Chapter 3
Terror, Terrorizing, Terrorism: Instilling Fear as a Crime in the Cases of Radovan Karadzic and Charles Taylor

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International criminal tribunals are not for ordinary crimes. The law has found expressions like 'persecution against any identifiable group', 'inhumane acts intentionally causing great suffering', and 'destruction of part of a population' to describe the nature of such crimes. Lately, a more emotive term, with a politically chequered history, has been added to this vocabulary. As will be detailed below, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) have convicted suspects of 'spreading terror' or 'acts of terrorism'.

This chapter will zoom in on two high-profile trials, that of Radovan Karadzic before the ICTY and that of Charles Taylor before the SCSL, to demonstrate how the prosecution uses and the defence contests, how the judges grapple with, and how war-affected elite observers understand, the introduction of 'terror' and 'terrorism' into the courtroom. The intention is not to determine whether or under what conditions terror should be an international crime, but rather to relate its introduction to changing legal understandings of what war is, in what ways it violates the law, and what the consequences of these changing legal understandings are.

These two cases lend themselves particularly well to such an examination. Charles Taylor is only the second former head of state on trial before an international tribunal, after the 5-year trial of Slobodan Milosevic, which ended without a verdict when he died in 2006. Radovan Karadzic on the other hand has also been a head of state of sorts, although not recognized as such by most other states, and is easily the most high-profile defendant after the death of Milosevic. Both cases raise questions, which I discuss more extensively elsewhere (Glasius and Meijers 2012; Meijers and Glasius 2013) about the relation between individual and collective responsibility and about the problem a charismatic defendant causes for international criminal courts. More specifically, both have been charged with acts designated as acts of terror, and both have mounted a spirited political defence against the charges relating to 'terror' and 'terrorism'.

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The chapter will first discuss the codification of the crime of terror in international humanitarian law and the trajectory of its use in cases before the ICTY and SCSL. It will then go on to discuss the Karadzic case: the charge of 'crimes of terror' against him, the prosecutor's narrative about what constitutes these crimes of terror, and the defence narrative about who were the real terrorists in this case. These narratives are established on the basis of an extensive discourse analysis of the trial transcripts.[1] The Taylor case is then treated in the same manner: discussion of the charges, the prosecution and defence narratives[2] but with an additional section on Liberian elite responses to the notions of 'terror' and 'terrorism' in the context of the Taylor trial based on fieldwork,[3] and a final section on the verdict in the Taylor case (now confirmed on appeal). The penultimate section will analyse the usages of 'terror' and 'terrorism' by different actors in relation to more general changes in the ways war and war crimes are perceived and constructed by lawyers, academics, and policymakers. The conclusion will sum up the argument and points at possible further trajectories of the crime of terror.

Terror and Terrorism in International Law

Codification in Treaties

In contemporary contexts, the notion of 'terrorism' commonly evokes the image of a bomb going off in an otherwise peaceful location frequented by ordinary citizens. The 'crime of terror' under discussion here however has derived from prohibitions under international humanitarian law, and hence presupposes a 'time of war'. The Fourth Geneva Convention of 1949, which deals with protection of civilians, prohibits 'all measures of intimidation or of terrorism',[4] hinting already that this use of 'terrorism' has something to do with intimidating civilians, but not being specific at all. The 1977 Additional Protocols to the Geneva Conventions give a more precise definition: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'[5]

The diplomatic discussions on these provisions at the time of their drafting[6] show that some delegates would have preferred a 'results-based' definition, articulated either as 'acts capable of spreading terror' or with a more solid focus on the actual infliction of terror on a civilian population, arguing that intent is difficult to establish

[1] For a more comprehensive analysis of the trial transcripts, see Meijers and Glasius 2013.

[2] For a more comprehensive analysis of the trial transcripts, see Glasius and Meijers 2012.

[3] Undertaken in Monrovia, Liberia between 16 and 27 May 2011.

[4] Article 33, Fourth Geneva Convention (1949).

[5] This prohibition, in identical wording, is contained in the First Additional Protocol, which deals with international wars, in Art. 51(2) and in the Second Additional Protocol, which deals with civil wars, in Art. 13(2).

[6] Travaux Préparatoires, Additional Protocols, Vol. III, 203–206; Vol. XIV, 53–55, 73.

with objectivity. However, the majority resisted such proposals, and they were not reflected in the final text of the provision. As the French delegate put it, 'In traditional war attacks could not fail to spread terror among the civilian population: what should be prohibited [. . .] was the intention to do so.'[7]

Since these Protocols have been very widely ratified, the prohibition of the use of 'terror' in this sense in war situations is not contested. However, as will be seen below, not everyone agrees that what is a prohibition on warring parties is also necessarily an international *crime* for which individuals can be punished.

Terror at the Yugoslavia Tribunal

The Statute for the ICTY does not contain an explicit crime of terror or terrorism. While common perceptions of the Yugoslav wars would probably endorse that 'terror' in the meaning of the Additional Protocol was one of their constant and defining characteristics, few suspects have been charged with the crime of terror. The first was Stanislav Galic, Major General of the Bosnian Serb Army's Sarajevo corps and responsible in this capacity for the shelling and sniping of Sarajevo. His indictment in 1999 had as its first charge 'infliction of terror',[8] as a violation of the Additional Protocol, but the Trial Chamber decided that what was intended was 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' and convicted him accordingly in 2003.[9]

On appeal, the Galic defence held that his intent to spread terror had not been proven and also that the Trial Chamber should not have changed the charge from 'infliction' to 'acts or threats', etc. The Appeals Chamber however decided that actual infliction of terror, although proven in this case, was not required. The majority opinion sought to establish that 'terror' is not just prohibited to warring parties; it can also constitute an individual crime. It argued that 'numerous states', including Norway, Ireland, the Czech and Slovak Republics, Cote d'Ívoire and Ethiopia, and, last but not least, Yugoslavia, had criminalized terror against civilians and that a Croatian domestic court had already convicted someone on such a charge. It further clarified that while 'extensive trauma and psychological damage form part of the acts or threats of violence', the 'actual terrorisation of the civilian population is not an element of the crime' of terrorism, i.e. it is not necessary to establish actual terrorisation.[10]

In terms of fact, the verdict determined that the shelling and sniping of Sarajevo constituted 'attacks [which] were designed to keep the inhabitants in a constant

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[7] Travaux Préparatoires, Vol. XIV, 65.

[8] International Criminal Tribunal for the former Yugoslavia, *Indictment*, The Prosecutor of the Tribunal against Stanislav Galic, 26 March 1999.

[9] International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Judgement and Opinion*, Prosecutor vs. Stanislav Galic, 5 December 2003, esp. Para. 72, 76, 94, 101, 132.

[10] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Judgement*, Prosecutor vs. Stanislav Galic, 30 November 2006, Para. 102; 104.

state of terror', which, beyond the direct physical victims, caused 'extensive trauma and psychological damage' to the civilian population at large. The intent to spread terror could be inferred from the nature, manner, timing, and duration of the attacks, which had neither military purpose nor the intent to wipe out the population. Instead, the majority of the judges held, the message was that no Sarajevan could be safe anywhere, which was intended to cause a state of extreme fear (ibid. Para. 107).

One judge, Wolfgang Schomburg, gave a dissenting judgment. He was not convinced that terror has been 'penalized beyond any doubt in international customary law', arguing that not 'numerous' but only a few states had in fact criminalized terror, and half of these, including Yugoslavia, failed to explicitly reference the Additional Protocols. Moreover, the fact that no crime of terror has been included in the Rome Statute in 1998 to him constituted strong proof that it is not state practice to consider spreading terror as criminal. Hence, it could only be considered as an aggravating factor to existing crimes.

Schomburg held that 'it would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes—thus highly politicizing its function—where the conduct in question was not without any doubt penalized at the time when it took place'.[11] He also makes clear, however, that he is convinced of the desirability of criminalizing terror in future. Another judge, Mohamed Shahabuddeen, gives an opinion that is not dissenting but 'separate', stating that the 'core' of the crime of terror is known in customary law, even though a more comprehensive definition, relating to state terrorism or terrorist acts by national liberation movements, remains contested.[12]

A second person indicted for terror was Dragomir Milosevic, Galic' Chief of Staff. In his defence, Milosevic argued that his intent, i.e. the primary purpose of the attacks being to spread terror, cannot be read off from witness statements about the actual terror experienced. He also argues a lack of clarity as to who is supposed to be the victim in this crime, i.e. the entire civilian population of Sarajevo or only people physically affected? The Appeals Chamber, however, followed the Galic judgement and also convicted Milosevic for acts or threats of violence that wilfully made the civilian populations their object, with the primary purpose of spreading terror. It made clear how terror was different from indiscriminate attack: terror requires intent, and indiscriminate attack requires injuries.[13] Hence, a suspect can be cumulatively charged for both, or could in principle be punished for terror without there being physical harm to civilians.

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[11] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Separate and Partially Dissenting Opinion of Judge Schomburg*, Prosecutor vs. Stanislav Galic, 30 November 2006, esp. Para. 2, 22.

[12] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Separate Opinion of Judge Shahabuddeen*, Prosecutor vs. Stanislav Galic, 30 November 2006, esp. Para. 3–5.

[13] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Judgement,* Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 39.

Again, one judge dissents: following Schomburg, judge Liu Daqun holds that terror is not a crime under customary law. He exhorts the Tribunal to 'not convict out of disgust but out of evidence', and finds the determination of a 'primary purpose' of the crime arbitrary and impossible to make with any certainty.[14] Nonetheless, Liu Daqun too recognizes a 'gap' in international criminal law relating to the 'infliction of severe psychological scars', which he would like to see criminalized in customary law or by treaty. For him, this would be an already unlawful act, coupled with a specific intent to spread terror, and resulting in severe trauma. He would like to see this crime of 'terror' distinguished from 'terrorism'.[15]

Apart from the indictment against Ratko Mladic, which is less far advanced than that of Radovan Karadzic, there is another case in which 'terror' has been charged. This case, Prlic et al., is the only case where the 'terror' charge does not relate to Sarajevo but to Mostar. In this case, quite differently from the Sarajevo case, it is the expulsion of civilians into East Mostar which is deemed to have been intended to spread terror.[16] This charge is unusual, because it has not been made in the Tribunal's many other cases that featured populations being forcibly moved. At the time of writing, the Trial Chamber has judged the defendants to be guilty of unlawful infliction of terror on civilians, and the defendants have appealed.

Terrorism at the Special Court for Sierra Leone

Unlike the Yugoslavia Tribunal, the Statute of the SCSL, dated 16 January 2002, actually contains a reference to 'acts of terrorism' as a serious violation of international law for which people can be prosecuted.[17] Indeed, the first indictments against three of the protagonists in the Sierra Leone civil war, Foday Sankoh, Johnny Paul Koroma, and Sam Bockarie, all charged the defendants with acts of terrorism. It did so by alleging that most of the other crimes charged were part of a 'campaign of terror and punishment', and as such were also separately punishable.[18] However, all three suspects died before a verdict could be rendered.

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[14] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Partly Dissenting Opinion of Judge Liu Daqun*, Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 5.

[15] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Partly Dissenting Opinion of Judge Liu Daqun*, Prosecutor v. Dragomir Milošević, 12 November 2009, Para. 23–29.

[16] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic, *Second Amended Indictment*, 11 June 2008, Count 25; Trial Transcript (Prosecution Closing Statement), 9 February 2011, p. 52073, 52076, 52079.

[17] Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 3(d).

[18] Special Court for Sierra Leone, Prosecutor against Foday Saybana Sankoh also known as Popay also known as Papa also known as Pa, *Indictment*, 7 March 2003, Count 1; Special Court for Sierra Leone, Prosecutor against Sam Bockarie also known as Mosquito also known as Maskita, *Indictment*, 7 March 2003, Count 1; Special Court for Sierra Leone, Prosecutor against Johnny Paul Koroma also known as JPK, Indictment, 7 March 2003, Count 1.

In the first case to come to a verdict, in early 2008, against members of the rebel group Armed Forces Revolutionary Council (AFRC), the Trial Chamber relies on the Galic verdict to establish that 'acts of terrorism' are to be understood as 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', that they are a crime under customary law, and contain the specific elements of an act or threat, wilfully making civilians its object, with the specific intent of spreading terror.[19] It then goes on to decide that the unlawful killings, sexual violence, and physical violence that had been proven all also constituted a campaign to terrorize the population and hence are an 'act of terrorism'. The use of child soldiers and forced labour, however, can be inferred to have military purposes, whereas sexual enslavement 'was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual needs and to fulfil other conjugal needs'.[20] Thus, it decides that 'the three enslavement crimes' can have other purposes than spreading terror and are not therefore acts of terrorism.[21]

In the second, Civil Defence Force (CDF) case, the Trial Chamber and subsequently the Appeals Chamber did not convict the accused of acts of terrorism, arguing that the spreading of terror has to be specifically intended, not just accepted as a likely side effect of certain acts.[22] In a legal finding relevant to the subsequent Taylor case, it finds that burning of houses, which is not in itself a war crime, can be an 'act of terrorism' if the intent to cause extreme fear is proven (ibid. 117–118; Para. 359).

In the third case, against members of the Revolutionary United Front (RUF), acts of terrorism are again charged, and do lead to convictions. Moreover, sexual enslavement can in some instances be considered an act of terrorism when it is 'not intended merely for personal satisfaction or a means of sexual gratification for the fighter', but rather the 'savage nature of such conduct against the most vulnerable members of the society demonstrates that these acts were committed with the specific intent of spreading fear amongst civilian population as a whole'.[23] The Trial Chamber and Appeals Chamber again rely on Galic, but have a further elaboration. Again in relation to sexual crimes, they find that the intent to spread terror need not be found with the implementers of the acts in question, as long as it is with those (the accused) who gave the orders.[24]

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[19] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement,* 20 June 2007, Para. 665–666.

[20] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement*, 20 June 2007, Para. 1459.

[21] Special Court for Sierra Leone, Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Chamber, *Judgement*, 20 June 2007, Para. 1450, 1454, 1459.

[22] Special Court for Sierra Leone, Prosecutor against Moinina Fofana and Allieu Kondewa, Appeals Chamber, *Judgement*, 28 May 2008, p. 119, Para. 365.

[23] Special Court for Sierra Leone, Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Trial Chamber, *Judgement*, 25 February 2009, Para. 1346–1352; also 1493.

[24] Special Court for Sierra Leone, Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Appeals Chamber, *Judgement*, 26 October 2009, Para. 1102.

The Karadzic Case

Charges

During the long period in which Karadzic was wanted, but at large, the indictment against him was amended several times. The first indictment in 1995 alleged that Karadzic had 'terrorized the civilian population' with the sniping campaign in Sarajevo, but did not designate this as a separate crime.[25] The 2000 indictment, does include a count of 'unlawfully inflicting terror upon civilians', with a reference to the Geneva Protocols.[26] The third and final indictment, which followed Karadzic's arrest in 2008, follows the language of the Galic verdict:

> Between April 1992 and November 1995, Radovan KARADZIC participated in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population. This objective involved the commission of the crimes of terror, unlawful attacks on civilians, and murder charged in this indictment.[27]

Although in their speeches, the prosecutors occasionally apply the word 'terror' in reference to forced expulsion, internment in camps, and other crimes against the non-Serb population, the charge of the crime of terror is exclusively reserved for the siege of Sarajevo, as it had been in other cases before Prlic.

The Prosecution's Narrative

In their questioning of witnesses, the prosecutors cover some actual incidents of sniping and shelling in detail. In their own speeches in court, they especially devote attention to describing the 'atmosphere of terror'[28] that engulfed the city:

> What is revealed is his primary purpose . . . the terrorisation of an entire civilian population. I want to pause for a moment and talk about the extent of the success of that objective in the daily life of Sarajevans because that bears some focus at this moment. Because his campaign succeeded in its objective, terror was the only constant in the otherwise uncertain daily life of these besieged Sarajevans. As a senior doctor from a hospital said, summing up the daily fear of trying to survive Sarajevan life: 'Every day on your way to work you ran the risk

[25] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, Ratko Mladic, *Indictment*, 24 July 1995.

[26] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Amended Indictment*, 28 April 2000, Count 10.

[27] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Third Amended Indictment*, 27 February 2009, Para. 15; also Count 9.

[28] International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, *Transcripts* (further: Transcripts Karadzic), p. 602, lines 13–14. Transcripts available at http://www.icty.org/case/karadzic/4#trans; coding frames available at author's personal website.

> of being killed or injured. Every day's work meant exposing yourself to the risk of being added to the long list of the killed and the wounded. Simple daily acts like crossing the street terrified people.'[29] The prosecutor prefaces this description by saying 'For 44 months, the civilian population lived under a pervasive sense of terror; exactly what was intended.'[30] He ends the statement with: 'This terror attack, Your Honours, virtually killed a living city terrified people.'[31]

Although unlawful killings are also separately charged, making the people of Sarajevo afraid for their lives is constituted as a war crime in itself. Even Karadzic's ally Milosevic is said to have 'described the earliest bombardments as "bloody criminal"'.[32] However, instilling fear appears to be just an intermediate purpose, with the following as ultimate aims: 'to secure concessions from the Bosnian government and the international community, the interest in exacting revenge, the interest in securing concessions in negotiations to cement gains and to obtain a resolution consistent with the objectives of the Bosnian Serbs'.[33]

The Defence Narrative

Karadzic turns around the accusation against him made in the indictment that he employed terror to reach his goals with respect to Sarajevo. At the beginning of the war 'there was terror exercised by the Muslims against the Serbs. There were rapes of young girls on an ethnic basis, and there were killings.'[34] Later, it was 'terror in Sarajevo [. . .] it was terrible to be a Serb that night in Sarajevo'.[35] The use of terror is imputed by Karadzic to Muslim leaders, but with a twist: they did not only spread terror, but they were also terrorists.

Central to Karadzic's defence before the ICTY is the portrayal of the Bosnian Muslim leadership as the aggressor and the criminal in the Bosnian crisis. They embarked on a Jihad to gain control of Bosnia.[36] According to Karadzic, who cites a court verdict against Izetbegovic for insurgent activities under Tito, the accomplishment of this goal can only be based 'on terror or possibly foreign intervention'.[37] The Muslim leadership tried to realize 'the implementation of [their] ideology, but not with terror or foreign intervention, but both terror and foreign intervention'.[38] The

[29] Transcripts Karadzic, p. 599, 5–18.

[30] Transcripts Karadzic, p. 597, 17–18.

[31] Transcripts Karadzic, p. 601, 25–602, 1. The words 'terror', 'terrorize', 'terrorization' are used at least 61 times by the prosecutors.

[32] Transcripts Karadzic, p. 615, 5–6.

[33] Transcripts Karadzic, p. 198, 16–19.

[34] Transcripts Karadzic, p. 978, 14.

[35] Transcripts Karadzic, p. 928, 17.

[36] Transcripts Karadzic, p. 2278, 4–6.

[37] Transcripts Karadzic, p. 888, 19–22.

[38] Transcripts Karadzic, p. 889, 3–4.

tactic of 'terror' was used to scare Serbs in Bosnia. The Muslims were 'organising and preparing terrorist organisations against prominent Serbs'.[39] Also, in Srebrenica 'there was terrible terror exercised by the Muslims of the area'.[40]

Hence, the Muslims are terrorist, not the Serbs: 'we [Serbs] do not have a tradition of terrorism, and we are against killing'.[41] In the end, the 'SDA failed to achieve that [their goals] through terror'[42] and turned to the other tactic, provoking foreign intervention, instead. Karadzic makes a cultural argument, using the post-9/11 association between armed groups based on a Muslim identity and terror*ism,* whether in peacetime or war, to turn around rather than just reject the accusation.

Taylor Case

Charges

Like the defendants in the three preceding group trials, Charles Taylor is charged with 'acts of terrorism', with a reference to the Geneva Conventions and Additional Protocols, and as with the defendants in the AFRC and Revolutionary United Front (RUF) trials, with whom he is alleged to be acting in a joint criminal enterprise, it is the first count listed against him. The crime has two elements: burning of civilian property and committing the crimes listed in counts 2–11 'as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone'.[43] As described above, the judges in the CDF case had determined that burning down houses was not a war crime in itself, but could become one if the intent were to terrorize civilians. Counts 2–11, which were also charged as crimes independent of intent, include unlawful killings; sexual violence; physical violence; use of child soldiers; abductions and forced labour; and looting.

The Prosecution's Narrative

In her summary of the prosecution case, prosecutor Hollis argues that 'terror may also mean or include extreme fear'.[44] The prosecutor goes beyond the case's temporal and

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[39] Transcripts Karadzic, p. 11945, 12; p. 11983, 13.

[40] Transcripts Karadzic, p. 978, 14.

[41] Transcripts Karadzic, p. 2860, 17–18.

[42] Transcripts Karadzic, p. 958, 24–25.

[43] Special Court for Sierra Leone, The Prosecutor against Charles Ghankay Taylor also known as Dankpannah Charles Ghankay Taylor also known as Dankpannah Charles Ghankay Macarthur Taylor, *Second Amended Indictment*, 29 May 2007, count 1.

[44] Special Court for Sierra Leone, The Prosecutor against Charles Ghankay Taylor, p. 24135, line 18. Transcripts (further: Transcripts Taylor). Transcripts available at http://www.sc-sl.org/CASES/

territorial jurisdiction to argue that this was Taylor's primary purpose, in the Liberian as in the Sierra Leonian war. She also cross-examines Taylor himself at some length on the meaning of terrorism, and gets him to agree that 'terror is fear'[45] and that to 'instil fear, that's an act of terror'.[46] The allegation of the use of terror, intended to create or instil fear, is then associated with a phrase from the RUF rebels' own vocabulary: 'making fearful', which could apply to people, areas, or the campaign itself.

A few themes related to 'making fearful' are evoked by the prosecutors. The first is the AFRC/RUF attack on Freetown in January 1999, which according to various prosecution witnesses, Taylor ordered that it be made 'more fearful than any other', either to save ammunition or to assure victory,[47] particularly by burning down houses and killing civilians. The second theme is that of the RUF's practice of amputations,[48] the 'trademark atrocity of Sierra Leone',[49] and of carving its initials into people's skin with a knife.[50] The third refers to the RUF practices of displaying human body parts at crossroads and checkpoints.[51] The prosecution connects this back to the Liberian war to argue:

> Indeed, Mr Taylor told you that there were checkpoints in Liberia with skulls, not human heads, that skulls were used as symbols of death, that he saw them, he drove by them. They were used as symbols and he saw nothing wrong with using them.[52]

The fourth is a single, particularly gruesome incident used by the prosecution to symbolize the 'terrorism' or fearfulness of the RUF, and hence also of Charles Taylor: It concerns the testimony of a woman who heard the cries of children being killed, was forced to carry a bag filled with human heads, discovered her own children's heads among them as she was made to empty the bag, and was forced to laugh about the discovery.[53]

Thus, the prosecution made a skilful effort to 'vernacularise' the charge of terror, by attaching it to the phrase 'making fearful', which it demonstrated was widely

ProsecutorvsCharlesTaylor/Transcripts/tabid/160/Default.aspx; coding frames available at author's personal website.

[45] Transcripts Taylor, p. 31585, 29; p. 31588, 5.

[46] Transcripts Taylor, p. 31588/28–29.

[47] Transcripts Taylor, p. 24139, 29 to 24140, 1; p. 24169, 7; p. 24175, 12; p. 24176, 16; p. 24184, 8; p. 49160, 29 to 49161, 1; p. 49167, 6.

[48] A direct connection to instilling fear is made at Transcripts Taylor, p. 24136, 28–29; 24137, 25; 24138, 3–4; 49227, 26. For the numerous other references to amputations, see coding frame.

[49] Transcripts Taylor, p. 24331, 26–27.

[50] A direct connection with instilling fear is made at Transcripts Taylor, p. 303, 7–11; p. 24138, 3–4, 7–11; p. 31591, 13, 16, 19–20. Other references to the practice are made at p. 303, 1–4; p. 24151, 6–9; 49149, 7–8; p. 49204, 7–8.

[51] Transcripts Taylor, p. 5863, 7, 12–13; p. 24138, 16–19, 27–28; p. 24139, 13–14, 22–23; p. 31592, 2–4; p. 46192, 24, 29; p. 49179, 13–14, 17–19; p. 49180, 4, 6–7.

[52] Transcripts Taylor, p. 49179, 16–20.

[53] Described by prosecutors at Transcripts Taylor p. 24136, 8–18; p. 31589, 7 to 31591, 6–9. At p. 31589, 4 and p. 49180, 19–20, prosecutors describe an apparently separate incident of a mother forced to laugh as her child is buried alive.

used by the RUF, and using Charles Taylor's cross-examination to strengthen the credibility of this connection.

The Defence Narrative

In the defence case, Taylor's lawyer Courtenay Griffith puts Taylor in the stand and examines him as a defence witness in his own case for more than 6 months, thus giving him a platform to speak in court. Together, they relate the case in general, and the charge of 'terrorism' in particular, to Taylor's incurring of the displeasure of the USA. The USA turned against Taylor, they argue, because he stood up for Liberia, defending its economic interest in, for example, the off-shore oil[54]: '[T]he United States was not used to Liberian governments before mine telling them yes or no. It was, "Yes, sir. Yes, sir. Yes, sir." And I guess to a great extent they were stunned. And so the decision [to oust Taylor from power] was taken.'[55] The USA and the UK funded the Liberians United for Reconciliation and Democracy (LURD) rebel group, which attacked Liberia from neighbouring Guinea: 'my government was a democratically elected government. My government was under attack. What would you do as a friend? You help the democratically elected government. No, you help the rebels. [. . .] The die was cast, we were going to be destroyed anyway and it happened eventually. I'm here.'[56]

The Taylor defence draws attention to the political nature of the terrorist label, and Taylor actually adopts it as a badge of honour placing him in the same camp as, for example, Nelson Mandela.[57] Griffiths asks him in examination: 'Nelson Mandela was called a terrorist at one time, wasn't he, Mr Taylor?'[58] Like Mandela, it is purely in the eyes of those in power, those that want to get rid of him, that Taylor is labelled a terrorist: 'We've seen this throughout history. When leaders are sought for one reason or another, they destroy you. [. . .] Mandela was supposed to be a total—you know, he was a criminal and he—in fact, he was a terrorist, spent 27 years in jail.'[59]

Muammar Gaddafi is portrayed as another misunderstood hero, wrongfully depicted as a terrorist by the West.[60] '[S]omeone trying to say that a pan-Africanist at

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[54] For Taylor's perspective on his conflict with Mobil Oil, see Transcripts Taylor, p. 32151, 17 onwards.

[55] Transcripts Taylor, p. 31368, 4.

[56] Transcripts Taylor, p. 27706, 29.

[57] Taylor's relations with and respect for Mandela come up 25 times in Griffith's examination of his client; see coding frame.

[58] Transcripts Taylor, p. 25495, 9–10.

[59] Transcripts Taylor, p. 29970, 10–12.

[60] At the time when Taylor was in the witness box, in the autumn of 2009, Gaddafi's global reputation, while always contested, was of course considerably less problematic than it became after the Libyan uprising of 2011.

that time is a terrorist I'd say is talking pure nonsense.'[61] Taylor counters the accusation that he is a terrorist by saying that this is a label applied to all those who fight for African rule in Africa: 'Africa has to be free. Africa has to determine its own destiny. Yes, things are rough and yes, we are pushed around. But our actions cannot be—should not be—construed as terrorism.'[62]

Responses to 'Terror' in Liberia

As seen above, the notion of 'terror' as the instilment of fear on civilian populations has migrated from an international humanitarian law prohibition to a crime one can be charged with before international criminal courts. Perhaps surprisingly, the idea of terror as a crime turned out to have much resonance with a group of educated Liberians interviewed in 2011. The term 'terrorist' for a terror suspect on the other hand was more contested.

Liberian respondents in semi-structured interviews about their perceptions of the Charles Taylor trial nearly all had a strong, sometimes visceral reaction to the question: 'What does the word "terror" mean to you?' A youth leader said it meant '(e)xtreme wickedness, lack of fear of God. Terror, terrorism, it comes from Al-Qaeda, we didn't know it was also in Africa. It gives me the jitters, it makes me reflect on the past.'[63] A young NGO worker paused before saying '(i)t means a lot. To clearly define what it is, what it does, I cannot say because there is so much trauma. I can say it is the worst side of human beings.'[64] According to a student leader and strong critic both of Charles Taylor and of the USA, it means 'destruction of lives, killing indiscriminately, civilians in the community, defenceless, harmless people. It is not having the right to freely express yourself, having your civil liberties trampled upon.'[65] A women's rights activist said '(t)error is so frightening, so intimidating, without sensitivity, cold'.[66]

In answering the question whether Charles Taylor is a terrorist, respondents were clearly aware of the post-9/11 global context of such a designation, but disagreed about whether it was appropriate to apply to Charles Taylor. The NGO worker Jimmy Sankatuah held that '(b)ecause the definition of terror was not in the public language, he has not been seen as a terrorist, but from the perspective of where we are now, of course he is a terrorist'.[67] Development worker Louise Tukolon similarly believed that '(t)errorists are people who go into another country, disturb peaceful citizens, destabilize'.[68] On the other hand, women's rights activist Miatta Flameulah, cited

[61] Transcripts Taylor, p. 25495, 6–8.

[62] Transcripts Taylor, p. 25496, 25–28.

[63] Interview with Augustus Zayzay, President, Federation of Liberian Youth, 23 May 2011.

[64] Interview with Jimmy Sankatuah, Search for Common Ground/Talking Drum, 20 May 2011.

[65] Interview with Jacob Jallah, President, University of Liberia Student Union, 20 May 2011.

[66] Interview with Miatta Flameulah, former director, Cobaa's girls' centre, 16 May 2011.

[67] Interview Sankatuah.

[68] Interview with Louise Tukolon, development worker, 19 May 2011.

above, said that '(t)errorist is a different thing [from terror]. It is a phrase that we have heard since 9/11 . . . I wouldn't call Taylor a terrorist, not in the same context as Zarkawi'.[69] Similarly, student leader Jacob Jallah said '(s)o he wreaked terror, but again, the word has so many different meanings. Post 9/11 it has a different connotation. For the Americans the definition is anyone with an explosives jacket.'[70] According to human rights worker Davestus James too, '(w)hat it means is someone out of touch with the US'.[71]

The Taylor Verdict

On 18 May 2012, more than a year after the closing statements of the prosecution and defence, and almost a year after the interviews cited above had been conducted, the judges finally rendered their verdict in the Charles Taylor case. It found insufficient evidence of Taylor's participation in a joint criminal enterprise for most of the period charged, and specifically 'the evidence is insufficient for a finding that the Accused's support for the invasion of Sierra Leone was undertaken pursuant to a common purpose to terrorize the civilian population'.[72] It did however find him guilty of aiding and abetting the crimes charged, for which members of the AFRC and RUF had already been convicted, including 'acts of terrorism'.

It does not go into what happens to the intent requirement when one aids and abets acts of terrorism—whether the intent still needs to be with the suspect, or only with those who are being aided and abetted. For the final attack, first on Kono District and subsequently in Freetown and the Western Area, Taylor was also found guilty of planning the commission of crimes, including 'acts of terrorism'.

As in the AFRC case, the judges decided that the use of child soldiers, sexual enslavement or forced labour, and looting were not acts of terrorism because other purposes could easily be inferred. Murder, burning of houses, sexual violence, and physical violence—in particular mutilations and amputations—can constitute acts of terrorism.

The verdict distinguishes the 'international crime of terrorism' from the war crime of 'acts of terrorism' of which Taylor stands accused. The defence, basing itself on the Appeals Chamber of the Special Tribunal for Lebanon (STL), had argued that according to customary law terrorism required '(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or

[69] Interview Flameulah.

[70] Interview Jallah.

[71] Interview with Davestus James and Herron Gbidi, Foundation for Human Rights and Democracy, 16 May 2011.

[72] Special Court for Sierra Leone, Prosecutor vs. Charles Ghankay Taylor, *Judgement*, 18 May 2012, Para. 2388.

international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element' (ibid., Para. 408). However, the verdict states, the judges of the STL were referring to the international crime of terrorism 'in times of peace' (ibid., Para. 409). For the war crime of acts of terrorism, these elements are not required.

The verdict refers to the Appeals Chamber verdict in the *Dragomir Milosevic* case to find that 'actual infliction of death or serious bodily harm was not a required element of the crime of terror, but . . . it must be shown that the victims suffered grave consequences resulting from the acts or threats of violence' (ibid., Para. 407). Why the judges found it necessary to assert this is not clear, since there was ample evidence of death and bodily harm in the Taylor case.

Contextualising the Crime of Terror

The criminalization of 'spreading terror' can be seen within the wider context of a move in international law from attempts in the early and mid-twentieth century to humanise war with prohibitions on warring parties to an attempt to criminalize war with trials against individuals. This in turn relates to a shift in the perception and framing of the 'scourge of war' from an unfortunate but not unusual state of affairs, to seeing the waging of war, and particularly civil war, as a criminal activity actively pursued by a handful of masterminds. The Yugoslavia Tribunal pioneered the criminalization of war in this manner.[73]

Interestingly, the indictments against Galic and Dragomir Milosevic, Karadzic, and Mladic all predate the 9/11 attacks on the USA. Hence, the recent prosecutorial preoccupation with terror as a war crime is clearly not simply a result of the war on terror declared by the Bush Administration. Instead, the interest in deliberate instilment of extreme fear on civilian populations is more likely to be connected to the way in which the two war situations in question, the disintegration wars of Yugoslavia and the Sierra Leone[74] war have been perceived both in the media and in academic accounts. As both Zarkov and Buss have noted in this volume, scholars 'began emphasizing the conflicts as constructed, elite drive, modern and intentional'.[75] More specifically, two dominant, perhaps even foundational, academic treatments of the Bosnian war and the Sierra Leone war, by Mary Kaldor (1999, esp. ch. 3.) and Paul Richards (1996), respectively, draw attention to anti-civilian violence as a prime characteristic of these wars. While there are important differences in their

[73] The context of the International Criminal Tribunal for Rwanda's mandate and activities were rather different; although there was of course also an ongoing civil war, it has been constructed as primarily a genocide rather than a war crimes situation (and the winners of the war, the RPF, have remained immune from prosecution).

[74] The war in Sierra Leone was deeply connected to previous and subsequent conflicts in Liberia and Cote d'Ivoire, but gained a notoriety far beyond the other conflicts in the region, and became the object of international criminal justice in isolation from the connected conflicts across the borders.

[75] Doris Buss, this volume, pp.

respective interpretations of the wars in question,[76] they both see the wars as contemporary in nature and connected to processes of globalisation, and they both consider anti-civilian violence as a deliberate instrument to achieve political aims, rather than as an atavistic phenomenon. Kaldor sees the violence of the Bosnian war in particular as instrumental to a project of corrupt political elites desperate to hold on to power. For her, it was not ethnic nationalism that led to anti-civilian violence, but on the contrary, spectacular violence was used to destroy traditions of tolerance and co-create exclusivist nationalist identities. Richards similarly considers the use of extreme violence against civilians as 'performance', but in particular as a functional substitute for resources or more sophisticated weaponry, which the RUF lacked.

The legal personnel of the tribunals, including prosecutors and subsequently also judges, were probably influenced by these dominant interpretations, which coincide neatly with the needs of criminal law, namely to discern rational individuals with clear motives behind violent acts. If the atrocities of the Yugoslav and Sierra Leone wars were indeed part of an intentional political project, rather than just being by-products of war, prosecutors and judges would want to find ways to see the particular wickedness of intending to instil extreme fear separately punished.

Existing international humanitarian law does not lend itself particularly well to such a pursuit, as it focuses on material and physical damage in its relation to strategic necessity in order to come to a determination whether such damage is 'collateral' or excessive. Yet the tribunal workers, prosecutors followed more cautiously by judges, found in a few underspecified provisions on 'terror' an avenue for founding a new doctrine, the contours of which we can begin to see. Spreading terror escapes easy detection in the standard humanitarian law framework first because it is intent-based, and second because the damage can extend to those not physically affected in the form of psychological harm.

Judges have dealt with the first issue by determining that intent *can* be read off from effects, provided no other 'obvious' primary purpose, military or otherwise, presents itself. Hence, the use of child soldiers, forced labour, or 'bush wives' are mostly ruled out in Sierra Leone because the judges could easily imagine other purposes. On the other hand, the courts require their defendants to be rational actors, not interested like Hollywood serial killers in scaring people for the sake of it; so the primary purpose of terror must also have an ultimate purpose beyond it: taking over Sierra Leone and expulsion of Bosnian Muslims, respectively. Hence, the verdicts separate intent from infliction and primary purposes from secondary purposes, as well as immediate purposes from ultimate purposes, yet in terms of evidence, they revert to using physical acts to infer purpose and intent. In the case of Charles Taylor, to further complicate the interpretation of intents and purposes, the judges held that he was for the most part only 'aiding and abetting' the intent to instil fear.

The hermeneutic risks and contradictions involved in these determinations are obvious. Yet remarkably, even dissenting judges who believe the verdicts in question to be straying from legal interpretation into law creation hold that a crime of terror

[76] Richards relates the war in Sierra Leone in part to traditional forms of managing the rainforest; Kaldor relates the war in Bosnia to the political and economic context of a 'post-totalitarian' society.

should be codified into international law, because psychological traumatization ought to be criminalized separately from physical acts that cause it. Moreover, the idea of 'terror' as a crime of instilling extreme fear in civilians turned out to be not exclusively a construct of the legal imagination, but also internalized by elite figures who had lived through a period of 'terror' caused by civil war in Liberia, even whilst some rejected 'terrorism' in this context as politicized and connected to the USA.

At the same time, the two cases discussed show that the charge of terror gives high-profile defendants fertile ground to undermine the legitimacy of their trials, in particular pointing out how political and politicized the crime of terror is. The two defendants discussed here did so in very different ways, both highly plausible in particular to their home-base audiences. Taylor employed the classic 'one man's terrorist is another man's freedom fighter' argument, appealing to anti-imperialist sentiments, whereas Karadzic plays into a post-9/11 Islamophobic narrative, persuasive not only to a Serbian audience but also to western publics beyond, that Muslims in general, and Muslims in Europe in particular, are natural terrorists.

Conclusion

As suggested above, it is inaccurate to dismiss the recent international criminal convictions for terror, and similar charges in ongoing cases, as simply a side effect of the post-9/11 obsession with terrorist attacks. Instead, the increasing criminalization of 'terror' can be seen in relation to changing understandings of war, and measures to prevent or civilize war, amongst policymakers.

The initial intent of international humanitarian law was to civilize warring parties, whilst at the same time considering both the occurrence of war and even the idea that 'terror comes with war'[77] as relatively unavoidable. International criminal law, as a field that has rapidly expanded since the 1990s, on the other hand, sees war as an active choice of a handful of 'criminal minds', which can be combated in part by trying and incarcerating such individuals.[78] Even if wars cannot entirely be eradicated, the civilizing mission of international humanitarian law is taken a step further by criminalizing the 'cruel intent' of the perpetrators of war. In theory, this could even work in pre-emptive ways: a suspect could be tried exclusively for a 'crime of terror' in the form of intent evidenced by threats.

All cases involving terror to date have been very far from such a pre-emptive scenario. The actual effect of the recent shift of emphasis towards intent has been exclusively discursive: In every one of the recent and ongoing cases, the intent to terrorize was coupled with actual terrorization and indeed read off from the actual terrorization. A careful reading of the sentencing verdicts shows that the sentences

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[77] As noted by the French delegate at the Additional Protocol negotiations, quoted above.

[78] The belated criminalization of 'aggression' in Kampala in 2010, after the Rome Conference had initially been unable to find agreement on the definition of this crime, constitutes further evidence of such a crime. See de Hoon (2012) for a critical treatment.

have not been significantly lengthier than they would have been without the crime of terror: it just becomes one of many concurrent rather than cumulative sentences. Nonetheless, the verdicts of both the ICTY and SCSL have repeatedly insisted that in principle, intent is separate from actual infliction of terror and can exist without actual infliction.

The terror convictions of these two ad hoc tribunals have received little if any attention either from academics or from civil society. It has attracted neither critics nor advocates. The ad hoc tribunals are wrapping up their work. As noted above, the permanent International Criminal Court does not contain any form of 'crime of terror' either in its 1998 Statute or in its much more detailed Elements of Crimes document. There has been no attempt to include such a crime in the 2010 review, nor have the suspects to date been charged with crimes of terror.

It is conceivable that an ICC prosecutor would take up the crime of terror as a further interpretation of a crime that has been spelled out in the Elements of Crimes, and that judges would go along with this argument, referencing the ICTY and SCSL jurisprudence. The war crime of wilfully causing great suffering (Art. 8 (2) (a) (iii) of the Elements), in conjunction perhaps with attacking civilians or another 'results-based' crime, could lend itself to such interpretation. Or it could be that such a charge in the indictment would fail, or not even be attempted, but ICC staff or their civil society supporters would feel the need for a terror provision to do justice to the terror felt by civilians in a specific case, and push for its inclusion, along the lines outlined by the ad hoc tribunal verdicts, in the next ICC review round in 2017.

Equally, the legal profession may recover some of its caution in inferring intent from effect, and converting psychological scars of generalized victims of collective violence into penal consequences for individualized perpetrators. Time will tell whether the conviction of a handful of people in the early twenty-first century for intending to instil extreme fear in civilians during war has been a blip, or whether it is a harbinger of an international criminal law system that aspires to understand and prosecute the intentions of those it designates as war criminals.

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