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## Digital Terror Crimes

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# Digital Terror Crimes

CODY CORLISS\*

*Terror actors operating within armed conflict have weaponized social media by using these platforms to threaten and spread images of brutality in order to taunt, terrify, and intimidate civilians. These acts or threats of violence are terror, a prohibited war crime in which acts or threats of violence are made with the primary purpose of spreading extreme fear among the civilian population. The weaponization of terror content through social media is a digital terror crime.*

*This article argues that the war crime of terror applies to digital terror crimes perpetrated through social media platforms. It situates digital terror crimes within the existing jurisprudence on terror at ad hoc international and hybrid criminal tribunals. Terror is an autonomous war crime within international criminal law, but all previous convictions for terror have always been predicated upon another underlying criminal act. Digital terror crimes are different: The underlying act of social media use is not necessarily a war crime outside*

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*the crime of terror. This article explains terror in the digital context, examines the ways that digital terror crimes can be committed in armed conflict, and considers the various actors who could be implicated in the perpetration and distribution of digital terror.*

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## INTRODUCTION

In the early months of 2014, a group of 1,500 Islamic State fighters rolled through northern Iraq in dusty pick-up trucks with

second-hand AK-47s remaindered from past militant groups.<sup>1</sup> This ragtag army might have been using old weapons, but it brandished an innovative weapon for warfare: the Twitter hashtag. As Islamic State fighters moved through northern Iraq, group members used the hashtag #AllEyesonISIS to flood Twitter with horrific images of the violence it had administered to individuals who fought back or failed to submit.<sup>2</sup> In addition to its Twitter hashtag, the terror group created a smartphone app that allowed followers to track the Islamic State's progress and to link users' social media accounts in solidarity, enabling the Islamic State to post on behalf of its followers.<sup>3</sup> As many as 40,000 tweets originated from the app on a single day as the group advanced toward Mosul, Iraq.<sup>4</sup> As the Islamic State used social media to broadcast its move across the region, the hashtag #AllEyesonISIS "rose to the top of Arabic-speaking Twitter,"<sup>5</sup> fomenting a sense of hysteria over the group's looming arrival.<sup>6</sup> Terror engulfed Mosul as the Islamic State approached. The Iraqi Army abandoned military posts and its members joined citizens in fleeing the city, allowing 1,500 Islamic State fighters to easily take a city of 1.88 million people.<sup>7</sup>

Terror groups have embraced social media and its various uses. Terror groups have also used social media to communicate with the world and each other,<sup>8</sup> benefitting from the interactivity, immediacy, and perceived anonymity that social media platforms provide.<sup>9</sup> Terror actors can post on social media platforms to project strength, broadcast

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1. Dave Davies, *The "Weaponization" of Social Media – and its Real-World Consequences*, NPR, at 03:30 (Oct. 9, 2018), <https://www.npr.org/2018/10/09/655824435/the-weaponization-of-social-media-and-its-real-world-consequences> [https://perma.cc/HRL8-9M3A]; Emerson T. Brooking & P.W. Singer, *War Goes Viral*, THE ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/war-goes-viral/501125/> (last visited Dec. 12, 2023).

2. Davies, *supra* note 1, at 03:57; Brooking & Singer, *supra* note 1.

3. Brooking & Singer, *supra* note 1.

4. *Id.*; see also Laura Wakeford and Laura Smith, *Islamic State's Propaganda and Social Media: Dissemination, Support, and Resilience*, in *ISIS PROPAGANDA* 155, 169 (Stephane J. Baele, Katharine A. Boyd, & Travis G. Coan eds., 2020).

5. Davies, *supra* note 1, at 03:57.

6. Brooking & Singer, *supra* note 1.

7. *Id.*

8. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 88 (2004) ("The emergence of the World Wide Web has given terrorists a much easier means of acquiring information and exercising command and control over their operations.").

9. Gabriel Weimann, *Terrorist Migration to Social Media*, 16 GEO. J. INT'L AFF. 180, 181 (2015).

their ideology, indoctrinate supporters, or recruit new members.<sup>10</sup> As a tool for propaganda, social media allows groups to offer content ranging from formal lectures regarding beliefs to children's programming geared toward young disciples.<sup>11</sup> As a tool for recruitment, terror speech has inspired lone wolf attacks like those in San Bernadino and the Pulse Nightclub in Orlando, and led others to travel to the battlefield.<sup>12</sup> Recognizing the critical role of online operations for terror group communication generally, the United States has launched a cyber operations campaign against the Islamic State to disrupt the group's communication strategies.<sup>13</sup>

International prosecutors have recognized social media platforms' importance in documenting international crimes. Evidence collected from social media platforms has increasingly played an integral role in investigating international crimes.<sup>14</sup> At the International Criminal Court (ICC), the Prosecution used open-source evidence collected from YouTube as part of its case-in-chief against Ahmad Al Faqi Al Mahdi, a member of the Ansar Dine group who pleaded guilty to the intentional destruction of religious and cultural property in Timbuktu, Mali.<sup>15</sup> Prosecutors at the ICC have also relied largely on evidence

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10. See generally Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654–58 (2017) (regarding the use of social media as a tool for terrorist planning, organization, and incitement).

11. *Id.* at 654–57; Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 604–05, 608–09 (2017); Thane Rosenbaum, *The Internet as Marketplace of Madness—and a Terrorist's Best Friend*, 86 FORDHAM L. REV. 591, 594 (2017) (“Demented, demonic clerics preaching jihad from their bedrooms were essentially talking to the mirror until YouTube turned them into genocidal reality TV stars.”).

12. Tsesis, *supra* note 10, at 654–57 (noting that the San Bernadino shooters listened to hours of terror lectures prior to their attack); Rukmini Callimachi, *Was Orlando Shooter Really Acting for ISIS? For ISIS, It's All the Same*, N.Y. TIMES (June 12, 2016), <https://www.nytimes.com/2016/06/13/us/orlando-omar-mateen-isis.html> (last visited Nov. 29, 2023) (noting that the Pulse shooter pledged allegiance to the Islamic State in a post-shooting telephone call while the San Bernadino shooters posted an oath to the group on Facebook); Michal Lavi, *Do Platforms Kill?*, 43 HARV. J.L. & PUB. POL'Y 477, 484 (2020) (suggesting that social media “opens the gateway to violent extremism”); J. Richard Broughton, *Of Puppets and Terrorism*, 62 S.D. L. REV. 682, 683 (2017) (regarding social media as a recruiting tool).

13. David E. Sanger, *U.S. Cyberattacks Target ISIS in a New Line of Combat*, N.Y. TIMES (Apr. 24, 2016), <http://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html> (last visited Nov. 29, 2023).

14. Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. F. 323, 324 (2016) (“Increasingly, social media and online video and image sharing services provide a rich, open source of information about crimes and their perpetrators.”).

15. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgement and Sentence, ¶¶ 9, 30, 38 (Sept. 27, 2016). Although Al Mahdi pleaded guilty to the charges, the ICC rules

posted on social media platforms to secure an arrest warrant.<sup>16</sup> Moreover, certain United Nations investigative bodies responsible for evidence collection related to international crimes, such as the International, Impartial and Independent Mechanism (IIIM) for Syria and the Independent Investigative Mechanism for Myanmar (IIMM), have been barred by national governments from entering the countries to which their investigative mandates extend.<sup>17</sup> Consequently, they have turned to digital means to document crimes, aided by online evidence gathering and local documentarians armed with smartphone cameras.<sup>18</sup>

Although prosecutors and scholars have focused on the role that material posted to social media platforms may play in documenting international crimes, little attention has focused on social media content as a crime in itself. This article seeks to fill that gap. The article makes the case that certain terror content posted on social media platforms constitutes acts or threats intended to terrify a civilian population. Terror actors utilize social media as a weapon of war, using these platforms to spread propaganda depicting terror violence to taunt, terrify, and intimidate civilians and adversaries. The use of social media solely directed to an opposing military force during armed conflict is lawful, but it is a crime of terror when one of the principal purposes is to spread terror among civilians.<sup>19</sup> These are digital terror crimes. The creation of terror content and its use on social media with the intent to terrorize civilians constitute the war crime of terror.

The war crime of terror prohibits and criminalizes “[a]cts or threats of violence the primary purpose of which is to spread terror

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require the Prosecution to present evidence against an accused to corroborate an admission of guilt. Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 *FORDHAM INT’L L.J.* 283, 315–16 (2018).

16. Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest, ¶¶ 11–22 (Aug. 15, 2017) (relying on seven videos posted on social media platforms) [hereinafter Al-Werfalli Warrant of Arrest].

17. Rebecca J. Hamilton, *Social Media Platforms in International Criminal Investigations*, 52 *CASE W. RES. J. INT’L L.* 213, 217 (2020).

18. See, e.g., Freeman, *supra* note 15, at 332; Nikita Mehandru & Alexa Koenig, *ICTS, Social Media, & the Future of Human Rights*, 17 *DUKE L. & TECH. REV.* 129, 131–32 (2019).

19. Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 *CAL. L. REV.* 817, 853 (2012) (“Under the law of war, only three categories of individuals may be lawfully targeted: combatants, civilians directly participating in hostilities, and civilians acting in a continuous combat function.”); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 *DUKE J. COMP. & INT’L L.* 539, 543–44 (1997) (examining the criteria for lawful attacks on military objectives).

among the civilian population.”<sup>20</sup> International courts have recognized that “primary” does not “mean that the infliction of terror is the *only* objective of the acts or threats of violence.”<sup>21</sup> As the *Dragomir Milošević* Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted, “[p]erpetrators committing the crime of terror may have military, political or other goals,”<sup>22</sup> but proof of an ultimate military or political goal is not required.<sup>23</sup> The fact that “[o]ther purposes may exist simultaneously” does not negate terror—provided that the intent to spread terror is principal among the aims.<sup>24</sup>

The crime of terror is firmly established as part of customary international law and prohibited by Additional Protocols I and II to the Geneva Conventions, but it is, in many ways, a forgotten war crime. The crime is excluded from the jurisdiction of the ICC.<sup>25</sup> The first prosecutions for terror occurred at the ICTY. In 1997, a senior legal officer in the Office of the Prosecutor of the ICTY suggested in academic literature that terror could be prosecuted as a war crime.<sup>26</sup> The first indictment for terror was confirmed at that tribunal in 1998,<sup>27</sup> with the first trial conviction entered for the crime in 2003.<sup>28</sup> Although

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

21. Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Judgement, ¶ 879 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007) [hereinafter Milošević Trial Judgement] (emphasis added).

22. *Id.*

23. *Id.*

24. *Id.*; Prosecutor v. Galić, Case No. IT-98-29-A, Appeal Judgement, ¶ 104 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 30, 2006) [hereinafter Galić Appeal Judgement] (recognizing that acts may have more than one primary purpose and finding that the crime of terror requires that the intent to spread terror among a civilian population need be only one of the principal aims).

25. Oona A. Hathaway et al., *What is a War Crime?*, 44 YALE J. INT’L L. 53, 100 (2019) (noting that the ICC does not have jurisdiction over the crime of terror).

26. Fenrick, *supra* note 19, at 562 (suggesting that the crime of terror might be applicable as a charge for crimes committed during the siege of Sarajevo during the Balkan conflict).

27. Prosecutor v. Galić, Case No. IT-98-29-I, Review of the Indictment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 24, 1998) (confirming indictment against Stanislav Galić and Dragomir Milošević).

28. Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶¶ 751–52 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) [hereinafter Galić Trial Judgement]. Notably,

expert witnesses at the ICTY had suggested that terror motivated other acts, including the shelling of Zagreb, all convictions for terror at the ICTY were related to the siege of Sarajevo.<sup>29</sup> Relatively few prosecutions for terror have followed at other international criminal tribunals or hybrid international courts.<sup>30</sup> Moreover, although the crime of terror is an autonomous war crime, the prosecutions for terror at the international level have always been predicated upon other underlying criminal acts, including crimes related to the shelling and sniping campaign directed at civilians in Sarajevo,<sup>31</sup> murder,<sup>32</sup> and crimes of sexual violence.<sup>33</sup>

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one of Galić's grounds of appeal for his terror conviction was that it violated the principle of *nullum crimen sine lege* because "there exists no international crime of terror," an argument ultimately rejected by the Appeals Chamber. Galić Appeal Judgement, *supra* note 24, ¶ 79 (quoting Prosecutor v. Galić, Case No. IT-98-29-A, Defense Notice of Appeal, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia May 4, 2005)).

29. Prosecutor v. Martić, Case No. IT-95-11-R61, Decision, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 1996) ("The military expert believed that because they are inaccurate and have a low striking force, the choice of the Orkan rockets for the attack on Zagreb would not have been appropriate had the purpose been to damage military targets. . . . In this opinion, it is therefore reasonable to believe that attacking and terrori[z]ing the civilian population was the main reason for using such rockets.").

30. See Chile Eboe-Osuji, *Another Look at the Intent Element for the War Crime of Terrorism*, 24 CAMBRIDGE REV. INT'L AFF. 357, 359 (2011) ("There has been a dearth of opportunities at the international criminal tribunals to adjudicate the war crime of terrorism, even on the basis of the provisions of Additional Protocols I and II [to the Geneva Conventions]."); Kirsten M.F. Keith, *Deconstructing Terrorism as a War Crime: The Charles Taylor Case*, 11 J. INT'L CRIM. JUST. 813, 816 (2013) ("To date, there is still only limited jurisprudence concerning individual criminal responsibility for the war crime of acts of terrorism.").

31. Galić was also convicted of murder and inhumane acts as crimes against humanity predicated upon the campaign of shelling and sniping directed against civilians of Sarajevo, Bosnia, and Herzegovina. In convicting Galić for the war crime of terror, the Trial Chamber determined that the charges of unlawful attacks against civilians as a violation of the law and customs of war were subsumed under the terror charge. Galić Trial Judgement, *supra* note 28, ¶¶ 751–52.

32. See, e.g., Prosecutor v. Sesay, Case No. SCSL-04-15-T, Trial Judgement, ¶ 2308 (Mar. 2, 2009) [hereinafter Sesay Trial Judgement] (convicting for the crime of terror based upon the commission of murder and other crimes).

33. See, e.g., *id.* at 677–78, (convicting for the crime of terror based upon the commission of crimes of sexual violence); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Judgement, ¶ 2035 (May 18, 2012) ("It is well established that rape, sexual slavery, forced marriages, and outrages on personal dignity, when committed against a civilian population with the specific intent to terrori[z]e, amount to an act of terror.") [hereinafter Taylor Trial Judgement]; see also Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 WM. & MARY J. WOMEN & L. 7, 26 (2012) (noting that indictments at the Special Court for Sierra Leone alleged that "acts of terror were perpetrated . . . through the



Digital terror crimes represent a modern twist on the established war crime of terror. Terror propaganda posted to social media platforms in the context of armed conflict is a stand-alone war crime if such content is intended as a threat meant to terrify the civilian population. Social media postings of terror propaganda represent a new opportunity to prosecute the crime of terror. Criminal liability for such acts would not only reaffirm culpability for individuals who act with the intent to terrorize a civilian population, but such prosecutions would also recognize the changing nature of terror crimes and the increased role that content posted on social media platforms plays in creating terror in the digital age.

This article begins by examining how certain attributes of social media platforms function as conduits for the crime of terror. Certain factors inherent to social media platforms make them ideal vehicles for terror propaganda, including simplified connectivity, integrated video technology, and immediacy of broadcast. Part I of the article then moves from the functions of social media platforms generally to the specific use of social media by non-state terror actors. The article proceeds to explore acts of terror and threats on social media platforms, using illustrative examples of social media postings by members of non-state terror groups. Although terror non-state actors use social media for a variety of aims,<sup>34</sup> this article examines situations where terror non-state actors target civilians living within an area of armed conflict, thereby making civilians the subject of brutality in their social media messaging or as the intended audience of such messages.

To show how the publication of brutality on social media constitutes the autonomous war crime of terror, Part II of the article examines the prohibition against the intentional terrorization of civilians during armed conflict and the criminalization of terror. Exhortations to protect the civilian population have a long history within armed conflict, but the explicit prohibition under international humanitarian law against acts or threats intended to spread terror among the civilian population dates to the 1977 Additional Protocols I and II to the Geneva Convention and applies to all parties to international armed conflict (IAC) and non-international armed conflict (NIAC). The war crime of

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other crimes charged in the indictment, including the sexual violence charges,” thereby requiring that the Prosecutor “prove the underlying conduct and demonstrate that these underlying acts were carried out with the intent to spread fear.”).

34. I credit Darrin E. W. Johnson for the term “terror non-state,” which he describes as “typified by terrorist groups, such as the Islamic State of Iraq and Syria (ISIS) and Boko Haram, that have wrested control of large swaths of territory from sovereign governments, forming entities that flout the rule of law and subvert the human rights of those falling under their control.” Darrin E. W. Johnson, *The Problem of the Terror Non-State: Rescuing International Law from ISIS and Boko Haram*, 84 *BROOK. L. REV.* 475, 475–76 (2019).

terror has a precise definition: “acts or threats of violence the primary purpose of which is to spread terror among the civilian population,” where a perpetrator intends to commit an act or threat of violence (general intent) with the intent that it causes terror among the civilian population (specific intent).<sup>35</sup> Part II further examines the manner of crimes that international chambers have found to constitute the autonomous war crime of terror and analyzes the distinction between unlawful threats and lawful warnings.

Part III demonstrates how digital terror crimes constitute the war crime of terror under international law. Moreover, Part III examines questions of criminal liability and prosecution for those who have committed digital terror crimes. Various actors have distinct roles in the commission of digital terror crimes, including the terror content creator who committed the act of brutality, the digital terror strategist who packaged and uploaded terror content to social media platforms, and digital terror amplifiers who shared the message after it was uploaded to a platform. The article considers international criminal liability based on the respective roles of each actor in committing a digital terror crime.

## I. SOCIAL MEDIA PLATFORMS AND TERROR

Just as advances in technology have altered the methods of warfare, an evolution in communication technology has opened new avenues for individuals to commit the war crime of terror. Transformations in technology, particularly the advent of social media, have removed the barrier between content producer and content consumer, while certain aspects of social media have encouraged and enabled the production and consumption of extreme content.<sup>36</sup> The ease of communication and simplified video and editing features have enabled individuals affiliated with terror groups to quickly produce messages and videos with the intent of instilling terror in a civilian population.

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35. Galić Appeal Judgement, *supra* note 24, ¶¶ 102–04.

36. See, e.g., Amy B. Cyphert & Jena T. Martin, “A Change is Gonna Come:” *Developing a Liability Framework for Social Media Algorithmic Amplification*, 13 U.C. IRVINE L. REV. 151, 158 (2022) (noting that algorithms on social media designed to increase user engagement amplify extreme content to users who initially view extreme content, even in situations where a user has specifically reported such content as objectionable).

Although social media platforms have been used by governments to incite atrocities in Myanmar<sup>37</sup> or to spread misinformation to stoke tensions in a NIAC in Ethiopia,<sup>38</sup> non-state actors engaged in non-international armed conflict are most likely to utilize social media platforms to commit the crime of terror.<sup>39</sup> Rather than seeking legitimacy in the global community, these terror non-state actors have flouted international law and used terror as a tactic against local civilian populations.

### A. Social Media Platforms as Conduits for Terror

Key features of interactivity and reliance on user-generated content have made social media platforms excellent conduits for terror crimes.<sup>40</sup> Although most social media platforms moderate content,

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37. Myanmar's military, the Tatmadaw, utilized Facebook to wage a propaganda campaign in a genocidal campaign against the nation's minority Muslim population, the Rohingya. The Tatmadaw utilized fake accounts to flood the social media platform with posts labeling the Rohingya as "dogs" and "maggots" fit for extermination. Rebecca J. Hamilton, *Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities*, 63 B.C. L. REV. 1349, 1351–52 (2022).

38. Lee Hale & Eyder Peralta, *Social Media Misinformation Stokes a Worsening Civil War in Ethiopia*, NPR (Oct. 15, 2021, 11:39 AM), <https://www.npr.org/2021/10/15/1046106922/social-media-misinformation-stokes-a-worsening-civil-war-in-ethiopia> [<https://perma.cc/46A7-FBAQ>]; Liam Scott, *How Social Media Became a Battleground in the Tigray Conflict*, VOA (Oct. 17, 2021, 2:59 AM), <https://www.voanews.com/a/how-social-media-became-a-battleground-in-the-tigray-conflict-6272834.html> [<https://perma.cc/FK8Q-VDZX>].

39. David P. Fidler, *Cyberspace, Terrorism and International Law*, 21 J. CONFLICT & SEC. L. 475, 488 (2016) (listing al-Shabaab in Somalia, Boko Haram in Nigeria, and al Qaeda and the Islamic State as various groups using social media for terror). Similarly, Hamas utilized social media accounts to spread terror during its attack on Israel on October 7, 2023. In that attack, Hamas members used a different social media strategy to spread terror. Rather than utilizing Hamas' members accounts, Hamas members logged into the social media accounts of their Israeli hostages' social media accounts to broadcast the hostage-taking. In the days following the attacks, Hamas members appear to have continued to utilize hostages' social media accounts in order to issue death threats and calls for violence. Sheera Frenkel & Talya Minsberg, *Hamas Hijacked Victims' Social Media Accounts to Spread Terror*, N.Y. TIMES (Oct. 17, 2023), <https://www.nytimes.com/2023/10/17/technology/hamas-hostages-social-media.html> [<https://perma.cc/NTR2-WRE5>].

40. See, e.g., KELLI S. BURNS, SOCIAL MEDIA: A REFERENCE HANDBOOK 6 (2017) (noting such factors); GABRIEL WEIMANN, TERRORISM IN CYBERSPACE: THE NEXT GENERATION 126 (2015) ("Social media differs from traditional or conventional media in many aspects such as interactivity, reach, frequency, usability, immediacy, and permanence.").

prohibit terror content, and ban threats of violence,<sup>41</sup> such regulation is not universal.<sup>42</sup> Moreover, even social media platforms that engage in robust content moderation are unable to prevent all threatening speech, including speech from members of terror non-state groups or attacks on minority groups from public officials.<sup>43</sup> Despite strong stances against allowing explicit threats on many social media platforms, the reliance on individual platforms' content moderation efforts to stop and remove threats has proven, in the words of one scholar, "only partly adequate" in identifying and removing threats, particularly where the line is blurred between "true threats" and "merely loathsome speech."<sup>44</sup>

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41. For example, X, the platform formerly known as Twitter, had a Hateful Conduct Policy, which has since changed, explicitly restricting tweets that "promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease" and "prohibit[ed] content that makes violent threats against an identifiable target," with violent threats defined as "declarative statements of intent to inflict injuries that would result in serious and lasting bodily harm." *Hateful Conduct*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/BD69-GGVZ>]. See, e.g., Danny Yadron, *Twitter Deletes 125,000 ISIS Accounts and Expands Anti-Terror Teams*, THE GUARDIAN (Feb. 5, 2016, 3:18 PM), <https://www.theguardian.com/technology/2016/feb/05/twitter-deletes-isis-accounts-terrorism-online> [<https://perma.cc/GCE5-Q9T6>] (regarding the purge of accounts on Twitter); see generally Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1046–53 (2021) (describing the practice of social media platform content moderation).

42. Wilson & Land, *supra* note 41, at 1046 (stating that such social media platforms as Gab, 4chan, and 8chan engage in little or no moderation of content on their platforms).

43. *Report Reveals How Boko Haram, ISWAP Use Facebook, WhatsApp, Telegram to Recruit, Spread Propaganda in Nigeria*, SAHARA REPORTERS (Sept. 19, 2022), <https://saharareporters.com/2022/09/19/report-reveals-how-boko-haram-iswap-use-facebook-whatsapp-telegram-recruit-spread> [<https://perma.cc/AKD3-V2KM>] (noting the continued use of popular social media platforms by terror groups in Africa); Request for Authorization of an Investigation Pursuant to Article 15, ¶¶ 59, 60, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19 (July 4, 2019) (recounting a "carefully crafted hate campaign," including content on Facebook by high-ranking political figures and members of the government attacking the Rohingya minority in Myanmar); Hamilton, *supra* note 37, at 1351–52 (noting public officials' use of social media to wage a propaganda campaign against the Rohingya in Myanmar); Lavi, *supra* note 12, at 497 ("[I]ntermediaries' approaches toward moderation are inconsistent within a given platform, and differ among platforms. Despite news reports regarding the use of social media by terrorists, intermediaries' moderation of terrorist content is insufficient . . .").

44. Tsesis, *supra* note 10, at 684–85; see also Alex Hern, *Google's Eric Schmidt Calls for 'Spell-Checkers for Hate and Harassment'*, THE GUARDIAN (Dec. 8, 2015, 5:05 AM), <https://www.theguardian.com/technology/2015/dec/08/googles-eric-schmidt-spell-checkers-hate-harassment-terrorism> [<https://perma.cc/M6G8-9Q27>] (noting that the "Chairman says

There are numerous types of social media platforms, including various platforms most associated with social networking, photo sharing, video publishing, short video sharing, short message publishing, direct messaging, and many social media platforms that cross categories or appeal to specific demographics.<sup>45</sup> Within the existing strata of social media, certain platforms have in the past been prominent sources of terror, including X (the platform formerly known as Twitter),<sup>46</sup> YouTube,<sup>47</sup> or Telegram,<sup>48</sup> although changes in technology and platform content moderation policies regularly force terror groups to move between platforms to disseminate messages.<sup>49</sup> The platforms most likely to allow acts or threats which constitute a crime of terror are those platforms that allow messages to be viewed by wider audiences and which require no special relationship between creator and viewer in order for a viewer to access content.<sup>50</sup> While a platform like the

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everyone should work together to fight terrorism online and to de-escalate tensions on social media, but does not set out any plans.”).

45. WEIMANN, *supra* note 40, at 126–27 (describing various social media platforms); see also Lyrissa Barnett Lidsky & Linda Riedemann Norbut, #1 U: *Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1911 (2018) (noting that, among social media platforms, Snapchat, Tumblr, and Instagram have the youngest audiences while older audiences are more associated with such platforms as Facebook and LinkedIn).

46. Wakeford & Smith, *supra* note 4, at 171; Jytte Klausen, *Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq*, 38 STUD. IN CONFLICT & TERRORISM 1, 1 (2015) (describing the integration of YouTube upload and Twitter dissemination).

47. Klausen, *supra* note 46, at 1 (noting the integration of YouTube upload and Twitter dissemination); Tsesis, *supra* note 10, at 655 (describing YouTube as a “hub for radical videos available for viewing throughout the world.”).

48. Joby Warrick, *The “App of Choice” for Jihadists: ISIS Seizes on Internet Tool to Promote Terror*, WASH. POST (Dec. 23, 2016, 3:02 PM), [https://www.washingtonpost.com/world/national-security/the-app-of-choice-for-jihadists-isis-seizes-on-internet-tool-to-promote-terror/2016/12/23/a8c348c0-c861-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/world/national-security/the-app-of-choice-for-jihadists-isis-seizes-on-internet-tool-to-promote-terror/2016/12/23/a8c348c0-c861-11e6-85b5-76616a33048d_story.html) [<https://perma.cc/J3MW-NJQ7>]; Stuart A. Thompson & Mike Isaac, *Hamas is Banned from Social Media. Its Messages are Still Spreading*, N.Y. TIMES (Oct. 18, 2023), <https://www.nytimes.com/2023/10/18/technology/hamas-social-media-accounts.html> (last visited Nov. 29, 2023).

49. See, e.g., *Europol Disrupts Islamic State Propaganda Machine*, BBC NEWS (Nov. 25, 2019), <https://www.bbc.com/news/world-middle-east-50545816> [<https://perma.cc/N2Q7-KABH>] (regarding the purging of Islamic State accounts from Telegram); see Yadron, *supra* note 41 (regarding the purge of accounts on Twitter); see also Thompson & Isaac, *supra* note 48 (noting that Hamas is able to reach a mass audience through social media despite being banned from numerous social media platforms).

50. See Wakeford & Smith, *supra* note 4, at 163 (contrasting social media platforms which “tend to provide an insular space within which ideologues could interact privately with like-minded users, re-affirming their beliefs in an echo chamber-like environment” with “open” or public social media platforms).

secure messaging application Telegram is a popular choice for communication and file-sharing between members of terror non-state groups, the use of Telegram and similar applications for intra-group communication make them less likely to constitute platforms that facilitate terror crimes since such crimes, by their definition, must be acts or threats that are public-facing.<sup>51</sup>

Social media platforms are generally free to use, thereby making the platforms accessible to users regardless of socioeconomic class.<sup>52</sup> With low cost, few barriers to entry, and a largely global distribution, social media platforms have democratized the participatory space of unmediated mass communication.<sup>53</sup> Although social media use once required internet access, the creation of the smartphone and the resulting mobile phone-specific social media applications have further democratized access.<sup>54</sup> The ease of access has fostered widespread social media consumption and regular engagement, with users often spending significant time on social media platforms.<sup>55</sup> Terror groups operating in areas with less developed telecommunications infrastructure have recognized the importance of this connectivity. For example, in parts of Syria, the Islamic State has provided satellite-

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51. See *id.* at 179–80 (noting that while Telegram does allow users to broadcast material over public channels to an unlimited audience, the Telegram app has been used as a hub for retrieving terror-related content that is then distributed via other social media platforms); but see Thompson & Isaac, *supra* note 48 (noting that Telegram “emerged as the clearest launching pad for pro-Hamas messaging” where “[a]ccounts there have shared videos of captured prisoners, dead bodies and destroyed buildings.”).

52. Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 149 (2012); see also Kirsty Young, *Social Ties, Social Networks and the Facebook Experience*, 9 INT’L J. EMERGING TECH. & SOC’Y 20, 21 (2011) (noting the explosive growth of social media platforms).

53. Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 27 TEX. TECH. L. REV. 147, 149 (2011) (“Social media increases the number of individuals who can participate in unmediated communication.”); Fidler, *supra* note 39, at 486 (“[S]ocial media became a law enforcement and national security concern because the platforms provided cheap, accessible, versatile and globally distributed capabilities for terrorist communications, recruitment, radicalization and propaganda.”).

54. Joseph, *supra* note 52, at 148 (regarding the growth of smartphones and other mobile phones with Internet capabilities).

55. Aziz Z. Huq, *International Institutions and Platform-Mediated Misinformation*, 23 CHI. J. INT’L L. 116, 119 (2022) (noting the widespread utilization of social media platforms by consumers as a source for news); James Niels Rosenquist, et al., *Addictive Technology and its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431, 445 (2022) (noting a “large, nonlinear rate of growth in time spent on social media platforms since their introduction in the latter half of the 2000s”).

linked networks and satellite modems with hotspots and temporary pop-up Wi-Fi networks to facilitate access.<sup>56</sup>

The smartphone features that have made mobile social media ubiquitous have also facilitated terror crimes. Smartphone technology has revolutionized terror communication by easing the path of creation and distribution of threats meant to terrorize the civilian population.<sup>57</sup> Embedded cameras and video recording devices enable users to easily create and edit content. Most social media platforms integrate the smartphone camera and audio recording functions within mobile phone-specific applications, allowing social media users to seamlessly create and distribute content, including content which integrates text, images, audio, videos, or links to other platforms.<sup>58</sup>

Most significantly, there is an inherent performative element to posting amid the cacophony of opinions on social media platforms.<sup>59</sup> A user typically posts something to a platform with the understanding that he or she will have an external audience.<sup>60</sup> In addition, social media use may constitute a form of operant conditioning. At its most basic, operant conditioning involves psychological reinforcement, where acts that garner a response are more likely to be repeated.<sup>61</sup>

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56. Klausen, *supra* note 46, at 5.

57. WEIMANN, *supra* note 40, at 22 (recognizing that such technologies as mobile phones, SMS text communication, social media, online video sharing, and micro-blogging sites are the ideal platforms for terrorists); *see also* Joseph, *supra* note 52, at 149–50 (discussing the advent of “mobile social media”).

58. *See, e.g.*, Klausen, *supra* note 46, at 1 (describing the functions of the social media platform Twitter as one primarily designed for mobile devices).

59. The public-facing nature of the content varies by user-choice and platform. Certain platforms function in a “closed” context where the communication is limited to a small set of users who are typically familiar with each other (such as WhatsApp communication). Other social media platforms allow for “open” communication where the audience is unrestricted or where the user of a social media platform may choose to make communication public. *See generally* Joseph, *supra* note 52, at 148 (explaining the public functions of certain social media platforms allow the public to search and re-post the content created by others). For discussion regarding the performative aspect of social media sharing generally, *see* Lidsky & Norbut, *supra* note 45, at 1913.

60. Lidsky & Norbut, *supra* note 45, at 1912–13. Although the user recognizes that he or she will have an audience, the screen separating the performer from the audience creates a physical remove that may increase inhabitation in speech or acts, with the added sense of anonymity further fostering extreme conduct. *See* Lidsky, *supra* note 53, at 149 (noting that social media users often display a sense of inhibition because of perceived anonymity).

61. *See* Wayne Unger, *How the Poor Data Privacy Regime Contributes to Misinformation Spread and Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 323 (2021) (noting research that social media features can be a form of operant conditioning); Ronald J. Deibert, *The Road to Digital Unfreedom: Three Painful Truths about Social Media*, 30 J. OF

Regular social media users are sensitive to reward, with “reward” being perceived as increased attention and positive feedback from peers and supporters.<sup>62</sup> Hyperbole, exaggeration, or extreme content are more likely to garner that attention,<sup>63</sup> and the operant conditioning that social media use provides encourages certain users to act or speak in more extreme ways in order to achieve it.<sup>64</sup> Acts of violence then constitute the ultimate in “performance crimes,” where such an act is specifically committed with an audience in mind.<sup>65</sup>

### *B. Non-State Actors and the Use of Terror*

This use of social media platforms constitutes a targeted, technological amplification of the crime of terror by non-state terror groups

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DEMOCRACY 25, 29 (Jan. 2019) (noting the use of operant conditioning to encourage social media engagement where “[b]ehavior that is followed by pleasant consequences is likely to be repeated”).

62. See generally Björn Lindström et al., *A Computational Reward Learning Account of Social Media Engagement*, 12 NAT. COMMUN 1311 (2021) (noting the relationship between social reward and behavior by social media users).

63. Lidsky & Norbut, *supra* note 45, at 1913 (asserting that “[h]yperbole and exaggeration is one way to garner that attention” on social media); Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), <https://www.nytimes.com/2015/11/29/fashion/death-by-internet-hyperbole-literally-dying-over-this-column.html> (last visited Nov. 29, 2023) (quoting one social media analyst who asserted that the performance element “may be one of the major parts for social media; you are stepping onto a stage . . . Performance generally requires the performer to be interesting. So do likes, comments and reshares.”).

64. See A. Odysseus Patrick, *Australian Jihadist who Tweeted Gruesome Photo has Long History of Mental Illness*, WASH. POST (Aug. 29, 2014, 7:36 PM), [https://www.washingtonpost.com/world/asia\\_pacific/australian-jihadist-who-tweeted-gruesome-photo-has-long-history-of-mental-illness/2014/08/29/94eff84-2d70-11e4-994d-202962a9150c\\_story.html](https://www.washingtonpost.com/world/asia_pacific/australian-jihadist-who-tweeted-gruesome-photo-has-long-history-of-mental-illness/2014/08/29/94eff84-2d70-11e4-994d-202962a9150c_story.html) [<https://perma.cc/T4R6-ND5H>] (quoting a psychology researcher stating that while certain extreme behavior shocks the wider world, “the difficulty is that it becomes treated as positive behavior in ISIS.”).

65. See Raymond Surette, *Performance Crime and Justice*, 27 CURRENT ISSUES CRIM. & JUST. 195, 199 (2015) (defining “[c]ontemporary performance crime” as “the spectacle of recording, sharing and uploading crime in order to distribute the performance to new media audiences” and recognizing that “performance crimes often are purposely created and distributed by offenders”); see also Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1137 (2021) (noting that social media and mobile devices may foment crime, encouraging individuals to engage in “performative” acts of violence “precisely because they . . . have an audience”); Claudia Lauer & Haleluya Hadero, *TikTok and Other Social Media Trends are Thrusting Performance Crimes into the US Spotlight*, ASSOCIATED PRESS (May 22, 2023, 5:57 AM), <https://apnews.com/article/tiktok-social-media-challenges-crime-hyundai-kia-3baec4220ee2c874347e0ef0e74cf920> [<https://perma.cc/YD7B-X8P6>].



engaged in NIACs.<sup>66</sup> The public nature of the crime of terror has evolved where advances in technology have allowed groups engaged in armed conflict to control the production, editing, and dissemination of messages to various audiences.<sup>67</sup> Terror propaganda dissemination is one of the primary uses of the internet by terror non-state actors,<sup>68</sup> and social media platforms act as the optimal vehicle to transmit it.<sup>69</sup> Certain features common to social media, such as tagging options and hashtags have enabled terror sympathizers to access desired content more easily.<sup>70</sup> Members of non-state terror groups have responded to the changing communication dynamics fostered by social media by investing time and resources on their media operations.<sup>71</sup>

The most notable example of a non-state group using social media as a conduit for terror is the Islamic State, a group which has engaged in NIACs in Iraq, Libya, and Syria.<sup>72</sup> Indeed, a 2015 official

66. For many non-state terror actors, terror propaganda has been used to scare civilians and telegraph its ruthlessness. *See, e.g., Is Islamic State Shaping Boko Haram Media?* BBC NEWS (Mar. 4, 2015), <https://www.bbc.com/news/world-africa-31522469> [<https://perma.cc/3JSU-NWL9>] (noting that the group has broadcast propaganda and published branded photographs of areas under its control); Chris Wolumati Ogbandah & Pita Ogbaba Agbese, *Terrorists and Social Media Messages: A Critical Analysis of Boko Haram's Messages and Messaging Techniques*, in THE PALGRAVE HANDBOOK OF MEDIA AND COMMUNICATIONS IN AFRICA 313, 336–37 (Bruce Mutsaers ed., 2017) (concluding that Boko Haram used social media “primarily to convey a message about its ruthlessness [and] viciousness” where the group’s “astute use of brutality achieved its aim of scaring soldiers and civilians,” but ultimately functioned to unify opposition to the group where Muslims were the subject of Boko Haram attacks).

67. Tsesis, *supra* note 10, at 658.

68. *The Use of the Internet for Terrorist Purposes*, U.N. OFF. DRUGS & CRIME [UNODC], 1 (2012), [https://www.unodc.org/documents/frontpage/Use\\_of\\_Internet\\_for\\_Terrorist\\_Purposes.pdf](https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf) [<https://perma.cc/8U75-H8UM>]; Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SEC. J. 53, 68 (2017).

69. Lavi, *supra* note 12, at 543 (“The broad reach of the internet and social media in particular has taken terror to another scale and level.”); Klein & Flinn, *supra* note 68, at 70 (noting that in 2015, “about half of ISIS-related arrests in the U.S. involved the use of Facebook”).

70. Lavi, *supra* note 12, at 495.

71. Tsesis, *supra* note 10, at 658–59 (“[L]eaders are deeply aware of the importance communications play in terrorizing populations, indoctrinating recruits, consolidating power, and spreading propaganda.”).

72. *See, e.g.,* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 69 (2d ed. 2021) (noting that the Islamic State has brought about a series of NIACs in a number of Muslim countries where each NIAC should be considered a separate armed conflict between Islamic State insurgents and the respective government or other armed groups); Yannick Veilleux-LePage, *A Typology of the Islamic State's Social Media*

Islamic State document, *Media Operative, You Are a Mujāhid, Too*, stated that the production and dissemination of the group's messaging was a form of worship and valid form of jihad.<sup>73</sup> The Islamic State's social media campaigns served multiple aims: to recruit like-minded individuals, to intimidate rival armed forces, and to terrorize the local civilian population.<sup>74</sup> The Islamic State, a group whose modus operandi involved targeting civilians in pursuit of its claimed ideological goals,<sup>75</sup> regularly used social media platforms to amplify that message, with graphic content serving the dual purpose of inciting fear and appealing to supporters who might be influenced by such extremist content.<sup>76</sup> The Islamic State's use of social media for the crime of terror offers an illustrative study in the digital methods to commit terror crimes. Although the power and influence of the Islamic State has significantly waned, other terror groups have since engaged in similar social media tactics in order to spread terror.<sup>77</sup>

The Islamic State's system of propaganda utilized social media platforms to further terror. Researchers studying the Islamic State's terror propaganda have documented 2,281 camera-recorded killings between January 2015 and November 2020 by members of the Islamic State involving various forms of brutal violence.<sup>78</sup> Group members choreographed such violence specifically for the camera, suggesting an intent for the acts to reverberate beyond their immediate locations.<sup>79</sup> Members circulated episodes of violence in videos or photographs which were then circulated on social media platforms by group

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*Distribution Network*, in *MEDIA AND MASS ATROCITY: THE RWANDA GENOCIDE AND BEYOND* 453, 453 (Allan Thompson ed., 2019) ("Although all sides of the Syrian civil war have used social media extensively, the use of social media by the Islamic State (IS) appears to have generated the most attention.").

73. Wakeford & Smith, *supra* note 46, at 163.

74. Weimann, *supra* note 9, at 183; *see also* Ariel Victoria Lieberman, *Terrorism, the Internet, and Propaganda: A Deadly Combination*, 9 J. NAT'L SEC. L. & POL'Y 95, 108 (2017).

75. Cóman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 UTRECHT J. INT'L & EUR. L. 120, 130 (2017).

76. Donna Farag, *From Tweeter to Terrorist: Combatting Online Propaganda when Jihad Goes Viral*, 54 AM. CRIM. L. REV. 843, 848 (2017) (citing interview with U.S. State Department Foreign Affairs Officer).

77. *See, e.g., Is Islamic State Shaping Boko Haram Media?*, *supra* note 66.

78. Joseph Mroszczyk and Max Abrahms, *Countering Extremist Organizations in the Information Domain*, in *ROUTLEDGE HANDBOOK OF U.S. COUNTERTERRORISM AND IRREGULAR WARFARE OPERATIONS* 423, 425 (Michael A. Sheehan et al. eds., 2021).

79. *See* MARTHA CRENSHAW, *EXPLAINING TERRORISM: CAUSES, PROCESSES AND CONSEQUENCES* 3 (2011) (noting that terrorism is designed to "create a psychological effect in a watching audience").

members.<sup>80</sup> Illustrative examples of such violence include publicly shared videos of choreographed executions targeting political opponents, adherents of other religions, homosexual people, or local citizens considered to be “spies.”<sup>81</sup>

Such acts of violence committed by members of the Islamic State for a viewing audience have both instrumental and expressive aims.<sup>82</sup> As an instrumental aim, the act of violence is the goal in itself.<sup>83</sup> The violence committed by members of the Islamic State targeted specific sworn enemies of the group, with the brutality serving the purpose of ridding territory of perceived opponents. As a means of expression, the acts allow group members to express animus for perceived adversaries. The distribution of violent images and videos through social media provides an additional avenue to express animus while also serving such functions as terrorizing civilians, building morale among supporters, and recruiting like-minded individuals.<sup>84</sup> Noted attributes of social media—such as its reach and rapid diffusion

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80. See, e.g., Brooking & Singer, *supra* note 1; Tsesis, *supra* note 11, at 617 (“Testimony before Congress in 2015 indicated that ISIS had over 46,000 Twitter accounts and that its followers sent between 90,000 and 200,000 tweets per day.”); Salma Abdelaziz, *Death and Destruction in Syria: Jihadist Group “Crucifies” Bodies to Send Message*, CNN (May 2, 2014, 3:11 PM), <https://edition.cnn.com/2014/05/01/world/meast/syria-bodies-crucifixions/> [<https://perma.cc/FFR6-FL34>].

81. William M. Welch, *Islamic State Beheads 8, Led to Death by Teens*, USA TODAY (Mar. 29, 2015, 4:42 PM), <https://www.usatoday.com/story/news/world/2015/03/29/islamic-state-beheads-eight-men/70635014/> [<https://perma.cc/BF2H-V63C>] (noting that the video posted to social media showed teenage boys leading the hostages to execution and an Islamic State fighter called the hostages “impure infidels”); Scott Neuman, *ISIS Video Purports to Show Mass Beheading of Coptic Christians*, NPR (Feb. 15, 2015, 3:11 PM), <https://www.npr.org/sections/thetwo-way/2015/02/15/386498231/isis-video-purports-to-show-mass-beheading-of-coptic-christians> [<https://perma.cc/DF3C-G4Q4>] (noting the video made specific reference to the hostages’ Christian faith); Arwa Damon & Zeynep Bilginsoy, *Amid Brazen, Deadly Attacks, Gay Syrians Tell of Fear of ISIS Persecution*, CNN (Mar. 6, 2015, 10:41 AM), <https://www.cnn.com/2015/03/05/middleeast/isis-lgbt-persecution/index.html> [<https://perma.cc/K22R-VGSS>]; see Abdelaziz, *supra* note 80; Charles Winter, *The Virtual ‘Caliphate’: Understanding Islamic State’s Propaganda Strategy* 23, QUILLIAM FOUN. 5 (2015), <https://core.ac.uk/download/pdf/30671634.pdf> [<https://perma.cc/YQ2Q-YWE6>]; Kathleen German, *Video Verité in the Age of ISIS*, in *THE MEDIA WORLD OF ISIS* 125, 133 (Michael Krona & Rosemary Pennington, eds., 2019) (“Throughout its media, ISIS offers the spectacle of violence that delivers justice to unbelievers.”).

82. Veilleux-LePage, *supra* note 72, at 457.

83. *Id.*

84. Mroszczyk & Abrahms, *supra* note 78, at 423 (recognizing that terror media campaigns aim to “instill fear in a targeted population, particularly by threatening violence and communicating through violence”); Weimann, *supra* note 9, at 183; Veilleux-LePage, *supra* note 72, at 457.

rate—allow terror non-state actors to inexpensively and quickly broadcast terror content to the wider world in order to propagandize, terrify, radicalize, and recruit.<sup>85</sup>

There is no one-size-fits-all messaging system of terror propaganda. As the French philosopher and legal scholar Jacques Ellul wrote in a seminal book on propaganda, “[o]ne cannot make just any propaganda any place for anybody. Methods and arguments must be tailored to the type of man to be reached.”<sup>86</sup> The range of messages from Islamic State social media accounts might suggest a lack of cohesion at first glance, but the disparate messages were designed to reach different groups—from disaffected or sympathetic Westerners, civilians in territory controlled by the Islamic State, or potential enemies.<sup>87</sup> Researchers analyzing the propaganda from the Islamic State have identified six general themes of the Islamic State’s output: brutality, mercy, victimhood, war, belonging, and utopianism.<sup>88</sup>

Brutality holds a central role in Islamic State propaganda, particularly when the group means to convey vengeance or supremacy to a targeted audience.<sup>89</sup> One key target audience of images of brutality are active or potential opponents, with the precise audience depending on the brutality in question.<sup>90</sup> For example, when the Islamic State

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85. Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 13–14 (2017).

86. JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES 34 (Konrad Kellen & Jean Lerner trans., 1965); see also Mohamed Elewa Badar, *The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)*, 16 INT’L CRIM. L. REV. 361, 365–66 (2016) (noting that the Islamic State utilizes an extensive media infrastructure that “produce[s] high-quality, timely products in different languages for different audiences that fit the narrative that the group wishes to convey”); Winter, *supra* note 81, at 12 (noting a propaganda output that averaged multiple daily videos and photographs and radio news bulletins in six languages, including English, French, and Russian).

87. Veilleux-LePage, *supra* note 72, at 454 (noting that “the production of IS propaganda has been centralized into a highly vertical, hierarchical and centralized structure”); Farag, *supra* note 76, at 848 (noting while “ISIS has published content ranging from gruesome images of beheadings and calls for violence against *kafir* (infidels) to Instagram posts depicting jihadists who are cuddling with cats or are gleeful about access to Snickers and Funyuns,” such content is best understood as part of a single narrative enterprise that targets hugely diverse demographics where output is meant to target one or multiple audiences).

88. One popular misconception was that Islamic State propaganda only produced images of brutality, but the images seen most regularly in the Western media were designed for a foreign audience, with the group’s highest profile videos even translated prior to their distribution. Winter, *supra* note 81, at 22–30.

89. *Id.* at 22; see also UNODC, *supra* note 68, at 4 (“The promotion of violence is a common theme in terror-related propaganda.”).

90. Winter, *supra* note 81, at 23; see also Klein & Flinn, *supra* note 68, at 69 (suggesting that such propaganda creates a constant state of terror in the general public).

uses brutal execution videos of alleged “spies,” the message is meant to threaten “potential local dissenters of the unwavering ruthlessness with which they will be dealt.”<sup>91</sup>

Such propaganda videos of brutality most easily fall into the category of videos which are intended to terrify. Other videos combine victimhood with brutality to serve dual purposes. For example, videos from the Islamic State often juxtapose images of brutality with images that depict dead children who allegedly were killed by opponents of Islam.<sup>92</sup> Where images of brutality threaten, the victimhood images suggest that the group’s brutality is justified retaliation.<sup>93</sup>

## II. THE WAR CRIME OF TERROR

### A. *The Prohibition Against Terror during Armed Conflict*

Although the general prohibition against terrorizing a civilian population during wartime has a long history in legal, philosophical, and religious texts,<sup>94</sup> the 1977 Additional Protocols I and II to the 1949 Geneva Conventions made long-standing practice official: intentionally subjecting civilians to terror is explicitly prohibited in both international and non-international armed conflict. Article 51(2) of the Additional Protocol I (regulating IACs) and Article 13(2) of Additional Protocol II (regulating NIACs) state in identical terms:

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

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91. Winter, *supra* note 81, at 23; *see also* UNODC, *supra* note 68, at 4–5 (recognizing that terror propaganda is often used to propagate a sense of heightened anxiety, fear, or panic in a population).

92. Winter, *supra* note 81, at 24–25.

93. *Id.* at 25.

94. *See, e.g.*, Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 22 (promulgated Apr. 24, 1863) (Washington, Government Printing Office 1898) (“The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”); LESLIE GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 48–49 (2d ed. 1999) (noting that general exhortations to respect non-combatants appeared in ancient Chinese texts and Third Century BC Sanskrit epics); Daphne Richmond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1017 (2007) (noting the principle of distinction between combatants and non-combatants expressed in the Old Testament Book of Deuteronomy, 1500 BC Hinduism, ancient Greece, Sun Tzu’s *The Art of War* in the 4th Century BC, and 634 AD exhortations to the Muslim Arab Army invading Christian Syria not to mutilate or kill a child, man, or woman).

to spread terror among the civilian population are prohibited.<sup>95</sup>

The Article in the Additional Protocols confirms the customary rule that civilians must enjoy general protection against acts or threats of violence along with the customary prohibition against civilian attacks.<sup>96</sup> A majority of States have ratified the Additional Protocols.<sup>97</sup> Moreover, even nations that have not adopted the Additional Protocols, such as the United States, have issued legal opinions recognizing the general prohibition of spreading terror among the civilian population.<sup>98</sup>

Even with the prohibition against acts of terror in the Additional Protocols, legitimate military operations that cause fear among civilians remain lawful.<sup>99</sup> The ICRC Commentary to Article 51(2) of Protocol I emphasized this point, recognizing the role that military necessity plays in determining the lawfulness of spreading fear among a civilian population:

[T]here is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among

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95. Additional Protocol I, *supra* note 20; Additional Protocol II, *supra* note 20.

96. See *Galić Appeal Judgement*, *supra* note 24, ¶ 103.

97. *Id.* ¶ 89.

98. *Id.* ¶ 89 (noting that in 1987, the United States offered a legal opinion stating that civilians must not be the object of acts or threats in which the objective is to spread terror among the civilian population).

99. Fenrick, *supra* note 19, at 561; Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War*, 6 J. INT'L CRIM. JUST. 21, 34 (2008) (“[I]f a brutal military attack is aimed primarily at intimidating enemy forces and offers substantial military advantage, it is deemed to be lawful even if it spreads terror among the civilian population.”); see also *Milošević Trial Judgement*, *supra* note 21, at ¶ 888

“[A] certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict. The closer the theatre of war is to the civilian population, the more it will suffer from fear and intimidation. This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, but to constitute terror, an intent to instil [sic] fear beyond this level is required.”

the civilian population without offering substantial military advantage.<sup>100</sup>

Consequently, it is the purpose of the action rather than the resulting terror that is the determinative factor.

The war crime of terror has roots in the principle of distinction,<sup>101</sup> a key tenet of international humanitarian law that requires parties to distinguish between individuals participating in hostilities and those who are not, and direct attacks only at the former.<sup>102</sup> As the *Milošević* Trial Chamber at the ICTY noted, “[t]he crime of terror requires the same elements as the war crime of unlawful attacks against civilians.”<sup>103</sup> Given the crime’s additional mental element of being conducted for the primary purpose of spreading terror, the crime of terror is an aggravated, more serious form of unlawful attacks on civilians.<sup>104</sup>

Intentionally subjecting civilians to terror is a violation of international humanitarian law only if the act is committed in the context of an international or non-international armed conflict. All parties to an IAC or NIAC are subject to international humanitarian law.<sup>105</sup> Although the Geneva Conventions first introduced the term “armed conflict,” neither it nor the 1977 Additional Protocols explicitly defined the term.<sup>106</sup> The language of Geneva Conventions suggests that an

100. International Committee of the Red Cross, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, ¶ 1940, available at <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51/commentary/1987?activeTab=undefined> [<https://perma.cc/Y9G4-6AUH>].

101. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 701 (2010).

102. Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 54 (2010); Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 85 (2013) (noting that the principle of distinction forbids the intentional targeting of civilians); Fenrick, *supra* note 19, at 557 (“[A]ttacks on [civilians and] civilian objects are prohibited as a matter of customary law in all conflicts”); Galić Trial Judgement, *supra* note 28, at ¶ 45 (“The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”).

103. See *Milošević* Trial Judgement, *supra* note 21, ¶ 882.

104. *Id.* ¶ 883.

105. DINSTEIN, *supra* note 72, at 4.

106. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2468–69 (2008) (noting that the term “armed conflict” is “used freely in both the Geneva Conventions and the Additional Protocols but is not defined in either.”).

international armed conflict is analogous to the traditional understanding of “war” with two fairly straightforward conditions precedent for its existence under international law: the parties to the conflict must be states, and the conflict must be armed.<sup>107</sup> There have been few strictly “international armed conflicts” since the end of World War II,<sup>108</sup> but one recent notable example is the Russia-Ukraine international armed conflict following the Russian invasion of Ukraine on February 24, 2022.<sup>109</sup>

### *B. Acts and Threats Found to Constitute Terror*

The prohibition against terrorizing a civilian population applies to all parties in both IAC and NIAC. Although state and non-state actors may take part in the armed conflict, it is individuals who are subject to criminal prosecution for grave breaches of international humanitarian law. The crime of terror is an autonomous war crime: Acts of terror need not involve acts that are otherwise criminal under international criminal law.<sup>110</sup> The actus reus of terror is an act or threat which leads to “extensive trauma and psychological damage” being caused by the attacks or threats which were designed to keep inhabitants in a constant state of terror,<sup>111</sup> a term which courts have defined

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107. Geneva Convention No. 1 provides that the Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art.2, 6 U.S.T. 3114, 75 U.N.T.S. 31. The 1977 Additional Protocol to the Geneva Conventions adopt the same definition by reference. Additional Protocol I, *supra* note 20, art. 1(3). The United States Supreme Court has also adopted this approach to distinguish international armed conflict and those “not of an international character.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

108. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 713 (2004).

109. *See, e.g.,* DINSTEN, *supra* note 72, at 27 (“Any armed conflict in which two States are crossing swords with each other constitutes an IAC rather than a NIAC.”).

110. *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Appeal Judgement, ¶ 359 (May 28, 2008) [hereinafter *Fofana Appeal Judgement*].

111. *Galić Appeal Judgement*, *supra* note 24, ¶ 102 (“[T]he 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’”).



as “extreme fear.”<sup>112</sup> The acts or threats of violence need not actually result in or spread terror among the civilian population.<sup>113</sup> The definition of “civilian population” is one that is *predominately* civilian,<sup>114</sup> with the burden falling on the prosecution to prove that a perpetrator was aware or should have been aware of the civilian status of those attacked.<sup>115</sup>

Terror is a specific-intent crime: The perpetrator must intend to commit acts or threats of violence (general intent) and the perpetrator must intend those acts or threats to spread terror among the civilian population (specific intent).<sup>116</sup> Intent may be inferred from circumstances of the acts or threats, including their nature, manner, timing, and duration.<sup>117</sup> If terror among the civilian population is an incidental consequence of the acts or threats, but the act is committed to achieve a different primary purpose, the specific intent requirement is not met.<sup>118</sup> Still, even if other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population, the crime of terror may be proved, provided that the intent to

112. See Galić Trial Judgement, *supra* note 28, ¶ 137 (accepting the Prosecution characterization of “terror” equating to “extreme fear”); Fofana Appeal Judgement, *supra* note 110, ¶ 352 (“[T]error’ should be understood as causing of extreme fear.”); Milošević Trial Judgement, *supra* note 21, ¶¶ 885–86 (finding that the Prosecution’s definition of “terror” as “a fear calculated to demoralize, to disrupt, to take away any sense of security from a body of people who have nothing [. . .] to do with the combat” constituted “the essence of what the term terror denotes”).

113. See Galić Appeal Judgement, *supra* note 24, ¶¶ 103–04 (“[A]ctual terrorism of the civilian population is not an element of the crime.”).

114. Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeal Judgement, ¶ 50 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009) [hereinafter Milošević Appeal Judgement] (italics in original); see Milošević Trial Judgement, *supra* note 21, ¶ 922 (“The civilian population comprises all persons who are civilians. It is important to recall that the presence of soldiers does not necessarily deprive a civilian population of its civilian character.”). See also Milošević Trial Judgement, *supra* note 21, ¶ 876 (stating that the crime of terror may also include acts or threats of violence directed to “individual civilians causing death or serious injury to body or health within the civilian population or to individual civilians.”).

115. See Milošević Appeal Judgement, *supra* note 114, ¶ 60.

116. See Galić Appeal Judgement, *supra* note 24, ¶¶ 103–04; see also Fenrick, *supra* note 19, at 562 (“Threats to wipe out a city or to exterminate its population would be clear examples of prohibited threats. Whether or not unlawful acts do in fact spread terror among the civilian population can be determined by psychological evidence. Whether or not the primary purpose of unlawful acts is to spread terror can be inferred from the circumstances.”).

117. See Galić Appeal Judgement, *supra* note 24, ¶ 104; Milošević Appeal Judgement, *supra* note 115, ¶ 37; Prosecutor v. Brima, Case No. SCSL-04-16-T, Trial Judgement, ¶ 669 (Special Court for Sierra Leone June 20, 2007) [hereinafter Brima Trial Judgement].

118. See Galić Appeal Judgement, *supra* note 24, ¶ 103.

spread terror among the civilian population was principal among the aims of the perpetrators.<sup>119</sup>

The war crime of terror is recognized as customary international law and it may be prosecuted as an autonomous war crime,<sup>120</sup> but the prosecution of the crime suffers from a significant enforcement gap. The Statute of the ICTY allowed jurisdiction over war crimes that were prohibited on the basis of customary international law, even if specific war crimes were not explicitly listed in its statute, thereby opening the door for terror prosecutions. “Acts of terrorism” were explicitly listed among the war crimes under the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR)<sup>121</sup> and the Special Court of Sierra Leone (SCSL).<sup>122</sup> The International Criminal Court (ICC), on the other hand, does not have jurisdiction over the crime of terror.

The Rome Statute of the ICC does not list the crime of terror as a war crime under Article 8, and the omission precludes its

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119. *Id.* ¶ 104 (“The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims.”).

120. *See, e.g.*, Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INT’L L. STUD. 282, 295 (2016) (recognizing that the crime of deliberately inflicting terror among the civilian population has a strong treaty basis and in customary international law); Sébastien Jodoin, *Terrorism as a War Crime*, 7 INT’L CRIM L. REV. 77, 107 (2007) (noting that, following the ICTY decision in Galić, “one can say with some confidence that acts of terror constitute a war crime under international law” and that “the constitutive elements of the war crime of terrorism in international humanitarian law are fairly settled.”); Hathaway et al., *supra* note 25, at 100 (noting strong case law support that the crime of terror is a war crime under customary international law).

121. S.C. Res. 955, annex, Statute of the International Tribunal for Rwanda, art. 4(d) (Nov. 8, 1994) [hereinafter ICTR Statute]. Although the ICTR Statute prohibited terror, the crime was never charged. In the *Gatete* case, the Prosecution alleged that Gatete was part of a concerted and coordinated action to persecute, terrorize, and exterminate Tutsi civilians over a period of nearly four years from October 1990 through April 1994. *Prosecutor v. Gatete*, Case No. ICTR-2000-61-1, Trial Judgement, ¶ 613 (Int’l Crim. Trib. for Rwanda Mar. 31, 2011). The ICTR Statute limited prosecution and convictions to crimes that specifically occurred in 1994 and many of the alleged acts preceded the temporal jurisdiction of 1 January–31 December 1994. *Id.* ¶ 615 (“The Chamber recalls that it can only convict the Accused of criminal conduct occurring in 1994.”). The Trial Chamber did not enter a conviction for the crime of terror, instead entering a conviction for conspiracy to commit genocide based on evidence of an agreement to kill Tutsis that had been reached by April 11, 1994. *Id.* ¶ 625.

122. Statute of the Special Court for Sierra Leone, arts. 3(d), (h), Jan. 16, 2002, 2178 U.N.T.S. 146.

prosecution.<sup>123</sup> The creation of the ICC stemmed from a 1989 proposal from the Prime Minister of Trinidad and Tobago to establish an international criminal court to deal with international drug trafficking and terrorism associated with such trafficking.<sup>124</sup> The proposal led to an International Law Commission study and the establishment of the 1996 Preparatory Committee on the Establishment of an International Criminal Court leading to the 1998 Rome Statute.<sup>125</sup> The proposed definition of “terrorism” was broader than terror as a war crime. The definition incorporated peacetime terrorism and proscribed acts of violence intended to create terror for “political, philosophical, ideological, racial, ethnic, religious” or other purposes that may be invoked to justify them.<sup>126</sup> Although the proposed language defined various acts that fell within the definition of terrorism, including “encouraging or tolerating acts of violence,” the proposed definition of the crime did not explicitly include threatening violence against a civilian population.<sup>127</sup> The crime of terrorism was primarily excluded from the Rome Statute because delegations could not reach a consensus definition of

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123. Hathaway et al., *supra* note 25, at 100 (“One notable example of a war crime for which there is no jurisdictional authority under the Rome Statute is the crime of infliction of terror on a civilian population. In the *Galić* case, the ICTY held in clear terms that terror constituted a war crime under international law. But this crime was deliberately (and controversially) omitted from the Rome Statute.”); Schaack, *supra* note 120, at 295 (noting that the ICC cannot prosecute the crime of terror, even though the crime has a strong basis in treaty law and customary international law).

124. Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 13–14 (2002).

125. M. Cherif Bassiouni, *Codification of International Criminal Law*, 45 DENV. J. INT’L L. & POL’Y 333, 348–50 (2017); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 22–24 (1999).

126. Specifically, the prohibition against “crimes of terrorism” would have proscribed (1) acts of violence against persons/property to create terror, fear, or insecurity for political, ideological, or other purposes; (2) offenses under various international anti-terror conventions; and (3) offenses involving arms used as a means to perpetuate indiscriminate violence against persons or groups of person or property. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1 (Apr. 14, 1998).

127. *Id.* (defining the crime of terrorism to include “[u]ndertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence”).

the crime,<sup>128</sup> an issue that has long plagued international law.<sup>129</sup> Other factors weighing against the inclusion of terrorism were concerns that the crime would politicize the institution,<sup>130</sup> and a belief that prosecution of terrorism-related offenses was better suited to domestic jurisdictions.<sup>131</sup> Ultimately terror was excluded completely from the Rome Statute—as both a crime during war and during peacetime. Although its exclusion has no bearing on the status of the crime as a prohibited war crime under customary international law,<sup>132</sup> the failure to list terror

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128. See, e.g., Arsanjani, *supra* note 125, at 29 (noting that for the negotiation process for the Rome Statute, it “became clear that there was no time to secure a generally acceptable definition of terrorism”); Martinez, *supra* note 124, at 18 (noting exclusion of terrorism for lack of a generally accepted definition).

129. See, e.g., Eboe-Osuji, *supra* note 30, at 357 (“Terrorism enjoys unique stature as one of the most angst-ridden concepts in the annals of contemporary public international law.”). See generally Alex Schmid, *Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 376–77 (2004).

130. Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 423 (2008) (“[S]tates contended that the inclusion of terrorism would impede ratifications of the Rome Statute for fear of politicized prosecutions and proceedings, especially in cases in which states are battling subversive groups or internal rebellions.”); Martinez, *supra* note 124, at 17–18 (noting that the draft Statute of the International Criminal Court initially included jurisdiction over core international crimes and “treaty crimes,” which were “established pursuant to nine specified, widely-accepted treaties,” but that the delegates at the Rome Conference decided to drop the treaty crimes provision due to a number of factors, including “concern that the inclusion of the crime of terrorism might politicize the Court to a very high degree”); Kenny, *supra* note 75, at 130 (“Concerns centered on whether the incorporation of such a crime [of terrorism] would unduly politicise the institution.”).

131. Vincent-Joël Proulx, *A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty*, 11 HARV. NAT’L SEC. J. 151, 173 (2020) (noting that negotiations regarding a jurisdictional category of “terrorism” at the ICC “not only evidenced several states’ lack of agreement on a legal definition of ‘terrorism,’ but also their belief that terrorism-related offenses are better suited to domestic adjudication”). In addition, Johan D. Van der Vyver has suggested that terrorism was excluded as a compromise with the United States, a party whom many delegations desperately wanted to keep on-board with the creation of the ICC. Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 EMORY INT’L L. REV. 527, 544 (2010) (“The exclusion of terrorism in part reflected a compromise with the United States at a time when many delegations were anxious to accommodate the American demands—if for no other reason, then simply to keep the discontented American delegation on board . . .”).

132. See, e.g., Antonio Cassese, *The Multifaceted Notion of Terrorism in International Law*, 4 J. INT’L CRIM. JUST. 933, 945 (2006) (“[O]ne could object that the Statute of the International Criminal Court (ICC), which carefully and extensively lists in Article 8 the various classes of war crimes, fails to mention resort to terror against civilians. This argument would not, however, be compelling. Indeed, the various provisions of the ICC Statute are not intended to codify existing customary rules . . . .”); Van der Vyver, *supra* note 131, at 544 (“[T]errorism was not excluded from the subject matter jurisdiction of the ICC on the

under Article 8 of the Rome Statute has one significant consequence: Prosecution of terror as a war crime is not available at the ICC.

### 1. Terror During a Military Campaign that Targets Civilians

The ICTY was the first ad hoc international tribunal to recognize that violations of the prohibition against terror were criminalized under international criminal law.<sup>133</sup> The first prosecution for the crime as an autonomous war crime occurred as part of the case against Stanislav Galić, a commander of the Sarajevo-Romanija Corps (SRK) of the Army of Republika Srpska.<sup>134</sup> Galić was charged with subjecting civilians to terror as part of a campaign of shelling and sniping during the siege of Sarajevo, one of the longest military sieges in modern history, lasting between April 1992 and February 1996.<sup>135</sup> Military siege is an age-old military tactic that is not per se unlawful under international law, but its effects cause extreme hardship to all remaining inhabitants of a city, both military and civilian.<sup>136</sup> The counts against

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assumption that its prohibition was not part of customary international law . . . . The customary-law disposition of terrorism was not the issue.”).

133. Daniela Kravetz, *The Protection of Civilians in War: The ICTY’s Galić Case*, 17 LEIDEN J. INT’L L. 521, 524–25 (2004).

134. *Id.*

135. The ICTY Trial Chamber found that Sarajevo was besieged despite some limited opportunities for civilians to leave the city. As the ICTY Trial Chamber explained in *Prosecutor v. Dragomir Milošević*,

“[T]his was not a siege in a classical sense of a city being surrounded, [but] it was certainly a siege in the sense that it was a military operation, characterized by a persistent attack or campaign . . . during which the civilian population was denied regular access to food, water, medicine and other essential supplies, and deprived of its right to leave the city freely at its own will and peace.”

Milošević Trial Judgement, *supra* note 21, ¶ 751. See generally KENNETH MORRISON & PAUL LOWE, REPORTING THE SIEGE OF SARAJEVO 1 (2021) (noting that the siege was longer than such notable sieges as Medina during World War I, Madrid during the Spanish Civil War, and Leningrad and Stalingrad during World War II); Sylvia Poggioli, *Two Decades After Siege, Sarajevo Still a City Divided*, NPR (Apr. 5, 2012), <https://www.npr.org/2012/04/05/150009152/two-decades-after-siege-sarajevo-still-a-city-divided> [<https://perma.cc/7EZJ-3XM2>] (noting that the Siege of Sarajevo was the longest siege of a capital city in modern history).

136. Siege warfare is a military tactic where an encircling force attempts to capture a strategically held position or city through enforced isolation. During a siege, the encircling force attempts to capture the targeted position through direct assault, starving it of reinforcements, and by preventing escape. Although sieges are typically time-consuming, the practice is easier and less likely to result in casualties to the encircling force compared to a direct

Galić stemmed from acts of intentionally targeting civilians during the siege, including charges of terror, unlawful attacks on civilians, murder, and inhumane acts.<sup>137</sup> Following Galić's conviction, convictions for terror would be entered against other political and military leaders stemming from events that occurred during the siege of Sarajevo.

At the time of the siege, Sarajevo was the capital of the newly independent Bosnia and Herzegovina, a one-time republic within the former Socialist Federal Republic of Yugoslavia.<sup>138</sup> When Yugoslavia fractured along ethnic-religious lines, Bosnia and Herzegovina was unique in that no ethnicity had a majority in that country,<sup>139</sup> with Sarajevo remaining an ethnically mixed city of Bosnian Muslims, Serbs, and Croats.<sup>140</sup>

Sarajevo was controlled by a Bosnian Muslim Presidency and defended by the Army of Bosnia and Herzegovina while forces from the opposing SRK encircled the alpine capital and used its elevated

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engagement in urban warfare or the encircling force going house-to-house to root out an adversary. Unless an urban area has been evacuated of civilians, the hardships of siege fall upon both the civilian population and the encircled fighting force. Although siege warfare produces significant hardship on a civilian population, siege warfare is not *per se* unlawful. Schaack, *supra* note 120, at 316–17; Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT'L L. 353, 415 (1999) (noting that the narrow focus of ICTY indictments “corroborates the position that illegality . . . was more likely to lie in the underlying purpose and particular acts of barbarism that occurred as part of the siege, than in the decision to employ siege methods in attacking cities”).

137. See Galić Trial Judgement, *supra* note 28, ¶ 4.

138. The former Socialist Federal Republic of Yugoslavia had six constituent peoples: Slovenes, Croats, Serbs, Muslims, Montenegrins, and Macedonians. From 1974 onward, Yugoslavs were also recognized. IVANA MAČEK, SARAJEVO UNDER SIEGE: ANTHROPOLOGY IN WARTIME 13, 23 (2009). The former Yugoslavia would ultimately result in six States: Bosnia and Herzegovina, Croatia, North Macedonia, Montenegro, Serbia, and Slovenia. Saso Georgievski, *Separation of Powers in the Republic of Macedonia: A Case of A Multi-Ethnic Country Acceding to the European Union*, 47 DUQ. L. REV. 921, 921 n.1 (2009) (noting the creation of six independent states following the dissolution of the former Socialist Federative Republic of Yugoslavia). In addition, Kosovo, an autonomous region in the Balkans bordering Serbia, Albania, Montenegro, and North Macedonia, is recognized by some nations as independent. Jens Woelk, *2022 Casad Comparative Law Lecture: Forced Together, Never Sustainable? Post-Conflict Federalism in Bosnia and Herzegovina*, 71 U. KAN. L. REV. 251, 253 (2022) (noting that, although many nations have recognized it as independent, Kosovo is not recognized as independent by some nations, including Serbia and five EU Member States).

139. According to both the 1981 and 1991 censuses, the ethnic composition of Bosnia and Herzegovina was approximately 44% Muslims, 31% Serbs, and 17% Croat. See Galić Trial Judgement, *supra* note 28, ¶ 192 n.325.

140. MAČEK, *supra* note 138, at 13.

positions to fire into the city.<sup>141</sup> Rather than solely targeting military installations, the encircling force subjected the citizens of the city to regular shelling and sniping attacks.<sup>142</sup> These two methods of warfare utilized by the SRK—shelling and sniping—were designed neither to repel nor advance over an opposing armed force.<sup>143</sup>

One of the key aspects of the terror campaign was the use of military snipers to routinely target civilians within the city as they went about daily activities. The role of snipers requires a deliberate shot that homes in on a target.<sup>144</sup> The intentional targeting of civilians by sniper fire could also only serve the purpose of terrorizing a civilian population because the sniping of civilians who were not engaged in combat served no military purpose. Journalists who testified regarding events in Sarajevo observed that snipers often seemed to shoot civilians with the intention to wound, rather than kill, in order to attract others to the area in order to shoot them too, a strategy described as a “fairly morbid kind of fun.”<sup>145</sup> As one Senior Legal Officer at the ICTY Office of the Prosecutor explained, such “cat-and-mouse” sniping tactics where “some civilians would be attacked on a random basis” indicated a deliberate intent to force all civilians to live “in a constant state of extreme fear.”<sup>146</sup> The ICTY Chambers agreed. The ICTY *Galić* Trial Chamber, for example, specifically found that the SRK sniped at civilians in order to “create a climate of terror” in Sarajevo so that all citizens would feel “on edge.”<sup>147</sup>

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141. Alija Izetbegović, a Muslim, became the President of the newly formed Bosnia and Herzegovina. During the early part of the conflict, Serbian institutions were established throughout Bosnia and Herzegovina in competition with the ones recognized by the Presidency of Bosnia and Herzegovina. See *Galić* Trial Judgement, *supra* note 28, ¶¶ 193, 195; see also ROBERT J. DONIA, *SARAJEVO: A BIOGRAPHY* 313–17 (2006) (describing the general campaign of shelling and sniping by the Bosnian-Serb military from elevated positions around Sarajevo).

142. William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT’L & COMP. L. REV. 111, 116 (2007) (noting “protracted sniping and shelling campaigns upon the civilian population” by the Bosnian Serb Army forces surrounding Sarajevo). This article uses the definition of sniping from the ICTY: The direct targeting of individuals at a distance using any type of small caliber weapon. See *Galić* Trial Judgement, *supra* note 28, ¶ 184.

143. *Galić* Trial Judgement, *supra* note 28, ¶ 593 (noting that the “attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition” and that the acts “had no discernible significance in military terms”).

144. See *Milošević* Trial Judgement, *supra* note 21, ¶ 909.

145. See *Galić* Trial Judgement, *supra* note 28, ¶¶ 574–75.

146. Fenrick, *supra* note 19, at 562.

147. See *Galić* Trial Judgement, *supra* note 28, ¶¶ 568–73.

The regular targeting of civilian areas with highly accurate mortar shelling similarly indicated an intent to terrify civilians.<sup>148</sup> Targets included children playing in the snow,<sup>149</sup> a flea market in the civilian part of the old town,<sup>150</sup> a pump used by civilians to fetch water,<sup>151</sup> civilians waiting in bread lines,<sup>152</sup> those distributing and receiving humanitarian aid,<sup>153</sup> and the Markale Market, an area that “constituted the greatest concentration of shops selling food in Sarajevo at that time,” where two infamous shelling incidents resulted in 68 and 43 dead respectively.<sup>154</sup> The deliberate firing in numerous shelling incidents from accurate mortar weapons indicated an intent to terrorize.<sup>155</sup> In addition to specific targeted shelling incidents, the SRK military engaged in widescale shelling campaigns that indiscriminately targeted the entire city, including residential neighborhoods.<sup>156</sup>

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148. See Milošević Trial Judgement, *supra* note 21, ¶¶ 907, 913.

149. Prosecutor v. Mladić, Case No. IT-09-92-T, Trial Judgement, ¶¶ 2042, 2050 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017) [hereinafter Mladić Trial Judgement]; Prosecutor v. Mladić, Case No. IT-09-92-T, Witness Statement of Muhamed Kapetanović, ¶¶ 5–6 (Kapetanović stating, “It was winter when I was wounded. There was a lot of snow, so I went outside about noon with four of my friends to slide and sled . . . We were very close to our building when another shell landed behind us and one of my friends was killed by the explosion.”).

150. See Milošević Trial Judgement, *supra* note 21, ¶¶ 466, 474.

151. *Id.* ¶ 567. *But see id.* ¶ 579 (finding that the Chamber could not definitively determine that the shell was fired from territory controlled by the SRK).

152. See Mladić Trial Judgement, *supra* note 149, ¶ 2173.

153. *Id.* ¶¶ 2051, 2057.

154. See Milošević Trial Judgement, *supra* note 21, ¶ 670; *see also id.* ¶¶ 714, 724 (determining that shell was fired from territory controlled by the SRK); Mladić Trial Judgement, *supra* note 149, ¶¶ 2058–97 (regarding a shelling of the Markale Market on February 5, 1994 that killed at least 68 people); *id.* ¶ 2150 (regarding a shelling of the Markale Market on August 28, 1995 that killed at least 43 people).

155. Milošević Trial Judgement, *supra* note 21, ¶ 913.

156. See Galić Trial Judgement, *supra* note 28, ¶¶ 568–73; *see Milošević Trial Judgement, supra* note 21, ¶ 907 (noting that no area in the city was safe from shelling). The specific intent to commit terror can also be proved through statements of those charged with terror. For example, in the Mladić case at the ICTY, prosecutors proved the terror component in part through direct evidence that included intercepted commands from Bosnian Serb General Ratko Mladić during a notorious shelling campaign of Sarajevo on May 28–29, 1992. During the shelling, Mladić commanded his troops to shell specific neighborhoods where few Bosnian Serb lived and stated that the shelling should continue “so they can’t sleep, so we drive them out of their minds.” Prosecutor v. Mladić, Case No. IT-09-92-T, Trial Ex. P105 (containing a recording and partial transcript of media broadcast of intercepted conversations during bombardment of Sarajevo by VRS forces on May 28–29, 1992).



The *Milošević* Trial Chamber found that such indiscriminate shelling was further indicia of an intent to spread terror.<sup>157</sup>

The siege had profound consequences for civilians. Prior to the siege, Sarajevo was home to approximately 500,000 people.<sup>158</sup> Approximately 100,000 citizens fled the city in the first two years of the war.<sup>159</sup> By the conclusion of the conflict, approximately 12,000 civilians had been killed in shelling and sniping attacks in the city, including 1,600 children.<sup>160</sup> An additional 4,500 civilians died of natural causes due to the prevailing siege conditions.<sup>161</sup> Prosecution witnesses suggested that the shelling and sniping campaign was intended to wear down the resolve of residents or to use terror as a means to exert pressure on the Bosnian Muslim government to capitulate on Bosnian Serb terms.<sup>162</sup> Although the ICTY Chambers ultimately didn't find a specific motive for terror, they determined that the continual targeting of civilians with shell and sniper fire at locations well-known to be frequented by civilians during their daily activities provided strong indicia of terror.<sup>163</sup> “[T]he only reasonable conclusion,” according to one Chamber at the ICTY, was that “the primary purpose of the [shelling and sniping] campaign was to instill in the civilian population a state of extreme fear.”<sup>164</sup>

## 2. Public Acts or Acts with an Inherent Public Message

Judgments at the SCSL, a hybrid international court established following a request by the government of Sierra Leone to the United Nations, expanded the scope of terror crimes. Where ICTY case law analyzed terror in relation to only one specific event—the terrorization of civilians during the siege of Sarajevo—the decisions at

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157. See *Milošević* Trial Judgement, *supra* note 21, ¶ 881.

158. See *Mladić* Trial Judgement, *supra* note 149, ¶ 1851.

159. *Id.* ¶ 1864.

160. *Id.*

161. *Id.*

162. See *Milošević* Trial Judgement, *supra* note 21, ¶¶ 753, 755; see, e.g., Prosecutor v. Mladić, Case No. IT-09-92-T, Notice of Filing of Corrigendum to Updated Public Redacted Version of Prosecution Final Trial Brief, ¶¶ 637–39 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 13, 2017) (noting that the campaign was retaliation for the opposing side's military successes or meant to pressure the opposing BiH government to negotiate or accede to Bosnian Serb terms).

163. See *Milošević* Trial Judgement, *supra* note 21, ¶ 881.

164. See, e.g., *Galić* Appeal Judgement, *supra* note 24, ¶ 107 (affirming language of the *Galić* Trial Chamber); see also *Mladić* Trial Judgement, *supra* note 149, ¶ 3201.

the SCSL grounded its convictions for terror based upon two general principles. First, certain public acts that are committed against civilians and committed before a civilian audience demonstrate an intent to terrorize. Second, a terror crime may flow from an act that carries with it an inherent public message meant to terrorize civilians.

*i. Public Acts as Crimes of Terror*

Public acts committed against civilians before a civilian audience may constitute terror. For example, the *Sesay* Trial Chamber determined that the shooting of a civilian during a public demonstration against the AFRC/RUF military forces constituted terror where the act was “intended to impart a clear public message that such protests would be met with violence.”<sup>165</sup> Similarly, other public acts constituted the crime of terror, such as where AFRC/RUF military leaders gathered villagers to witness the punishment meted out in civilian executions,<sup>166</sup> where public killings were accompanied by public statements that others from the same ethnic group who had associated with the Junta’s enemies would be targeted,<sup>167</sup> or where bodies of civilians were displayed for days following executions.<sup>168</sup>

Further, the differing treatment of sexual violence as a crime of terror at the SCSL demonstrates the role of public acts as terror crimes. The Chambers in *Sesay* and *Taylor* determined that rape, sexual slavery, forced marriage, and outrages upon personal dignity constituted an act of terror against the civilian population.<sup>169</sup> In *Taylor*, the Chamber determined that the use of sex slaves by RUF and AFRC fighters in Sierra Leone was used to “send a message” to the enemy.<sup>170</sup> Members of the military subjected victims to perverse methods of sexual violence and often committed acts of public rape.<sup>171</sup> In its analysis, the Chamber emphasized the public nature of such crimes, recognizing them to be part of a deliberate tactic to spread terror among the civilian population.<sup>172</sup> The *Sesay* Chamber similarly noted the public nature

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165. See *Sesay* Trial Judgement, *supra* note 32, ¶ 1127.

166. See *Taylor* Trial Judgement, *supra* note 33, ¶ 597.

167. *Id.* ¶ 600.

168. *Id.* ¶¶ 597, 603, 606.

169. See *Sesay* Trial Judgement, *supra* note 32, ¶¶ 1346–52; *Taylor* Trial Judgement, *supra* note 33, at ¶ 2035.

170. See *Taylor* Trial Judgement, *supra* note 33, ¶¶ 2035–36.

171. *Id.* ¶ 2036.

172. *Id.* ¶¶ 2037, 2052–53, 2176–78.

of sexual violence crimes,<sup>173</sup> finding that the acts were intentionally committed in order to “alienate victims and render apart communities.”<sup>174</sup> Consequently, the aim of the RUF and AFRC was to use sexual violence to extend power over the civilian population by “perpetuating a constant threat of insecurity that pervaded daily life and afflicted both women and men.”<sup>175</sup>

On the other hand, the *Brima* Chamber at the SCSL declined to enter a conviction of sexual violence as a crime of terror.<sup>176</sup> Although the Chamber recognized the widespread use of sexual slavery by AFRC troops that abducted women, detained them for months, repeatedly raped them, and forced them to perform domestic labor,<sup>177</sup> the Chamber determined that such acts did not have the primary purpose of spreading terror. Unlike the later SCSL judgments in *Taylor* and *Sesay*, the *Brima* Chamber did not emphasize the public performative nature of crimes of sexual violence, and instead focused on the acts as primarily intended to take advantage of the spoils of war by treating women as property in order to satisfy sexual desires and other conjugal needs.<sup>178</sup>

*ii. Acts that Carry an Inherent Public Message as a Crime of Terror*

An act which carries with it an inherent public message meant to terrorize civilians may also be terror. One of the most notorious acts during the conflict in Sierra Leone was the physical mutilations and amputations committed by rebel forces against the civilian population.<sup>179</sup> According to multiple Chambers at the SCSL, these acts, sometimes committed in public places with others present,<sup>180</sup> constituted terror. Such acts of mutilation carried with them, in the words of

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173. See *Sesay* Trial Judgement, *supra* note 32, ¶ 1347 (discussing evidence of gang rape, forced sexual intercourse between civilian abductees, and acts of public rape).

174. *Id.* ¶ 1349.

175. *Id.* ¶ 1350.

176. *Brima* Trial Judgement, *supra* note 117, ¶ 1455.

177. *Id.*

178. *Id.* ¶ 1459.

179. Norimitsu Onishi, *Sierra Leone Measures Terror in Severed Limbs*, N.Y. TIMES (Aug. 22, 1999), <https://www.nytimes.com/1999/08/22/world/sierra-leone-measures-terror-in-severed-limbs.html> (last visited Nov. 29, 2023); Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 86 (2005) (“[T]he conflict was notorious worldwide for the widely reported amputations.”).

180. Keith, *supra* note 30, at 825.

the *Brima* Trial Chamber, “an inherent public message” that would serve as a “visible lifelong sign to all other civilians not to resist the AFRC and not to back President Ahmed Tejan Kabbah or his supporters.”<sup>181</sup> The *Sesay* Trial Chamber similarly found that such acts were intended to serve as “permanent, visible and terrifying reminder[s] to all civilians of the power and propensity to violence of the AFRC and RUF” when it entered convictions for terror.<sup>182</sup>

The case law at the SCSL also extended the crime of terror to acts of destroying civilian property, providing further support that the purpose of an attack rather than its targeted object governs what acts constitute terror crimes.<sup>183</sup> The Chamber found that the burning of villages perceived to be loyal to the opposition constituted terror where, much like physical mutilations, the burning constituted an inherent public message that villages that rebel forces perceived to collaborate with the enemy would be punished.<sup>184</sup> The burning of villages demonstrated to civilians the repercussions of collaborating with the enemies of the RUF and AFRC, and the wide-scale destruction was meant to instill fear in the civilian population.<sup>185</sup>

### *iii. Acts Where Terror Is a Side-Effect Rather Than a Primary Purpose*

Absent a confession by the accused, prosecutors and international trial chambers must determine a perpetrator’s intent to commit terror based upon the circumstances surrounding the acts or threats. As the ICTY *Galić* Appeals Chamber noted, a Chamber may infer the intent behind a perpetrator’s acts or threats based upon the circumstances surrounding them, including their “nature, manner, timing, and

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181. *Brima* Trial Judgement, *supra* note 117, ¶ 1463; *see also* *Taylor* Trial Judgement, *supra* note 33, ¶¶ 2040–42 (noting that mutilations were “notorious” and meant to serve as “a permanent, visible and grotesque reminder to all civilians of the consequences of resisting the AFRC or RUF or of supporting Kabbah or ECOMOG”).

182. *Sesay* Trial Judgement, *supra* note 32, ¶ 1357.

183. *Keith*, *supra* note 30, at 819–20.

184. *See, e.g.*, *Sesay* Trial Judgement, *supra* note 32, ¶¶ 1159–60 (discussing trial evidence that certain villages not loyal to the Junta forces were burned).

185. *Taylor* Trial Judgement, *supra* note 33, ¶ 2021 (noting that AFRC and RUF fighters made civilian homes the object of attack, and that its primary purpose was to “terrorise the civilian population by demonstrating the repercussions of collaborating with the enemies of the RUF and AFRC”); *Brima* Trial Judgement, *supra* note 117, ¶ 670 (“[I]t is not the property as such which forms the object of protection from acts of terrorism, the destruction of people’s homes or means of livelihood and, in turn, their means of survival, will operate to instil [sic] fear and terror.”).

duration.”<sup>186</sup> Without question, a significant number of war crimes involving civilians are horrific. It is the circumstances of the acts and threats and the manner in which evidence is presented against an accused that will enable a Chamber to infer terror intent.<sup>187</sup> For example, where the *Brima* Chamber at the SCSL determined that AFRC troops committed crimes of sexual violence with the intent to take advantage of the spoils of war and satisfy sexual desires,<sup>188</sup> the *Taylor* Chamber at the same tribunal found that acts of sexual violence—many of which were committed in public—were terror crimes.<sup>189</sup> As Valerie Oosterveld has suggested, “the additional evidence put forward in the *Taylor* case” explained the differing outcomes on the terror charges.<sup>190</sup>

Chambers at the SCSL declined to enter convictions for terror where they have found that spreading terror among the civilian population was a side-effect of an act rather than its primary purpose. For example, the widespread use of civilian abductions to be used as forced laborers in diamond mines was deemed “primarily utilitarian or military in nature” rather than intended to spread terror.<sup>191</sup> As the *Taylor*

186. Galić Appeal Judgement, *supra* note 24, ¶ 104; *see also* Milošević Appeal Judgement, *supra* note 114, ¶ 37 (recognizing that nature, manner, timing, and duration are some factors which a Chamber may consider, but noting that these factors are not an exhaustive list).

187. In addition, some prosecution cases have not charged certain acts as terror crimes, even where their manner of commission suggests an intent to commit terror. For example, crimes of sexual violence against Tutsi women were committed in public and in humiliating fashion during the Rwandan genocide, circumstances that seem to suggest the purpose of causing terror. *See* Susana SàCouto, *Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes*, 10 GONZ. J. INT’L L. 49, 52 (2007) (noting public acts of sexual violence during the Rwandan genocide); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 421, 423, 731–34 (Int’l Crim. Trib. Rwanda Sept. 2, 1998) (noting public acts of sexual violence against Tutsi women and finding that such acts of sexual violence constitute genocide). Although the terror was a crime available to be charged under the ICTR statute, terror was never charged at the ICTR based upon crimes of sexual violence or any other crime. ICTR Statute, *supra* note 121, art. 4(d); Nathan A. Canestaro, “*Small Wars*” and the Law: *Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT’L L. 73, 108 (2004) (noting the availability to charge crimes of terror under the ICTR Statute); Dermot Groome, *International Crimes and the Ad Hoc Tribunals*, 100 AM. J. INT’L L. 993, 997 (2006) (book review) (noting that crimes of terror under Article 4(d) of the ICTR Statute “have never been charged”).

188. *Brima* Trial Judgement, *supra* note 117, ¶ 1459.

189. *Taylor* Trial Judgement, *supra* note 33, ¶¶ 2035–38.

190. Oosterveld, *supra* note 33, at 28.

191. *Taylor* Trial Judgement, *supra* note 33, ¶¶ 1970–71; *see also* Sesay Trial Judgement, *supra* note 32, ¶¶ 1359–60 (finding that the primary purpose of abduction and forced mining was “utilitarian or military in nature” and not committed with the primary purpose to spread terror).

Trial Chamber noted, the “abduction of persons from their homes, their continued detention, and their subjection to forced labour, including forced mining and living in RUF camps, under conditions of violence may have spread terror among the civilian population,” but it also noted that such terror was a “side-effect” of the act.<sup>192</sup> Similarly, the use of child soldiers was deemed to have a primarily military purpose and only a secondary purpose of terror.<sup>193</sup> Terror was also found to be a “side-effect” of looting rather than the primary purpose of the act.<sup>194</sup>

### C. Unlawful Threats and Lawful Warnings

Although threats intended to instill terror among civilians are war crimes, warnings to the civilian population of pending military actions are encouraged under international law.<sup>195</sup> Additional Protocol I of 1977 governing IACs requires advanced warning of an attack which may affect the civilian population where circumstances allow.<sup>196</sup> Additional Protocol II governing NIACs does not include this provision, but the ICRC has suggested that the obligation also extends to NIACs.<sup>197</sup>

The distinction between lawful warnings to protect civilians and threats meant to terrorize them is thin, based largely upon the nature of the warning and its intent.<sup>198</sup> Certainly, warnings to civilians that an attack is imminent would provoke fear, but such a warning is intended to encourage civilians to leave a combat zone or seek safety. Genuine warnings—even those that might be worded in a “frightening way”—do not have the primary purpose to terrorize if the intent is to encourage civilians to leave an area for their protection because an

192. Taylor Trial Judgement, *supra* note 33, ¶ 1971.

193. Brima Trial Judgement, *supra* note 117, ¶¶ 1448–50 (noting that even though Brima ordered the capture of civilians to “attract the attention of the international community,” the non-military purpose was subordinate to the use of child soldiers for military purposes).

194. Taylor Trial Judgement, *supra* note 33, ¶¶ 1973–78.

195. See generally Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under International Law: Theory and Practice*, 87 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 359, 361–75 (2011) (regarding the duty to warn to minimize civilian casualties).

196. Additional Protocol I, *supra* note 20, art. 57(2)(c) (“[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

197. Baruch & Neuman, *supra* note 195, at 362 (citing 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 63–64 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005)).

198. *Id.* at 375 (“The defining element in differentiating between lawful warnings and unlawful threats is the intention.”).

attack is imminent.<sup>199</sup> Consequently, warnings “worded in a way that clarifies the danger in a forceful manner” are likely to be more effective and better clarify the danger to those civilians who might choose to remain in an area in the face of legitimate danger.<sup>200</sup>

On the other hand, warnings may constitute crimes of terror where the “warning” is a thinly disguised threat meant to spread fear. For example, the Trial Chamber in *Brima* in the SCSL found that the “strict warning” that “any civilian who tried to run away was a betrayer and will be shot on sight” was not a true warning, but it was instead a statement intended to terrorize.<sup>201</sup> Rather than a warning to civilians that leaving an area will result in safety, the Chamber determined that the language was a threat that certain actions (i.e. leaving) would result in the specific targeting of civilians.<sup>202</sup>

#### *D. Digital Terror Outside Armed Conflict*

The war crime of terror only applies to acts committed during armed conflict rather than domestic terror events, even if civilians are targeted. The intentional terrorization of a civilian population during hostilities that do not reach the level of a non-international armed conflict is not governed by international humanitarian law.<sup>203</sup>

The operative definition of a non-international armed conflict was established in the ICTY Appeals Chamber’s interlocutory decision in *Tadić*.<sup>204</sup> There, the Appeals Chamber found that “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and

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199. *Id.* at 376.

200. *Id.*

201. *Brima* Trial Judgement, *supra* note 117, ¶¶ 1691, 1695 (finding that the orders constituted terror where they were given to spread fear among the civilian population, but declining to enter a conviction where the Prosecution failed to prove individual criminal liability against *Brima* in relation to the crimes committed in the district where these threats occurred).

202. *Id.*

203. For example, the Additional Protocols are not applicable to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” Additional Protocol II, *supra* note 20, art. 1(2); *see also* DINSTEIN, *supra* note 72, at 13.

204. *See, e.g.*, Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT’L L. 693, 718 (2013) (noting that the criteria established in *Tadić* “quickly became the determinative statement on what constitutes armed conflict.”).

organized armed groups or between such groups within a State.”<sup>205</sup> Sporadic terrorist acts remain internal disturbances while terrorist acts that “form part and parcel of organized, protracted and intense violence ... definitely fit the [mold] of a NIAC.”<sup>206</sup>

Although there is no set length of time for what constitutes “protracted,” such a requirement suggests that violence that occurs within a NIAC must be part of a continuum and not just one short, violent incident or a series of isolated or sporadic events of domestic unrest.<sup>207</sup> On the other hand, the *Abella v. Argentina* decision in the Inter-American Human Rights Commission provides a counterexample of a brief episode of violence that was found to constitute armed conflict that would be governed by IHL. The Inter-American Human Rights Commission found that a thirty-hour battle between armed soldiers and an armed group constituted armed conflict based on the

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205. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

206. DINSTEIN, *supra* note 72, at 43. Indicative factors of “protracted violence” include the number, duration and intensity of individual confrontations, the types of weapons and other military equipment used, the number of caliber of munitions fired, the number and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, the number of civilians fleeing combat zones, and potentially the involvement of the UN Security Council. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgement, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) [hereinafter Haradinaj Judgement] (providing indicative factors of “protracted violence”); *see also* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Judgement, ¶¶ 336, 340–41 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (finding protracted armed violence based in part on “serious fighting for an extended period of time”); Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgement, ¶¶ 84, 167–68 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (applying the “protracted armed violence” requirement through an examination of the intensity of the conflict and finding armed conflict where clashes were sustained over a geographically widespread area and resulted in the forced departure of civilians and dozens of casualties).

207. DINSTEIN, *supra* note 72, at 41–42 (noting that, while there is not a precisely set time required for a NIAC to mature, “protracted” is “obviously the antonym of ‘isolated and sporadic’” such that protracted violence requires “a necessary interval of germination and sprouting of armed conflict.”); Janina Dill, *Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities*, in 2 LAW APPLICABLE TO ARMED CONFLICT 197, 238 (Anne Peters & Christian Marxsen eds., 2020) (“Specifically, what criteria make armed violence ‘protracted’ is far from obvious. Indicators drawn on in international jurisprudence include the frequency of hostile confrontations, the type and range of weapons and the calibre of munitions used, the number of persons participating in combat, wounded or killed as a result of hostilities, the severity and extent of the physical destruction and the number of displaced persons.”).



military-grade weapons that both sides used.<sup>208</sup> Decisions that follow the reasoning of *Abella v. Argentina* would greatly extend the reach of international humanitarian law and the war crime of terror by expanding the scope of what events constitute NIACs.<sup>209</sup> Indeed, such an expansion would negate both the requirement that a non-international conflict be “protracted” and a general understanding that NIACs are formed following a period of pre-NIAC gestation.<sup>210</sup> Such reasoning would also seemingly run counter to Additional Protocol II’s language that internal disturbances constituting sporadic acts of violence do not constitute armed conflict.<sup>211</sup>

Based upon the operative definition of armed conflict in *Tadić*, many acts or threats of violence that utilized social media platforms are not war crimes because they occurred during a domestic terrorist attack rather than within the context of an IAC or NIAC. For example, the livestreamed broadcast on Facebook of a terror attack by a white supremacist directed against Muslims in Christchurch, New Zealand, is domestic terrorism, not a war crime, because it occurred outside a NIAC.<sup>212</sup> Moreover, in certain situations, non-state actors that utilize

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208. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, Doc. 6 rev. ¶¶ 1, 155–56 (1998); *see also* Haradinaj Judgement, *supra* note 206, ¶ 49 (finding that protracted armed violence “refer[s] more to the intensity of the armed violence than to its duration.”).

209. KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 367–69 (2016). Specifically, Watkin writes,

[I]t is difficult to see how the violence associated with the *Abella v. Argentina* case (i.e., 30 hours), the 2000 Sierra Leone hostage rescue (4 hours), the hijacked aircraft September 11, 2001, attacks (21 to 45 minutes), the November 26–28, 2008 Mumbai attack (60 hours), the September 11, 2012, attack on the U.S. diplomatic facilities in Benghazi (i.e., 13 hours), the September 21–24, 2013, Kenyan Westgate Mall attack (i.e., 80 hours), or the 2015 Paris assaults (3 hours) does not factually take on the attributes of an armed conflict and can only be dealt with by means of human rights-based law enforcement.

*Id.* at 367–68 (footnote omitted).

210. *See* DINSTEIN, *supra* at note 72, at 42 (“There is no allotted minimum period. Occasionally, it takes months of ongoing violence before a NIAC is plainly in evidence. Now and again, a week or two of continuous tumult may suffice to fulfill the requirement of protracted violence . . . . Whatever the shortest admissible space of time may be, it cannot plummet down to just a few hours or even a couple of days.”).

211. Additional Protocol II, *supra* note 20, art. 1(2).

212. Eleanor Ainge Roy, Harriet Sherwood & Nazia Parveen, *Christchurch Attack: Suspect had White-Supremacist Symbols on Weapons*, THE GUARDIAN (Mar. 15, 2019, 1:29 PM), <https://www.theguardian.com/world/2019/mar/15/christchurch-shooting-new-zealand-suspect-white-supremacist-symbols-weapons> (last visited Nov. 29, 2023); Cade Metz & Adam Satariano, *Facebook Restricts Live Streaming after New Zealand Shooting*, N.Y. TIMES (May

digital terror are not guilty of war crimes because the armed conflict threshold is not met. The attack on the Westgate Shopping Mall in Nairobi, Kenya, by al-Shabaab, a Somali jihadist group that swears allegiance to al-Qaeda, is such an act of violence that utilized a social media platform, but that did not constitute a war crime.<sup>213</sup> During that attack, which lasted between September 21 and September 24, 2013, the group's media wing and other al-Shabaab affiliates used Twitter to live-tweet the assault and directed most of the messages at the general Kenyan population.<sup>214</sup> Despite the group's use of social media, the Westgate attack is better characterized as an isolated terrorist act rather than a NIAC or even one event within a larger NIAC. Consequently, al-Shabaab's acts on social media were not crimes of terror under international law, even where the message was meant to terrorize the general population. Moreover, Kenya's response to the attacks suggests that it did not consider the Westgate attack to be an NIAC.<sup>215</sup>

### III. DIGITAL TERROR CRIMES AS WAR CRIMES

#### *A. Digital Terror Crimes as Crimes of Terror*

When committed within the context of armed conflict, digital terror crimes constitute the war crime of terror. The use of digital

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14, 2019), <https://www.nytimes.com/2019/05/14/technology/facebook-live-violent-content.html> (last visited Nov. 29, 2023).

213. War crimes must occur within the context of armed conflict. John Cerone, *Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law*, 10 SAN DIEGO INT'L L.J. 335, 350 (2009) ("War Crimes are distinguished from ordinary crimes by virtue of their connection to an armed conflict. . ."). Although al-Shabaab was considered to be engaged in a NIAC in neighboring Somalia, at the time of the attack on the Westgate Shopping Mall, al-Shabaab was generally not considered to be engaged in a NIAC in Kenya. See generally Kevin Jon Heller, 'One Hell of a Killing Machine': Signature Strikes and International Law, 11 J. INT'L CRIM. JUST. 89, 111 (2013) (noting a NIAC between al-Shabaab and the Transitional Federal Government of Somalia).

214. David Mair, #Westgate: A Case Study: How al-Shabaab used Twitter During an Ongoing Attack, 40 STUD. IN CONFLICT & TERRORISM 24, 30 (2017); Mark Gollom, *Kenya Attack: Why al-Shabaab Live-Tweeted the Assault*, CBC NEWS (Sept. 24, 2013, 5:02 AM), <https://www.cbc.ca/news/world/kenya-attack-why-al-shabaab-live-tweeted-the-assault-1.1865566> [<https://perma.cc/YDM3-EQ8G>]; *Al-Shabab Showed Gruesome Social Media Savvy During Attack*, CBS NEWS (Sept. 24, 2013, 5:56 PM), <https://www.cbsnews.com/news/al-shabab-showed-gruesome-social-media-savvy-during-attack/> [<https://perma.cc/G93N-UV78>].

215. See Stephen Kingah, *Legal Treatment of Boko Haram Militants Captured by Cameroon*, 26 AFR. J. INT'L & COMPAR. L. 44, 58 (2018) (noting that Kenya did not treat the Westgate attack as part of a NIAC, but instead responded by tightening its Prevention of Terrorism Act).

terror fits the established definition of this crime—acts or threats the primary purpose of which is to spread terror among the civilian population. In many instances, civilians are both the direct subjects and the objects of attack. As the subjects of attack, civilians are directly brutalized by members of terror non-state groups, with that violence captured in videos or photographs. In such instances, civilians are direct victims of violence, an act that may constitute a crime of terror independently. Digital terror crimes utilize these images to make other civilians the object of an attack: The publication and dissemination of brutal images to a civilian population via social media is conducted with the purpose of spreading terror among the civilian population.

The underlying violent act committed against a civilian is the first step in a digital terror crime, and such acts fit within the established jurisprudence of terror. In many instances, the acts of brutality that create content for digital terror crimes are targeting civilian populations committed within a wider military campaign<sup>216</sup> analogous to the terror committed against Bosnian Muslim civilians during the siege of Sarajevo.<sup>217</sup> Moreover, these brutal acts are often public acts, consistent with crimes of terror found at the SCSL.<sup>218</sup> Most significantly, the choreography and documentation of the underlying violent act through video and photographs is indicative of its use for terror. The camera allows these acts of brutality to become public-facing acts committed in furtherance of some public message.

The intent of the actor is the ultimate determinate of a crime of terror, not whether an act or threat resulted in terror among the civilian population. The use of brutality for content creation, the use of choreography, and the documentation of the act of brutality indicate the intent to terrorize. Such acts of content creation using brutality, even without their transformation into a digital terror crime through later processes, are crimes of terror in themselves.

Digital terror crimes often include editing that magnifies the original violent content. In some instances, the terror content creator or a close associate will upload the terror content in an amateur

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216. See, e.g., Al-Werfalli Warrant of Arrest, *supra* note 16, ¶ 10 (noting that, in the context of an armed conflict in Libya, the 33 individuals killed on videos posted to social media appeared to be civilians or persons *hors de combat*); *supra* text accompanying note 81 (documenting acts of violence posted to social media that targeted civilians in the context of an armed conflict in Syria).

217. See *supra* Section II.B.1 (acts specifically targeting civilians during a military campaign).

218. See *supra* text accompanying note 81 (depicting acts of brutality choreographed for a camera); *supra* Sections II.B.2.i (finding terror for public acts of violence in Sierra Leone) and II.B.2.ii (finding terror for acts of brutality intended to carry an inherent public message).

fashion.<sup>219</sup> In other situations, terror non-state actors will rely on their own media operations teams, often individuals physically removed from the location where acts of brutality occurred, to edit the material.<sup>220</sup> These digital terror strategists edit the raw terror content for dramatic effect, incorporating edited fade outs, voicing narration, and sometimes including subtitles translated into other languages.<sup>221</sup> After the original violent content is edited into a digital package, the material is uploaded on a social media platform or a link to an independent website is circulated via social media.<sup>222</sup>

Terror does not require an underlying criminal act to constitute a war crime, an important qualification given the nature of digital terror crimes. The established case law on the crime of terror at the ICTY and SCSL always included underlying “acts” that were crimes in themselves, in addition to constituting a crime of terror. Such underlying criminal acts included murder,<sup>223</sup> mutilation,<sup>224</sup> crimes of sexual violence,<sup>225</sup> and the burning of villages.<sup>226</sup> In those circumstances, the crime of terror was an additional charge, but one that flowed from an underlying criminal act.<sup>227</sup> As an autonomous war crime, the crime of

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219. Nema Milaninia, *Using Mobile Phone Data to Investigate Mass Atrocities and the Human Rights Considerations*, 24 UCLA J. INT’L L. & FOREIGN AFF. 273, 290 (2020) (noting images and video uploaded to social media by direct perpetrators and their close associates).

220. See, e.g., Stephane J. Baele, et al., *Shock and Inspire: Islamic State Propaganda Videos*, in *ISIS PROPAGANDA* 127, 131 (Stephane J. Baele, Katharine A. Boyd, & Travis G. Coan eds., 2020) (“IS propaganda is not solely produced by a single central office, but instead comes from a series of independent yet connected and hierarchically organized offices.”); Wakeford & Smith, *supra* note 46, at 165 (noting that the Islamic State utilized vast and diversified media operations team with a “decentralized network of media offices” spanning multiple geographic regions in order to “protect its media operations from the perils that accompany running an effective media operation in a war zone”).

221. See Wakeford & Smith, *supra* note 46, at 169 (noting a steady output of “skillfully crafted pieces of media” often intended to coincide with attacks and where a small portion of material was translated into English, with the specific goal of English-language content to incite terror).

222. *Id.* at 166; see also Tthesis, *supra* note 10, at 659 (noting that social media messages often include “warnings to those unwilling to join in the ideological and religious mission”); Eleni Polymenopoulou, *A Thousand Ways to Kiss the Earth: Artistic Freedom, Cultural Heritage and Islamic Extremism*, 17 RUTGERS J.L. & RELIGION 39, 47–48 (2015) (noting direct uploads to social media documenting attacks of cultural institutions in Iraq, Mali, and Syria); Milaninia, *supra* note 219, at 290 (noting direct upload of content on social media).

223. Galić Trial Judgement, *supra* note 28, ¶¶ 751–52.

224. Brima Trial Judgement, *supra* note 117, ¶ 1455, 1459.

225. See *supra* note 33.

226. Keith, *supra* note 30, at 826.

227. See, e.g., Oosterveld, *supra* note 33, at 26.

terror need not flow from another criminal act. Any act or threat of violence where the primary purpose is to spread terror among the civilian population may be a crime of terror, regardless of the nature of the underlying act. In the case of digital terror crimes, certain acts may not constitute crimes beyond terror. Digital terror strategists who upload terror content have not necessarily committed an additional crime under international criminal law, but these digital terror strategists have committed the crime of terror.

While the underlying act of terror need not necessarily be criminal, such an “act” must be tied to a military operation. Although Article 13(2) of Additional Protocol II explicitly protects civilians from “acts or threats of violence,” the Commentary to Article 13 of Additional Protocol II indicates that Article 13(2) should be construed to prohibit “acts” that correlate to military operations within a NIAC rather than any “act” that terrifies civilians.<sup>228</sup> The acts of brutality that terror content creators commit against civilians would usually fall under the scope of terror crimes, as those acts are typically committed in newly-claimed territory and occur in the midst of armed conflict. A threshold question for digital terror crimes, however, is whether these intermediate acts of digital manipulation and the ultimate social media upload by digital terror strategists constitute an “act” related to a military operation that falls within the crime of terror. Although there is no case law on the issue, such acts committed by digital terror strategists are likely to have sufficient ties to military operations to constitute acts falling within the crime of terror.<sup>229</sup> Digital terror strategists

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228. The Commentary to Article 13 of Additional Protocol II states that the Article “declares the principle that civilians shall enjoy general protection against the dangers arising from military operations.” MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 778 (2d ed. 2013). The first sentence of Article 13 also states that “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.” Additional Protocol II, *supra* note 20, art. 13(1).

229. For example, in October 2023, the International Committee for the Red Cross (ICRC), the group responsible for overseeing and monitoring the rules of armed conflict, published rules of engagement for civilian hackers who have become involved in armed conflict through digital methods. Noting the increasing number of civilians becoming engaged in armed conflict through digital means, the ICRC published eight international humanitarian law-based rules with which all hackers who carry out operations in the context of an armed conflict must comply. The ICRC specifically stated that terror in the digital context was unlawful, noting the prohibition of specific digital acts such as making threats to spread terror among a civilian population, hacking into communication systems with the primary intent to spread terror, and designing and spreading graphic content to spread terror among civilians in order to compel them to flee. Tilman Rodenhäuser & Mauro Vignati, *8 Rules for “Civilian Hackers” During War, and 4 Obligations for States to Restrain Them*, EJIL: TALK! (Oct. 4,

have weaponized social media to aid their armed forces with attempts to terrorize a civilian population into submission.<sup>230</sup>

More generally, the nexus requirement of war crimes prosecution requires a link between the alleged act of an accused and an armed conflict,<sup>231</sup> but alleged offenses need not occur at the time and place where that armed conflict is occurring.<sup>232</sup> As the Appeals Chamber at the ICTY noted,

The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the act], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.<sup>233</sup>

Moreover, a war crime need not have been planned or supported by some form of policy.<sup>234</sup> Dan Saxon submits that the same indicators are relevant with respect to crimes perpetrated via cyberspace.<sup>235</sup> Evidence that indicates that acts committed via social media

2023), <https://www.ejiltalk.org/8-rules-for-civilian-hackers-during-war-and-4-obligations-for-states-to-restrain-them/> [<https://perma.cc/B3VU-NHRU>]; Joe Tidy, *Rules of Engagement Issued to Hacktivists After Chaos*, BBC NEWS (Oct. 4, 2023), <https://www.bbc.com/news/technology-66998064> [<https://perma.cc/WQ2H-PGLE>].

230. See, e.g., Ogbondah & Agbese, *supra* note 66, at 336–37 (noting the use of social media by non-state actors in order to convey viciousness in order to scare civilians); Mroszczyk & Abrahms, *supra* note 78, at 423 (noting terror media campaigns that communicate through violence in order to instill fear).

231. Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Public Judgement with Confidential Annex: Volume I of II, ¶ 1527 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011); see also Robin Geiss, *Cyber Warfare: Implications for Non-International Armed Conflicts*, 89 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 627, 638–40, 645 (2013) (cautioning against an over-extension of the laws of armed conflict and suggesting that the operative act must pay heed to geographical proximity).

232. Dan Saxon, *Violations of International Humanitarian Law by Non-State Actors during Cyberwarfare: Challenges for Investigators and Prosecutions*, 21 J. CONFLICT & SEC. L. 555, 563 n.43 (2016).

233. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) [hereinafter Kunarac Judgement]; see also Prosecutor v. Semanza, Case No. ICTR-97-20-T, Separate Opinion of Judge Yakov Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, ¶ 14 (Int'l Crim. Trib. for Rwanda May 15, 2003) (stating that nexus factors include whether the act is “closely related to the hostilities” or “committed in conjunction with armed conflict”).

234. See Kunarac Judgement, *supra* note 233, ¶ 58.

235. Saxon, *supra* note 232, at 563.

platforms contribute to the overall military objectives of the non-state group will be particularly relevant.<sup>236</sup> Where cyberspace is used with the intent to deliver attacks against “real world”—as opposed to virtual—targets, the same legal principles under international humanitarian law should apply, including the strict prohibition against terrorization of the civilian population.<sup>237</sup> Consequently, the packaging and distribution of an image or video to social media platforms would likely constitute an “act” falling within the crime of terror.

The crime of terror criminalizes both acts and threats,<sup>238</sup> and the weaponization of social media for digital terror crimes constitutes a threat, the second type of terror crime. At its most straightforward, direct threats to civilians that utilize social media platforms to convey that threat constitute terror crimes where the intent is to still instill fear in a civilian population.<sup>239</sup> In addition, digital acts of terror may serve as tacit “threats” of violence.

Even where the language is not one of a direct threat, non-state terror actors’ use of violent imagery on social media platforms can function as a tacit threat to a civilian population.<sup>240</sup> As the ICTY Appeals Chamber noted in *Galić*, propaganda may constitute a crime of terror, provided that it amounts to a threat and has the effect of spreading terror among the population.<sup>241</sup> The act of terror violence is expressive: the video documentation and choreography of terror crimes indicate the intention to utilize the violence for more than the act itself. Such intent to terrorize would place social media upload within the scope of the crime of terror. In situations where an act of violence itself is an act of terror, the upload and distribution of the violent act on a social media platform constitutes an implicit threat of warning against a civilian population. Individuals from non-state groups that

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236. *Id.*

237. Geiss, *supra* note 231, at 644.

238. See Cassese, *supra* note 132, at 946 (“[T]he prohibited conduct arguably consists of any violent action or threat of such action against civilians or other persons not taking a direct part in armed hostilities . . . .” (emphasis omitted)).

239. See, e.g., Greg Botelho, *ISIS Video Claims Beheading of Russian Spy, Threatens Russian People*, CNN (Dec. 3, 2015, 11:05 AM), <https://www.cnn.com/2015/12/02/middleeast/isis-russian-beheading-claim> [<https://perma.cc/YCB8-7YGL>] (noting video threats made to the Russian people).

240. See *Galić* Appeal Judgement, *supra* note 24, ¶ 102 (noting that the crime of terror “can comprise attacks or threats of attacks”).

241. *Id.* ¶ 102 n.317 (citing 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, Geneva (1974–1977), at 52, 61, 67 (1978)) (“[M]any States referred to ‘propaganda’ as a possible method of terror.”).

use terror content as propaganda meant for local civilians meet this standard.<sup>242</sup>

Terror is a crime conducted with the specific intent of having a psychological effect on a civilian population. Recognizing that acts of digital terror constitute tacit threats acknowledges the ultimate purpose of the crime. As the ICTY *Galić* Appeals Chamber recognized, the ultimate aim of a crime of terror is to cause “extensive trauma and psychological damage.”<sup>243</sup> The goal of the actor is “to keep inhabitants in a constant state of terror.”<sup>244</sup> Digital terror crimes serve the same aim of terrorizing civilians, but their digital form and distribution allow for amplification compared to previous acts found to constitute terror. Digital terror crimes can be enhanced through editing and narration, allowing terror actors to focus their message. Moreover, the recording of the act of brutality and its digital distribution allow for re-traumatization. By recording the act of brutality, terror actors can reuse the videos and images. Upload through social media platforms may allow the targeting of a message at intended audiences, and the upload creates a digital ripple where the image may survive in multiple forms, being saved and shared on personal mobile devices and repeatedly re-surfacing via social media platforms.

Still, even the most gruesome digital terror crimes targeting civilians are not necessarily crimes of terror, even if a terror group documented an act of violence committed against a civilian and then spread it on social media platforms. Regardless of the content of the material, the intent of the message determines whether it is a crime of terror. The video made by members of the Islamic State depicting the murder of American civilian James Foley is one such example where

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242. For example, after the forced conversion of Yazidi men to Islam, members of the Islamic State provided videos to relatives of the “converted” Yazidi practicing Islam to encourage fellow Yazidi to convert. Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, “They Came to Destroy”: ISIS Crimes Against the Yazidis, ¶¶ 33, 39, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016); see also Nick Cumming-Bruce, *ISIS Committed Genocide Against Yazidis in Syria and Iraq*, U.N. Panel Says, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/middleeast/isis-genocide-yazidi-un.html> (last visited Nov. 29, 2023); Leila Molana-Allen, ‘I Have No Future Here:’ Yazidis Struggle to Rebuild Their Lives Despite ISIS Retreat, PBS NEWSHOUR (July 17, 2021, 4:35 PM), <https://www.pbs.org/newshour/show/i-have-no-future-here-yazidis-struggle-to-rebuild-their-lives-despite-isis-retreat> [<https://perma.cc/GDP2-V9VA>]. Other examples of extreme violent content may constitute terror propaganda if aimed at the civilian population. See, e.g., Selim Algar, ‘This is Our Ball’: Iraqi Jihadis Cut Off Head for World Cup Tweet, N.Y. POST (June 13, 2014), <https://nypost.com/2014/06/13/iraqi-jihadists-joke-about-using-severed-head-as-soccer-ball/> [<https://perma.cc/GZ3K-X46Y>] (showing terror violence tied to the World Cup).

243. See *Galić* Appeal Judgement, *supra* note 24, ¶ 102 (internal quotations omitted).

244. *Id.* (internal quotations omitted).



the language in the video suggests that its intended aim was to influence American foreign policy rather than to terrify civilians.<sup>245</sup> Although actions may have more than one purpose and only one such aim must be to instill terror in the civilian population to constitute a crime of terror, direct appeals to policymakers suggest an absence of a primary purpose to terrify civilians, regardless of content. While such messaging does not foreclose the possibility of a second primary purpose to terrorize the civilian population, proving intent to terrorize civilians is more challenging without additional corroborating evidence.

### *B. Conceptualizing Criminal Liability for Digital Terror Crimes*

International criminal law punishes individuals responsible for international crimes, a principle established at Nuremberg and later reaffirmed at ad hoc international criminal tribunals and the ICC.<sup>246</sup> Therefore, criminal responsibility attaches to the individuals who have engaged in specific acts of terror rather than the non-state terror groups generally. A threshold question for liability, however, is the forum for individual prosecution. As previously noted, the ICC's Statute does not extend to the war crime of terror. Absent an amendment of Article 8 governing war crimes under the Rome Statute, the crime of terror cannot be charged at the ICC. Moreover, the ICC's jurisdiction is limited to crimes committed on the territory or perpetrated by a national of a State Party to the Rome Statute, absent a Security Council referral or a nation's ad hoc acceptance of jurisdiction.<sup>247</sup> Consequently, many

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245. In the video, members of the Islamic State specifically addressed the video to "you Obama" and suggested that foreign policy decisions that "deny the Muslims their rights of living in safety under the Islamic caliphate will result in the bloodshed of [American] people." *James Foley: Islamic State Militants 'Behead Reporter,'* BBC NEWS (Aug. 20, 2014), <https://www.bbc.com/news/world-middle-east-28862268> [<https://perma.cc/4Z64-KSSW>] (internal quotations omitted).

246. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG: 14 NOVEMBER 1945–1 OCTOBER 1946, at 223 (1947) (containing the famous statement by the Nuremberg Tribunal that "[c]rimes against international law are committed by men, not by abstract entities . . ."); S.C. Res. 827, ¶ 2 (May 25, 1993) (establishing individual criminal liability at the ICTY); S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing individual criminal liability at the ICTR); Rome Statute of the International Criminal Court, arts. 1, 25, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (establishing individual criminal liability at the ICC); *see also* Hamilton, *supra* note 37, at 1370 (noting that "legal, political, and practical constraints of that moment led the Nuremberg Tribunal to pursue individuals at the expense of entities").

247. Rome Statute, *supra* note 246, arts. 12–13 (providing for the exercise of jurisdiction where crimes occur on the territory of a State Party to the Rome Statute or are perpetrated by

terror crimes would fall outside ICC jurisdiction even if terror were included as a war crime.<sup>248</sup> Ad hoc tribunals, ad hoc hybrid courts, and internationalized domestic chambers that attach liability for crimes belonging to customary international law remain potential justice mechanisms.<sup>249</sup>

In the context of digital terror crimes, there are multiple actors who could be criminally liable for these acts of terror within the context of armed conflict. There are those who engaged in physical acts of brutality or filmed such acts (the terror content creators), those individuals who edited and packaged content or first uploaded it to social media (the digital terror strategists), and those individuals who then re-shared uploaded terror material (the digital terror amplifiers). In addition, liability could attach to individuals in positions of political and military leadership who developed and approved the use of digital terror strategy.

Given the requirement of extensive resources to investigate and prosecute serious violations of international humanitarian law and the limited capacity to hold offenders accountable, Dan Saxon suggests that any international prosecution of crimes committed in cyberspace should follow the same considerations utilized by past international tribunals, including weighing such factors as the severity of the crimes committed, the number of victims, the scope of destruction, and the role of the person under investigation, including his or her position in political or military leadership.<sup>250</sup> For example, in the case of non-state terror groups, the utilization of prosecution resources at the

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the national of a State Party, where a state accepts the court's jurisdiction for the crime in question, or through U.N. Security Council referral).

248. For example, Syria and Iraq are not parties to the Rome Statute and the ICC does not have jurisdiction over crimes committed there absent U.N. Security Council referral or a decision by the nation to avail itself of ICC jurisdiction. See, e.g., Cody Corliss, *Prosecuting Members of ISIS for the Destruction of Cultural Property*, 45 FLA. ST. U. L. REV. 183, 218 (2017) (examining jurisdictional challenges to prosecuting war crimes committed in Syria and Iraq by members of the Islamic State); Johnson, *supra* note 34, at 513–14 (evaluating the limits of jurisdiction over Islamic State crimes in Iraq and Syria and advocating the creation of an *ad hoc* tribunal to try Islamic State crimes).

249. See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003) (describing the use of domestic-international courts that blend international and domestic law to be used in situations where no politically viable full-fledged international tribunal exists); Johnson, *supra* note 34, at 513–14 (advocating the creation of an *ad hoc* tribunal to try Islamic State crimes); Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237, 244–46 (2013) (discussing internationalized domestic chambers trying piracy cases).

250. Saxon, *supra* note 232, at 564.

international level is best directed at key terror content creators and digital terror strategists rather than lower-level facilitators.<sup>251</sup>

### 1. Liability for Leadership

Liability for the commission of digital terror crimes would likely apply to the leadership of non-state terror actors under an extended form of joint criminal enterprise (JCE) liability utilized at the hybrid courts and international ad hoc tribunals or, assuming jurisdiction could be established, under a theory of indirect co-perpetration utilized at the ICC. These two theories of international criminal liability would allow military and political leadership to be criminally charged for the commission of digital terror crimes where such crimes were perpetrated by subordinates who shared a common criminal plan or purpose of using social media to perpetuate terror.<sup>252</sup> Convictions for the crime of terror have previously been entered against political and military leaders under this mode of liability at the ICTY and the SCSL.<sup>253</sup> In addition, liability could attach for the accessory modalities of planning or organizing such crimes, two accessory modes of liability that form part of customary international law.<sup>254</sup>

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251. *Id.*

252. THOMAS WEATHERALL, DUALITY OF RESPONSIBILITY IN INTERNATIONAL LAW 137–38 (2022). The elements of indirect co-perpetration include the same three elements of co-perpetration, in addition to a principal control over an organization, an organized and hierarchical apparatus of power that enables a principal to commit crimes through subordinates, and an apparatus that enables the principal to execute the crime through automatic compliance. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 500–18 (Sept. 30, 2008). The extended form of JCE requires the baseline JCE requirements, in addition to requiring that (1) it was reasonably foreseeable that terror crimes would be committed by other members of a JCE and (2) a member of leadership willingly took that risk by continuing to participate in the common criminal plan or purpose. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Tadić Appeal Judgement]; see WEATHERALL, *supra* note 252, at 139–40 (noting that JCE has been utilized at the ICTY, ICTR, SCSL, Special Tribunal for Lebanon, and Extraordinary Chambers in the Courts of Cambodia).

253. See, e.g., Brima Trial Judgement, *supra* note 117 (terror conviction at the SCSL of a member of the Armed Forces Revolutionary Council which successfully staged a coup that ousted Sierra Leonean president Ahmad Tejan Kabbah); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (terror conviction at the ICTY of the President of the Republika Srpska).

254. WEATHERALL, *supra* note 252, at 143–46; see Taylor Trial Judgement, *supra* note 33, ¶¶ 469 n.1104, 474 n.1115.

## 2. Terror Content Creators

Terror content creators who have committed violence choreographed for a camera would be guilty of terror as direct perpetrators,<sup>255</sup> following the reasoning that SCSL Chambers used in entering terror convictions.<sup>256</sup> Such choreographed violence indicates an intent to convey a public message, particularly where the targets of such violence were civilians. Those individuals who assisted in terror content creation with the same criminal intent (such as videographers) would also be liable under international law for the commission of the crime of terror under the theories of JCE or co-perpetration.<sup>257</sup>

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255. Direct perpetration provides criminal liability for the direct commission of crimes in *ad hoc* international criminal tribunals and the ICC. See, e.g., Tadić Appeal Judgement, *supra* note 252, ¶ 188; see Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶¶ 1381–83 (Mar. 7, 2014) (explaining the mode of individual criminal responsibility under Art. 25(3) where “that person ‘commits’ the crime”).

256. See *supra* Section II.B.2.

257. Hybrid courts and *ad hoc* international criminal tribunals have used a form of liability for collectively committed crimes known as JCE. Under the most basic form of JCE, commission liability attaches under the following conditions: (1) a plurality of persons, (2) the existence of a common criminal plan, purpose, or design, where (3) an accused participated in the common plan to perpetuate the crime. In addition, specific intent crimes such as terror must be shown to share the specific intent to commit the crime. See Taylor Trial Judgement, *supra* note 33, ¶ 465; Tadić Appeal Judgement, *supra* note 252, ¶¶ 227–28 (regarding the elements of JCE generally); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgement, ¶ 110 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (concluding that participants in the basic form of JCE must share the specific intent of the principal perpetrators).

The ICC uses a different form of liability for joint commission crimes called co-perpetration, which similarly reflects the understanding that individuals typically commit international crimes with others. Article 25(3)(a) of the Rome Statute of the ICC provides for criminal liability where an accused “commits such a crime . . . jointly with another.” The general requirements of co-perpetration include two or more persons, the existence of a common plan, and the provision by the accused of an essential contribution to the common plan in essential fulfillment of the material elements of the crime. Rome Statute, *supra* note 246, art. 25(3)(a); WEATHERALL, *supra* note 252, at 135–37. For digital terror crimes, the recording of the act of brutality would constitute an essential contribution to terror.

Liability would attach for digital terror crimes as crimes of commission under either theory to those collectively involved in terror content creation. Although the Rome Statute does not presently provide for the war crime of terror to be charged at the ICC, the liability theory of co-perpetration would be fairly straightforward where the operation of cameras and coordination of violence suggest that all terror content creators shared the plan to terrorize through the creation of a public act of brutality.

### 3. Digital Terror Strategists

Digital terror strategists would similarly be liable for the commission of terror, regardless of whether their packaging of digital terror content and their uploading it to a digital platform constitutes an act or a threat of violence with the intent to spread terror among a civilian population. Such digital terror strategists would constitute direct perpetrators for their acts or for their tacit terror threats. Moreover, joint liability theories of JCE or co-perpetration could apply as a mode of commission where digital terror strategists share the same intent as terror content creators. The editing and upload of the material to social media platforms by digital terror strategists would constitute an essential element of digital terror.

### 4. Digital Terror Amplifiers

Criminal liability under international criminal law seems unlikely for individual digital terror amplifiers who subsequently re-share previously uploaded terror material on social media. International criminal law attaches criminal liability for the aiding and abetting of international crimes, but digital terror amplifiers would still need to act with the requisite *mens rea* of terrorizing a civilian population.<sup>258</sup> Although there is limited case law addressing the aiding and abetting of a crime after its commission by the principal actors, the *Blagojević* Trial Chamber at the ICTY found that aiding and abetting after the commission of the initial crime requires a prior agreement between the principal and one who aids or abets the commission of the

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258. Although the crime of terror is not currently available as a war crime at the ICC, the Rome Statute would allow a charge of aiding and abetting if an individual performed the material element of the crime (here, the digital amplification) “[f]or the purpose of facilitating the commission of such a crime” (in this case, instilling fear in a civilian population). Rome Statute, *supra* note 246, art. 25(3)(c); WEATHERALL, *supra* note 252, at 152. The tribunals and hybrid courts have found that the acts specifically directed to assist must have a “substantial effect” on the principal crime which is performed with the requisite *mens rea* to assist in the commission of the crime, although specific intent crimes may require the same specific intent (terrorizing a civilian population) as the principal perpetrator. *See* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgement, ¶ 52 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) (finding that in order to aid and abet the specific intent crime of persecution, the aider and abettor must be aware of both the crime that he is facilitating and the specific intent of the principal perpetrators); Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1615 (2019) (suggesting that the requisite *mens rea* for aiding and abetting remains unsettled under international criminal law).

crime.<sup>259</sup> Such an agreement is unlikely under the circumstances, thereby seeming to preclude aiding and abetting as a mode of liability under international law for digital terror amplifiers.

Lower-level facilitators who act as digital terror amplifiers may have committed criminal acts, and in such cases, domestic laws in individual countries may offer a better course for prosecutions of such crimes.<sup>260</sup> Prosecution in some national jurisdictions for sharing terror content remains a viable alternative that has already resulted in convictions.<sup>261</sup> Unfortunately, a strategy of domestic prosecution for such actors is likely to result in a significant enforcement gap. Perpetrators who reside in nations with few resources to devote to prosecuting cyber-related crimes—and particularly those who reside in nations immersed or emerging from conflict—are more likely to avoid prosecution.<sup>262</sup>

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259. Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgement, ¶ 731 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) (“It is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime.”).

260. See Tsesis, *supra* note 10, at 675–84 (noting laws in various nations which criminalize such acts as terrorist incitement, purposeful distribution of terrorist publications, and purposeful provision of services that enable the viewing of terror materials).

261. See, e.g., *Luton Man Sent Islamic State Execution Videos to Undercover Officer*, BBC (Sept. 1, 2021), <https://www.bbc.com/news/uk-england-beds-bucks-herts-58415468> [<https://perma.cc/84SB-6UFG>] (regarding the conviction and seven-year sentence of a British man for sharing graphic execution content from the Islamic State using Facebook and Telegram); David Francis, *German Jihadist Gets Two Years in Jail for Posing with Severed Heads*, FOREIGN POL'Y (July 12, 2016, 4:42 PM), <https://foreignpolicy.com/2016/07/12/german-jihadist-gets-two-years-in-jail-for-posing-with-severed-heads/> [<https://perma.cc/PE9A-4HX9>] (“[A]ccused posed with the dismembered heads and let himself be photographed three times, so as to mock and belittle the deceased, whom he considered ‘dishonourable infidels.’”); *Sweden Charges Syrian Asylum-Seeker with War Crimes*, ASSOCIATED PRESS (Sept. 14, 2017, 7:31 AM), <https://apnews.com/article/177e3494d8354604afbc55df9e9cf61d> [<https://perma.cc/NSS6-MLU3>] (charging a Syrian military member for posing with the dead and combatants for photographs where, according to prosecutors, the accused “knew the photos were intended as propaganda”).

262. See, e.g., Alexandra Perloff-Giles, Note, *Transnational Cyber Offenses: Overcoming Jurisdictional Challenges*, 43 YALE J. INT'L L. 191, 207 (2018) (noting that certain nations lack the expertise and resources to adequately investigate and prosecute cyber-based crimes); Cody Corliss, *Human Trafficking as “Modern Slavery”: The Trouble with Trafficking as Enslavement in International Law*, 71 S.C. L. REV. 603, 629 (2020) (recognizing the limited judicial resources of nations immersed in or emerging from conflict); Cody Corliss, *Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa’s Cradock Four Case*, 21 MICH. ST. INT'L L. REV. 273, 282–83 (2013) (exploring alternative justice models where nations have limited resources to investigate and prosecute crime).

The recent prosecution of Islamic State terror narrator Mohamed Khalifa in the United States offers an example of how domestic prosecution could complement international criminal law. The United States used 18 U.S.C. § 2339B, a statute that criminalizes providing material support to a foreign terrorist organization resulting in death, to prosecute terror propagandist Khalifa.<sup>263</sup> Following his capture by the Syrian Democratic Forces in January 2019, Khalifa was brought to the United States to face charges under 18 U.S.C. § 2339B, related most prominently to his role as the “voice behind the violence” of various Islamic State terror propaganda videos.<sup>264</sup> After Khalifa swore allegiance to the Islamic State, the Islamic State recruited Khalifa for its media department in part because of his fluency in English and Arabic.<sup>265</sup> In this role, Khalifa ultimately led the Islamic State’s English Media section and narrated many of the group’s English language videos which depicted graphically violent content directed at Western audiences.<sup>266</sup> Although Khalifa once claimed that he was “just the voice” and played no role in the actual violence committed by members of the Islamic State,<sup>267</sup> he pleaded guilty to 18 U.S.C. § 2339B and received a life sentence for his role in narrating various Islamic State terror propaganda videos and executing a Syrian soldier on video.<sup>268</sup>

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263. Judgment in a Criminal Case at 1–2, *United States v. Khalifa*, No. 1:21-cr-00271 (E.D. Va. July 29, 2022), ECF No. 52 (adjudicating guilt and a life sentence following the defendant’s guilty plea for conspiracy to provide material support to a foreign terrorist organization resulting in death, an offense under 18 U.S.C. § 2339B).

264. Adam Goldman, *Canadian Man Who Narrated ISIS Videos Flown to U.S. to Face Terrorism Charges*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/us/politics/isis-mohammed-khalifa-terrorism.html> (last visited Nov. 29, 2023); Affidavit in Support of a Criminal Complaint at 23, *United States v. Khalifa*, No. 1:21-cr-00271 (E.D. Va. Feb. 5, 2021), ECF No. 2 (regarding Khalifa’s capture by Syrian Democratic Forces on January 13, 2019).

265. Affidavit in Support of a Criminal Complaint, *supra* note 264, at 23 (regarding Khalifa’s capture by Syrian Democratic Forces on January 13, 2019).

266. *Id.* at 10; Statement of Facts at 3–7, *United States v. Khalifa*, No. 1:21-cr-00271 (E.D. Va. Dec. 10, 2021), ECF No. 37; Goldman, *supra* note 264.

267. Rukmini Callimachi, *The English Voice of ISIS Comes Out of the Shadows*, N.Y. TIMES (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/world/middleeast/isis-islamic-state-narrator.html> (last visited Nov. 29, 2023).

268. Statement of Facts, *United States v. Khalifa*, ECF No. 37, *supra* note 266, at 7–8; Judgment in a Criminal Case, *United States v. Khalifa*, ECF No. 52, *supra* note 263, at 1–2.

## CONCLUSION

Just as social media has altered many aspects of modern life, it has changed the weapons of war. Material posted on social media platforms has become an additional way to terrorize. Crimes of terror are no longer necessarily committed before civilian audiences. Instead, these crimes are committed before cameras, edited, and then shared on digital domains. Where the civilian population is the targeted recipient, the distribution of acts or threats of violence represents a new method to instill terror in civilians.

Unquestionably the biggest impediment to prosecuting digital terror crimes as an international crime is that terror is presently a war crime without a clear forum for prosecution. The ICC, the most logical forum to prosecute the crime of terror, does not have jurisdiction over the crime. The establishment of the ICC was once envisioned to foreclose future needs for other international criminal justice mechanisms, but resource and jurisdictional constraints have limited the ICC's caseload well below the threshold that global justice demands.<sup>269</sup> In recent years when the international community has required global justice avenues beyond the ICC, it has responded with investigative and evidence-collection bodies, ad hoc hybrid courts, and internationalized domestic chambers.<sup>270</sup> Absent an amendment to the Rome Statute that allows for the prosecution of the war crime of terror at the ICC, any future prosecutions for digital terror crimes will come from such international bodies and national courts.

The first step to bringing such prosecutions, however, is an understanding of the crime of terror and a recognition that digital terror crimes constitute acts or threats of violence intended to instill terror in a civilian population. The crime of terror has been largely dormant in international prosecution, but the use of social media platforms by non-state terror groups offers an opportunity for its resurrection. Non-state terror actors have embraced social media and recognized its importance in spreading terror. It is incumbent upon the international community to respond in kind.

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269. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 *DENV. J. INT'L L. & POL'Y* 169, 171–72 (2016).

270. Sterio, *supra* note 249, at 246; Michael Scharf & Laura Graham, *Bridging the Divide Between the ICC and UN Security Council*, 52 *GEO. J. INT'L L.* 977, 1010 (2021) (“[I]nvestigative mechanisms such as the IIM and IIMM are the current political reality for countries torn apart by armed conflict”).