population. The bombardment of the civilian population or of civilian objects in such cases is deliberately intended to intimidate the adversary and the enemy civilian population. Although it constitutes a blatant violation of fundamental humanitarian law, which undoubtedly falls within the category of 'grave breaches' which should be sanctioned as war crimes, this particularly barbarian variant of 'total' warfare is unfortunately used regularly by military actors in practice.[508]

It is worth mentioning here that attacks against the civilian population resulting in death or serious injury to body or health are considered grave breaches under Article 85 of Additional Protocol I.[509] It is significant that not only acts of violence but also threats of such acts are prohibited as means of intentionally spreading terror among the civilian population. Threats of violence can take different forms such as verbal intimidation or media campaigns. Such a prohibition would cover proclamations made in the past threatening the annihilation of civilian

[504] 1977 (Additional Protocol I, Article 49(1).
[505] ICRC Commentary AP II, para. 4783
[506]ICRC Commentary AP I, para. 1940
[507] Sandoz et al (eds.), n.195, para 1940(1977) Protocol I, Art 51(2)
[508] Stefan Oeter, Methods and Means of Combat in Dieter Fleck (eds.) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 2013), p. 188.
[509] ICRC Commentary AP I, para. 1941

populations.[510] However, the subjective nature of operative element of intent may provide a source for 'propaganda allegations that warnings of impending attacks against military objectives intended to provide civilians with an opportunity to evacuate the vicinity of military objectives to take shelter were in fact threats intended to induce terror'.[511] Propaganda can also be used to induce terror among the civilians. It is possible in some situations it may constitute 'acts or threats of violence' with the purpose of spreading terror.[512]

As for the characterisation of the civilian population, Additional Protocol I adopted a negative definition of civilian, i.e. 'the civilian population is made up of persons who are not members of the armed forces'.[513] According to Article 50 of Additional Protocol I:

> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[514]
> 2.The civilian population comprises all persons who are civilians.
> 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[515]

A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.[516] The Commentary to Additional Protocol I further clarifies that persons who have not committed hostile acts, shall be considered to be a civilian for as long as there is a doubt as to

[510] ICRC Commentary AP I, para. 1940
[511] Bothe, Michael, Karl Josef Partsch and Waldemar A. Solf, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 1982), p. 301.
[512] Michael Kearney, 'Propaganda in The Jurisprudence of The International Criminal Tribunal for The Former Yugoslavia 'Available at: <https://www.academia.edu/30834123/Propaganda_in_the_Jurisprudence_of_the_International_Criminal_Tribunal_for_the_Former_Yugoslavia> Last Accessed 18 December 2019
[513] ICRC Commentary, para. 1913
[514] Article 43 of Additional Protocol I states: '1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict'.
[515] Article 50 of Additional Protocol I.;Para 1922 commentary on Article 50(3) of Additional Protocol I '[I]wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population'.
[516] Article 50(1) of Additional Protocol I.

their real status.[517] In the *Galić* case, the Trial Chamber mentioned that it is a matter of evidence in every case to establish whether an individual has the status of civilian.[518] The *Galić* Trial Chamber further elaborated:

> In order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly. In certain situations, it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.[519]

If Article 51 is considered part of the customary international law, then the scope of application associated with the rule will be widened. This will be discussed in a subsequent section. However, the conventional scope of application is based on the applicability of Additional Protocol I.

Article 13(2) of Additional Protocol II repeats the rule of Article 51 of Additional Protocol I and expands the scope of the prohibition not to spread terror among the civilian population to non-international armed conflict.[520] The ICRC Commentary states that Article 13(2) of Additional Protocol II lays down an absolute obligation applicable at all times: 'The civilian population as such, as well as individual civilians, shall not be the object of attack.'[521] The ICRC Commentary describes the scope of the rule: 'This rule prohibits launching direct attacks against the civilian population'.[522] Article 13 para 2 provides a specific rule ' with the absolute prohibition of direct attacks and of acts or threats of violence committed with a view to spreading terror'.[523] The Commentary reinforces that 'the prohibition of attacks against the civilian population as such, and against individual civilians, remains valid, even if the adversary has committed breaches'.[524]

Attacks against the civilian population and indiscriminate attacks with the primary purpose to spread terror among the civilian population will fall under both the first and second sentences

[517] ICRC Commentary, para. 1920.
[518] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 47
[519] *Ibid.*, para. 50
[520] Additional Protocol II Art 13(2)(d)
[521] ICRC Commentary, para. 4777.
[522] ICRC Commentary, para. 4779.
[523] ICRC Commentary, para.4761.
[524] ICRC Commentary of AP II, Para. 4784.

of Article 13(2). The 'threat of violence' may bring propaganda under the scope of the prohibition. Conditions for the applicability of international humanitiarna law in non-international armed conflict include the existence of protracted armed confrontations.[525] In order for a conflict to be categorized a non-international armed conflict, the hostilities must reach a minimum level of intensity and the parties involved in the conflict must show a certain level of organization.[526] Moreover, 'international humanitarian law does not pertain only to those areas where actual fighting takes place; it applies to the entire territory of the state involved in armed conflict'.[527]

An important provision dealing with 'acts of terrorism' in situations of non-international armed conflict is Article 4(2)(d) of Additional Protocol II. The section that follows will discuss this provision as it has significance for the future development of law pertaining to the prosecution of terror as a war crime.

2.8 Article 4(2)(d) of the Additional Protocol II: 'acts of terrorism'

Under the heading of 'fundamental guarantees', Additional Protocol II prohibits 'acts of terrorism' (Article 4(2)(d)) and threats to commit any such acts (Article 4(2)(h)). This provision applies to 'all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'.[528] The preliminary draft of what became article 4(2)(d) suggested 'acts of terrorism in the form of acts of violence'.[529] However, the provision was amended on the proposal of Mr. Bloembergen from Netherlands with 26 votes to 17, and 19 abstentions.[530]

The Spanish delegation was of the opinion that acts of violence are implicit in the meaning of the term 'acts of terrorism' and that the amendment proposed by the Netherlands was not trying to modify the meaning of terrorism.[531] The delegate from USA, Mr. Bettauer, had a narrower interpretation of terrorism. He stated that his delegation had voted against the deletion of the

[525] Article 1 of AP II
[526] *Ibid.;* Anthony Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law*, (Cambridge: Cambridge University Press, 2010), p.102,118.
[527] Anthony Cullen, 'The parameters of internal armed conflict in international humanitarian law' (2004) 12 *The University of Miami International and Comparative Law Review* 189,203
[528] Article 4 1 of AP II
[529] Official Records vol IV, CDDH/212, p. 195
[530] Official Records CDDH/I/SR.39 Vol. VIII, p. 412; *CDDH/I/SR.41*, p. 442
[531] Official Records *CDDH/I/SR.40* Vol VIII, p. 425

words ‘in the form of acts of violence committed against those persons’ in article 6, paragraph 2 (c) because it considered that they constituted a very important clarification of what was meant by ‘acts of terrorism’. “Terrorism” was an excessively vague word of which no satisfactory definition existed. Since the Netherlands delegation in proposing deletion of the language in question had considered that language unnecessary and was not trying to modify the meaning of the sub-paragraph but merely to simplify it, the United States delegation would interpret the sub-paragraph as if those words had not been deleted. i.e. to cover acts of terrorism involving physical violence. He strongly disagreed with the Spanish representative’s view that a concept of ‘psychological terrorism’ was relevant in draft Protocol II. Mr. Bettauer found such a term ‘incomprehensible and did not believe that it had been the intention of the Netherlands delegation to broaden the scope of the paragraph to cover such a concept’.[532] Additionaly he stated that ‘the United States delegation did not interpret paragraph 2 (c) to cover propaganda or the incidental effects of legitimate military operations’.[533]

Other delegates, including those from Iraq, Mexico and Iran. supported a categorical prohibition stating that it should not be confined to the persons referred to in article 6, paragraph. 1(Article 4 para 1 of Additional Protocol II, now).[534]

The ICRC Commentary on Article 4(2)(d) provides a broad interpretation of the terms of this provision:

> The prohibition of acts of terrorism is based on Article 33 of the fourth Convention. The ICRC draft prohibited “acts of terrorism in the form of acts of violence committed against those persons” (i.e., against protected persons) …The formula which was finally adopted is simpler and more general and therefore extends the scope of the prohibition. In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect. It should be mentioned that acts or threats of violence which are aimed at terrorizing the civilian population, constitute a special type of terrorism and are the object of a specific prohibition in Article 13 (Protection of the civilian population), paragraph 2.[535]

Terrorism under international humanitarian law may be defined in terms that are non-technical, flexible, wide in scope, apolitical and applicable to variety of acts committed by both State and

[532] Official Records, vol. VIII *CDDH/I/SR.40)* p. 426
[533] Official Records, vol. VIII *CDDH/I/SR.40)* p. 426
[534]Official Records, vol. VIII CDDH*/I/SR.40*,, p. 428; vol. VIII *CDDH/I/SR.32* p. 326
[535] ICRC commentary, para, 4538

nonstate actors.[536] According to Sebastien Jodoin, in keeping with one of the fundamental tenets of the law of armed conflict, the definition of terrorism under international humanitarian law focuses on the tactic used: violence intended to spread terror, instead of the underlying reason for the violence. He states that 'for these reasons, this definition may be said to be "tactical" unlike most of the definitions advanced in international law which are usually of the "political status" variety'.[537] Due to the straightforward and balanced nature of the provisions relating to the offence of terror, several states incorporated them into national laws. The following section probes with the response of states to provisions prohibiting terror against civilians by investigating state practice. This part draws extensively on the collection of practice supporting the ICRC Study on Customary International Humanitarian Law.

2.9 Development of State Practice related to 'Crime of Terror'

After the Additional Protocols of 1977 entered into force, a number of states incorporated the prohibition on the use of terror into their military manuals and criminalised it in their penal codes. This section will discuss the practice of states and international organisations in relation to the offence of terror and the implications for the customary international law. State practice contributed to the criminalisation of the offence of terror by international criminal tribunals and this was taken into account when determining the customary status of the rule. In incorporating the rule into military manuals, most states used language similar to that contained in the Additional Protocols prohibiting terror as a method of warfare. Similarly, states criminalising the use of terror against the civilian population have also often used language which is identical to the prohibition set out in the Additional Protocols.

States stipulating a prohibition on the use of terror in their military manuals include Argentina, Australia, Belgium, Canada, Cameroon, France, Colombia, Croatia, Ecuador, Germany, Kenya, Netherlands, New Zealand, Russia, Spain, Sweden, Togo, Switzerland and the United States. For example, Spain's LOAC Manual of 1996 prohibits acts or threats of violence which have as a primary objective the spreading of terror among the civilian population. [538] Sweden's international humanitarian law Manual prohibits terror attacks and defines terror attacks as

[536] Sebastien Jodoin, 'Terrorism as a War Crime' (2007) 7 *International Criminal Law Review* 77, 85
[537] Sebastien Jodoin, 'Terrorism as a War Crime' (2007) 7 *International Criminal Law Review* 77, 86
[538]Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. II (Cambridge: Cambridge University Press, 2004), p. 70; Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.b.(3) and 3.3.b.(7). [531]

'attacks deliberately aimed at causing heavy losses and creating fear among the civilian population'.[539] The US Naval Handbook prohibits intentional terrorization, including 'bombardment, the sole purpose of which is to attack and terrorize the civilian population' is an example of a war crime.[540] The Department of Defense Law of War Manual updated in 2016 prohibits intentional spreading of terror against civilian population.[541] It further states that 'propaganda would be prohibited if it constituted a measure of intimidation or terrorism against the civilian population, such as the threats of violence whose primary purpose is to spread terror among the civilian population'.[542] It also proscribes the use of inherently indiscriminate weapons, including those that are designed to be used in attacks to terrorize the civilian population.[543] In addition, it prohibits acts of terrorism or threats to commit such acts during non-international armed conflict.

The UK Joint Service Manual of The Law of Armed Conflict of 2004 includes offence of terror as a prohibited method of warfare and states that:

> This rule reinforces the rule that civilians are not to be made the object of direct attack. It would apply, for instance, to car bombs installed in busy shopping streets, even if no civilians are killed or injured by them, their object being to create panic among the population. Threats of violence would include, for example, threats to annihilate the enemy's civilian population. It does not apply to terror caused as a by-product of attacks on military objectives or as a result of genuine warnings of impending attacks on such objectives.[544]

It also notes that booby-traps are also used to cause cruel or lingering death, for the purpose of intimidation and terror hence the use of such traps is prohibited.[545] Australia's Defence Force Manual included the prohibition of terror as provided in Article 51(2) of Additional Protocol I and added that 'offensive support or strike operations against the civilian population for the sole purpose of terrorising the civilian population [are] prohibited'.[546] There are several other

[539] *Ibid.*; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 44.
[540] *Ibid.*; US, *Naval Handbook* (1995), § 11.3. US, *Naval Handbook* (1995), § 6.2.5
[541] The Department of Defense Law of War Manual (June 2015, updated May 2016) Measures of intimidation or terrorism against the civilian population are prohibited, including acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. p. 187, 201.
[542] *Ibid.*,p 308
[543] For example, Japanese bombs attached to free-floating, long-range balloons used during World War II were unlawful for this reason. Also, German long-range rockets without guidance systems used during World War II were similarly illegal. p. 340
[544]JSP 383 The Joint Servicemanual of The Law of Armed Conflict Joint Service Publication 383, 2004 Edition, p. 67
[545] *Ibid.*, p. 107
[546] Australia, *Defence Force Manual* (1994), § 531; see also *Commanders' Guide* (1994), *Australia, Defence Force Manual* (1994), § 554 as cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. II (Cambridge: Cambridge University Press, 2004), p. 68

states which have incorporated the prohibition of spreading terror in their military manuals. This is significant as a reflection of state practice.

States incorporating the prohibition of spreading terror into national law include Ireland, Bosnia and Herzegovina, Côte d'Ivoire, Croatia, Slovenia, Czech Republic, Slovakia, China, Ethiopia, Lithuania, Norway and Spain. For instance, The Criminal Code of the Federation of Bosnia and Herzegovina and Republika Srpska, provided that 'the application of measures of intimidation and terror' against civilians is a war crime.[547] Spain's Penal Code penalises anyone, who commits the violation of article 51(2) of the Additional Protocol I to spread terror among the civilian population[548] The Penal Code of Côte d'Ivoire provides that measures of terror in time of war or occupation constitutes a 'crime against the civilian population'.[549] Similarly, the Criminal code of Croatia and the Penal Code of Slovenia provide that measures of terror and intimidation against the civilian population amount to a war crime. [550]

In addition to state practice, the practice of international organisations in relation to the crime of terror is reflected in statements emanating from UN bodies, international judicial and quasi-judicial institutions. For example, in 1994, the UN General Assembly adopted a resolution condemning the 'systematic terrorization and murder of non-combatants' in the former Yugoslavia.[551] In 1998, the UN General Assembly adopted a resolution on the situation of human rights in Kosovo stating:

> gravely concerned about the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) by the police and the military. [552]

Between 1992 and 1995, the UN Commission on Human Rights passed several resolutions on the situation of human rights in the territory of the former Yugoslavia, condemning the 'systematic terrorization and murder of non-combatants.[553] The UN Sub-Commission on

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[547] *Ibid*; Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1)., Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[548] *Ibid.*, Spain, *Penal Code* (1995), Article 611(1).
[549] *Ibid*; Cote d'Ivoire, *Penal Code as amended* (1981), Article 138(5).
[550] *Ibid*; Croatia, *Criminal Code* (1997), Article 158(1); Slovenia, *Penal Code* (1994), Article 374(1).
[551] UN General Assembly, Res. 49/196, 23 December 1994, § 7
[552] UN General Assembly, Res. 53/164, 9 December 1998, preamble.
[553] UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12; Res. 1994/72, 9 March 1994, § 7(b) ("murder of civilians and noncombatants"); Res. 1995/89, 8 March 1995, § 5. 74 distinction between civilians and combatants

Human Rights passed a resolution on the situation of human rights in El Salvador, in 1989, stating that it was 'alarmed by the intensification of activities to terrorize the population that are being carried out by the death squads composed of police and armed forces personnel operating in civilian clothing under the orders of senior officers'.[554] The UN Secretary-General, in 2000, in a report on the establishment of a Special Court for Sierra Leone mentioned that the violations of Article 4 of Additional Protocol II committed in the non-international armed conflict 'have long been considered customary international law'. [555] The Special Rapporteur of the UN Commission on Human Rights, in a report on the situation of human rights in the former Yugoslavia, in 1992, pointed out that the regular bombardment of cities such as, Sarajevo or Bihac by Serb forces in Bosnia and Herzegovina was used a tactic to terrorise the civilian population.[556] In a report issued in 2000, the Special Rapporteur of the UN Sub-Commission on Human Rights mentioned that 'the use of sexual violence is seen as an effective way to terrorize and demoralize members of the opposition, thereby forcing them to flee'. [557]

The ICRC has also tried to disseminate the rule relating to the prohibition of terror and teach it to armed and security forces around the world.[558] During the middle east conflict in 1973, before the creation of additional protocols to the Geneva conventions, the ICRC urged all the belligerents (Egypt, Iraq, Israel and Syria) to comply with, *inter alia*, Article 46(1) of draft Additional Protocol I, which stated that 'methods intended to spread terror among the civilian population are prohibited'. All governments concerned replied favourably. [559] The ICRC also reminded the parties in Nagorno-Karabakh conflict in 1993 and Angola conflict in 1994 of the same prohibition.[560]

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[554] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble.
[555] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[556] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. A/47/418 – S/24516, 3 September 1992, §§ 17 and 20.
[557] UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Update to the final report, UN Doc. E/CN.4/Sub.2/2000/21, 6 June 2000, § 20.; In another report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the UN High Commissioner for Human Rights noted that 'all kinds of sexual violence, including assault, rape, abuse and torture of women and children, have been used in a more or less systematic manner to terrorize civilians and destroy the social structure, family structure and pride of the enemy'.(UN High Commissioner for Human Rights, Report on systematic rape, sexual slavery and slavery-like practices during armed conflicts, UN Doc. E/CN.4/Sub.2/2000/20, 27 June 2000, p. 2, § 9.)
[558] Frederic de Mulinen, *Handbook on the Law of War for Armed Forces*, (ICRC, Geneva, 1987) ed´§ 398.
[559] ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.
[560] ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993; ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503. *Violence Aimed at Spreading Terror* 77

In a resolution adopted at the 26th International Conference of the Red Cross and Red Crescent in 1995, deep concerns were expressed over the use of terror against civilians as prohibited in Additional Protocol I and Additional Protocol II.[561] In a press communication in 2000 concerning the violence in the Near East, the ICRC emphasised that 'terrorist acts are absolutely and unconditionally prohibited'.[562] In 1993, in a report on war crimes in Bosnia and Herzegovina, Helsinki Watch condemned the use of indiscriminate bombing and shelling to terrorize the local population. [563] According to the report such attacks were aimed at terrorizing the civilian population, thereby inducing them either to flee from the besieged area or surrender. [564] With reference to Article 51(2) of Additional Protocol I, the report states:

> This article also prohibits bombing or shelling to attack civilian morale. Although technically there may be a distinction between morale and terror bombing, they are, in practice, treated the same. It often has been observed that what is morale bombing to the attacking force is terror bombing to the civilians who are targeted. Some attacks may be carried out by strategic bombardment or shelling of the enemy's economic infrastructure. This infrastructure may include a mix of military and civilian targets. To the extent that these attacks are launched or threatened solely or primarily for political ends, they violate the principles of civilian immunity, proportionality, and humanity. Attacks intended primarily to induce the civilian population to rebellion or to overthrow its leadership would be examples of unlawful attacks.[565]

The use of 'Shock and Awe' strategic bombing by the US in Iraq war in 2003 was also considered terror by many authors. Ullman and Wade state that 'the appropriate balance' of shock and awe 'must cause the perception and anticipation of certain defeat and the threat and fear of action that may shut down all or part of the adversary's society or render his ability to fight useless short of complete physical destruction'.[566] Noam Chomsky also equated 'Shock and Awe' bombing with terrorism, stating 'we saw this repeated again in the attack on Iraq, spun as "Shock and Awe", which is simply a niceified phrase for Causing Terror'. Nathan Newman remarked, 'let's end the hypocrisy of labelling attacks on civilians by enemies

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[561] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, Preamble.
[562] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
[563] Helsinki Watch, *War Crimes in Bosnia-Hercegovina*,Vol. II, (New York, April 1993), p. 11.
[564] War Crimes In Bosnia-Hercegovina , A Helsinki Watch Report , p. 103 Available at:<https://www.hrw.org/reports/pdfs/y/yugoslav/yugo.928/yugo928full.pdf > Last Accessed: 24 December 2019
[565] War Crimes In Bosnia-Hercegovina , A Helsinki Watch Report p 205, Available at <https://www.hrw.org/reports/pdfs/y/yugoslav/yugo.928/yugo928full.pdf > Last Accessed: 24 December 2019
[566]Ullman, Harlan & James Wade (1996) Shock and Awe: Achieving Rapid Dominance. Washington, DC: National Defense University.

"terrorism" and our own use of it "shock and awe'.[567] However, Beau Grosscup comments that the bombing powers have always avoided any relation between terrorism and their use of air power from public discourse.[568]

A report issued by the independent international commission of inquiry on the Syrian Arab Republic in 2014 points out that different belligerents in the Syrian conflict violated international humanitarian law by spreading terror among the civilian population. Different methods were used to induce such terror. These included indiscriminate and disproportionate aerial bombardment, shelling, car bombings in civilian areas, public executions, and the use of barrel bombs. The attacks with civilians as their main target show a clear intent to spread terror among the civilian population.[569] Witnesses' consistently narrated that due to the barrel bombing campaign, much of the civilian population lived in a state of terror.[570] Other methods employed to spread terror included enforced disappearances, area bombardment, torture and other forms of ill-treatment by government forces.[571] There is no doubt that intentionally targeting civilians is a an offence and its constant violation indicates that states need to take more action in this regard.

Cyber technologies are also becoming more important in armed conflicts. The videos posted by Islamic State (ISIL) on the Internet, show the killing of people detained by the group. According to the UN Commission, these videos are part of a 'coordinated campaign of spreading terror among the civilian population'.[572] The videos are a form of 'information warfare' in cyberspace to spread terror among the civilian population under the control of the Islamic State. According to the jurisprudence of international criminal tribunals, the posting of such videos could be interpreted as threats of violence intended to terrorize civilians qualifying as a crime of terror.

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[567] Beau Grosscup, Strategic Terror: The Politics and Ethics of Aerial Bombardment, (Zed Books 2006); Nathan Newman Available at:<http://www.nathannewman.org/log/archives/000873.shtml> > Last Accessed: 24 December 2019

[568] Beau Grosscup, Strategic Terror: The Politics and Ethics of Aerial Bombardment, (Zed Books 2006) 5

[569] UNGA, Human Rights Council, Twenty-seventh session Agenda item 4
Human rights situations that require the Council's attention, A/HRC/27/60, p. 8,17, 41.

[570] *Ibid.*, p. 50.

[571] UNGA, Human Rights Council Twenty-seventh Session Agenda item 4 Human rights situations that require the Council's attention, A/HRC/27/60 p. 10, 14, 44

[572] ISIS Is Commiting War Crimes on the Internet <https://nationalinterest.org/blog/the-buzz/isis-commiting-war-crimes-the-internet-12581> Last Accessed: 24 December 2019

The use of Military Psychological Operations (PSYOP) are a vital component of national security of many states. If such operations are used to target the civilian population, then there is potential for the prohibition contained in Article 51(2) of the Additional Protocol I to be violated.[573] These aspects of the violation of the prohibition on terror merit particular attention in order to establish which type of conduct falls within the purview of the offence.

Since the two world wars, states have continued to engage the use of terror. Despite the express prohibition of spreading terror against civilians, and its incorporation in many states' military manuals, not much success has been achieved in preventing such conduct. The existence of state practice, and the consistent efforts on the part of states to deny any involvement in such acts, confirms the prohibition of terror as a matter of customary international law. The prosecution of the crime of terror by international tribunals has also highlighted the importance of this rule. After situating the prohibition of terror historically and reflecting on its emergence as a treaty rule, it is now appropriate to address the criminalisation of this prohibition. The Chapter that follows will investigate of jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone with respect to the establishment of individual criminal responsibility for the war crime of terror.

2.10 Conclusion

Despite recognition since the First World War that the use of terror against civilians was unlawful, efforts to draft binding treaty rules prohibiting this conduct were slow to yield fruit. The large-scale indiscriminate bombing of civilians during the second world war underscored the need for such binding rules. Despite this, the 1949 Geneva conventions failed to include any express provision proscribing the use of terror against civilian population and sufficiently detailed rules for the protection of civilians during the conduct of hostilities.

Despite several efforts to codify a provision expressly prohibiting terror against civilians, there was little success until the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened in 1974 until 1977. This conference agreed the text of Article 51(2) of Additional Protocol I and Article 13(2) of

[573] Peter J. Smyczek, 'Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) under Public International Law' (2005) 57 *Air Force Law Review* 209-240, p. 227

Additional Protocol II which expressly prohibited the intentional use of terror against civilian population. Although there was a general consensus that spreading terror among civilians was unlawful, it took more than thirty years to codify it in a binding treaty rule. These provisions are significant for the protection of civilians in the modern asymmetrical armed conflicts

This chapter examined various efforts by the ICRC during the post-World War two period to include the prohibition of terror in some legally binding instrument. It looked at the *Travaux Preparatoires* of the two Additional Protocols of 1977 in order to understand the scope, meaning and importance of this prohibition. Different elements of the offence of terror were analysed in order to clarify the purpose and limitations of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The language of these provisions prohibiting terror is not plain and simple but complex and was adopted after much debate at the diplomatic conference. Some states wanted to add propaganda as a prohibited means of spreading terror while others wished to prohibit acts capable of spreading terror. However, in the end the provisions adopted kept in view the concerns of military necessity and other aspects of international humanitarian law. After the inclusion of terror in the Additional Protocols, several states included it in their military manuals and a number of states criminalised it under their domestic law, strengthening its status as rule of customary international law.

The international criminal tribunals have also prosecuted the violations of this provision and punished the offenders and declared it a crime under customary international law. In doing so the tribunals clarified the elements of the crime and interpreted the scope of the provision. The chapter that follows will examine the prosecution of the 'crime of terror' by international criminal tribunals.

Chapter 3. The Prosecution of the Crime of 'Terror' by International Criminal Tribunals

3.1 Introduction

This chapter examines the prosecution of the crime of 'terror' by international courts and tribunals, scrutinising in particular a number of landmark cases of the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone. It analyses the contextual elements of the war crime relating to 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. In doing so, the chapter seeks to clarify the status, evolution and development of the offence of spreading terror among civilian population by the international tribunals.

The chapter is structured in five parts. The first discusses issues surrounding how the crime of 'terror' is defined as a violation of international humanitarian law. The second provides historical background to the contemporary prosecution of 'terror' as a war crime. The third and fourth sections examine key decisions of the International Criminal Tribunal for the Former Yugoslavia and the Special Court of Sierra Leone. The fifth and final section assesses the contribution of these institutions to the development of the crime of 'terror' under international humanitarian law.

3.2 Defining the Crime of 'Terror'

International humanitarian law embodies prohibitions on acts of 'terrorism' and 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.[574] The jurisprudence of international criminal tribunals has played a significant role in developing how these prohibitions are interpreted.[575] Although both acts of 'terror' and 'terrorism' are prohibited under international humanitarian law, previously this distinction did not result in a separate category of crime.[576] However, it is important to appreciate the emergence of the two

[574] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, 1977, Article. 51(2); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 U.N.T.S. 609, 1977), Article 4(2)(d) Article 13(2)
[575] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T; *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A; *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T.
[576] Protocol Additional to the Geneva Conventions of (12 August 1949), Protocol II, 8 June 1977, Article 4(2)(d), Protocol Additional to the Geneva Conventions of (12 August 1949), Protocol I, 8 June 1977, art 51(2) Protocol

distinct offences under the law of armed conflict.[577] The first relates to the proscription of 'all measures of intimidation or, of terrorism' in situations of international armed conflict or 'acts of terrorism' in non-international armed conflict.[578] The second is applicable to 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' in both international and non-international armed conflict.[579] With regard to the latter, the Trial chamber in the *Galić* case defined the material and mental elements of the crime of terror in terms of the meaning of the rule contained in Article 51(2) of Additional Protocol I.[580] As an offence falling under Article 3 of the ICTY Statute, the tribunal stated the following elements of the crime of terror:

> 1. Acts of violence directed against the civilian population or individual civilians not taking a direct part in hostilities causing death or serious injury to body or health within the civilian population.
> 2. The offender willfully made the civilian population or individual civilians not taking a direct part in hostilities the object of those acts of violence.
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[581]

The crime of terror is a specific-intent crime. Besides the *actus reus* and *mens rea* required for every crime, the crime of terror needs a 'surplus of intent' ('the primary purpose').[582] *Mens rea* literally means 'guilty mind',[583] and is used to describe the mental element (intention or knowledge) required to constitute a crime. It is 'an element of volition to bring about the prohibited conduct, which, as a result, renders the act blameworthy.'[584] It is one of the central doctrines in criminal law theory. There is no general definition of *mens rea* in the Charter of the International Military Tribunal, the Statute of the International Criminal Tribunal for the former Yugoslavia, or the Statute of the International Criminal Tribunal for Rwanda. However, the Rome Statute of the International Criminal Court includes a provision stipulating the mental

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Additional to the Geneva Conventions of (12 August 1949), Protocol II, 8 June 1977, Article 4(2)(d) and Article 13(2); Geneva Convention (IV) Relative the Protection of Civilian persons in time of War (12 August,1949), Article, 33(1)

[577] *Ibid.*

[578] Geneva Convention (IV) Relative the Protection of Civilian persons in time of War (12 August,1949), Article 33(1)

[579] Additional Protocol I, Article 51(2); Additional Protocol II, Article 4(2)(d) and art 13(2)

[580] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 41, 42; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 133

[581] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 133

[582] Mohamed Elewa Badar, 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' 2006 (6) *International Criminal Law Review* 313, 327.

[583] William A. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia' (2002)37 *New England Law Review* 1015

[584] See Ilias Bantekas, *International Criminal Law* (Hart Publishing 2010, 4th edition)

element of criminal responsibility (Article 30). William A. Schabas states: 'although not required within the text of the ICTY Statute, in contrast with the Rome Statute, the judges of the ICTY have treated mens rea as an element of all of the offences within the Tribunal's subject matter jurisdiction. Indeed, there are more or less systematic efforts by the judges to identify the specific mental element of each crime.'[585]

As terror could be the natural result of lawful acts of war, the 1977 Additional Protocols proscribed only intentional acts or threats of violence the primary purpose of which is to spread terror among the civilian population. However, the treaty law does not define the elements of this crime. At the Diplomatic Conference which drafted the 1977 Additional Protocols, with reference to the prohibition of terror, the French delegate Mr Girard maintained that 'in traditional war attacks could not fail to spread terror among the civilian population: what should be prohibited in paragraph I was the intention to do so.'[586] In the report of its second meeting, the Committee III(at the Diplomatic Conference) specified:

> The prohibition of acts or threats of violence which have the primary object of spreading terror is directed to intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful.[587]

The primary purpose (to spread terror among the civilian population) is specifically mentioned in the 1977 Additional Protocols as the formative element of the offence.[588] The general intent of crime of terror relates to the unlawful conduct of the offender which could be any act of violence wilfully committed, including murder, torture, mistreatment or direct attacks against civilians. The concept of 'primary purpose' is best understood by considering subjective and objective perspectives on the assessment of 'acts or threats of violence'.[589] The subjective assessment relates to the intention of the perpetrator, the mental element of the crime.[590] The objective assessment relates to the material element of the crime. If the attack against a legitimate military target resulted in collateral civilian damage, the primary purpose

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[585] William A. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia' (2002)37 *New England Law Review* 1015, 1025

[586] *Official Records*, vol. XIV, CDDH/I II/SR. 8, p. 65.

[587] *Official Records*, vol. XV, CDDH/215/Rev.I p. 274; Prosecutor *v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 101

[588] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, 217.

[589] Chile Eboe-Osuji, 'Another look at the intent element for the war crime of terrorism' (2011) 24(3) *Cambridge Review of International Affairs* 357, p. 370.

[590] *Ibid*.

requirement would not be fulfilled.[591] However, a naked act of violence with no military purpose against a civilian population would be more likely to qualify, in particular if there is foreseeable civilian casualties.[592] Chile Eboe-Osuji describes it as the 'effects theory' of the primary purpose requirement.[593] He states that 'the intent to commit a crime involves not only a deliberate desire to occasion the criminal outcome, but also the perpetration of a course of conduct with reasonable foresight of a certain criminal outcome'.[594]

It can be argued that primary purpose to spread terror among the civilian population enhances the gravity of the act or threat of violence. As Ben Saul notes '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.'[595] The objective seems to be to punish the aim of the perpetrator, regardless of the results. Lauterpacht asserted that the strategic Allied bombing in the Second World War was not so offensive because it had not 'the exclusive purpose of spreading terror and shattering the morale of the population at large'.[596] Hence, the primary purpose requirements tries to create a balance between military necessity and the protection of the civilian population from scourge of war.

The *actus reus* of crime of terror consists of acts or threats of violence. The term *actus reus* is used to describe 'guilty act' or 'criminal conduct'.[597] It consists of all the elements of an offence except the mental element.[598] It also constitutes any circumstances or results required to make the conduct criminal.[599] Sometimes the *actus reus* requires only an action (if the action itself is criminalized) without consequences resulting from the action. While in cases of material crimes the consequences of the action are important, the crime of terror seems to be a crime of conduct (where the act itself is criminlaised, not the result).[600]

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[591] *Ibid.*
[592] *Ibid.*
[593] *Ibid.*, p. 371
[594] *Ibid*
[595] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press,2006), p. 313.
[596] Hersch Lauterpacht (eds) *Oppenheim's international law. A Treatise*: vol II (8th edn,Longmans, Green and Co, London, 1955), p. 528.
[597] Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), p. 229.
[598] D. Ormerod, *Smith & Hogan: Criminal Law* (10th edn., Oxford: Oxford University Press, 2005), 30.
[599] Robinson, Paul H., Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction? in Stephen Shute, John Gardner and Jeremy Horder(eds.), '*Action and value in criminal law'* (Oxford University Press), 188.
[600] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, 211

The *actus reus* of crime of terror is based on other crimes; the primary purpose requirement differentiates it on the basis of the intention of the perpetrator, who arguably should be punished more for his or her special intent to spread terror. As Sergey Sayapin stated:

> Where an attempt to spread terror among the civilian population fails, but the completed part of the act contains the indicia of another war crime, as this would be the case in most instances, because the spreading of terror "borrows" its actus reus part from other offenses, this should be deemed to be the aggregate of crimes, and the punishment should be imposed accordingly. Where an act or a threat of violence the primary purpose of which is to spread terror among the civilian population succeeds, the final punishment should be more severe, for the penalty for spreading terror - a graver crime - would absorb the less severe punishment.[601]

To qualify as a crime of terror, the target of the acts of violence must be against the civilian population or individual civilians not taking a direct part in the hostilities. Rules of international humanitarian law do not provide a positive definition of a civilian.[602] Article 50(1) of Additional Protocol I defines civilians negatively by excluding them from the corollary category of combatants: anyone who is not a member of the armed forces, militias or volunteer corps or of an organized military group belonging to a party to the conflict.[603] Thus, all persons who are not combatants are civilians. If a civilian engages in hostilities, he loses the protection provided by international humanitarian law and becomes a legitimate military target during the period of his participation in the hostilities.[604] Accordingly, the crime of terror may also require an assessment of civilian or non-combatant status.

Frederik Harhoff observed that although the crime of terror is long known in history, 'a single universal legal definition has never been agreed upon. Main points of controversy are still whether terror must be inflicted with any particular purpose, or whether it must in fact have been inflicted—rather than just intended'.[605] Issues arising from such points of controversy have been addressed by the International Criminal Tribunal for the former Yugoslavia. The approach adopted by the tribunal will be explored later in this chapter. Before doing so, the

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[601] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 Asia-Pacific Yearbook of International Humanitarian Law 196, 224

[602] Claire Garbett, 'The concept of the civilian: legal recognition, adjudication and the trials of international criminal justice' (2012) 8(04) *International Journal of Law in Context* 469, 477

[603] Claude Pilloud, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1915.

[604] Article 51(3) of Additional Protocol I

[605] Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), p. 532

section that follows will provide background to the contemporary prosecution of 'terror' as a war crime.

3.3 Prosecution of the crime of 'terror' as a war crime

For a conduct to be criminalized it must be wrongful and there must be an imperative to use criminal law to condemn or avert the repetition of such conduct.[606] It has been substantiated by ample evidence that terror is not merely an offence but a crime of grave nature as it attacks the humanity of, and causes serious consequences for, the victims.[607] In order to prosecute the crime of 'terror' as a war crime, the prosecution needs to prove that at the time of the commission of the act there existed a state of armed conflict in the related territory and that the acts of the accused were sufficiently connected to that conflict. The prosecution has also to prove that the alleged offence constituted a serious infringement of a rule of international humanitarian law that entailed individual criminal responsibility under international law at that time.[608]

The factors significant in determining whether an international prohibition 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 interest of the international community'.[609] International and hybrid tribunals have developed new practice relating to the prosecution of crime of terror while elaborating the criminal elements of acts of terror and terrorization. Moreover, the war crime of terror is different from the ordinary peace-time notions of terrorism, i.e. 'violence committed to compel a government or international organisation to do or refrain from doing something or to advance a political, religious or ideological cause.'[610] Violence is an inherent feature of war so any type of armed conflict is likely to cause terror. The crime of terror only criminalizes the intentional use of terror. The offence of terrorism under peacetime is not necessarily an offence under international humanitarian law.

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[606] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, p. 208.
[607] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 196, 224
[608] Mettraux, Gunal, *International Crimes and the ad hoc Tribunals* (Oxford University Press on Demand, 2005), p.30.
[609] Theodor Meron, International Criminalization of International Atrocities' (1995) 89 *American Journal of International Law* 554,570
[610] Ben Saul, 'Terrorism in International and Transnational Criminal Law' (Sydney: Legal Studies Research Paper no.15/83, 2015), p. 4.

The prosecution of acts of terror committed during armed conflict is not a contemporary notion. The origins of liability extend as far back as 1919 with the Report of the Commission on the Responsibilities for the First World War in which systematic terrorism of civilians was given a pre-eminent position in the list among the most serious of war crimes committed during the war.[611] Although such a crime was never prosecuted at the unproductive Leipzig trials,[612] the provisions impacted on the future efforts to establish criminal liability and provided the foundation for several national post-war prosecutions.[613] At the London Conference, in 1945, the British Delegation suggested the inclusion of 'systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians' as a crime under Article 6 of the International Military Tribunal Charter. However, the final draft of article 6 of the IMT Charter did not include 'terrorism' in its non-exhaustive list of war crimes.[614] The IMT considered the terrorization of civilians in the context of crimes against humanity without specifying in detail, its difference from war crimes.[615]

The Geneva Conventions of 1949 do not mention the term 'war crimes'; instead they refer to 'grave breaches'.[616] Grave breaches of international humanitarian law are regarded as war crimes and give rise to individual criminal responsibility,[617] but provisions related to grave breaches do not expressly mention terror or terrorism. Nevertheless, attacks against the civilian population in general or individual civilians may, irrespective of their purpose, amount to a grave breach under Article 85(3)(a) of Additional Protocol I. Additionally, under Article 85(3)(b) of Protocol I, indiscriminate attacks may amount to grave breaches if they are planned despite knowing that they will disproportionately affect civilians.[618]

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[611] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report to the Preliminary Peace Conference, 29 March 1919, (1920)14(1/2) *The American Journal of International Law* 95, p.113.
[612] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para.116.
[613] The offence of terrorizing the civilian population also got recognition in Article 22 of The Hague Air Warfare Rules of 1924: 'Any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants, is forbidden.'
[614] Statute of the International Military Tribunal, Article .6, Robert H. Jackson, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington D.C.: US Government Printing Office,1949), p. 312.
[615] IMT Judgment: War Crimes and Crimes against Humanity, In the Rosenberg and Frank Judgment, no. (16) 224,Available at: < http://avalon.law.yale.edu/imt/judrosen.asp> Last Accessed: 02 December 2019
[616] Anthony Cullen, 'War Crimes' in Nadia Bernaz and William Schabas (eds.), *Routledge Handbook of International Criminal Law* (Oxford: Routledge, 2011), pp. 139-154. p.141.
[617] Article 85(5) of the Additional Protocol I
[618] Marco Sassoli, 'Terrorism and war' (2006**)** 4(5) *Journal of International Criminal Justice* 959, 968.

The Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone enumerate 'acts of terrorism' in their jurisdictional provisions dealing with serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Article 4(d) of the Statute of the International Criminal Tribunal for Rwanda includes 'acts of terrorism' among the punishable violations of Common Article 3 of the Geneva Conventions and Article 13(2) of Protocol II.[619] However, there have been no documented prosecutions of terrorism or terror in the International Criminal Tribunal for Rwanda. 'Acts of terrorism' are specified as war crimes under the Article 3(d) of the Statute of the Special Court for Sierra Leone.[620] In his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted that violations of Article 4 of Additional Protocol II have long been considered crimes under customary international law.[621] Several cases in the Special Court for Sierra Leone included charges of 'acts of terrorism' or 'terrorizing the civilian population'.[622]The International Criminal Tribunal for the former Yugoslavia was the first international criminal tribunal to exercise jurisdiction over the crime of terror.

Although terrorism or terror are not expressly mentioned as a crime in the International Criminal Tribunal for the former Yugoslavia Statute, the first judicial examination of terror as a war crime took place before International Criminal Tribunal for the former Yugoslavia in the *Galić* case[623]. Article 3 of the tribunal's statute permits the prosecution of violations of 'the laws and customs of war' but jurisdiction is not limited to the offences enumerated in the Statute. It expressly states that the subject matter jurisdiction of the International Criminal Tribunal for the former Yugoslavia shall include, but not be limited to those instances of violations of the laws and customs of war mentioned by name.[624] Accordingly, the International Criminal Tribunal for the former Yugoslavia prosecuted criminal conduct that accounted for crime of 'terror' under the title of 'violations of the laws and customs of armed conflict'.[625]

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[619] Statute of the International Tribunal for Rwanda, UNSC Res. 955 (Nov. 8, 1994) UN Doc S/Res/955. Article. 4(d)
[620] Statute of The Special Court for Sierra Leone, UNSC Res. 1315 (14 August 2000), UN Doc. S/RES/1315 Article 3(d)(h).
[621] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para 14.
[622] *Prosecutor v. Fofana et al.*, Trial Chamber, Judgement, 2 August 2007, Case No, SCSL-04-14-T; *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T
[623] Laura Paredi, 'The War Crime of Terror: An Analysis of International Jurisprudence' ICD Brief 11(June 2015) Available**:**<http://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf> accessed 19 November 2019.
[624] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res. 827 (8 May 1993), UN Doc. S/RES/827, Article. 3
[625] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 63

The jurisprudence of International Criminal Tribunal for the former Yugoslavia played a momentous role in the development of crime of 'terror' as an independent war crime. On 30 November 2006 Stanislav Galić, a military commander involved in deliberate attacks on Sarajevo citizens, was given the maximum penalty of life imprisonment by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.[626] He was convicted of 'acts or threats of violence, the primary purpose of which was to spread terror among the civilian population.'[627] The elements of the 'crime of terror' were elucidated by the *Galić* Trial Chamber judgement.[628]

While Article 3 of the International Criminal Tribunal for the former Yugoslavia Statute sets out a non-exhaustive list of violations of laws of war, it does not expressly mention the prohibition on acts of terror. Nevertheless, the evolution of the Tribunal's jurisprudence in determining the lawful conduct of hostilities resulted in recognition of the existence of war crime of terror under Article 3. Although many cases in the International Criminal Tribunal for the former Yugoslavia examined the evidence of the terrorising of civilians with reference to other charges, the crime of terror was initially considered in detail in the *Galić* and *Dragomir Milošević* cases.[629] These cases will be analysed in the sections that follow.

3.4 International Criminal Tribunal for the former Yugoslavia and crime of 'terror'

The UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in reaction to the massive violations of international humanitarian law and human rights perpetrated in the Former Yugoslavia from 1991 onwards.[630] The tribunal is the first ever international judicial body to prosecute terror as provided in Article 51(2) of Additional Protocol I. The case of *Prosecutor v. Stanislav Galić* was the first in which terror was tried as a war crime.

[626] *Prosecutor v Stanilav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, p.185
[627] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 769
[628] *Ibid.*, para. 133
[629] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T
[630] Statute of the International Criminal Tribuanl for the Former Yugoslavia, UNSC Res 827 (8 May 1993), UN Doc S/Res/827; Kai Ambos, *Treatise on International Criminal Law*: Volume 1 (Oxford: Oxford University Press, 2013).19.

3.4.1 Prosecutor v. Stanislav Galić

The *Galić* case concerns one of the most infamous periods of the war in Bosnia and Herzegovina: the siege of its capital, Sarajevo, between 1992 and 1994, by the Sarajevo Romanija Corps (SRK), a section of the Bosnian Serb army. After the independence and international recognition of Bosnia and Herzegovina as a state on April 6th, 1992, the army of Bosnia-Herzegovina was engaged in armed conflict with fighters belonging to the Republika Srpska, an entity that had established itself on the territory of Bosnia-Herzegovina.[631] Stanislav Galić was the Commander of the Sarajevo Romanija Corps (SRK) from 10 September 1992 to 10 August 1994.[632] He exercised command of approximately 17,000 soldiers.[633] During that period, the SRK executed a military strategy which terrorised the civilian population by conducting a protracted campaign of relentless bombardment and sniper attacks directed at civilians in Sarajevo to keep them in a constant state of terror.[634] The shelling and sniping killed and wounded thousands of civilians; men, women, and children. People were targeted while walking in the street, playing, shopping at the market, or using public transport, queuing for bread, collecting water, attending funerals, shopping in markets, or gathering wood.[635] The Prosecution narrated:

> The siege of Sarajevo, as it came to be popularly known, was an episode of such notoriety in the conflict in the former Yugoslavia that one must go back to World War II to find a parallel in European history. Not since then had a professional army conducted a campaign of unrelenting violence against the inhabitants of a European city so as to reduce them to a state of medieval deprivation in which they were in constant fear of death. In the period covered by this Indictment, there was nowhere safe for a Sarajevan, not at home, at school, in a hospital, from deliberate attack.[636]

Stanislav Galić was charged with seven counts as a result of the campaign carried out by SRK forces.[637] The first count of the indictment charged the accused with 'unlawfully inflicting terror upon civilians' through a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population.[638] This charge was brought under Article 3 of the International Criminal Tribunal for the former Yugoslavia Statute as violations of Article 51(2)

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[631] *Prosecutor v. Stanislav Galić*, 30 November 2006, Case No. IT-98-29-A, Indictment, para.2.
[632] *Ibid.*, para. 3
[633] Melissa J. Epstein and Richard Butler, 'Customary Origins and Elements of Select Conduct of Hostilities Charges before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions' (2004) 179 *Miltary Law Review* 68, p.105.
[634] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 206
[635] *Prosecutor v. Stanislav Galić*, 30 November 2006, Case No. IT-98-29-T, Indictment, para. 4b; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, paras. 584, 765
[636] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 2.
[637] *Prosecutor v. Stanislav Galić*, 30 November 2006, Case No. IT-98-29-A, Indictment.
[638] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 64.

of Additional Protocol I (and Article 13(2) of Additional Protocol II to the 1949 Geneva Conventions.[639] Both identical provisions state that: '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'.[640] As Galić had effective control over the activities of the troops under his command, he was charged with individual criminal responsibility (under Article 7(1) of the ICTY Statute) for ordering the crimes that had been committed by his subordinates. He was also charged with superior criminal responsibility under Article 7(3) of the ICTY Statute.[641] The indictment was supported by a list of individual incidents for the specificity of pleading, as well as evidence of sniping, shelling incidents and others aspects of general evidentiary nature.[642] The parties to the conflict in Sarajevo had signed a series of agreements under the auspices of the ICRC to protect the civilian population and, on the basis of those agreements, the Trial Chamber concluded that, whether or not 'terror' was a crime under the customary international law, the ICTY had subject-matter jurisdiction over it.[643]

While addressing a challenge to its jurisdiction over the charge in the Indictment, i.e. killing and wounding civilians in time of armed conflict with the intention to inflict terror on the civilian population, the *Galić* Trial Chamber invoked the four *Tadić* conditions that must be met for an offence to be prosecuted under Article 3 of the ICTY Statute.[644] The four *Tadic* conditions are:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met …
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule

[639] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 64.
[640] Protocol Additional to the Geneva Conventions of (12 August 1949), Protocol I, 8 June 1977, art 51(2), Protocol Additional to the Geneva Conventions of (12 August 1949), Protocol II, 8 June 1977, art 13(2)
[641] *Prosecutor v. Stanislav Galić*, 30 November 2006, Case No. IT-98-29-A, Indictment, para. 10, Having found General Galić is guilty of the crimes proved at trial under Article 7(1) of the Statute it did not have to scrutinize Galić's superior criminal responsibility under Art. 7 (3) ICTY Statute.
[642] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 3; *Prosecutor v. Stanislav Galić*, Second Schedule to the Indictment', Case No. IT–98–29–I
[643] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 22,25
[644] *Ibid.*, para. 12

> of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[645]

The Chamber scrutinized the four 'Tadić conditions' which, according to the Appeals Chamber, must be fulfilled in order for an offence to fall within the scope of Article 3 of the Statute. It established that all conditions had been satisfied in regard to the crime of terror against civilians, and that the Trial Chamber had jurisdiction over it.[646] In its decision on the defence motion for interlocutory appeal on jurisdiction the Tadic Appeals Chamber expounded that:

> Article 3 [of the ICTY Statute] is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law.[647]

The Appeal Chamber also referred to the Hungarian delegate's (at the Security Council meeting for the establishment of International Tribunal for the Former Yugoslavia) declaration with regard to Article 3, who stated, 'the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia.'[648]

After analysing and elaborating the elements of the crime of terror, on 5 December 2003, the Trial Chamber, by a majority of two judges to one, found Galić guilty on the first count of the Indictment and four counts of crimes against humanity. Judge Nieto-Navia gave a partly dissenting opinion in which he disagreed with numerous factual findings and concluded that the Tribunal did not have jurisdiction on the crime of terror because the 'crime of terror' does

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[645] *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 94.
[646] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 89-130
[647] *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 89.
[648] *Ibid.*, para. 88; Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993)

not satisfy the requirement of individual criminal responsibility under international humanitarian law.[649] He stated that 'the Tribunal cannot create new criminal offences, but may only consider crimes already well established in international humanitarian law'.[650] He was of the view that the majority failed to establish that there was a crime of terror under customary international law. Although the majority referred to instances of criminalisation by penal codes and military manuals, Judge Nieto-Navia believed it was not enough to demonstrate that the offence attracted individual criminal liability under customary international law.[651]

The Trial Chamber's decision was challenged by both the Prosecution and the Defence. The prosecution only appealed the sentence arguing that it was '"manifestly inadequate" in light of the gravity of the crimes and his degree of criminal responsibility'.[652] Galić filed 19 grounds of appeal alleging various errors of law and fact.[653] However, all 19 grounds of appeal by the accused, including those which claimed that Trial Chamber wrongly convicted him of the 'crime of terror', were dismissed by the Appeals Chamber. The prosecution's appeal on the length of Sentence was allowed on the basis that 'the sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct.'[654] So the sentence of 20 years was quashed by the Appeals Chamber, and Galić was sentenced to life imprisonment.[655] Galić's seventh ground of appeal was that the Trial Chamber had violated the principle of *nullum crimen sine lege* in convicting him under count 1 as the Tribunal has no jurisdiction over the crime of terror.[656] The Appeals Chamber stated that the prohibition of terror against the civilian population as incorporated in Article 51(2) Additional Protocol I and Article 13(2) Additional Protocol II evidently belonged to customary international law from at least the time of its inclusion in those treaties.[657] Moreover, with the help of historical analysis and an examination of state practice, the majority in the Chamber found that customary international law imposed individual criminal liability for the crime of

[649] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, Separate and Partially Dissenting Opinion of Judge Nieto-Navia 5 December 2003, Case No. IT–98–29–T, para. 113
[650] *Ibid.*, para. 109
[651] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 33; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, 5 December 2003, Case No. IT–98–29–T, para. 113
[652] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 4.
[653] *Ibid.*
[654] *Ibid.*, para 455.
[655] *Ibid.*, p. 185.
[656] *Ibid.*, para.79.
[657] *Ibid.*, para 88-98.

terror as enshrined in Article 51(2) Additional Protocol I and Article 13(2) Additional Protocol II, from at least the period relevant to the indictment.[658]

3.4.1.1 The Prohibition and Criminalisation of Terror Under Customary International Law

To prove that a violation of international humanitarian law gives rise to individual criminal responsibility is different from establishing that a prohibition of international humanitarian law itself is customary in nature. In many cases, treaty law only provides for the prohibition of a certain conduct without criminalising it or criminalises it without sufficiently defining the elements of the crime, so customary international law helps in identifying those elements.[659] In its 2006 judgment, the *Galić* Appeals Chamber held by majority that a breach of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, gave rise to individual criminal responsibility under customary international law.[660] In the *Galić* case, the Trial Chamber found it unnecessary to consider whether the crime of terror also has a foundation in customary law because terror as a crime within international humanitarian law was made effective in this case by treaty law.[661] The Appeals Chamber in *Galić*, after analysing the jurisprudence of the International Tribunals, asserted that although treaty law can form the basis of the Tribunal's jurisdiction, the judges had always endeavoured to check that crimes under consideration existed and were sufficiently defined under the customary international law at the time of their commission.[662] The Appeals Chamber held that even though conventional law provided a basis for the tribunal to exercise its jurisdiction, 'in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom'.[663]

On appeal, Galić disputed many aspects of the Trial Chamber's analysis relating to jurisdiction. He argued that the Trial Chamber was mistaken in considering treaty law to be appropriate to give jurisdiction to the Tribunal, which may only exercise jurisdiction over crimes under customary international law. Galić's objections relating to the jurisdiction of the tribunal on the basis of treaty law were dismissed by establishing that the crime of terror existed under

[658] *Ibid.*, para 98.
[659] *Ibid.*, para 83.
[660] *Ibid.*, para 79.
[661] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 138.
[662] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 83.
[663] *Ibid.*, para 85.

customary international law, and Article 51(1), (2), and (3) of Additional Protocol I constituted a confirmation of existing customary international law at the time of its adoption.[664] While examining customary international law in relation to 'terror', the Appeals Chamber referred to how the prohibition of terror was incorporated in Article 51(2) of the first Additional Protocol and Article 13(2) of the second Additional Protocol to the Geneva Conventions.[665] Article 51 was adopted by a majority of 77 votes in favour, only one against and 16 abstentions. None of the States involved in the Diplomatic Conference leading to the adoption of both Protocols expressed any concern in relation to its second paragraph.[666] Article 13 of Additional Protocol II was adopted by consensus.[667] This indicates that Article 51 (2) of Additional Protocol I and Article 13 of Additional Protocol II were an affirmation of existing customary international law at the time of their adoption.[668] Besides that, a detailed analysis of State practice and the history of attempts to criminalize terror helped the Appeal Chamber in reaching this conclusion.[669]

Conventional law and instruments entered into by the conflicting parties, including agreements concluded under the auspices of the ICRC, can form the basis of the Tribunal's jurisdiction provided that they are unquestionably binding on the parties at the time of the commission of the alleged offence and are not in conflict with or derogating from peremptory norms of international law.[670] The majority in *Galić* Appeals Chamber noted that the requirement for agreement between the parties to be unconditionally binding at the time of the offence arises from respect for the principle of *nullum crimen sine lege*.[671] This principle is 'meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their

[664] *Ibid.*, para 83.
[665] *Ibid.*, para 87
[666] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*; vols. 1-14; Berne: Federal Political Department, 1978. Hereafter *Official Records*. vol. VI, CDDH/SR.41, p. 163; *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Para 87
[667] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 87
[668] *Official Records*, vol. VI, CDDH/SR.41, p. 163; *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 87.
[669] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 88-98.
[670] *Ibid.*, para 82,83; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT-98-29-T, para. 143.
[671] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-T, para 98.

commission.'[672] In order to avoid the issue of non-adherence to the *nullum crimen sine lege* principle, the report of the Secretary-General recommending the establishment of the International Tribunal mentioned that it was expected to apply 'rules of international humanitarian law which are beyond any doubt part of customary law', emphasizing the importance of prosecuting persons responsible for serious violations of international humanitarian law.[673] In his separate and partially Dissenting Opinion, Judge Meron referred to Fourth Hague Convention on the Laws and Customs of War, which bans the threats that no quarter will be given, while addressing criminal responsibility for violations of Article 51(2):

> It is a crime to violate principles of customary international law identified in the Fourth Hague Convention. And if threats that no quarter will be given are crimes, then surely threats that a party will not respect other foundational principles of international law – such as the prohibition against targeting civilians – are also crimes. The terrorization at issue here is exactly such a threat.[674]

The *Galić* Appeals Chamber explained that the customary status of individual criminal responsibility for the crime of terror could be supported by State practice, declarations of government officials and international organisations as well as the prosecution of the offence by national or military courts.[675] Accordingly, the prohibition and criminalisation of the crime of terror were determined to be part of customary international law. Since the *Galić* case, this interpretation has been applied in other cases.[676] In the *Dragomir Milošević* case, the Appeals Chamber affirmed it by declaring that crime of terror existed at the time of the commission of the offences at stake in the *Galić* case, which took place earlier than the crimes of which Milošević is convicted.[677] The Trial Chamber of the Special Court for Sierra Leone in the *Prosecutor v. Sesay et al* case commented that the decisions of International Criminal Tribunal for the former Yugoslavia have persuasive value and they are useful in determining the state of customary international law.[678] Regarding the crime of terror, the Special Court for Sierra Leone observed that the core provisions of Article 3 of the Statute formed part of the customary

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[672] *Ibid.*, para 93
[673] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, paragraph 34.
[674] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Meron, para.2
[675] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para. 89.
[676] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 662; *Prosecutor v. Taylor*, Trial Chamber, Judgement, 18 May 2012, Case No, SCSL -03-01-PT, para. 408
[677] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 30.
[678] *Prosecutor v. Sesay et al.,* Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para. 48

international law at the relevant time, and 'any argument that these norms do not entail individual criminal responsibility has been put to rest in International Criminal Tribunal for the former Yugoslavia and ICTR jurisprudence.'[679]

The *Galić* Appeals Chamber concluded that Additional Protocol I reaffirmed the customary rule that attacks against civilians are prohibited and that civilians must enjoy general protection against the danger arising from hostilities. It asserted 'The prohibition of acts or threats of violence would in that sense stem from the unconditional obligation not to target civilians for any reason, even military necessity'.[680] It also referenced the *Blaškić* Appeal Judgement, which observed that 'there is an absolute prohibition on the targeting of civilians in customary international law'. [681]

In the *Galić* case, the Appeals Chamber judge Mohamed Shahabuddeen commented in his separate opinion that there was a core concept of terror but no comprehensive definition. He stated: 'the international community is divided on important aspects of the question, with the result that there is neither the required opinio juris nor state practice to support the view that customary international law knows of a comprehensive definition'.[682] However, he agreed that individual criminal responsibility for the core of crime of terror existed at the time of the commission of the offence.[683]

In his partial dissenting opinion, Judge Schomburg mentioned that it was not possible to assert beyond doubt that count 1 of the indictment ('terror') was penalised under customary international criminal law at the time relevant to the indictment.[684] He stated that 'it would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of

[679] *Ibid.*, para. 60
[680] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 103.
[681] *Prosecutor vs Tihomir Blaškić* Appeal Judgement, Date: 29 July 2004 Case No.: IT-95-14-A, para. 109; *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 104.
[682] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Separate Opinion of Judge Shahabuddeen, para 3
[683] *Ibid.*, paras. 3-5; Para 3:The perils of going forward in haste were presumably in the mind of Judge Petrén when, on another matter, he referred to what he regarded as a request for the International Court of Justice "to pronounce upon the future of a customary law in active evolution".
[684] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 4

inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place'.[685] He disagreed with the majority's analysis of the relevant state practice in the matter. He observed that the use of terror against the civilian population was penalised by 'extraordinarily limited number of states' at the time relevant to the Indictment. Accordingly, there was not enough evidence of 'extensive and virtually uniform' state practice on this matter.[686] The Appeals Chamber, while addressing the customary status of crime of terror, remarked that the trend in proscribing terror against the civilian population as a method of warfare at the national level continued after 1992.[687] In response, Schomburg condemned this approach:

> It is not necessary to dwell on the question of whether today the crime of terrorization against a civilian population is part of customary international law. In fact, there might be some indicators that this is indeed the case. However, one cannot conscientiously base a conviction in criminal matters on a "continuing trend of nations criminalising terror as a method of warfare" or on a "trend in prohibiting terror continued after 1992". The use of the term "trend" clearly indicates that at the time of the commission of the crimes in question, this development had not yet amounted to undisputed state practice. The case in question is about a conduct that happened fourteen years ago, which must be assessed accordingly.[688]

Although, he asserted that the use of 'terror' prohibited by Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, should be penalized as a crime *sui generis*, he criticized the Tribunal for 'acting as a legislator' [689] He stated that it was the Tribunal's responsibility to apply only customary international law applicable at the time of the criminal conduct, between 1992 and 1994.[690]

Schomburg also referred to the fact that the terrorization of a civilian population was not included in the subject matter jurisdiction of the International Criminal Court because this crime was not beyond doubt part of customary international law in 1998.[691] He concluded that he would have overturned Galić's conviction under Count 1 and considered the acts of terrorization against the civilian population as an aggravating factor in sentencing.[692] However,

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[685] *Ibid.*, para.21
[686] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Schomburg para. 10
[687] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 98, Footnote 286
[688] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Schomburg, para.21
[689] *Ibid.*
[690] *Ibid.*
[691] *Ibid.*, para. 20
[692] *Ibid.*, para. 23

the absence of crime of terror from the Rome Statute does not suggest that it cannot be prosecuted by other tribunals. Article 10 of the Statute itself states that: 'nothing in this part shall be interpreted as limiting or prejudicing in anyway existing or developing rules of international law for the purposes other than this statute.' The *Galić* case is a significant milestone in the evolution of crime of 'terror' as it settled the elements of the crime and added clarity to its criminalisation under the customary international law. The next section contains an in-depth analysis of the elements of crime of terror as explained in the *Galić* case.

3.4.1.2 The Elements of the Crime of Terror

The detailed analysis provided in both the Trial Chamber and the Appeals Chamber judgements add to the precedential value of the *Galić* case, in particular in relation to the elements of the crime of terror. Fenrick argues that:

> [A]lthough it is relatively easy to identify which types of acts constitute war crimes, it is often quite difficult to spell out the elements of individual offenses because substantial portions of international humanitarian law are expressed at a high level of abstraction or generality and because many offenses have rarely, if ever, been prosecuted in criminal courts.[693]

An analysis of elements of crime of terror will be helpful in order to understand the criminalization of acts of terror and thus to strengthen the enforcement of the prohibition of terror under the international humanitarian law.

3.4.1.2.1 The Mens Rea and Primary Purpose

What distinguishes crime of terror from other crimes is its special intent.[694] Since terror is an offence of compound nature, the *mens rea* requires proof of two types of intent: the general intent (civilians were 'willfully' made the object of the attack) and the specific intent (the acts or threats of violence were committed with the primary purpose of spreading terror among the civilian population).[695] The general intent implies disregard for the protected status of the persons attacked.

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[693] William J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes?' (1998) 37 *Columbia Journal of Transnational Law* 767, 772

[694]*Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para.72, *Prosecutor v. Stanislav Galić*, Prosecutor's Pre-Trial Brief Pursuant to Rule 65 ter (E) (i), 23 October 2001, Case No. IT-98-PT, paras. 143,148

[695]*Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 136

The *Galić* Trial Chamber noted that 'the prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that was result which he specifically intended.'[696] This shows that the most essential element of the crime of terror is its specific intent because it is imperative to prove that the perpetrator had the primary intent to spread terror among the civilian population. At the Diplomatic Conference which drafted the Additional Protocols, the word 'purpose' was substituted for 'intention', apparently with a view that 'purpose' was a more objective term.[697] The requirement of a purpose discards the assertion that any act of violence causing the spreading of terror among the civilian population constitutes an illegal act. If some other acts or threats of violence designed to achieve another primary objective incidentally cause terror among the civilian population, it will not satisfy the specific intent requirement and a conviction would then not be possible. Hence, the primary purpose is conclusive: an act done for a definite military purpose which terrorises the population as a secondary consequence does not fall under the prohibition.

The Trial Chamber relied heavily on the ICRC Commentary on Additional Protocol I. The Commentary on Article 85 of the Additional Protocol explains the term wilfully as involving recklessness:

> [T]he accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.[698]

Considering the fact that proving *dolus specialis* (specific intent) is complicated, the tribunals have tried to simplify it. The *Galić* Appeal Judgement propounded that the specific intent can be inferred from the nature, manner, timing and duration of the acts or threats of violence.[699] Prolonged or indiscriminate attacks against civilians and attacks during cease-fires could be indicative of the intent to spread terror among the civilian population; for instance, where the

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[696] *Ibid.*
[697] *Official Records*, vol. XIV, CDDH/II I/SR. 8, p 64; *Official Records*, vol. XV, CDDH/III/51 p, 241
[698] Claude Pilloud, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3474.
[699] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 104

targets were markets, water distribution points, public transports, or places commonly visited by the civilian population.[700] As the Trial Chamber described it,

> The attacks on civilians had no discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo.[701]

In terms of *mens rea*, 'primary' does not mean that the causing terror would be the only objective of the acts or threats of violence. The *Galić* Appeals Chamber explained that a plain reading of Article 51(2) implies that the purpose of the acts or threats of violence need not be the only purpose. Another purpose could exist simultaneously with this primary purpose, but in order to charge with the crime and satisfy the *mens rea* requirement, the intent to spread terror has to be principal among all other purposes.[702]

3.4.1.2.2 Actus Reus

An *actus reus* consists of more than just an act. In the *Orić* case it was acknowledged that the *actus reus* of a crime could be established by omission when the perpetrator has a duty to act.[703] The crime of terror consists of two types of external conduct: acts of violence and threats of violence. The term 'acts of violence' is a broader term which embodies all acts of violence which by their nature are likely to spread terror among the civilian population.[704] Galić challenged the prosecution's claim that sniping and shelling served to inflict terror upon the civilian population, on the ground that it does not refer to 'acts of violence'. He contended: 'the Trial Chamber considered that "acts of violence" constituted the manner used to spread terror among the civilian population while the Prosecution alleged that sniping and shelling served to inflict terror upon the civilian population, thereby making no reference to such "acts of violence"'.[705]

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[700] *Prosecutor v. Stanislav Galić*, 30 November 2006, Case No. IT-98-29-A, Indictment, para. 4b
[701] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 593.
[702] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para. 104.
[703] *Prosecutor V. Naser Orić*, Trial Chamber, Judgement, Case No. IT-03-68-T, 30 June 2006, para. 302
[704] *Ibid.*, para.102
[705] *Ibid.*

However, the Appeals Chamber confirmed the finding of the Trial Chamber that the *actus reus* of the crime of terror consisted of 'attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence'.[706] The Appeals Chamber further stated that the sniping and shelling under consideration fell indisputably within the scope of 'acts of violence'. Article 49 of the first Additional Protocol defines 'attacks' as 'acts of violence against the adversary, whether in offense or in defence'.[707] Relying on this definition, the Appeals Chamber concluded that acts or threats of violence executed with the primary purpose of spreading terror among the civilian population could include attacks against civilians.[708] The acts or threats of violence which constitute the *actus reus* of the crime of terror are not only committed through direct attacks against civilians (or threats thereof), but also through indiscriminate and disproportionate attacks.[709] The Trial Chamber also explained that 'acts of violence' do not include legitimate attacks against combatants but only unlawful attacks against civilians.[710]

Besides the 'primary purpose' requirement, the other legal elements of the crime of terror are the same as those of unlawful attacks on civilians. In order to elucidate the crime of terror, the Trial Chamber interpreted the rule provided in Article 51(2) of Additional Protocol I according to 'ordinary meaning of the terms of Additional Protocol I, as well as of its spirit and purpose'.[711] The term 'civilian population' was understood as provided in Article 50 of Additional Protocol I (discussed below, in section 3.7).

With regard to the charge of 'unlawful attacks against civilians', the Trial Chamber in *Galić* stated that in order to prove the *mens rea* for this offence, the prosecution must show that 'the perpetrator was aware of the civilian status of the persons attacked'.[712] Moreover, it held that in a case of doubt the prosecution must prove that under the given circumstances a reasonable person could not have believed that the victim of the attack was a combatant.[713] The Trial Chamber explained that non-combatant status could be determined by taking into account

[706] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 106, *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 596
[707] *Ibid.*; para. 52
[708] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 102
[709] *Ibid.*, para. 102
[710] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 135
[711] *Ibid.*, paras. 46, 137
[712] *Ibid.*, para. 55
[713] *Ibid.*

factors such as the distance of the victim(s) from the alleged perpetrator(s), the visibility at the time of the event, and the proximity of the victim(s) to possible military targets.[714] Furthermore, while considering whether Galić could be held responsible for directly targeting civilians, the Trial Chamber gave special consideration to the questions of:

> distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.[715]

The *actus reus* of the crime of terror could also be established by threats of violence intended to spread terror against the civilian population. The Prosecution in the *Galić* case claimed that 'shelling and sniping of civilians created a constant threat that more such acts would be perpetrated at any moment'.[716] The Trial Chamber stated that such threats were implicit in the acts of violence.[717] The Trial Chamber held that it had not been called upon to decide whether the Tribunal had jurisdiction over the crime of terror consisting only of threats of violence, so it did not express a view on it.[718] However, the Trial Chamber did not neglect this issue. It noted that:

> Certain threats of violence would undoubtedly involve grave consequences. For example, a credible and well publicized threat to bombard a civilian settlement indiscriminately, or to attack with massively destructive weapons, will most probably spread extreme fear among civilians and result in other serious consequences, such as displacement of sections of the civilian population.[719]

As the Trial Chamber did not rule on the applicability of this aspect of the crime of terror, the scope of the *Galić* precedent is limited to acts of violence and not threats thereof. The means may range from unlawful killings to the use of certain propaganda. The latter is evident from the discussions at the Diplomatic Conference where some delegates suggested provisions to prevent the use of propaganda as a means of spreading terror among the civilian population.[720]

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[714] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 320, 355, 522
[715] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 188
[716] *Ibid.*, para.71
[717] *Ibid.*, para.71
[718] *Ibid.*, para. 130
[719] *Ibid.*, para.110, Footnote,179
[720] *Official Records*, vol. XIV, CDDH/III/SR. 8, p. 61 Mr. Ogola (Uganda) said that his delegation was a sponsor of the amendment to paragraph, 'the object of which was to obtain recognition of the role of propaganda in spreading terror; *Official Records*, vol. XIV, CDDH/III/SR. 8, p. 67 Mr. Dixit (India) said that, in his delegation's opinion, the prohibition of spreading terror among the civilian population should also, extend to psychological or propaganda warfare; *Official Records*, CDDH/III/SR.7 vol. XIV, p. 52 Mr. Crabbe (Ghana), introducing his

Since the crime of terror is a crime of conduct, the threats of violence can also be prosecuted even if they do not cause any actual harm to the civilians. The Trial Chamber also addressed the question of result requirement for the crime of terror; this will be discussed in the following section.

3.4.1.2.3 A Result Requirement for the Crime of Terror

The Trial Chamber in *Galić* also addressed the existence of a 'result requirement' as an element of the crime of terror. The argument that the actual terrorisation of the civilian population was a required element of the crime was put forward by both the prosecution and the defence.[721] The prosecution suggested that it was an element of the offence of terror to establish that terror was in fact caused and that there was a causal link between the acts and the terror.[722] In the introductory paragraph to the Indictment, the Prosecution initially envisaged the term 'infliction of terror'. However, the Trial Chamber noted that it was not an appropriate designation of the offence.[723] According to the *Galić* Trial Chamber, one of the elements of the crime of terror was 'acts of violence causing death or serious injury to body or health within the civilian population.'[724] This seemingly requires a specific result consisting of death or serious injury to body or health within the civilian population.[725] However, a plain reading of Article 51(2) of Additional Protocol I does not indicate that the 'terrorising of the civilian population' requires an 'actual' infliction of terror. The Trial Chamber took into account the discussions and attempts in the *travaux préparatoires* to Additional Protocol I to replace the intent to terrorise with actual terror. In doing so, it confirmed that the actual infliction of terror was not a constitutive legal element of the crime of terror.[726] The Appeals Chamber also approved that 'actual terrorisation of the civilian populations is not an element of the crime'.[727]

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delegation I amendment to article 46, said that its main purpose was to prevent the use of propaganda as a means of spreading terror among the civilian population.

[721] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 82
[722] *Ibid.*, para. 73
[723] *Ibid.*, para. 66
[724] *Ibid.*, para.133
[725] *Ibid.*, para. 133; *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para. 100
[726] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 134 Certain States attempted to have intent substituted with actual infliction of terror: see the joint proposal by Algeria et al.; *Official Records*, CDDH/III/48 vol.III, p. 205, as well as the proposals by Mongolia *Official Records*, CDDH/III/SR.7 vol. XIV, p. 53 , Iraq, *Official Records*, CDDH/III/SR.7 vol. XIV, p. 54, Indonesia, *Official Records*, CDDH/III/SR.7 vol. XIV, p. 55 and USSR, *Official Records*, CDDH/III/SR.9 vol. XIV, p.73
[727] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, Para.104

Since the *Galić* case only involved allegations of acts causing death or serious injury, the Trial Chamber did not examine the issue in detail.[728] The Majority did not consider whether the crime of terror against the civilian population could consist only of threats of violence, or the form including acts of violence not causing death or injury.[729]

3.4.1.2.4 Terror as 'extreme fear'

The Trial Chamber and Appeals Chamber in *Galić* referred to terror as 'extreme fear'.[730] Neither Chamber provided an actual definition of terror. However, they approved the prosecution's assertion that terror was associated with extreme fear, by stating that the *travaux préparatoires* of Additional Protocol I did not suggest a different meaning of terror.[731] With regard to the *actus reus* of the crime of terror, the *Galić* Appeal Chamber remarked:

> The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of 'extensive trauma and psychological damage' being caused by 'attacks which were designed to keep the inhabitants in a constant state of terror'. Such extensive trauma and psychological damage form part of the acts or threats of violence.[732]

This indicates that there is no requirement for the actual infliction of 'terror' as a constitutive legal element of the offence.[733] As mentioned above, terror should not be equated with the fear connected with legitimate military actions or the conflict related fear experienced by civilians in war.[734] As fear and intimidation are to some extent part of almost every armed conflict, it is important to bear in mind this distinction.[735] The concept of terror developed in *Galić* was further elaborated by the International Criminal Tribunal for the former Yugoslavia in the *Dragomir Milošević* case. This will be examined in the section that follows.

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[728] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 132
[729] *Ibid.*, para.130
[730] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 103, footnote 320.
[731] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para. 137
[732] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para 102
[733] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para 35
[734] *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para.101
[735] Julinda Beqiraj, 'Terror and Terrorism in Armed Conflict: Developments in International Criminal Law' in Pocar, Fausto, Marco Pedrazzi and Micaela Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and investigation* (Edward Elgar, 2013) pp. 257-275, p. 265.

3.4.2 Prosecutor v. Dragomir Milošević

Dragomir Milošević assumed command of the Sarajevo Romanija Corps (SRK) after the departure of Stanislav Galić in August 1994 and remained in that position until November 1995.[736] His case also concerned the strategy implemented by the Sarajevo Romanija Corps, which used shelling and sniping to kill, injure, and spread terror among the civilian population of Sarajevo. The Trial Chamber applied the principles established in *Galić* and concluded that the campaign of sniping and shelling of civilians in Sarajevo constituted the war crime of spreading terror.[737] The Trial Chamber thus found Milošević guilty under Article 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia on various Counts, including the planning and ordering of the crime of terror as a violation of the laws or customs of war.[738] The Trial Chamber imposed a sentence of 33 years imprisonment which was reduced by the Appeals Chamber to 29 years.[739]

In addition to applying the principles established in the *Galić* case, a few elements of the crime of terror were further clarified. The Trial Chamber declared that 'attacks during cease-fires and truces or long term and persistent attacks against civilians, as well as indiscriminate attacks, may be taken as indicia of the intent to spread terror'.[740] With regard to the 'primary purpose' requirment, the Appeals Chamber in the *Dragomir Milošević* case developed the *Galić* jurisprudence by stating that the 'nature, manner, timing and duration of the acts or threats'[741] are only some of the factors which could be taken into account to infer the specific intent. These were not an exhaustive list of mandatory considerations. The Appeals Chamber held that the actual infliction of terror and the indiscriminate nature of the attacks were reasonable factors for the Trial Chamber to examine in ascertaining the specific intent of the accused in this case.[742]

[736] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para. 1
[737] *Ibid.*, paras. 905-913.
[738] *Ibid.*, paras. 869.913
[739] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para 1008, *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 337
[740] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, Para. 104; *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, Para. 881
[741] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 37
[742] *Ibid.*

In his partly dissenting opinion, Judge Liu Daqun disapproved the primary purpose requirement. He classified the hierarchy of intent as an arbitrary and novel concept which had no place in international law before the *Galić* case.[743] He referred to the primary purpose requirement as being 'impossible to determine with any certainty from purely circumstantial factors in accordance with the approach adopted by the majority.'[744]

Additionally, the *Dragomir Milošević* Appeals Chamber, while addressing the applicable law on cumulative convictions with regard to the crime of terror and unlawful attacks against civilians, underlined that the focus of the inquiry was to be placed on the legal elements of each crime, instead of the underlying conduct of the accused.[745] It described the offence of unlawful attacks against civilians as requiring proof of death or serious injury to body or health, which was not an element of the crime of terror.[746] The offence of terror requires proof of the intent to spread terror among the civilian population which is not an element of the crime of unlawful attacks against civilians.[747] Thus, each offence has an element requiring proof of a fact not required by the other, allowing cumulative convictions.[748]

The absence of a result requirement for the crime of terror was confirmed in the *Dragomir Milošević* case by the Appeals Chamber. The Trial Chamber had stated that: 'While the actual infliction of death or serious harm to body or health is a required element of the crime of terror, both the Trial Chamber and the Appeals Chamber in the Galić case held that actual infliction of 'terror' on the civilian population is not an element of the crime'.[749] The Appeals Chamber reversed this ruling by stating:

> [T]he Trial Chamber misinterpreted the Galić jurisprudence by stating that "actual infliction of death or serious harm to body or health is a required element of the crime of terror", and thus committed an error of law. Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*.[750]

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[743] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, Partly Dissenting Opinion of Judge Liu Daqun, 2 November 2009, Case No. 98-29/1-A, para. 19
[744] *Ibid.*
[745] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 39
[746] *Ibid.*
[747] *Ibid.*
[748] *Ibid.*
[749] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para. 880
[750] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 33

Moreover, the Appeals Chamber observed that for the offence to fall under the jurisdiction of this Tribunal, it was necessary 'that the victims suffered grave consequences resulting from the acts or threats of violence'.[751] The actual infliction of terror can, however, serve as a corroboration to prove other elements of the crime.[752] The prosecution submitted that the crime of terror has no result requirement provided that the underlying acts or threats of violence are "capable of spreading terror"'. [753] The Appeals Chamber rejected the prosecution's submission and referred to the *travaux préparatoires* to Additional Protocol I, where, the delegations of the Soviet Union tried to introduce the term 'acts capable of spreading terror' into the language of the prohibition enshrined under Article 51(2), but it was rejected for being too broad.[754] In addition, the Appeals Chamber noted that '"acts capable of spreading terror", does not necessarily imply grave consequences for the civilian population and thus does not per se render the violation of the said prohibition serious enough for it to become a war crime within the Tribunal's jurisdiction.'[755] Accordingly, the Trial Chamber in *Blagojević and Jokić* held that the Prosecution only needs to establish that the Accused intended to spread terror and that the acts or threats of violence were carried out to create an atmosphere of terror among a civilian population.[756] It does not need to be proven that the protected population was actually terrorised.

The Appeals Chamber in *Dragomir Milošević* case also broadened the *actus reus* for the crime of terror to include undue 'trauma or psychological damage' within the element of inflicting grave consequences.[757] The Appeals Chamber stated that 'extensive trauma and psychological damage form part of the acts or threats of violence'.[758] The *Dragomir Milošević* Trial Chamber established that the incidents under consideration had a psychological impact on the population of Sarajevo which also satisfies the threshold of grave consequences.[759] Moreover, all the incidents under consideration also constituted unlawful attacks against civilians, causing death

[751] *Ibid.*
[752] *Ibid.*, para. 35
[753] *Ibid.*, para. 34
[754] *Ibid.*
[755] *Ibid.*
[756] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Chamber Judgment, 17 January 2005, Case No. IT-02-60-T, para. *590*
[757] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para.30-40
[758] *Ibid.*, para. 35
[759] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 35

or serious injury to body or health of civilians.[760] Hence, the Appeals Chamber held that the legal error of the Trial Chamber regarding the *actus reus* of the crime had no impact on the analysis of evidence and guilt of the accused.[761] Finally, the Appeals Chamber concluded that since the *actus reus* of the crime of terror, in this case, was proven, the matter did not require any further exploration.

This indicates that there is no result requirement of 'terror' for the crime because 'extensive trauma and psychological harm' are part of the 'acts or threats of violence'.[762] The actual concept of terror was also elaborated in the *Dragomir Milošević* case. The prosecution in its closing arguments described:

> No one knew whether they might be the next victim. It affected every waking moment of their lives. People for 15 months over the period of this indictment knew absolutely no sense of safety anywhere in the city. Terror is the intentional deprivation of a sense of security. It's been the primal fear that people feel when they see someone in front of them gunned down and that moment of panic when they try and run to help the victim, waiting for the next shots to come, and you've had ample evidence about that.
> And it's not just the fear that comes from being nearby the combat. This is a fear calculated to demoralise, to disrupt, to take away any sense of security from a body of people who have nothing to do with the combat.[763]

The Trial Chamber remarked that the prosecution's description is the essence of what the term terror denotes.[764] The prosecution also asserted that the drafters of the provisions relating to terror were 'meant to capture the deliberate infliction of fear far and away apart from, completely not linked from any military objective or any military advantage to either of the opposing forces.'[765]

In his dissenting opinion in the *Dragomir Milošević* case, Judge Liu Daqun stated that although there was a clear prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population under customary international law during the indictment period, it did not entail individual criminal responsibility and, therefore, the

[760] *Ibid.*, para. 33
[761] *Ibid.*, para. 36
[762] *Ibid.*, para. 35
[763] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para. 884; *Prosecutor v. Dragomir Milošević,* Prosecution Closing arguments, 9 Oct 2007, P, 9468, 9472
[764] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para. 886,
[765] *Prosecutor v. Dragomir Milošević,* Prosecution Closing arguments, 9 Oct 2007, pp. 9471-9472, available at: https://www.icty.org/x/cases/dragomir_milosevic/trans/en/071009ED.htm

Tribunal had no jurisdiction over the crime of terror.[766] He further asserted that 'the elements of the offence set out by the majority in the Judgement do not adequately define a criminal charge'.[767] Since actual infliction of death or serious harm to body or health is only one of the possible modes of the commission of the crime of terror, the nature of acts or threats of violence can vary: 'The offence would thus appear to lack a clear minimum threshold, particularly where threats constitute the *actus reus* of the offence in the absence of any result requirement of actual terrorisation'.[768] Liu Daqun opined that the lack of gravity threshold violates the principle of specificity.[769]

Liu Daqun introduced a different approach to the crime of terror stating that 'there has been a continuing trend of states criminalising terror as a method of warfare in accordance with the Additional Protocols.'[770] He argued that there was a clear gap in international criminal law to punish those responsible for inflicting severe psychological scars on individuals in the course of conflict.[771] Liu Daqun was of the opinion that translating the prohibition of terror into a crime was not straightforward so 'a "crime of terror" should be properly defined and prospectively confirmed as part of the canon of war crimes either by convention or clear custom.'[772] He suggested that the potential elements of such crime could include, among others, acts of beating, torture, rape and murder as well as threats and intimidation; shelling and sniping in and around civilian areas; separation of family members; burning of homes and destruction of property.[773] Due to absence of a result requirement, Liu Daqun believed that the current definition of the crime of terror lacked coherence because in some cases the victims of the direct attack may in fact be dead, while those 'injured by an unlawful attack may also be terrorised'. This incongruity undermined the very purpose of a prohibition on terror.[774]

Liu Daqun recommended a 'result requirement' of terrorisation for the crime of terror stating: 'the offence would criminalise unlawful acts or threats designed to create an atmosphere of

[766] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement , Partly Dissenting Opinion of Judge Liu Daqun, 2 November 2009, Case No. 98-29/1-A, para.13.
[767] *Ibid.*, para. 14
[768] *Ibid.*, para.17
[769] *Ibid.*
[770] *Ibid.*, para.23
[771] *Ibid.*
[772] *Ibid.*, para.24
[773] *Ibid.*, para.26
[774] *Ibid.*, para.22

terror among a civilian population that result in terrorisation.'[775] 'This offence would include, inter alia, state terror and terrorisation by guerrilla groups.'[776] He concluded: 'Although these proposals for a crime of terror are purely academic, the lessons of history suggest that the inclusion of such an offence under international criminal law is long overdue.'[777] It could be argued that even the dissenting judges were convinced that the crime of 'terror' should be codified under international law.

This indicated that even the dissenting judges recognised the status of crime of terror under international law, despite objecting its current formulation. The *Galić* and *Dragomir Milošević* cases were applied in several other cases under the ICTY. However, there is still some uncertainty in relation to different cases of crime of terror. It has been argued elsewhere that the definition of 'terror' lacks precision due to the absence of an explanation objectively evaluating the capability of a specific unlawful behaviour to spread terror among the civilian population.[778] Therefore, judging it on a case to case basis seems to be the best solution to the problem. Ben Saul notes that '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.'[779]

In *Blagojević and Jokić*, 'the terrorising of Bosnian Muslim civilians in Srebrenica and at Potočari' was charged as an act of persecutions.[780] The Prosecution asserted that 'terrorisation as a form of persecutions was different from the charged offence of terrorisation in the *Galić* case'.[781] The Prosecution described terrorisation as 'establishing, through unlawful acts, physical and psychological conditions designed to create an atmosphere of terror or panic among a civilian population'.[782] The Trial Chamber held that although the act of 'terrorising the civilian population' is not found in the Statute, it is similar to 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' prohibited

[775] *Ibid.*, para. 24
[776] *Ibid.*, 26
[777] *Ibid.*, para. 29
[778] Laura Paredi, 'ICD Brief 11 The War Crime of Terror: An Analysis of International Jurisprudence' (2015) <http://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf> accessed 19 November 2016.
[779] Ben Saul, '*Defining Terrorism in International Law*' (Oxford: Oxford University Press,2006) p.304
[780] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Chamber Judgment, 17 January 2005, Case No. IT-02-60-T, para. 588
[781] *Ibid.*, para. 589
[782] *Ibid.*, para. 588

under Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The Trial Chamber relied on the *Galić* Trial judgement to define the elements of the crime and concluded that terrorisation violates a fundamental right laid down in international customary law and treaty law. The *Blagojević* and *Jokić* Trial Chamber stated: 'the exposure to terror is a denial of the fundamental right to security of person which is recognised in all national systems and is contained in Article 9 of the ICCPR and Article 5 of the ECHR'.[783]

The following section will examine the more recent and prominent cases to highlight the method in which the International Criminal Tribunal for the former Yugoslavia has elaborated the crime of terror, relying on the *Galić* and *Dragomir Milošević* judgements.

3.4.3 Further Development of the Crime of Terror by International Criminal Tribunal for the former Yugoslavia

The *Galić* and *Dragomir Milošević* jurisprudence relating to the crime of terror was also applied in subsequent cases before the International Criminal Tribunal for the former Yugoslavia, including the *Mladić* case and the *Radovan Karadžić* case. These judgements are a valuable addition to the jurisprudence on the crime of terror as they explicated many features of the crime. This section will briefly highlight the points added or emphasised by the tribunal in such cases addressing the crime of terror.

On 22 November 2017, after more than five years of trial, the International Criminal Tribunal for the former Yugoslavia rendered its last judgement in *Prosecutor v. Ratko Mladić*, one of the largest and most complex war crimes trials in history.[784] The prosecution charged the accused with acts of violence the primary purpose of which was to spread terror among the civilian population, a violation of the laws and customs of war, punishable under Articles 3, 7(1), and 7(3) of the ICTY Statute, and unlawful attacks on civilians, a violation of the laws and customs of war, punishable under Article 3, 7(1) and 7(3) of the Statute, under Counts 9 and 10.[785] According to the Indictment, Mladić and others participated in a joint criminal enterprise (JCE), whose objective was to spread terror among the civilian population: The

[783] *Ibid.*, para. 589
[784] Jonas Nilsson, The Mladić Trial – The Last Case Before The ICTY, ICD Brief 23 September 2018 p. 2
[785] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Second Amended Indictment, 1 June 2011 para.75

accused 'committed in concert with others, planned, instigated, ordered, and/or aided and abetted the crimes of terror'.[786] Moreover, he had reason to know that his subordinates were committing the crimes of terror civilians or had done so but failed to take the appropriate steps to stop such acts or to punish the offenders.[787]

The Trial Chamber examined different types of evidence to conclude that between 12 May 1992 and November 1995, there existed a joint criminal enterprise with the primary purpose of spreading terror among the civilian population through a campaign of sniping and shelling.[788] The evidence of witnesses in relation to the Bosnian-Serb military and political leadership's repeated communications and unvarying opinions conveyed at joint meetings with internationals was evaluated. Additionally, the Trial Chamber found the evidence that the leadership was aware of crimes on the ground and that the campaign of sniping and shelling continued relentlessly over almost four years. The Trial Chamber also took into account the composition and organisation of political and military institutions.[789] The objective involved the crimes of terror, unlawful attacks against civilians, and murder, which are all violations of the laws and customs of war.[790]

The Chamber separately addressed all the elements of joint criminal enterprise, including, plurality of persons, participation of the accused in the objective's implementation and a common objective which involves the commission of a crime provided for in the Statute.[791] To establish the plurality of persons, the Trial Chamber found that *Karadžić*, *Galić*, *Dragomi*r

[786] *Ibid.*
[787] *Ibid.*
[788] *Prosecutor v. Ratko Mladić*, Trial Judgment, Case No. IT-09-92-T, Vol IV,22 November 2017 para. 4892
[789] *Ibid.*, para. 4740
[790] *Prosecutor v. Ratko Mladić*, Trial Judgment, Case No. IT-09-92-T, 22 November 2017 para. 4893; The Trial Chamber made findings about Mladić's acts and omissions during the existence of the Sarajevo JCE. The Trial Chamber found that Mladić: (i) worked on establishing the SRK in May 1992; (ii) made personnel decisions in the SRK; (iii) commanded SRK units from 1992 to 1995 in various operations; (iv) ordered the production and use of modified air bombs; (v) procured military assistance from the VJ for the SRK; (vi) participated in policy discussions between 1992 and 1995 with members of the Bosnian-Serb government; (vii) participated in the dissemination of anti-Muslim and anti-Croat propaganda between September 1992 and June 1995; (viii) provided misleading information about crimes to representatives of the international community; (ix) failed to investigate crimes and/or punish members of the SRK who committed crimes; and (x) frequently ordered the restriction of humanitarian aid to Sarajevo. The Trial Chamber considered in particular Mladić's acts vis-à-vis the SRK, given that all perpetrators of the Sarajevo crimes were SRK members. Mladić's acts were instrumental to the commission of these crimes. In light of this, the Trial Chamber finds that through his acts set out in this paragraph, the Accused significantly contributed to achieving the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling by way of committing the crimes of terror, unlawful attacks against civilians, and murder.
[791] *Prosecutor v. Ratko Mladić*, Trial Judgment, Case No. IT-09-92-T, Vol IV,22 November 2017, para. 3561

Milošević, *Krajišnik*, *Plavšić*, and Koljević participated in the realization of the common criminal objective.[792] *Mladić's* contribution to the joint criminal enterprise involved, among others, commanding units of the SRK from 1992 to 1995 in numerous operations and participation in the formation of the unit, including taking decisions about its personnel.[793] The Trial Chamber was persuaded that Mladić's support had been meaningful in achieving the objective of spreading terror among the civilian population of Sarajevo 'through a campaign of sniping and shelling by way of committing the crimes of terror, unlawful attacks against civilians, and murder'.[794]

The element of *mens rea* required that the JCE members had a common state of mind through which the common objective was to be carried out. [795] The Trial Chamber deduced Mladić's intent to attain the common objective from his statements and conduct during the Indictment period. A large number of witness accounts were used to establish this intent,[796] including Mladić's personal direction for the SRK artillery, mortar, and rocket attack on Sarajevo that started on 28 May 1992 and continued until early the next morning.[797] With respect to cumulative convictions for murder as a violation of the laws or customs of war and the war crime of terror, the chamber followed the *Milošević* Appeal Judgment and concluded that the two offences are distinct as each requires proof of a fact not required by the other. As the offence of murder requires proof that the accused caused the death of one or more persons, this is required for the offence of terror. Causing death denotes only one of the ways in which the offence of spreading terror can be committed. On the contrary, the offence of terror requires proof of intent to spread terror among the civilian population which is not an element of murder.[798] Ratko Mladić was sentenced to life imprisonment on all but one counts.[799]

This judgement addressed the application of theory of joint criminal enterprise which required precise evaluation of and conclusions from the evidence, 'throughout the whole chain of responsibility from the acts of the physical perpetrator to the contribution and *mens rea* of the

[792] *Ibid.*, para. 4892
[793] *Ibid.*, para. 4893
[794] *Ibid.*, para. 4893
[795] *Ibid.*, para. 3561; *Prosecutor v. Radovan Karadžić*, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009, Case No. IT-95-5/18-AR72.4, Vol.3, para. 18.
[796] *Prosecutor v. Ratko Mladić*, Trial Judgment, Case No. IT-09-92-T, 22 November 2017 para. 4895-4921
[797] *Ibid.*, para. 4902
[798] *Ibid.*, para. 5178
[799] *Ibid.*, para. 5215

accused himself'.[800] The application of the joint criminal enterprise theory in the *Mladić* case is an 'important test for the application of this theory in international criminal law generally'.[801] It is also significant with regard to crime of terror as it clarifies the method in which conviction for this crime can be made in cases involving a joint criminal enterprise.

In *Prosecutor vs Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić*, the crime of terror conviction was reversed by the Appeals Chamber on *mens rea* grounds. With regard to unlawful infliction of terror on civilians, the Trial Chamber concluded that the destruction of the Old Bridge of Mostar had a major psychological impact on the morale of the population and that the HVO (Hrvatsko Vijeće Obrane, Croatian Defence Council) had to be aware of that impact, in particular because of its 'great symbolic, cultural and historical value'. Therefore the Trial Chamber considered it as an 'act of violence, the main aim of which was to inflict terror on the population'.[802] The Trial Chamber in some previous findings had mentioned the military value of old bridge, but with regards to crime of terror, the Trial Chamber failed to expressly mention its previous findings that the HVO had a military interest in destroying the bridge and that it was a military target. [803] Therefore, the Appeal Chamber concluded that the act of destroying the Old Bridge could have simultaneously served multiple purposes.[804] The Appeal Chamber held that 'no reasonable trier of fact could have found, beyond reasonable doubt, that the HVO had the specific intent to commit terror'.[805] Accordingly, the Appeals Chamber reversed the Trial Chamber's findings that the destruction of the Old Bridge constituted an unlawful infliction of terror on civilians as a violation of the laws or customs of war and, with Judge Pocar dissenting, acquitted the Appellants of this count in relation to the Old Bridge.[806]

In his dissenting opinion, Judge Pocar upheld the findings of Trial Chamber. In doing so he recalled the evidence examined by the Trail Chamber which included the destruction of the Old Bridge of Mostar and the indiscriminate shelling and firing which terrified the population

[800] Jonas Nilsson, *The Mladić Trial – The Last Case Before The ICTY*, (ICD Brief 23 September 2018) p. 18
[801] *Ibid.*
[802] *Prosecutor v. Prlic´* et al, Trial Chamber Judgment, 29 May 2013, Case No IT-04-74-T, Vol.3, para.1690
[803] *Ibid.*, para.1582.
[804] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.1, para. 425
[805] *Ibid.*
[806] *Ibid.*, para. 426

of East Mostar.[807] He concurred with the Trial Chamber findings that people living under constant shelling and gunfire in deafening noise and under the constant threat, 'deliberate isolation' of the population of East Mostar and the 'exacerbation of their distress and difficult living conditions' proved that the HVO had the specific intent to spread terror among the civilian population of East Mostar.[808] He strongly disagreed with the reasoning and the conclusions of the Majority and concluded that the destruction of the Old Bridge of Mostar constituted unlawful infliction of terror on civilians as a violation of the laws of customs of war.[809]

A point raised by the defence for Praljak was with regard to the Trial Chamber's conclusion that the HVO committed the crime of unlawful infliction of terror by shelling the population of East Mostar. He submitted that shelling was aimed at military targets and that the Trial Chamber failed to establish that the purpose of the shelling was to spread terror. The Trial Chamber failed to establish the specific intent to spread terror on the part of that any member of the HVO.[810] Praljak also asserted: 'the Trial Chamber concluded that the shelling terrified the population, without any conclusive evidence and without establishing the required degree of trauma and psychological damage'.[811] In addressing this issue, the Appeals Chamber confirmed that there is no result requirement for crime of terror. It stated that although crime of terror includes cases in which 'extensive trauma and psychological damage' are caused by attacks designed to keep the inhabitants in a constant state of terror, there is no need to prove

[807] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.3, para. 20,21.; *Prosecutor v. Prlic´* et al, Trial Chamber Judgment, 29 May 2013, Case No IT-04-74-T, Vol.3, para.1691

[808] *Ibid.*

[809] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.3, para. 21

[810] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.1, para. 551; 562 The Appeals Chamber considers that Praljak ignores findings when submitting that, in light of the Trial Chamber's admission that the shelling was aimed at military targets, it failed to establish that the purpose of the shelling was to spread terror and that any HVO member had the specific intent to spread terror. Namely, the Trial Chamber found that the attack was indiscriminate as the HVO's shelling and firing were not limited to military targets; rather, the whole of East Mostar was subjected to daily and intense shelling and artillery fire in which heavy artillery was used. The indiscriminate nature of an attack was a reasonable factor for the Trial Chamber to consider in determining specific intent to spread terror. The Trial Chamber also considered, inter alia, the HVO's deliberate shelling and destruction of ten mosques in East Mostar. Finally, it expressly linked shelling and sniping as factors contributing to the terrorisation of the population of East Mostar. The Appeals Chamber considers that a reasonable trier of fact could conclude that HVO actions were conducted with the requisite specific intent to spread terror on these bases. Praljak fails to show that the Trial Chamber erred in this respect, His argument is dismissed.

[811] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.1, para. 551

that actual terror was caused among the civilian population. The Appeals Chamber concluded that 'Trial Chamber was not, stricto sensu, required to establish such'.[812]

The defence for Stojić also submitted that the Trial Chamber had failed to find the intent required for the crime of terror under Article 3 of the Statute.[813] The Appeals Chamber stated that the Trial Chamber failed to provide a reasoned opinion, by neglecting to set out in a clear and articulate manner the factual and legal mens rea findings on the basis of which it reached the decision to convict Stojić for the crime of unlawful infliction of terror.[814] It further noted that the Trial Chamber failed to fulfil its obligation under Article 23(2) of the Statute, translated into Rule 98 ter(C) of the Rules, to give a reasoned opinion in writing, meaning that 'all the constituent elements of a crime have to be discussed and supporting evidence has to be assessed by the Trial Chamber'.[815] Nevertheless, after an appraisal of evidence to establish whether this error of law invalidated the Trial Chamber's decision, the Appeals Chamber concluded that while the Trial Chamber erred in failing to provide a reasoned opinion on Stojić's intent, it did not invalidate Stojić's conviction of the said crime.[816]

The *Karadžić* case is also important because it establishes that there can be no immunity for violations even for high-profile offenders. The Accused was a founding member of the SDS and served as its President, from July 1990 to July 1996. From 17 December 1992, the accused was the sole President of Republika Srpska, and the Supreme Commander of the armed forces of Republika Srpska.[817] On 24 March 2016, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia convicted Karadžić of, inter alia, violations of the laws or customs of war in connection with his participation in the 'Sarajevo JCE', aiming to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling.[818] The Trial Chamber sentenced Karadžić to 40 years of imprisonment.[819] He had two charges of

[812] *Ibid.*, para. 563
[813] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.2, para. 1775 and 1776
[814] *Ibid.*, para. 1779
[815] *Ibid.*, para.1778; Prosecutor v. Kordić and Čerkez, Appeals Chamber Judgement, Case No:IT-95-14/2-A, 17 December 2004, para. 383.
[816] *Prosecutor v. Prlic´* et al, Appeals Chamber Judgement, 29 November 2017, Case No IT-04-74-A, Vol.2, para. 1789
[817] *Prosecutor v. Radovan Karadzic*, Trial Chamber Judgment, *24* March 2016, Case No.: IT-95-5/18-T Vol I, para 2
[818] *Ibid.*, para. 3, The Prosecution charges the Accused only with the first form of JCE in relation to the Sarajevo JCE. See Indictment, paras. 15–19.
[819] *Prosecutor v. Radovan Karadzic*, Trial Chamber Judgment, 24 March 2016, Case No.: IT-95-5/18-T Vol I, para 6072

crime of terror against him: the first for the 'Sarajevo JCE' under Article 7(1) of the ICTY Statute and the second under Article 7(3) of the Statute for having planned, instigated, ordered, and/or aided and abetted the crimes including crime of 'terror'.[820]

Karadžić accepted that civilians in Sarajevo experienced terror, but he argued that civilians on both sides experienced terror as is 'always the case in civil wars and street fights.[821] He claimed that SRK units did not 'intend to cause civilian casualties or to spread terror among the civilian population of Sarajevo'.[822] He further submitted that SRK units were never ordered, verbally or in writing, by SRK commands or civil authorities, to target civilians.[823] However, the Trial Chamber rejected this argument that the terror experience in Sarajevo was a normal state experienced in times of war. It asserted that while any civilian population would be expected to be fearful during tumultuous times of war, the situation of the civilians living in Sarajevo was exceptional due to the siege perpetrated by the SRK.[824]

A large number of Prosecution witnesses testified that civilians in Sarajevo were deliberately targeted in order to instil terror in the civilian population and to undermine the morale of the ABiH troops whose families were in the city.[825] Doctors testified that many people in Sarajevo were in fact 'visibly traumatised', suffered from 'post-traumatic stress disorder' and paranoia. Mandilović, a doctor from the Sarajevo State Hospital, affirmed that people were in a state of permanent fear and the civilian population became 'numb to everything going on around them'.[826] Another way in which the Trial Chamber inferred the intention to terrorise was the pattern of terror attacks. It noted that whenever there was an explicit threat of intervention by NATO, the attacks against civilians would reduce, but would then increase if the threat subsided.[827] Terror attacks were also used to retaliate against ABiH offensives, with intentional

[820] *Ibid.*, para. 4; Indictment, paras. 32–35.
[821] *Prosecutor v. Radovan Karadzic,* Trial Chamber Judgment, *24* March 2016, Case No.: IT-95-5/18-T Vol I, para. 4578
[822] *Ibid.*
[823] *Ibid.*
[824] *Prosecutor v. Radovan Karadzic,* Trial Chamber Judgment, *24* March 2016, Case No.: IT-95-5/18-T Vol I, para. 4599
[825] *Ibid.*, para. 4579, 'Indeed the Chamber heard that already by August 1992, the UN Special Rapporteur on Human Rights reported back to the UN that the city was being shelled on a regular basis and that snipers are killing innocent civilians in what "appears to be a deliberate attempt to spread terror among the civilian population." Similarly, towards the end of the conflict, in July 1995, the UN was reporting on a "general atmosphere of terror in the city" caused by the Bosnian Serb sniping and shelling'.
[826] *Prosecutor v. Radovan Karadzic,* Trial Chamber Judgment, *24* March 2016, Case No.: IT-95-5/18-T Vol I, para 4585
[827] *Ibid.*, para. 4601

use of sniping and shelling to terrorise the civilian population.[828]

The Trial Chamber observed that perpetrators of attacks intended to spread terror among the civilian population of Sarajevo and that the spreading of terror was the primary purpose of the acts of violence directed against the civilian population.[829] Such a purpose could be inferred from timing of attacks (in times of cease-fire or during quiet periods when civilians thought it was safe to walk around and when trams were operating), use of highly destructive modified air bombs, and disproportionate and indiscriminate shelling attacks on the city resulting in a number of casualties.[830] After analysing all the statements[831] and evidence in relation to the actions and omission of Karadžić his modulation of that campaign in accordance with his political goals and several other factors the Chamber established beyond reasonable doubt that he shared the common purpose of the Sarajevo JCE. Therefore, the Trial Chamber concluded that the accused bore individual criminal responsibility pursuant to Article 7(1)for terror, as violations of the laws or customs of war.[832]

The International Residual Mechanism for Criminal Tribunals Appeals Chamber upheld Karadžić's conviction for crime of 'terror' on appeal. Karadžić had submitted that the Trial Chamber erred in its application of the principles of the law of armed conflict in finding that the shelling in Sarajevo was 'indiscriminate' and 'disproportionate'.[833] However, the Appeals Chamber held that the Sarajevo JCE's intent to terrorise the civilian population would be sustained on the basis of the shelling attacks which the Appeals Chamber found to be indiscriminate as well as the shelling and sniping attacks found to have been deliberate attacks on civilians.[834]

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[828] *Ibid.*
[829] *Ibid.*, para. 4632
[830] *Ibid.*, paras. 4632, 4633
[831] *Ibid.*, para. 4649 'As that evidence shows, many of the Bosnian Serb military and political leaders were regularly put on notice that civilians were dying in Sarajevo due to direct targeting or due to indiscriminate and/or disproportionate fire by the SRK but allowed this type of fire to continue for a protracted period of time. Had it not been a part of their plan, this practice would not have persisted unabated for so long. Accordingly, the Chamber is convinced that the campaign of sniping and shelling, the primary purpose of which was to cause terror among the civilian population, was planned and that it emanated from the higher military and political structures in the RS.'
[832] *Prosecutor v. Radovan Karadzic,* Trial Chamber Judgment, 24 March 2016, Case No.: IT-95-5/18-T Vol I, para 4939.
[833] *Prosecutor v. Radovan Karadzic,* Appeals Chamber Judgement, 20 March 2019, Case No: MICT-13-55-A, para. 479
[834] *Prosecutor v. Radovan Karadzic,* Appeals Chamber Judgment, 20 March 2019, Case No: MICT-13-55-A, para. 507 'The Trial Chamber's findings reflect that "disproportionate" attacks were simply one of several types of illegitimate attacks, and the Trial Chamber's conclusions on the Sarajevo JCE's intent to terrorise the civilian population would be sustained on the basis of all the shelling attacks found to be indiscriminate as well as the

While *Ratko Mladić, Prosecutor vs Jadranko Prlić et al* and *Karadžić* cases have relied on the previous judgements on the crime of terror, a number of additional issues were elucidated. These cases denote that the International Criminal Tribunal for the former Yugoslavia has dealt with the crime of terror in a large number of cases and in the process addressed different issues related to examination of evidence and other legal and factual questions. These include the applicability of the JCE theory and different modes of analysing evidence to infer the existence of the 'primary purpose' to spread terror among the civilian population. This jurisprudence also highlights the significance of the crime of terror as an offence with the broader framework of international humanitarian law, the influence of which is conspicuous in the jurisprudence of the Special Court for Sierra Leone on the crime of 'acts of terrorism'. The Court followed the precedent of the International Criminal Tribunal for the former Yugoslavia in adjudicating on 'acts of terrorism' and developed the crime further to include attacks against property. The following section investigates case-law from the Special Court for Sierra Leone addressing 'acts of terrorism', highlighting the relationship between this offence and the war crime of 'terror'.

3.5 The Special Court for Sierra Leone and 'Acts of Terrorism'

While examining the elements of the crime 'acts of terrorism', the Special Court for Sierra Leone reproduced most of the elements set out by the Trial Chamber in the *Galić* case for the crime of 'terror'. The definition and elements of the crime of 'terror' and 'acts of terrorism' as described by the Special Court for Sierra Leone will be examined in this section.

Article 3(d) of the Statute of the Special Court for Sierra Leone includes 'acts of terrorism' as a serious violation of common Article 3 of the Geneva Conventions 1949 and Additional Protocol II of 1977. Article 3(d) of the Statute grants the Special Court jurisdiction to prosecute 'acts of terrorism' in non-international armed conflict. The 'acts of terrorism' offence is based on Article 4(2)(d) of Additional Protocol II. According to Special Court for Sierra Leone, Article 13(2) of Additional Protocol II is to be interpreted as a 'narrower derivative' of Article

shelling and sniping attacks found to have been deliberate attacks on civilians. In finding that Karadzic shared the common purpose of the Sarajevo CE, had the intent to spread terror, and significantly contributed to the joint criminal enterprise, the Trial Chamber relied on factors entirely independent of the 'disproportionate' nature, of any particular attack. · Finding that attacks related to Scheduled Incidents G.l and G.2 were disproportionate is not necessary to sustain these findings.

4(2)(d) of Additional Protocol II.[835] The former provision is therefore relevant to the interpretation of the latter.

The Special Court for Sierra Leone in its initial cases adopted a different approach while interpreting the crime of 'acts of terrorism', however as the jurisprudence further developed, the approach of the Court became more consistent with the International Criminal Tribunal for the former Yugoslavia**.** The cases discussed in this section will throw light on the war crime of 'acts of terrorism' as developed by the Special Court for Sierra Leone.

In *Prosecutor v. Fofana et al.* (Civil Defense Forces, CDF case) the indictment charged the Accused under Count 6 with 'acts of terrorism' as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3(d) of the Statute. This Count concerned to the Accused's alleged responsibility for the crimes which included threats to kill, destroy and loot, as part of a campaign to terrorise the civilian populations.[836] The Trial Chamber described the specific elements of crime of 'acts of terrorism' as follows:

> (i) Acts or threats of violence directed against persons or property;
> (ii) The Accused intended to make persons or property the object of those acts and threats of violence or acted in the reasonable knowledge that this would likely occur; and
> (iii) The acts or threats of violence were committed with the primary purpose of spreading terror among persons.[837]

The Trial Chamber relied on the Rule 98 Decision of Trial Chamber and remarked that the offence in Article 3(d) of the Statute extends beyond protected persons.[838] The Rule 98 Decision of Trial Chamber stated:

> The Chamber notes that Protocol II does not define the term "acts of terrorism", and that whilst Article 4(d) of the aforesaid Protocol prohibits "acts of terrorism" generally and with respect to protected persons, Article 13(2) thereof refers only to a specific type of violence or threat, is one that is directed towards terrorizing the civilian population. In the Chambers opinion, Article 4(d) does encompass Article 13(2) and the latter provision is useful in interpreting the meaning of terrorism in the former provision. Relying on the ICRC Commentaries on Article 51 of the Protocol I, upon which Article 13(2) is based, the Chamber holds that the proscriptive ambit of Protocol II in respect of "acts of terrorism" does extend beyond acts of threats of violence committed against

[835] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para.111
[836] *Prosecutor v. Fofana et al.*, Trial Chamber, Judgement, 2 August 2007, Case No, SCSL-04-14-T, para. 167
[837] *Ibid.*, para. 170
[838] *Ibid.*, para. 173

> protected persons to "acts directed against installations which would cause victims terror as a side-effect."[839]

The Trial Chamber further highlighted that all types of civilian property, including that which belongs to individual civilians, was protected, as its destruction could be used as a means to spread terror.[840]

With regards to the *mens rea* requirement of 'acts of terrorism', the Trial Chamber took guidance from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. The Court maintained that the Prosecution needed only to prove that the Accused intended to spread terror and did not need to establish that the protected population was actually terrorised.[841] It further commented:

> It is clear that civilian populations are frightened by war and that legitimate military actions may have a consequence of terrorising civilian populations. This offence is not concerned with these types of terror: it is meant to criminalise acts or threats that are undertaken for the primary purpose of spreading terror in the protected population. Thus, the specific intent to spread terror must be proven as an element of the offence. This is not to say, however, that the intent to spread terror must be established by direct evidence or that it needed to have been the only purpose behind the act or threat.[842]

The Chamber stated that for specific intent crimes 'the aider and abettor must have knowledge of the specific intent of the perpetrator to commit such crimes'.[843] The Trial Chamber acquitted Fofana and Kondewa of the crime of 'acts of terrorism' because it concluded that neither Fofana nor Kondewa were criminally responsible under Article 6(1) or Article 6(3) of the Statute for acts of terrorism. The Trial Chamber held that it was not proved beyond reasonable doubt that either of them possessed the requisite *mens rea* to establish criminal responsibility.[844] The prosecution challenged the acquittals of Fofana and Kondewa for 'acts of terrorism' on various grounds. However, the acquittals were upheld on appeal.[845] The Appeals Chamber further elaborated the elements of the crime.

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[839] *Prosecutor v. Fofana et al.*, Decision on Motions for Judgment of Acquittal pursuant to Rule 98 (TC), 21 October 2005, Case No, SCSL-04-14, para. 359; Commentary on the Additional Protocols, at 1375

[840] *Ibid.*, para.173

[841] *Ibid.*, para.174

[842] *Ibid.*, para. 175

[843] *Ibid.*, para. 731

[844] *Ibid.*, paras.731, 743, 779-780, 879.; 731'The Chamber finds that while spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and 'collaborators', to inflict physical suffering or injury upon them and to destroy their houses, this is not the only reasonable inference that can be drawn from the evidence. As such the Chamber finds that it has not been proved beyond reasonable doubt that Fofana had the requisite knowledge, an essential element of the crime of acts of terrorism'.

[845] *Prosecutor v. Fofana et al.*, Trial Chamber, Judgement, 2 August 2007, Case No, SCSL-04-14-T, paras

The Appeals Chamber described the elements of the crime of 'acts of terrorism' as follows:

> 1 Acts or threats of violence directed against persons or their property;
> 2. The perpetrator wilfully made persons or their property the object of those acts and threats of violence; and
> 3 The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.[846]

In the second element of the crime, 'wilfully' is used to show the general intent requirement. It was expounded by CDF Appeals chamber as follows:

> Article 85 of Additional Protocol I and its corresponding commentary define the term "wilfully," in relation to the distinct prohibition of making the civilian population or individual civilians the object of attack. The Appeals Chamber finds, however, that there is no reason why the definition of the term "wilfully" as discussed in relation to Article 85 of Additional Protocol I should not apply to the crime "acts of terrorism."…
>
> It follows, that for the crime "acts of terrorism" the second element ("wilfully made the civilian population or individual civilians, the object of an act or threat of violence") requires the Prosecution to prove that an accused acted consciously and with intent or recklessness in making the civilian population or individual civilians the object of an act or threat of violence. Negligence, on the other hand, is not enough.[847]

Article 4(2)(d) is tied to Article 13(2) of Additional Protocol II, which provides that 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.' The Appeals Chamber noted that Article 3(d) of the Statute 'borrows its language from Article 4(2)(d) of Additional Protocol II, therefore, prohibits acts of terrorism in its broad sense.'[848] The Appeals Chamber further stated: 'Article 13(2) is a narrower derivative of Article 4(2)(d). An offence under Article 13(2) of Additional Protocol II may be charged under Article 3.d. of the Statute. This is because acts of terrorism under Article 4(2)(d) inherently encompass the narrower elements of acts of terrorism prohibited under Article 13(2)'.[849]

731, 743, 779-780, 879.
Prosecutor v. Fofana et al., Appeal Chamber, Judgement, 28 May 2008, Case No, SCSL-04-14-A, para 374, 377,379
[846] *Ibid.*, para.350
[847] *Ibid.*, para. 354, 355
[848] *Ibid.*, para. 345
[849] *Ibid.*, para. 348

The Appeals Chambers mentioned that Count 6 of indictment (Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute) did not specify whether the accused was charged under Article 4(2)(d) or Article 13(2). To determine this the Appeals Chamber scrutinized the Prosecution's Pre-Trial Brief, the Trial Judgment and took into account the reliance placed upon the International Criminal Tribunal for the former Yugoslavia case of *Prosecutor v. Galić* by all parties to establish the elements of the crime. After examining all these documents, the Appeals Chamber concluded that the intention and understanding of all parties from the beginning of the trial, was to interpret Count 6 as being a charge under Article 13(2) of Additional Protocol II.[850] This reasoning was also applied by the Trial Chamber in the *Sesay et al* case while discussing Count 1 related to 'acts of terrorism'.[851]

Consistent with the ICRC Commentary to Additional Protocol II, the Appeals Chamber in the *Fofana* case agreed that the offence 'covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect.'[852] According to the Appeals Chamber, not every act or threat of violence is sufficient to satisfy the first element of the crime of 'acts of terrorism'.[853] It further observed that although the actual terrorisation of the civilian population was not an element of the crime, the acts or threats of violence alleged must be at least capable of spreading terror, and such capability should be judged on a case-by-case basis within the context involved.[854] Like the *Galić* Trial Chamber, the Appeals Chamber in *Fofana* maintained that 'terror' should be understood as the causing of extreme fear.[855] After considering all the elements of the crime, the Appeal Chambers concluded that 'the crime "acts of terrorism" may be proved by any act or threat of violence capable of spreading extreme fear amongst the civilian population.'[856]

The Prosecution submitted that the Trial Chamber's made an error of law by stating that 'responsibility for acts of terrorism may only be based on acts of violence, which themselves amount to other crimes under international criminal law'.[857] After explaining the elements of

[850] *Ibid.*, para. 348, 349
[851] *Prosecutor v. Sesay et al.,* Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, Para. 111
[852] *Prosecutor v. Fofana et al.,* Appeal Chamber, Judgement, 28 May 2008, Case No, SCSL-04-14-A, para. 351
[853] *Ibid.*, para. 352
[854] *Ibid.*, para. 352
[855] *Ibid.*
[856] *Ibid.*, para. 359
[857] *Ibid*., para. 327

the crime of 'acts of terrorism', the Appeal Chambers agreed with the prosecution that 'acts of terrorism' may be established by acts or threats of violence which do not satisfy the elements of another crime.[858]

The Trial Chamber while interpreting Count 6 (acts of terrorism) stated that 'only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal responsibility for acts of terrorism'.[859] This was challenged by the prosecution in its Sixth Ground of Appeal.[860] The prosecution argued that the Trial Chamber added a prerequisite to the elements of the offence which resulted in it 'erroneously disregarding acts of violence charged in the Indictment, such as the burning of houses'.[861] While addressing whether the Trial Chamber made an error of law by adding a requirement not included in the elements of the crime 'acts of terrorism' the Appeals Chamber concluded that 'the Trial Chamber should have considered all conduct that was adequately pleaded in the Indictment irrespective of whether such conduct satisfied the elements of any other crimes under Counts 1-5'.[862] However, the Appeals Chamber held that the Trial Chamber's error did not invalidate the decision because prosecution could not demonstrate the *mens rea* requirement for acts of terrorism.[863]

Since the jurisdictional basis of 'acts of terrorism' are Article 13(2) and Article 4(2)(d) of Additional Protocol II, it can be argued that the crime is broad in scope, supporting the conclusion of the Appeals Chamber that 'acts of terrorism' may be proved by any act or threat of violence capable of spreading terror. This does not require to prove that the primary purpose of the attack was to spread terror among the civilian population and just capability of the attack to spread terror is enough. The lower gravity threshold for acts 'capable of spreading terror'

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[858] *Ibid*., para. 352

[859] *Prosecutor v. Fofana et al.*, Trial Chamber, Judgement, 2 August 2007, Case No, SCSL-04-14-T, Paras 843

[860] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-03-14-I, Indictment, 5 February 200,Paragraph 28 of the Indictment stated:At all times relevant to the Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.; *Prosecutor v. Fofana et al.*, Appeal Chamber, Judgement, 28 May 2008, Case No, SCSL-04-14-A, para. 325

[861] *Prosecutor v. Fofana et al.*, Appeal Chamber, Judgement, 28 May 2008, Case No, SCSL-04-14-A, para. 325

[862] *Ibid.*, para.364; The Appeals Chamber found that paragraph 28 of the Indictment has clearly established that the material facts supporting criminal responsibility under Count 6 are the material facts pleaded in relation to Counts 1 to 5 of the Indictment. These include 'threats to kill, destroy and loot'.

[863] *Prosecutor v. Fofana et al.*, Appeal Chamber, Judgement, 28 May 2008, Case No, SCSL-04-14-A, paras. 365, 379

does not seem to meet the 'grave consequences' criteria set out by the ICTY. Nevertheless, in the subsequent cases the Special Court for Sierra Leone applied International Criminal Tribunal for the former Yugoslavia jurisprudence which is based on Article 51(2) Additional Protocol I and I and Article 13(2) Additional Protocol II, instead of using the capability test.

In the Armed Forces Revolutionary Council (AFRC) case before the Special Court for Sierra Leone, the Trial Chamber followed the ICTY's *Galić* jurisprudence to conclude that the intentional use of terror against civilians is both prohibited and criminal under customary international law.[864] The three accused were charged, inter alia, with 'acts of terrorism' as a violation of common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II (punishable under Article 3(d) of the 2002 Statute of the Special Court for Sierra Leone).[865] Although the Trial Chamber followed the ICTY jurisprudence in explaining the elements of the crime, it broadened the scope of the crime to include attacks against property.[866]

The defence argued that the crime of 'acts of terrorism' does not include acts of threats or violence targeted at protected property but only protected persons. In addressing this argument, the Trial Chamber held that the property itself is not the object of protection; the object of protection remains the civilian population.[867] However, attacks against property can also be used to inflict terror upon people by destroying their means of livelihood and survival. The Trial Chamber noted:

> The attacks on, or destruction of, property thus plays an important role in defining the contours of this crime. What places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population. The acts or threats of violence committed in furtherance of such a purpose are innumerable and may well encompass attacks on property through which the perpetrators intend to terrorise the population.[868]

The Trial Chamber also used the word 'persons' or 'protected persons' instead of civilians.[869] The word 'persons' has broader meaning than the term 'civilians'; it may include other individuals not taking direct part in hostilities, for example individuals *hors de combat*. The term 'protected persons' was arguably used because according to the Court Article 3(d) of the Statute is the verbatim reproduction of Article 4(2)(d) of Additional Protocol II, which is tied

[864] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 662
[865] *Ibid.*, para. 240
[866] *Ibid.*, para. 670
[867] *Ibid.*
[868] *Ibid.*
[869] *Ibid.*, para. 667

to Article 13(2) of Additional Protocol II.[870] Additional Protocol II which applies to non-international armed conflicts does not provide a definition of civilians or the civilian population even though these terms are used in several provisions.[871] According to the ICRC Commentary on Customary International Humanitarian Law, 'many other treaties, applicable to non-international armed conflicts, have used the terms civilians and civilian population without defining them'.[872] While analysing the other other elements of the crime of terror the Trial Chamber applied the similar appaorach as adopted in the *Galić* case.

The ICTY's *Galić* jurisprudence on the 'primary purpose' requirement was applied by the Special Court for Sierra Leone. In *Prosecutor v. Brima et al.* the Special Court for Sierra Leone opined: 'the Trial Chamber is also of the opinion that certain acts of violence are of such a nature that the primary purpose can only be reasonably inferred to be to spread terror among the civilian population regardless of the context in which they were committed.'[873] In its analysis of the primary purpose requirement, the Trial Chamber relied on evidence which showed a pattern of similar attacks, including the context of acts committed and their related purpose, regardless of the nature of that evidence.[874] The Trial Chamber also noted that an individual act of violence even when committed in the context of other acts of violence the primary purpose of which may be to terrorise the civilian population, may not have been committed in furtherance of such a campaign.[875]

The Trial Chamber examined the factual circumstances of different acts of violence to find out the primary purpose. These acts included looting, enslavement, sexual slavery and amputations. The Trial Chamber found that certain acts had not the primary purpose of spreading terror.[876] For instance, the primary purpose behind the commission of abductions and forced labour; the conscription and use of child soldiers by the AFRC during the conflict in Sierra Leone was military in nature.[877] However, from the manner, place and timing of the physical violence which was done by way amputations, the Trial Chamber inferred that the

[870] *Ibid.*, para. 661
[871] Additional Protocol II, Article 13-15 and 17-18
[872] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Cambridge: Cambridge University Press, 2004), p. 19
[873] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 1446.
[874] *Ibid.*, para. 1439
[875] *Ibid.*, para. 1445
[876] *Ibid.*, para. 1450, 1454
[877] *Ibid.*, para. 1450, 1454

amputations, regardless of the context in which they were committed, were acts of violence committed with the primary purpose to terrorise protected persons.[878]

An examination of the evidentiary record with regard to crime of terror showed conscription of child soldiers, abduction of civilians in order to attract the attention of the international community abduction of civilians for use as slave labour, capturing civilians to use them as human shields. , and rape of women by the AFRC troops.[879] With regard to abduction and detention of persons, and their subjection to forced labour under conditions of violence, the Trial Chamber held that the '"side-effect" of terror is not sufficient to establish the specific intent element of the crime with regards to these acts'.[880] Civilians who tried to escape from AFRC/RUF were executed. People living under their command were in a constant fear of being killed.[881] Children watched their abductors executing family members.[882] Women and young girls were treated as war booty, abducted from their homes and repeatedly raped.[883] Child soldiers were terrorised, drugged and made to commit crimes against other civilians.[884] The appraisal of evidence indicates that the deliberate infliction and threat of terror against civilians was used as a tool to maintain a brutal system which resulted in all the above-mentioned crimes. The Prosecution appealed the acquittal on the count of enslavement crimes as 'acts of terrorism' but the Appeals Chamber exercised its discretion not to entertain it.[885] The Appeals Chamber was of the opinion that the Appellants have already been convicted of 'acts of terrorism' and an adequate sentence had been imposed so the Prosecution's attempt to add more crimes to this list was an unnecessary exercise.[886]

The evidence in this case suggests that to ensure victims' compliance terror was instilled in their minds and it was an integral part of most of the atrocities. The manner in which these

[878] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 1462; para1462 'The Trial Chamber is satisfied on the basis of the express statements of the perpetrators made at the time many of the amputations were carried out that such amputations were used by the AFRC with the primary purpose to spread terror among the civilian population. The Trial Chamber also notes that such amputations were carried out primarily against unarmed civilians, in or near their homes, villages, and farms, and the Trial Chamber is satisfied that the attacks could not have been primarily for military advantage'.
[879] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 1450, 1452, 1455
[880] *Ibid.*, para. 1453
[881] *Ibid.*, para. 1317
[882] *Ibid.*, para. 1832
[883] *Ibid.*, para. 1105
[884] *Ibid.*, para. 1832
[885] *Prosecutor v. Alex Tamba Brima et al.*, Appeals Chamber, Judgement, 22 February 2008, Case No. SCSL2004-16-A, para. 174
[886] *Ibid.*, para.172

heinous acts of terror were committed makes the judgement of the Trial Chamber questionable and it has been severely criticized.[887] However, the Court's approach to crime of terror changed in subsequent cases. According to Chile Eboe-Osuji, the reported use of violence to maintain a system of suppression is a classic manifestation of the notion of 'reign of terror'.[888] He asserted:

> To the extent both that terrifying violence was needed (and used) to sustain the system, and it is reasonable to say that the victims were subjected to a reign of terror, the primary purpose of spreading terror was thus clearly established, as a matter of first principles. Consequently, it becomes immaterial that there might have been other purposes also mixed up in the crimes. Indeed, it is no stretch to contend that the systematic use of violence to capture and subjugate the victims into the condition of enslavement would have been the first and foremost instance of the use of terror, before deducing the other reasons for the enslavement. All this is to say that once the primary purpose of spreading terror is present, such a purpose is never displaced by the presence of other ulterior motive for the conduct… In the circumstances of the Sierra Leone civil war, there is no theory known to international law, which could convert sexual slavery, abduction and enslavement of civilians, and conscription of children and their use as soldiers, into lawful and legitimate uses of war with a primary purpose that overrode the terror attendant upon those crimes.[889]

Arguably, the approach adopted by Special Court for Sierra Leone in the *Brima* case downplays the significance of crime of terror. The multiple purposes approach adopted by the Special Court for Sierra Leone, and the primary purpose requirement itself, were also criticised by Chile Eboe-Osuji. He contended that multiple purposes approach legitimizes conducts that are criminal in international law, simply because those conducts could result in advancing the objectives of the perpetrators in the context of a given armed conflict. He noted:

> Among other things, that reasoning failed to consider that a systematic use of violence was employed to capture and subjugate the victims, as a primary event, while the realization of the ultimate utilitarian objective in each case was only achieved after that primary act of violence. There is a flaw in the reasoning that wholly ignores the jural significance of that primary event, while concentrating on the secondary event. That flaw sets back rather than advances the objectives of international humanitarian law.[890]

The flawed approached adopted in AFRC case was rectified by the Special Court for Sierra Leone in subsequent cases. The Trial Chamber in *Prosecutor v. Sesay et al.* concluded that the crimes of unlawful killings, acts of physical violence and enslavement in Kenema District and

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[887] Chile Eboe-Osuji, 'Another look at the intent element for the war crime of terrorism' (2011) 24(3*) Cambridge Review of International Affairs 357*, 365
[888] *Ibid.*
[889] *Ibid.*
[890] *Ibid.*, p. *357*, 376

others were intended to illustrate the gruesome repercussions of collaborating with enemies of the Revolutionary United Front (RUF) and thus had the specific intent to terrorise the civilian population of Sierra Leone.[891] In this case, charges of 'acts of terrorism', among others, were framed against senior commanders in the Revolutionary United Front Junta and Armed Forces Revolutionary Council (AFRC)/RUF forces, the accused Sesay and Kallon, and the accused Gbao, the senior commander of the RUF and AFRC/RUF forces. The *Sesay* Appeals Chamber rejected Kallons argument that alternative inferences could be drawn from the commission of an 'act of terror' by stating that Kallon did not challenge the primacy of the specific intent to spread terror. For instance, it held that the mere existence of additional purposes such as the enslavement of civilians to mine for diamonds did not alone disprove the requisite intent to spread terror.[892] The Appeals Chamber also noted that these alternative inferences were duly considered and rejected by the Trial Chamber. For instance, the Trial Chamber examined and distinguished acts that were solely perpetrated for thefts from those acts that demonstrated the specific intent to spread terror.[893]

With reference to sexual violence, the Special Court for Sierra Leone in this case found that rape, sexual slavery, and other outrages on personal dignity can constitute 'acts of terrorism' when committed against a civilian population with the specific intent to spread terror.[894] The Trial Chamber observed that sexual violence was rampantly committed against the civilian population in a nature and manner which represented a calculated and concerted pattern on the part of the perpetrators to use it as a weapon of terror.[895] This approach was also followed by the Special Court for Sierra Leone in Charles Taylor case.

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[891] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para. 1122, Para 1357.The Chamber is satisfied that the amputations in Tombodu, Yardu and Penduma, the amputations and beatings in Sawao and the carvings in Kayima and Tomandu were acts of violence directed against civilians with the specific intent of terrorising the civilian population. The amputations and carvings practised by the AFRC/RUF were notorious. These crimes served as a permanent, visible and terrifying reminder to all civilians of the power and propensity to violence of the AFRC and RUF. The Chamber finds that the perpetrators of these crimes specifically intended by their conduct to terrorise the civilian population. The Chamber thus finds that the amputations in Tombodu, Sawao, Penduma and Yardu and the carvings in Kayima are acts of terrorism as charged in Count 1 of the Indictment.

[892] *Prosecutor v. Sesay et al.*, Appeal Chamber, Judgement, 26 October 2009, Case No, SCSL-04-15-A, para. 668

[893] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, para. 892

[894] *Ibid.*, para. 1352

[895] *Prosecutor v. Sesay et al.*, Trial Chamber, Judgement, 2 March 2009, Case No. SCSL-04-15-T, 1347; Para,1347The Chamber observes that sexual violence was rampantly committed against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed. The Chamber finds that the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror. These fighters employed perverse methods of sexual violence against women and men of all ages ranging from brutal gang rapes, the

3.5.1 The Charles Taylor case

Charles Taylor was the President of the Republic of Liberia from 2 August 1997 until 11 August 2003.[896] He was charged with numerous acts of terrorism under Count 1 of the Indictment. Apart from specific charges of burning, these included crimes that were also charged as separate crimes under Counts 2 to 13 of the Indictment: killings, sexual violence, physical violence, abduction and forced labour, enslavement, conscripting children under the age of 15 years and using them in hostilities and pillage. The indictment stated:

> Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.[897]

In *Taylor* case, the Defence argued that the war crime of terror incorporated the additional elements of customary international law identified in *Prosecutor v. Ayyash et al*.[898] Those elements are:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element.[899]

The Trial Chamber dismissed the Defence argument stating that these three key elements were applicable to the 'customary rule of international law regarding the international crime of

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insertion of various objects into victims' genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees. In one instance, the wife of TF1-217 was raped by eight rebels as he and his children were forced to watch. TF1-217 was ordered to count each rebel as they consecutively raped his wife, "he had no power not to" as the rapists laughed and mocked him. After the ordeal, her rapists took a knife and stabbed her in front of the entire family.

[896] *Prosecutor v. Sesay et al.*, 2 March 2009, Case No. SCSL-04-15-T, Indictment para. 3

[897] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No, SCSL -03-01-T, para .1964.; Also, Indictment, para. 5, 13

[898] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No, SCSL -03-01-T, para.408.; Defence Response to Prosecution Final Trial Brief, paras 172-173.

[899] Defence Response to Prosecution Final Trial Brief, para. 171, referring to STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, [STL Appeal Decision], para. 85 as cited in *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No, SCSL -03-01-T, para. 408

terrorism' at least in times of peace.[900] It distinguished this from the war crime of 'acts of terrorism'.[901] The Trial Chamber affirmed the approach adopted by the International Criminal Tribunal for the former Yugoslavia, holding that the war crime of 'acts of terrorism' without these elements is firmly established in customary international law.[902]

The Trial Chamber applied ICTY jurisprudence in defining the elements of the crime of 'acts of terrorism' with one marked difference relating to the object of the violence.[903] In this context, it cited its own AFRC Trial Judgment where property was also considered as the object of violence. Articles 51(2) Additional Protocol I and 13(2) Additional Protocol II do not refer to the objects of violence but only to the subject which is the civilian population. Accordingly, a broad interpretation may include any object of attack that is committed with the primary purpose of spreading terror among the civilian population.[904]

The *Taylor* Trial Chamber examined the evidence relating to the various Counts in the Indictment to analyse the primary purpose behind them and concluded that certain acts were not intended to spread terror while other acts had the primary purpose of spreading terror. The Trial Chamber found that 'acts of terrorism' had been committed through killing, sexual violence and physical violence. It also mentioned that rape, sexual slavery, forced marriage and outrages upon personal dignity are all crimes that amount to an 'act of terror' when committed with the specific intent to terrorize.[905] The Trial Chamber referred to a Human Rights Watch report stating that 'the rebel forces have used sexual violence as a weapon to terrorize, humiliate and punish, and to force the civilian population into submission'.[906] Such acts were done in order to destroy the 'traditional family nucleus, thus undermining the cultural values and relationships which held society together'.[907] The Trial Chamber recognised that rape could also be used as an instrument of terror to instil fear in not just the victims but the wider civilian community. As Kirsten Keith, a Former Legal Officer for the office of the

[900] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No, SCSL -03-01-T, para. 408.
[901] *Ibid.*
[902] *Ibid.*
[903] *Ibid.*, para. 403
[904] Kirsten MF Keith, 'Deconstructing Terrorism as a War Crime the Charles Taylor Case' (2013) 11(4) Journal of International Criminal Justice 813, 820
[905] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No: SCSL -03-01-T, para. 2035
[906] Exhibit P-330, 'Human Rights Watch Report, Sierra Leone - We'll Kill You if You Cry - Sexual Violence in the Sierra Leone Conflict' Vol. 15, No. 1 (A), January 2003, p. 35.; *Prosecutor v. Taylor*, Trial Chamber, Judgement, 18 May 2012, Case No: SCSL -03-01-PT, para. 2035
[907] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No: SCSL -03-01-T, para. 2035

Prosecutor of the Special Court for Sierra Leone, observed: 'The Taylor Trial Chamber's finding in relation to sexual violence as acts of terrorism, and the judges' silent departure from their previous finding in the AFRC Trial Judgment that such crimes were committed for opportunistic and utilitarian purposes, is perhaps the most valuable contribution to the jurisprudential development of this crime.'[908]

With regards to unlawful killings as 'acts of terrorism', the Trial Chamber simply stated that the elements of the crime of 'acts of terrorism' have been established beyond reasonable doubt.[909] The Trial Chamber also observed that physical violence (including amputations and mutilations), were perpetrated with the intent to spread terror amongst civilians. A large number of civilians had their hands amputated.[910] People were mutilated by the carving of RUF and AFRC onto their bodies to prevent them from escaping.[911] The amputations were sometimes carried out by child soldiers who were often incapable of performing the amputations successfully, leaving victims with mangled hands, or requiring older rebels to finish the amputations.[912]

After considering the evidence relating to the burning of property in various regions, the Trial Chamber found that 'the evidence of the large-scale nature of the burnings of buildings, some of which were occupied by persons at the time, and of the stated objective of making the area "fearful", proves beyond reasonable doubt that the burnings were committed with the primary purpose of spreading terror amongst the civilian population.'[913] With regard to pillage, the Trial Chamber found that AFRC and RUF rebels appropriated civilian property for their personal gain as there was a strategic decision that 'each soldier should take responsibility for feeding himself'.[914] Therefore, it was not was not perpetrated with the primary purpose of spreading terror.[915]

Conversely, the Trial Chamber held that the crimes of conscripting children and using them in hostilities, abductions, forced labour and enslavement were carried out for military or utilitarian

[908] Kirsten MF Keith, 'Deconstructing Terrorism as a War Crime the Charles Taylor Case' (2013) 11(4) Journal of International Criminal Justice 813, 833
[909] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No: SCSL -03-01-T, para. 2032
[910] *Ibid.*, paras. 2039, 2179, 2182, 1999, 2186
[911] *Ibid.*, paras. 2039-2049, 2179-2191.
[912] *Ibid.*, para. 2183
[913] *Ibid.*, paras. 2006, 2017, 2021, 2026, 2031, 2068, 2082, 2122, 2132, 2139, 2151, 2162.
[914] *Ibid.*, para. 1974
[915] *Ibid.*, para. 1978

purposes.[916] The Trial Chamber remarked that the abductions and forced labour, including forced mining and living in RUF camps under conditions of violence, may have spread terror among the civilian population but the 'side-effect' of terror was not sufficient to establish the specific intent element in relation to these crimes.[917]

The Appeals Chamber made a detailed examination of evidence related to crime of 'acts of terrorism' and concluded that the RUF/AFRC strategy entailed a campaign of terror against civilians as a primary *modus operandi* throughout the Indictment Period, to achieve its goals through extreme fear.[918] Therefore Ground 17 of the Appeal related to 'acts of terrorism' was dismissed.[919]

The civil war in Sierra Leone was characterized by use of murders, inhumane treatment, beheadings, amputations, sexual violence against civilians with the purpose of instilling terror in the civilian population. The extraordinary importance of Taylor's judgement is due to the fact that Taylor was found responsible for aiding and abetting the crimes and it sent a message that even those who are at the highest position of power can be held accountable, and that there is no impunity for such crimes. In determining the specific intent of the crime of terror, the Chamber examined a huge amount of evidence which revealed the horrific nature of the conflict and also established an accurate historical record of the war. The evidence suggested a wider strategy of spreading terror among civilians and that there were many acts of violence which showed that the primary purpose behind them could only be infliction of terror. For instance, one of the rebels publicly eating a raw human heart depicted the 'campaign of terror that served as a warning to the civilian population not to oppose the Junta forces'.[920] The beheading of victims and the forcing civilians to carry the heads in a bag from one place to another, and the callousness of forcing a mother to 'laugh' at her own children's beheading, were few of the many such brutal acts reported.[921] There were also orders by RUF to 'make the area fearful' by targeting civilians, by burning their homes, killing many indiscriminately and amputating others.[922]

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[916] *Ibid.*, paras. 1967, 1969
[917] *Ibid.*, para.1971
[918] *Prosecutor v. Taylor*, Appeals Chamber, Judgement, 26 September 2013, Case No, SCSL -03-01-A, para. 300, 253
[919] *Ibid.*, para. 302
[920] *Prosecutor v. Taylor*, Trial Chamber II, Judgement, 18 May 2012, Case No, SCSL -03-01-T, para.710
[921] *Ibid.*, para. 704
[922] *Ibid.*, para. 710

One of the most valuable aspects of the Court's jurisprudence is the manner in which various aspects of the conflict and evidence were used to infer the specific intent. It will no doubt be of great value to future trials of crime of 'terror' and may also act as a deterrent for potential perpetrators of such heinous crimes. The CDF and AFRC judgments are noteworthy because they included attacks against property under the scope of crime of terror. There is less clarity about difference between Article 13(2) and Article 4(2)(d) of Additional Protocol II because primary purpose requirement had to be only fulfilled under Article 13(2). Nevertheless, the approach adopted by the Court has made a significant contribution in adding clarity and coherence to other aspects of the crime of 'terror'. A clearly defined war crime of 'terror' is useful in differentiating the 'lawful use of terror' from prohibited forms terror during armed conflict. It is important to have a consistent and straightforward definition with its elements incorporating all terror related provisions of international humanitarian law. State parties to the International Criminal Court could potentially use the foundation laid down by the International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone to frame a comprehensive provision dealing with the war crime of terror.

Yasmeen Naqvi notes: 'SCSL has seemingly amalgamated the two notions of "acts of terrorism" and "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."'[923] 'The difficulties of applying the narrower constitutive elements of Article 13(2) of Additional Protocol II to Article 3(d) of the Special Court for Sierra Leone Statute, and in particular, the primary purpose test, have therefore arguably resulted in a number of acquittals for crimes that would otherwise have been covered under the category of "acts of terrorism".'[924] It is pertinent to mention that terrorism was not included in the list of war crimes under the Rome Statute 'due to the failure to reach consensus on a legal definition of terrorism'.[925] In fact, directing attacks against the civilian population and civilian objects in international armed conflict is considered a war crime under the Rome Statute.[926] As widespread attacks against civilians are common in contemporary conflicts, the judgements of the Special Court for Sierra Leone can be helpful addressing the issue in future cases.

[923] Andrea Bianchi, Yasmin Naqvi, 'Key Issues in Times of Armed Conflict' in Andrew Clapham, Paola Gaeta, Tom Haeck, Alice Priddy (eds.) *The Oxford handbook of international law in armed conflict* (Oxford University Press, 2014), pp. 574-604, p. 595.
[924] *Ibid*, p. 596.
[925]Roberta Arnold, 'Terrorism, War Crimes and the International Criminal Court' in Ben Saul (eds.) *Research Handbook of International Law and Terrorism* (Cheltenham: Edward Elgar,2014), pp. 282-297, p. 288.
[926] Rome Statute 1998, International Criminal Court, 2187 UNTS 3, Article 8(2)(b)(1)

3.6 The development of war crime of 'terror' by international criminal tribunals and the principle of legality

International law in general, and international humanitarian law in particular, has a very frail record of enforcement.[927] The development of individual criminal responsibility in international law can be seen to complement State responsibility for infringements of international humanitarian law, over which the International Court of Justice has rarely exercised jurisdiction.[928] Since the 20th-century, judicial bodies have played an enormous role in the development and clarification of the law of war crimes.[929] Although the judicial evolution of international humanitarian law is not a new phenomenon, the proliferation of international courts and tribunals in the last two decades has resulted in a considerable development of international humanitarian law.[930] Shane Darcy asserts: 'The contribution of the judgments of international courts and tribunals to the development of international humanitarian law has often been subtle and understated, yielding a slow but steady influence on the law's progression'.[931] The work of the ad hoc International Criminal Tribunals made a significant contribution in identifying the existing lacunae and filling the gaps in international humanitarian law, including in the identification and development of the contours of war crimes such as the crime of spreading terror among the civilian population.[932]

In the contemporary conflicts, violence is employed where people dwell and work, and most of the casualties are civilians.[933] Unimaginable brutality is systematically used to generate terror as a mean of controlling whole populations, which violates civilians' fundamental human rights.[934] Although wars cannot entirely be eradicated, part of the mission of international humanitarian law was to civilize warring parties, by criminalizing the 'cruel intent' of the perpetrators of war. Marlies Glasius notes:

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[927] Rüdiger Wolfrum and Dieter Fleck 'Enforcement of International Humanitarian Law' in Dieter Fleck (eds.) '*The handbook of international humanitarian law'* (Oxford University Press, 2013), p.675.
[928] Shane Darcy, *Judges, law and war: the judicial development of international humanitarian law*. Vol. 107. (Cambridge University Press, 2014), p. 224.
[929] Shane Darcy, 'Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law' in Noelle Quenivet and Shilan Shah-Davis, *International Law and Armed Conflict; Challenges in the 21st Century*, (T.M.C. Asser Press, 2010), pp319- 337, p. 331.
[930]*Ibid*, p. 319.
[931] *Ibid*, p. 320.
[932] Carsten Stahn, 'Between Constructive Engagement, Collusion and Critical Distance: The ICRC and the Development of International Criminal Law' (2016) 15 *Chinese Journal of International Law* 139,147
[933] Sergey V. Sayapin, 'The Spread of Terror Among the Civilian Population-A War Crime' (2006) 2 Asia-Pacific Yearbook of International Humanitarian Law 196, 200
[934] *Ibid.*

> the recent prosecutorial preoccupation with terror as a war crime is clearly not simply a result of the war on terror declared by the Bush Administration. Instead, the interest in deliberate instilment of extreme fear on civilian populations is more likely to be connected to the way in which the two war situations in question, the disintegration wars of Yugoslavia and the Sierra Leone war have been perceived both in the media and in academic accounts.[935]

The *Galić* case played a significant role in the development of international humanitarian law and international criminal law. It illustrated the elements of the war crime of terror and paved the way for its future development. The prosecution and punishment of culprits for such crimes could also have the effect of reducing the use of such methods in the future conflicts. Although all cases of crime of terror in the International Criminal Tribunal for the former Yugoslavia involved acts resulting in death or serious injury, the relevant judgements of the tribunal indicate that the acts not resulting in casualties or serious injuries may also result in individual criminal responsibility. Specific cases relating to acts of terror not resulting in death or serious injury will no doubt add more clarity to this issue.

As the crime of terror is not a 'grave breach' of international humanitarian law, it is pertinent to look at the criminalisation of non-grave breaches. The Rome Statute is itself not clear about the source of criminalization for the non-grave breach offenses. Some scholars argue that an offense must have been criminalized by statute or custom before it could constitute a war crime in terms of Article 8.[936] When confirming war crime charges, the International Criminal Court simply references the Rome Statute as the primary source of criminalization.[937] Some domestic military manuals consider international humanitarian law itself as a source of criminalisation and treat any violation of international humanitarian law as a war crime. The U.S. Army Military Manual from 1956 states that 'The term war crime; is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime'.[938] Similarly the German war manual implies that courts can

[935] Marlies Glasius, 'Terror, terrorizing, terrorism: instilling fear as a crime in the cases of Radovan Karadzic and Charles Taylor' in Dubravka Zarkov and Marlies Glasius (eds.) *Narratives of Justice in and Out of the Courtroom* (Springer, 2014) p. 14.

[936] Michael Cottier, Article 8: War Crimes, in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn. C.H.Beck,Hart, Nomos, 2016) 305

[937] Oona A Hathaway and Paul K Strauch and Beatrice a Walton and Zoe a Y Weinberg, 'What is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 73

[938] Dep't Of The Army (U.S.), Field Manual 27-10, The Law Of Land Warfare, 178 (1956). Notably, at the adoption of the Statute of the ICTY by the UN Security Council, the U.S. Representative to the United Nations interpreted Article 3 of that statute, which covers the laws of war, to mean that all violations of that article were criminal under international law. As cited in Oona A Hathaway and Paul K Strauch and Beatrice a Walton and Zoe a Y Weinberg, 'What is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 83

prosecute any member of the armed forces who has violated international humanitarian law.[939] Therefore, violations of international humanitarian law criminalised by domestic law would qualify as war crimes.

In the *Galić* and *Milošević* cases the strong criticism made in relation to the criminalisation of crime of terror by Judge Nieto-Navia, Judge Mohamed Shahabuddeen, Judge Schomburg and Judge Liu Daqun, indicates that there were some disagreements concerning the issue of legality. The principle of legality is founded on the maxim *nullum crimen sine lege*, *nulla poena sine lege*, which means no crime without law and no punishment without law.[940] It requires 'the scope of the crime and the applicable punishment must be set out in clear terms before its commission'.[941] This principle protects a fundamental right that nobody can be prosecuted for acts based on a rule that did not exist at the time the acts or omissions were committed. Conversely, it has also been argued that the principle of nullum crimen requires that laws should not be retrospective in effect. The principle is not associated with a particular source of international law prohibiting this.[942] Robert Cryer stated that the nullum crimen sine lege principle does not necessitate that 'offenses against international law be criminalized under customary, rather than treaty, law'.[943] He further remarked that the *Galić* Trial Chamber should have adopted a simpler approach by accepting that 'that all serious violations of the laws and customs of war are criminal'.[944]

It can be argued that the principle relating to the protection of civilians from the deliberate infliction of terror is a fundamental one. Any individual could reasonably be expected to have understanding that a violation of this principle could result in his or her criminal responsibility. The Trial Chamber in the *Galić* case also addressed the issue of legality with regard to war crime of terror, which it based on severity of the crime (proving gravity through deaths and injuries to the civilians), without addressing its status under customary international law. This

[939] Fed. Ministry Of Def. (Ger.), Manual Dsk -VV207320067, Humanitarian Law in Armed Conflicts -Manual, § 1207 (1992).; Oona A Hathaway and Paul K Strauch and Beatrice a Walton and Zoe a Y Weinberg, 'What is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 83
[940] Antonio Cassese et al, *International Criminal Law: Cases and Materials* (Oxford University Press, 2011) 53
[941] William Schabas, *Unimaginable Atrocities: Justice, Politics, And Rights at The War Crimes Tribunals* (Oxford University Press, 2012). p.47.
[942] Machteld Boot, *Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*. Vol. 12. Intersentia NY), 2002 127-17
[943] Robert Cryer, 'Prosecutor v. *Galić* and the War Crime of Terror Bombing' (2005 2 *Israel Defense Forces Law Review* 75, 84
[944] Robert Cryer, 'Prosecutor v. *Galić* and the War Crime of Terror Bombing' (2005)2 *Israel Defense Forces Law Review* 75, 93

issue was addressed by the *Galić* Appeals Chamber (and other chambers in both International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone) which confirmed the customary status of crime of terror.

The severity element was considered essential to determine that the breach of international humanitarian law was criminal in nature. If the violation is severe enough, the understanding is that it is not necessary for the violation to have been previously criminalized. In some cases, seriousness was evaluated as applied to the facts and the act itself by examining the manner in which the offense was carried out or on the gravity of its consequences. In the *Naletilic & Martinovic* case, the International Criminal Tribunal for the former Yugoslavia Trial Chamber used the criterion of seriousness to criminalise a violation of international humanitarian law as the war crime of 'wilfully causing great suffering or serious injury to body or health'.[945] This approach is, however, not without criticism. For instance, in his dissenting opinion in the *Hinga Norman* case, Judge Geoffrey Robertson labelled the conflation of severity and criminality as a violation of nullum crimen sine lege. He stated:

> It must be acknowledged that like most absolute principles, nullum crimen can be highly inconvenient - especially in relation to conduct which is abhorrent or grotesque, but which parliament has not thought to legislate against. Every law student can point to cases where judges have been tempted to circumvent the nullum crimen principle to criminalise conduct which they regard as seriously antisocial or immoral, but which had not been outlawed by legislation or by established categories of common-law crimes. This temptation must be firmly resisted by international law judges. [946]

On the other hand, with regard to the IMT, William Schabas opined: 'the Tribunal admitted that there was a retroactive dimension to prosecution for crimes against peace but said leaving such wrongs unpunished would be unjust. The nullum crimen rule was thus a relative one, subject to exception in light of circumstances'.[947] It can be argued that severity is an essential element of war crimes but it does not address the issue of legality of a crime. Therefore, a suitable approach in defining war crimes is to address the problem in context, asking in each case whether the defendant is prosecuted properly for an act that was at the time the subject of

[945] *Prosecutor v. Naletilic & Martinovic*, Trial Chamber Judgment, 31 March 2003
Case No. IT-98-34-T, para. 73 39-43
[946] *Prosecutor v. Samuel Hinga Norman*, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Case No. SCSL-2004-14-AR729E para. 12
[947] William Schabas, *Unimaginable Atrocities: Justice, Politics, And Rights at The War Crimes Tribunals* (Oxford University Press, 2012), p. 49.

criminal liability instead of attempting to address concerns about retroactivity by relying on prior 'criminalization'.[948]

The customary status of crime of terror has been established in several cases so in principle violation of nullum crimen sine lege should not be an issue with respect to this crime. However, the divergence of opinions between judges about the customary status of the crime, and about the different elements of the crime as reflected in customary international law, indicate that it is more complex in practice.[949]

It is clear from the judgements of the Special Court for Sierra Leone that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia will continue to influence other international and national tribunals dealing with the crime of 'acts of violence the primary purpose of which is to spread terror among the civilian population'. The Special Court for Sierra Leone relied on the *Galić* case to determine that 'acts of terrorism' are 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' and that customary international law imposed individual criminal responsibility for such acts.[950] As previously mentioned, while the Rome Statute of the International Criminal Court does not include a crime of 'terror' or 'terrorism', there are many provisions prohibiting attacks against the civilian population and civilian objects.[951] The case law of these tribunals can be utilised to make a case for the inclusion of a war crime of 'terror' in the Rome Statute. This will be discussed in the chapter next chapter.

3.7 Conclusion

The International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone have been pivotal in developing jurisprudence on the crime of spreading terror. The International Criminal Tribunal for the former Yugoslavia has addressed the customary status of the prohibition of terror. It has also clarified the meaning of different elements of the prohibition. The distinctive feature of the crime is its specific intent, as it is necessary to prove

[948] Oona A Hathaway and Paul K Strauch and Beatrice a Walton and Zoe a Y Weinberg, 'What is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 113
[949] La Haye, Eve. *War crimes in internal armed conflicts*. Vol. 60. (Cambridge University Press, 2008), p. 331.
[950] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, paras. 664,665,666
[951] Rome Statute of International Criminal Court (adopted 17 July 1988, entered into force 1 July 2002), 2187 UNTS 3, Article 8(2)(b)(i)-(iv)

that the perpetrator had the primary intent to spread terror among the civilian population. The crime of 'terror' has not been widely discussed in the framework of international humanitarian law because it is intent based, and the victim could be other than one who is physically affected. However, the tribunals have found ways to infer the special intent required from the context and circumstances of acts of violence.

This chapter demonstrated the evolutionary process of criminalizing the 'terror' and confirmed that the spreading of terror among the civilian population is a war crime in both international and non-international armed conflicts. The *Galić* case pioneered the development of the crime and settled that offence of spreading terror can give rise to individual criminal responsibility. It also established the legitimacy of prosecuting of the crime of terror by addressing its status under customary international law. This approach was further confirmed in the subsequent case-law of both the International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone. The development of crime of terror by these institutions will certainly affect the work of other national and international courts dealing with such offences in future. Indeed, the jurisprudence of the tribunal has had a significant impact on the interpretation of various war crimes, including those in the Rome Statute of the International Criminal Court.[952] As the contours of the crime of 'terror' are developed, and considering the customary status of the offence, it is arguable that it should now be included in the Rome Statute of the International Criminal Court. The next chapter will study the scope and practicability of including the war crime of terror in the Rome Statute.

[952] Anthony Cullen, 'War Crimes' in Nadia Bernaz and William Schabas (eds.), *Routledge Handbook of International Criminal Law* (Oxford: Routledge, 2011), pp. 139-154, at p.146.

Chapter 4. Terror, Terrorism and the International Criminal Court

4.1 Introduction

Following the development of crime of terror by international criminal tribunals, and considering the role of International Criminal Court in prosecuting war crimes, it is germane to consider the possibilities for the prosecution of the crime of terror under Rome Statute. Although, the Rome Statute incorporates includes various war crimes in international and non-international armed conflict, it does not specifically provide for the criminalisation of attacks aimed at terrorising civilians.

Exploring its relevance with the crime of terror, this chapter will examine the drafting history of the Rome Statute. In doing so, the different methods by which International Criminal Court could have potentially exercised jurisdiction over 'terror' will be assessed. Rules relating to the targeting of civilians in Article 8 of the Rome Statute will be scrutinized to decipher elements in common with Article 51(2) of Additional Protocol I and Article 13 (2) of Additional Protocol II. The chapter will further assess the practicability of prosecuting the crime of terror in the International Criminal Court under the existing provisions of the Rome Statute. The conflation of 'terror' with terrorism as a crime under international law will also be considered, clarifying differences between the two offences. Lastly, the chapter will investigate whether there is merit in amending the Rome Statute to include the crime of terror or if it can be substantively accommodated under the existing provisions as a triable offence.

4.2 The crime of 'terror' and Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court does not include the spreading of terror among civilians as a war crime. The main reason for this was the controversy concerning the inclusion of 'terrorism' in its broader and more general form and the difficulty in defining the crime with the precision necessary for the criminal law.[953] The Rome Conference not only rejected a proposal to include the offence of international terrorism,[954] but also excluded a more

[953] Patrick Robinson, The Missing Crime, in The Rome Statute of The International Criminal Court: A Commentary in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 515.

[954] Preparatory Committee on The Establishment of An International Criminal Court11-21 February 1997 A/AC.249/1997/WG.1/C.R.P.4; On 17 June 1998, the Committee of the whole considered article 5 entitled 'Crimes within the jurisdiction of the Court and Coordinator submitted to the Committee of the Whole the following Recommendations regarding article 5 which included 'Act of terrorism' which was also endorsed by several states including India, Sri Lanka and Turkey. It defined "acts of terrorism as (i) An act of terrorism, in all

specific war crime of terrorism. Article 24 of the 1995 draft statute included a crime of international terrorism. However, it was not incorporated in the final draft because of multiple objections by states. It stated:

> An individual who as an agent or representative of a State commits or orders the commission of any of the following acts: '—undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public 'shall, on conviction thereof, be sentenced [to . . .] .[955]

Article 20 of the ILC draft of 1996 stated under the heading of War Crimes, several acts committed in violation of international humanitarian law applicable in armed conflict not of an international character including acts of terrorism under Article 20(f). According to the

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its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime; (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender."(Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol.3 p. 20, 222) The proposal to include acts of terrorism under the Court's jurisdiction also included crimes against humanity committed in armed conflict. Several states such as, Algeria, Kyrgyzstan, the former Yugoslav Republic of Macedonia, Tajikistan, India, Turkey, Russian Federation, Congo, Sri Lanka, Netherlands, Tunisia, Costa Rica, New Zealand, Cuba, Jamaica and Bolivia, strongly supported the inclusion of terrorism as a crime under the statute. While some other showed more flexible approach towards its inclusion, some subjected its inclusion to the creation of a proper definition. Most of the Arab states opposed such inclusion however, some states like Saudi Arabia, United Arab Emirates and Yemen were willing to support if the definition of terrorism provided by the League of Arab States was considered. Algeria, India, Sri Lanka and Turkey, proposal to include as a crime against humanity was opposed by many states such as the USA. (Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol.3)

[955] Report of the International Law Commission on the work of its forty-seventh session, 2 May- 21 July 1995, Document A/50/10, Official Records of the General Assembly, Fiftieth session, Supplement No.10 Extract from the Yearbook of the International Law Commission: - 1995 vol. II(2), p 28; Those who supported the inclusion of international terrorism as a separate article in the Code highlighted 'the seriousness of acts of terrorism, the universal recognition of such acts as crimes, the continuing occurrence of such acts, the need to formulate a general definition to facilitate the prosecution of the perpetrators of all such acts, and the enhanced deterrence to be derived from the characterization of international. terrorism as a crime against the peace and security of mankind and its inclusion in the Code'.(Document A/50/10, Report of the International Law Commission on the work of its forty-seventh session, 2 May- 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10 Extract from the Yearbook of the International Law Commission:- 1995 vol. II(2), p 28); With regard to the definition of terrorism general opinion was that 'the definition should avoid any reference to subjective motives and to the objective of the terrorist act; the crime of terrorism should be defined in terms of its nature and effects and should include acts that were intended to spread or had the effect of spreading terror; the definition of terrorism should cover all of its manifestations by way of enumeration; three objective criteria, namely, seriousness, massive nature and violation of the international legal order should be used to determine the list of terrorist acts that would qualify as crimes against the peace and security of mankind'. Many members acknowledged that it was necessary to identify the common elements of the various forms of terrorism and to provide for the international prosecution of terrorism as a crime because national prosecutions under the existing instruments had failed in the eradication of terrorism.(Document A/50/10, Report of the International Law Commission on the work of its forty-seventh session, 2 May- 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10 Extract from the Yearbook of the International Law Commission:- 1995 vol. II(2), p 29)

commentary on the ILC draft, this provision covers violations of Article 4, paragraph 2 (d), of Additional Protocol II and has the same meaning and scope of application as the corresponding provisions contained in the Geneva Conventions and Additional Protocol II.[956] However none of these provisions made it to the Rome Statute at the end.

According to Chile Eboe-Osuji, 'the silence of the Rome Statute in relation to the war crime of "terrorism" was motivated by the anxiety generated by the controversy that arrested the attempt to give the International Criminal Court jurisdiction over the crime of terrorism in its broader acceptation'.[957] The drafters of the Rome Statute were methodical in trying to restrict the jurisdiction of the Court at that time to crimes that were already considered to be criminalised under customary international law. Therefore in an effort to be under-inclusive of customary international law crimes, rather than over-inclusive, they omitted a number of offences that would have otherwise qualified as war crimes under general international law.[958] The drafters even failed to include crimes that the International Criminal Tribunal for the former Yugoslavia (ICTY) had declared, before the Rome Conference, to be customary. The crime of spreading terror among civilian was 'deliberately (and controversially) omitted from the Rome Statute'.[959] The absence of crime of terrorism or terror from the Rome Statute does not make the treaty irrelevant in relation to the crime of terror. There are many provisions in the Statute which deal with attacks against civilian population and objects, which can be used to try the acts of terror or terrorism committed during an armed conflict. Roberta Arnold has argued that,

> Notwithstanding the initial exclusion of terrorism from the jurisdiction of the ICC Statute as a treaty crime, it may be argued that in light of the relatively recent jurisprudence of the ICTY and the SCSL, the time may be ripe for the ICC to adopt a new approach. This would include the recognition of acts of terrorism as within its jurisdiction over existing international crimes, in particular as serious violations of the LOAC constituting war crimes under Article 8 of the ICC Statute.[960]

[956] Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996), Document A/51/10, p. 55, 56.
[957] Chile Eboe-Osuji, 'Another look at the intent element for the war crime of terrorism' (2011) 24(3) *Cambridge Review of International Affairs* 357, 373
[958] Leena Grover, *Interpreting crimes in the Rome statute of the International Criminal Court*. (Cambridge University Press, 2014) 246; Dapo Akande, Customary International Law and the Addition of New War Crimes to the Statute of the ICC, *EJIL: Talk* (January. 2, 2018)
[959] Oona A Hathaway and Paul K Strauch and Beatrice a Walton and Zoe a Y Weinberg, 'What is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 100
[960] Roberta Arnold, 'Terrorism, War Crimes and the International Criminal Court' in Ben Saul (ed) *Research Handbook of International Law and Terrorism* (Cheltenham: Edward Elgar,2014), p. 296.

The section that follows will explore the possibilities that exist for the Court to interpret acts of terror under different provisions of Article 8.

4.3 Article 8(2)(b)(i) and Article 8(2)(e)(i) of the Rome Statute

While terror against the civilian population is not a crime as such under Article 8(2) of the Rome Statute of the International Criminal Court, it is likely that such acts fall within the broad scope of Article 8(2)(b)(i). The crime of attacking civilians is derived from Article 51(2) of Additional Protocol I, which is the same provision that proscribed the spreading of terror among the civilian population within the Additional Protocol I. These words could be implied within the Article 8(2) of the Rome Statute, although drafting history of the Rome Statute is silent about it. However, according to William A. Schabas, the conclusion of the ICTY Appeals Chamber that the second sentence of Article 51(2) of Additional Protocol I should be viewed as a distinct crime suggests that spreading terror among civilians may not be implied in the terms of Article 8(2) of the Rome Statute.[961]

On the other hand, according to Mark Klampberg, as Article 8(2)(b)(i) is an expression of the principle of distinction enshrined in Articles 48 and 51 Additional Protocol I, and given that Article 8(2)(b) must be read 'within the established framework of international law', it is plausible that this provision will also cover the second sentence of the Article 51(2) Additional Protocol I: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[962] This viewpoint is supported by jurisprudence of the International Criminal Tribunal for the former Yugoslavia insofar as it has described the prohibition of terror in terms of 'a specific prohibition within the general (customary) prohibition of attack on civilians' [963]

Article 8(2)(b)(i) of the Rome Statute deals with attacks against a civilian population as such or against individual civilians not taking direct part in the hostilities. Article 8(2)(b)(i) provides

[961] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford 2010 2nd Edition), p. 258.
[962] Mark Klamberg, Commentary on the Law of the International Criminal Court, (Torkel Opsahl Academic EPublisher 2017), p. 75.
[963] *Ibid.*; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 98, upheld in *Prosecutor v. Stanislav Galić*, Appeals Chamber Judgement, 30 November 2006, Case No. IT-98-29-A, para. 87).

that the International Criminal Court has jurisdiction overs acts of 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.[964] For non-international armed conflicts, Article 8(2)(e)(i) of the International Criminal Court Statute provides similar rule. The inclusion of Article 8(2)(b)(i) in the Rome Statute was subject to much contention, especially because of its potential implications for the use of nuclear weapons. France notably opposed its inclusion for a long time.[965] In light to such controversy, it is instructive to analyse the elements of Article 8(2)(b)(i) to establish its relevance to crime of terror.

4.3.1 Material Elements

A study of the material elements of the war crimes included in the Rome Statute suggests that definitions of key terms such as 'attack' and 'civilian population' are same as those provided by the Additional Protocols to the Geneva conventions (discussed in chapters 2 and 3).[966] The term 'acts of violence' signifies the use of physical force which includes the use of weapons but 'acts such as disseminating propaganda, embargos or non-physical forms of psychological, political or economical warfare would not fall under the notion of attack'.[967] Cyber operations[968] resulting in physical harm to person or objects that goes beyond the computer program or data attacked can also qualify as 'acts of violence' or attack under international humanitarian law.

> Such attacks could be for example the opening of a floodgate of a dam, which leads to the death of persons in the flooded areas – it can't make a difference whether such casualties are caused by a bomb or by means of cyber-attack. What defines an attack is not the violence of the means – as it is uncontroversial that the use of biological, chemical or radiological agents would constitute an attack, but the violence of the effects or consequences, even if indirect.[969]

It has been argued that in order to qualify as an 'attack', cyber operations have to result in physical damage or produce irreversible effects. However, '[i]f this claim implies that a civilian object may be lawfully shut down/rendered dysfunctional in such cases, it is suggested that this

[964] Article 8(2)(b)(i) of the Rome Statute
[965] Daniel Frank, Article 8(2)(b)(i)-Attacking Civilians in Roy SK Lee (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, (*Transnational Publishers Inc 2001), p. 141.
[966] See sections 2.7, 3.3, 3.4.
[967] Knut Dörmann, *War Crimes- Para. 2(b)(i)* in Otto Triffterer and Kai Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn. C.H.Beck,Hart, Nomos, 2016), para 185, p. 355.
[968] *Ibid.,* para. 186, p. 35. 'via a computer or a computer system required through a Data stream, by means of viruses, worms, etc'
[969] *Ibid.,* para. 185 p. 355.

is unfounded under existing law – at least if the consequences go beyond mere inconvenience'.[970]

Article 8(2)(b)(i) of the Rome Statute also protects individual civilians not taking direct part in hostilities.[971] For international armed conflict, this is established in Article 51(3) of Additional Protocol I: civilians will be protected from attack unless and for such time as they take a direct or active part in hostilities. The concept of direct participation in hostilities has not been defined under international humanitarian law and state practice is not clear. On account of this, there are grey areas in its interpretation.[972] In determining which actions would amount to direct participation, it is normally considered that such participation would resemble acts of war which by their nature or purpose could cause death of personnel or damage to the equipment of the enemy armed forces. Whether an act amounts to direct participation must be assessed on a case-by case basis.[973] Additional Protocol II (which applies to Article 8(2)(e)(i) does not provide a precise definition because in non-international armed conflicts it is more difficult for parties to meet the criteria in the third Geneva Convention and Additional Protocol I that relates to combatant status.[974] In conclusion, it can be said that the material elements of crime of terror and Article 8(2)(b)(i) are not significantly different.

4.3.2 Crime of Conduct

[970] *Ibid.*, para. 186 p. 356.

[971] Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (International Committee of the Red Cross, 2009) 46
'According the ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law , for a civilian to be considered as directly participating in In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1.The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3.The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)'.

[972] Knut Dörmann, *War Crimes- Para. 2(b)(i)* in Otto Triffterer and Kai Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn. C.H.Beck,Hart, Nomos, 2016), p .357.

[973] *Prosecutor v. Strugar*, Case No. IT-01-42-T, Appeal Chamber Judgement, 17 July 2008, para. 178
trugar, ICTY (AC), judgment of 17 July 2008, para. 178

[974] Anicee Van Engeland, *Civilian or Combatant?: A Challenge for the 21st Century*. (Oxford University Press, 2011) p. 32, (p. 33 'Protocol II distinguishes between those who are fighting and those who are not (or those who are no longer fighting). Additionally, it is established that some people may be civilians while participating in hostilities at certain times, which is impossible in international conflicts; according to Additional Protocol II, such individuals benefit from the protection granted to civilians. This protection may be suspended only for the time they directly participate in hostilities. The whole population is considered to be civilian and is protected "unless and for such time as they take a direct part in hostilities" (Article 13.3 APII)'.)

In contrast to Article 85(3) Additional Protocol I, the war crime of intentionally attacking civilians is not a result-based crime. Whereas the *chapeau* of Article 85(3) requires that the attack must have caused death or serious injury to body or health, the Statute itself does not mention this additional requirement. On account of this, the Preparatory Commission had to resolve this issue. The result requirement for Article 8(2)(b)(i) was extensively debated by the Preparatory Commission. The question arose as to whether a war crime required the causing of death or serious injury to body or health like the grave breaches under Article 85(3) and (4)(d) of Additional Protocol I. Most of the delegates identified that at the Diplomatic Conference in Rome, the result requirement for war crimes of certain types of unlawful attacks had deliberately been excluded. They explained that the crime would be committed under Article 8(2)(b)(i), if, for example, in the case an attack was directed against the civilian population or individual civilians, but owing to the failure, of the weapon system the intended target was not hit. However, others argued that in such a situation the conduct should be charged only as an attempted crime.[975] It was also claimed that the application of result requirement of the grave breaches provisions to the war crimes derived from Protocol I had always been implicitly understood.[976] Finally, consensus was reached on the basis of the majority view, so the elements do not require the attack to have a particular result.[977]

The proposals by U.S. and Japan included a result element, which accorded with Article 85(3) of Additional Protocol I. On the contrary, the Swiss proposal and the working paper introduced by Spain did not require a result.[978] China favoured the inclusion of the words 'and causing death or serious injury to body or health'.[979] During the debates majority of delegates supported the Swiss approach, dismissing the inclusion of a threshold. Consequently, a result element was not incorporated. This was reflected in an informal discussion paper prepared by Australia, France, Germany, Japan, the Netherlands, Switzerland, and the United States, which was endorsed by all delegations. Therefore, 'the elements express in full conformity with the Statute that the overall wrong of this crime is the attack against protected persons or objects in itself,

[975] Knut Dörmann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes' (2000) 82, *International Review of the Red Cross* 461, 467
[976] *Ibid.*
[977] Daniel Frank, Article 8(2)(b)(i)-Attacking Civilians in Roy SK Lee. ed., The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, (Transnational Publishers Inc 2001), p. 142.
[978] *Ibid*; PCNICC/1999/DP.4/ADD.2; PCNICC/1999/WGEC/DP/12(Proposal submitted by Japan: Elements of crimes: article 8, paragraph 2 (b) (i) to (xvi) ; PCNICC/1999/DP.20.
[979] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford 2010 2nd Edition), p. 225.

and not any actual damage'.[980] Knut Dörmann concludes that the express mention of result requirement in some other crimes indicates that for the crimes without result requirement a lower threshold was deliberately chosen compared to grave breaches provisions. It can also be argued that a lower threshold was chosen purposely to underscore that Article 8(2)(b)(i) of the Statute is mainly based on Article 51(2) of Additional Protocol I.[981] This demonstrates the fact that not all war crimes are grave breaches.

The absence of result requirement for Article 8(2)(b)(i) has been confirmed by the International Criminal Court Trial Chamber in *Katanga* case. According to the International Criminal Court Trial Chamber, the crime under Article 8(2)(b)(i) does not entail any material result or a detrimental effect on the civilian population or on the individual civilians targeted by the attack. It is completed by the 'mere launching of the attack on a civilian population or individual civilians not taking direct part in hostilities, who have not yet fallen into the hands of the attacking party'.[982] While the material results from such acts may include death or serious injury to the body or health of the civilians targeted by such attack, civilian causalities are not a requirement for the completion of the crime. The Trial Chamber further concluded that the absence of a result requirement in the Elements of Crimes is not unintentional. Where a crime for which an actual result requirement exists, 'the Elements of Crimes refer to it and specify the consequence thereof'.[983]

As far the result requirement is concerned, it can be argued that Article 8(2)(b)(i) is not substantively different from the crime of terror. Neither require that actual harm is caused to civilians. The 'intent' in the targeting the civilians is the greater consideration in determining the criminality of the accused. The main difference between Article 8(2)(b)(i) and crime of terror lies in the distinctive *mens rea* of both crimes.

[980] Daniel Frank, Article 8(2)(b)(i)-Attacking Civilians in Roy SK Lee (eds.) The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *(*Transnational Publishers Inc 2001), p.142.
[981]Knut Dörmann, Louise Doswald-Beck, and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*; (Cambridge: Cambridge University Press, 2003), p. 131.
[982] *Prosecutor* v. Katanga and Chui (Case No. ICC-01/04-01/07) Decision on the Confirmation of Charges, 30 September 2008, para. 270
[983] *Prosecutor v. Katanga and Chui* (ICC- 01/04-01/07-3436-T) Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 799

4.3.3 Mental Elements

The most important element of Article 8(2)(b)(i) to consider in relation to the crime of terror is the mental element i.e. 'intentionally' directing an attack. The interpretation of the term 'intentionally' is crucial in understanding the mental element of this crime. The third element of the Elements of Crimes of Articles 8(2)(b)(i) and 8(2)(e)(i) state that 'the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack'.[984] A cursory look at the wording of Article 8(2)(b)(i) would indicate that the word 'intentionally' appears to just confirm the default rule on the mental element of Article 30 of the Rome Statute[985] and the specific mention of intent in the Article appears unnecessary. For Knut Dörmann, the intent requirement expressly stated seems to be an application of the default rule codified by Article 30. Accordingly, the standard defined in Article 30(2)(b) would apply, which states that the perpetrator means to cause the intended consequences or is aware that it will occur in the ordinary course of events.[986] However, according to Michael Bothe the express mention of intent means an alteration of the rule included in Article 30, which requires that with regard to the consequences of a conduct, 'knowledge that they will occur in the ordinary course of events is sufficient'. Therefore, in the cases that expressly refer to intent, 'this means that not only the actual conduct (e.g. dropping a bomb), but also the consequences (e.g. hitting a civilian object) must be covered by the intent'.[987]

With regard to the necessary intent of the perpetrator in connection with the *actus reus*, it was suggested by one delegation to include the concept incorporated in Article 57 of Additional Protocol I that would cover direct intent as well as a perpetrator 'recklessly failing to take the

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[984] Knut Dörmann, Louise Doswald-Beck, and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003), p. 130.; Young Sok Kim, *The International Criminal Court: a commentary of the Rome Statute*. (Wisdom House, 2003), p. 124.

[985] 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[986] Knut Dörmann, War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes, **(**2003)7 *Max Planck Yearbook of United Nations Law Online* 341, 381

[987] Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 389,390.

necessary precautionary measures to protect the civilian population'.[988] Other delegations suggested the inclusion of specific intent or ulterior motive because of the express mention of intent in the statute. Some argued for the application of Article 30 without any endeavours to elaborate further.[989]

The degree of knowledge required as to the status of the victim, the civilian population as such or individual citizens not taking direct part in hostilities, was also debated by the Preparatory Commission while discussing the mental element of the crime. The Swiss proposal included a formulation based on the International Criminal Court commentary that 'the perpetrator was aware of the factual circumstances that established the civilian status of the population or individual person or persons attacked'.[990] However, the majority decided against including that specific phrase and agreed on 'the perpetrator was aware of the factual circumstances that established that protected status'.[991]

Moreover, there was also considerable debate about including a mental element in relation to the object of the attack in the elements of the crime. Some delegations argued that such an intent was also covered by Article 30, while others advocated for the express mention of specific intent to clearly distinguish this crime from the one embodied in Article 8(2)(b)(iv). As a result, the third element was inserted which expressly mentions the intent of the perpetrator regarding the object of the attack.[992] According to Gerhard Werle and Florian Jeßberger, the mental element of the offence of intentionally attacking civilians requires that the perpetrator act with the purpose of attacking civilians. They further stated:

> This can be determined not only from the wording of the criteria of the offence ('intentionally') and the Elements of Crimes ('intended'), but also from the interplay between the norms that criminalize direct attacks against non-military objects and war crimes under Article 8(2)(b)(iv) of the ICC Statute. This provision criminalizes excessive incidental damage to non-military targets. If an attack leads to incidental damage that is not excessive, Article 8(2)(b)(iv) does not apply. This result, which reflects a principle of international humanitarian law, would be contradicted if non-purposeful incidental damage to nonmilitary targets were criminalized under the norms considered here.[993]

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[988] Daniel Frank, Article 8(2)(b)(i)-Attacking Civilians in Roy SK Lee (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, (*Transnational Publishers Inc 2001), p.142.
[989] *Ibid.*
[990] *Ibid.;* PCNICC/1999/WGEC/INF.2/Add.1.
[991] Daniel Frank, Article 8(2)(b)(i)-Attacking Civilians in Roy SK Lee (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, (*Transnational Publishers Inc 2001), p.141.
[992] *Ibid.*p. 142.
[993] Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, (Oxford University Press 2014, 3rd edition), p. 482.

For the use of indiscriminative weapons to qualify as a crime under this provision,[994] the requisite *mens rea* of each particular case would need to be assessed. The precautionary measures prescribed in Article 57 of Additional Protocol I can assist in determining the intention. The ICTY has also concluded that attacks which use certain means of combat that cannot discriminate between military and non-military objectives are equivalent to the direct targeting of civilians.[995] The International Court of Justice in its advisory opinion on nuclear weapons equated the use of indiscriminative weapons with a deliberate attack on civilians.[996] The type of weapon used can be helpful in determining whether an attack is directed against civilians. For example, the use of sniper rifles and other direct fire weapons would indicate that the attack was directed against civilians whereas some other weapons may have a more legally acceptable degree of error in targeting. Likewise, in case of the immediate presence of military objective in an area it is not always straightforward in determining the target of the attack.[997]

The death or injury of civilians does not automatically support the required *mens rea*. Civilian casualties may occur as a result of attack against military objectives where projectiles miss the target or where attack was made in good faith but on the basis of inaccurate information.[998] A disproportionate attack could also be covered under Article 8(2)(b)(i) where the anticipated causalities or damage to civilian property was so extensive that it would be possible to infer that the object of the attack was indeed civilian.[999] It has been argued that even if the *mens rea* required for the war crime of attacking civilians under the Rome Statute is in accordance with the general subjective element set out in Article 30**,** any attack directed at a specific military target that nevertheless hits civilians due to a disregard of the necessary precautionary measures can not be treated as an attack intentionally directed against civilians.[1000]

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[994] 'those that are not capable of distinguishing between civilians or civilian objects and military objectives, which include combatants'

[995] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para.57

[996] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, International Court of Justice (ICJ), 8 July 1996, p. 226

[997] Knut Dörmann, *War Crimes- Para. 2(b)(i)* in Otto Triffterer and Kai Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn. C.H.Beck,Hart, Nomos, 2016), Para 204, p. 362.

[998] *Ibid.*, para. 205 and 206, p. 362.

[999] *Prosecutor v. Katanga and Chui* (ICC- 01/04-01/07-3436-T) Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 802

Prosecutor v. Stanislav Galić, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 60; Dr. Juan-Pablo Pérez-León-Acevedo 'The Challenging Prosecution of Unlawful Attacks as War Crimes at International Criminal Tribunals' (2018) 26 *Michigan State International Law Review* 408, 420

[1000] Paola Gaeta, *War Crimes and Other International 'Core' Crimes*, in Andrew Clapham, Paola Gaeta, Tom Haeck, Alice Priddy (eds.) *The Oxford Handbook of International Law in Armed Conflict*. Oxford University Press, 2014) 737-765 ,749

It is also relevant to note here that the Court can derive exceptions to intent from other provisions of the Rome Statute because of the wording 'Unless otherwise provided' at the very beginning of Article 30. However, it is still not clear whether varying standards of the mental element could arise from the Elements of Crimes or even from customary international law. The early practice of the International Criminal Court suggests that both the Rome Statute and the Elements of Crimes can provide 'otherwise' in the sense of the opening clause of Article 30.[1001]

The approach adopted by the International Criminal Court in explaining the additional *mens rea* for the crime contained in Article 8(2)(b)(i) and Article 8(2)(e)(i) has varied in different cases. For instance, in the case of *Katanga and Chui*, the Court stated in its Decision on the Confirmation of Charges that the intention to attack the civilian population is in addition to the standard *mens rea* requirement provided in Article 30 of the Rome Statute. Accordingly, the offence encompasses a *dolus directus* of the first degree.[1002] The Court further stated that the offence is completed once the perpetrators launch the attack with the intent to target the civilian population or individual civilians not taking direct part in the hostilities.[1003] It also held that intentional attacks against the civilian population can be of two types. First, when the civilian population is the sole target of the attack; and second when the perpetrator launches the attack with two distinct specific aims: '(i) to target a military objective within the meaning of articles 51 and 52 of Additional Protocol I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity'.[1004]

However, Trial Chamber II used a different approach when addressing the same provision for non-international armed conflict: Article 8(2)(e)(i). In the *Katanga* case, the Court concluded

[1001]Mohamed Elewa Badar and Sara Porro, Rethinking the Mental Elements in the Jurisprudence of the ICC in Carsten Stahn (eds.) *The law and practice of the International Criminal Court*. (Oxford University Press, USA, 2015), pp. 649-667, p. 666.
, Article 30 of the Rome Statute; The Court has relied on part of paragraph (2) of the General Introduction to the Elements of Crime, which states [a]s stated in article 30, 'unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. Where no reference is made in the Elements of Crime to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies'.
[1002] *Prosecutor* v. Katanga and Chui (Case No. ICC-01/04-01/07) Decision on the Confirmation of Charges, 30 September 2008, para. 271
[1003] *Ibid.*, para. 272
[1004] *Ibid.*, para. 273

that the additional mental element (the third element) provided in the Elements of Crimes is a repetition of Article 30(2)(a). Moreover, it held that for the mental element of the crime to be established, the perpetrator must have '(1) intentionally directed an attack; (2) intended the civilian population or individual civilians to be the object of the attack; (3) been aware of the civilian character of the population or of civilians not taking part in hostilities; and (4) been aware of the factual circumstances that established the existence of an armed conflict'.[1005] The court also addressed the ways in which the intention of attacking the civilian population or individual civilians could be ascertained. It includes: the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack, or the nature of the act constituting the attack. For instance, in the *Katanga* case, the intent to attack civilians could be inferred from circumstances such as the blocking roads to and from the village, the order to kill civilians attempting to flee, and the chanting songs with lyrics indicating that some specific groups should be killed while others shown mercy.[1006]

The prosecutor's report about situation in Republic of Korea in 2014 noted that '[t]he jurisprudence regarding Article 30(2) is still in its infancy'.[1007] Even the case law of International Criminal Court indicates that the threshold in Article 30(2)(b) entails more than mere eventuality or possibility.[1008] In the *Lubanga* case the Trial Chamber excluded a *dolus eventualis* and was of the opinion that the low risk of a crime's occurrence was enough under Article 30(2)(b).[1009] The Trial Chamber gave the word 'will occur in the ordinary course of

[1005] *Prosecutor v. Katanga and Chui*, Trial Chamber. II, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-T, 7 March 2014, para. 808

[1006] *Prosecutor v. Katanga and Chui* (Case No. ICC-01/04-01/07) Decision on the Confirmation of Charges, 30 September 2008, para. 280, 281

[1007] Situation in the Republic of Korea Article 5 Report, The Office of the Prosecutor, June 2014, para 64, 4 Available at: < https://www.icc cpi.int/iccdocs/otp/sas-kor-article-5-public-report-eng-05jun2014.pdf> Last Accessed: 10 December 2019, (Para 64 'An argument could be made that a pattern of indifference and recklessness with respect to civilian life and property should eventually satisfy the intent requirements of Articles 30 and 8(2)(b)(i) and (ii).60 If the civilian deaths, injury, and property damage were the result of carelessness, poor equipment, or mistaken targeting information and DPRK military continue to launch attacks using this equipment and information—with knowledge of the prior civilian deaths and injury— persisting in that conduct in the face of such knowledge may well rise to the level required to meet the intent standard under Article 30(2)(b) and Articles 8(2)(b)(i) and (ii)'.)

[1008] *Prosecutor v. Jean-Pierre Bemba Gombo*, (Case. No. ICC-01/01-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 para. 363; *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06), Judgment pursuant to Article 74 of the Statute, 14 March 2012, para.1010-1011

[1009] *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06), Judgment pursuant to Article 74 of the Statute, 14 March 2012, para.1010-1011 (para 1010The Pre-Trial Chamber considered that within dolus eventualis "two kinds of scenarios are distinguishable". First, if the co- perpetrator was aware of a substantial risk that his conduct will bring about "the objective elements of the crime", his intent can be inferred from the fact that he acted in the manner agreed in spite of this level of awareness. Second, if there was a low risk of bringing about "the objective elements of the crime", "the suspect must have clearly or expressly accepted the idea that such objective elements

events' their ordinary meanings that the perpetrators do not require to have practical certainty but awareness of a substantial risk of a crime's occurrence.[1010] The Trial Chamber stated that '"awareness that a consequence will occur in the ordinary course of events" means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future'.[1011] In *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II stated that the standard was higher than the common standard for *dolus eventualis*, the applicable standard being 'near inevitability or virtual certainty'.[1012] In the *Bemba* case, Pre Trial Chamber II concluded that 'in the system of the ICC Statute, the suspect could not be said to have intended to commit any of the crimes charged unless he was aware that the material elements of the offence would have been virtually certain consequence of his or her act'.[1013]

It can be argued that in most of the cases, the Court has required a higher threshold than that of Article 30. However, this is still not same as the *mens rea* required for the crime of terror under international humanitarian law. The next section compares Article 51(2) of Additional Protocol I and Article 8(2)(b)(i) of the Rome Statute with a view to address the possibility of prosecuting the crime of terror before the International Criminal Court.

4.3.4 Article 51(2) of Additional Protocol I and Article 8(2)(b)(i) of the Rome Statute

Highlighting the prosecution of 'terror' and 'acts of terrorism' before international criminal tribunals, Johan Van der Vyver contends that 'Terrorism can also, in the appropriate

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may result from his or her actions or omissions".) This approach is in accordance with the Office of the Prosecutor's position that the words 'will occur in the ordinary course of events' should be given their ordinary meaning.

[1010] *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06), Judgment pursuant to Article 74 of the Statute, 14 March 2012, para.1012 (Para 1011'The drafting history of the Statute suggests that the notion of dolus eventualis, along with the concept of recklessness, was deliberately excluded from the framework of the Statute (e.g. see the use of the words "unless otherwise provided" in the first sentence of Article 30).The plain language of the Statute, and most particularly the use of the words "will occur" in Article 30(2)(b) as opposed to "may occur", excludes the concept of dolus eventualis. The Chamber accepts the approach of Pre-Trial Chamber II on this issue'.); (para1007 'Article 30 defines the requirement of "intent" by reference to three particular factors: conduct, consequence and circumstance. First, pursuant to Article 30(2)(a), a person has intent if he or she "means to engage in the conduct". Second, under Article 30(2)(b) and in relation to a consequence, it is necessary that the individual "means to cause that consequence or is aware that it will occur in the ordinary course of events". Third, by Article 30(3) "knowledge" "means awareness that a circumstance exists, or a consequence will occur in the ordinary course of events".')

[1011] *Ibid.*

[1012] *Prosecutor v. Jean-Pierre Bemba Gombo*, (Case. No. ICC-01/01-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 para. 367, 368

[1013] *Ibid.*, para. 369.

circumstances be prosecuted in the ICC as a war crime'.[1014] This assertion is followed by a reference to the terms of Article 8(2)(b)(i). The significance of Article 8(2)(b)(ii) and Article 8(2)(e)(i) is also highlighted by Van der Vyver.[1015]. Indeed, except for the offence contained in Article 8(2)(b)(xxiv),[1016] the elements of the other war crimes related to the conduct of hostilities follow the same structure as that of Article 8(2)(b)(i). Accordingly, the prosecution of the crime of terror could be considered on the basis of the elements under any of these provisions.

Article 8(2)(b)(i) may be differentiated from the offence of unlawful attacks against civilians prosecuted by the ICTY because it requires evidence of intent. Evidence of recklessness is inadequate. Indiscriminate attacks may also qualify as intentional attacks against the civilian population or individual civilians, particularly in cases where the harm caused to civilians is great. However, the subjective element is decisive in determining whether it was an intentional attack.[1017] With regard to war crimes involving unlawful attacks, the Prosecution in the *Blaskic* case stated that the *mens rea* 'is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness that could be likened to serious criminal negligence'.[1018] The ICTY Trial Chamber noted that: 'Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians were being targeted'.[1019] With regard to the scope of Article 8(2)(b)(i), Dörmann stated that,

> This offence is not limited to attacks against individual civilians. It essentially encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially failing to seek precise information on the objects or persons to be attacked.[1020]

The requisite *mens rea* may be inferred from the fact that necessary precautions were not taken before and during the attack. This would apply to all the war crimes relating to unlawful attacks against persons or objects protected against such attacks.

[1014] Johan D. Van der Vyver, Legal Ramifications of the War in Gaza, (2009) 21 *Florida Journal of International Law* 403 ,426

[1015] *Ibid.*

[1016] 'Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law'.

[1017] *The Prosecutor v. Tihomir Bloskic*, Trial Chamber Judgment, 3 March 2000, Case No. IT-95-14-T, para. 179

[1018] *Ibid.*

[1019] *Ibid.*, para. 180.

[1020] Knut Dörmann, Louise Doswald-Beck, and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*; (Cambridge: Cambridge University Press, 2003), p. 132.

The *actus reus* and *mens rea* of the offence in Article 8(2)(b)(i) both differ from the equivalent employed by International Criminal Tribunal for the former Yugoslavia. These differences are significant as they could potentially allow for a defence of mistake of fact. The *Galić* Trial Chamber's definition of the crime of attack on civilians required that the attack cause death or serious bodily injury to body or health within the civilian population.[1021] The *mens rea* for the crime included both direct intent and recklessness while excluding mere negligence,[1022] as it is derived from the chapeau of Article 85(3) of Additional Protocol I (which includes 'wilfully').[1023] This definition would therefore include attacks directed against civilians as such, but also situations where attacks are were made without taking necessary precautions to spare the civilian population or individual civilians.

It is possible that unlawful attacks against civilians as conceptualised by the ICTY would not meet the requirements of Article 8(2)(b)(i). On account of this, it has been argued that 'the relevant provisions of the Rome Statute appear to be too restrictive from the point of view of the enhanced protection of victims of armed conflict'.[1024] However, the comparatively higher *mens rea* required by Article 8(2)(b)(i) is compensated by the absence of a result requirement.

The elements of the crime of intentional attacks against civilians are different from that of unlawful attacks against civilians due to strict *mens rea* requirement of the former. Likewise, the crime of terror is different from Article 8(2)(b)(i) due to the 'primary purpose' requirement for the mens rea of this offence. The criteria for specific intent of crime of terror is higher than that both of offences referred to above. Despite this, the protection provided to the civilians by Article 51(2) of Additional Protocol I is of more specific and broader nature. Evidently, the evidentiary criteria for proving 'primary purpose' is higher than the intention required for Article 8(2)(b)(i). An intentional attack against civilian population may not qualify as a crime of terror due to the existence of another primary purpose (for example, the utilitarian purpose

[1021] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 43
[1022] *Ibid.*, para. 54
[1023] ICRC Commentary para. 3474, 'the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences'.
[1024] Paola Gaeta, *War Crimes and Other International 'Core' Crimes*, in Andrew Clapham, Paola Gaeta, Tom Haeck, Alice Priddy (eds.) *The Oxford Handbook of International Law in Armed Conflict*. Oxford University Press, 2014), pp. 737-765, p.750.

discussed in the Special Court for Sierra Leone jurisprudence). It is possible to argue that the underlying conduct constituting the crime of terror could be prosecuted under Article 8(2)(b)(i) without having to prove the primary purpose requirement. However, this would not apply to threats of violence.

It is important to appreciate that an attack with the primary purpose to spreading terror among civilians is inherently contemptible and deserves specific mention. Moreover, the prohibition of terror provides additional protection in a way that if the intentional attacked failed to cause death or injury to civilians, normally a charge would not be brought under article 8(2)(b)(i). However, in the presence of a provision about spreading of terror it is more likely that such acts would be prosecuted (because despite the absence of result requirement for crime of terror, terror is usually caused by such acts). It can be argued that aside from the 'primary purpose' to spread terror, the other legal elements of the crime are the same as those of an intentional attack on civilians. However, Article 8(2)(b)(i) of the Rome Statute does not prohibit threats of violence which are coved by the crime of terror.

4.3.5 Article 8(2)(b)(ii)

Article 8(2)(b)(ii) of the International Criminal Court Statute, which is closely linked to Article 8(2)(b)(i), deals with intentional attacks against civilian objects. This prohibition is anchored in customary international law.[1025] With regard to the mental elements of this crime, reference may be made to the explanations given for the war crime of attacking civilians under Article 8(2)(b)(i). That explanation applies *mutatis mutandis* for all crimes covering unlawful acts. Hence, criminal liability under this provision of the ICC Statute does not require that damage actually occurred. Launching the proscribed attack is sufficient. The Statute contains no equivalent provision prohibiting intentional attacks against civilian objects, dealing with non-international armed conflict.

An attack perpetrated solely to spread terror among the civilian population is a special case of an unlawful attack on the civilian population. If an attack is made against civilian objects with such purpose, it could constitute a of crime of terror. Usually such attacks are resorted to in

[1025] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. II (Cambridge: Cambridge University Press, 2004), p. 581.

order to intimidate the adversary and the enemy civilian population. With reference to the crime of terror, Stefan Oetar noted:

> Although it constitutes a blatant violation of fundamental humanitarian law, which undoubtedly falls within the category of 'grave breaches' which should be sanctioned as war crimes, this particularly barbarian variant of 'total' warfare is unfortunately used regularly by military actors in practice. The 'Yugoslav', or rather Serbian Army, for example, has repeatedly launched terror attacks on the civilian population and threatened attacks on purely civilian objects in the course of the wars in Croatia in 1991 and in Bosnia since 1992, in order to intimidate the 'secessionist' republics and to expel the indigenous population from the territories claimed as 'historically Serbian'.[1026]

Such practices were also adopted during Soviet warfare in Afghanistan during the 1980s and the Iraqi attacks with 'Scud' missiles on Saudi and Israeli cities during the Kuwait War in 1991.[1027] Thus, the attacks against civilian objects can also result in spreading of terror among civilian population. The jurisprudence of Special Court for Sierra Leone has also shown that attacks against property with the primary purpose of spreading terror among civilians qualified as acts of terrorism under the court's jurisdiction. Therefore, the underlying conduct could be punishable under this provision, although it would not cover every act or threat of violence.

4.4 Other provisions of Article 8

There are other provisions of Rome Statute criminalising attacks against civilian population and objects that could fulfil many of the constituent elements of crime of terror (besides primary purpose requirement). Marlies Glasius noted:

> It is conceivable that an ICC prosecutor would take up the crime of terror as a further interpretation of a crime that has been spelled out in the Elements of Crimes, and that judges would go along with this argument, referencing the ICTY and SCSL jurisprudence. The war crime of wilfully causing great suffering (Art. 8 (2) (a) (iii) of the Elements), in conjunction perhaps with attacking civilians or another 'results based' crime, could lend itself to such interpretation.[1028]

Acts of terrorism may also constitute 'other serious violations of the laws and customs applicable in international armed conflict'. Article 8(2)(b) states that such offences cover:

> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance

[1026] Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck, (eds.) *The handbook of international humanitarian law (*Oxford University Press, 2013), p. 188.
[1027] *Ibid*
[1028] Marlies Glasius, 'Terror, terrorizing, terrorism: instilling fear as a crime in the cases of Radovan Karadzic and Charles Taylor' in Dubravka Zarkov and Marlies Glasius (eds.) *Narratives of Justice in and Out of the Courtroom* (Springer, 2014), p.17.

with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;...
(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; ...
(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; ...
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
[and]
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.

It has been stated that common Article 3 of the four Geneva Conventions, upon which Article 8(2)(c) of the Rome Statute is based 'in effect outlaws terrorism'.[1029] The acts outlined in Article 8(2)(c) may be used to encompass terrorist acts, including:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; [and]
(iii) Taking of hostages.[1030]

However, acts of terrorism under Geneva conventions are different in scope and application as compared to the crime of terror. In relation to other serious violations of the laws and customs applicable in armed conflicts not of an international character, the acts mentioned in Article 8(2)(e) that may encompass the underlying conduct of crime of terror are:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

[1029]Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments In Codification and Implementation* (Brill 1997), p. 200.; Lucy Martinez, 'Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems' (2002) 34 *Rutgers Law Journal* 1, 48
[1030] Article 8(2)(c) of the Rome Statute

> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, and
> (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

As the conduct which constitutes crime of terror has been criminalized under various provisions in the Rome statute, the question arises as to whether the inclusion of a specific crime of terror would be worthwhile. Would the express inclusion of crime of terror in the Rome Statute add value to the protection of civilians in armed conflict? This point will be addressed in the sections that follow.

4.5 The case for including of the crime of 'terror' in the Rome Statute

The underlying conduct that constitutes offence of terror may be prosecuted under various provisions of the Rome Statute provided their distinct requirements are fulfilled. However, the seriousness of the prohibition arguably warrants the inclusion of a specific provision criminalising the offence. According to Ben Saul,

> 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.[1031]

The scope of the offence of terror is broader than existing crimes relating to attacks against civilians under the court's jurisdiction . Although some aspects of crime of terror could be tried under Article 8, this would not apply to threats of violence or the spreading of psychological terror among civilian population. The prohibition of terror provides a much broader level of protection compared to the prohibition on intentional attacks against the civilians. Adding the offence to the jurisdiction of International Criminal Court would make the prohibition more visible**,** supporting deterrence of such conduct. Moreover, the prosecution of violations under International Criminal Court could play a major role in the future development of international humanitarian law, strengthening for the protection of civilians. Questions of legality and customary status of the prohibition have already been addressed in the jurisprudence of international criminal tribunals. Neither would hinder its incorporation into the Rome Statute.

[1031] Ben Saul, *Defining Terrorism in international Law* (Oxford: Oxford University Press,2006), p. 313.

In addition to the value added to the protection of civilians in armed conflict, the inclusion of the crime of terror would also help in clarifying the offence of terror in armed conflict, which is often confused with the crime of international terrorism.

There are several ways in which offence of terror could be addressed by the International Criminal Court. If the Rome Statute was amended to include a crime of 'terrorism', then a specific crime of terror during armed conflict could be part of such provision. Secondly, the Court could interpret the offence of terror under one of the crimes which already fall within the Court's competence, such as war crime of intentionally attacking civilians. This, however, this would not cover all the aspects of crime of terror. Arguably, in the event of amending the Rome Statute, it would be useful to take into account the provisions related to 'terrorism' and 'terror' included in the Geneva Conventions of 1949 and the Additional Protocols of 1977.

Article 121 states that after seven years from the entry into force of the Statute 'any State Party may propose amendments'. The first review conference took place in Kampala, Uganda in 2010. There was a suggestion to review the option of including drug crimes and the crime of terrorism within the Statute, but it was not taken into consideration during the conference. At the 8th Session of the Assembly of State Parties, the Netherlands proposed an amendment to the Article 5 of the Statute to include the crime of terrorism. The Netherlands was of the view that it was the time to consider the inclusion of the crime of terrorism in the list of crimes over which the Court has jurisdiction. It stated that:

> Terrorism is one of the biggest and most challenging threats the world is facing in the twenty-first century. The international community stands united in its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security. Indeed, terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community.[1032]

Impunity for such serious crimes calls for a role for the International Criminal Court. The delegation of the Netherlands further mentioned that there is all too often impunity for acts of terrorism. It also pointed to the Resolution E adopted in 1998 during the Rome Conference which recommended a Review Conference to consider, inter alia, the crime of terrorism in

[1032] See for instance A/Res/60/288 - The United Nations Global Counter-Terrorism Strategy**).** Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, ICC-ASP/8/43/Add.1, p 12, Report of the Bureau on the Review Conference, 10 November 2009

order to arrive at an acceptable definition and the inclusion of this offence in the list of crimes within the jurisdiction of the Court.[1033]

Due to the absence of a generally acceptable definition of terrorism, the Netherlands' proposal sought to apply for the crime of terrorism the same approach as has been accepted for the crime of aggression by the 1998 Rome Diplomatic Conference for the crime of aggression. By adopting this approach the crime could be included in Article 5 of the Rome Statute, while at the same time postponing the exercise of jurisdiction by the Court until the definition and the modalities for the exercise of such jurisdiction had been agreed upon by a working group discussing how to integrate crime in the court.[1034]

During this discussion about inclusion of crime of terrorism in the Rome Statute, many delegations expressed their staunch support for the combating of terrorism. However, it was professed that 'a clear definition agreed to in the United Nations was a precondition to inclusion of terrorism in the Statute'.[1035] Many doubted the feasibility of incorporating the crime of terrorism into the Court's jurisdiction, in the absence of a legal definition of terrorism. Furthermore, the view was expressed that putting the crime of terrorism on the agenda of the Review Conference could risk of politicization of the issue, raising significant political sensitivities that would result in a difficult negotiation process at the Review Conference.[1036]

It was also argued that the proposed working group would face similar complex issues which are faced by the forum of the United Nations that had for several years been deliberating the subject of a draft comprehensive convention on international terrorism. However, it was suggested that the proposal merited further consideration in the future after the outcome of the work under discussion in the Sixth Committee of the United Nations General Assembly. It was also contended that proposals to incorporate the crime of terrorism could be contemplated at

[1033] Assembly of States Parties, eighth session, The Hague, 18-26 November 2009, ICC-ASP/8/43/Add.1, p. 12.; Report of the Bureau on the Review Conference, 10 November 2009, Delegations
[1034] Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, (ICC-ASP/8/20), Vol. I, Annex II (Report of the Working Group on the Review Conference), at page 54, §42.
[1035] Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, (ICC-ASP/8/20), Vol. I, Annex II (Report of the Working Group on the Review Conference), at page 55, §43.
[1036] Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, ICC-ASP/8/43, p 6, Report of the Bureau on the Review Conference, 10 November 2009, section 17 and Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, (ICC-ASP/8/20), Vol. I, Annex II (Report of the Working Group on the Review Conference), at page 55, §46

other review conferences in the future.[1037] Some delegates remarked that conduct constituting terrorism was to a large extent included in sixteen multilateral conventions; it was contended there was, in fact, no lack of definition of terrorism.[1038] At the twelfth Session of the Assembly of State Parties, the Netherlands declared that it would no longer proceed with its proposal to amend Article 5 of the Rome Statute to provide the Court with jurisdiction over the crime of terrorism.[1039] On account of this, no progress has been made, despite growing jurisprudence on crime of terror and the conflation of counter-terrorism law and international humanitarian law on this subject.

Acts of terror committed systematically or in a widespread manner directed against a civilian population may amount to crimes against humanity, whether perpetrated in time of war or peace.[1040] As Cassese noted:

> if in time of armed conflict an armed group or organization (or even a state), besides indiscriminately and violently attacking on a large scale civilians and other persons not taking an active part in hostilities, captures, rapes or tortures enemy combatants for the purpose of spreading terror among the enemy belligerent or to obtain from him the release of imprisoned members of the group, organization (or state), these acts, which normally would be classified as war crimes, may acquire the magnitude of a crime against humanity.[1041]

Some authors have suggested that terrorism - including acts of terror - could be prosecuted under the heading of crime against humanity. It may be possible to address it as 'the sub-offence of murder, torture, deportation, or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, persecution and enforced disappearance' under Article 7(1)(k) of the Rome Statute.[1042] Roberta Arnold stated that under international humanitarian law terror is considered to be intrinsic to war: 'Since it is the combatants' job to fight and deal with such strategies, terrorist

[1037] Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, ICC-ASP/8/43, p. 6, 9, Report of the Bureau on the Review Conference, 10 November 2009, section 20, 45
[1038] Assembly of States Parties, Eighth session, The Hague, 18-26 November 2009, ICC-ASP/8/43, p 6, Report of the Bureau on the Review Conference, 10 November 2009
[1039] Assembly of States Parties, Eighth session, The Hague, 20-28 November 2013, ICC-ASP/12/44, p1
[1040] Nabil Mokaya Orina, 'A Critique of the International Legal Regime Applicable to Terrorism' (2016) 2 *Strathmore Law Journal*.21,23, Matija Kovac, International Criminalization of Terrorism, (2007) 14 *Hrvatski Ljetopis za Kazneno Pravo i Praksu* 267, 290
[1041] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 93, 950
[1042] Roberta Arnold, 'The Prosecution of Terrorism as a Crime Against Humanity' (2004) 64 *Zeitschrift für ausllndisches öffentliches Recht und Völkerrecht* 979, 999; Galingging, Ridarson. 'Prosecuting Acts of Terrorism as Crimes against Humanity under the ICC Treaty' (2010) 7 *Indonsesian Journal of International Law* 746

attacks against them do not constitute a breach of the laws of war'.[1043] However, not everyone agrees with this approach to terrorism as a crime against humanity. According to Tim McCormack, there may also drawbacks to not categorising terrorism as a distinct crime because of the possibility that terrorist acts that do not meet the requirements of war crimes or crimes against humanity are not tried due to the high thresholds of such offences.[1044]

The future inclusion of the crime of terror in the Rome Statute is still a possibility. One way of realizing this is for civil society to push for the inclusion of a terror provision in advance of the next ICC Review Conference .[1045] Article 10 of the Rome Statute states that the Statute cannot limit or prejudice 'in any way existing or developing rules of international law for purposes other than this Statute'. The International Criminal Tribunal for the former Yugoslavia stated in the *Furundzija* case:

> Notwithstanding Article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *com grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[1046]

The exclusion of crime of terror from the Rome Statute does not impede the future development of such an offence as a matter of customary international law. However, the incorporation of the crime should be considered as it would add to its enforceability.

It has also been argued that the Rome Statute is defective because it fails to fully incorporate core principles of humanitarian law for protection of civilians.[1047] For example, it does not sufficiently enforce the principle of distinction because it requires intention or knowledge with

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[1043] Roberta Arnold, 'The Prosecution of Terrorism as a Crime Against Humanity' (2004) 64 *Zeitschrift für ausllndisches öffentliches Recht und Völkerrecht* 979, 999

[1044] Seminar hosted by ICCT with Prof. Tim McCormack on 'International Criminal Court and Terrorist Offences' with support of the Australian Embassy in The Hague. 30 June 2011.Available at: <https://icct.nl/event/seminar-icc-terrorist-offences/> Last Accessed: 11 December 2019

[1045] Marlies Glasius, 'Terror, terrorizing, terrorism: instilling fear as a crime in the cases of Radovan Karadzic and Charles Taylor' in Dubravka Zarkov and Marlies Glasius (eds.) *Narratives of Justice in and Out of the Courtroom* (Springer, 2014) p.17.

[1046] *Prosecutor v Furundžija*, Trial Chamber Judgement, Case No: IT-95-17/1-T, 10 Dec. 1998, para. 227

[1047] Adil Ahmad Haque, 'Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute' (2011) 14 *New Criminal Law Review* 519, 521

regard to all the material elements of the related war crimes.[1048] To enhance the protection available to civilians, amendments to Article 8 are recommended. The crime of terror could be included as a part of the major reforms required in the Statute in order to fill the gaps in civilian protection.

The process for amending Article 8 is simple and a precedent has been set in the first review conference in June 2010. This expanded the Court's jurisdiction over the use of prohibited weapons in international armed conflicts to their use in armed conflicts of a non-interantional character.[1049] The process that led to the adoption of this amendment could serve as a guideline for inclusion of crime of terror under the Rome Statute. Apart from being an example for the ICC Statute's provisions on the entry into force of amendments, the process for building consensus on the amendment adopted by Belgium could serve as a model for any attempt to include crime of terror under the Rome Statute. Belgium's strategy is instructive as it increased its base of support for the amendment through bilateral meetings with various governments. By the time of the Review Conference, many delegations were already familiar with the proposal and various states signed on as co-sponsors.[1050] The amendment procedure is straightforward: There are no conditions for certain majorities and no postponement of final decisions to a future meeting. The amendment enters into force for those States Parties that ratify it one year after the deposit of their instruments of ratification.[1051]

The creation of International Criminal Court symbolises for many a high point in the history of international criminal law and has resulted in remarkable developments in this area. It has also contributed in increasing respect for international humanitarian law and the adoption of national legislation providing penal sanctions at the domestic level for the commission of international crimes. The incorporation of the offences from Rome Statute into national law has resulted in the creation of unprecedented domestic legislative frameworks and widespread domestic implementation of international criminal law, one of the most momentous

[1048] *Ibid.,* 'The result is that it is possible for a combatant with a culpable mental state, without justification or excuse, and in violation of humanitarian law, to kill civilians, yet escape criminal liability under the Rome Statute'.
[1049] Amendments to Article 8 of the Rome Statute, Resolution RC/Res.5, 10 June 2010 (Amendment Resolution).
[1050] Amal Alamuddin and Philippa Webb, 'Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute' (2010) 8 *Journal of International Criminal Justice* 1219, 1240
[1051] *Ibid*., p.1237

achievements of the International Criminal Court.[1052] The inclusion of crime of terror under the Rome Statute could contribute to harmonisation of jurisprudence on offence by resolving the existing discrepancies while increasing compliance at the national level.

There has also been some consideration about the creation of an international court to deal specifically with all terror related offences.[1053] Such a court of tribunal could assume jurisdiction over the war crime of terror under a separate provision dealing with terror offences during an armed conflict. However, it is submitted that the incorporation into the Rome Statute of a comprehensive crime of terrorism, including crime of terror, would be more advantageous. It would be more cost effective due to complimentary nature of International Criminal Court's jurisdiction, avoiding the creation of a new institution involving a substantial negotiations and procedural controversies.

If the crime of terror is to be added under International Criminal Court as a distinct crime, then one possible way is to include it under a provision criminalising terrorism in its all forms and manifestations. The next section will examine the crime of international terrorism, exploring similarities and differences with war crime of terror and the possibilities that exist for harmonising the different legal regimes.

4.6 The conflation of the crime of terror and terrorism

According to Antonio Coco, the crime of terror as identified in the *Galić* case constitutes the same criminal offence as terrorism in times of armed conflict, prohibited in both international and non-international armed conflicts.[1054] Although the crime of terror under international humanitarian law is distinct, it shares many similarities with the peacetime concept of terrorism found in counter-terrorism instruments. In the absence of a clear, comprehensive legal definition of terrorism confusion sometimes arises in understanding terror violence, i.e. war

[1052] Tim McCormack, 'The Contribution of the International Criminal Court to Increasing Respect for International Humanitarian Law' (2008) 27 *University of Tasmania Law Review* 22, 46
[1053] Lucy Martinez, 'Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems' (2002) 34 *Rutgers Law Journal* 1,1, Alfred P Rubin, 'Legal Response to Terror: An International Criminal Court?' (2002) 43 *Harvard international Law Journal* 65.
[1054] Antonio Coco, 'The Mark of Cain the Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in R v. Mohammed Gul' (2013) 11(2) *Journal of International Criminal Justice* 425, 437

crime of terror is confused with the acts of terror outside an armed conflict. Such ambiguity has also arose from labelling of some military engagements as 'war on terror'.[1055]

The use of terror as a method of warfare also increases the uncertainty in this regard. Héctor Olásolo asserts that 'the phenomenon of terrorism, which is characterized by the use of terror in order to obtain political gains, can take place both in situations of peace and during an armed conflict'.[1056] Often the decision to use terror as a method of warfare is made in order to gain political and military advantage. Combatants and other persons that actively participate in hostilities have to suffer the psychological trauma of the terror caused by the enemy through the use of lawful means of warfare against which there is no possible protection.[1057] The crime of terror is specifically against civilians and is the main limit on use of terror as a method of warfare during armed conflict, the infringement of which gives rise to individual criminal liability.[1058] But during an armed conflict the use of terror against combatants and other persons who actively participate in the hostilities is also subject to important limitations. This includes the criminalization of any order signifying that no quarter shall be given.[1059]

Furthermore, the indirect use of terror during armed conflict is also subject to important limitations due to the prohibition on the use a number of means and methods of warfare. Prohibited means and methods of warfare which could indirectly cause terror include 'employing bullets which expand or flatten easily in the human body – such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions – and cause superfluous injury or unnecessary suffering'.[1060] However, all such forms of terror should not be confused with the war crime of terror. The concept of terrorism in war is relative due to the recognition of 'rule-based violence' in international humanitarian law, unlike the unqualified prohibition of terrorist acts in peacetime.[1061] Marja Lehto stated 'that international

[1055] Tim Stephens, 'International Criminal Law and the Response to International Terrorism' (2007) 27 *University of New South Wales* 454, 455
[1056] Héctor Olásolo, *Unlawful attacks in combat situations: from the ICTY's case law to the Rome Statute* (Brill Nijhoff, 2007), p. 46.
[1057] *Ibid*.
[1058] Roberta Arnold, *The ICC as a new instrument for repressing terrorism*. Brill Nijhoff, 2004. P193-195
[1059] Article 8(2) (b) (xii) and and (x) of the Rome Statute
[1060] Héctor Olásolo, *Unlawful attacks in combat situations: from the ICTY's case law to the Rome Statute* (Brill Nijhoff, 2007), p. 47.
[1061] Marja Lehto, *Indirect Responsibility for Terrorist Acts. Redefinition of the Concept of Terrorism Beyond Violent Acts.* The Erik Castrn Institute Monographs on International Law and Human Rights, Vol. 10 (Martinus Nijhoff Publishers: Leiden, Boston, 2009), p. 84.

jurisprudence has been concerned with terrorism as a war crime as well as with policies of terror as an aspect of other crimes'.[1062]

While addressing the uncertainty about terrorism under international law, Richard Barnes noted that 'if international law is at the edge of law and humanitarian law is at the edge of international law, then regulation of terrorism occurs at the vanishing point of humanitarian law'.[1063] On account of this, efforts to provide an appropriate normative framework are constantly required. International humanitarian law will only apply to a war on terror when it amounts to an armed conflict. Gabor Rona opined that when the war on terror does not amount to an armed conflict, international humanitarian law is not only inadequate, but its application is inappropriate.[1064]

The classification of the campaign launched after the attacks of 11 September 2001, referred to as a 'global war on terrorism', was characterised by US authorities as a 'state of armed conflict'. This characterization entails, 'a privatization of the notion of war on the assumption that war can be unleashed and waged by a private group'.[1065] The over application of international humanitarian law during the 'war on terrorism' is also problematic.[1066] As Paust asserted: 'any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of nonstate actor violence and targeting that otherwise remain criminal could become legitimate'.[1067] The argument that international humanitarian law gives legitimacy or recognition to the terrorist groups is not completely valid. As noted by Hans-Peter Gasser, Article 4 of Additional Protocol

[1062] Marja Lehto, *Indirect Responsibility for Terrorist Acts. Redefinition of the Concept of Terrorism Beyond Violent Acts*. The Erik Castrn Institute Monographs on International Law and Human Rights, Vol. 10 (Martinus Nijhoff Publishers: Leiden, Boston, 2009), p. 96.
[1063] Richard Alan Barnes, 'Of Vanishing Points and Paradoxes: Terrorism and International Humanitarian Law' (2005) *International Conflict and Security Law* 129,132
[1064] Gabor Rona, 'Interesting Tomes for International Humanitarian Law: Challenges from the 'War on Terror' (2003) 27 *Fletcher Forum of World Affairs* 55, 58.
[1065] Manuel Pérez-González, Combating Terrorism: An International Humanitarian Law Perspective in Fernández-Sánchez, Pablo Antonio, (eds.) *International legal dimension of terrorism* (Brill, 2008), p. 258.
[1066]If the war on terror was a war, then the enemy soldiers could legitimately target military headquarters, vessels or fight the troops of the USA. However, the bombing of US *cole* is not considered a legitimate act of warfare. Similarly, the combatants fighting the US military in Afghanistan were not given the prisoners of war status. Miriam J. Aukerman, War, Crime, or War Crime?: Interrogating the Analogy Between War and Terror in Linnan, David K (eds.) *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues: A Guide to the Issues*. (ABC-CLIO, 2008), p. 149.
[1067] Jordan J. Paust, 'There is no need to revise the laws of war in light of September 11th' (2002) *American Society of International Law*, p. 3

I precludes any effect on the status of the parties to a conflict.[1068] The quid pro quo of international humanitarian law is that, it give legitimacy to acts which would be regarded as criminal otherwise, in return for compliance with its rules. A problem arises when states choose when and how the rules of international humanitarian law apply according to their own interests. Manuel Pérez-González observed that it is not appropriate to apply the logic of war or armed conflict to any violence between States and international terrorist networks or groups. He states that applying the logic of war to such groups would signify that 'these networks or groups must be under the same international humanitarian law rights and obligations as the States fighting them and this is something which States seem reluctant to accept'.[1069] The application of the correct legal regime is of utmost importance. Any act of terrorism outside the scope of armed conflict should be dealt with by applying domestic and international human rights law.[1070] Antonio Cassese described international terrorism under international law as:

> a discrete international crime perpetrated *in time of peace* exhibits the following requisites: (i) is an action normally criminalized in national legal systems; (ii) is transnational in character, i.e. not limited in its action or implications to one country alone; (iii) is carried out for the purpose of coercing a state, or international organization to do or refrain from doing something; (iv) uses for this purpose two possible modalities: either spreading terror among civilians or attacking public or eminent private institutions or their representatives; and (v) is not motivated by personal gain but by ideological or political aspirations.[1071]

Cassese differentiated it from terror in armed conflict by defining crime of terror as 'violent action (or even threat of such action) taken (i) against civilians or any other person not taking an active part in armed hostilities, and (ii) has as its primary purpose the spreading terror among the civilian population'.[1072] The fundamental distinction between international humanitarian law and counter-terrorism law in armed conflict situations, is that, in legal terms, international humanitarian law does not prohibit certain acts of violence against military objectives and personnel, while any act of violence designated as 'terrorist' is always unlawful.[1073] As noted

[1068] Hans-Peter Gasser 'An Appeal for the Ratification by the United States' (1987) 81 *American Journal of International Law* 912, 917–18. See also the final line of Article 3 common to the four Geneva Convention of 1949.
[1069] Manuel Pérez-González, Combating Terrorism: An International Humanitarian Law Perspective in Fernández-Sánchez, Pablo Antonio, ed. *International legal dimension of terrorism*. (Brill, 2008), p. 258.
[1070] Marco Sassoli, Use and Abuse of the Laws of War in the "War on Terror"*:* (2004) 22 Law & Inequality *:A Journal of Theory and Practice*, 195, 198,211
[1071] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933, 957
[1072] *Ibid*.
[1073] Committee of Experts on Terrorism (CODEXTER), 'Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts Discussion Paper', Strasbourg, 13 March 2017, p. 10

by Ben Saul, 'the threshold of application of IHL violence that is labelled as 'terrorist' (whether politically or by legal norms outside IHL) may contribute to constituting an 'armed conflict' in a number of ways'.[1074] Even extreme violence is not prohibited under international humanitarian law, provided military necessity justifies the target of the attack, and any incidental loss of civilian life is not excessive or disproportionate with respect to the concrete and direct military advantage predicted from the act itself. The ICRC has elaborated this in the following terms:

> [A]cts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled "terrorist" at the international or domestic levels (although they remain subject to ordinary domestic criminalization where a NIAC is involved). Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as 'terrorist' under another regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets.[1075]

Since 1963, the international community has elaborated 19 international legal instruments to prevent terrorist acts.[1076] Some of the treaties against terrorism, including the 1979 Convention against hostage-taking, the 1997 Convention against terrorist bombings, the 1999 Convention against the financing of terrorism, and the 2005 Convention against nuclear terrorism, include provisions mentioning international humanitarian law or the concepts originated from it.[1077] These provisions are mostly exclusionary clauses which preclude military operations by State armed forces in almost all situations from the universal counter-terrorism regime, even in circumstances where state forces use oppressive measures designed to intimidate or create

[1074] Ben Saul, 'Terrorism, Counter-Terrorism and International Humanitarian Law', May 2016, p.1, Available at:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778893 >Last Accessed: 11 December 2019
[1075] ICRC, The Applicability of International Humanitarian Law to Terrorism and Counter-Terrorism (2015). Availabale at:< https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism> Last Accessed: 05 December 2019
[1076] United Nations Office of Counter-Terrorism, International Legal Instruments, Available at <https://www.un.org/en/counterterrorism/legal-instruments.shtml>. Last Accessed: 11 December 2019
[1077] International Convention against the Taking of Hostages, New York, 18 December 1979, 1316 UNTS 205, entered into force on 3 June 1983; International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc.A/Res/54/109, entered into force on 10 April 2002; International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Doc. A/52/653, entered into force on 23 May 2001; International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Doc. A/Res/59/290, entered into force on 7 July 2007

terror in a civilian population.[1078] Conversely, acts of violence by disorganised armed groups or civilians taking direct part in hostilities may still be covered by these treaties' provisions despite the regulation of such conduct by international humanitarian law.[1079]

The exclusionary clause of the International Convention for the Suppression of Terrorist Bombings applies only to acts committed during an armed conflict and states that 'the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law'.[1080] It does not apply to other situations in which international humanitarian law is applicable, for instance, occupation. It is 'an affront to the rule of law' that the convention applies to violence by disorganised armed groups or civilians sporadically taking a direct part in hostilities, while it exempts regular armed forces who commit similar acts.[1081] The designation of some armed groups as 'terrorist' can undermine the equality of the parties and reduce the already weak incentives for non-state armed groups to comply with IHL. This often weakens the guarantees provided of civilian protection during armed conflict.

The exception in the Convention against Terrorist Bombings suggests that anti-terrorist law does not apply where the rules of international humanitarian law govern a situation. It implies either the rules of international humanitarian law apply or anti-terrorist law.[1082] There is no overlapping area between the two. The exclusion of acts of terror during war from the anti-terrorist conventions suggests that in times of an armed conflict no terrorist acts are possible by the parties to that conflict. Attacking a lawful target under the laws of war would not result in a prosecution for terrorism. Christian Walter states:

> The solution favoured here is that each body of law follows its own logic to the largest extent possible: i.e. the terrorist conventions should apply where the criteria for the definition of terrorism are fulfilled, and the rules of international humanitarian law apply whenever there is a situation of an armed conflict. Acts which must be qualified

[1078] Committee of Experts on Terrorism (CODEXTER), Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts Discussion Paper, Strasbourg, 13 March 2017, p. 12
[1079] *Ibid*.
[1080] International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Doc. A/52/653, entered into force on 23 May 2001; Article 19.2 of the Convention
[1081]Daniel O'Donnell, International treaties against terrorism and the use of terrorism during armed conflict and by armed forces, (2006) 88 *International Review of Red Cross* 853, 879
[1082] Christian Walter, 'Defining Terrorism in National and International Law' p. 18 Available at: http://iusgentium.ufsc.br/wp-content/uploads/2017/03/1-2-Defining-Terrorism-in-National-and-International-Law-Christian-Walter.pdf Last Accessed: 11 December 2019

> as terrorism under anti- terrorism law, are only excluded to the extent that international humanitarian law provides for a specific justification (as is the case for example with lawful targets). In all other cases there is no reason, why war crimes which match the criteria for terrorism should not be called and treated as such. [1083]

He further explains that if there is direct conflict between individual rules, the rules of international humanitarian law must prevail as *lex specialis*.[1084] However, there are also disagreements about the application of the principle of *lex specialis*, contending that it may not apply to the general relationship between counter-terrorism and international humanitarian law regimes, but rather to the specific rules in specific situations. Hence, it does not provide a definitive answer to the potential conflicting norms between the two areas.[1085]

The approach taken by the 1999 Convention against the financing of terrorism is entirely different as it does not contain any exclusionary clauses. The terrorism financing Convention provides a definition of terrorism in an indirect way in Article 2(1). This is the closest the international community has yet come to an agreed legal understanding of a general offence of terrorism.[1086] It states:

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
> (a) An act which constitutes an offence within the scope of and as defined in one of the [United Nation's twelve counter-terrorism conventions]; or
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[1087]

Remarkably, this definition suggests that in all situations it is unacceptable and prohibited to target civilians and others who are not actively participating in hostilities. The identity or status of the perpetrator with regard to armed conflict is irrelevant. It demonstrates that the definition can apply, by analogy, to protections that international humanitarian law provides to civilians

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[1083] *Ibid.*
[1084] *Ibid.*
[1085] Ben Saul, Terrorism, Counter-Terrorism and International Humanitarian Law, May 2016, p. 9, Available at:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778893 >Last Accessed: 11 December 2019
[1086] Tim Stephens, 'International Criminal Law and the Response to International Terrorism' (2007) 27 *University of New South Wales* 454, 462
[1087] International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc.A/Res/54/109, entered into force on 10 April 2002

during armed conflict. It shows that if the intent requirement is fulfilled, the killing of civilians can be considered an act of terrorism. On the other hand, collecting or donating funds with the knowledge that they will be used to finance attacks on enemy armed forces participating in an armed conflict, with the requisite intent would not be considered terrorism, irrespective of the means used to kill the combatants and the status of the perpetrator with regard to the conflict. It would, however, punish the financing of violent acts abroad directed against persons not taking an active part in armed hostilities.[1088] The ratification by large number of state parties (189) indicates the generally held view that terrorism is criminalized in time of armed conflict.

According to the Special Tribunal Lebanon, the ratification of the convention by the five permanent members of the UN Security Council, countries such as Brazil, India, Pakistan, Indonesia, Saudi Arabia, Turkey and Nigeria, and several Arab countries that are parties to the Arab Convention on Terrorism (a Convention that excepts from the category of terrorists the class of 'freedom fighters'), demonstrate that:

> an overwhelming majority of States currently takes the view that acts of terrorism may be repressed even in time of armed conflicts to the extent that such acts target civilians who do not take an active part in armed hostilities; these acts, in addition, could also be classified as war crimes (whereas the same acts, if they are directed against combatants or civilians participating in hostilities, may not be defined as either terrorist acts or war crimes, unless the requisite conditions for war crimes were met).[1089]

Some states hold the position that while acts committed by freedom fighters in wars of national liberation are not covered at all by the international law on terrorism, they are governed by international humanitarian law.[1090] Cassese elaborated on this by stating that deliberate attacks of Palestinians' on Israeli civilians in the West Bank (occupied territory), could not be labelled as terrorist acts, but could amount to the war crime of terror. He contended that 'the diplomatic contention then boils down to an essentially ideological dispute over how to further term an act

[1088] Daniel O'Donnell, International treaties against terrorism and the use of terrorism during armed conflict and by armed forces, (2006) 88 *International Review of Red Cross* 853, 869

[1089] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon 16:02:11 para. 108

[1090] Art. 18(2) of the draft proposed by the Coordinator of the UN Ad Hoc Committee established by GA Res. 51/210 (1996), to a large extent inspired by Western countries, stipulates that 'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.' (see UN Doc. A/57/37 (2002), at 17).
European council framework decision on combating terrorism, Article 11
'the preamble of this Decision states that 'Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision'.

that is undisputedly criminal: as a terrorist act or as a war crime (intended to spread terror)?'[1091] This question can arguably be addressed by the approach adopted by Convention against the financing of terrorism which safeguards the interests of civilians by criminalizing acts of terror. Article 2(1)(b) of the Convention propounds that attacks by freedom fighters and other combatants in armed conflict against military personnel and objectives in accordance with international humanitarian law are lawful and 'may not be termed terrorism'.[1092] Under the Convention , attacks against civilians may amount to terrorist acts or war crimes. Accordingly, the Convention would apply to terrorism in the conduct of hostilities, including acts that are not in accordance with international humanitarian law such as the offence of spreading terror among civilians.

Antonio Cassese argued if a state fighting terrorism is obliged by an international convention on terrorism that deals with terrorism both in time of peace and in time of war 'there would be a two-fold legal characterization of the same conduct or the combined simultaneous application of two different bodies of law to the same conduct'.[1093] According to Ben Saul, the dual criminalisation of attacks on civilians as a war crime or the crime of terrorism is mostly unobjectionable, even if hostilities between armed forces ought to be properly left to the exclusive domain of international humanitarian law.[1094] The specific rules relating to terrorism under international humanitarian law are firmly focused on the purpose of protecting civilians, instead of taking sides between state against non-state actors. On account of this, the prohibitions of international humanitarian law on terrorism, acts of terrorism, and acts intended to spread terror among civilian population, deal with state and non-state actors in the same manner. The war crime of spreading terror recognizes the 'additional wrongfulness of attacking civilians for the ulterior purpose of psychologically intimidating or terrorizing them'.[1095]

Although the International Criminal Tribunal for the former Yugoslavia was cautious to limit itself to a consideration of the crime of terror to the framework of war crimes, the elements of the offence can also be applied more generally to the recognition of terrorism as crime under

[1091] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice*, 933, 954
[1092] *Ibid.*, p. 956; International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc.A/Res/54/109, entered into force on 10 April 2002, Art. 2(1)(b)
[1093] *Ibid.*, p. 948
[1094] Ben Saul, 'Terrorism, Counter-Terrorism and International Humanitarian Law', May 2016, p.12 Available at:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778893 >Last Accessed: 11 December 2019
[1095] *Ibid.*

customary international law.[1096] It has also been observed that there is a striking parallel between the elements of the crime of terror as identified by the International Criminal Tribunal for the former Yugoslavia and those elements that Cassese contends point towards the crime of terrorism *per se* as a matter of customary international law.[1097]

A major hindrance in arriving a universally accepted definition of terrorism is the distinction that exists between armed struggles of national liberation and other forms of armed conflict. The controversy relates to acts of terror committed in furtherance of national liberation, impedes the inclusion of terror related offences in the Rome Statute. As Fiona de Londras stated:

> Terrorism is generally conceived of as an activity that is motivated by a desire to spread feelings of terror and lack of security among the civilian population in order to try to influence the actions of a state or an institution. Indeed, it is the targeting of civilians towards a particular purpose or with a particular motivation that is generally said to distinguish terroristic activity from 'simple' criminal activity; it is the distinction between mass murder and a terrorist attack that brings about multiple fatalities. At their core, both of these examples involve the same action and result: causing the death of multiple persons by means of unlawful activity.[1098]

Depending on the existence of a nexus with an armed conflict, the same conduct could qualify as war crime of terror or in absence of such nexus a different approach would be adopted. As mentioned in the discussion paper of committee of experts on terrorism (Council of Europe, Strasbourg, 2017):

> Assessing which conduct is within the bounds of the law of armed conflict and which is more likely qualified as terrorist can be further contextualised as operations that do not have an immediate military objective, but rather are acts intended to terrorise opposition within the framework of "strategic communications" or "psychological operations". The aim of these actions is to spread "fear, dread, panic or mere anxiety […] among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act - its shocking brutality, lack of discrimination, dramatic or symbolic quality and disregard of the rules of warfare and the rules of punishment." These propaganda techniques and strategic communications are critical to the success of such hybrid threat groups, as they seek to "systematically spread [propaganda and] disinformation, including through targeted social media

[1096] Fiona de Londras, 'Terrorism as an international crime' in William A. Schabas and Nadia Bernaz, (eds.) *Routledge handbook of international criminal law*. (Routledge, 2010), p. 174.
[1097] *Ibid.*
[1098] *Ibid.*, p. 168.

> campaigns, thereby seeking to radicalise individuals, destabilise society and control the political narrative."[1099]

Motive becomes less relevant in characterisation of terrorist acts as war crimes because acts intended to spread terror are always 'public' in nature. Personal motives such as racial hatred, revenge, anger, do not have bearing on the nature of the offence as violation of international humanitarian law.[1100] According to Cassese:

> [T]errorist acts in armed conflict are acts calculated to 'spread terror' among the civilian population or other protected persons. Here, then, the purpose of coercing a public (or private) authority to take a certain course of action disappears or, at least, wanes. The only conspicuous purpose appears to be that of terrorizing the enemy.[1101]

In considering the conceptualisation of terror and terrorism inside and outside the context of armed conflict, it is important to recall how the International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone developed the war crime of terror and paved way for its recognition as an offence under international criminal law. In addition to its incorporation in to Rome Statute, the protection provided would be furthered by UN organs affirming the prohibition in resolutions on terrorism, proscribing it at the international level and inviting States to consider it as a specific war crime subject to universal jurisdiction. There have been various cases at national and international level dealing with interplay between international humanitarian law and other legal regimes applicable to international terrorism. One of the most recent cases in this regard is Ukraine v Russia at the International court of justice (ICJ). The section that follows explores the significance of this case.

4.6.1 Ukraine v Russia at the International Court of Justice

On 16 January 2017, Ukraine submitted a lawsuit against Russia at the ICJ with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial

[1099] Committee of Experts on Terrorism (CODEXTER), Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts Discussion Paper, Strasbourg, 13 March 2017 p. 10

[1100] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933, 948

[1101] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933, 947

Discrimination (CERD). This was followed up by a provisional measures request.[1102] Ukraine requested the Court to adjudicate and pronounce that the Russian Federation bears international responsibility for its sponsorship of terrorism, failure to stop the financing of terrorism, and for the acts of terrorism committed by its proxies in Ukraine. Ukraine referred to the bombing of peaceful marchers in Kharkiv, the bombardment of Mariupol, the attacks on Volnovakha and Kramatorsk, and the shooting-down of Malaysia Airlines Flight MH17. All of which, according to the Ukraine, involved an 'intent to cause death or serious injury to civilians' and were executed 'to intimidate a population'.[1103]

Ukraine's stated that in 2014, the Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) launched 'a campaign of killings targeting civilians, in what the OHCHR [Office of the United Nations High Commissioner for Human Right] determined to be "a reign of intimidation and terror to maintain their position of control."'[1104] It argued that such acts targeting civilians, often political opponents, served the purpose of inflicting a reign of terror on a population. Accordingly, they met all the elements of Article 2(1)(b) of the ICSFT:

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

Russia contended that Ukrainian armed forces had been equally engaged in indiscriminate shelling and the other violations of international humanitarian law of which they had accused Russia. Additionally, it was claimed the civilian casualties referred to by Ukraine were caused by indiscriminate shelling of areas controlled by both sides, and not by acts of terrorism within the meaning of Article 2 of the ICSFT.[1105] These attacks were not intended to harm civilians

[1102] International Court of Justice, Application of The International Convention for The Suppression of The Financing of Terrorism and of The International Convention on The Elimination of All Forms of Racial Discrimination (Ukraine V. Russian Federation) Request for The Indication of Provisional Measures Order Of 19 April 2017, p. 6

[1103] *Ibid.*, p. 6,127

[1104] *Ibid.;* Written Statement of Observations and Submissions on The Preliminary Objections of The Russian Federation Submitted by Ukraine para 250. p.131

[1105]Preliminary Objections Submitted by the Russian Federation, Volume I 12 September 2018, para.97,98,99 Available at: <https://www.icj-cij.org/files/case-related/166/166-20180912-WRI-01-00-EN.pdf> Last Accessed:11 December 2019 'Ukrainian armed forces are themselves responsible for numerous acts of indiscriminate shelling, starting with the shelling of residential areas in Slavyansk in May 2014, where many civilians were killed and wounded by the shelling by Ukrainian armed forces, while residential buildings, hospitals and infrastructures were destroyed or damaged'

or committed with the purpose of intimidating the population. Russia contended that Ukraine's evidence of purpose to intimidate was not on the same scale as that used by the International Criminal Tribunal for the former Yugoslavia for the war crime of terror.[1106] This implied that a protracted campaign was an essential element to such a finding. However, Ukraine responded that International Criminal Tribunal for the former Yugoslavia did not intend to rule that only 'evidence of a "campaign" of attacks against civilians constitutes the war crime of terror'.[1107] Moreover, the fact that a purpose of spreading terror was found in a particularly egregious case did not signify that the same purpose could not exist in slightly different circumstances. It was contended that even if multiple attacks were required to prove such purpose, Ukraine's evidence met that test.[1108]

One of the questions which arose was whether international humanitarian law should apply exclusively to these acts as *lex specialis*, or whether the counter terrorism regime overlaps with international humanitarian law. The Russian Federation contended that Ukraine mischaracterized the nature of the case. It was argued that Ukraine had erroneously invoked the ICSFT and that the dispute fell directly within the scope of international humanitarian law due to attacks being against military objectives.[1109] Ukraine on the other hand relied on the express language of Article 2(1)(b) of the ICSFT, contending that a state of armed conflict does not exclude the application of the ICSFT and that international humanitarian law is not the only relevant law applicable in situations of armed conflict.[1110] The ICSFT also applies in such situations, as long as those attacked are not actively engaged in armed conflict.

[1106] Preliminary Objections Submitted by the Russian Federation, Volume I 12 September 2018, para 103. Available at: <https://www.icj-cij.org/files/case-related/166/166-20180912-WRI-01-00-EN.pdf >Last Accessed:11 December 2019

[1107] International Court Of Justice, Application Of The International Convention For The Suppression Of The Financing Of Terrorism And Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Ukraine V. Russian Federation) Request For The Indication Of Provisional Measures Order Of 19 April 2017, Written Statement Of Observations And Submissions On The Preliminary Objections Of The Russian Federation Submitted by Ukraine p.135

[1108] *Ibid*, para. 239, p. 124, Ukarine further added: 'it will often be appropriate to infer a purpose of intimidating a civilian population from the circumstances of an attack on a civilian area. The Italian Supreme Court of Cassation, interpreting ICSFT Article 2(1)(b), found that such an attack will "creat[e] fear and panic among the local people," thereby "achiev[ing] the particular results that constitute terrorist purposes."Similarly, the Supreme Court of Denmark stated that acts including the use of "imprecise mortar shells in civilian areas" constitute a terrorist attack under its ICSFT implementing legislation. Considering the analogous war crime of terrorism, the ICTY infers a purpose to spread terror from "both the actual infliction of terror and the indiscriminate nature of the attack." And the U.N. Commission of Inquiry on Gaza observed that "indiscriminate" rocket attacks, using imprecise weapons that "raise the question as to what military advantage [the armed groups] could expect to obtain," support a purpose of spreading terror'.

[1109] *Ibid*, para. 70

[1110] *Ibid*, para. 67

With regard to factual question as to whether the conduct of a non-state armed group could meet the elements of terrorism as defined in Article 2(1) of the ICSFT, the court ruled that there was insufficient evidence to conclude in the affirmative. Consequently, the provisional measures requested by Ukraine were not granted.[1111] When deciding the case on the merits, the Court examined evidence of intentionality and addressed the 'IHL as lex specialis' question as a matter of law. According to the standard developed by the ICTY in *Milošević* and *Galić*,[1112] indiscriminate attacks could be suggestive of the fact that the attack was directed against the civilian population. As Ukraine evidenced a large numbers of civilian casualties, some of the attacks could be categorised as attacks against civilians.[1113]

Judge ad hoc Pocar did not agree that the required threshold of plausibility was not met for the provisional measures requested by Ukraine. He concluded that examination of the evidence makes it is plausible that the indiscriminate attacks alleged by Ukraine were intended to spread terror, and that the persons providing funds to those who conducted these attacks had knowledge that such funds would be used for that purpose. Reliable international organizations have shown that these attacks have no discernible significance in terms of military advantage.[1114] Since knowledge and purpose are usually be determined through circumstantial evidence, the frequency of the attacks on civilians and large number of official reports made it at least plausible that the providers of funds were aware that these might likely be used for such attacks. Citing *Galić* and *Milošević* jurisprudence from ICTY, Pocar remarked:

> as to the purpose of the attacks, the intent to spread terror has been regarded by international criminal jurisprudence as the only reasonable inference to be drawn from indiscriminate attacks when repeated and bearing no military advantage, or carried out at sites known to be frequented by civilians during their daily activities. If such a conclusion has been affirmed in determining the "primary purpose" of an attack under Article 51, paragraph 2, and Article 13, paragraph 2, of Additional Protocols I and II of 8 June 1977 respectively, it is at least plausible that such inference may be drawn when the mere "purpose" of the attack has to be determined under Article 2, paragraph 1 (b), of the ICSFT.[1115]

[1111] *Ibid*, para. 75,76 'The above conclusion is without prejudice to the Parties' obligation to comply with the requirements of the ICSFT, and, in particular, Article 18 thereof'para. 77.

[1112] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, paras. 66-67; *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No.IT–98–29–T, para. 57

[1113] KimberleyTrapp, Ukraine v Russia (Provisional Measures): State 'Terrorism' and IHL, May 2, 2017; Available at: <ejiltalk.org/ukraine-v-russia-provisional-measures-state-terrorism-and-ihl/> Last Accessed: 11 December 2019

[1114] Separate Opinion of Judge Ad Hoc Pocar p. 218, para. 3

[1115] *Ibid.*

Judge Bhandari in his separate opinion also gave similar conclusion stating that on the basis of preliminary examination of the evidence submitted by both Parties, the Court ought to have granted the provisional measures requested. The evidence made it plausible that funds were transferred with the 'intent or knowledge' that they would be used or were to be used to commit one of the offences under Article 2, paragraph 1 (b), of the ICSFT.[1116]

Terrorism as defined under Article 2(1)(b) of ICSFT includes any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict'. This is also clearly prohibited under international humanitarian law. The definition of the war crime of terror was not included in the Convention. Instead, a peacetime definition was used with a reference to armed conflict. Arguably, it is same as the offence of unlawful attacks against civilians with the added intention to intimidate a population or to pursue certain political objective (dolus specialis). The final judgement of ICJ in this case will not doubt be helpful in further clarifying the relationship between the two different regimes of international law.

The separation of international counter-terrorism law and international humanitarian law regimes has been blurred by measures introduced after the attacks of 11 September 2001. UN Security Council Resolution 1373 (2001) required states to criminalize terrorism in domestic law despite absence of an agreed definition of terrorism.[1117] While enacting terrorism offences in domestic law, many states criminalised acts which are not prohibited by international humanitarian law, instead of considering the relevance of terror as a war crime. In some cases the international treaties adopted prior to 11 September 2001 that excluded hostile acts committed by parties to armed conflict were ignored. A more coherent and well defined framework for the crime of terror would provide an opportunity to separate the two regimes dealing with terrorism. The two legal regimes, international humanitarian law and counter terrorism law, should not be blurred. Such an approach undermines the effectiveness of international humanitarian law by disincentivizing compliance by the non-state groups. The cases discussed in this section underscore the issues that arise as a consequence of the lack of clarity about terrorism during armed conflict.

[1116] Separate Opinion of Judge Bhandari. Para. 1 and 23, p. 87, 98
[1117] UN Security Council Resolution 1371 (2001) 1368 and 1373; Kimmoe Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law' (2006) 4 *Journal of International Criminal Justice* 998-1016, 1005

4.6.2 R v. Mohammed Gul

The defendant Mohammed Gul, a law student at Queen Mary University of London, was accused of having perpetrated an act of terrorism by posting videos on YouTube. The videos were recordings of attacks against coalition forces in Iraq and Afghanistan, attacks against Israeli soldiers, and attacks by Al Qaeda, the Taliban and other banned groups on military targets.[1118] The crime of disseminating of a terrorist publication requires that the publication actually concerns a terrorist act. The defendant was indicted on counts of having disseminated terrorist publications, a criminal offence in the UK, according to Section 2 of the UK Terrorism Act of 2006.[1119] On account of this, it was essential to determine whether the videos posted by the defendant showed actual terrorist attacks. The jury had to determine whether attacks carried out by non-state armed groups against state armed forces in the context of an armed conflict could actually be considered as terrorist acts.[1120] The judge instructed the jury that it was terrorist attack and Gul was convicted. He sentenced him to five years imprisonment. The Court of Appeal also upheld the conviction.[1121]

In the Court of Appeal, the defendant argued that UK domestic law should be interpreted in accordance with applicable rules of international law. It was contended that the United Kingdom's international obligations require it to define terrorism more narrowly in its criminal laws.[1122] Gul claimed that attacks by non-state armed groups on state armed forces in the context of an armed conflict do not constitute acts of terrorism under international humanitarian law. He cited several international instruments on terrorism containing an exemption clause for attacks carried out by non-state armed groups during armed conflict.[1123] In doing so, Gul argued that only attacks against civilians can count as terrorism under international humanitarian law.

[1118] Court of Appeal of England and Wales (Criminal Division*), R v. Mohammed Gul*, Case No. 2011/01697/C5, [2012] EWCA Crim 280 para. 3
[1119] Court of Appeal of England and Wales (Criminal Division), *R v. Mohammed Gul*, Case No. 2011/01697/C5, [2012] EWCA Crim 280 para 4
[1120] *Ibid.*, paras 9-14
[1121] *Ibid.*
[1122] *Ibid.*, para. 27
[1123] *Ibid.*, paras. 39-45

In support of his position, Gul referred to several such prohibitions,[1124] state practice and scholarly writings but the court did not alter its conclusion.[1125]

Relying on the Special Tribunal for Lebanon (STL) judgement, the Court of Appeal stated that international law has developed so that the crime of terrorism is recognised in situations where there is no armed conflict. However, it held that such a crime could not be defined with sufficient certainty during a state of armed conflict.[1126] On the basis of STL judgement, it also held that there was no discrete crime of terrorism in times of armed conflict as a matter of customary international law, and that 'crime of terror' was merely a subcategory of war crimes.[1127]

After examining the material presented before it, the court addressed the question of whether 'the definition of terrorism under customary international law has developed so that an attack by insurgents on military forces of a government is not terrorism'. The court concluded that:

> although international law may well develop through state practice or opinio juris a rule restricting the scope of terrorism so that it excludes some types of insurgents attacking the armed forces of government from the definition of terrorism, the necessary widespread and general state practice or the necessary opinio juris to that effect has not yet been established. [1128]

Finally, the Court relied on the *Lotus* case decided by the Permanent Court of International Justice, according to which States are free to do as they like, as long as their behaviour is not expressly prohibited by international law.[1129] Hence, the court held that the Terrorism Act was

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[1124] Consequences of the Construction of a Wall in the occupied Palestinian Territory (Consequences of the Construction of a Wall in the occupied Palestinian Territory (ICJ Rep 2004), "Deliberate and indiscriminate attacks against civilians with the intention to kill are the core elements of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them."
) (ICJ Rep 2004), General Assembly of the United Nations entitled "Measures to eliminate international terrorism" ("acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes")(65/34), International Convention for the Suppression of the Financing of Terrorism (Article 2), 1999, Article 51(2) of AP 1 and Article 13(2) of AP II.

[1125] Court of Appeal of England and Wales (Criminal Division), R v. Mohammed Gul, Case No. 2011/01697/C5, [2012] EWCA Crim 280 para 3Para 43, It held that' 'although it is clear that in all forms of armed conflict civilians should not be attacked, that does not amount to state practice or opinio juris that those who attack military personnel in non-international armed conflict cannot be designated as terrorists' and that evidence contained in the material provided was not evidence of state practice·

[1126] *Ibid.,* para. 335;'Although international law has developed that far in relation to what constitutes the international crime of terrorism (and does not yet make it an international crime to commit an act of terrorism against civilians in the course of armed conflict), we are concerned with a different question'.(para. 37)

[1127] *Ibid.,* paras 32-35

[1128] *Ibid.,* paras 37 and 47

[1129] *Ibid.,* para 48; Permanent Court of International Justice in the SS Lotus (1927, Series A – 10) where the court said: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as

consistent with international law due to the lack of an express proscription labelling as terrorist attacks by non-state armed groups on state armed forces in non-international armed conflict. In concluding that there is no discrete crime of terrorism in armed conflict, the court failed to engage the relevant areas of international humanitarian law and assumed that international law did not prohibit states from characterising as terrorist any attacks on governmental armed forces during an armed conflict. In doing so the, the court also ignored the exclusion clauses of the Terrorist Bombings Convention and Terrorist Financing Convention, which were arguably the most relevant to the attacks which Gul uploaded onto the internet.

On Appeal, the Supreme Court unanimously upheld the appellant's conviction and rejected the arguments for a narrower definition of terrorism.[1130] The Supreme Court also took into account the statement of The Independent Reviewer of Terrorism Legislation in the United Kingdom, Mr David Anderson QC: 'the current law allows members of any nationalist or separatist group to be turned into terrorists by virtue of their participation in a lawful armed conflict, however great the provocation and however odious the regime which they have attacked'.[1131] Moreover, the Supreme Court's judgment also concluded with a strongly worded obiter dictum emphasising the need for amendment of section 1 of the 2000 Act and stating that the current definition of terrorism is 'concerningly wide'.[1132] The Supreme Court further noted that Canadian and South African Criminal Codes, excluded acts committed by parties regulated by the law of armed conflict from the definition of terrorism and a report in Australia also recommended that country should do the same.[1133]

The Supreme Court rejected the argument that the section 1 definition of terrorism should be interpreted narrowly in accordance with international law on the basis that the 2000 and 2006 Acts were legislated to give effect to international law obligations.[1134] One of the reasons for this conclusion by the Supreme Court was that there was no agreed of definition of terrorism.[1135] The court also noted that the main issue in concluding a comprehensive definition

expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

[1130] *R v Gul (Appellant),* [2013] UKSC 64, United Kingdom: Supreme Court, 23 October 2013 para. 59

[1131] *R v Gul (Appellant),* [2013] UKSC 64, United Kingdom: Supreme Court, 23 October 2013 para 61

[1132] *Ibid.*, para. 38

[1133] *Ibid.*, para. 61

[1134] *Ibid.*, paras. 51-55

[1135] *Ibid.*, paras. 44-55

of terrorism was the disagreement over whether attacks by so-called freedom fighters could be exempted from the terrorism label.[1136]

As stated by Antonio Coco, the issue at stake in the Gul case was not that concerned freedom fighters. In the negotiations leading to the adoption of the comprehensive convention there was never a question as to whether attacks against military targets could be considered as terrorist attacks.[1137] Although the goal of two different regimes – international humanitarian law and domestic criminal law – differ, there is still overlap between both. According to the ICRC, international humanitarian law proscribes, as war crimes, both specific acts of terrorism committed in armed conflict and several other acts of violence committed against civilians or civilian objects. Additionally, 'If states choose to additionally designate such acts as "terrorist" under international or domestic law, this will in effect duplicate their criminalisation'.[1138] However, the approach adopted by the UK courts is not helpful and undermines the applicability of international humanitarian law. On account of this, more clarity is required to delineate the application of two regimes to terror.

Many other domestic courts have also been asked to pronounce on the difference between terror during armed conflict and terrorism in time of peace. Some domestic courts have tried to harmonise national legal systems with international obligations while addressing the cases related to 'terrorist acts'.[1139] *Italy v Abdel Aziz and ors*, discussed below, is one such case.

4.6.3 Italy v Abdel Aziz and ors

In 2007, the Italian Supreme Court examined a different aspect of the conflation of the law applicable to armed conflict and terrorism. The case involved Moroccan and Tunisian nationals who were charged on the basis of, *inter alia*, Article 270-bis (3) of the Italian Penal Code[1140]

[1136] *Ibid.*, para. 46
[1137] Antonio Coco, 'Crocodile Tears: The UK Supreme Court's Broad Definition of Terrorism in R. v Mohammed Gul', 18, 2013, *EJIL: TALK!*
[1138] 'The applicability of IHL to terrorism and counterterrorism'*International Committee of the Red* Cross (1 October 2015) available at< https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism> (last accessed: 11 December 2019).
[1139] Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International criminal law: cases and commentary* (Oxford University Press, 2011), p. 288
[1140] 'amended on 15 December 2001, reads in part: 'Anyone promoting, instituting, organizing, managing or financing associations whose purpose is to commit acts of violence for purposes of terrorism or to subvert the democratic order shall be punished by a term of imprisonment between 7 and 15 years. Anyone participating in the aforementioned associations shall be punished by a term of imprisonment between 5 and 10 years'.

for taking part in the recruitment and dispatching of volunteers to be trained as Islamic fighters within *Ansar-al-Islam*, a transnational Islamic group.[1141] A pre-trial judge in Milan dismissed the case, holding that the raising of funds and forging of documents by a group of Muslim foreigners in Milan was aimed at supporting guerrilla fighters in Iraq, and did not have the purpose of spreading terror among civilians. Therefore, the actions were not terrorist in nature, as they were probably directed against military objectives.[1142]

The Prosecutor appealed against the dismissal of charges, arguing that *Ansar-al-Islam* was a terrorist organization engaged in planning and committing attacks to intimidate the population. He also contended that the distinction between guerrilla warfare and terrorism was not settled under international law and so could not be applied by domestic courts.[1143] The Appeals Court rejected the Prosecutor's position and upheld the decision on the basis of several international law arguments, stating that international norms established a distinction between terrorism and guerrilla warfare. The court held that during armed conflict only violent actions directed exclusively against civilian population could be deemed terrorist. If the acts were legitimate combatant actions merely causing collateral damage amongst civilians, then it would lack the specific intent to establish a terrorist purpose.[1144]

Against the decision of the Court of Appeal, the Prosecutor appealed once again, this time to the Supreme Court of Cassation (*Corte di cassazione*), challenging the definition of international terrorism adopted by the Court of Appeal. In a landmark decision, the Supreme Court laid out the law on the crime of terrorism, taking into account the International Convention for the Suppression of the Financing of Terrorism, and the European Union Council Framework Decision on Combating Terrorism.[1145]

[1141] Milan Tribunal, Office of the Judge for Preliminary Hearings Decision; *Italy v Abdelaziz and ors*, No 5774; (27 April 2005) Diritto & Giustizia (in Italian), 24 January 2005

[1142] *Ibid.*

[1143] Milan Court of Appeal of Assizes Decision; *Italy v Abdelaziz and ors*, Foro Italiano II-343 (2006) (in Italian), 28 November 2005

[1144] Milan Court of Appeal of Assizes Decision; *Italy v Abdelaziz and ors*, Foro Italiano II-343 (2006) (in Italian), 28 November 2005

[1145] *Italy v Abdelaziz and ors, Final Judgment*, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cessation; 1st Criminal Section at para. 2.1.
'European Union Council Framework Decision on Combating Terrorism, No 2002/475/JHA,
entered into force 13 June 2002, Article 1, Parliament had approved Article 270-Sexies, which criminalized international terrorism as defined in the EU Council Framework Decision on Combating Terrorism of 13 June 2002. Although this provision has retrospective effect in relation to the facts of the case, the Court considered it useful to refer to it in order to clarify the terms of Article 270-bis.

The court noted that due to disagreements among states about status of freedom fighters during wars of liberation, a global convention on international terrorism does not exist. However, Article 2(1)(b) of the 1999 Convention, which was implemented in Italy through law No. 7 of 27 January 2003, provides a general definition of international terrorism, applicable in both times of peace and during armed conflict.[1146] This definition includes any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.[1147] The Court also held that for conduct to qualify as terrorist the criminal conduct must be based on political, ideological, or religious motivations and must not be undertaken for a personal end. This is in accordance with the rule of customary international law embodied in various resolutions by the UN General Assemby and the UN Security Council, as well as in the 1997 Convention for the suppression of Terrorist bombings.[1148]The court held that

> legal regulation to which any terrorist conduct has to be subjected differs in the identity of the perpetrators and the victims. The application of the relevant regulation, i.e. international humanitarian law or common criminal law, depends on whether the action has been carried out by combatants and against civilians or people not involved directly in the hostilities. It follows that changing these subjective prerequisites, the conduct will amount either to war crimes or to crimes against humanity.[1149]

The Court criticised the Court of Appeal for 'excluding from the definition of terrorism attacks directed against military personnel in places where there may also be civilians.'[1150] An attack on a military objective would to be considered a terrorist act if the purpose of spreading panic among the civilian population was part of the overall strategy, and the harm it caused to

[1146] *Italy v Abdelaziz and ors, Final Judgment*, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cessation; 1st Criminal Section at para 2.1.; International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc.A/Res/54/109, entered into force on 10 April 2002, Article 2(1)(b)
[1147] *Italy v Abdelaziz and ors, Final Judgment*, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cessation; 1st Criminal Section at para. 2.1.
[1148] *Italy v Abdelaziz and ors, Final Judgment*, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cessation; 1st Criminal Section at para 2.1.; the UN General Assembly and Security Council, as well as in the International Convention for the Suppression of Terrorist Bombings (15 December 1997) UNGA Res 52/164 UN Doc A/RES/ 52/164, entered into force 23 May 2001
[1149] *Italy v Abdelaziz and ors, Final Judgment*, No. 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cessation; 1st Criminal Section at para 2.1.
[1150] *Ibid.*, para 4.1, 6.4

civilians was inevitable. For instance, bombing of a military tank in a crowded open-market.[1151] Moreover, the court concluded that armed attacks on combatants not actively engaged in hostilities could also amount to terrorism.[1152]

It is arguable that the Italian judges sought to discern a generally accepted notion of terrorism according to international law. In addressing the relation between terrorism and guerrilla warfare, the Court concluded that attacks by freedom fighters against military personnel in accordance with international humanitarian law would be lawful, whereas the attacks may amount to terrorist acts if they target civilians.

It is clear from these cases that there is no uniform practice in relation to acts of terrorism committed during an armed conflict. This is arguably due to the absence of a comprehensive definition of terrorism under international law and confusion surrounding the applicability of international humanitarian law to the crime of terror and terrorism. The concept of terrorism in the international counter-terrorism conventions is different from that of the war crime of terror, although there are some elements in common. The kind of terror that is prohibited in war has always been controversial. The labelling of the conduct which is lawful under international humanitarian law as terroristic was one of the impediments in concluding the comprehensive convention on international terrorism.

Due to the regular conflation of armed conflict and terrorism in the public domain, and the interplay between the acts of terror committed inside and outside situations of armed conflict, it is important to examine how the crime of terror may be dealt with by a comprehensive convention on international terrorism. It is foreseeable that a comprehensive definition of terrorism would have significant implications for the interpretation and prosecution of the crime of terror as a matter of national and international criminal law. The following section will investigate the Comprehensive Convention on International Terrorism and some of the hindrances to its adoption.

4.6.4 Comprehensive Convention on International Terrorism

[1151] *Ibid.*, para 4.1
[1152] *Ibid.*, para 4.1

In its resolution 54/110 of 9 December 1999, the UN General Assembly decided to begin consideration with a view to the elaboration of a Comprehensive Convention on International Terrorism (CCIT). The purpose was to create a comprehensive legal framework to combat acts of terrorism. The General Assembly assigned this work to an ad hoc committee within the framework of a working group of the General Assembly's Sixth Committee.[1153] India presented a draft of the Comprehensive Convention in 2000 at the 55th session of the General Assembly. Negotiations since then have been based on that draft.[1154] Article 18 of the Indian draft stated:

> Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law. The activities of armed forces during an armed conflict, as those terms are understood under international law, which are governed by that law, are not governed by this Convention, and the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law are not governed by this Convention.[1155]

The Coordinator of the Working Group submitted a new draft of the Convention in 2002. The definition of terrorism provided by the Coordinator (which is still reflected in the Draft Convention) is not problematic with regard to its inclusionary elements but with regard to exclusionary elements.[1156] The main reason why the Comprehensive Convention on International Terrorism has not progressed beyond the negotiations phase in past two decades is the difference between acts of terrorism and acts of national liberation movements (the legitimate struggle of peoples under foreign occupation and colonial or alien domination in the exercise of their right to self-determination).[1157] Other issues of contention include the acts of

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[1153] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37, Sixth Session (28 January-February 2002), Annexes I to IV; Available at<https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-54-110-december-1999>Last Accessed: 11 December 2019

[1154] Working Document submitted by India on the Draft Comprehensive Convention on International Terrorism Availabel at:<https://www.satp.org/satporgtp/countries/india/document/papers/India_IntConv.htm > Last Accessed: 11 December 2019; Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism' (2006) 4 *Journal of International Criminal Justice*, 1031, 1032.

[1155] Fifty-fifth session, Sixth Committee, Agenda item 166, Measures to eliminate international terrorism Draft comprehensive convention on international terrorism Working document submitted by India, p. 9

[1156] 1. Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37, Sixth Session (28 January-February 2002), Annexes II, 6 ,Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or 1.(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

[1157] A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change', UN Doc UN A/5565, p. 48.

state military forces in peacetime and the question of state terrorism.[1158] For example, it has been contentious as to whether the acts of armed forces during armed conflict could ever constitute terrorist offences. Marco Sassoli suggested that excluding the activities of armed forces could be 'understood as violating the principle of the equality of belligerents before Jus in bello'.[1159] However, it has also been argued that if the belligerents engaged in attacks intended to spread terror among civilians in the context of armed conflict those responsible could be punished under the war crime of terror.[1160]

The Indian proposal was challenged by alternative proposals sponsored by the Organisation of Islamic Cooperation (OIC). Alternate wording was suggested for Article 18 describing how the treaty will apply to armed conflict. This ultimately led to a deadlock. The OIC proposed that the convention should exclude the activities of 'parties' (rather than 'armed forces') 'during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.[1161] Some have argued that the reason why the OIC wanted to exclude such acts from being labelled as terrorist was to exempt the acts of Kashmiris against India, the acts of Palestinians against Israel, and to brand violations of the laws of war by Israel Defense Forces as terrorists acts.[1162]

[1158] A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change', UN Doc UN A/5565, p. 48. the summary of discussions regarding a comprehensive convention in Report of the Ad Hoc Committee established by CA resolution 51/210, A/65/37 (2010), at 5-8; Report of the Ad Hoc Committee established by CA resolution 51/210, A/64/37 (2009), p. 5, 6.

[1159] Marco Sassoli, 'Terrorism and war' (2006**)** 4 *Journal of International Criminal Justice* 959, 977

[1160] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933, 944

[1161] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37, Sixth Session (28 January-February 2002), Annex VI; The summary of discussions regarding a comprehensive convention in Report of the Ad Hoc; Committee established by CA resolution 51/210, A/65/37 (2010), at 5-8; Report of the Ad Hoc Committee established by CA resolution 51/210, A/64/37 (2009), at 5-6. The text of Art. 18 proposed by the Member States of the Organization of the Islamic Conference: 'Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law. 1. The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention. 2. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law, are not governed by this Convention. 3. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.' This text is reproduced in the UN Doc. A/57/37 (2002), at 17.

[1162]Statements in Security Counsel Meeting to Combat Terrorism, Press Release, U.N. SCOR, U.N. Doc. SC/7638 (Jan. 20, 2003), Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11th', **(**2004) 35 *Cornell International Law Journal* 475, 488

In 2007 another concerted attempt was made in the Ad Hoc Committee to get agreement on the text of a definition. Specific articles were added to convey that where international humanitarian law was applicable, it would take precedence over the new Convention. More provisions were added relating to the non-impunity of armed forces for acts falling in the purview of international humanitarian law.[1163] Amendments were proposed to Article 18, including Article 18(5) which provided that the convention was without prejudice to the rules of international law applicable during armed conflict, in particular rules applicable to the acts that are lawful under the international humanitarian law.[1164] The intention of this paragraph was to protect the continued applicability of international humanitarian law in the relevant circumstances.[1165] In 2010, the Coordinator of the Ad Hoc Committee supported the new draft of Article 18 as a suitable definition addressing acts of terrorism. However, differences remained.[1166]

In 2011, the stalemate on exclusionary clauses of definition of terrorism, and therefore on the whole treaty draft convention, resulted in the suspension of the treaty negotiations until 2013 when the Ad Hoc Committee was reconvened by General Assembly's Sixth Committee. In a subsequent meeting there were further discussions regarding the text of Article 18 (now article 3). However, little tangible progress was achieved.[1167]

It can be argued that there is no lack of legal answers to conclude the Comprehensive Convention, but an agreement has not been reached due to the absence of genuine political will. Although consensus has developed on most issues, deadlock still remains on the definition of terrorism. The absence of an accepted definition is 'more excuse than legitimate impediment' to the creation of a comprehensive international legal regime to combat terrorism.[1168] If the controversy relating the definition of terrorism was resolved, both regimes could potentially apply to crime of terror. The development of a more coherent framework could facilitate resolution of this dispute by allowing the applicability of the convention to the

[1163] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37(5, 6 and 15th February 2007) A62/37 Annex to the Report, para. 14
[1164] *Ibid.*
[1165] *Ibid.*, para. 18
[1166] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/65/37(12 to 16th April 2010) para. 12, 14 and 18
[1167] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/68/37(8 and 15[12th] April 2013) A62/37 Annex to the Report para. 11
[1168] Michael Lawless, "Terrorism: An International Crime." *International Journal*, vol. 63, no. 1, 2007, pp. 139–159. Available at <http://www.journal.forces.gc.ca/vo9/no2/05-lawless-eng.asp#n1>Last Accessed: 11 December 2019

offence. The content of the financial terrorism convention and state practice indicates that there is agreement on the proscription of intentionally using terror against civilians. Such an understanding could be useful in resolving the controversy that exists in relation to the freedom fighters. One option would be to incorporate a crime of terror with all elements derived from the Geneva Conventions of 1949 and the Additional Protocols of 1977.[1169] This could result in a more detailed crime of terror, encompassing all existing terror prohibitions under the law of armed conflict.

A recent noteworthy example is the 2011 decision of the of Special Tribunal for Lebanon declaring that a general definition of 'terrorism' exists in international law. The Special Tribunal for Lebanon provided a simple 'minimalist definition of international terrorism however, it has ae lack of 'specificity and legal certainty'.[1170] As a result of negotiations between the United Nations and the Lebanese government, the Special Tribunal of Lebanon was convened in The Hague with the purpose of trying individuals responsible for the bombing that killed the Lebanese Prime Minister Rafiq Hariri and 22 others in Lebanon.[1171] The Special Tribunal of Lebanon (STL) was mandated to judge according to the Lebanese Criminal Law, but it could also apply international customary law and treaty law when considered necessary. Based on its review of state practice and indicators of *opinio juris*, the Appeal Chamber declared that there actually existed a definition of terrorism as a matter of customary international law. The Interlocutory Decision of the Appeals Chamber of the STL identified the following key elements comprising a customary definition of international terrorism:

> the threat or perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on; the intent to spread fear among the population (which would generally entail the creation of public danger); or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it and a transnational element.[1172]

The finding by the Appeals Chamber that terrorism had crystallized into a discrete crime under international law was bold but not surprising. However, the innovative judgment of Special Tribunal of Lebanon was severely criticised on many grounds. These include missing the

[1169] Article 33 of GC IV, Article 51(2) Additional Protocol 1, Article 13(20 Additional Protocol II and Article 4 (2) (d) of Additional Protocol II
[1170] Guénaël Mettraux,The United Nations Special Tribunal for Lebanon: Prosecuting terrorism in Ben Saul(eds.), Research Handbook of International Law and Terrorism (Cheltenham: Edward Elgar,2014), p. 664
[1171] United Nations Security Council Resolution 1757, 2007, §1, UN Doc. S/RES/1757.
[1172] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon 16:02:11 para. 85

requirement of additional intent (covering an ideological, political or religious purpose) and the method used to assess the formation of the custom surrounding terrorism.[1173] The Special Tribunal of Lebanon became the first international tribunal to claim jurisdiction over the crime of terrorism through this method. Afterwards, French and English courts also concluded that the crime of terrorism was a peremptory norm.[1174]

A distinct crime of terrorism during armed conflict is also a possibility in future, which could incorporate all forms of terrorism provided for under the international humanitarian law (including crime of terror). As noted by Cassese 'one ought not to exclude that, on account of the current discussions on terrorist conduct by "freedom fighters", the evolution of the legal regulation of terrorism in time of armed conflict might lead to the formation of a distinct category of *warlike terrorist acts*.'[1175]

One of the most crucial points of the judgement was the following statement of the Appeals Chamber:

> while the customary rule of an international crime of terrorism that has evolved so far only extends to terrorist acts in times of peace, a broader norm that would outlaw terrorist acts during times of armed conflict may also be emerging. As the ICTY and the SCSL have found, acts of terrorism can constitute war crimes, but States have disagreed over whether a distinct crime of terrorism should apply during armed conflict.[1176]

The Appeals Chamber further added:

> Thus, the conclusion is warranted that a customary rule is incipient (in statu nascendi) which also covers terrorism in time of armed conflict (or rather, the contention can be made that the current customary rule on terrorism is being gradually amended). It is plausible to envisage that state practice (consisting of statements, national legislation, judicial decisions and so on), in particular acts with the same value and importance as Security Council Resolution 1566 (2004) previously noted, may gradually solidify the view taken by so many States through Article 2(1)(b) of the Convention for the Suppression of Financing of Terrorism. If this occurs and State practice in addition extends such view to other manifestations of terrorism, one day the conclusion will be

[1173] See Ben Saul, 'The Special Tribunal of Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function' in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate research companion to International Criminal Law: critical perspectives* (Ashgate Publishing, Ltd., 2013); Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 *Leiden Journal of International Law* 655

[1174] Mateo Corrales Hoyos, 'Including the Crime of Terrorism Within the Rome Statute: Likelihood and Prospects' *(2017)* 3 *Global Politics Review* 25 at 34; Thomas Weatherall, 'The Status of the Prohibition of Terrorism in International Law: Recent Development' (2015) 46 *Georgetown Journal of International Law 589* at 611

[1175] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice*, 933, 958

[1176] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon 16:02:11 para. 107

> warranted that the customary rule currently in force has broadened so as to also embrace terrorism in time of armed conflict.[1177]

Cassese states that 'terrorism in time of armed conflict, currently a sub-category of war crimes, might gradually become a discrete class of international crimes as a result of the combined application of humanitarian law and general norms on terrorism'.[1178] Only time will tell whether such a development will materialise. Nonetheless, the manner in which the crime of terror creates a balance between the different principles of international humanitarian law, such as military necessity, proportionality can prove to be very helpful. It can be very useful in defining the scope of comprehensive convention on international terrorism by satisfying Organisation of Islamic Cooperation and others seeking protection for fighters engaged in the wars of national liberation.

4.7 Conclusion

The Rome Statute provides the International Criminal Court jurisdiction over a 'subset of possible war crimes - not as defining the complete set of possible war crimes'.[1179] While the Statute provides an extensive list of war crimes in Article 8, it does not mention crime of terror against civilians. The Statute criminalizes deliberate attacks against the civilian population, individual civilians, and civilian objects in international armed conflicts (Article 8(2)(b)(i) and Article 8(2)(b) (ii)), and attacks against civilians in non-international armed conflicts (Article 8(2)(e)(i)). Nonetheless, there are many significant omissions. For example, attacks against civilian objects in non-international armed conflicts fall outside of the International Criminal Court's jurisdiction. Despite a few common elements, the offences contained in Article 8 differ substantively from the crime of terror, which originated in Article 51(2) of the Additional Protocol I and Article 13(2) of Additional Protocol II.

The war crime of terror is also different from terrorism as an international crime. While several UN treaties deal with the crime of terrorism, none subsume individual offences (such the 'spreading of terror') under a comprehensive framework because of absence of a universally

[1177] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon 16:02:11 para. 85
[1178] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933, 958.
[1179] Oona A Hathaway and Paul K Strauch and Beatrice A Walton and Zoe A Y Weinberg, 'What Is a War Crime' (2019) 44 *Yale Journal of International Law* 53, 101.

accepted definition of terrorism. Agreement on a definition of terrorism has been complicated by contentions surrounding the status of armed struggles for self-determination and the question of overlap between treaties of international humanitarian law and a Comprehensive Convention on International Terrorism. As a consequence, there is currently a substantive gap in international criminal law regarding protection of civilians against the crime of terror during an armed conflict.

Against this background, this chapter offers reflections on how the International Criminal Court can interpret the spreading of terror among civilians as offence that overlaps with some of the crimes over which it has competence. It also briefly addresses the vexed issue of defining terrorism and possibility of including a comprehensive crime of terrorism, incorporating terror in situations of armed conflict. The intricate relationships between international humanitarian law and application of various international counter-terrorism laws has also been analysed.

In conclusion, the possibility of prosecuting crime of terror under the Rome Statute is fraught with difficulty. A preferred option would be the submission of an amendment to the next review conference to include the war crime of terror under the jurisdiction of the International Criminal Court. This would enhance the effectiveness of international criminal law and international humanitarian law by safeguarding civilian populations from acts or threats of violence and the psychological harm caused by unnecessary and cruel war tactics.

Conclusion

The crime of terror is a relatively new crime under international humanitarian law. As a consequence, it has not been discussed as widely as terrorism outside armed conflict. The thesis conceptualizes and determines the status of crime of terror under international humanitarian law. It also argues the possibilities of its future inclusion under the jurisdiction of the International Criminal Court. The thesis focuses on a very narrow and specific form of terror during an armed conflict, as opposed to the broader crime of terrorism under international law.

The thesis attempted to distinguish the war crime of terror from the peace time concept of terrorism in order to bring clarity to the former as a concept of international humanitarian law. In doing so, the thesis dissects the historical development of crime of terror, illuminating the scope for its future development. The prosecution of terror during war is fraught with difficulty due to the fact that terror is endemic in war. On account of this, the definition of crime of terror under international humanitarian law is very specific, prohibiting acts or threats of violence with the primary purpose of spreading terror among the civilian population.

To date, there is no substantive study addressing the historical evolution and drafting history of the crime of terror. The original contribution of the thesis includes the analysis of drafting history of additional Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The analysis of jurisprudence from the international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone, also represents a contribution to the existing scholarship. In addition, the thesis has sought to provide clarity on the customary status and content of crime of terror. It is hoped that by doing so, the elucidation provided will prove useful in countering unhelpful conflations with the crime of international terrorism.

The rule prohibiting the deliberate spreading of terror among civilians was drafted carefully so that it does not interfere with the delicate balance between the interests of military necessity and humanity, the edifice upon which international humanitarian law stands. The International Criminal Tribunal for the former Yugoslavia was the first international tribunal to interpret this prohibition as a crime. It did so by drawing on the drafting history of the Additional Protocols, state practice, and the jurisprudence of other courts and tribunals**.** The tribunal developed the crime of terror by identifying its elements, clarifying requirement such as the specific intent.

In the process, it addressed the issue of legality and broadened the scope of crime to include threats and acts of violence not involving death and serious injury to body or health.

Addressing the scope, status and significance of crime of terror, the thesis is structured in four chapters. Chapter one focused on the status and development of crime during the interwar period and the Second World War. It showed that during the world war I aerial bombing was used to spread terror among civilian populations and that treaty rules of international humanitarian law had not been developed to address this situation. Consequently, during the interwar period several unsuccessful attempts were made to codify new rules. Despite their general acceptance by the international community, the Hague Rules of 1923 (Article 22 of which laid the basis for prohibition of terror under international humanitarian law),[1180] were not adopted. Although the terror bombing of civilians was not expressly prohibited by international law, the perpetrators of such acts provided alternative justifications for their acts and denied the intentional targeting of civilians. Massive 'terror bombing' campaigns against civilians during the World War II made it an imperative to provide civilians with some measure of protection against terror attacks. This resulted in the adoption of the Geneva Conventions of 1949 and the Additional Protocols of 1977. The two additional protocols contain identical provisions prohibiting acts or threats of violence with the primary purpose of spreading terror among the civilian population.

Despite the general consensus that spreading terror among civilians was unlawful, it took more than three decades to codify it in a binding treaty rule. The prohibition of terror was included in the Additional Protocols to the Geneva Conventions to prevent the kind of terror attacks which happened during the two world wars. The second chapter traced the development of prohibition of terror under the Additional Protocols in the post-world war period by examining the *travaux preparatoires* of these instruments. It deciphered the intention behind the inclusion of this prohibition in the additional protocols by investigating the deliberations of the delegates at the diplomatic conferences which resulted in the adoption of the protocols. The most important element of the identical prohibitions of terror in Additional Protocol I and Additional II is the primary purpose of spreading terror. The words 'intention to spread terror' in the initial

[1180] Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at the Hague, December 1922 - February 1923, Article 22. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=B9CA3866276E91CFC12563CD002D691C&action=openDocument> Last Accessed: 20 December 2019

draft were replaced by 'primary purpose' to spread terror after some debate at the diplomatic conference. Chapter two elucidates the rationale behind the choice of this narrow *mens rea* standard in the *travaux preparatoires* of the Additional Protocols. The subjective element of the offence was given much importance at the diplomatic conference, excluding 'terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful'.[1181] In adopting this approach, the Diplomatic Conference drafted the provision in a way that it does not interfere with the principle of military necessity under international humanitarian law.

Following on from the analysis contained in chapter two relating to the scope and applicability of the prohibition, chapter three explored the jurisprudence of the international courts and tribunals on the crime of spreading terror among the civilian population. The case law of the International Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) were scrutinized for their contribution to the development and enforcement of this area of international humanitarian law. This case law defined the elements of crime of terror in detail and no doubt influenced the future development of the offence. Accordingly, it is now clear that the *mens rea* of crime of terror requires proof of two types of intent: a general intent to direct acts of violence against the civilian population and a special intent of spreading terror among the civilian population. [1182] The "primary purpose" of spreading terror could be inferred from circumstantial evidence, related to the nature, manner, timing and duration of the attacks.[1183] Actual terrorization of the civilian population is not a required element of the crime, as long as the conduct in question entailed "grave consequences" for the victims.[1184] The term 'terror' was equated with extreme fear which is beyond the normal conflict-related fear generated by the conduct of hostilities.[1185]

However, further development of the law may be needed to resolve the different existing approaches to the elements of the crime of terror. Moreover, the threats of attacks with the primary purpose of creating terror has not been explored so it is yet to be seen if the no result requirement and grave consequences criteria could be met in the cases of mere threats where

[1181] *Official Records*, vol. XV, CDDH/215/Rev.I p. 274
[1182] *Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, Case No. IT–98–29–T, para 133
[1183] *Ibid.*, para 72
[1184] *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgement, 12 November 2009, Case No. 98-29/1-A, para. 33-34
[1185] *Prosecutor v. Dragomir Milošević*, Trial Chamber, Judgement, 12 December 2007, Case No. IT-98-29/1-T, para. 885-886

actual terror is not a result. As all the cases dealt by the tribunals involved death or serious injury to the civilians, it is not clear in the event of no actual terror resulting from an attack if a conviction would be possible.

The juristic basis of the crime of terror under the Special Court for Sierra Leone also included Article 4 (2) (d) in addition to Article 13(2) of the Additional Protocol II. There is no equivalent provision of 4 (2) (d) in the Additional Protocol I. Although in the landmark cases[1186] the Special Court for Sierra Leone adopted similar approach as International Criminal Tribunal for the former Yugoslavia in defining crime of terror, it is still important to address incongruences. It is yet to be seen whether a case under article 51(2) of Additional Protocol I would also agree with the approach adopted by Special Court for Sierra Leone. The tribunals have also made detailed analysis of the special intent requirement for crime of terror and devised the method to incur the primary purpose. The examination of jurisprudence showed that intentionally spreading terror among the civilians is a heinous and reprehensible crime which deserves specific condemnation.

The strong foundation for the future prosecution of this crime has been laid down by the international criminal tribunals by confirming the customary status of these provisions. When the Rome Statute was drafted and entered into force, the crime of terror had not been developed at that time. The historical analysis of the crime and prosecution by the tribunals, customary status of the crime and importance of these provisions in reinforcing the protection of civilians make a strong case for the inclusion of the crime under the Rome Statute.

After the analysis of the jurisprudence of international criminal tribunals in the preceding chapter, the fourth chapter explored the possibilities of prosecuting the crime of terror under the International Criminal Court. Due to the failure to reach consensus on a universally accepted definition of terrorism, the Rome Statute refrained from incorporating any form of terror provision. This chapter examined different provisions of Article 8, including Article 8 (2)(b)(i) of the Rome Statute, to find their common elements with the crime of terror. The chapter established that although the underlying conduct of crime of terror may be prosecuted under Article 8 in some circumstances, its express inclusion under the Statute would be

[1186] *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgement, 20 June 2007, Case No. SCSL-2004-16-T, para. 670.

preferable. As Ben Saul noted 'simple protections against physical attacks do not capture the idea that some attacks are deliberately designed to achieve more than their immediate objective of physical harm'.[1187] Accordingly, such conduct should be specifically recognised as a crime and subject to the jurisdiction of the International Criminal Court.

In the on-going armed conflicts like Yemen and Syria, there are widespread terror attacks against the civilian population, so it is essential to have some mechanism to hold the perpetrators accountable. With the development of new technology, it is foreseeable that with the use of cyber-attacks may be capable of inducing terror with mere threats. On account of this, a forward-looking approach to the development of international humanitarian law and international criminal law would be prudent.

Chapter four also addressed the complex problem arising from the conflation of terrorism as an international crime with the crime of terror under international humanitarian law. Instead of bolstering conditions for the prosecution of the war crime of terror in armed conflict situations, counter-terrorism laws often undermine the efficacy of international humanitarian law by comprising the applicability of the legal regime. Consequently, it will be important for the Comprehensive Convention on International Terrorism, which is currently under negotiation at the UN General Assembly's Sixth Committee, to articulate an appropriate definition of crime of terror. To this end, it would be helpful for the Convention to define the scope of its application to situations of armed conflict. This would help address issues arising from the simultaneous application of domestic and international law to the acts of terror committed during an armed conflict.

The final chapter concluded that there would be merit in including the crime of terror as a subcategory of war crime under the Rome Statute. This would bolster the role of International Criminal Court in terms of deterrence and strengthen the accountability for crime of terror. The modalities of trial and the substantive law on the crime of terror has been developed and clarified by the international criminal tribunals, providing a basis for International Criminal Court to accommodate the crime of terror. Indeed, the jurisprudence of these tribunals has paved the way for inclusion of crime of terror under the jurisdiction of International Criminal

[1187] Ben Saul, 'Crimes and prohibitions of "Terror" and "Terrorism" in armed conflict: 1919–2005' (2005) 4 *Journal of the International Law of Peace and Armed Conflict* 264, 276.

Court. The Rome Statute should be amended to provide jurisdiction over the crime in order to bring the violators to justice. Moreover, the development of future jurisprudence may add additional clarity to the war crime of terror under international humanitarian law, further distinguishing it from crime of terrorism during peacetime.

For the purpose of further research, the enforcement of international humanitarian law in relation to the crime of terror would be worth investigating. The United Nations, and in particular the UN Security Council, has at its disposal a wide range of measures for the enforcement of the law of armed conflict. These measures include the investigation of violations, the urging of parties to comply with the law, the authorisation of military action to prevent or respond to violations, and the establishment of criminal tribunals. Research on how to prevent the use of terror as a weapon of war would prove useful. A study on the benefits of incorporation of the crime of terror in domestic law, and the challenges in prosecuting the crime of terror at national level, could help in further development of enforcement mechanisms in relation to the crime of terror.

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