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CONTENTS

Equality Jurisprudence in Canada <i>Sheilah L Martin</i>	127
Expansive Application of Self-Defence: Protecting Security at the Expense of Legality <i>Rachel Buckman</i>	153
The 2014 Gaza Conflict and the Prohibition Against Spreading Terror Among the Civilian Population <i>Darius Lee</i>	179
A Kimberley Process for Conflict Antiquities: Determining the Viability of a Cultural Property Certification Scheme <i>Ruby Meagher</i>	215

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THE 2014 GAZA CONFLICT AND THE PROHIBITION AGAINST SPREADING TERROR AMONG THE CIVILIAN POPULATION

*Darius Lee**

In the summer of 2014, the State of Israel engaged in intensive hostilities against Hamas and other Palestinian armed groups in the Gaza Strip, referred to as "Operation Protective Edge" or the "2014 Gaza Conflict". This article examines the prohibition under international humanitarian law against spreading terror among the civilian population, and its associated war crime. It compares and distinguishes the prohibition against spreading terror from the different definitions of "terrorism" under international law. Finally, the article analyses whether, on the basis of the available evidence to date, there are grounds to believe that the prohibition against spreading terror among the civilian population had been violated in the 2014 Gaza Conflict.

I INTRODUCTION

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens," Israel declared in its 1991 derogation, pursuant to art 4(3) of the International Covenant on Civil and Political Rights (ICCPR),¹ that these "[t]hese have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings."²

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1 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

2 State of Israel *Derogations: Notification Under Article 4(3) of the Covenant* (3 October 1991) [Israel ICCPR Derogation].

In the summer of 2014, Israel engaged in intensive hostilities against Hamas and other Palestinian armed groups in the Gaza Strip (known as "Operation Protective Edge" or the "2014 Gaza Conflict"). Located towards the southwest of Israel, and bordering Israel and Egypt, the Gaza Strip is a small densely populated area of 360 km² and had approximately 1.8 million residents at around the time of the 2014 Gaza Conflict.³ According to Israel, Operation Protective Edge proceeded in three phases: an aerial campaign (7 to 17 July); a ground operation (17 July to 5 August); and redeployment and aerial strikes (5 to 26 August). It ended in a mutual ceasefire between Israel and Hamas.⁴

As a result of the hostilities from 7 July to 26 August 2014, there were more than 2,000 deaths and 11,000 injuries among Palestinians (although classifications of militants and civilians have been disputed). Six civilians (five Israelis and one Thai national) and 67 Israel Defense Forces (IDF) soldiers were killed, and more than a thousand Israelis were injured. In addition, both sides suffered extensive losses, including property damage, psychological harm and displacement. In response, both the Commission of Inquiry (COI) appointed by the Human Rights Council (HRC) and Israel have respectively published reports addressing concerns over violations of human rights and international humanitarian law (IHL) arising out of the conflict.⁵ The Prosecutor of the International Criminal Court (ICC) has also submitted to the ICC that "there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities in Gaza."⁶

This article will examine the IHL prohibition against spreading terror among the civilian population (sometimes referred to as "terrorism"), and its associated war crime, in the context of the 2014 Gaza Conflict on the basis of the available evidence to date. It will begin in Part I by distinguishing the different definitions of "terrorism" under international law, as compared with the IHL prohibition against spreading terror among the civilian population and its related war crime. Part II elaborates on the war crime of spreading terror and the elements thereof, as laid down by international criminal tribunals, before comparing it with definitions of "terrorism". In Part III, this article will analyse whether, on the basis of the available evidence to date, there are grounds to believe

3 "Gaza: Fact Sheet" (1 August 2014) World Bank <www.worldbank.org>.

4 State of Israel *The 2014 Gaza Conflict, 7 July–26 August 2014: Factual and Legal Aspects* (May 2015) at [70] and [81] [Gaza Conflict Report]; and Human Rights Council *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1* UN Doc A/HRC/29/CRP.4 (24 June 2015) [Detailed Findings] at [58].

5 Gaza Conflict Report, above n 4; Detailed Findings, above n 4; and Human Rights Council *Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1* UN Doc A/HRC/29/52 (24 June 2015) [COI Report].

6 Office of the Prosecutor *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine* ICC Pre-Trial Chamber I, ICC-01/18-12, 22 January 2020 [Palestine Article 19(3) Request] at [94].

that the prohibition against spreading terror among the civilian population had been violated in the 2014 Gaza Conflict, before concluding.

II DISTINGUISHING "TERRORISM" FROM THE PROHIBITION AGAINST SPREADING TERROR AMONG CIVILIANS

In a controversial 2011 decision, the Special Tribunal for Lebanon (STL) held that there exists a customary international law rule regarding the international crime of terrorism, at least in times of peace, notwithstanding the common ground between the Defence Office and the Prosecutor in their submissions that "there is currently no settled definition of terrorism" under customary international law.⁷ According to the STL, the international crime comprised the elements of:⁸

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage taking, or 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 public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.

In arriving at its decision, the STL purportedly drew from various sources, including treaties, resolutions of the Security Council, national laws, as well as rulings of international criminal tribunals in the context of the prohibition against spreading terror among civilians in armed conflict. These sources were far less consistent than assumed by the STL. Most significantly for the purposes of this article, the STL erred by conflating "terrorism" with the prohibition against spreading terror among civilians under IHL and its associated war crime.

Hence, this part of the article seeks to clarify the confusion surrounding the definitions of "terrorism" or lack thereof in international law, as evinced by the STL decision. It will examine and distinguish between the definitions of "terrorism" under treaty law, the Security Council and the United Nations (UN), the lack of definition under international criminal law, as opposed to the prohibition against spreading terror among civilians in armed conflict and its associated war crime, the focus of this article.

A Treaty Law

In view of the difficulties defining "terrorism", the international community has adopted a "twin-track approach", dealing with particular manifestations of terrorist activity and generally condemning the phenomenon.⁹ To date, there are 19 universal legal instruments, including amendments and

⁷ *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law)* STL Appeals Chamber STL-11-01/I, 16 February 2011 [*STL Interlocutory Decision*] at [83].

⁸ At [85].

⁹ Malcolm N Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 884–885.

protocols, concerning terrorism, creating an interlocking network of international obligations by defining the offences, and imposing obligations to criminalise specific conduct under domestic law, establish jurisdiction and either prosecute or extradite offenders.¹⁰

The STL opined that the UN's "clearest definition of terrorism" was found in the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention).¹¹ Article 2(1) of the Terrorism Financing Convention goes beyond defining offences within the scope of and as defined in nine listed treaties. Article 2(1)(b) addresses any other act:¹²

... intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

International efforts towards a comprehensive multilateral counter-terrorism convention are manifest in ongoing negotiations over the Draft Comprehensive Convention Against International Terrorism (Draft Comprehensive Convention), which began in 1996. In contrast with the Terrorism Financing Convention, art 2 of the 2005 Draft Comprehensive Convention includes within its definition not only death or serious bodily injury to persons, but also "serious damage to public or private property" or damage to "property, places, facilities or systems... resulting or likely to result in major economic loss",¹³ reflecting concerns contained in some other counter-terrorism treaties, such as the 1997 International Convention for the Suppression of Terrorist Bombings.¹⁴ Nevertheless, even after almost two decades since work first began on the Draft Comprehensive Convention in 2000 under the auspices of the Ad Hoc Committee and subsequently continued by the Working Group of

10 At 885. See also Daniel O'Donnell "International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces" (2006) 88 Int Rev Red Cross 853 at 856–860.

11 International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 (opened for signature 9 December 1999, entered into force 10 April 2002) [Terrorism Financing Convention], art 2. See *STL Interlocutory Decision*, above n 7, at [88].

12 See also International Convention Against the Taking of Hostages 1316 UNTS 205 (opened for signature 17 December 1979, entered into force 3 June 1983) [Hostage Taking Convention], art 1; and International Convention for the Suppression of Acts of Nuclear Terrorism 2445 UNTS 89 (opened for signature 13 April 2005, entered into force 7 July 2007) [Nuclear Terrorism Convention], art 2.

13 *Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly*, UN Doc A/59/894 (12 August 2005), Appendix II: Draft Comprehensive Convention Against International Terrorism, at 9.

14 See International Convention for the Suppression of Terrorist Bombings 2149 UNTS 256 (opened for signature 15 December 1997, entered into force 23 May 2001) [Terrorist Bombing Convention], art 2.

the Sixth Committee, negotiations over the convention have not concluded, owing to a lack of agreement over the definition of terrorism.¹⁵

B Security Council and the United Nations

Especially after the attacks of 11 September 2001, the Security Council has in various resolutions imposed binding obligations on states, pursuant to ch VII and art 25 of the Charter of the United Nations, to prevent and suppress terrorism through various means including through criminal sanctions, freezing of assets and restrictions on movement.¹⁶ Even though such obligations prevail over those under any other international agreement pursuant to art 103 of the UN Charter, the Security Council provided no definition of "terrorism" under Resolutions 1368 and 1373 of 2001. The precise scope of terrorism offences thus remained vague for the purposes of the harsh measures mandated.¹⁷

The language which most closely resembles a definition by the Security Council of "terrorism" was only provided a few years later, under Resolution 1566 of 2004, which referred to:¹⁸

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism ...

By referring to these international counter-terrorism conventions and protocols, it was clear that Resolution 1566 did not provide a standalone definition of "terrorism". In the Security Council debate following the adoption of the resolution, Brazil opined that the provision instead reflected "compromise language that contains a clear political message".¹⁹

The language under Resolution 1566 notably differed from earlier Security Council practice which also condemned terrorist acts causing "massive destruction to property" in Kenya and

15 *Sixth Committee: Summary Record of the 33rd Meeting* UN Doc A/C.6/73/SR.33 (6 December 2018) at 2–3. See also *Measures to Eliminate International Terrorism* GA Res 51/210 (1997); and *Measures to Eliminate International Terrorism* GA Res 59/46 (2004).

16 SC Res 1368 (2001); and SC Res 1373 (2001).

17 Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* UN Doc E/CN.4/2006/98 (28 December 2005) at [26]–[27]; and Nicholas Rostow "Before and After: The Changed UN Response to Terrorism Since September 11th" (2002) 35 *Cornell Intl LJ* 475 at 484.

18 SC Res 1566 (2004) at [3]. See also for example *Terrorism Financing Convention*, above n 11, art 6; *Nuclear Terrorism Convention*, above n 12, art 5; *Terrorist Bombing Convention*, above n 14, art 5; and *Hostage Taking Convention*, above n 12, art 1.

19 *United Nations Security Council, Fifty-ninth year: 5053rd meeting* UN Doc S/PV.5053 (8 October 2004) at 7.

Tanzania.²⁰ Nevertheless, the Security Council's language is more precise than that of the General Assembly under its 1994 Declaration on Measures to Eliminate Terrorism, which defined terrorist acts as "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes".²¹

Decisions of the Security Council, especially under ch VII, are binding on all UN member states pursuant to art 25 of the UN Charter,²² and resolutions of the General Assembly may contribute towards the confirmation or formation of customary international law.²³ Yet, contrary to the STL's suggestion,²⁴ neither body of the UN intended the language of their resolutions to serve as legal definitions.²⁵ Furthermore, Security Council sanctions are not criminal in nature, despite their serious consequences,²⁶ thereby posing an obstacle to the inference of an international crime of terrorism therefrom.

C International Criminal Law

At the 1998 Rome Conference, delegates expressed regret that "no generally acceptable definition" of the crime of terrorism could be agreed upon for inclusion within the jurisdiction of the ICC under the Rome Statute.²⁷ Although the issue was revisited at the behest of the Netherlands at the 2010 Review Conference in Kampala, little progress was made due to the lack of definition of "terrorism" even as delegations reportedly condemned terrorism and declared their unwavering

20 SC Res 1189 (1998) at [1].

21 *Measures to Eliminate International Terrorism* GA Res 49/60 (1995) at [3]; and *Measures to Eliminate International Terrorism* GA Res 51/210 (1997), above n 15, at [2].

22 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 [Kosovo] at 442; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 [Namibia] at 53–54.

23 *Kosovo*, above n 22, at 437–438; and *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 [Nuclear Weapons] at 254–255; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95 at 132–133.

24 *STL Interlocutory Decision*, above n 7, at [88].

25 Islam Ibrahim Chiha "Redefining Terrorism under the Mubarak Regime: Towards a New Definition of Terrorism in Egypt" (2013) 46 *Comp & Intl LJ S Afr* 90 at 97 and 100–101; Scheinin, above n 17, at [38]; Javier Rupérez *The United Nations in the Fight Against Terrorism* (United Nations Counter-Terrorism Committee Executive Directorate, 28 January 2006); and SC Res 1535 (2004).

26 Human Rights Committee *Views: Communication No 1472/2006* UN Doc CCPR/C/94/D/1472/2006 (22 October 2008) [*Sayadi v Belgium*] at [10.11].

27 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records: Volume I* UN Doc A/CONF.183/13 (Vol I) (2002) at 71. The crime of terrorism is thus not included in the provision on jurisdiction: Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], art 5.

support to combat it. The delegations preferred to defer the issue to the UN, considering that a clear definition agreed to by the UN was "a precondition to inclusion of terrorism in the Statute".²⁸ As discussed above, no such clear and agreed definition of "terrorism" is yet evident.

Some sympathy may be granted to the STL for its bold attempt to define an international crime of terrorism under customary international law and international criminal law, given that the "principal *raison d'être*" of its founding was to focus on the murder of former Lebanese Prime Minister Rafiq Hariri in a car bomb explosion on 14 February 2005 and related political attacks.²⁹ The act was characterised as a "terrorist crime" in Security Council Resolution 1757 of 2007 which annexed the STL's founding statute, though the STL rightly recognised that such characterisation merely reflected the "political perspectives of the Statute's framers."³⁰

In order to derive international criminal law offences from prohibitions under international law, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held in *Tadić* that relevant factors to be considered include "clear and unequivocal recognition" of the rule in international law and state practice indicating an intention to criminalise the prohibition.³¹ For reasons detailed above, there is a lack of consensus over the definition of terrorism, and the Security Council – whose resolutions the STL heavily relied upon – did not lay down any such definition. The scope and content of any rule against the vaguely defined notion of "terrorism" in international law, therefore, remain largely unsettled.

Most significant for the purposes of this article, the STL misread the decisions of the ICTY in *Galić*³² and the Special Court for Sierra Leone (SCSL) in *Brima*,³³ which only addressed the IHL prohibition and corresponding international criminal law war crime of spreading terror among the civilian population in the context of armed conflict. This IHL prohibition had been enshrined in art 51(2) of Additional Protocol I (API) and art 13(2) of Additional Protocol II (APII) to the Geneva Conventions, and was held to constitute customary international law.³⁴ The ICTY Trial Chamber in

28 *Assembly of State Parties to the Rome Statute of the International Criminal Court Eighth Session Official Records, Volume I* ICC Doc ICC-ASP/8/20 (2009), Annex II at [43].

29 Carsten Stahn *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge, 2019) at 198–202.

30 SC Res 1757 (2007), annex, preamble [Special Tribunal for Lebanon Agreement]; and *STL Interlocutory Decision*, above n 7, at [14] and [42]. See also *Kosovo*, above n 22, at 442; and *Namibia*, above n 22, at 52–53.

31 *Prosecutor v Tadić (Jurisdiction)* ICTY Appeals Chamber IT-94-1, 2 October 1995 [*Tadić (Appeal)*] at [128].

32 *Prosecutor v Galić (Judgment)* ICTY Trial Chamber I, IT-98-29-T, 5 December 2003 [*Galić (Trial)*]; and *Prosecutor v Galić (Judgment)* ICTY Appeals Chamber IT-98-29-A, 30 November 2006 [*Galić (Appeal)*].

33 *Prosecutor v Brima (Judgment)* SCSL Trial Chamber II, SCSL-2004-16-T, 20 June 2007 [*Brima (Trial)*].

34 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into

Galić had explicitly noted that "terrorism" has never been singly defined under international law.³⁵ Therefore, it is highly doubtful that an international crime of "terrorism" – as distinct from the specific prohibition of spreading terror among the civilian population within armed conflict – can be said to exist under international criminal law.

D International Humanitarian Law and War Crimes

As *lex specialis* to international human rights law applicable in the context of armed conflicts, IHL seeks to mitigate the consequences of armed conflict by fixing the rights and duties of belligerents in their conduct of operations and methods and means of warfare, and to protect various categories of persons in armed conflict, including civilians.³⁶ The Additional Protocols of 1977 – API and APII – are applicable to international and non-international armed conflicts (IAC and NIAC) respectively.

Among the issues they were intended to update and supplement the 1949 Geneva Conventions was the issue of guerrilla warfare, which include acts that may be regarded as "terrorist" acts in modern political parlance. Eleven groups regarded as national liberation movements, including – despite Israeli objections – the Palestinian Liberation Organization (PLO), were invited to participate as observers in the discussions from 1974 to 1977, even as they did not have the right to vote.³⁷

Both art 51(2) of API and art 13(2) of APII are similarly worded and provide:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 4(2)(d) of APII provides that "acts of terrorism" shall remain prohibited "at any time and in any place whatsoever". Article 33 of the Fourth Geneva Convention prohibits collective penalties and

force 7 December 1978) [API], art 51(2); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978) [APII], art 13(2).

35 *Galić (Trial)*, above n 32, at [87] and [132]–[138]. See also *Galić (Appeal)*, above n 32, at [87]; *Galić (Appeal)*, above n 32, separate opinion of Judge Shahabuddeen at [3]; and *Brima (Trial)*, above n 33, at [660]–[671].

36 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [*Wall Opinion*] at 177–178; *Nuclear Weapons*, above n 23, at 240 and 256; and Human Rights Committee *General Comment No 36 – Article 6: Right to Life* UN Doc CCPR/C/GC/36 (3 September 2019) at [64].

37 Michael Bothe, Karl Josef Partsch and Waldemar A Solf *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed, Martinus Nijhoff, Leiden, 2013) at 1–10; Yvez Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, Geneva 1987) at xxix–xxxv; and Gary D Solis *The Law of Armed Conflict: International Humanitarian Law of War* (2nd ed, Cambridge University Press, New York, 2016) at ch 4.

all measures of intimidation or terrorism, thereby implicitly affirming the similarities between these forms of prohibited conduct.

The spreading of terror is an "aggravated" form of the offence of unlawful attacks against civilians,³⁸ reinforcing the core IHL principle of distinction between combatants and military objectives on the one hand, and civilians and civilian objects on the other. Generally, while combatants are legitimate targets for attack, civilians are not, "unless and for such time as they take a direct part in hostilities".³⁹ The ICTY Appeals Chamber held in *Galić* that the prohibition against terrorising civilians reflected customary international law *at least* from the time these were included in the treaties.⁴⁰

Both API and APII impose obligations on all belligerent parties to the conflict, including states and non-state armed groups. Although the four Geneva Conventions impose obligations on High Contracting Parties to enact domestic legislation providing effective penal sanctions for grave breaches,⁴¹ API and APII do not explicitly impose direct criminal responsibility on individuals for violations thereof under international criminal law.

However, ever since the post-World War II Nuremberg Trials, the principle of dual responsibility has become a feature of international law, encapsulated in the Nuremberg Mantra that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁴² Prosecution of individuals under international criminal law has become the concrete means by which

38 *Prosecutor v Milošević (Judgment)* ICTY Trial Chamber III, IT-98-29/1-T, 12 December 2007 [*Milošević (Trial)*] at [882]; and Bothe, Partsch and Solf, above n 37, at 340–342 and 778.

39 *Nuclear Weapons*, above n 23, at 257; *Tadić (Appeal)*, above n 31, at [96]–[99] and [100]–[119]; and *Public Committee against Torture in Israel v Government of Israel* [2006] 2 Isr LR 459 [*Targeted Killings*] at [23].

40 *Galić (Appeal)*, above n 32, at [87]; and *Galić (Trial)*, above n 32, at [132]–[138].

41 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [First Geneva Convention], arts 49–50; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Second Geneva Convention], arts 50–51; Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) [Third Geneva Convention], arts 129–131; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Fourth Geneva Convention], arts 146–148.

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 at 116; *United States and others v Göring and others* (1946) 1 Trials of the Major War Criminals 171 at 223 (International Military Tribunal Nuremberg); and *Tadić (Appeal)*, above n 31, at [128].

international criminal tribunals punish serious violations of IHL and other grave violations of international law.

The ICTY Appeals Chamber in *Galić* found that the prohibition against spreading terror among the civilian population fulfilled the four cumulative conditions laid down in *Tadić* for imposition of individual criminal responsibility: (i) the violation constituted an infringement of a rule of IHL; (ii) the rule was both embodied in customary international law and treaty unquestionably binding on the parties at the time of the offence and did not conflict or derogate from peremptory norms; (iii) the violation was "serious"; and (iv) entailed individual criminal responsibility.⁴³

The majority of the ICTY Trial Chamber found Stanislav Galić, commander of the Sarajevo Romanija Corps unit within the Bosnian-Serb Army, guilty of carrying out a campaign of sniping and shelling of civilians in areas of Sarajevo held by the Armed Forces of the Republic of Bosnia and Herzegovina, from around 10 September 1992 to 10 August 1994, from Sarajevo Romanija Corps controlled territories, with the aim to spread terror among the civilian population,⁴⁴ along with other war crimes.

Sending a strong signal about the gravity of the offence, the Appeals Chamber by majority took the view that the Trial Chamber's sentence of 20 years' imprisonment "underestimated the gravity of Galić's criminal conduct", and increased his sentence to life imprisonment. Among other things, the Appeals Chamber had regard to the Trial Chamber's observations that Galić had created "an anguishing environment in which, at a minimum hundreds of men, women, children, and elderly people were killed, and thousands were wounded and more generally terrorized", adding that his crimes were characterised by "exceptional brutality and cruelty".⁴⁵

Unlike debates over the definition of terrorism, the prohibition against spreading terror among the civilian population and its corresponding international criminal law war crime are firmly established in customary international law, and the ruling in *Galić* has since been followed by subsequent ICTY decisions⁴⁶ as well as the SCSL.⁴⁷ The International Committee of the Red Cross (ICRC) has likewise affirmed the IHL prohibition in its study on customary international law, adding that during the 1973 Yom Kippur War, states involved in the conflict – Egypt, Iraq, Israel and Syria – "replied favourably"

43 *Tadić (Appeal)*, above n 31, at [94] and [143]; *Galić (Appeal)*, above n 32, at [87]–[98]; and *Galić (Trial)*, above n 32, at [89]–[130].

44 *Galić (Trial)*, above n 32, at [594].

45 *Galić (Appeal)*, above n 32, at [454]–[455]; and *Galić (Trial)*, above n 32, at [764].

46 *Milošević (Trial)*, above n 38; and *Prosecutor v Milošević (Judgment)* ICTY Appeals Chamber IT-98-29/1-A, 12 November 2009 [*Milošević (Appeal)*].

47 *Brima (Trial)*, above n 33; *Prosecutor v Taylor (Judgment)* SCSL Trial Chamber II, SCSL-03-01-T, 18 May 2012 [*Charles Taylor (Trial)*]; and *Prosecutor v Sesay (Judgment)* SCSL Trial Chamber I, SCSL-04-15-T, 2 March 2009 [*Sesay (Trial)*].

when the ICRC appealed to them to respect the prohibition of "methods intended to spread terror among the civilian population".⁴⁸

III THE WAR CRIME OF SPREADING TERROR AMONG CIVILIANS

Terror against populations has historically been used as a weapon of war in order to demoralise one's enemies and to secure strategic advantages. During World War II, Nazi Germany notoriously conducted "Blitz-bombing" against centres of civilian population, including places in Poland, the Netherlands and Britain. However, the use of "area-bombing" was not limited to the Germans. British and American forces conducted air raids against Germany and Japan, culminating in the United States of America dropping atomic bombs in the Japanese cities Hiroshima and Nagasaki.⁴⁹

Beyond IACs, governments have also conducted aerial bombardments against populations suspected of sympathising with rebel factions. For example, between 1961 and 1975, the Iraqi government carried out a number of indiscriminate aerial bombing campaigns against Kurdish-populated areas, among other atrocities.⁵⁰

Apart from injury or loss of life, prolonged terror causes numerous devastating psychological effects to the civilian population and severe disruption of ordinary life. British civilians exposed to German air raids during World War II showed impulsive, uncontrolled and irrational behaviour, experiencing enduring states of helplessness, disorientation and apathy.⁵¹ In *Galić*, the Trial Chamber heard evidence of how civilians in Sarajevo adapted to the hostile environment by taking various measures such as closing schools, carrying out their activities at night, hiding in apartments or cellars, reducing movement and setting up containers and barricades as shelters against sniper fire.⁵² The details of the various cases before the ICTY and SCSL involving the war crime of spreading terror have left little doubt as to the gravity of the offence in international law.

48 International Committee of the Red Cross (ICRC) "Customary IHL: Rule 2. Violence Aimed at Spreading Terror among the Civilian Population" IHL Database <www.ihl-databases.icrc.org>.

49 DW Greig "The Underlying Principles of International Humanitarian Law" (1980) 9 Aust YBIL 46 at 58–59; and Solis, above n 37, at 274–275.

50 James E Bond "Application of the Law of War to Internal Conflicts" (1973) 3 Ga J Intl & Comp L 345 at 358; and Inga Rogg and Hans Rimscha "The Kurds as Parties to and Victims of Conflicts in Iraq" (2007) 89 Intl Rev Red Cross 823.

51 Sergey V Sayapin "The Spread of Terror among the Civilian Population – A War Crime" (2006) 2 APYIHL 196 at 214–215.

52 *Galić (Trial)*, above n 32, at [222]–[225] and [586].

This part will examine the prohibition against spreading terror among the civilian population elaborated upon by the ICTY and SCSL, in terms of who can be guilty of the crime, elements of the war crime, and thereafter compare it with definitions of "terrorism" in international law.

A Who Can be Guilty of the War Crime?

The prohibition against spreading terror among the civilian population operates within the framework of IHL, and applies to all parties to the armed conflict, whether IACs or NIACs.⁵³ Both states and non-state armed groups can, in principle, commit and be held responsible for violating the IHL prohibition against spreading terror.

However, in the tenor of the Nuremberg Mantra that international crimes "are committed by men, not by abstract entities",⁵⁴ international criminal law and international criminal tribunals prosecute and punish natural persons rather than states or any other collective entities for international crimes. Members of non-state armed groups and state agents have been convicted before international criminal tribunals of the crime of spreading terror.⁵⁵ Significantly in 2012, the SCSL convicted Charles Taylor, the former President of Liberia, for crimes against humanity and war crimes, including aiding and abetting the spread of terror among the civilian population (referred to in the judgment as "terrorism"), the first conviction of a former head of state by an international tribunal for international crimes since the Nuremberg trials.⁵⁶

Taylor's attempt to invoke Head of State immunity was rejected, on the basis that there is no such immunity before international criminal tribunals. The Trial Chamber further regarded his status as President at the time, being "a position of public trust, with inherent authority" at the "highest level of leadership", as one of the aggravating factors justifying a sentence of 50 years' imprisonment for planning, aiding and abetting the war crime of spreading terror among civilians and other international crimes for which he was convicted, a sentence upheld on appeal.⁵⁷

53 *Tadić (Appeal)*, above n 31, at [70].

54 *United States and others v Göring and others*, above n 42, at 223.

55 See for example *Galić (Trial)*, above n 32; *Milošević (Trial)*, above n 38; *Brima (Trial)*, above n 33; and *Prosecutor v Fofana (Judgment)* SCSL Trial Chamber I, SCSL-04-14-T, 2 August 2007.

56 Kirsten MF Keith "Deconstructing Terrorism as a War Crime: The Charles Taylor Case" (2013) 11 JICJ 813 at 813–814.

57 *Prosecutor v Taylor (Sentencing)* SCSL Trial Chamber II SCSL-03-01-T, 30 May 2012 at [95]–[103]; and *Prosecutor v Taylor (Judgment)* SCSL Appeals Chamber SCSL-03-01-A, 26 September 2013 [*Charles Taylor (Appeal)*] at [705]–[708].

B What Are the Elements of the War Crime?

Drawing from art 51(2) of API and art 13(2) of APII, the ICTY and SCSL have laid down the elements of the war crime of spreading terror among the civilian population in various decisions, as follows:

- (1) Acts or threats of violence or attacks against the civilian population (actus reus);
- (2) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence (mens rea); and
- (3) The above offence was committed with the primary purpose of spreading terror among the civilian population (mens rea).⁵⁸

The actus reus of the offence comprises acts or threats of violence or attacks against the civilian population, including indiscriminate or disproportionate attacks or threats thereof. It is irrelevant whether the conduct in question had been carried out in offence or defence.⁵⁹ The nature of such acts or threats can vary as long as the victims suffered "grave consequences", and include attacks designed to cause "extensive trauma and psychological damage". The ICTY Appeals Chamber in *Galić* further suggested in a footnote that "propaganda" (presumably propaganda amounting to a threat) may also be a method of terror.⁶⁰ "Terror" was defined as "extreme fear".⁶¹

The distinction between a "threat" and a "warning" lies in the legitimacy of the intended act being cautioned against. Warnings – precautionary measures aimed at minimising harm to civilians and objects from attacks against legitimate military objectives – are permitted and even required under some circumstances in IHL.⁶² On the other hand, in *Brima*, the SCSL Trial Chamber held that a so-called "warning" that any civilian who tried to run away "was a betrayer and will be shot on sight" fell within the scope of the offence of spreading terror.⁶³ Although it was not explicitly stated in its

58 *Galić (Appeal)*, above n 32, at [100]–[104]; *Prosecutor v Fofana (Judgment)* SCSL Appeals Chamber SCSL-04-14-A, 28 May 2008 [*Fofana Appeal*] at [350]; and *Prosecutor v Sesay (Judgment)* SCSL Appeals Chamber SCSL-04-15-A, 26 October 2009 [*Sesay Appeal*] at [889].

59 *Milošević (Trial)*, above n 38, at [906].

60 *Galić (Appeal)*, above n 32, at [102]. See also *Milošević (Appeal)*, above n 46, at [33]; and *Charles Taylor (Trial)*, above n 47, [407].

61 *Galić (Trial)*, above n 32, at [137]. See also *Fofana (Appeal)*, above n 58, at [352]; and *Milošević (Trial)*, above n 38, at [885]–[886].

62 Pnina Sharvit Baruch "The Report of the Human Rights Council Commission of Inquiry on the 2014 Operation in the Gaza Strip – A Critical Analysis" (2016) 46 Isr YB Hum Rts 29 at 43; and API, above n 34, art 57(2)(c).

63 *Brima (Trial)*, above n 33, at [1691]–[1695]. See also *Galić (Appeal)*, above n 32, separate and partially dissenting opinion of Judge Meron at [2].

judgment, the SCSL apparently accepted that such a statement would more accurately be characterised as a threat.

Questionably, the SCSL Trial Chamber in *Brima* – by its own admission – went further than the clear language of art 51(2) of API and art 13(2) of APII to include acts or threats of violence against property, since "the destruction of people's homes or means of livelihood and, in turn, their means of survival, will operate to instil fear and terror."⁶⁴ By contrast, the SCSL Appeals Chamber reoriented the focus on civilians as the protected category, citing the commentary on APII by the ICRC, that the prohibition covers acts "directed against installations which would cause victims as a side-effect".⁶⁵

Since virtually any armed conflict would instil fear in civilians, the specific intent to spread terror among the civilian population is a critical element of the war crime. Accordingly, the ICTY and SCSL have held that, to establish such mens rea, the purpose of the unlawful acts or threats thereof need not be the only purpose of the acts or threats of violence, as long as the intent to spread terror among the civilian population was principal among the aims. *Dolus eventualis* or recklessness are excluded. Such intent can be inferred from the circumstances of the acts or threats, which includes their nature, manner, timing and duration, as well as the actual infliction of terror and the indiscriminate nature of the attack.⁶⁶

The ICTY has explained that the term "civilian population" refers to a population that is *predominantly* civilian.⁶⁷ In criminal proceedings, the prosecution bears the burden to prove that the perpetrator was aware or should have been aware of the civilian status of the persons attacked, and in cases of doubt, that the given circumstances must be such that a reasonable person could not have believed that the individual attacked was a combatant.⁶⁸

While the ICTY has explained that actual terrorisation of the civilian populations is not an element of the crime, evidence of actual terrorisation may establish other elements of the crime.⁶⁹ This is a reasonable conclusion since victims of terror may demonstrate dissimilar reactions in the face of the

64 *Brima (Trial)*, above n 33, at [670].

65 *Fofana (Appeal)*, above n 58, at [351].

66 *Galić (Appeal)*, above n 32, at [104] and [106]–[109]; *Galić (Trial)*, above n 32, at [136]; *Milošević (Appeal)*, above n 46, at [37]; *Milošević (Trial)*, above n 38, at [881]; and *Brima (Trial)*, above n 33, at [669].

67 *Milošević (Appeal)*, above n 46, at [50]–[51]; and *Milošević (Trial)*, above n 38, at [921]–[924].

68 *Milošević (Appeal)*, above n 46, at [60]; and *Milošević (Trial)*, above n 38, at [952].

69 *Galić (Appeal)*, above n 32, at [104] and [107]; *Galić (Trial)*, above n 32, at [134]; and *Milošević (Appeal)*, above n 46, at [35].

same material dangers, making an effort to determine feelings of terror among the civilian population highly subjective in criminal proceedings.⁷⁰

C Comparison with Definitions of "Terrorism"

The prohibition against spreading terror among the civilian population under IHL, enforced by international criminal law, stands out from definitions of "terrorism" in international law, not least because it has clearly been established in treaty law and customary international law, but also because of its limited scope of application within the context of armed conflict.

As a rule of IHL (*jus in bello*), it is distinct from *jus ad bellum* (law governing resort to the use of force) by generally remaining aloof of the political agendas of the parties to an armed conflict. An exception to IHL's neutrality towards political goals is art 1(4) of API, though for the limited purpose of classifying as IACs those armed conflicts where peoples are "fighting against colonial domination and alien occupation and against racist regimes" in exercise of their right of self-determination.

During the negotiations in Geneva from 1974 to 1977, Israel was the only state which voted against art 1 of API, owing to its rejection of art 1(4). Israel considered that a reference to belligerents' "motives and cause" clearly contradicted the spirit and accepted norms of IHL, and criticised what it saw as the politicisation of IHL.⁷¹ Nevertheless, owing to doubts as to how art 1(4) is to be applied, the status of art 1(4) as customary international law has been doubted, including by the ICRC.⁷²

Yet, as an IHL rule, the prohibition against spreading terror among the civilian population is distinct from definitions or attempted definitions of "terrorism" in a number of ways. First, the prohibition focuses on the protected status of civilians in armed conflict. Proof of ultimate military or political goals is not required (even though these may exist), unlike certain definitions of terrorist conduct which contemplate whether the act is intended to compel a government or international organisation "to do or to abstain from doing any act."⁷³

70 See by contrast Sayapin, above n 51, at 215–216.

71 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977: Volume VI* (Federal Political Department, Bern, 1978) at 39–42.

72 Noam Lubell *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, Oxford, 2010) at 97; Nils Melzer *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) at 249; and ICRC "Self-determination" How does law protect in war? Online casebook <www.casebook.icrc.org>. Contrast Antonio Cassese "Wars of National Liberation and Humanitarian Law" in *The Human Dimension of International Law: Selected Papers* (Oxford University Press, Oxford, 2008) 99.

73 *Milošević (Trial)*, above n 38, at [879]. See Terrorism Financing Convention, above n 11, art 2(1)(b); Nuclear Terrorism Convention, above n 12, art 2(1)(b)(iii); and SC Res 1566, above n 18.

Next, as noted above, both state and non-state agents can be guilty of the war crime of spreading terror among the civilian population. Belligerent parties in all armed conflicts, including asymmetric conflicts, are deemed to be equal, with all parties being bound by the same IHL obligations.⁷⁴

By contrast, in the context of the definitional debate over terrorism, terrorist conduct has primarily been defined to encompass only non-state actors who carry out acts of politically motivated violence. Obligations imposed on states, on the other hand, are focused on prohibitions against aiding, abetting or financing such conduct by non-state actors, as well as obligations to take action against such conduct.⁷⁵

Nevertheless, these debates over the definition of terrorism still remain unresolved to a large extent. Key controversies relate to exceptions for "freedom fighters" and "national liberation movements" who carry out acts of violence in exercise of the right of peoples to self-determination, and the category of "state terrorism" which seeks to impose the same obligations on state and non-state actors regarding acts typically characterised as terrorist conduct.⁷⁶

Despite the above, existing definitions of terrorist acts and the IHL prohibition against spreading terror among the civilian population are all agreed that the prohibited violent conduct in question cannot be justified with reference to considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.⁷⁷ Similar to the numerous pronouncements by the international community on "terrorism", nothing within IHL permits a violation thereof in the name of a just cause.⁷⁸

IV THE 2014 GAZA CONFLICT

The prospect of prosecution of parties to the 2014 Gaza Conflict for war crimes is a serious reality, especially in light of recent developments at the ICC. The state of Palestine had accepted ICC jurisdiction for alleged crimes committed "in the occupied Palestinian territory, including East

74 Marco Sassòli and Yuval Shany "Debate: Should the obligations of states and armed groups under international humanitarian law really be equal?" (2011) 93 Int Rev Red Cross 425; and Inger Österdahl "Dangerous Liaison? The Disappearing Dichotomy between *Jus ad Bellum* and *in Bello*" (2009) 78 Nordic J Intl L 553 at 556.

75 See generally Terrorism Financing Convention, above n 11; and SC Res 1373, above n 16.

76 *Sixth Committee: Summary Record of the 28th Meeting* UN Doc A/C.6/66/SR.28 (2 December 2011) at [81]; and Rostow, above n 17, at 488–489. See also O'Donnell, above n 10, at 872–878.

77 See for example Terrorism Financing Convention, above n 11, art 6; Nuclear Terrorism Convention, above n 12, art 5; Terrorist Bombing Convention, above n 14, art 5; and SC Res 1566, above n 18.

78 Österdahl, above n 74, at 554–557. See also *Sixth Committee: Summary Record of the 28th Meeting* UN Doc A/C.6/69/SR.28 (13 November 2014) at [9].

Jerusalem, since June 13, 2014".⁷⁹ Such accession to the Rome Statute was accepted by the ICC Prosecutor in 2015, although she took the controversial position that Palestine was a "state" for the purposes of the Rome Statute.⁸⁰

On 20 December 2019, the ICC Prosecutor concluded that all the statutory criteria under the Rome Statute for the opening of an investigation into the situation in the Palestinian territories have been met, and sought a jurisdictional ruling under art 12(2)(a) of the Rome Statute on whether the territory subject to investigation comprised "the West Bank, including East Jerusalem, and Gaza".⁸¹ Before the ICC pre-trial chamber, the Prosecutor submitted that "there is a reasonable basis to believe that war crimes were committed" by both members of the IDF as well as Hamas and Palestinian armed groups in the 2014 Gaza Conflict.⁸²

Regrettably, as the war crime of spreading terror among the civilian population is not included within the exhaustive list of war crimes within ICC jurisdiction under art 8 of the Rome Statute,⁸³ the prospect of prosecution of agents of Israel or members of Palestinian armed groups for this well-established war crime in the ICC is virtually non-existent. This is incongruous with the principle of punishing serious violations of the laws and customs of war embedded in the Rome Statute, especially since the war crime of spreading terror among the civilian population is an "aggravated" form of the war crime of unlawful attacks against civilians, the latter of which falls within ICC jurisdiction according to the Rome Statute.⁸⁴

Notwithstanding the above, this section will analyse whether there are grounds to believe that the state of Israel or Hamas or other Palestinian armed groups violated the IHL prohibition against spreading terror among the civilian population during the 2014 Gaza Conflict. The analysis will proceed according to the elements of the war crime as elaborated upon by the ICTY and SCSL, although it should be borne in mind that only natural persons can be prosecuted, tried and sentenced under international criminal law as it currently stands.

It will begin by critiquing Israel's Gaza Conflict Report and the COI's summary and detailed findings reports, all published in 2015, setting out the analytical methodology and general comments

79 State of Palestine *Declaration Accepting the Jurisdiction of the International Criminal Court* (31 December 2014) [Palestine Declaration].

80 See Hyeyoung Lee "Defining 'State' for the Purpose of the International Criminal Court: The Problem Ahead After the Palestine Decision" (2016) 77 U Pitt L Rev 345.

81 Palestine Declaration, above n 79; and Palestine Article 19(3) Request, above n 6.

82 Palestine Article 19(3) Request, above n 6, at [94].

83 See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records: Volume II* UN Doc A/CONF.183/13 (Vol II) (2002).

84 *Rome Statute*, above n 27, arts 8(2)(b) and 8(2)(e); and *Milošević (Trial)*, above n 38, at [882].

thereto. Thereafter, it will analyse the conduct of Hamas and other Palestinian armed groups and the conduct of Israel during the conflict. For the avoidance of doubt, only the prohibition against spreading terror among the civilian population will be discussed below and, unless directly relevant to the analysis of the said prohibition, no position will be taken on whether other IHL norms have or have not been violated.

A Critique, Methodology and General Comments

In a conflict as politically controversial as the Israeli-Palestinian conflict, objectivity is a scarce resource. Such concerns apply no less with regard to the conflicting reports produced by Israel and the UN in relation to the 2014 Gaza Conflict.

First, the underlying motivations of Israel's and the UN COI's respective reports on the 2014 Gaza Conflict can both be questioned on account of bias. Israel's Gaza Conflict Report can be impugned for its self-serving motivations, since it is a "joint effort by numerous governmental agencies" of its own, including the Justice Ministry, Foreign Ministry, IDF Judge Advocate General and others in both the IDF and the National Security Council.⁸⁵

On the other hand, the HRC Resolution S-21/1 of 2014 authorising the COI had already reached the conclusion that Israel committed "widespread, systematic and gross violations of international human rights and fundamental freedoms" arising from the military operations since 13 June 2014.⁸⁶ This pre-judged outcome lends some credit to the high degree of Israeli scepticism towards the COI.

Nevertheless, contrary to Israel's assertions, the earlier involvement and subsequent resignation of former chairperson William Schabas from the COI arising out of a legal opinion previously prepared for the PLO in October 2012 does not per se significantly taint the COI's findings on account of his alleged conflict of interest. Schabas resigned on 2 February 2015 around the beginning of the drafting of the COI's reports, approximately halfway between the formal commencement of the COI's work on 16 September 2014 and the publication of the reports on 24 June 2015. There were at all times two other experts on the COI, Mary McGowan Davis (who took over as Chair) and Doudou Diène, who finalised the report.⁸⁷

85 Gaza Conflict Report, above n 4, at 7; and Israel Ministry of Foreign Affairs "Cabinet Secretary Mandelblit presents PM Netanyahu with Israel's Position on Operation Protective Edge" (press release, 14 June 2015). See also B'Tselem *Whitewash Protocol: The So-called Investigation of Operation Protective Edge* (September 2016).

86 *Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem* HRC Res S-21/1 (2014) at [2].

87 Letter from William Schabas (Chair of the Commission of Inquiry on the Gaza Conflict) to Joachim Rucker (President of the Human Rights Council) resigning from the Commission of Inquiry (2 February 2015); Israel Ministry of Foreign Affairs "FM Liberman on the resignation of William Schabas" (press release, 3 February 2015); Israel Ministry of Foreign Affairs "PM Netanyahu on the resignation of William Schabas" (3 February 2015); Office of the High Commissioner on Human Rights "Press Statement on the resignation of the

Secondly, doubts can be raised about the methodology and legal and factual conclusions adopted by the respective reports. Israel's Gaza Conflict Report risks over-classifying Palestinians as "militants" since it regards mere formal membership in non-state armed groups as sufficient for the purposes of such characterisation.⁸⁸

Based on the approach of the Israeli Supreme Court in the *Targeted Killings* case, as well as the ICRC, members of these armed groups would be considered civilians and would lose their protected status only for such time that they directly participate in hostilities. Both the Court and the ICRC accepted that the proverbial "farmer by day, fighter by night" may lose protected status, but neither went as far as endorsing a formal membership approach.⁸⁹

Conversely, due in part to factors beyond its control, the COI's fact-finding process was hindered and its objectivity was potentially undermined by various factors, including refusals of access to the West Bank and the Gaza Strip owing to lack of cooperation from Israel and Egypt. It only "received full cooperation from the State of Palestine" and communicated with the "authorities in Gaza".⁹⁰

Opening the door to doubts about the reliability of witness testimony, Palestinian witnesses were found to have "fear of reprisals by armed groups and the local authorities if they provided information" and suffered summary executions if suspected of "collaborating" with Israel.⁹¹ Even as the COI carried out interviews with Palestinian and Israeli witnesses, often remotely, it added that assessment of the veracity of witness testimony was "impossible".⁹²

Accordingly, the analysis below proceeds on the basis that it neither accepts nor rejects as proven or disproven any assertions of fact (although errors and common ground will be highlighted if relevant), but considers all of the assertions in totality for the purposes of assessing the *legal* aspects

Chairperson of the Commission of Inquiry on the 2014 Gaza Conflict" (press release, 3 February 2015); Detailed Findings, above n 3, at [1]–[2]; and COI Report, above n 4, at [1]–[2].

88 Gaza Conflict Report, above n 4, at [263]–[270].

89 The Court accepted that a civilian who has made a terrorist organisation his "home", committing a chain of hostilities in that role with short periods of rest in between, directly participates in hostilities and loses his protected status. The ICRC considered that such an individual lost protected status on account of that person's continuous combat function. See *Targeted Killings*, above n 39, at [24]–[31] and [39]; Nils Melzer *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law* (ICRC, Geneva, 2009) at 27–36; and Yahli Shereshevsky "Targeting the *Targeted Killings* Case – International Lawmaking in Domestic Contexts" (2018) 39 *Mich J Intl L* 241 at 250.

90 COI Report, above n 5, at [3]–[5]; and Detailed Findings, above n 4, at [3]–[5].

91 Detailed Findings, above n 4, at [467] and [490]–[502]; and COI Report, above n 5, at [62] and [67]–[68].

92 Detailed Findings, above n 4, at [18]; and COI Report, above n 5, at [7]. See also Baruch, above n 62, at 45, 57 and 69; and Geoffrey Corn *Analysis of the UN Report on the 2014 Gaza Conflict: The Distorting Effects of Flawed Foundations* (JINSA, June 2015).

of the conflict insofar as these may engage the prohibition against spreading terror among the civilian population.

Finally, the analysis below will not attempt to conclusively classify the 2014 Gaza Conflict as an IAC or NIAC. The prohibition against spreading terror among the civilian population is the same in both legal frameworks, rendering the classification of the armed conflict less material. Nevertheless, where relevant, this article will address the legal differences between the frameworks.

B Conduct of Hamas and Other Palestinian Armed Groups During the Conflict

Hamas has been the de facto governmental authority of the Gaza Strip since 2007, with a structured and organised military wing, the Izz al-Din al-Qassam Brigades. Additionally, other Palestinian armed groups, such as the Palestinian Islamic Jihad and Al-Aqsa Martyrs Brigades, operate in Gaza and cooperate with Hamas especially in times of high-intensity operations such as in 2014.⁹³

Asymmetric warfare between the state of Israel, on the one hand, and Hamas and other Palestinian armed groups, on the other, raises numerous difficulties under IHL, particularly because such groups rarely use uniforms or any other distinctive signs marking them as combatants. It is often part of their strategy to blend into the general population and blur the distinction between combatants and civilians, or even use civilians as human shields in their operations for tactical advantages. By creating a heightened risk of civilian casualties and damage to protected objects, they place additional burdens on their opposing parties to comply with IHL, as was the case in the 2014 Gaza Conflict.⁹⁴

Drawing from Israel's and the COI's reports, this section will examine three aspects of the conduct of Hamas and other Palestinian armed groups during the conflict, namely whether the rocket and mortar attacks, assault tunnels, and means used by these groups to compel civilians to act as human shields violate the prohibition against spreading terror among the civilian population.

1 Rocket and mortar attacks

In the lead-up to and during the 2014 Gaza Conflict, Hamas and other Palestinian armed groups fired rockets and mortars from the Gaza Strip into Israel. Israel places the figure at more than 4,500 rockets and mortars fired during the 51 days of the conflict, with approximately 90 per cent directed

93 Baruch, above n 62, at 38–39; Gaza Conflict Report, above n 4, at [31] and [55]; and Detailed Findings, above n 4, at [62].

94 Hilly Moodrick-Even Khen "Reaffirming the Distinction between Combatants and Civilians: The Cases of the Israeli Army's 'Hannibal Directive' and the United States' Drone Airstrikes against ISIS" (2016) 33 *Ariz J Intl & Comp L* 765 at 776 and 784; Monica Hakimi "International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide" (2008) 33 *Yale J Intl L* 369 at 380; Detailed Findings, above n 4, at [479] and [483]; and Gaza Conflict Report, above n 4, at [123]–[165].

at Israel's civilian population.⁹⁵ UN figures are higher, at 4,881 rockets and 1,753 mortars fired between 8 July and 26 August.⁹⁶ The arsenals of these non-state armed groups included rockets up to the range of 160 km, capable of reaching central and northern Israel, including the major cities of Jerusalem, Tel Aviv and Haifa.⁹⁷

The ICTY Appeals Chamber clarified in *Milošević* that, although causing death or serious injury is one of the modes of spreading terror, it is not an element of the offence per se as long as the victims suffered "grave consequences".⁹⁸ Hence, the actus reus of the offence of spreading terror among civilians is fulfilled even though Israel's Iron Dome counter-missile defence system intercepted a majority of the projectiles, while six civilians were killed and approximately 1,600 civilians were injured. Additionally, Israel reported over approximately USD 39 million in direct damage to civilian property and USD 443 million in indirect damage to civilians.⁹⁹

While there is no need to prove actual terrorisation of the civilian population for the purposes of the offence, there is clear evidence of actual terrorisation and disruption of ordinary civilian life in Israel that supports the actus reus element.¹⁰⁰ Among other things, educational and other activities near the Gaza border had to cease or relocate, elderly and the disabled were confined to protective shelters, approximately 10,000 civilians in the areas near the Gaza border evacuated their homes, and it was postulated that many suffered or would suffer short- and long-term psychological damage.¹⁰¹

Israel has argued that the armed groups directly targeted major cities and populated areas, at times firing rockets and mortars at different cities and towns simultaneously or firing a barrage of rockets and mortars at a particular city or town, in order to circumvent Israel's protective mechanisms.¹⁰² The COI, on the other hand, has taken a long route by suggesting that the armed groups may have been targeting military objectives, but since their weapons were unguided and inaccurate, such acts

95 Gaza Conflict Report, above n 4, at [179].

96 Detailed Findings, above n 4, at [66]; COI Report, above n 5, at [27]; and Human Rights Council *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, Addendum* UN Doc A/HRC/28/80/Add.1 (26 December 2014) at [25].

97 Gaza Conflict Report, above n 4, at [54].

98 *Milošević (Appeal)*, above n 46, at [33].

99 Gaza Conflict Report, above n 4, at [112]; Detailed Findings, above n 4, at [66]; and COI Report, above n 5, at [21].

100 *Galić (Appeal)*, above n 32, at [104] and [107]; *Galić (Trial)*, above n 32, at [134]; and *Milošević (Appeal)*, above n 46, at [35].

101 Gaza Conflict Report, above n 4, at [200]–[212]; Detailed Findings, above n 4, at [560]–[564]; and COI Report, above n 5, at [21].

102 Gaza Conflict Report, above n 4, at [113].

constitute indiscriminate attacks amounting to acts of violence for the primary purpose of spreading terror.¹⁰³

Not only has the COI's approach been criticised for seeking to give Hamas an inordinate amount of benefit of the doubt,¹⁰⁴ such an approach is legally unnecessary in relation to the prohibition against spreading terror given that the purpose of the unlawful acts or threats need not be the only purpose thereof and the presence of a few legitimate targets within a civilian population does not necessarily change the ultimate character of the population.¹⁰⁵ Nevertheless, both Israel and the COI have pointed to public statements made by Palestinian armed groups as evidence of deliberate targeting of Israeli civilian populations.¹⁰⁶ The COI even noted a 7 July communiqué where Hamas's military wing deliberately targeted Israeli towns while falsely characterising them as military bases.¹⁰⁷

Buttressing the above are Israeli findings that Hamas and other Palestinian armed groups fired on Israel in breach of mutually-agreed ceasefires, including the ceasefires of 28 July, 5 August, 11 August and 19 August.¹⁰⁸ All of these factors, including the attacks during ceasefires and long-term and persistent indiscriminate attacks against civilians, have been recognised by the ICTY as establishing the intent to spread terror.¹⁰⁹

Both Israel and the COI came to the conclusion that Hamas and other Palestinian armed groups violated the prohibition against spreading terror among the civilian population,¹¹⁰ a conclusion that is eminently justified on the available data.

2 *Assault tunnels*

One of Israel's stated objectives for Operation Protective Edge was the "neutralisation of [Hamas's and other terror organisations'] network of cross-border assault tunnels" which became its operational objective in the second phase (ground operation from 17 July to 5 August). The IDF withdrew from the Gaza Strip after neutralising 32 such tunnels.¹¹¹ Israel's Gaza Conflict Report rightly refrained

103 Detailed Findings, above n 4, at [84]–[99]; and COI Report, above n 5, at [33].

104 Baruch, above n 62, at 39–40.

105 *Galić (Appeal)*, above n 32, at [104] [106]–[109] and [136]; and *Galić (Trial)*, above n 32, at [136].

106 Gaza Conflict Report, above n 4, at [114]; Detailed Findings, above n 4, at [90]; and COI Report, above n 5, at [33].

107 Detailed Findings, above n 4, at [90].

108 Gaza Conflict Report, above n 4, at [97] and [100].

109 *Milošević (Trial)*, above n 38, at [881]. See also *Galić (Appeal)*, above n 32, at [67].

110 Gaza Conflict Report, above n 4, at [116]; Detailed Findings, above n 4, at [99]; and COI Report, above n 5, at [34].

111 Gaza Conflict Report, above n 4, at [77], [91] and [99]; and Detailed Findings, above n 4, at [105].

from using language in various earlier IDF statements and media reports that loosely referred to "terror tunnels",¹¹² since such terms are question-begging and presuppose certain purposes of the tunnels.

Israel noted four separate occasions – on 17, 19, 21 and 28 July – when Hamas militants emerged from various tunnels opening between 1.1 km to 4.7 km of civilian homes, though they encountered IDF troops stationed near those border towns, thereby "obstructing their ability to carry out attacks against civilians."¹¹³

Even though the cross-border assault tunnels may amount to "threats" and their use may arguably amount to "attacks" within the *actus reus* element of the war crime of spreading terror, there are numerous doubts as to whether these are directed against the civilian population within the scope of both the *actus reus* and *mens rea* elements of the offence.

Factors such as the close proximity of the tunnel openings to civilian populations may suggest civilian targets, but remain insufficient to prove the matter.¹¹⁴ As noted above, the four incidents cited by Israel where militants emerged from the tunnels all involved encounters with IDF troops instead of civilians.¹¹⁵ Hence, it is unclear whether the militants who emerged from the tunnels were targeting combatants or civilians and, as the COI correctly pointed out, it could not "conclusively determine the intent of Palestinian armed groups with regard to the construction and use of these tunnels."¹¹⁶

While both Israel and the COI found that the tunnels caused a great degree of fear and anxiety to Israelis,¹¹⁷ the prohibition against spreading terror among the civilian population does not prohibit terror as an incidental effect of acts of warfare which have another primary object and are in all other respects lawful. This is because it is recognised that the waging of war would almost automatically lead to the spreading of terror among the civilian population.¹¹⁸

Therefore, the available facts at present do not provide grounds to believe that the prohibition against spreading terror among the civilian population had been violated on account of the assault

112 Elior Levy "Hamas reconstructing terror tunnels using Israeli materials" (19 December 2014) YNet News <www.ynetnews.com>; Mitch Ginsburg "How Hamas dug its Gaza 'terror tunnel,' and how the IDF found it" (16 October 2013) Times of Israel <www.timesofisrael.com>; and "UN Secretary-General, Ban Ki Moon, Visits Hamas Terror Tunnel in Southern Israel" (14 October 2014) Israel Defense Forces <www.idf.il>.

113 Gaza Conflict Report, above n 4, at [119]–[120].

114 Contrast *Milošević (Trial)*, above n 38, at [901]; and *Milošević (Appeal)*, above n 46, at [140].

115 Gaza Conflict Report, above n 4, at [119]–[120].

116 Detailed Findings, above n 4, at [108].

117 Gaza Conflict Report, above n 4, at [121]; Detailed Findings, above n 4, at [106]–[107]; and COI Report, above n 5, at [32].

118 *Galić (Appeal)*, above n 32, at [103]; and *Sesay (Trial)*, above n 47, at [120].

tunnels. Neither have Israel nor the COI suggested so in their respective reports on the 2014 Gaza Conflict.

3 *Means used to compel civilians to act as human shields*

Israel has asserted that Hamas and other Palestinian armed groups directed civilian movement for the purpose of shielding their hostilities "both by verbal means – by waging an official campaign pressuring civilians to disregard Israel's evacuation warnings prior to impending IDF military activity – and by explicit intimidation and physical coercion."¹¹⁹ Articles 51 and 52 of API and art 13 of APII – which reflect customary international law – prohibit the use of civilians as shields to impede military operations.¹²⁰ However, a separate and distinct question arises whether the verbal and coercive *means* used by these armed groups to compel civilians within the Gaza Strip to act as shields for their military operations violate the prohibition against spreading terror.

At the outset, it is immaterial that the civilians in question were residents of Gaza and not Israeli nationals or residents. With the exception of the provisions within the Fourth Geneva Convention which are less relevant to the present analysis on the conduct of hostilities, the nationality or lack thereof of civilians is irrelevant to the protection of civilians from being made the object of attack under IHL.¹²¹ The ICC has rejected the notion that war crimes are generally limited to cases where victims are nationals of the opposing party, and the COI has likewise rejected the notion of an "enemy civilian" on the basis that "a civilian is a civilian regardless of nationality, race or the place where he or she lives."¹²²

Acts such as "explicit intimidation and physical coercion" alleged by Israel certainly amount to threats and attacks as a matter of principle.¹²³ Although verbal calls to ignore Israeli warnings do not per se amount to "attacks" or "threats" within the *actus reus* element of the offence of spreading terror, surrounding acts of intimidation and physical coercion may in certain circumstances turn such verbal calls into "threats".¹²⁴ A caveat remains that the evidence cited by Israel in relation to Hamas

119 Gaza Conflict Report, above n 4, at [158]–[165]. See also Detailed Findings, above n 4, at [482]–[483].

120 *Prosecutor v Strugar (Interlocutory Appeal)* ICTY Appeals Chamber IT-01-42-AR72, 22 November 2002 at [10]; and *Galić (Appeal)*, above n 32, at [87].

121 See for example *Nuclear Weapons*, above n 23, at 257; and *Adalah v GOC Central Command, IDF* HCJ 3799/02, 23 June 2005 [*Early Warnings*] at [21].

122 Detailed Findings, above n 4, at [395]. See also *Prosecutor v Ntaganda (Judgment)* ICC Appeals Chamber ICC-01/04-02/06 OA5, 15 June 2017 at [62].

123 Gaza Conflict Report, above n 4 at [158], and [159]–[165]. See also Detailed Findings, above n 4, at [482]–[483].

124 See *Brima (Trial)*, above n 33, at [592]–[593] and [1691]; and *Charles Taylor (Trial)*, above n 47, at [627].

intimidation and coercion is relatively thin, based on single eye-witness accounts by IDF soldiers of distinct incidents and, in at least one instance, hearsay.¹²⁵

These facts are further supported by the COI's finding that the armed groups carried out summary executions against those suspected of "collaborating" with Israel,¹²⁶ and the findings of both Israel and the COI that these groups conducted military operations from within or near densely populated areas,¹²⁷ from which it can be inferred that such armed groups were able to monitor and observe civilian conduct.

Since proof of ultimate military goals (that is, that civilians would function as human shields impeding Israeli military operations) is not an element of the offence, the key mens rea threshold remains the intent to spread terror among the civilian population.¹²⁸ On the other hand, the SCSL Trial Chamber in *Sesay* distinguished a "primarily utilitarian or military" purpose where terror is felt as a "side-effect", from an intent to spread terror within the mens rea requirement of the offence. The threshold is a high one, since the SCSL even considered on the particular facts of that case that widespread enslavement, abduction and detention per se were insufficient to establish the specific mens rea element.¹²⁹

Thus, although the above-mentioned acts may fulfil the actus reus element, it is doubtful whether or not spreading terror among the civilian population was the primary intent of Hamas or the Palestinian armed groups. As such, unless there is clearer evidence of such primary intention to spread terror among civilians, the evidence does not support a finding that the prohibition against spreading terror had been violated.

C Conduct of Israel During the Conflict

Israel has emphasised, among other things, the fact that the 2014 Gaza Conflict took place in a "complex, crowded, and constantly changing urban battlefield", involved "high-intensity combat", and its ground operation was "characterised by close-quarter combat and intensive urban warfare."¹³⁰ While stressing throughout its findings that Gaza and the neighbourhoods therein are small "densely populated" areas, the COI has construed this fact against Israel, suggesting at various points that Israel

125 Gaza Conflict Report, above n 4, at [161]–[165].

126 Detailed Findings, above n 4, at [467], [490]–[502]; and COI Report, above n 5, at [67]–[68].

127 Gaza Conflict Report, above n 4, at [54] and [123]–[156]; Detailed Findings, above n 4, [470]–[480]; and COI Report, above n 5, at [63]–[65].

128 *Milošević (Trial)*, above n 38, at [879]; *Galić (Trial)*, above n 32, at [137]; and *Fofana (Appeal)*, above n 58, at [352].

129 *Sesay (Trial)*, above n 47, at [1359]–[1360].

130 Gaza Conflict Report, above n 4, at [20]–[25].

violated the principle of distinction by engaging in indiscriminate attacks or that its warning systems were ineffective.¹³¹

As far as the war crime of spreading terror among the civilian population is concerned, the field conditions of a particular armed conflict affect the assessment of mens rea. In *Milošević*, the ICTY Trial Chamber recognised that, in an urban environment, even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, and, therefore, held that "to constitute terror, an intent to instil fear beyond this level is required."¹³²

Nevertheless, it is also trite that, in IHL, "[o]ne side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all of its obligations".¹³³ Thus, Israel remains bound to comply with IHL notwithstanding the violations of IHL by Hamas and other Palestinian armed groups, such as the use of human shields.

This section will examine three aspects of Israel's conduct during the conflict, namely whether the air strikes, air-land incidents in Shuja'iya, Khuza'a and Rafah, and arrests of numerous Palestinian individuals in Gaza and the West Bank violate the prohibition against spreading terror among the civilian population.

1 Air strikes

Israel carried out more than 6,000 air strikes throughout Operation Protective Edge. According to Israel, the strikes were directed at military objectives, including buildings used by organised armed groups for command, control, communications and intelligence activities, as armament production and storage, and launching sites, and to house openings and exits to combat and cross-border tunnels. These objectives, Israel stated, were intentionally situated by those armed groups within densely populated areas. While Israel has credited its precautionary efforts as effective since "the overwhelming majority" of its air strikes resulted in no civilian fatalities, the COI has placed the figure at 742 or 1,066 fatalities, including women and children, although it has not divided the figures between civilians or otherwise.¹³⁴

There can be little doubt that the air strikes amount to "attacks" fulfilling the actus reus element within the prohibition against spreading terror. A more interesting question is whether Israel's "roof knocking" warning methods – where a low-explosive projectile is fired at the target's roof in order to

131 See Detailed Findings, above n 4, at [172], [194], [221], [225], [236], [255], [293]–[294], [304], [337], [366], [371], [388], [399], [403], [408], [410], [415] and [440]; and COI Report, above n 5, at [54]–[56].

132 *Milošević (Trial)*, above n 38, at [888].

133 *Milošević (Appeal)*, above n 46, at [69].

134 Gaza Conflict Report, above n 4, at [21], [272], [403] and [405]; Detailed Findings, above n 4, at [111]; and COI Report, above n 5, at [35].

signal the impending danger and give civilians in or near the target a last opportunity to seek safety before an attack¹³⁵ – may also amount to either "attacks" or "threats".

Parties in IACs have a duty, pursuant to art 57(2)(c) of API and customary international law, to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.¹³⁶ No similar rule exists explicitly in NIACs, though it is arguable that such a rule may be derived from the principle that parties to the armed conflict must take reasonable care to harm to civilians in attacking military objectives, embodied in the principles of distinction and proportionality.¹³⁷

In contrast with Israel's other warning methods such as leaflets, phone calls, text messages, radio and television broadcasts,¹³⁸ low-explosive projectiles used in "roof-knocks" are still capable of causing death, injury and damage to property. In principle, they fulfil the actus reus element of "attacks" and "threats", but it is very unlikely that genuine "roof-knocks" are intended to spread terror, since they are intended to warn civilians of imminent danger.¹³⁹

ICTY jurisprudence has taken into account the type and accuracy of weapons in order to establish mens rea. In *Milošević*, the use of sniper fire and mortar shelling against civilian populations (which the ICTY accepted were accurate weapons) constituted evidence of deliberate targeting of civilians. On the other hand, the use of highly inaccurate modified air bombs with highly destructive force and psychological effects showed the indiscriminate nature of the attacks, that led the ICTY to infer a primary purpose to spread terror among civilians.¹⁴⁰

Israel has stated that the IDF conducted "pinpoint aerial strikes" whenever feasible, with most its air-delivered bombs being "precision-guided munitions", and that it "employed delay fuses for bombs to detonate deep inside targets, to limit damage to adjacent structures."¹⁴¹ Likewise, the COI has noted that the buildings were "likely struck by laser guided air dropped munitions".¹⁴² Furthermore, both

135 Gaza Conflict Report, above n 4, at [313].

136 See also *Early Warnings*, above n 121, at [20]; and International Law Association Study Group on the Conduct of Hostilities in the 21st Century "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare" (2017) 93 Intl L Stud Ser US Naval War Col 322 at 384–388.

137 See *Prosecutor v Kupreškić (Judgment)* ICTY Trial Chamber IT-95-16-T, 14 January 2000 at [521]–[526].

138 Gaza Conflict Report, above n 4, at [296]–[304].

139 See Roger-Claude Liwanga "Roof-Knocking Tactic: A Lawful and Effective Warning Technique under the Laws of War?" (2018) 43(2) NC J Intl L 31 at 48–50.

140 *Milošević (Trial)*, above n 38, at [908]–[913], [967]–[971] and [1001]; and *Milošević (Appeal)*, above n 46, at [305].

141 Gaza Conflict Report, above n 4, at [312] and [340].

142 Detailed Findings, above n 4, at [224]; and COI Report, above n 5, at [37].

Israel and the COI concur that Israel did issue warnings to civilians, including "roof-knocks", before the strikes in many, though not all, instances.¹⁴³ These factors suggest that Israel was deliberately targeting certain military objectives.

However, citing anonymous "military experts", the COI has argued that Israel likely violated the prohibition against indiscriminate attacks because of the use of "large air-dropped weapons with highly destructive potential", specifically naming the use of the GBU-32/MK-82 1,000 pound bomb and the GBU-31/MK-84 2,000 pound bomb.¹⁴⁴ In practice, tribunals have not relied solely on the indiscriminate nature of the attacks to infer an intention to spread terror, but also their widespread or recurrent nature among other factors, to establish the requisite mens rea.¹⁴⁵

The COI examined in detail 15 strikes on residential buildings,¹⁴⁶ representing only a fraction of the total number of air strikes carried out. Nine out of the 15 had indications that there were military objectives,¹⁴⁷ and in at least one of these incidents examined by the COI (the Abu Jama family home), Israel's Military Advocate General (MAG) found grounds for "a reasonable suspicion that the incident involved a deviation from the rules and procedures applicable to IDF forces."¹⁴⁸ Yet the COI has offered no reason why those 15 incidents were chosen, and it would be a mistake to regard these incidents as representative of all air strikes.¹⁴⁹

Assuming the accuracy of Israel's statement that "the overwhelming majority" of its air strikes resulted in no civilian fatalities,¹⁵⁰ this would militate against an inference of an intent to terrorise the civilian population especially when account is taken of its issued warnings. Hypothetically, even if Israel had deliberately targeted civilians in the remaining six out of 15 strikes examined by the COI, these would be violations of the prohibition against unlawful attacks against civilians, but do not per se fulfil the "aggravated" prohibition of spreading terror among the civilian population, since evidence

143 Detailed Findings, above n 4, at [214]; COI Report, above n 5, at [42]; and Gaza Conflict Report, above n 4, at [291]–[309].

144 Detailed Findings, above n 4, at [225]–[226].

145 *Charles Taylor (Trial)*, above n 47, at [702]–[704]; *Sesay (Appeal)*, above n 58, at [678]; *Sesay (Trial)*, above n 47, at [1130]; *Milošević (Trial)*, above n 38, at [1001]; and *Milošević (Appeal)*, above n 46, at [305].

146 Detailed Findings, above n 4, at [112]; and COI Report, above n 5, at [36].

147 Detailed Findings, above n 4, at [220]; and COI Report, above n 5, at [39].

148 Military Advocate General "Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Occurred During Operation 'Protective Edge' Update No 2" (press release, 4 December 2014).

149 Baruch, above n 62, at 55.

150 Gaza Conflict Report, above n 4, at [21], [272], [403] and [405].

of the intent to terrorise is lacking.¹⁵¹ Hence, there is insufficient data to conclude that Israel violated the prohibition against spreading terror on account of its air strikes.

2 Air-land incidents (*Shuja'iya, Khuza'a and Rafah*)

The COI has focused on the IDF's ground operations in the Gazan neighbourhoods of Shuja'iya (19 to 20 July), Khuza'a (20 July to 1 August), Rafah (1 to 3 August) and the operation targeting the market neighbourhood of Shuja'iya (30 July), which took place during the second phase of Operation Protective Edge.¹⁵² According to Israel, the purpose of its ground operation was to "[locate] and [neutralise] the threat to Israeli citizens posed by the sophisticated network of secret cross-border assault tunnels", and was accordingly limited to a limited territorial area on the outskirts of the Gaza Strip's civilian neighbourhoods.¹⁵³ Taking into account the use of tank shells, artillery, mortar, air-dropped bombs during the ground operation, the COI took the view that there are "strong indications" and that Israel "may" have violated the prohibition against indiscriminate attacks or the principle of proportionality.¹⁵⁴

The *actus reus* elements of the prohibition against spreading terror are certainly fulfilled on account of the ground operation but, as before, the critical issues relate to *mens rea*. As above, Israel's issuance of warnings to the civilian populations in these areas tends to suggest that Israel was deliberately targeting military objectives rather than civilians.¹⁵⁵

Nevertheless, the question remains whether a primary purpose to terrorise civilians may be inferred from surrounding facts, especially including alleged indiscriminate attacks. In drawing such inferences, allowance can and should be made for circumstances of close-quarter combat. In *Galić*, for example, the ICTY took into account facts such as the killing of civilians due to stray bullets and shooting of civilians in honest belief that they were directly participating in hostilities.¹⁵⁶

The COI found that the IDF heavily shelled Shuja'iya for more than six hours with extensive amounts of explosive weapons during the ground operations on 19 and 20 July, using aerial or long-range bombardment to ensure the security of ground forces.¹⁵⁷ Such "force protection", in principle,

151 *Milošević (Trial)*, above n 38, at [882]; and *Bothe, Partsch and Solf*, above n 37, at 340–342 and 778.

152 Detailed Findings, above n 4, at [248]; COI Report, above n 5, at [46]; and Gaza Conflict Report, above n 4, at [87]–[99].

153 Gaza Conflict Report, above n 4, at [87].

154 Detailed Findings, above n 4, at [293], [337], [366], [370], [388] and [415]; and COI Report, above n 5, at [46]–[60].

155 See Gaza Conflict Report, above n 4, at [90] and [300]–[304]; and Detailed Findings, above n 4, at [257]–[258], [305]–[307] and [396]–[405].

156 *Galić (Trial)*, above n 32, at [589]; and *Galić (Appeal)*, above n 32, at [259].

157 Detailed Findings, above n 4, at [259]–[260]; and Gaza Conflict Report, above n 4, at [95].

seeks to minimise risks for one's own forces, while increasing risks for the civilian population as a consequence.¹⁵⁸ UN figures report that 55 civilians, including 19 children and 14 women, were killed during that period.¹⁵⁹

Yet, in contrast with the facts of *Galić* and *Milošević* where artillery and mortar shelling took place on a "daily" basis and no discernible military objective,¹⁶⁰ IDF shelling of Shuja'iya was shorter and more concentrated. It was prompted by the destruction of an armoured personnel carrier and death of seven IDF soldiers and kidnapping of the body of First Sergeant Oron Shaul by Hamas militants through a tunnel shaft and, according to Israel, were aimed at neutralising armed groups in the area.¹⁶¹

Similar analysis applies to the operations in Khuza'a, Rafah and the market neighbourhood of Shuja'iya.

As argued above, property is not per se protected by the prohibition against spreading terror among civilians. Thus, destruction or damage to 740 buildings in Khuza'a resulting from IDF shelling, air strikes and bulldozing ought to have less weight in drawing an inference of an intent to terrorise.

According to Israel, it was targeting the large number of enemy forces concentrated in the area, cross-border assault tunnels, explosive devices, military infrastructure and weaponry embedded in the area. Regarding assertions that the IDF intentionally killed civilians attempting to flee Khuza'a between 22 and 24 July 2014, Israel's MAG found that "Palestinian terror organizations had fired at civilians trying to evacuate the area" and there was "no indication" that IDF forces directly or intentionally did so, but nevertheless ordered further factual examinations.¹⁶²

The COI may have gone too far in interpreting an Israeli commander's statement in the context of the Khuza'a operation that "Palestinians have to understand that this does not pay off" as indicative of a "punitive intent".¹⁶³ In order to infer an intent to terrorise civilians from commanders' statements such as these, the SCSL has considered whether they amount to calls to adopt certain measures in

158 Robin Geiss "The Principle of Proportionality: 'Force Protection' as a Military Advantage" (2012) 45 Isr L Rev 71 at 71; and Moodrick-Even Khen, above n 94, at 782–783. See also Detailed Findings, above n 4, at [296].

159 Detailed Findings, above n 4, at [282].

160 *Galić (Trial)*, above n 4, at [561] and [592]; and *Milošević (Trial)*, above n 38, at [889]–[905].

161 Detailed Findings, above n 4, at [259]–[260] and [296]; Gaza Conflict Report, above n 4, at [95]; and Prime Minister's Office "PM Benjamin Netanyahu and his Wife Express Deep Sorrow over the Passing of Herzl Shaul" (press release, 2 September 2016).

162 Military Advocate General "Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' – Update No 6" (15 August 2018) Israeli Defense Forces <www.idf.il> [MAG Update 6]; and Detailed Findings, above n 4, at [314]–[319] and [338].

163 Detailed Findings, above n 4, at [301] and [341]. See also Baruch, above n 62, at 100.

violation of IHL,¹⁶⁴ whereas the Israeli commander's statement does not clearly refer to the adoption of such illegal measures.

It is also doubtful that the mens rea to spread terror was fulfilled in the Rafah "Black Friday" incident on 1 August, which involved the execution of the IDF General Staff Directive for Contending with Kidnapping Attempts (the "Hannibal Directive"), in force at the time, after the capture of Lieutenant Hadar Goldin (later declared dead). Although details of the Hannibal Directive are confidential, it is apparent from available data that the Directive calls for intensification of force in hot pursuit to thwart attempted kidnappings of Israeli civilians or combatants.¹⁶⁵ Thus, it is unlikely that the primary purpose of such intensification of force was to spread terror among the civilian population.

Support for this can be found in the MAG's findings. Though the COI has opined that Israel violated the prohibition against indiscriminate attacks due to the alleged use of over 250 mortar shells, 800 artillery and tank shells and 100 fatalities in relation to the "Black Friday" incident, the MAG reached a different figure of around 114 fatalities (of whom at least 42 were military operatives), and that the attacks were directed at cutting off the kidnapping squad, locating Lieutenant Goldin, and attacking military operatives and targets. The MAG found that "no factual basis whatsoever was found that gave rise to a suspicion that the use of fire was done for the purpose of 'revenge' or as a 'price tag' on the residents of Rafah."¹⁶⁶

Finally, though the MAG found no violation of IHL arising from the shelling of the market neighbourhood of Shuja'iya on 30 July, the COI questionably concluded that the IDF shelling may have violated the prohibition on indiscriminate attacks and even directly attacked civilians.¹⁶⁷ Despite having acknowledged IDF statements that the ceasefire at the time did not apply to Shuja'iya, the COI misleadingly stated that the incident "took place during a ceasefire".¹⁶⁸

Furthermore, the COI's suggestion that mortars are inaccurate or imprecise weapons, whose shells are "likely to fall between 136 and 300 metres from the intended target",¹⁶⁹ must be seen in light of

164 *Sesay (Trial)*, above n 47, at [861]–[866]. See for example *Charles Taylor (Trial)*, above n 47, at [1990]–[2006]–[2017] and [2022]–[2031].

165 Gaza Conflict Report, above n 4, at [334]–[336]; MAG Update 6, above n 162; and Moodrick-Even Khen, above n 94, at 786–790. See also Judah Ari Gross "New IDF orders to thwart soldier abductions replace misunderstood protocol" (23 January 2017) Times of Israel <www.timesofisrael.com>.

166 MAG Update 6, above n 162; and Detailed Findings, above n 4, at [356] and [365].

167 Military Advocate General "Decisions of the IDF Military Advocate General regarding Exceptional Incidents during Operation 'Protective Edge' – Update No 3" (18 March 2015) Israeli Defense Forces <www.idf.il> [MAG Update 3]; and Detailed Findings, above n 3, at [385]–[388].

168 Detailed Findings, above n 4, at [385]; and MAG Update 3, above n 167.

169 Detailed Findings, above n 4, at [385] and [387]–[388].

the findings of the ICTY Trial Chamber in *Milošević* that mortars are "accurate" weapons. Expert evidence adduced in *Milošević* had testified that deviations of mortar shells would *decrease* from initial deviations of up to 128 m in direction and 312 m in distance if the mortar remains located in one place for an extended period of time and if the mortar crew are highly trained, among other factors.¹⁷⁰

According to the MAG report, which the COI accepted, the IDF fired an initial round of five mortar shells "with the aim of suppressing the fire targeted at IDF forces", and 10 more shells after 18 minutes when the fire emanating from that site continued.¹⁷¹ Thus, while the COI may have been correct that *initial* deviations of mortar shells may have fallen far from the target, it is unlikely that all 15 shells deviated to the same extent. In any event, notwithstanding the fact that Israel's mortar fire caused death and injury to civilians, evidence of intent to terrorise remains limited.

Therefore, although questions remain as to whether Israel fully complied with other IHL principles, there is insufficient basis to conclude that Israel violated the prohibition against spreading terror among the civilian population during its ground operations, since evidence of *mens rea* is lacking.

3 (Mass) arrests

According to Israel, the IDF captured "certain individuals on the battlefield" (that is, the Gaza Strip), with approximately 150 cases of captured individuals brought into Israeli territory for questioning. 21 persons were subjected to detention orders under Israeli criminal law and preventive detention was exercised over one individual pursuant to Israel's Incarceration of Unlawful Combatants Law.¹⁷² On the other hand, the COI stated that the IDF conducted arrests of "dozens of Palestinian men and children throughout the duration of the operation in Khuza'a", adding that soldiers behaved abusively during arrests and subjected detainees to forms of ill-treatment.¹⁷³ It added that Israeli security forces carried out "mass arrests" in the West Bank, including East Jerusalem, detaining "large numbers of Palestinians, including children", placing the figure at over 2,050 Palestinians between June and end-September 2014.¹⁷⁴

In the 1947 case of *Motomura* concerning Japanese war crimes in the Netherlands East Indies during World War II, it was held that mass arrests of "groups of persons" on grounds of "wild rumours and suppositions" and "without definite facts and indications with regard to each person" to justify

¹⁷⁰ *Milošević (Trial)*, above n 38, at [91] and [913].

¹⁷¹ MAG Update 3, above n 167; and Detailed Findings, above n 4, at [383].

¹⁷² Gaza Conflict Report, above n 4, at [361]–[366]; and MAG Update 6, above n 162.

¹⁷³ Detailed Findings, above n 4, at [324]–[328].

¹⁷⁴ Detailed Findings, above n 4, at [504] and [509]–[512]; and COI Report, above n 5, at [69].

such arrests may constitute the war crime of spreading terror among the civilian population.¹⁷⁵ While the ICTY Trial Chamber in *Galić* left the question open, the wide approach towards the actus reus element laid down by the ICTY Appeals Chamber in *Galić* and *Milošević* strongly supports the view that mass arrests or threats thereof may amount to "attacks" or "threats" within the scope of the war crime.¹⁷⁶ In similar vein, the SCSL has on the facts of one case held that "indiscriminate abductions" of civilians amount to the offence of spreading terror.¹⁷⁷ Thus, international criminal law jurisprudence supports the position that arrests fulfil the actus reus, while the lack of justification or indiscriminate nature of the arrests may lead to an inference of an intent to spread terror under the mens rea element of the war crime.

Civilians who directly participate in hostilities are not entitled to prisoner-of-war (POW) status in IACs, and POW protections are unavailable in NIACs.¹⁷⁸ Pursuant to the Fourth Geneva Convention – applicable to IACs, including occupation – internment or placing in assigned residence is only permitted if "absolutely necessary" (art 42) or for "imperative reasons" (art 78, in occupied territory) of "security". The ICTY has interpreted art 42 to require that there are "serious and legitimate reasons to think that [the persons detained] may seriously prejudice its security by means such as sabotage or espionage", language suggesting that such means are non-exhaustive.¹⁷⁹ The Israeli Supreme Court has considered that, when shots are fired at the defence forces from a house, a person or group or persons in the house with the ability to shoot may be suspected of endangering security.¹⁸⁰

The ICJ has held that the Fourth Geneva Convention is applicable to the West Bank, even though Israel accepts only that the "humanitarian provisions" thereunder apply.¹⁸¹ On the other hand, Israel has taken the position that provisions of the Fourth Geneva Convention "do not necessarily apply" to the Gaza Strip, although it has affirmed its respect for the customary international law norms

175 *Trial of Shigeaki Motomura* (1947) 1 Law Reports of Trials of War Criminals 138 (Netherlands Temporary Court-Martial at Macassar) at 143.

176 *Galić (Trial)*, above n 32, at [132]; *Galić (Appeal)*, above n 32, at [102]; and *Milošević (Appeal)*, above n 46, at [33].

177 *Charles Taylor (Trial)*, above n 47, at [704]. See also *Sesay (Trial)*, above n 47, at [1359]–[1360].

178 *Targeted Killings*, above n 39, at [25] and [31].

179 *Prosecutor v Delalić (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998 at [576].

180 *Marab v IDF Commander in the West Bank* HCJ 3239/02, 28 July 2002 at [22]–[23].

181 *Wall Opinion*, above n 36, at 173–177. See also *Beit Sourik Village Council v The Government of Israel* HCJ 2056/04, 2 May 2004 at [23].

governing armed conflict.¹⁸² Furthermore, Israel has derogated from its obligations under art 9 (right to liberty and security of person) of the ICCPR.¹⁸³

Although standards for arrest and detention in NIACs are comparatively lower than IACs,¹⁸⁴ NIACs remain subject to IHL principles such as distinction and military necessity. Thus, a compelling case can be made for the existence in NIACs of a prohibition against arrests of civilians without sufficient justification according to military necessity.¹⁸⁵ Hence, regardless of the nature of the armed conflict, the analysis below will proceed on the assumption that standards similar to those under the Fourth Geneva Convention apply to Gaza.

Israel's capture of individuals on the battlefield in order to "screen persons suspected of being involved in terror activity", as stated in its Gaza Conflict Report, is consistent with military necessity. On the other hand, its capture of individuals "in order to collect tactical intelligence regarding the location of combat tunnels or booby-trapped buildings in the area of IDF activity" may violate the prohibition against the use of physical or moral coercion of protected persons to obtain intelligence under art 31 of the Fourth Geneva Convention and recognised by the Israeli Supreme Court.¹⁸⁶

The large numbers of arrests of Palestinians (approximately 150 from Gaza and 2,050 from the West Bank) is a factor to be considered in inferring an intent to spread terror. However, despite using the term "mass arrests", the COI did not suggest that the arrests were without grounds.¹⁸⁷

As noted above, a "primarily utilitarian or military" purpose, where terror is felt as a "side-effect", is distinct from an intent to spread terror among civilians.¹⁸⁸ The available evidence suggests that the primary purpose of Israel's arrests during the 2014 Gaza Conflict was more likely "utilitarian" or "military" in nature, albeit with doubts as to their legality, rather than for the primary purpose of spreading terror.

Thus, even though questions may arise as to the legality of some of the arrests conducted by Israel, there is insufficient basis to conclude that Israel violated the prohibition against spreading terror among the civilian population by carrying out the large numbers of arrests.

182 Gaza Conflict Report, above n 4, at [368] and [371]; and *Ahmed v Prime Minister* HCJ 9132/07, 27 January 2008 at [14].

183 Israel ICCPR Derogation, above n 2; and *Wall Opinion*, above n 36, at 187–188.

184 See generally Hakimi, above n 94.

185 See generally Knut Dörmann "Detention in Non-International Armed Conflicts" (2012) 88 Intl L Stud Ser US Naval War Col 347.

186 Gaza Conflict Report, above n 4, at [362]; and *Early Warnings*, above n 121, at [24].

187 Detailed Findings, above n 4, at [509]; and COI Report, above n 5, at [69].

188 *Sesay (Trial)*, above n 47, at [1359]–[1360].

V CONCLUSION

The 2014 Gaza Conflict was devastating to both Israelis and Palestinians, and its effects are still being felt today, with calls to hold parties accountable, including the ongoing interest of the ICC Prosecutor in the matter. The COI remarked that the high incidents of death and injury during the conflict was "heartbreaking", and Israel "deeply regrets" the harm suffered by civilians in the Gaza Strip.¹⁸⁹ The Israeli-Palestinian conflict is still one of the most intractable conflicts in the world.

To fulfil its noble role as a "gentle civiliser of nations" in a conflict as deeply tainted by identity politics and as intractable as the one in the Middle East, the call to international law to provide an objective and impartial standard applicable to all parties without succumbing to political partisanship is elusive, but extremely necessary.¹⁹⁰

The IHL prohibition against spreading terror among the civilian population, and its corresponding war crime in international criminal law, is well-established under art 51(2) of API, art 13(2) of APII and customary international law. Contrary to the STL's reasoning in the 2011 decision,¹⁹¹ it is distinct from definitions of "terrorism" under other areas of international law, for which there remains a lack of consensus.

Based on the reasoning of international criminal tribunals in relation to the prohibition against spreading terror among the civilian population, and on the basis of publicly available data, this article has examined the legal issues arising out of the conduct of Hamas and other Palestinian armed groups, as well as Israel, during the 2014 Gaza Conflict. There are grounds to believe that the prohibition had been violated in the conflict by Hamas and other Palestinian armed groups on account of the rocket and mortar attacks, but the available data is presently insufficient to reach the same conclusion with regard to Israel.

An important caveat remains that there are significant gaps in information, and any conclusions reached on the conduct of any party are tentative at best. Regrettably, the war crime of spreading terror among the civilian population is not included within the list of war crimes under art 8 of the Rome Statute. It is desirable to amend the Statute to include the crime within the ICC's jurisdiction, since this would be more consistent with its goal of punishing serious violations of the laws and customs of war, among other international crimes.

189 Detailed Findings, above n 4, at [16]; COI Report, above n 5, at [20]; and Gaza Conflict Report, above n 4, at [24], [270] and [455].

190 Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2004) at 516–517.

191 *SLT Interlocutory Decision*, above n 7.

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