MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE 490A(AAA)** **Mr. Al Baluchi's Motion to Decline Joinder in Part and Separate Position Regarding** AE490(MAH) Defense Motion to Dismiss Charges I, VI, and VII due to Lack of Jurisdiction Based on *Ex Post Facto* Violation 24 February 2017

1. **Timeliness:** This pleading is timely filed, pursuant to AE490-2(Rul)(AAA) Ruling.

2. **Relief Sought:** Mr. al Baluchi respectfully requests the military commission dismiss charges I, VI, and VII on the basis that these charges violate the *Ex Post Facto* Clause of the United States Constitution.

3. **Overview:**

A. The benchmark for *ex post facto* analysis is whether alleged war crimes were triable in 2001 by military commission under UCMJ Article 21, which incorporated the international law of war as a jurisdictional limit.

1. In September 2001, UCMJ Article 21 limited military commissions jurisdiction to offenses subject to the law of war or statutorily authorized.

2. The Article 21 "law of war" refers to a portion of the law of nations incorporated into U.S. law.

B. In September 2001, conspiracy was a not a war crime subject to law-of-war military commission jurisdiction.

1. The weight of—admittedly divided—authority supports the view that in 2001, conspiracy was not a war crime triable by an Article 21 law-of-war military commission.

2. The international law of war does not recognize conspiracy as an offense against the laws of war.

3. The United States conducted Civil War conspiracy trials, including the Lincoln assassination trial, under martial law and military occupation military commissions, not law-of-war military commissions.

a. During and after the Civil War, the United States used military commissions to enforce martial law in the embattled North and military government in the occupied South.

b. The United States tried the Lincoln conspirators under martial law, not in what today would be considered a law-of-war military commission.

c. In *Ex Parte Milligan*, the United States made clear its view that Civil War military commissions possessed jurisdiction under martial law rather than the law of war.

4. *Ex Parte Quirin* avoided, rather than resolved, the question of conspiracy as a violation of the law of war.

C. In September 2001, terrorism was a not a war crime subject to law-of-war military commission jurisdiction.

1. U.S. jurisprudence affirms the international consensus that terrorism is not a chargeable crime.

2. The crime of terrorism does not exist under the customary law of armed conflict.

3. International criminal tribunals between World War I and 2001 have affirmed the consensus that terrorism was not a war crime.

4. The MCA's definition of terrorism is inconsistent with even the post-2001 *Galić* definition.

a. *Galić* terrorism includes targeting civilians as an element, but the MCA does not.

b. *Galić* terrorism requires specific intent to spread terror among the civilian population, but the MCA does not.

c. *Galić* terrorism requires an element of "extreme fear," but the MCA does not.

D. In September 2001, hijacking was a not a war crime subject to law-of-war military commission jurisdiction.

1. Hijacking has never been considered a war crime.

2. Suppression conventions do not create war crimes.

4. Burden of Proof: The defense bears the burden of persuasion on the demonstration of an *Ex Post Facto* Clause violation.[1] The government bears the burden of making "a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[2]

5. Relevant Facts:

a. On 4 April 2012, the government filed a charge sheet against Mr. al Baluchi and four other defendants. Charge I alleges a standalone conspiracy to commit offenses triable by military commission. The latest overt act alleged against Mr. al Baluchi is on 10 September

[1] Mr. al Baluchi joins Mr. al Hawsawi's contention that the *Ex Post Facto* Clause violation deprives the military commission of jurisdiction, with the concomitant shift in burden of persuasion. *See Bahlul v. United States*, 767 F.3d 1, 34 (D.C. Cir. 2014) (*en banc*) [hereinafter *Bahlul I*] (Rogers, J., concurring in the judgment in part and dissenting) ("Because Bahlul's conduct occurred prior to the enactment of the 2006 Act, and the military commission lacked jurisdiction to try these non-law-of-war offenses, Bahlul's convictions must be vacated."). Mr. al Baluchi acknowledges, however, that a majority of the D.C. Circuit has held that an *ex post facto* claim regarding jurisdiction is not itself jurisdictional. *Bahlul I*, 767 F.3d at 9 n.6 (opinion of the Court).

[2] *Hamdan v. Rumsfeld*, 548 U.S. 557, 603 (2006) (Stevens, J., joined by three Justices). Because different portions of the *Hamdan* decision—as well as the *Bahlul* decisions—attracted differing numbers of votes, Mr. al Baluchi will take special care to note the precedential value of each portion.

2001. None of the overt acts alleged against Mr. al Baluchi is itself a violation of the law of war. Charges VI alleges hijacking, and Charge VII alleges terrorism as a standalone offense.

b. On 3 February 2017, Mr. al Hawsawi filed AE490(MAH) Defense Motion to Dismiss Charges I, VI, VIII Due to Lack of Jurisdiction Based on *Ex Post Facto* Violation.

6. Law and Argument:

In September 2001, Article 21 of the Uniform Code of Military Justice permitted military commission jurisdiction over violations of the law of war and two statutory offenses. At the time, neither Congress nor the common law of war defined conspiracy, hijacking, or terrorism as war crimes. Congress' attempt to retroactively define these offenses as "war crimes," and the government attempt to seek the death penalty based on that retroactive statute, violate the *Ex Post Facto* Clause of the U.S. Constitution. Mr. al Baluchi largely supports the analysis of Mr. al Hawsawi in AE490(MAH), and joins most of its reasoning.[3]

A. The benchmark for *ex post facto* analysis is whether alleged war crimes were triable in 2001 by military commission under UCMJ Article 21, which incorporated the international law of war as a jurisdictional limit.

For *ex post facto* purposes, the appropriate benchmark is whether an alleged war crime fell within law-of-war military commission jurisdiction under Uniform Code of Military Justice Article 21 in September 2001. If a 2001 law-of-war military commission would not have had jurisdiction over conspiracy, terrorism, and hijacking as stand-alone war crimes in 2001, Congress' expansion of military commissions jurisdiction over five years later violates the *Ex Post Facto* Clause.

[3] Mr. al Baluchi joins AE490(MAH) except the following aspects: § 5(C) first paragraph; § 5(C) footnote 4 on page 7; § 5(D) the words "or its right to make war" in footnote 6 on page 9; and § 5(E) first paragraph, other than the first sentence.

The *Ex Post Facto* Clause, as both a structural restraint on Congress and a guarantee of individual protection against legislative abuses, is fully applicable to these military commissions. "The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively."[4] Mr. al Baluchi has articulated his full position on the applicability of the *Ex Post Facto* Clause in AE251F,[5] incorporated herein by reference.

1. In September 2001, UCMJ Article 21 limited military commissions jurisdiction to offenses subject to the law of war or statutorily authorized.

In *Ex Parte Quirin*, the Supreme Court treated Article of War 15 as the Congressional authorization for military commissions.[6] "[T]he *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war."[7]

Article of War 15 became Article 21 of the 1950 Uniform Code of Military Justice.[8] Article 21, like Article of War 15 before it, provided that court-martial jurisdiction did not negate military commissions jurisdiction over "offenders or offenses that by statute or by the law of war may be tried by such military commissions . . . ."[9] In 2001, in addition to the law of war, two

[4] *Johnson v. United States*, 529 U.S. 694, 701 (2000).
[5] AE251F(AAA) Mr. al Baluchi's Brief on Application of the *Ex Post Facto* Clause as Directed by AE251D Order, Motion to Dismiss Charges III and V as Barred by the Statute of Limitations.
[6] *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).
[7] *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006) (five-Justice majority).
[8] *Id.* at 593 n.22 (five-Justice majority).
[9] 10 U.S.C. § 821 (2001); *see also Hamdan*, 548 U.S. at 642 (Kennedy, J., joined by three Justices) ("At the same time, however, the President's authority to convene military commissions is limited: It extends only to 'offenders or offenses' that 'by statute or by the law of war may be

statutes authorized trial by military commission for aiding the enemy and spying.[10] The 14 September 2001 Authorization for Use of Military Force did not "expand or alter the authorization set forth in Article 21 of the UCMJ."[11] Accordingly, "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."[12] In September 2001, military commissions jurisdiction over offenses arose, if at all, under "the law of war."

September 2001 military commissions jurisdiction must be established, if at all, under a law-of-war military commission framework. The law of war recognizes three distinct types of military commissions jurisdiction: martial law, military occupation, and law-of-war.[13] In September 2001, the United States had not imposed martial law or military occupation over any area of significance to this motion. "Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available."[14]

---

tried by' such military commissions."). Military commission jurisdiction over "offenders" will be the subject of a separate motion.

[10] *See* 10 U.S.C. § 904; 18 U.S.C. § 2441.

[11] *Hamdan*, 548 U.S. at 594 (five-Justice majority).

[12] *Id.* at 628 (five-Justice majority); *see also id.* at 600 n.31 (Stevens, J., joined by three Justices) ("Article 21 of the UCMJ require[d] that the President comply with the law of war in his use of military commissions."); *id.* at 639 (Kennedy, J., joined by three Justices) ("While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case.").

[13] *Id.* at 595 (Stevens, J., joined by three Justices); *Bahlul I*, 767 F.3d at 7 (opinion of the Court); *see generally Madsen v. Kinsella*, 343 U.S. 341 (1952) (occupation military commission); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (martial law military commission).

[14] *Hamdan*, 548 U.S. at 597 (Stevens, J., joined by three Justices); *see also Bahlul I*, 767 F.3d at 7 (opinion of the Court) ("It is undisputed that the commission that tried Bahlul is of the third type: a law-of-war military commission."). For purposes of Common Article 2, Guantanamo Bay is occupied territory. *See* IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *available at* https://www.icrc.org/ihl/INTRO/380. The original lease of Guantanamo Bay recognizes the United States' occupation of Guantanamo Bay, a legal status which continues to this day. *See* 1903 Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Art. III (Feb. 23, 1903), *available at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp; *Rasul v. Bush*, 542 U.S. 466, 471 (2004); *see also Boumediene v. Bush*, 553 U.S. 723, 768 (2008) (describing U.S. control of

The jurisdiction of a law-of-war military commission is "limited to offenses cognizable during time of war."[15] "Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool."[16] Law-of-war military commission jurisdiction is limited by at least four factors: geographical, temporal, personal, and offense.[17]

"Congress, through Article 21 of the UCMJ, has 'incorporated by reference' the common law of war, which may render triable by military commissions certain offenses not defined by statute."[18] With respect to offense, "[n]either congressional action nor the military orders constituting the commission authorize[] it to place [a defendant] on trial unless the charge preferred against him is a violation of the law of war."[19] Thus, a reviewing court must "first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."[20]

Given the certainty required in criminal cases, the existence of common-law war crimes must rest on unambiguous authority. When "neither the elements of the offense nor the range of

---

Guantanamo Bay as more absolute and indefinite than the occupation of Germany); *The Adula*, 176 U.S. 361, 369 (1900) (describing the original occupation of Guantanamo Bay by American troops); *Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. 2010) (distinguishing long-term occupation of Guantanamo Bay in the face of a hostile government from the situation of Bagram Airfield in Afghanistan). Guantanamo Bay, however, is not "enemy-occupied territory" for military commissions jurisdiction purposes because the United States is not at war with the Republic of Cuba. *Cf. Hamdan*, 548 U.S. at 597 (Stevens, J., joined by three Justices). The legal meaning of the word "enemy" will be the subject of a separate pleading.

[15] *Hamdan*, 548 U.S. at 597 (Stevens, J., joined by three Justices); *see also id.* at 597 n.27 (Stevens, J., joined by three Justices) ("[C]ommissions convened during time of war but under neither martial law not military government may try only offenses against the law of war.").

[16] *Id.* at 625.

[17] *Id.* at 597-98 (Stevens, J., joined by three Justices) (citing William Winthrop, Military Law and Precedents 838-39 (2nd ed. 1920)); *id.* at 683 (Thomas, J., dissenting); *Ex Parte Quirin*, 371 U.S. 1, 29 (1942); *see also e.g.*, *Bahlul II*, 792 F.3d at 62 (Henderson, J., dissenting).

[18] *Hamdan*, 548 U.S. at 601 (Stevens, J. joined by three Justices).

[19] *In re Yamashita*, 327 U.S. 1, 13 (1946).

[20] *Quirin*, 371 U.S. at 29.

permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution."[21]

2. The Article 21 "law of war" refers to a portion of the law of nations incorporated into U.S. law.

Ex parte Quirin—"the high water mark of military power to try enemy combatants for war crimes"[22]—treated the question of whether an offense violates the international law of war as one of its two main inquiries. The Court in *Quirin* explained, "Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, *according to the rules and precepts of the law of nations, and more particularly the law of war*, are cognizable by such tribunals."[23] Indeed, the Court in *Quirin* referred to the law of war as a part of international law not less than seven times.[24]

---

[21] *Hamdan*, 548 U.S. at 601 (Stevens, J., joined by three Justices).
[22] *Id.* at 597 (Stevens, J., joined by three Justices).
[23] *Quirin*, 371 U.S. at 28 (emphasis added).
[24] *Id.* at 26 (explaining that the President has authority to execute "all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war"); i*d.* at 27-28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."); *id.* at 28 ("Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."); *id.* at 29 ("We may assume that there are acts regarding in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury."); *id.* ("It is no objection that

Five Justices in *Hamdan* relied on the international law of war to define offenses triable by an Article 21 law-of-war military commission. In the portion of his *Hamdan* concurrence joined by three other Justices, Justice Kennedy clearly stated that the law of war, "as the Court explained in *Ex Parte Quirin*, derives from the 'rules and precepts of the law of nations'; it is the body of international law governing armed conflict."[25] And Justice Stevens, joined by the same three Justices, relied on international law-of-war principles outlined at Nuremberg regarding conspiracy.[26] Five Justices, then, treated the statutory phrase "law of war" to mean the international law of war.

Despite this impressive pedigree, at least some judges on the D.C. Circuit appear to believe that "the Supreme Court has not yet resolved the question whether 'law of war' means only the international law of war or includes 'the common law of war developed in U.S. military tribunals."[27] In the short term, however, it is possible to extract two relevant considerations from the relevant opinions: international law and American history. These two inquiries, international law and American history, demonstrate that the charges of conspiracy, terrorism, and hijacking are not and have never been offenses under the common law of war.

Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law, or to mark its precise boundaries, or to enumerate or define by state all the acts which that law condemns."); *id.* at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has been so generally accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by the Government by its enactment of the Fifteenth Article of War."); *id.* at 36 n.12 ("Authorities on International Law have regarded as war criminals . . . .").

[25] *Hamdan*, 548 U.S. at 641 (Kennedy, J., joined by three Justices).

[26] *Id.* at 610 (Stevens, J., joined by three Justices).

[27] *Bahlul III*, 840 F.3d at 102 (Millett, J., concurring).

B. In September 2001, conspiracy was a not a war crime subject to law-of-war military commission jurisdiction.

1. The weight of—admittedly divided—authority supports the view that in 2001, conspiracy was not a war crime triable by an Article 21 law-of-war military commission.

In *Hamdan*, four Justices of the Supreme Court identified "the most serious defect of this [conspiracy] charge: The offense it alleges is not triable by law-of-war military commission."[28] The plurality explained, "The crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war."[29] The plurality concluded that prior to the 2006 MCA, "Far from making the requisite substantial showing, the Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission."[30]

The majority of courts have read *Hamdan* to mean that, even now, conspiracy is not a war crime under the law of war. The Second Circuit has explained, "As to conspiracy as an inchoate offense, the Supreme Court held in *Hamdan v. Rumsfeld*, that the only 'conspiracy' crimes that have been recognized by international war crimes tribunals . . . are conspiracy to

[28] *Hamdan*, 548 U.S. at 602 (Stevens, J., joined by three Justices); *see also Bahlul I*, 767 at 13 (opinion of the Court) ("In *Hamdan*, four justices concluded that [conspiracy] was not triable under the extant statute (section 821) and three concluded that it was.").
[29] *Hamdan*, 548 U.S. at 603-04 (Stevens, J., joined by three Justices).
[30] *Id.* at 611 (Stevens, J., joined by three Justices).

commit genocide and common plan to wage aggressive war."[31] The Eleventh Circuit says that, "The Supreme Court did conclude in *Hamdan* that a conspiracy to violate the customary international law of war was not an offense punishable under that body of law in a military commission."[32]

In *Bahlul I*, however, the D.C. Circuit fractured over the issue of whether the *Ex Post Facto* Clause prohibits a conviction for conspiracy under the 2006 MCA for pre-2006 conduct. The controlling factor in the case was that Bahlul boycotted his military commission trial, and—in the majority's view—forfeited every forfeitable issue.[33]

Bahlul I relied on one basis not available to the government here. The court concluded that it was not "plain error" to try conspiracy in a military commission when 18 U.S.C. § 2332(b) prohibited conspiracy to kill a national of the United States.[34] The court noted that this reasoning would not be available if the government sought the death penalty, as § 2332(b) does not authorize the death penalty.[35] And the court reconciled the differing elements between § 2332(b) and the alleged war crime of conspiracy to violate the law of war solely on the basis of plain error review.[36]

---

[31] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2nd Cir. 2009). Conspiracy as a standalone offense is an inherently inchoate offense, in that it "requires an agreement and overt acts, but no completed deed." *Id.*

[32] *United States v. Belfast*, 611 F.3d 783, 812 (11th Cir. 2010); *see also In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009), *aff'd in part, rev'd in part on other grounds*, 402 Fed. App'x 834 (4th Cir. 2010).

[33] *Bahlul I*, 767 F.3d at 18 (opinion of the Court).

[34] *Id.* (opinion of the Court).

[35] *Id.* at 20 n.11 (opinion of the Court).

[36] *Id.* at 21 (opinion of the Court); *see also id.* at 52 n.1 (Brown, J., concurring in the judgment in part and dissenting in part) ("Indeed, by relying on *Olano*'s fourth prong, the court practically concedes that the existence of the conspiracy provision in Title 18 would not save Bahlul's conviction if not for the court's application of a plain error standard.").

With respect to the historical evidence for conspiracy as a war crime, the D.C. Circuit in *Bahlul I* did "not hold that these precedents conclusively establish conspiracy as an offense triable by military commission under section 821. After all, four justices examined the same precedents and found them insufficiently clear."[37] Instead, the *Bahlul I* court, reversing the burden from *de novo* review, simply held that "any *Ex Post Facto* Clause error in trying Bahlul on conspiracy to commit war crimes is not plain."[38]

In *Bahlul III*, the D.C. Circuit again fractured, this time over the issue of Congress' authority to define conspiracy as a war crime in the Military Commissions Act of 2009.[39] The five opinions in *Bahlul v. United States* apply at least four different approaches: deference to Congress (Henderson);[40] jurisdiction through international law or U.S. history (Kavanaugh, Brown, and Griffeth);[41] jurisdiction because MCA conspiracy is consistent with international law (Millett and Wilkins);[42] and lack of jurisdiction because MCA conspiracy is not consistent with international law (Rogers, Tatel, and Pillard).[43]

Only the Joint Dissent ventured a guess as to the precedential value of *Bahlul III*, and suggested it had none. Because only four judges applying *de novo* review voted to affirm the conviction, the Joint Dissent reasoned that "the majority of judges declines to endorse the government's view of the Constitution. [The] decision thus provides no precedential value for

[37] *Id.* at 26 (opinion of the Court).
[38] *Id.* at 27 (opinion of the Court).
[39] *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (*en banc*) [hereinafter *Bahlul III*].
[40] *Bahlul v. United States*, 792 F.3d 1, 27 (D.C. Cir. 2015) [hereinafter *Bahlul II*] (Henderson, J., dissenting). Judge Henderson's dissent in *Bahlul II* became her concurrence in *Bahlul III*, 840 F.3d at 4.
[41] *Bahlul III*, 840 F.3d at 5 (Kavanaugh, J., concurring).
[42] *Id.* at 49 (Millett, J., concurring); *id.*at 109 (Wilkins, J., concurring).
[43] *Id.* at 129 (Joint Dissent).

the government's efforts to divert the trial of conspiracy or any other purely domestic crime to law-of-war military commissions."[44]

Although only the Supreme Court can provide the final decision on whether conspiracy was triable by an Article 21 law-of-war military commission, the weight of authority suggests that conspiracy was not a war crime in 2001. Pending final authority, Mr. al Baluchi will examine the three most prominent sources of law in this area: international law; the Lincoln conspirator trial; and *Quirin*.

2. The international law of war does not recognize conspiracy as an offense against the laws of war.

International sources confirm that conspiracy "is not a recognized violation of the law of war."[45] "The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes."[46]

The judges at Nuremberg specifically declined to recognize conspiracy as an autonomous war crime despite its inclusion in the London Charter of the International Military Tribunal.[47] The crime of conspiracy "as a stand-alone offense is a particularity of the common law," whereas

[44] *Id.* at 838 (Joint Dissent).
[45] *Hamdan*, 548 U.S. at 610 (Stevens, J., joined by three Justices).
[46] *Id.* (Stevens, J., joined by three Justices); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 664 (S.D.N.Y. 2006) ("The charge of conspiracy was rejected at the time as a basis for imposing liability for either crimes against humanity or war crimes."), *aff'd*, 582 F.3d 244 (2d Cir. 2009).
[47] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (8 August 1945) Count 1, *available at* http://www.refworld.org/docid/3ae6b39614.html ["London Charter"].

the law of war must by definition "reflect the consensus of all legal systems."[48] "As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that '[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.'"[49]

The Tribunal recalled that Article 6 of the London Charter defined conspiracy as underpinning the commission of "any of the foregoing crimes" of crimes against the peace, war crimes, and crimes against humanity.[50] The Tribunal noted, however, that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war."[51] The Tribunal's conclusion was therefore that "these words do not add a new and separate crime to those already listed . . . The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes Against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war."[52]

---

[48] George Fletcher, "The Hamdan Case and Conspiracy as a War Crime," 4 Oxford J. Crim. Justice 442, 445 (2006) ["Fletcher"].

[49] *Hamdan*, 548 U.S. at 611 (Stevens, J., joined by three Justices) (quoting Tayor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992)).

[50] London Charter at art. 6.

[51] TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg, Germany : [s.n.] 1947-1949) p. 469 ["Nuremberg Judgment"].

[52] Fletcher, an expert in international criminal law, writes that

> [I]international arguments in the post-World War II period have quietly dropped all references to charges of conspiracy. This admittedly has not been an explicit process, but the pattern is undeniable . . . [this is because] international criminal proceedings are oriented to post-hoc justice, to condemn those who have already brought about massacres and other major crimes of concern to the international community. Conspiracy, in contrast, is properly suited to a legal system that emphasizes early police intervention before criminal plans develop into harmful activity.

Fletcher at 445.

Nor has the government historically claimed that conspiracy is a violation of the international law of war. In the *Bahlul* appeals, the government "repeatedly conceded that the three offenses of which Bahlul was convicted are not, and were not at the time of Bahlul's conduct, law-of-war offenses under international law."[53]

3. The United States conducted Civil War conspiracy trials, including the Lincoln assassination trial, under martial law and military occupation military commissions, not law-of-war military commissions.

a. During and after the Civil War, the United States used military commissions to enforce martial law in the embattled North and military government in the occupied South.

During the Civil War, both President Abraham Lincoln and Congress imposed martial law throughout the North. In many places, the United States, "by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers."[54] The United States also imposed military government, including military occupation courts, in the South as the war progressed.

These two forms of military rule—martial law and military occupation—gave rise to extensive military jurisdiction in both North and South. During the Civil War, "a single tribunal

[53] *Bahlul I*, 767 F.3d at 38 (Rogers, J., concurring in the judgment in part and dissenting).
[54] *Ex parte Merryman*, 17 F. Cas. 144, 152 (D. Md. 1861) (Taney, Circuit Justice). The Civil War was not the first time the United States had imposed martial law. *See, e.g.*, *Despan v. Olney*, 7 F. Cas. 534, 535 (Cir. Ct. D.R.I. 1852) (instructing jury on martial law in a lawsuit arising from the Dorr Rebellion).

often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike."[55] "The Civil War precedents must therefore be considered with caution" because "the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions."[56]

President Lincoln authorized the suspension of the writ of *habeas corpus*—authorizing martial law—from Washington to Philadelphia on 27 April 1861,[57] and extended martial law and military commissions jurisdiction throughout the United States in 1862.[58] Given prominent opinions that President could not unilaterally suspend the writ of *habeas corpus*,[59] in 1863, Congress passed a law "authorizing the President to suspend the writ of *habeas corpus* and precluded civil and criminal liability of any person making a search, seizure, arrest, or

[55] *Hamdan*, 548 U.S. at 590 (five-Justice majority). In actuality, "war crimes" should be dropped from this list. Attorney General James Speed, architect of the military commissions structure, believed that, "Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations." *Milligan*, 71 U.S. at 14 (Argument of Attorney General Speed).

[56] *Hamdan*, 548 U.S. at 596 n.27 (Stevens, J., joined by three Justices).

[57] Justice Taney, acting as Circuit Justice, determined that only Congress could suspend the writ of *habeas corpus*, but his power to issue a writ of *habeas corpus* was "resisted by a force too strong for [him] to overcome." *Merryman*, 17 F. Cas. at 153.

[58] *Johnson v. Jones*, 44 Ill. 142, 146 (Ill. 1867) (describing sequence of events in proclamation of martial law); Daniel A. Farber, *Lincoln's Constitution* 159 (2003) ("Lincoln issued a whole series of suspension orders, gradually expanding the scope of the authorization until it covered the entire nation.").

[59] *See Ex Parte Benedict*, 3 F. Cas 159, 171 (N.D.N.Y. 1862) (holding that only Congress could suspend the writ of *habeas corpus*); *Merryman*, 17 F. Cas. at 149 (same); *In re Kemp*, 16 Wis. 359, 367 (Wis. 1863); *Martial Law*, 8 Op. Att'y Gen. 365 (1857) (opining that only the legislature can declare martial law). *But cf. Ex Parte Field*, 9 F. Cas. 1, 8-9 (Cir. Ct. D. Vt. 1862) (holding that the President had the authority to impose martial law in Vermont); *Suspension of the Privilege of the Writ of* Habeas Corpus, 10 Op. Att'y Gen 74 (1861) (opining that the President could suspend the writ of *habeas* corpus). At the time of the Civil War, "the enlargement of the army and navy and the suspension of the *habeas corpus* privilege were open to grave doubts." James G. Randall, *Constitutional Problems Under Lincoln* 52 (1926).

imprisonment under any order of the President during the rebellion."[60] The *Habeas Corpus* Act allowed martial law throughout the North,[61] and specifically contemplated that the military would take "state or political prisoners."[62]

Martial law gave the government extraordinary powers in the North, including the authority to submit civilians to trial by military commission.[63] President Lincoln proclaimed that, "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to

[60] *Greenwood v. Peacock*, 384 U.S. 808, 822 (1966); *see* An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases [hereinafter *Habeas Corpus* Suspension Act], 12 Stat. 755 (Mar. 3, 1863). The *Habeas Corpus* Suspension Act also allowed removal of criminal cases to federal court, *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 709, 75-76 (1927), and stripped reviewing courts of jurisdiction over military commissions. S*ee Ex Parte Vallandigham*, 28 F. Cas. 874, 924 (S.D. Ohio 1863) (holding that the court could not review a military commission arrest), *aff'd*, 68 U.S. 243, 253 (1864) (declining jurisdiction under the *Habeas Corpus* Act in an appeal from a martial law military commission. The plurality in *Hamdi v. Rumsfeld* cited the *Habeas Corpus* Suspension Act as one of "the rarest of circumstances" in which "Congress [has] seen fit to suspend the writ." 542 U.S. 507, 525 (2004) (plurality opinion).

[61] "Plainly expressed, the suspension of the privilege of the writ is an express permission and direction from congress [sic] to the executive, to arrest and imprison all persons for the time being, in relation to the rebellion or invasion, which is or may be dangerous to the common weal." *McCall v. McDowell*, 15 F. Cas. 1235, 1242 (D. Cal. 1867).

[62] *Id.* § 2; *cf. Luther v. Borden*, 48 U.S. 1, 45-46 (1849) (explaining and approving martial law in Rhode Island during 1842).

[63] *See, e.g.*, General Orders No. 13, Headquarters of the Department of the Missouri, Dec. 4, 1861 (suspending the writ of *habeas corpus*, imposing martial law, and authorizing military commissions in Missouri); *see also Hamdan*, 548 U.S. at 595 (Stevens, J., joined by three Justices) (Military commissions "have substituted for civilian courts at times and in places where martial law has been declared."); *Johnson v. Jones*, 44 Ill. 142, 155 (Ill. 1867) (acknowledging military commissions under martial law, but holding that martial law was not in effect in Illinois at the time of the prisoner's arrest).

martial law, and liable to trial and punishment by courts-martial or military commissions."[64] The United States tried thousands of people for a dizzying array of offenses,[65] apparently bringing "every person and every act within military law and military courts."[66]

President Lincoln also established military courts of occupation, including the Provisional Court of Louisiana, in the conquered South.[67] The United States exercised its right to govern the former CSA as conquered territory, including by military commissions applying occupation law.[68] "The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent."[69] Given the dual role of the United States as sovereign and occupier, its

---

[64] *A Proclamation*, Sept. 24, 1862, *available at* http://www.nytimes.com/1862/09/25/news/important-washington-another-proclamation-president-punishment-rebels-their.html.

[65] William Winthrop, *Military Law and Precedents* 839-40 (2d ed. 1920).

[66] 37 Cong. Globe 957 (Feb. 14, 1867) (remarks of Sen. Davis). According to historian Daniel Farber, "Roughly 5 percent of the military trials—about two hundred—took place in uncontested territory, outside of the South or the border states." Farber, *Lincoln's Constitution*, at 164.

[67] *New Orleans v. The Steamship Co*., 87 U.S. 387, 394 (1874). In its most notorious act, the Provisional Court executed William B. Mumford for tearing down the U.S. flag and handing the shreds to the crowd. *See* Vagts, *Reconstruction Military Commissions*, at 241. The power of the Provincial Court lasted beyond the end of actual hostilities, until it was dissolved on 28 July 1866. *Burke v. Miltenberger*, 86 U.S. 519, 525 (1874).

[68] *See Hamdan*, 548 U.S. at 595-96 (Stevens, J., joined by three Justices) (Military "commissions have been established to try civilians 'as part of the temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878) (explaining military government in Tennessee during Civil War); *New Orleans*, 87 U.S. at 393-94 (explaining that the United States had the same authority in Louisiana "as if the territory had belonged to a foreign government and had been subjugate din a foreign war"); *cf. Civil War*, 9 Op. Att'y Gen. 140 (May 15, 1858) (explaining the rights of an occupying government).

[69] *The Grapeshot*, 76 U.S. 129, 132 (1869). The United States had previously applied the law of occupation to many conquered territories. *See Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1858) (New Mexico); *Cross v. Harrison*, 57 U.S. 164, 189-90 (1854) (California); *Jecker v. Montgomery*, 54 U.S. 498, 515 (1852) (Mexico). Interestingly, the United States even applied the law of occupation against itself with respect to the British occupation of Castine, Maine during the War of 1812. *See United States v. Rice*, 17 U.S. 246, 253 (1819).

powers were at their zenith. These military commissions applying occupation law had jurisdiction over criminal as well as civil cases.[70]

Martial law continued after the Civil War was over, as the United States fought the threat of the Ku Klux Klan and other terrorist groups in the occupied South. The Reconstruction Act of 1867[71] placed ten of the former Confederate states under martial law, authorizing the use of military commissions to try civilians.[72]

b. The United States tried the Lincoln conspirators under martial law, not in what today would be considered a law-of-war military commission.

On 14 April 1865, John Wilkes Booth assassinated President Lincoln. At the time of President Lincoln's assassination, the war was very much still ongoing, despite General Lee's surrender a few days before.[73] Secretary of War Edwin Stanton sought a military commission rather than a civilian trial for those accused of involvement in the plot, which he described as part of the Confederate war effort, led by CSA President Jefferson Davis himself.[74] Secretary

[70] *United States v. Reiter*, 27 F. Cas. No. 16,146 (Prov. Ct. La. 1865) (upholding the jurisdiction of the Provisional Court of Louisiana in criminal cases).
[71] *An Act to provide for the more efficient Government of the Rebel States*, 14 Stat. 428 (Mar. 2, 1867).
[72] *Case of James Weaver—Reconstruction Laws*, 13 Op. Att'y Gen. 59 (1869) (opining that a Texas military commission conviction was valid under Reconstruction martial law).
[73]The Civil War formally ended on 20 August 1866. *United States v. Anderson*, 76 U.S. 56, 71 (1869). It had ended in all states but Texas, however, on 2 April 1866. *Adger v. Alston*, 82 U.S. 555, 561 (1873); *The Protector*, 79 U.S. 700, 702 (1871). "It will thus be seen that the legal termination of the war followed about a year after its termination through the military surrenders of Lee and Johnston." Randall, *Constitutional Problems Under Lincoln*, at 50.
[74] *See* Martin S. Lederman, The Law (?) of the Lincoln Assassination 53, *available at* http://scholarship.law.georgetown.edu/facpub/1835.

Stanton convinced President Johnson's new Attorney General James Speed to support a military commission, and Speed issued a one-sentence opinion on 28 April 1865.[75]

Contemporary documents make clear the alleged conspiracy arose under martial law. As the basis for military commissions jurisdiction, the charge sheet alleged that the offense was committed "within the Military Department of Washington, and within the fortified and entrenched [sic] lines thereof."[76] John A. Bingham, arguing for the government, defended the jurisdiction of the military commission as based on martial law.[77] Later in *Ex Parte Milligan*, Attorney General Speed defended the same charging language of "within a military district of a geographical military department" and "within the military lines of the army" as justifying military commission jurisdiction under martial law.[78]

Following the execution of four of the defendants, Attorney General Speed wrote a more extensive defense of the use of military commissions.[79] Attorney General Speed echoed the claim that the District of Columbia, including Ford's Theatre, was governed by martial law. As one of his first points, Speed argued,

> At the time of the assassination a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal

---

[75] *Murder of the President*, 11 Op. Atty Gen. 215 (1865) ("I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court.").

[76] Executive Order—General Court-Martial Orders 356, available at http://www.presidency.ucsb.edu/ws/?pid=72257.

[77] The Trial: The Assassination of President Lincoln and the Trial of the Conspirators 368 (argument of John A. Bingham).

[78] *Milligan*, 71 U.S. at 17 (Argument of Attorney General Speed). The concurrence in *Milligan* echoed this language: "In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion." *Milligan*, 71 U.S. at 140 (opinion of Chase, C.J.).

[79] *Military Commissions*, 11 Op. Atty Gen. 297 (1865).

> police of the city was by federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's house and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.[80]

Attorney General Speed later explained in *Ex Parte Milligan* that he considered the United States to be under martial law through at least 1866.[81]

The Lincoln conspiracy trial was not a law-of-war military commission at all, but rather an exercise of martial law jurisdiction. By the time of the alleged offenses in 2001, the Lincoln conspirators military commission was more of a cautionary tale than a legal precedent. During World War II, in response to a request from Justice Frankfurter, military law expert Frederick Bernays Weiner called the Lincoln conspirators military commission a precedent "no self-respecting military lawyer will look straight in the eye."[82]

c. In *Ex Parte Milligan*, the United States made clear its view that Civil War military commissions possessed jurisdiction under martial law rather than the law of war.

There is no question that Attorney General Speed considered military commissions to be an instrument for enforcing martial law as opposed to the law of war. In fact, Attorney General

[80] 11 Op. Atty Gen. at 297.
[81] *Milligan*, 71 U.S. at 16 (Argument of Attorney General Speed).
[82] Letter of Frederick Bernays Weiner to Felix Frankfurter, Nov. 5, 1942, at 9; *see also* Frederick Bernays Weiner, A Practical Manual of Martial Law 138 (1940) (Military lawyers "have generally have hesitated to regard the occasion as a sound precedent, or ,indeed, as anything more than an indication of the intensity of popular feedling at the time."). For a discussion of the disregard for the Lincoln conspirators military commissions as a precedent prior to 2006, see Martin S. Lederman, The Law (?) of the Lincoln Assassination, *available at* http://scholarship.law.georgetown.edu/facpub/1835.

Speed specifically viewed military commission as lacking jurisdiction over law of war violations.

Although the Supreme Court never reviewed the case of the Lincoln conspirators, the Supreme Court addressed the status of a civilian who unlawfully supported an organized armed group against the United States in a time of war—in modern terms, a terrorist—in *Ex Parte Milligan*.[83] Milligan belonged to the Order of the Sons of Liberty, "a secret political organization, armed to oppose the laws, [which] seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States."[84] At the time of Milligan's arrest, President Lincoln and Congress had both suspended the writ of *habeas corpus* in Indiana, placing it under martial law.[85]

[83] 71 U.S. (1866). The Supreme Court in *Milligan* knew that the jurisdiction of military commissions was critically important, "for it involves the framework of the government and the fundamental principles of American liberty." *Id.* at 109.

[84] *Milligan*, 71 U.S. at 130; *see also id.* at 132 (opinion of Chase, C.J.) ("The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice."); *see also* Curtis A. Bradley, *The Story of* Ex Parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization*, *in* Presidential Power Stories 106 (2009) (describing the paramilitary structure of the Sons of Liberty). The Supreme Court later described Milligan as having "plotted an attack on military installations during the Civil War." *Rasul v. Bush*, 542 U.S. 466, 474 (2004).

[85] *See Johnson v. Jones*, 44 Ill. 142, 158 (Ill. 1867) ("The case of Milligan was the weaker of the two [compared to Johnson], in this, that, at the time of his arrest and trial, in 1864, the writ of *habeas corpus* had been suspended by Congress, which furnished the counsel for the government an argument in support of the theory of martial law.").

Attorney General Speed began his argument in *Milligan* by distinguishing between martial law,[86] military law,[87] and the law of war.[88] He cautioned that, "These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals."[89]

Attorney General Speed explained that military commissions had authority to punish violations of martial law, but *not* violations of the law of war. His initial premise was that, "A military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed."[90] In Attorney General Speed's view, "Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations."[91] "Hence arise military commissions, to investigate and determine, not offences against military law by soldiers and sailors, *not breaches of the common laws of war by belligerents*, but the quality of the acts which are the proper subject of restraint by martial law."[92]

Attorney General Speed's argument in *Milligan* puts to rest any debate over whether the Lincoln conspiracy trial arose under martial law or the law of war. In the view of the chief

[86] "Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler." *Milligan*, 71 U.S. at 14 (Argument of Attorney General Speed).
[87] "Military law is the rules and regulations made by the legislative power of the State for the government of its land and naval forces." *Id.* (Argument of Attorney General Speed).
[88] "The laws of war (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, flagranti bello." *Id.* (Argument of Attorney General Speed).
[89] *Id.* (Argument of Attorney General Speed).
[90] *Id.* at 13 (Argument of Attorney General Speed).
[91] *Id.* at 14 (Argument of Attorney General Speed).
[92] *Id.* at 15 (Argument of Attorney General Speed).

architect of the Lincoln conspiracy military commission, that military commission *only* had jurisdiction over violations of martial law, and lacked jurisdiction over violations of the law of war. Unquestionably, the Lincoln conspiracy military commission, like others of its time, operated under martial law rather than the law of war.

4. *Ex Parte Quirin* avoided, rather than resolved, the question of conspiracy as a violation of the law of war.

The other major precedent cited for conspiracy as a war crime is *Ex Parte Quirin.*[93] As the *Hamdan* plurality explained, however, *Quirin* is at most weak support for law-of-war jurisdiction over conspiracy, and most likely authority to the contrary.

The government in *Quirin* charged the defendants with four offenses, including conspiracy. Charge I was "Violation of the law of war," and Charge IV was "Conspiracy to commit the offenses alleged" in the other charges.[94]

"That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission."[95] The Court in *Quirin* instead relied on the first specification of Charge I, finding that, "The offense was complete when with [hostile] purpose they entered . . . our territory in time of war without uniform or other appropriate means of identification."[96] The Court thus focused on the overt act committed by the defendants, not

[93] 317 U.S. 1 (1942). Admittedly, there are other authorities relevant to the question of conspiracy as a war crime. Mr. al Baluchi addresses the three most prominent here, and will address others as the government chooses to raise them.
[94] *Quirin*, 317 U.S. at 23; *see also Hamdan*, 548 U.S. at 605 (Stevens, J., joined by three Justices).
[95] *Hamdan*, 548 U.S. at 605 (Stevens, J., joined by three Justices).
[96] *Quirin*, 317 U.S. at 38; *see also Hamdan*, 548 U.S. at 605 (Stevens, J., joined by three Justices).

the objective of alleged conspiracy, as the relevant inquiry. The *Quirin* Court explicitly declined to address the second specification of Charge I, or Charges II or III.[97] "No mention was made at all of Charge IV—the conspiracy charge."[98] This analysis led the *Hamdan* plurality to conclude that, "If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war."[99]

Although reasonable minds have differed on the question, the weight of authority—including a plurality of the Supreme Court—holds that conspiracy was not a war crime subject to Article 21 law-of-war jurisdiction in 2001. Indeed, in 2013, the Office of the Chief Prosecutor asked Convening Authority to withdraw the conspiracy charge and advised the military commission that it did not oppose a motion to dismiss the conspiracy charge.[100] At that time, the government took the position—at least as a matter of prudence—that conspiracy was more supportable as a theory of liability than a freestanding crime. The slender reed of authority for conspiracy as a standalone war crime is too thin to support a sentence of death, and the military commission should dismiss it from the charge sheet.

[97] *Quirin*, 317 U.S. at 46; *see also Hamdan*, 548 U.S. at 606 (Stevens, J., joined by three Justices).
[98] *Hamdan*, 548 U.S. at 606 (Stevens, J., joined by three Justices).
[99] *Id.* at 606 (Stevens, J., joined by three Justices).
[100] AE107A Government Response to Defense Motion to Dismiss for Lack of Jurisdiction; AE107A(GOV Sup) Government Supplement to Defense Motion to Dismiss for Lack of Jurisdiction.

C. In September 2001, terrorism was a not a war crime subject to law-of-war military commission jurisdiction.

1. U.S. jurisprudence affirms the international consensus that terrorism is not a war crime.

International legal expert Marco Sassòli explains that terrorism "is not and never has been considered an autonomous, prosecutable war crime."[101] To this day, terrorism does not even "have a recognized and agreed legal meaning."[102] United States jurisprudence reflects current international consensus that terrorism is not a violation of international law, but rather to be criminalized in domestic statutes.

In the 1984 case of *Tel-Oren v. Libyan Arab Republic*[103], the D.C. Circuit examined whether terrorism constituted a violation of the laws of nations, and concluded that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."[104] The court noted that

> [O]ne need only look at documents of the United Nations. They demonstrate that to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation . . . Given such disharmony, I cannot conclude that the law of nations--which, we must recall, is defined as the principles and rules that states feel themselves bound to

[101] Attachment B, Declaration of Marco Sassòli at para. 26 ["Sassòli Declaration"].
[102] Gutman, Rieff and Dworkin, CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 2.0, (London,W.W.Norton 2007) at 396-399.
[103] 726 F.2d 774 (1984).
[104] *Tel-Oren*, 726 F.2d at 795.

observe, and do commonly observe[29]--outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system."[105]

Judge Robert Bork in his *Tel-Oren* concurring opinion further stated that the claim that a defendant "violated customary principles of international law against terrorism[] concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues .... [N]o consensus has developed on how properly to define 'terrorism' generally."[106]

Even post-9/11, U.S. case law does not depart from this position that terrorism "is not a useful legal concept."[107] The next case to analyze the international status of the crime of terrorism was *United States v. Yousef*[108] in 2003. In the nearly 20 years between *Tel-Oren* and *Yousef*, the international community developed six new legal instruments to combat terrorism.[109] The United Nations Security Council also began negotiating a comprehensive convention on

---

[105] *Tel-Oren,* 726 F.2d at 796.
[106] *Id.* at 798-823 (Bork concurring); *see also Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (noting that the crimes at issue in that case were recognized in "*international law* as violations of the law of war").
[107] Louis Henkin, "General Course on Public International Law," 216/IV Collected Courses (1989) 9, at 159.
[108] 327 F.3d 56 (2003).
[109] United Nations, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, UN Treaty Series 1990, *available at* http://www.refworld.org/docid/3ddcac634.html; United Nations General Assembly, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, No. 29004, *available at* http://www.refworld.org/docid/3ae6b3664.html; United Nations General Assembly, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, UNTS 1678, I-29004, *available at* http://www.refworld.org/docid/3dda0fff4.html; United Nations General Assembly, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, *available at* http://www.refworld.org/docid/3dd90f0c7.html; General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517, *available at* http://www.refworld.org/docid/3dda06ddc.html.

terrorism in the late 1990s.[110] Regardless, the Second Circuit found in *Yousef* that terrorism had simply not yet risen to the level of a violation of the laws of nations such that universal jurisdiction was applicable. Although Ramzi Yousef's conviction for terrorist acts was upheld, the Second Circuit did so, on the basis of United States' treaty obligations (the Montreal Convention[111]) and domestic law.[112] The court first stated that "The strictly limited set of crimes subject to universal jurisdiction cannot be expanded by drawing an analogy between some new crime such as placing a bomb on board an airplane and universal jurisdiction's traditional subjects. Nor . . . can universal jurisdiction be created by reliance on treatises . . . of aspirational propositions that are not themselves good evidence of customary international law, much less primary sources of customary international law."[113]

The court then noted that "Unlike those offenses supporting universal jurisdiction under customary international law — that is, piracy, war crimes, and crimes against humanity — that now have fairly precise definitions and that have achieved universal condemnation, 'terrorism' is a term as loosely deployed as it is powerfully charged."[114] The court concluded that the opinions of Judges Edwards and Bork from *Tel-Oren* remained true despite the passage of time. Although the court in *Yousef* focused on the potential to exercise universal jurisdiction, the threshold

[110] United Nations Security Council, Counter-Terrorism Committee, "International Laws," available at http://www.un.org/en/sc/ctc/laws.html.
[111] International Civil Aviation Organization (ICAO), *Convention for the Unification of certain Rules relating to International Carriage by Air (Warsaw Convention) (as amended at the Hague, 1955, and by Protocol No. 4 of Montreal, 1975)*, 12 October 1929, *available at* http://www.refworld.org/docid/48abd581d.html.
[112] *Yousef*, 327 F.3d at 91.
[113] *Id.* at 81.
[114] *Id.* at 87.

finding that terrorism is not a war crime is key to the present case, as is the ultimate conclusion that domestic and treaty law sanctioned the domestic prosecution of terrorism. [115]

It is thus clear that as late as 2003, U.S. law did not consider terrorism a violation of the law of war. In 2001, no U.S. case had treated terrorism as a war crime. Terrorism as a standalone concept was simply not included in the law of war incorporated by Article 21.

2. The crime of terrorism does not exist under the customary law of war.

International law distinguishes sharply between prohibited acts and prosecutable crimes. "In contrast to crimes against humanity and genocide, crimes which are established as independent crimes under international law, the concept of war crimes is based on the accessoriness between the primary rules concerning prohibited acts under international humanitarian law and secondary rules concerning the punishment of war crimes."[116] Violations of prohibitions "engender state responsibility, while prosecution of war crimes imposes liability upon individuals beyond the collective responsibility."[117]

---

[115] Civil suits following *Yousef* echo the Second Circuit's reasoning. *See Saperstein v. Palestinian Auth*., No. 1:04-cv-20225-PAS, 2006 WL 3804718, at 7 (S.D. Fla. Dec. 22, 2006) ("[P]olitically motivated terrorism has not reached the status of a violation of the law of nations"); *Mwani v. Bin Ladin*, No. CIV A 99-125 CKK, 2006 WL 3422208, at 3 n.2 (D.D.C. Sept. 28, 2006) ("[t]he law is seemingly unsettled with respect to defining terrorism as a violation of the law of nations."); *see also Almog v. Arab Bank*, PLC, 471 F. Supp. 2d 257, 262, 276-77 (E.D.N.Y. 2007); Thomas Weatherall, "The Status of the Prohibition of Terrorism in International Law: Recent Developments," Georgetown J. Int'l Law (2014), *available at* https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00215000589.PDF.

[116] Oxford Public International Law, "War Crimes," *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e431.

[117] Sassòli Declaration (Attachment B) at para. 27. In its Decision on Interlocutory Appeal issued on 22 November 2002, the ICTY Appeals Chamber in *Strugar and others* (IT-01-42-AR72) held that 'the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol 1 and Article 13 of Additional Protocol II are principles of customary international law' (§ 10), confirming the *prohibition* with regards to state responsibility, without individual criminal responsibility.

While terrorism is prohibited under international law, it has not been criminalized under international humanitarian law ("IHL"). Within both domestic and international law, "there is little evidence that . . . terrorism . . . may be considered to be part of the laws and customs of war."[118] The crime of terrorism exists almost exclusively in the domestic law of states, rather than under IHL, because the acts that comprise "terrorism" are already penalized as war crimes. The creation of an autonomous "terrorism" charge is unnecessary and has no basis in customary international law.

Violations of IHL conferring individual criminal responsibility have been recognized for centuries, from the Manu-Smriti ("Laws of Manu") in ancient India to Roman and subsequent European law.[119] International legal scholars consider the trial of Peter von Hagenbach to be the first recorded prosecution of war crimes.[120] International legal experts Michael Scharf and

---

[118] AE107A, Govt Response to Motion to Dismiss Charges, at 20.

[119] George Buhler (translator), MANU-SMRITI, *available at* http://www.sacred-texts.com/hin/manu/manu07.htm, at Ch. 7:

> [When a warrior] fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says 'I am thine;' Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe); Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, *nor one who is in fear, nor one who has turned to flight*; (but in all these cases let him) remember the duty (of honourable warriors)."

This text, circa 200 B.C.E., acknowledges that terror may be a central element of war crimes. More importantly, it prescribes that once terror exists among the targets, combatants are not to pursue or target them. Therefore, it was the pursuit of terrorized people that constituted the crime, rather than the striking of terror itself by the perpetrator.

[120] Michael P. Scharf and William A. Schabas, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 39 (New York: Continuum, 2002) ["Scharf and Schabas"]; George Schwarzenberger, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, VOL. II, 462-66

William Schabas recount that during the occupation of Breisach, Germany, the Burgundian mercenary Peter Von Hagenbach and his troops (acting on behalf of the Holy Roman Empire) raped and killed innocent civilians, and pillaged most of the remaining property.[121] What followed was a remarkable step in war crimes accountability, as "[t]he leaders of the twenty-six member states of the Holy Roman Empire, either in person or through representatives, acted as international judges to prosecute Peter, a Dutchman, for crimes committed in Germany on the order of a French head of state."[122] At Von Hagenbach's trial, the charges included murder of civilians, perjury with regards to his oath to uphold the laws of Breisach (violations of which included pillage and plunder), and mass rape of women.[123] Despite the conclusions of contemporary historians and modern legal scholars that Von Hagenbach's governorship had constituted a "regime of arbitrariness and terror that went beyond anything that was customary even in those rather rough times," no separate charge relating to the imposition of a state of terror was imposed.[124]

(1949); Kevin Heller and Gerry Simpson (eds.), THE HIDDEN HISTORIES OF WAR CRIMES TRIALS (2013), *The Trial of Peter von Hagenbach*, Oxford University Press Scholarship Online, *available at* http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199671144.001.0001/acprof-9780199671144-chapter-2 at 13 ["Heller and Simpson"]; M. Cherif Bassiouni, "The Perennial Conflict Between International Criminal Justice and Realpolitik," 22 GA. ST. U. L. REV. 541, 551 (2006)["Bassiouni"]; Robert Cryer et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 115 (3d ed. 2014).

[121] Scharf and Schabas at 39.

[122] M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, (Martinus Nijhoff, 2013) at 1048.

[123] Gregory S. Gordon, "The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law (Feb. 15, 2012) at 31, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006370.

[124] Heller and Simpson at 16; *see also* Georg Schwarzenberger, "A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474," *Manchester Guardian* (London), 28 September 1946, 4; L.C. Green, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (Leiden: Sijthoff, 1976), 263; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal*

The Von Hagenbach trial later influenced the International Military Tribunal at Nuremberg, whose charter ["Nuremberg Charter"] defined war crimes as violations including "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[125] Terrorism did not appear as a separate offense in the Nuremberg Charter.

The Nuremberg Charter followed this line of thought regarding terrorism; while terrorism was "rejected as a distinct crime, it underlay some of the thinking about the content, and proof, or aggression and crimes against humanity."[126] In the Nuremberg Indictment, "crimes of murder and ill-treatment of civilians were allegedly committed 'for the purpose of systematically terrorizing the inhabitants' of occupied territories . . ."[127] The Nuremberg Judgment also makes frequent reference to Nazi "terrorism" in relation to the chargeable war crimes and crimes against humanity; through murder and ill-treatment, and also through killing hostages, destroying towns, and massacring civilians.[128] The use of the word "terrorism" or the phrase "systematic

---

Law Regime (Cambridge: Cambridge University Press, 2005). Von Hegenbach was convicted of all charges. Incidentally, Von Hagenbach's trial was a benchmark in humanitarian law as the first known trial in which rape was charged as a war crime.

[125] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, *available at* http://www.refworld.org/docid/3ae6b39614.html ["London Charter"].

[126] Ben Saul, DEFINING TERRORISM IN INTERNATIONAL LAW, Oxford Monographies in International Law 285 (2006) ["Saul"].

[127] Nuremberg Trial Proceedings, *Indictment (Count 3)*, *available at* http://avalon.law.yale.edu/imt/count3.asp.

[128] TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg, Germany : [s.n.] 1947-1949) n. 103, 289, 229, 182, 231 ["Nuremberg Judgment"].

terrorism" were descriptive, but not "legal terms to trigger criminal liability."[129] Another example is the famous *Justice Case* (*United States v. Josef Alstoetter*), where the court noted that the defendants created a "reign of terror" resulting "in murders, cruelties, tortures, atrocities, plunder of private property, and other inhumane acts." Notably, the charges in the *Justice Case* did not include terrorism.[130]

The Nuremberg Charter's crimes were codified in the 1949 Geneva Conventions ["Conventions"] as "grave breaches" during international armed conflict, which also include torture, destruction of property, and attacking civilians.[131] During non-international armed conflict, Common Article 3 of the Geneva Conventions lists the acts to be treated as war crimes and includes "murder of all kinds, mutilations, cruel treatment, and torture."[132] Such enumerated war crimes and crimes against humanity trigger universal jurisdiction over the perpetrators.[133]

---

[129] Saul at 286. The only legal use of terrorism found in the Nuremberg Judgment is in relation to Nazi law; one example is Gestapo orders that included "terrorists" along with Communists, Marxists, Jehovah's Witnesses, and others for "third degree" interrogation methods that involved the use of torture. Nuremberg Judgment at n. 230

[130] *United States v. Josef Altstoetter, et al*. (Indictment), Military Tribunal III Council Law No. 10, 1946-1949, Vol. III (1951) *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf at 17, 19.

[131] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at art. 50; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at art. 51;
International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at art. 130; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 at art. 147 ["Geneva Conventions"].

[132] Geneva Conventions, art. 3 common.

[133] Theodor Meron, "International Criminalization of Internal Atrocities," 89 Am. J. Int'l L. 554, 572 (1995) (*citing* Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes,* 2 Brit. Y.B. Int'l L. 58, 65 (1944); Michael Scharf, "Defining Terrorism as the Peacetime

The sole mention of "terrorism" in the Conventions is found at Article 33(1) of the Fourth Geneva Convention, which provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited."[134] This provision is framed as a prohibition, rather than as a crime, and is expressly not included among the criminal "grave breaches" in Article 147 of the Fourth Geneva Convention.[135] To incorporate the psychological element of terrorism into the war crimes paradigm, Article 51(2) of Additional Protocol 1 and Article 13 of Additional Protocol II prohibit "acts or threats of violence the primary purpose of which is to spread terror among the civilian population,"[136] but the prohibition on terrorism in Protocol I is

---

Equivalent of War Crimes: Problems and Prospects," (2004), Faculty Publications, Paper 229, *available at* http://scholarlycommons.law.case.edu/faculty_publications/229 ["Scharf"]; Jelena Pejic, "Armed Conflict and Terrorism: There is a (Big) Difference," in A. Salinas de Frias, K. Samuel, and N. White (eds.), Counter-Terrorism: International Law and Practice (2012), Oxford, at 171-204 ["Pejic"].

[134] Geneva Conventions art. 33(1).

[135] Art. 33(1) was primarily aimed at avoiding the common practice of belligerents resorting to "intimidatory measures to terrorise the population" with a view to preventing hostile acts. ICRC, COMMENTARY, FOURTH GENEVA CONVENTION (Geneva, ICRC, 1958), at 225-226.

[136] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 art 51(2) ["AP I"];
International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, art. 13 ["AP II"]. The provision in APII simply extends the prohibition on causing terror to non-international armed conflicts. *See* Declaration of Marco Sassòli. The United States has affirmatively concurred that this provision of AP I is binding customary law. Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U.J. INT'LL. & POL'Y 419, 420 (1987); *see also* Levie on the Law of War, "The 1977 Protocol I and The United States," 38 Saint Louis University Law Journal 469 (1993); *Prosecutor v. Kordic and Cerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, I.C.T.Y. No. IT-95-14/2-PT (Mar. 2, 1999) at para. 31: "[T]o the extent that these provisions . . . echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these

also specifically *not criminalized* as a grave breach under that Protocol.[137] The acts of targeting civilians, however, as reflected in the military commission charge sheet, is classified as a grave breach under Article 85(3)(a) of Protocol I.[138]

Under customary IHL, therefore, "terrorist actions committed in the context of armed conflict are violations of international humanitarian law," meaning that the underlying "acts of violence" causing terror—murder, etc.—incur individual criminal responsibility in IHL.[139] These provisions do not, however, support a separate charge of terrorism. "The argument that acts of terrorism . . . amount to grave breaches [incurring criminal responsibility] . . . misrepresents the legal character of the prohibition on terror. [T]he underlying *acts* may be grave breaches (such as unlawful killings) . . ."[140] The concept of "terrorism" in armed conflict, therefore, is illustrative rather than legal.[141]

In fact, the government has already endorsed the principle that the acts underlying terrorism, rather than "terrorism" itself, are already considered war crimes (and constitute other charges against the defendants). The government explains at page 11 of AE107A (emphasis added):

---

specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to be international or non-international conflicts."

[137] AP I, art 85. AP II contains no grave breaches provisions. The ICRC Commentary on Article 51(2) explains that violence in war "almost always give rise to some degree or terror among the population and sometimes also among the armed forces." Pilloud, C., Sandoz, Y., Swinarski, C., Zimmermann, B., & International Committee of the Red Cross. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, (Geneva: International Committee of the Red Cross, 1987).

[138] Charge Sheet (May 31, 2011); AP I at art 85(3).

[139] Gutman, Rieff, and Dworkin at 398.

[140] Saul at 305.

[141] Antonio Cassese, INTERNATIONAL CRIMINAL LAW, Oxford University Press (2003) at 130 ["Cassese"](discussing the criminal nature of the underlying acts of terrorism: "It may be noted that international substantive rules on international crimes of terrorism are fairly satisfactory").

> [T]he D.C. Circuit acknowledged that "international law establishes at least *some forms of terrorism*, including the intentional targeting of civilian populations, as war crimes." *Hamdan II*, 696 F.3d at 1249-50 (emphasis added). For this conclusion, the panel cited, *inter alia*, the Rome Statute, art. 8(2)(b) (stating that it is a serious violation of the laws and customs applicable in international armed conflict, within the established framework of international law, to "[i]ntentionally direct[] attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.[142]

3. International criminal tribunals between World War I and 2001 have affirmed the consensus that terrorism was not a war crime.

In AE107A,[143] the government attempted to conflate the distinct concepts of legal "terrorism" and "systematic terrorism."[144] The concept of "systematic terrorism" originated from the 1919 Paris Peace Conference and echoed through the negotiations of the Nuremberg Charter and the final Nuremberg Judgment. The concept was first set forth in the March 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties following the atrocities of World War I.[145] In that report, an international commission of members from the United States, the British Empire, France, Italy, and Japan set forth the chargeable war crimes and described the facts supporting each charge. Regarding "systematic

---

[142] AE107A Government Response to Defense Motion to Dismiss for Lack of Jurisdiction.

[143] *Id*.

[144] *Id*. at 12.

[145] Paris Peace Conference (1919-1920), COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES: VIOLATION OF THE LAWS AND CUSTOMS OF WAR; REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS (Oxford, Clarendon Press, 1919), *available at* https://www.jstor.org/stable/pdf/2187841.pdf ["WWI Commission"].

terrorism," the commission first described it in the context of the sheer number of crimes committed that were intended to instill terror:

> Violations of the rights of combatants, of the rights of civilians, and of the rights of both, are multiplied in this list of the most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end. Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance. Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or the honor of individuals, the issue of counterfeit money reported by the Polish Government, the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking list of crimes that has ever been drawn up to the eternal shame of those who committed them.[146]

[146] WWI Commission at 113-114.

In short, the Commission viewed "systematic terrorism" as the state of affairs existing when (a lengthy list of) war crimes are committed systematically or in concert with devastating results. This position is confirmed in the Commission's ultimate list of charges for the Leipzig trials, the first of which is "Murder and massacres; systematic terrorism."[147] Terrorism was not a separate charge; it was the result of the overwhelming commission of murder and massacres.[148] It was to be condemned, but not separately criminalized; neither "terrorism" nor "systematic terrorism" were charged at the subsequent Leipzig Trials.[149]

There are two primary cases cited in the discussion of systematic terrorism, and both treat systematic terrorism as being comprised of chargeable war crimes rather than an autonomous offense. In 1947, the Netherlands Temporary Court-Martial at Macassar convicted Shigeki Motomura and 15 others of war crimes during Japanese occupation of the island.[150] Although the government in AE107A cited the *Motomura* case as one that charged systematic terrorism, the

[147] *Id*. at 114.
[148] United Nations War Crimes Commission of 1943-1948, "Developments of the Laws of War During the First World War," *available at* http://www.unwcc.org/wp-content/uploads/2014/11/UNWCC-history-ch3.pdf.
[149] *See generally* United Nations War Crimes Commission of 1943-1948, "Law Reports of Trials of War Criminals, (London, 1947), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf ["UNWCC"] *See also* Judgment, *Galić* (IT-98-29-T),Trial Chamber, 5 December 2003 ["*Galić Trial Judgment"]*. Post World War I, discussion of terrorism tended to focus on the inherently indiscriminate aerial bombings; "as early as 1918, one writer argued that bombing 'for the purpose of terrorizing the population and not for a military object, is contrary to the universally recognized principles of the law of war' . . . Picasso's Guernica (1937) famously depicted the terror of an aerial attack by Germany's Condor Legion . . . on a neutral Basque village in Spain." Importantly, the focus was not on the commission of terror itself, but on the prohibition of indiscriminate aerial bombings – and even that prohibition was not criminalized under customary law at the time. Saul at 274-278.
[150] *Case No. 79 (Trial of Shigeki Motomura and 15 Others)*, Netherlands Temporary Court-Martial at Macassar (Judgement Delivered 18th July, 1947), *available at* http://www.worldcourts.com/imt/eng/decisions/1947.07.18_Netherlands_v_Motomura.pdf.

two charges were, in fact, "unlawful mass arrests" and "torture and ill treatment."[151] Per the prosecutor's indictment in *Motomura*, the inclusion of "systematic terrorism" was in the "form of repeated, regular and lengthy torture and/or ill-treatment."[152] In further explaining the second charge, the judgment stated that torture and ill treatment were "particular forms of systematic terrorism."[153] The chargeable crimes, therefore, were the torture and ill treatment that constituted "systematic terrorism," rather than a stand-alone charge of terrorism, systematic or otherwise.

The second case, that of Joseph Buhler in the Supreme National Tribunal of Poland in 1948, echoed the use of the phrase "systematic terrorism" from *Motumura*. The actual charges against Buhler were:

> (a) individual and mass murders of the civilian population,
>
> (b) torturing, and persecuting of Polish civilians,
>
> (c) systematic destruction of Polish cultural life and looting of Polish art treasures, Germanisation, seizure of public property, and in economic exploitation of the country's resources, and of its in habitants,
>
> (d*)* in systematically depriving Polish citizens of private property. [154]

As explained in the Law Report of Trials of War Criminals, "Following the findings of the Tribunal, the considerable mass of [illegal] orders and regulations enacted by the German authorities of the Government General can be divided into several groups, according to the various groups of crimes for the commission of which these measures were intended to serve as a

---

[151] *Id*. at 142-144.
[152] *Id*. at 138.
[153] *Id*. at 144.
[154] UNWCC, *Case of Dr. Josef Buhler, Staatssekretär and Deputy Governor-General, Supreme National Tribunal of Poland (17th June – 10th July 1948).*

seemingly legal basis."[155] One of the "groups of crimes" was "systematic terrorism," which included "murders, tortures, ill-treatment, plunder, deportation," and others.[156] The phrase "systematic terrorism," therefore, was certainly not a chargeable crime, but rather one of several categories of chargeable crimes before the Tribunal. Not only that, but the phrase "systematic terrorism" was used only *"following"* the findings of the Tribunal as a categorization tool – it could not possibly have been included as a charge.

The promulgation of the new international criminal tribunals in the 1990s ushered in a resurgence of negotiations regarding the definition of terrorism and its criminalization.[157] Regardless, the "criminalization of terrorism as a freestanding crime under customary international law is quite speculative." It is not included as a stand-alone crime in the Statutes of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") or the International Criminal Tribunal for Rwanda ("ICTR"); in the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind; or the Rome Statute of the International Criminal Court ("ICC").[158] At the Rome Conference during the drafting of the Rome Statute,

[155] *Id*. at 27.
[156] *Id*.
[157] Steven Ratner, Jason Abrams and James Bischoff (eds.), ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, (New York: Oxford University Press, 2009) at 132 ["Ratner, Abrams, Bischoff"].
[158] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (25 May 1993); UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (8 November 1994); *Draft Code of Crimes Against the Peace and Security of Mankind*, Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc A/51/10 (1996); UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6. Terrorism is listed as an underlying offense for war crimes in internal conflicts in the ICTR and Special Court for Sierra Leone Statutes, and in the Draft Code.

negotiators formally stated that the absence of a "generally acceptable definition of the crimes of terrorism" prevented inclusion of terrorism in the ICC Statute.[159]

The major perceived exception to the customary rule on "terrorism" being distinct from war crimes is the ICTY's 2003 decision in *Prosecutor v. Stanislav Galić*,[160] a precedent that does not help the government in any case because it arose after 2001. General Galić, commander of the siege of Sarajevo between 1992 and 1995, was convicted of (among other charges) the "crime of terror."[161] The Trial Chamber cited the prohibition on terror contained in Article 51 of Additional Protocol I as the basis for its decision in a highly controversial judgment.[162]

At the outset, legal scholars have expressed the view that "An attack directed at combatants or military objectives was not considered as prohibited, even if the primary purpose of the attack was [still] to spread terror among the civilian population."[163] Due to this limitation of the 'crime of terror' to violence directed at civilians, the *Galić* jurisprudence does not go

---

[159] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex I, Resolution E, UN Doc. A/CONF.183/10; *see also* A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law," 12 European J. Int'l Law 5 (2001), 93-101 at 994: "[M]any states including the U.S. opposed the proposal [to include terrorism as a crime against humanity] essentially on four grounds: (i) the offence was not well defined; (ii) in their view the inclusion of the crime would politicize the Court; (iii) some acts of terrorism were not sufficiently serious to warrant prosecution by an international tribunal; (iv) generally speaking, prosecution and punishment by national courts were considered more efficient than by international tribunals."

[160] Judgment, *Galić* (IT-98-29-T),Trial Chamber, 5 December 2003 ("*Galić* Trial Judgement").

[161] *Id*.

[162] *See, e.g.*, Guenael Mettraux, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS, Oxford University Press (2005); Dubravka Zarkov and Marlies Glasius (eds.), NARRATIVES OF JUSTICE IN AND OUT OF THE COURTROOM: FORMER YUGOSLAVIA AND BEYOND, Springer Science and Business Media (Apr. 2014).

[163] *Galić* Trial Judgement; Marco Sassòli, "Terrorism and War," Journal of International Criminal Justice (2006) 959, 969 ["Sassòli, Terrorism and War"]. *See also*, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), Sections 5.32–5.33.5; J.M. Hanckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Cambridge: Cambridge University Press, 2005), at 46–76; A. Cassese, *International Law* (Oxford: Oxford University Press, 2005), at 415–423.

beyond Article 85(3)(a) of Protocol I, which classifies making civilians the object of an attack as a grave breach."[164] In other words, the *Galić* trial chamber convicted General Galić of "terrorism" in a charge nearly identical to the traditional war crime of attacking civilians. Moreover, "the Trial Chamber's finding that the prohibition of terror in armed conflict was criminalized was essentially limited to the case at issue and to the accused standing trial."[165]

The *Galić* decision was savaged by international law experts for its lack of basis in custom. Indeed, the decision was based entirely on the controversial position that terrorism was criminalized *by treaty* (AP I), leaving untouched "the question of . . . [nonexistent] criminalization of terror under customary international law" that the government relies upon before the military commission.[166] Judge Nieto-Navia of the Trial Chamber expressed disapproval upon judgment, stating that it could not be concluded that "[terrorism] existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law."[167] Judge Schomburg, in a "persuasive" and widely accepted dissent from the Appeals Chamber,[168] framed the problem in a way that recalled previous use of the phrase "systematic terrorism": "[T]here is no basis to find that [terrorism] as such was penalized beyond any doubt under customary international criminal law . . . Rather, I

[164] Sassòli, Terrorism and War.
[165] A. Cassese, "The Multifaceted Criminal Notion of Terrorism in International Law," Journal of International Criminal Justice 2006 4(5): 933-958, n. 29 ["Cassese, Criminal Notion of Terrorism"]. The idea of criminalization of terrorism under treaty recalls the Second Circuit's reasoning in *Yousef*.
[166] *Id*.
[167] *Galić* Trial Judgment, separate and partially dissenting opinion of Judge Nieto-Navia (5 Dec. 2003), *available at* http://www.icty.org/x/cases/*Galić*/tjug/en/gal-so031205e.htm.
[168] Ratner, Abrams, Bischoff at 134.

would have overturned Galić's conviction under Count 1 [Terrorism] and convicted him under Counts 4 and 7 for the same underlying criminal conduct."[169]

Judge Schomburg's dissent also eviscerates the notion of terrorism as a war crime pursuant to a "continuing trend" to treat it as such, stating that "one cannot conscientiously base a conviction in criminal matters on a 'continuing trend' . . .[t]he use of the term 'trend' clearly indicates that at the time of the commission of the crimes in question, this development had not yet amounted to *undisputed state practice*."[170] Judge Schomburg concluded by noting again that the Trial Chamber could have achieved the same result "in an undisputable way" by dropping the charge of terrorism and pursuing the underlying traditional war crimes.[171] International legal commentary has concurred with Judge Schomburg's opinion, with scholars writing that "the reasoning of the Trial Chamber in relation to this offence appears flawed in that it seems to conflate the illegality of a conduct with its criminal character."[172]

---

[169] *Galić* Appeal Judgment, separate and partially dissenting opinion of Judge Schomburg, para. 2, *available at* http://www.icty.org/x/cases/*Galić*/acjug/en/gal-acjud061130.pdf ["Schomburg Dissent"].

[170] Schomburg Dissent, para. 21; *see also* Saul at 307, writing in 2006, five years after the September 11, 2001 attacks, that "there is some evidence that the treaty prohibitions on terrorism are emerging as customary crimes." There can be no doubt, therefore, that such customary crimes of terrorism did not exist in 2001.

[171] Schomburg Dissent, para. 22.

[172] Mettraux at 129; Saul at 307: "As the majority in *Galić* admitted, there are few examples of national or international criminal prosecutions for violations of treaty or customary prohibitions on terrorizing civilians. Ordinarily, more than a few isolated cases are necessary to establish a customary crime, and widespread evidence of prosecutions in State practice and the attendant *opinio juris* is required." The Special Court for Sierra Leone in *Prosecutor v. Taylor*, Case No. SCSL-03-01-T at 150 (Apr. 26, 2012) ["*Taylor*"] also found Charles Taylor guilty of "acts of terrorism" in 2012, relying heavily on the *Galić* decision. However, the 2012 decision by the SCSL is inapplicable to the question of whether on September 11, 2001, there existed in international law a crime of terrorism. The Schomburg Dissent along with contemporary commentators make clear that there was not, and the STL's 2011 Interlocutory Decision (ibid n. 73) supports the proposition that there is still no such crime.

In his seminal 2011 opinion at the Appeals Chamber of the STL[173], Judge Antonio Cassese (also a former ICTY and STL judge and a widely recognized expert on international criminal law) wrote that "the existence of a customary rule outlawing terrorism does not automatically mean that terrorism is a criminal offence under international law . . . As the ICTY and the SCSL have found, acts of terrorism can constitute war crimes, but States have disagreed over whether a distinct crime of terrorism should apply during armed conflict." In this opinion (issued shortly before the military commission defendants were charged for the second time), Cassese calls into question the significance of the *Galić* and *Taylor/Brima* cases by interpreting those convictions in the "systematic terrorism" framework: the terrorism charge comprised of specific war crimes, rather than "terrorism" as an autonomous crime.

4. The MCA's definition of terrorism is inconsistent with even the post-2001 *Galić* definition.

Even if the military commission construes international law in 2001 to recognize a war crime of terrorism rather than a description or mandate for domestic suppression, it would not be the same crime created in the Military Commissions Act. The crime of "terrorism" at the military commission differs from terrorism under international law in three ways that expand liability: expansion of the "purpose" requirement; dropping the strict mens rea requirement; and eliminating the requirement that "terror" consist of "extreme fear."[174]

a. *Galić* terrorism includes targeting civilians as an element, but the MCA does not.

[173] *Case STL 11-01/I*, STL, Appeals Chamber, Interlocutory Decision on Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, available at http://www.stl-tsl.org/sid/55_ ("STL Interlocutory Decision") (advancing a definition of terrorism under international law, applicable to the STL proceedings), at paras. 103, 107.
[174] *Galić* Trial Judgement at para. 593.

The targeting of the civilian population is a critical element of terrorism, as evidenced by numerous international legal instruments and military law of war manuals.[175] After 2001, the *Galić* Appeals Chamber treated the prohibition of terror against civilians as belonging to customary international law, which finds support in Art. 51(2) of Additional Protocol I and Article 13 of Additional Protocol II, which prohibit "acts or threats of violence the primary purpose of which is to spread terror *among the civilian population*."[176] As Sassòli states, "the ICTY correctly held that the violation must involve acts of violence—underlying acts—directed at civilians."[177]

In comparison, the Military Commission Act purports to criminalize terror acts committed "in a manner calculated to influence or affect the conduct of *government* or civilian population by intimidation or coercion, or to *retaliate against government conduct* . . ."[178] The

[175] Aside from API and APII, *see* Draft Rules of Aerial Warfare, "General Report of the Commission of Jurists at The Hague, 1923," (1923) 17 A.J.I.L. Supp. 242; "Rules Relating to Aerial Warfare and Rules Concerning the Use of Radio in Time of War," in James Molony Spaight, Air power and war rights, 3rd ed., (New York, Longmans, Green, 1947), annex.; Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, 1956, online: http://www.icrc.org/ihl.nsf/FULL/420?OpenDocument; Declaration of Minimum Humanitarian Standards, reprinted in Report of the Sub-commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995). The ICRC's Customary International Humanitarian Law project lists a number of military manuals (including those of the United States of America, Argentina, Australia, Belgium, Canada, Colombia, France, Mexico, the Russian Federation, and the United Kingdom) that include the language about targeting civilians, at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule2.

[176] *See Galić* Appeals Judgement at para. 90; Schomburg Dissent at para. 24; *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 13: "Between August 1994 and November 1995, there was a clear prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population under customary international law. However this prohibition did not entail individual criminal responsibility and, consequently, this Tribunal has no jurisdiction over the crime of terror during the Indictment period."

[177] Sassòli Declaration at para. 30.

[178] 10 U.S.C. 948a(24).

government's definition of terrorism contravenes the very meaning of terrorism, which is violence aimed at civilians during peacetime. When government facilities or population are attacked during wartime, those are acts of war falling under IHL, which must then be assessed for legality according to the necessity and proportionality tests.[179]

> [T]here is a fine line between legitimate tactics owing to the nature of hostilities and illicit acts of terrorism. What is clear though is that international humanitarian law does not specifically prohibit the commission of acts of terrorism against *combatants* . . . the inflection of terror for strategic purposes against *military objectives* is perhaps the oldest tactic of warfare."[180]

Sassòli concurs, explaining that "an attack directed at combatants or military objectives [is] not considered as prohibited, even if the primary purpose of the attack was to spread terror among the civilian population"[181] Therefore, if an armed conflict existed on September 11, 2001, violent acts aimed at military objectives or "government conduct," per the MCA, would not qualify as "terrorism." Such crimes would fall under the "attacking civilians" and "attacking civilian objects" charges in order to avoid an *ex post facto* criminalization of government targeting in contravention of international law. As Sassòli states,

---

[179] *See* API; Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95; *see also* Mary-Ellen O'Connell, "Lawful Self-Defense To Terrorism," Scholarly Works, Paper 599, *available at* http://scholarship.law.nd.edu/law_faculty_scholarship/599: "Necessity restricts the use of military force to the attainment of legitimate military objectives. Proportionality requires that the force needed to attain those military objectives be weighed against possible civilian casualties."
[180] Sébastien Jodoin, "Terrorism as a War Crime," 7 Int'l Crim. L. Rev 77 (2007) at 82, arguing for the prospective inclusion of terrorism in IHL.
[181] Sassòli Declaration, para. 30.

> I . . . believe that inclusion of the crime of terrorism is redundant due to the inclusion in the 9/11 case charges of attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war – all of which constitute the acts underlying terrorism that qualify as war crimes. I consider these charges to be triable by military commission in the context of an armed conflict.[182]

In reality, the government's amalgamation of IHL and criminal law is self-serving, in order to shoehorn under the military commissions umbrella, acts that took place outside of an armed conflict against a civilian population. Advancing a criminal charge of terrorism merely confuses the distinct realms of criminal law and IHL.[183] Even the government in AE107 concedes that international legal scholars believe that "there is little evidence that . . . terrorism . . . may be considered to be part of the laws and customs of war."[184]

In the STL 2011 Interlocutory Decision, Cassese found "a customary rule of international law regarding the international crime of terrorism" in times of peace, but distinguished it from the war crime of "acts of terrorism."[185] While acts of terrorism may occur during peacetime or during armed conflict, when they occur during an armed conflict, "[they are] covered by the detailed provisions of the four 1949 Geneva Conventions and their Additional Protocols of 1977. These International Humanitarian law conventions provide very specific definitions of a wide

---

[182] Sassòli Declaration, para. 32.
[183] Sassòli Declaration, paras. 21 and 28.
[184] Andrea Bianchi and Yasmin Naqvi (eds.), International Humanitarian Law and Terrorism 244 (2011) ["Bianchi and Naqvi"].
[185] STL Interlocutory Decision, para. 110; *see also Madan Singh v. State of Bihar* (Supreme Court of India, 2004): "If the core of war crimes - deliberate attacks on civilians, hostage-taking and the killing of prisoners is extended to peacetime, we could simply define acts of terrorism veritably as 'peacetime equivalents of war crimes.'"

range" of criminal conduct.[186] Among the chargeable war crimes under the Fourth Geneva Convention are attacking and killing civilians and the destruction of property, in which five of the charges against Mr. al Baluchi and the defendants are mirrored.[187]

The ICRC is clear that "[o]nce armed conflict level is reached . . . there is little added value in designating most acts of violence against civilians or civilian objects as 'terrorist' because such acts would already constitute war crimes under international humanitarian law."[188] Humanitarian law scholars further state that "Given the comprehensiveness of the sanctioning of civilian participation in hostilities ensured by the interplay of international and domestic law, it is difficult to see what purpose is served by designating as 'terrorist' acts of violence committed by civilians in armed conflict. In legal terms it entails an inevitable duplication of criminal charges for the same act . . ."[189] The danger, therefore, in blurring the legal regimes of armed conflict and terrorism lies in the determination of armed conflict. "[B]ased upon the principle of distinction, IHL absolutely prohibits direct and deliberate attacks against civilians, that is acts of violence that would be classified as 'terrorist' if committed outside armed conflict."[190] The inclusion of terrorism in the charge sheet and its application to acts taken against government

---

[186] Scharf at 363.
[187] Fourth Geneva Convention art. 147; Charge Sheet (May 31, 2011), including the charges of attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder, and destruction of property.
[188] Jelena Pejic, "Terrorism Acts and Groups: A Role for International Law?" British Yearbook of International Law 71, 74-75 (2005).
[189] Pejic at 180. Cassese goes further, outlining the limitations placed upon prosecuting acts of terror when forced into an IHL framework: ". . .[H]ow to further term an act that is undisputedly criminal: as a *terrorist* act or as a *war crime* (intended to spread terror)? This difference in ideology and social psychology is not . . . the end of the matter. [If we place terrorism under] the regulation of international humanitarian law . . . the whole range of investigative powers and consequent measures accruing to enforcement agencies may no longer be applied with regard to them." Cassese, Criminal Notion of Terrorism at 14.
[190] *Id*.

entities, belies the government's insecurity about the existence of an armed conflict on September 11, 2001.[191] If the government is to claim validity of the military commissions based on IHL, then it must limit the charges to crimes existing under IHL on September 11, 2001.[192]

b. *Galić* terrorism requires specific intent to spread terror among the civilian population, but the MCA does not.

Regarding mens rea, the *Galić* Trial Chamber expanded upon the purpose, noting in the case summary that "[terrorism] is constituted of the same legal elements as the crime of attack on civilians, plus an additional mental element."[193] To be clear, *Galić* in no way justifies the view the terrorism was a war crime in 2001. But *Galić* would not save the terrorism charge even if terrorism were a war crime generally, because the MCA definition of terrorism expands its scope well beyond *Galić* and the traditional prohibition on terrorism.

The Trial Chamber listed the elements of "terrorism" as follows:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

---

[191] It remains Mr. al Baluchi's position that there was no armed conflict in existence on September 11, 2001, and that even if there had been an armed conflict, he did not participate in hostilities. *See* Sassòli Declaration at para. 12: "It is my opinion to a reasonable degree of professional certainty that the United States was not engaged in armed conflict as defined by IHL on September 11, 2001."

[192] The doctrine of *nullen crimen sine lege* (the legality of crimes; literally translated as "no crime without law") has its roots in the struggle between monarch and subject leading to the establishment of the Magna Carta in 1215. *See Magna Charta libertatum* art. 39 (1215): "*Nullus liber homo capiatur vel impresonetur aut dissaisiatur aut utlegatur aut exuletur aut aloquo modo destruatur nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terrae*" ["No free man may be apprehended or imprisoned or disseised or outlawed or exited or destroyed in any other manner without the legal judgment by his peers and on the strength of the (existing) law of the land . . ."].

[193] *Galić* Trial Judgement Summary, *available at* http://www.icty.org/x/cases/*Galić*/tjug/en/031205_Gali_summary_en.pdf.

2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

3. The above offence was committed with the *primary purpose* of spreading terror among the civilian population.[194]

The Trial Chamber explained the specific intent requirement further:

"Primary purpose" . . . is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended."[195]

Both the Trial Chamber and the Appeals Chamber in *Galić* emphasized the importance of the specific intent requirement, citing the discussions at the 1974-1977 Diplomatic Conference under the auspices of the ICRC.[196] The conference committee clearly stated that, "The prohibition of 'acts or threats of violence which have the primary object of spreading terror' . . . excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare."[197] On this point, the Trial Chamber conducted a detailed analysis of the evidence, which was recognized for its importance by the Appeals Chamber.[198]

---

[194] *Galić* Trial Judgement at para. 133.
[195] *Id.* at para. 136.
[196] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 17 vols. (Geneva: ICRC, 1974-77)("Records").
[197] Records at vol. XV, p. 274.
[198] *Galić* Trial Judgement at paras. 209-591; *Galić* Appeals Judgment at paras. 105-107; *see also* Weatherall at 595; Gideon Boas, James L. Bischoff, Natalie L. Reid (eds.), INTERNATIONAL

In contrast, the Manual for Military Commissions lists an optional *mens rea* requirement, that "[t]he accused intentionally killed or inflicted great bodily harm on one or more protected persons *or engaged in an act that evinced a wanton disregard for human life* . . ."[199] The absence of the *Galić* specific intent requirement further delegitimizes a military commission charge that already suffered from lack of international legal support. The only element separating terrorism from the traditional war crime of attacking civilians was the specific intent to cause terror. As *Sassòli* states incredulously, "The crime of terrorism as delineated by the [MCA] does not include [a specific intent] requirement, and is therefore a radical departure" from existing definitions of terrorism.[200]

Cassese wrote that "As for *mens rea* [for terrorism], national legislation as well as the Conventions . . . all point in the same direction. In addition to the subjective elements required for the underlying offense . . . there must be a special intent, that is, to spread terror among the population."[201] Cassese further wrote that motive is "unique" to terrorism:

> Motive is important because it serves to differentiate terrorism as a manifestation of *collective criminality* from criminal offences (murder, kidnapping and so on) that are instead indicative of *individual criminality*. Terrorist acts are normally performed by groups or organizations, or by individuals acting on their behalf or somehow linked to them. A terrorist act, for instance the blowing up of a disco, may surely be performed by a single individual not belonging to any group or

---

CRIMINAL LAW PRATITIONER LIBRARY, VOL. II: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW (2008), Cambridge University Press, at 284.

[199] Manual for Military Commissions, Crimes and Elements 24(b)(1) (emphasis added).

[200] Sassòli Declaration at para. 33.

[201] Cassese at 129-130. The Special Court for Sierra Leone used the same definition in *Prosecutor v. Taylor*, Case No. SCSL-03-01-T at 150 (Apr. 26, 2012)("*Taylor*"), and *Prosecutor v. Brima et. al,* Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, Feb. 22, 2008.

> organization. However, that act is terrorist if the agent was moved by a collective set of ideas or tenets (a political platform, an ideology or a body of religious principles), thereby subjectively identifying himself with a group or organization intent on taking similar actions. It is this factor that transforms the murderous action of an individual into a terrorist act. [202]

Without that specific intent, the military commission's charge of "terrorism" is duplicative and cannot be supported.

c. *Galić* terrorism requires an element of "extreme fear," but the MCA does not.

Finally, the United States has departed from the *Galić* elements with regard to the nature of the terror attempted or caused. The MMC provides that the second element of "terrorism" is that "[t]he accused did so in a manner calculated to influence or affect the conduct of

[202] Cassese, Criminal Notion of Terrorism at 5. Cassese further wrote at 5-6:

> *Motive* in criminal law is normally immaterial . . . Motive exceptionally becomes relevant here: as noted earlier, criminal conduct must be inspired by non-personal inducements. Hence, if it is proved that a criminal action (for instance, blowing up a building) has been motivated by non-ideological or non-political or non-religious considerations, the act can no longer be defined as international terrorism, although it may of course fall under a broader notion of terrorism upheld in the state where the act has been accomplished. This, for instance, holds true for cases similar to an American criminal act that lacks, however, the transnational element proper to international terrorism: Timothy McVeigh's blowing up in 1995 of a public building in Oklahoma City, with the consequent death of 168 persons. Reportedly that action was carried out in revenge for the killing, by the FBI, of members of a religious sect at Waco, Texas. Similarly, if bandits break into a bank, kill some clients and take others hostage for the purpose of escaping unharmed with the loot, this action cannot be classified as terrorism, although the killing and hostage-taking are also intended to spark terror among civilians and compel the authorities to do or not to do something. Here the essential element of ideological or political motive is lacking. Consequently, the offence is one of armed robbery aggravated by murder and hostage-taking, not terrorism.

government or civilian population *by intimidation or coercion.*"[203] "Mere 'intimidation' or 'coercion' of civilians by violence falls well short of the standard of 'extreme fear' established in the *Galić* case, and inferred from the ordinary meaning of 'terrorism.'"[204] Further, the prohibition of terrorism in IHL, whether from *Galić* or the Conventions and Protocols, is focused solely on civilians, and is not meant as a "wider insulation of government policy from influence by coercion or intimidation . . ."[205] Therefore, the military commission's crime of terrorism attempts to incorporate sentence fragments from international law, but ultimately "is not grounded in any general international rime of terrorism outside IHL . . . and thus permits punishment for an offense which did not exist at the time the conduct took place."[206]

D. In September 2001, hijacking was a not a war crime subject to law-of-war military commission jurisdiction.

No international criminal tribunal has ever prosecuted hijacking as a war crime.[207] That fact did not prevent the government from including hijacking alongside the duplicative charges of attacking civilians and civilian objects, both of which are longstanding war crimes.[208] The

[203] Manual for Military Commissions, Crimes and Elements 24(b)(2)(emphasis added).
[204] Saul at 310, commenting on "United States Department of Defence, *Military Commissions Instruction No. 2: Crimes and Elements for Trials by Military Commissions*," 30 April 2003, which has identical language as the current MCM on the second element of terrorism.
[205] Saul at 310.
[206] Saul at 310-311.
[207] The Rome Statute of the International Criminal Court does not include hijacking or hazarding a vessel among the crimes under its jurisdiction; neither do any of the international criminal tribunals or special courts.
[208] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at art. 50; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at art. 51;

inclusion of hijacking among the charges against the defendants reflects the clear misunderstanding of the government of the difference between crimes under international law, and war crimes. The former category is comprised of crimes that violate the "laws of nations" that are triable in national jurisdictions and which may, if sufficiently grave, trigger universal jurisdiction. The latter category is comprised of crimes committed during armed conflict that trigger individual criminal responsibility and are triable in international tribunals or by military commission. Hijacking is an international crime that has never been considered a war crime, and is therefore not triable by military commission.[209]

1. Hijacking has never been considered a war crime.

The 1949 Geneva Conventions codified the acts giving rise to individual criminal responsibility as "grave breaches."[210] Such grave breaches included torture and attacking civilians, but did not include terrorism or hijacking. The reason for traditionally excluding hijacking from "war crimes" is because "the seizure of a plane by a terrorist group does not usually involve the levels of violence associated with an armed conflict."[211] Hijacking, in this

---

International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at art. 130; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 ["Geneva Conventions"].

[209] The 1956 Army Field Manual and its 1976 change also do not include hijacking in the list of war crimes. *See* Department of the Army Field Manual 27-10, The Law of Land Warfare (Jul.18, 1956 with Change 1, Jul. 15, 1976) at sections 500-504.

[210] Geneva Conventions at art. 147. During non-international armed conflict, Common Article 3 of the Geneva Conventions lists the acts to be treated as war crimes and includes "murder of all kinds, mutilations, cruel treatment, and torture."

[211] Kenneth Watkin, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT (Oxford: OUP, 2016) at 586. The 1976 hijacking (by members of the Popular Front for the Liberation of Palestine) of an Air France plane originating in Tel Aviv and landing in Uganda with the blessing of Idi Amin, triggered Operation Entebbe, in which Israeli commandos entered Uganda to recover the hostages. There has been considerable controversy

sense, is on par with piracy, which is also not traditionally considered to take place within the legal framework of armed conflicts.[212]

The 1979 case of *United States v. Tiede*[213] involved an East German waiter who hijacked a Polish airliner and forced it to land in West Germany. Although World War II hostilities had long ended and the American occupation government had transformed "from military to civilian status," Tiede's trial was conducted in a State Department-convened Article II court in West Berlin pursuant to occupation powers.[214] Even though Tiede was being tried in a country where U.S. military forces were stationed and in a court established by wartime occupation powers, the

---

over whether Operation Entebbe constituted an armed conflict, but crucially, that debate centers *not* on the hijacking as trigger, but on respective responses by the Ugandan government and the Israeli Defense Force. Watkin at 405-412.

[212] Tullio Treves, "Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia," 20 Eur J Int Law 2 (April 1, 2009) at 399-414:

> This is not use of force against the enemy according to the law of armed conflict, because there is no armed conflict, international or internal. Pirates are not at war with the states whose flotillas protect merchant vessels in the waters off the coast of Somalia. It has been argued that pirates not being combatants are civilians who, under international humanitarian law, may not be specifically targeted except in immediate self-defence. Whatever opinion one holds about the applicability of the law of armed conflict, it is a fact that practice in the waters off Somalia seems to indicate that warships patrolling these waters resort to the use of weapons only in response to the use of weapons against them. So in an incident in the Gulf of Aden reported on 14 November 2008, a British naval vessel having positively recognized a Yemeni cargo ship which had participated in a hijacking attempt on a Danish cargo ship on the same day, tried to stop it by 'non forcible methods'. Only when these had failed, did 'the Royal Navy launch [] small assault craft to encircle the vessel'. Once the pirates opened fire, 'the Navy fired back in self-defence.'

[*Citing* bulletins of the (US) Office of Naval Intelligence, Civil Maritime Analysis Department, Worldwide Threat to Shipping, Mariner Warning Information, available at: www.icc-ccs.org/]; *see also* Nancy Douglas Joyner, AERIAL HIJACKING AS AN INTERNATIONAL CRIME (1976) New York, Oceana, for lengthy analytical comparisons with the international crime of piracy.

[213] *United States v. Tiede*, 86 F.R.D. 227 (1979).

[214] Maryellen Fullerton, "Hijacking Trials Overseas: The Need for an Article III Court," 28 Wm. & Mary L. Rev. 1, 25 (1986). Fullerton decried the use of an Article II court for a civilian charged with air piracy, and foreshadowed many of Mr. al Baluchi's arguments before the present military commission.

charges he faced – hijacking and acts against the safety of civil aviation, among others – were "non-military offenses" that did not implicate the law of armed conflict and could not be classified as war crimes.[215]

United States v. Yunis[216] is perhaps the most significant U.S. case supporting the fact that hijacking is distinct from war crimes and may not be tried by military commission. The court in *Yunis* found that "[u]nder the universal principle, states may prescribe and prosecute 'certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism,' even absent any special connection between the state and the offense."[217] Hijacking is specifically separated from war crimes by the *Yunis* court in its analysis, for precisely the reason that hijacking does not traditionally take place during armed conflict.

Yunis was somewhat ahead of international law in asserting even that hijacking was an international crime triggering universal jurisdiction. In the 2002 *Case Concerning the Arrest Warrant of 11 April 2000*,[218] the International Court of Justice commented that "[T]he past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law . . . the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide . . ."[219] Pursuant to the court's statement that universal jurisdiction over acts of terrorism was "increasingly" recognized in 2002, it is difficult to argue

---

[215] *Tiede*, 86 F.R.D. at 245.
[216] 924 F.2d 1086 (D.C. Cir. 1991) ["*Yunis*"].
[217] *Yunis*, 924 F.2d at 1091 (*citing* Restatement (Third) of the Foreign Relations Law of the United States, Sec. 404, 423 (1987)).
[218] 2002 I.C.J. 3 (Congo v. Belgium)["*Arrest Warrant Case*"].
[219] *Id*. at para. 12.

that universal jurisdiction over hijacking had crystallized into customary international law by the time the *Yunis* court examined the question in 1991. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") debated this precise question as late as 2003, with Judge Robinson deciding that "in my mind, [the *aut dedere, aut judicare* provisions of the hijacking conventions] do confer universal jurisdiction, " but acknowledging that judges of the International Court of Justice "concluded that the *aut dedere aut judicare* provision in these treaties are more properly seen as 'an obligatory territorial jurisdiction over persons albeit in relation to acts committed elsewhere.'"[220]

The crucial point is that the debate, even in 2003, was whether hijacking had risen to the level of an international crime triggering universal jurisdiction. Neither the *Yunis* nor the *Arrest Warrant* cases involved armed conflict or even the proposition that hijacking was a war crime.

3. Suppression conventions do not create war crimes.

In 2017, it is possible that the government might prevail on a claim that hijacking is an international crime prosecutable in national courts under universal jurisdiction. The government may even rely on suppression conventions for that claim, as did the court in *Yunis*. The government and the military commission may not, however, rely on suppression conventions to justify inclusion of hijacking as a *war crime* before a law-of-war military commission, even today.

There are three suppression conventions with respect to hijacking: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Convention"); the 1969

[220] *Prosecutor v.Milan Milutinovic et al.*, Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, paras. 20-21 (May 6, 2003)(Sep. Op. of Judge Patrick Robinson)["Milutinovic Opinion"], *citing* Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant Case* (enumeration of universal jurisdiction crimes excludes hijacking).

Convention of Offenses and Certain Other Acts Committed on Board Aircraft (the "Tokyo Convention"); and the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the "Montreal Convention").[221] The Hague Convention affirms the principle of *aut dedere, aut judicare* (extradite or prosecute) with regards to individuals culpable of on-board seizures of aircraft.[222] The Tokyo Convention covers criminal offenses that occur on board an aircraft that jeopardize safety, including hijacking. The Tokyo Convention has no mandatory prosecution provisions and no provisions for extradition or penalties.[223]

The Montreal Convention fills in the gaps left by the Hague and Tokyo Conventions, eliminating the requirement that the perpetrators be aboard the plane, and repeats codification of the principle that national jurisdictions must prosecute or extradite the perpetrators.[224] Crucially, none of these three conventions establishes an international crime of hijacking. They instead obligate states to enact domestic laws criminalizing hijacking or pledge to extradite perpetrators to other jurisdictions.[225]

Judge Robinson at the ICTY in 2003 even cast doubt on whether "the prohibition of the specific conduct and the obligation *aut dedere, aut judicare* in most of the 'suppression of crime' treaties relating to hijacking . . . have yet acquired customary status; it may be that they exist only as treaty obligations. In other words, the required State practice and *opinio juris* may not be present in relation to the prohibition of those activities and the companion obligation *aut dedere,*

[221] 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; 24 U.S.T. 564, T.I.A.S. No. 7570.
[222] Hague Convention at arts 4, 6-8.
[223] Tokyo Convention, art. 4.
[224] Montreal Convention at arts. 3-8.
[225] Hague Convention, art. 2: "Each Contracting State undertakes to make the offence punishable by severe penalties."

aut judicare." [226] In short, even post 9/11, judges specializing in the interpretation of international law at the ICTY could not yet decisively conclude that the obligation to prosecute the crime of hijacking *in domestic courts* had risen to the level of customary international law.

In *United States v. Nashiri*, [227] the military commission declined to address the suppression conventions relating to the hijacking of aircraft (listed above), and instead compared the language of the MCA and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"). [228] Despite the fact that the SUA Convention does not address aircraft hijacking (and there exist three conventions that do address aircraft hijacking), the military commission wrongly read the SUA Convention on maritime navigation as allowing the MCA to establish jurisdiction over the 9/11 aircraft hijacking as a war crime:

> The M.C.A. prohibits conduct that 'endangers the safe navigation of a vessel.' The similarity between the M.C.A. and the SUA Convention is plain and unambiguous. The SUA Convention proscribes the same conduct the M.C.A. proscribes and of which the Accused is charged… The Commission finds by a preponderance of the evidence the Prosecution has demonstrated the crime of Hijacking or Hazarding a Vessel or Aircraft is based on norms firmly grounded in international law and can be plainly drawn from established precedent. Therefore, the Commission concludes the offense of Hijacking or Hazarding a

[226] Milutinovic Opinion, paras. 20-22. Judge Robinson now sits on the International Court of Justice.

[227] AE 169E, Order, Defense Motion to Dismiss Charge IX: Hijacking or Hazarding a Vessel Does Not Violate The International Law of War (28 April 2014, Nashiri).

[228] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) at art. 3 ["SUA Convention"].

> Vessel or Aircraft was an *international law of war crime* at the time the Accused allegedly engaged in the conduct, thus conferring jurisdiction over the offense.[229]

The military commission's analysis fails on several points. The SUA Convention does not address hijacking aircraft; the Montreal Convention addresses hijacking aircraft. The SUA Convention and the applicable hijacking conventions do not create individual criminal responsibility; it creates a state obligation to criminalize acts within domestic jurisdiction.[230] The SUA Convention and applicable hijacking conventions nowhere allude to the law of war, as it is understood that the unlawful acts in question occur outside of armed conflict. While the Montreal Convention illustrates that the "crime of hijacking" is prohibited under international law (at least under the treaty and possibly under custom), none of the suppression conventions provide support for the legal leap to categorize hijacking as an "international law of war crime."[231]

---

[229] AE169E at 4.

[230] SUA Convention, art. 6; *see also* Saul at 131, 139:

> Most [of the so-called anti-terrorist suppression treaties] require States to prohibit and punish in domestic law certain physical acts – such as hostage-taking or hijacking . . .[they] are built on the principle of 'prosecute or extradite' [and] do not give rise to individual criminal responsibility for terrorist-type activities in international *stricto sensu* (before international criminal tribunals), but rely on domestic prosecutions, facilitated by transnational judicial co-operation.

[231] If the military commission's legal reasoning were to be applied to other widely-ratified suppression conventions, it would elevate – for example - corruption, drug trafficking, the use of child labor, and kidnapping diplomats to the level of war crimes. *See* United Nations Convention Against Corruption, 43 I.L.M. 37 (2004); Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 / [1973] ATS 3 / 7 ILM 8809 (1968); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493 (1988); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 38 ILM 1207 (1999); United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 13 ILM 41 (1974).

"Under international law, the terms 'war' and 'armed conflict' are used for an important normative purpose - to make certain rules applicable and to provoke certain legal effects."[232] Hijacking is not a war crime.[233] The charges of "attacking civilians" and "attacking civilian objects" are, as noted, traditional war crimes that duplicate the charge of hijacking in a wartime context.[234] As the Supreme Court stated in *Hamdan v. Rumsfeld* (and as the military commission noted in *Nashiri* AE169E), "Although the common law of War may render triable by military commission certain offenses not defined by statute, the precedent for doing so with respect to a particular offense must be plain and unambiguous." [235] Taking account of the domestic criminalization of hijacking and the reasons for excluding it from war crimes, the only possible conclusion by the military commission is that the charge of hijacking was not a war crime in 2001.

In 2001, no reasonable jurist would have suggested that an Article 21 law-of-war military commission had jurisdiction to try a "war crime" of terrorism, much less hijacking. Drawing on the Lincoln conspirators trial and *Quirin*, reasonable jurists could have debated the existence of a war crime of conspiracy, although the negative side of the debate would have the much stronger argument. Possibility and debate are no basis for a death sentence. The government here seeks to execute the defendants on the basis of a retroactive law which imposes new penalties and liabilities beyond those which clearly existed at the time of the crime. Such retroactive liability and punishment is the very definition of an *Ex Post Facto* Clause violation.

---

[232] Sassòli Declaration at para. 21.
[233] Even in the progressive CRIMES OF WAR by Gutman, Rieff, and Dworkin, the crime of hijacking is nowhere to be found as occurring in wartime.
[234] Geneva Conventions at art. 147.
[235] *Hamdan v. Rumsfeld*, 548 U.S. 557, 563 (2006).

7. **Request for Oral Argument:** Mr. al Baluchi requests oral argument.

8. **Witnesses:** Mr. al Baluchi reserves the right to identify witnesses based on the government's response.

9. **Conference with Opposing Counsel:** The moving party conferred with the opposing party; the government opposes this motion.

10. **Translated Documents:** The translations in the documents are all verified**.**

11. **Attachments:**

A. Certificate of Service

B. Declaration of Marco Sassòli

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
LtCol, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 24th day of February, 2017, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel

Attachment B

DECLARATION OF MARCO SASSOLI

Background

1. My name is Marco Sassoli. I am over 18 years of age and competent to make a declaration.

2. I am currently Professor of International Law at the University of Geneva, Switzerland. I am also an Associate Professor at the University of Quebec in Montreal (Canada). I have been between 2004 and 2013 Chairman of the board of Geneva Call, an NGO working with armed groups to ensure adherence to humanitarian law norms.

3. I obtained a law degree at the University of Basel, Switzerland, in 1982, and was admitted to the bar of the Kanton Basel-Stadt in 1984. I also obtained a Doctor of Laws degree at the University of Basel in 1989.

4. I joined the International Committee of the Red Cross ("ICRC") in 1985, first as a member of the Legal Division. I was Legal Advisor for the ICRC Delegation in Israel and the Occupied Territory from 1990-1991, then coordinator of the Legal Advisors to the Operations of the ICRC and Legal Adviser for the Middle East from 1991-1993.

5. From 1993-1994, I was Head of the ICRC Delegations in Jordan and Syria.

6. I became Deputy Head of the Legal Division of the ICRC in 1994, keeping that position until 1996.

7. In 1996, I worked for seven months as ICRC Protection Coordinator for the Former Yugoslavia, based in Sarajevo, and Chairman of the Working Group on Missing Persons in Bosnia and Herzegovina.

8. I was also Secretary-General of the Swiss Fund for Needy Victims of the Holocaust (Bern, Switzerland) from 1997-1998, and Executive Secretary of the International Commission of Jurists from 1998-1999. From 1999-2000, I have been registrar at the Swiss Supreme Court in Lausanne.

9. I began teaching International Law in 2001. From 2004-2008, I was Chairman of the board of the Geneva Academy of International Humanitarian Law and Human Rights, and have been Director of the Department of Public International Law and International Organization of the University of Geneva from 2009-2016.

10. I am the author of numerous publications on the sources of international law, on international humanitarian law, international human rights law, international criminal law, state responsibility, and non-state actors in international law; including (together with Antoine Bouvier and Anne Quintin) "How Does Law Protect in War?" 3rd ed (ICRC), which is regularly updated online at: https://casebook.icrc.org/. The list of my publications is annexed. Additionally, I have written extensively on the specific legal issues surrounding the conflict with Al Qaeda post-September 11, 2001. I am considered a world-renowned expert on the use, application, and interpretation of international humanitarian law ("IHL").

11. It is my understanding that two of the primary issues being raised before the military commission are whether an armed conflict existed on September 11, 2001, such that the jurisdiction of a military commission is valid; and whether the charge of "terrorism" is triable before a military commission convened under IHL.

12. Pursuant to the following analysis, it is my opinion to a reasonable degree of professional certainty that the United States was not engaged in armed conflict as defined by IHL on September 11, 2001. If there was an armed conflict, the earliest it could have started was on September 11, 2001. In my expert opinion, the armed conflict did not begin until October 7, 2001. It is my further opinion that even if the United States were engaged in an armed conflict on September 11, 2001, "terrorism" does not exist as a crime under IHL, and did not exist as a crime under IHL in 2001. All opinions in this declaration are expressed to a reasonable degree of professional certainty.

Background

13. The September 11, 2001 attacks triggered new debates about the law applicable to transnational armed groups such as Al Qaeda, the organization responsible for those attacks. Shortly after the attacks, Al Qaeda was named the main "enemy" in the "War on Terror" declared by the United States in response. It is certainly my view that international terrorism poses challenges that must be addressed through international law.

14. However, the actions of the United States in classifying terrorism as "war" or "armed conflict," post 9/11, have been highly controversial due to their lack of legal support. This classification has nevertheless formed the basis of the Guantanamo Bay military commissions, which were formed to try individuals pursuant to the "laws of war." There are two interrelated questions that must be examined with reference to the application of IHL to military commission

defendants: whether an armed conflict exists in the first place; and whether the crimes charged at the military commission constitute war crimes.

15. The initial line of argument advanced by the Bush administration to justify indefinite detention without trial of suspected terrorists in Guantanamo and in the so-called "black sites" may be summed up as follows: First, the U.S. is engaged in an armed conflict, the "war on terror." Second, this is a single, worldwide armed conflict against a non-state actor, Al Qaeda and its associates. The U.S. claims that this armed conflict began at some point in time in the 1990s and will continue until victory. Third, as a party to an armed conflict, the U.S. claims all the prerogatives afforded by international humanitarian law, including, in particular, detention of enemy combatants without any judicial decisions. Fourth, however, the Taliban, al Qaeda and associated forces fail to meet the legal criteria required for qualification as prisoners of war – upon capture, their status is that of "unlawful combatants," later "enemy combatants," or, as the Obama administration later called them, "alien unprivileged enemy belligerents." Fifth, as such individuals are said to be engaged in armed conflict against the U.S., the humanitarian law rules protecting civilians cannot apply to them. Sixth, the U.S. maintains that guarantees under human rights law are largely displaced by the laws of war during armed conflicts. In any case, the U.S. holds few international human rights law obligations applicable extraterritorially, although the government did in November 2014 acknowledge the applicability of the Convention Against Torture at Guantanamo Bay. Finally, domestic constitutional guarantees and the corresponding criminal legislation, like international human rights law obligations, were initially claimed not to be applicable to non-citizens extraterritorially, and such application has still not been finally settled. The conclusion of this flawed logic is that "unlawful combatants" may be detained without trial or individual decision until the end of active hostilities in the "war on terror," at least when they are held in Guantanamo, *i.e.,* outside U.S. territory; or if they are granted trials under the purpose-built military commissions, no law applies except for the Military Commissions Act of 2009. This line of argumentation has been met with international (and domestic) criticism and I have personally analysed these arguments extensively in the years since 9/11.[1]

---

1 *See in particular* the following articles I authored: "La «guerre contre le terrorisme», le droit international humanitaire et le statut de prisonnier de guerre," Canadian Yearbook of International Law (2001), (Translation: (French) “The War on Terror,” International Humanitarian Law and the Convention on Prisoners of War,” Canadian Yearbook of International Law (2001)). pp. 211-252; "'Unlawful Combatants': The Law and Whether it Needs to be *Revised," Proceedings of the 97th Annual Meeting of the ASIL* 97 (2003), pp. 196-200; "The Status of Persons Held in Guantanamo under International Humanitarian Law," Journal of International Criminal Justice 2 (2004), pp. 96-106; "Use and Abuse of the Laws of War in the 'War on Terrorism,'" Law and Inequality: A Journal of Theory and Practice 22 (2004), pp. 195-221; "Query: Is There a Status of

Existence of an Armed Conflict

16. Relevant factors that determine the existence of an armed conflict include: intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect IHL, collective, open and coordinated character of the hostilities, direct involvement of governmental armed forces (vs. law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.[2] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") puts a particular emphasis on the protracted character of the violence and the extent of organization of the parties.[3]

17. The Bush administration initially argued that by its scale, level of violence, and the degree of organization of the parties, the "war on terror" was one single novel type of international armed conflict that was neither covered by the Geneva Conventions, nor by their Common Article 3 applicable to non-international armed conflicts. This part of the argument was overturned by the U.S. Supreme Court in *Hamdan v Rumsfeld,* which held that any conflict that is not covered by

---

'Unlawful Combatant'?" in: JAQUES (ed.), "Issues in International Law and Military Operations," International Law Studies 80 (2006), Naval War College, Newport, Rhode Island, pp. 57-67; "Transnational Armed Groups and International Humanitarian Law," Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Winter 2006, Nr. 6; "Terrorism and War," Journal of International Criminal Justice 4 (2006), pp. 959-981; "La definition du terrorisme et le droit international humanitaire", Revue quebecoise de droit international (2007) (hors serie), *Etudes en Homage a Katia Boustany,* (Translation: (French) "The Definition of Terrorism and International Humanitarian Law," Quebec International Law Review (2007), Papers in Honor of Katia Boustany) pp. 127-146; "The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect," *Proceedings of the 104th Annual Meeting of the ASIL* 104 (2011), pp. 277-280; Entry "Guantanamo, Detainees," in: WOLFRUM (ed.), The Max Planck Encyclopedia of Public International Law, Oxford, OUP, 2012, vol. IV, 622-631 (updated in the online version, *available at* http://opil.ouplaw.com/home/EPIL, in 2015); "Legal Framework for Detention by States in Non-International Armed Conflict" Collegium 45 (Autumn 2015), *Proceedings of the Bruges Colloquium, Detention in Armed Conflicts, 16-17 October 2014,* pp. 51-65.

[2] *See* ICTY, *The Prosecutor v. Dusko Tadic aka "Dute,"* Trial Chamber Judgment of 7 May 1997 (Case No. IT-94-1-T), para. 562; ICTY, *The Prosecutor v. Ramush Haradinaj and others,* Trial Chamber Judgment of 3 April 2008 (Case No. IT-04-84-T) (for indicators on intensity see para. 49, for indicators on organisation see para. 60). See also ICRC, *Commentary on the First Geneva Convention* (2nd ed., Cambridge/Geneva, Cambridge University Press/ICRC, 2016), paras. 414-437.

[3] *See ibid.* and ICTY, Decision on Jurisdiction, *Tadic,* Appeals Chamber, 2 October 1995, para. 70; Judgement, *Delalic, Mucic, Delic and Landzo,* Trial Chamber, 16 November 1998;para. 184.

Art. 2 common to Geneva Conventions I-IV must perforce be not of an international character and therefore covered by Art. 3 common to Geneva Conventions I-IV ("Common Article 3"). The acts considered by the Bush administration in assessing the duration and protracted character of the "armed conflict" with Al Qaeda included the 1998 bombings of U.S. embassies by individuals associated with Al Qaeda.

18. Although the Obama administration largely abandoned the phrase "war on terror" and pledged to apply Common Article 3, they continued to apply a wartime paradigm to detention and military commissions at Guantanamo Bay (and indeed to drone operations and other anti-terror strikes outside the scope of this declaration). The amended Military Commissions Act of 2009 "establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[4]

19. In my view, neither the Obama nor the Bush administrations have ever provided proper legal reasoning, beyond a semantic notion of "war," to support the position that either terrorist acts committed by Al Qaeda or anti-terror measures against Al Qaeda (other than the armed conflict in Afghanistan that indeed started in October 2001) constitute armed conflict.

20. It is my expert opinion that an international armed conflict ("IAC") existed between the United States and Afghanistan. This IAC was initiated by the United States on October 7, 2001 with air strikes against the Taliban (Operation Enduring Freedom). The majority of the Taliban were disbanded by December 7, 2001, with the fall of Kandahar.[5] The new Afghan Transitional Government was established on June 19, 2002, which marked the end of the IAC between the

[4] 10 U.S.C. §948b(a).

[5] Robin Geiss and Michael Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?" International Review of the Red Cross, Volume 93 Number 881 (2011).

United States and Afghanistan.[6] My view is shared by the International Committee for the Red Cross and numerous other international legal experts.[7]

21. Further, it is my expert opinion that other engagements with Al Qaeda (the perpetrators of the 9/11 attacks) outside of U.S. military operations in Afghanistan do not qualify as armed conflict, including the 9/11 attacks and the isolated terror attacks preceding 9/11. The United States never referred to its engagements with Al Qaeda as "war" or "armed conflict" prior to September 11, 2001, and certainly not with regards to acts of terrorism committed by Al Qaeda in the 1990s. While both parties have, since 9/11, referred to their conflict as a "war," the media or descriptive use of that word must not be conflated with the legal terminology. Under international law, the terms "war" and "armed conflict" are used for an important normative purpose - to make certain rules applicable and to provoke certain legal effects.[8]

22. Until the issuance of the Military Commissions Instructions in 2003 by the United States, terrorist acts by private groups have not been viewed as creating armed conflicts.[9] On the contrary, the United Kingdom stated when it ratified Protocol I that "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted

---

[6] *Id. See,* UN Security Council resolution 1419 (2002), of 26 June 2002, welcoming the election of Hamid Karzai. *See also* Report of the Secretary-General, "The situation in Afghanistan and its implications for international peace and security," 11 July 2002, UN Doc. S/2002/737. The International Conference on Afghanistan held in December 2001 led to the 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions ("Bonn Agreement")', S/200111 154, of 5 December 2001, establishing an interim authority and calling for the establishment of an emergency Loya Jirga; Lucy Morgan Edwards, "State-building in Afghanistan: a case showing the limits?" International Review of the Red Cross, Vol. 92, No. 880, 2010, pp. 967-991; Norah Niland, "Impunity and insurgency: a deadly combination in Afghanistan" in ibid., pp. 931-950.

[7] Jelena Pejic, "'Unlawful/enemy combatants': interpretation and consequences," in Michael N. Schmitt and Jelena Pejic (eds), International Law and Armed Conflict: Exploring the Faultlines -Essays in Honour of Yoram Dinstein, Martinus Nijhoff Publishers, Leiden, 2007, pp. 335-336; Gabor Rona, "Legal issues in the 'war on terrorism': reflecting on the conversation between Silja N.U. Voneky and John Bellinger," German Law Journal, Vol. 9, No. 5, 2008, pp. 711-736.

[8] *See, e.g.,* Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law?," 75 *British Yearbook of International Law* (2004) pp. 85-88.

[9] Judgement, *Delalic, Mucic, Delic and Landzo,* Trial Chamber, 16 November 1998, para. 184.

or in isolation."[10] The British and Spanish campaigns against the Irish Republican Army and *Euskadi Ta Askatasuna* have not been treated as armed conflicts under IHL.[11] Even though those conflicts existed on the territory of one state, there is no precedent for classification of a situation as an armed conflict simply because it spreads over the territory of several states.

23. In my view, the existence of an armed conflict depends exclusively upon the facts, *i.e.* the quantity and quality of violence. The facts of the Al Qaeda attacks before and after 9/11 do not support a determination of armed conflict. After bombings in 2004 and 2005, the UK and Spanish governments followed the reaction of the U.S. reaction to pre-9/11 terrorist attacks and pursued the perpetrators through criminal investigations. They did not consider themselves involved in an armed conflict and did not, for example, bomb as military objectives the apartments where those responsible were hiding.[12]

24. Finally, it is my expert opinion that members of Al Qaeda do not qualify as members of an "armed group" for the purpose of declaring a non-international armed conflict under IHL. Article 1(1) of Additional Protocol II to the Geneva Conventions sets a relatively high threshold for a group to be an addressee of it. The group must "under responsible command, exercise such control over [a High Contracting Party's] territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol." The threshold of application of Article 3 common to the Geneva Conventions is lower, but judicial decisions and scholars insist on a necessary level of organization comprising as indicators

> "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice

---

[10] Reservation by the United Kingdom to Art. 1(4) and Art. 96(3) of Protocol I, *available at* http://www.icrc.org/ihl.nsf.

[11] Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* (Aldershot, Vermont: Dartmouth Publishing, 1992), p. 318.

[12] The responses of France and Belgium to recent ISIS-associated terror attacks on their territory, although involving military forces, were conducted according to a law enforcement paradigm and not according to the laws of war. Those States consider that the laws of war apply only to operations against ISIS in Syria and Iraq, where there is indeed a non-international armed conflict.

> and negotiate and conclude agreements such as cease-fire or peace accords."[13]

It is extremely rare for transnational armed groups to fulfil these criteria.[14] In my view, at least outside Afghanistan in 2001, Al.Qaeda does not fulfill those criteria.

25. In my view, the qualification (or lack thereof) of Al Qaeda as a transnational armed group under IHL highlights the difference between IHL applicable to armed conflicts and law enforcement and criminal law directed towards combating crime. The former has to apply to both sides equally and it has to be implemented with and by the parties, while criminal law has to be enforced by the state against the criminals. IHL must take the problems, aims and aspirations of armed groups seriously, while criminal law does not need to do so about criminals. This is an important reason for not classifying in law the "war on terror" as an armed conflict and trans-national terrorist networks as "armed groups."

War Crimes Under International Humanitarian Law (the Law of War)

26. Even if the existence of a non-international armed conflict were to be assumed, "terrorism" is not and has never been considered an autonomous, prosecutable war crime. Under IHL, there is a difference between prohibited acts and acts that are punishable as war crimes. The former are acts that engender state responsibility, whereas war crimes impose liability upon individuals as well.

27. The term "terrorism" appears in prohibitions set out in Article 33 of the Fourth Geneva Convention (concerning, protected civilians, *i.e.* basically civilians who find themselves in the hands of the enemy,[15] in international armed conflicts) and

---

[13] ICTY, *The Prosecutor v. Ramush Haradinaj and others,* Trial Chamber Judgment of 3 April 2008 (Case No. IT-04-84-T), para. 60.

[14] In the past, the ICRC pleaded that "the scope of application of the article must be as wide as possible." *See* Jean S. Pictet, International Committee of the Red Cross, *Commentary, JV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 36. In the meantime, the ICRC has abandoned this position: see ICRC, *Commentary of the First Geneva Convention,* supra note 2, paras 414-437, and has joined the general understanding that even armed conflicts under Art. 3 common need a high level of intensity and of organization of the parties.

[15] Under the text of Convention [No. IV] relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 UST 3516, 75 UNTS 287 – 417,, Art. 4, the term "protected persons" covers enemy and certain neutral nationals. The ICTY replaces the nationality standard by an allegiance standard *(See* ICTY, Judgement, *Tadic,* Appeals Chamber, 15 July 1999, paras. 163-69, and our criticism, Marco Sassoli & Laura Olson,

in Article 4(2)(d) of Protocol II (concerning all persons not or no longer taking a direct part in hostilities in non-international armed conflicts). However, that factor is not decisive. The context and field of application of those provisions shows that their purpose was to prohibit collective measures taken by (mainly state) authorities against a civilian population under their control to terrorize them in order to forestall hostile acts.[16] The examples which were before the eyes of the drafters and which they wanted to cover were the measures taken by Nazi Germany in the territories it occupied. Indeed, under Article 33 of Convention IV "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." Protocol II simply extends this prohibition to non-international armed conflicts.[17] In both provisions, measures or acts of terrorism are mentioned together with collective punishments striking the innocent and guilty alike after a hostile act has been committed. This is not the typical situation of criminal terrorist acts, which are seldom directed at persons who are in the hands of those who commit them and are normally not aimed at preventing those targeted from taking action (although the latter may not be true from the perspective of the terrorists).

28. Most terrorist acts are committed against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants. In both international and non-international armed conflicts, "[t]he 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."[18]

"Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case n° IT-94-A, ICTY Appeals Chamber (15 July 1999)," *94 AJIL* (2000) 571, 576-77).

[16] Emanuela-Chiara Gillard, "The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law," in Michael Schmitt, "Deconstructing October 7th: A Case Study in the Lawfullness of Counterterrorist Military Operations," in: Schmitt/Beruto (eds.), *Terrorism and International Law, Challenges and Responses* (San Remo: International Institute of Humanitarian Law and George Marshall European Center for Security Studies, 2002); Jean S. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958),.225-226.

[17] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Dordrecht: ICRCi Martinus Nijhoff Publishers, 1987), para. 4538.

[18] *See* Art. 51(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 UNTS 3 – 434, Art. 13(2) of Protocol [No II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, and a corresponding rule

29. While terrorism as such is not a war crime, certain or even most *acts* of terrorism constitute war crimes. In armed conflicts, any act which could reasonably be labelled as "terrorist" is criminalized by IHL if it is linked with the armed conflict and committed on the territory of one of the states affected by the conflict (or on the High Seas). [19] Therefore, underlying acts of terrorism are considered to be war crimes. Such acts include murder, torture, pillage and plunder, slavery, and attacking civilians and civilian property.

30. The decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Galic* is often cited as an example as a recent conviction for. "terrorism." In fact, the ICTY convicted General Galic, the commander of the siege of Sarajevo by Bosnian Serb forces from 1992-1995, for war crimes underlying a terror campaign.[20] In its judgment, the Trial Chamber defined the offence of terrorism by the following specific elements:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
>
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
>
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population. [21]

Terror was accepted to mean extreme fear, and provoking such fear had to be the specifically intended result.[22] The ICTY correctly held that the violation must involve *acts of violence* – underlying acts - directed at civilians. An attack directed at combatants or military objectives was not considered as prohibited, even if the primary purpose of the attack was to spread terror among the civilian population. [23] Due to this limitation of the "crime of terror" to violence directed at

---

of customary IHL (See Rules 1 and 2 of the *ICRC Study on Customary International Humanitarian Law* Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), Vol. I at 3-11.).

[19] *See generally* Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," 847 *IRRC* (2002) 547-570, at 556; Marco Sassoli, "International Humanitarian Law and Terrorism," in Wilkinson & Steward (eds.), *Contemporary Research on Terrorism* (Aberdeen: Aberdeen University Press, 1987) 466:..474, at 470-472.

[20] Judgment, *Galic,* Trial Chamber, 5 December 2003, paras. 91-137 and 208-597.

[21] *Ibid.* at para. 133.

[22] *Ibid.* at paras. 136-137.

[23] *Ibid.* at para. 135.

civilians, the *Galic* jurisprudence does not go beyond Article 85(3)(a) of Protocol I, which classifies making civilians the object of an attack as a (prosecutable) grave breach.

31. I have carefully reviewed the "Crimes and Elements" of offenses deemed to be triable by military commission at Guantanamo Bay. It is my expert opinion that inclusion of terrorism as a war crime triable by military commission was either superfluous – if it only covered other offenses defined – or contradicts established international law because no such distinct war crime exists.

32. I also believe that inclusion of the crime of terrorism is redundant due to the inclusion in the 9/11 case charges of attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war – all of which constitute the acts underlying terrorism that qualify as war crimes. I consider these charges to be triable by military commission in the context of an armed conflict.

33. Even if the autonomous charge of terrorism were to be included, using *Galic* or any international tribunal decisions as a model dictates that the crime include a specific intent requirement. The crime of terrorism as delineated by the military commission manual does not include such a requirement, and is therefore a radical departure from the evolving international practice regarding the prosecution of terrorism. Such a definition of terrorism as a crime unequivocally did not exist on September 11, 2001.

I declare that the foregoing is true under penalty of perjury under the laws of the United States.

Dated this 20th day of February, 2017

Professor of international law
Faculty of Law
University of Geneva
UNI MAIL
Bd du Pont-d'Arve 40
1211 Geneve 4
Switzerland

LIST OF PUBLICATIONS

Marco Sassoli

"Les droits populaires en Suisse", in : DELPEREE (ed.), *Referendums,* Bruxelles, 1985, pp. 359-383 (with L.WILDHABER et B. SCHMID).
(Translation: (French) "Common Law of Switzerland," in Delperee (eds), Referendums, Brussels (1985).)

"La contribution du Comite international de la Croix-Rouge a la formation et a l'application des normes internationales", in : BETTATI/DUPUY (ed.), *Les ONG et le droit international,* Paris, 1986, pp. 93-102.
(Translation: (French) "The Contribution of the ICRC to the Formation and Application of International Norms," in Bettati/Dupuy (ed.), NGOS AND INTERNATIONAL LAW, Paris, 1986.)

"The Status, Treatment and Repatriation of Deserters under International Humanitarian Law", International Institute of Humanitarian Law, Yearbook 1985, pp. 9-36.

"International Humanitarian Law and Terrorism", in : WILKINSON/STEWARD (ed.), *Contemporary Research on Terrorism,* Aberdeen, 1987, pp. 466-474.

"The National Information Bureau in Aid of the Victims of Armed Conflicts", International Review of the Red Cross 1987, pp. 6-24

"Mise en oeuvre du droit international humanitaire et du droit international des droits de l'homme : une comparaison", Annuaire suisse de droit international XLIII (1987), pp. 24-61.
(Translation: (French) "Implementation of International Humanitarian Law and International Human Rights Law: A Comparison," SWISS DIGEST OF INTERNATIONAL LAW XLIII (1987).)

"La peine de mort en droit international humanitaire et dans l'action du Comite international de la Croix-Rouge", Revue internationale de droit penal 58 (1987), pp. 583-592.
(Translation: (French) "The Death Penalty in International Humanitarian Law and in the work of the ICRC," International Criminal Law Review 58 (1987).)

"The Victim-oriented approach of International Humanitarian Law and of the International Committee of the Red Cross (ICRC)" in : *Victims,* Nouvelles Etudes Penales, 7, (1988), pp. 147-180.

"La Suisse et le droit international humanitaire - une relation privilegiee ?", Annuaire suisse de droit international XLV (1989), pp. 47-71.
(Translation: (French) "Switzerland and International Humanitarian Law: A Special Relationship?" SWISS DIGEST OF INTERNATIONAL LAW XLV (1989).)

"Le Droit international humanitaire applicable aux conflits armes non internationaux : Quelques problemes fondamentaux et le role du CICR", in: Revue burkinabe de droit, No. 17 (1990), pp. 115-143.
(Translation: (French) "The Role of International Humanitarian Law in Armed Conflict: Fundamental Problems and the Role of the ICRC," in Burkina Law Review No. 17 (1990).)

"Bedeutung von 'travaux preparatoires 'zu Kodifikationsvertragen fiir das allgemeine Volkerrecht", Oesterreichische Zeitschrift fiir offentliches Recht und Volkerrecht 41 (1990), pp. 109-149.
(Translation: (German) "The Impact of 'Preparatory Work' on Codification of Civil Law," Austrian Journal of Public and Private Law 41 (1990).)

Bedeutung einer Kodifikation fur das allgemeine Volkerrecht - mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevolkerung vor den Auswirkungen von Feindseligkeiten, Basel, 1990 (536 pp.)
(Translation: (German) "The Importance of Codification of Civil Law with Special Consideration of the Effects of Hostilities on Civilians," Basel (1990).)

"Der Konflikt im ehemaligen Jugoslawien : Recht und Wirklichkeit", in: Wolfgang Voit (ed.), *Hutnanitares Vo/kerrecht im Jugos/awienkonflikt - Auslandische F/Uchtlinge - Andere Rotkreuzfragen,* Bochum,1993, pp. 5-25.
(Translation: (German) "The Conflict in the Former Yugoslavia: Rights and Reality," in Woflgang Voit (ed.), INTERNATIONAL HUMANITARIAN LAW IN THE YUGOSLAV CONFLICT AND REFUGEES, ICRC, Bochum (1993).)

"La premiere decision de la Chambre d'appel du Tribunal penal international pour l'ex-Yougoslavie: Tadic (competence)", Revue generale de droit international public 100 (1996), pp. 101-134.
(Translation: (French) "The First Decision of Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia: Tadic (Jurisdiction)," General Review of Public International Law 100 (1996).)

"Le role des tribunaux penaux internationaux dans la repression des crimes de guerre", in: LATTANZI/SCISO (eds.), *Dai tribunali penali internazionali ad hoc a una carte permanente, Atti de/ convegno Roma, 15-16 dicembre 1995,* Napoli, 1996, pp. 109 - 125.
(Translation: (French and Italian) "The Role of International Criminal Tribunals in Preventing War Crimes," in Lattanzo/Sciso (eds) FROM AD HOC INTERNATIONAL CRIMINAL TRIBUNALS TO A PERMANENT COURT: THE PROCEEDINGS OF THE ROME CONFERENCE, DECEMBER 15-16, 1995, Naples, 1996.)

"Principles of humanitarian and medical aid" and "On possible ICRC co-operation with the Tribunals", in: STOLTENBERG/HOFTVEDT/KINIGER-PASSIGLI (eds.), *Non-governmental organizations and the Tribunals: a new partnership,* Oslo - The Hague, 1996, pp. 17 '". 23 and 88 - 93.

"The Swiss Special Fund for Holocaust victims: Innovative and pragmatic solutions in favour of the victims in a difficult environment", Justice [Review of t]he International Association of Jewish Lawyers and Jurists, 17 (June 1998), pp. 30 - 34 (with R. BLOCH).

How Does Law Protect in War? - Cases and Teaching Materials on the Contemporary Practice in International Humanitarian Law, ICRC, Geneva, 1999 (1493 pp., with A. BOUVIER). [also published in Chinese, Political Academy of the Chinese People's Liberation Army, Xi'an, 2004, and in part in Serbian, ICRC, Belgrade, 2002]

"The Impact of Globalization on Human Rights", The Review, International Commission of Jurists 63 (1999), pp. 67-81.

"Aktuell aus dem Bundesgericht", Zeitschrift des Bernischen Juristenvereins 136 (2000), pp. 1-8.
(Translation: (German) "Updates from Federal Court," Journal of the Bern Legal Association 136 (2000).)

"Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case No. IT-94-A, ICTY Appeals Chamber, 15 July 1999", American Journal oflnternational Law 94 (2000), pp. 571-578 (with LAURA M. OLSON).

"Le mandat des tribunaux internationaux en cas de violations du droit international humanitaire", in: *Drott international humanitaire et droits de l'homme:vers une nouvelle approche,* Beirut, 2000, pp. 99-1 11.
(Translation: (French) "The Mandate of the International Criminal Tribunals on Violations of International Humanitarian Law," in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS: A NOVEL APPROACH, Beirut (2000).)

"The decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?", International Review of the Red Cross 82 No. 839 (2000), pp. 733-769 (with LAURA M. OLSON).

"L'effet horizontal des droits humains dans le contexte de la mondialisation", *in:* M. BORGHI/P. MEYER-BISCH (ed.), *Societe civile et indivisibilite des droits de l'homme,* Fribourg, 2000, pp. 341-364.
(Translation: (French) "The Horizontal Effect of Human Rights in Globalization," in M. Borghi/P. Meyer-Bisch, CIVIL SOCIETY AND THE INDIVISIBILITY OF HUMAN RIGHTS, Fribourg (2000).)

"Economic Sanctions and International Humanitarian Law", *in:* V. GOWLLAND (ed.), *United Nations Sanctions and International Law,* The Hague, 2001, pp. 243-250.

"The legal qualification of the conflicts in the former Yugoslavia: double standards or new horizons in international humanitarian law?", in: WANG TIEYA and SIENHO YEE (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei,* London, 2001, pp. 307-333.

"Droit international penal et droit penal interne: le cas des territoires se trouvant sous administration internationale", in: ROTH/HENZELIN (eds), *Le droit penal a l 'epreuve de l 'internationalisation,* Paris/Geneve/Bruxelles, L.G.D.J./Georg/Bruylant, 2002, pp. 119-149.
(Translation: (French) "International and domestic criminal law: Territories Under International Administration," in Roth/Henzelin (eds.), INTERNATIONALIZATION OF CRIMINAL LAW (2002).)

"Le genocide rwandais, la justice militaire suisse et le droit international", Revue suisse de droit international et de droit europeen (2002) 12, pp. 151-178.
(Translation: (French) "The Rwandan Genocide, Swiss Military Justice, and International Law," Swiss Review of International and European Law 12 (2002).)

"State Responsibility for Violations of International Humanitarian Law", International Review of the Red Cross No. 846 (2002), pp. 401-434.

"La «guerre contre le terrorisme», le droit international humanitaire et le statut de prisonnier de guerre", Canadian Yearbook oflnternational Law 2001, pp. 211-252.
(Translation: (French): "The War on Terror," International Humanitarian Law and the Convention on Prisoners of War," Canadian Yearbook of International Law (2001).)

"La responsabilite internationale de l'Etat face a la mondialisation, la dereglementation et al privatisation : quelques reflexions", in: DELAS/DEBLOCK (ed.), *Le bien commun comme reponse a la mondialisation,* Bruxelles, Bruylant, 2003, pp. 303-325.
(Translation: (French) "The International Responsibilities of States Regarding Globalization, Deregulation, and Privatization: Some Reflections," in Delas, Deblock (eds.), THE COMMON GOOD AS A RESPONSE TO GLOBALIZATION, Brussels, Bruylant (2003).)

"L'arret Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", Revue Generale de Droit International Public 2002, pp. 789-818.
(Translation: (French) "The Yerodia Judgment: Remarks on the Collision of Two Branches of International Law," General Review of Public International Law (2002).)

"The ICRC and the missing", International Review of the Red Cross No. 848 (2002), pp. 727-750 (with Marie-Louise TOUGAS).

Conscripts' Rights and Military Justice Training Manual, Chisinau, Centre for Recruits' and Servicemen's Rights Protection of the Republic of Moldova, 2002, 238 pp. (also published in Russian)

"Collective security operations and international humanitarian law", Collegium 27 (Spring 2003), *Proceedings of the Bruges Colloquium, Relevance of InternatiOnal Humanitarian Law to Non-State Actors, 25th-26th October 2002,* pp. 77-100.

"Les disparus de guerre : Les regles du droit international et les besoins des families entre espoir et incertitude", Frontieres, vol. 15, no. 2 (Spring 2003), pp. 38-44. (Translation: (French) "The Missing During War: Rules of International Law and the Needs of Families In Hope and Uncertainty," Frontiers vol. 15, no. 2, (Spring 2003).)

"'Unlawful Combatants": The Law and Whether it Needs to be Revised', *Proceedings of the 97th Annual Meeting of the ASIL* 97 (2003), pp. 196-200.

Un droit dans la guerre? Geneve, CICR, 2003, vol. 1, *Presentation du droit international humanitaire,* vol. 2, *Cas et documents, Plans de cours,* 2086 pp. (with A. BOUVIER)
(Translation: (French) "A Right To War?" Geneva, ICRC 2003, vol. 1, Presentation of International Humanitarian Law, vol. 2, Cases and Documents, Lesson Plan.)

"The Status of Persons Held in Guantanamo under International Humanitarian Law", Journal of International Criminal Justice 2 (2004), pp. 96-106.

"Use and Abuse of the Laws of War in the 'War on Terrorism'", Law and Inequality: A Journal of Theory and Practice 22 (2004), pp. 195-221.

"Some Challenges to International Humanitarian Law (IHL) in Contemporary Armed Conflicts", in: PALACIOS-HARDY/RIVET/STILL (eds.), *Enforcing International Law: Practices and Challenges, Summary of Conference Proceedings, Ottawa, 11-13 March 2004,* Ottawa, 2004. pp. 92-109. (with LINDSEY CAMERON)

"Targeting: The Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts", in: WIPPMAN/EVANGELISTA (eds.), *New Wars, New Laws? Applying the Laws of War in 21s[1] Century Conflicts,* Ardsley, Transnational Publishers, 2005, pp. 181-210.

"The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda ",* in: RONZITTI/VENTURINI (eds.), Current Issues in the International Humanitarian Law of Air Warfare, Utrecht, Eleven, 2006, pp. 35-74 (with LINDSEY CAMERON)

"Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", European Journal of International Law 16 (2005), pp. 661-694.

How Does Law Protect in War? 2nd ed., Geneva, ICRC, 2006, Vol. I, *Outline of International Humanitarian Law, Possible Teaching,* Vol. II, *Cases and Documents, Outlines,* 2473 pp. (with ANTOINE BOUVIER). [also published in Russian, Moscow, ICRC, 2008, Chinese, Beijing, ICRC, 2010, and Arabic, Cairo, ICRC, 2011]

"Query: Is There a Status of 'Unlawful Combatant'?" in: JAQUES (ed.), *Issues in International Law and Military Operations,* International Law Studies 80 (2006), Naval War College, Newport, Rhode Island; pp. 57-67.

Transnational Armed Groups and International Humanitarian Law, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Winter 2006, Nr. 6, 45 pp., online: http://www.hpcr.org/pdfs /Occasiona1Paper6.pdf

"Terrorism and War", Journal oflntemational Criminal Justice 4 (2006), pp. 959-981.

Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber, Dike, Zilrich, 2007, 1650 *pp.* (ed., with STEPHAN BREITENMOSER/BERNHARD EHRENZELLER/WALTER STOFFEL/BEATRICE WAGNER PFEIFER).

"La Cour europeenne des droits de l'homme et les conflits armes", in: BREITENMOSER/EHRENZELLER/SASSOLI/STOFFEL/WAGNER PFEIFER (eds.), Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber, Dike, Zurich, 2007, pp. 709-731.
(Translation: (French) "The European Court of Human Rights and Armed Conflicts," in Breitenmoser/Ehrenzeller/Sassoli/Stoffel/Wagner Pfeifer (eds.), HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW, in honor of Lucius Wildhaber, Dike, Zurich, 2007.)

"!us ad helium and *!us in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?" in: SCHMITT/PEJIC (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein,* Nijhoff, Leiden/Boston, 2007, pp. 242-264.

"La definition du terrorisme et le droit international humanitaire", Revue quebecoise de droit international (2007) (hors Serie), *Etudes en hommage a Katia Boustany,* pp. 127-146.
(Translation: (French) "The Definition of Terrorism and International Humanitarian Law," Quebec International Law Review (2007), Papers in Honor of Katia Boustany.

"Le droit international humanitaire comme cadre ethique d'interventions militaires a des fins humanitaires?" in: RIOUX (ed.), *L 'intervention armee peut-elle etre juste? Aspects moraux et ethiques des petites guerres contre le terrorisme et !es genocides,* Fides, Montreal, 2007, pp. 175-204.
(Translation: (French) "International humanitarian law as an ethical framework for military interventions and humanitarian purposes?" in CAN ARMED CONFLICT BE JUST? MORAL AND ETHICAL ASPECTS OF STRUGGLES AGAINST TERRORISM AND GENOCIDE, Fides, Montreal (2007).

"Le droit international humanitaire, une lex specialis par rapport aux droits humains?" in: AUER, FLUCKIGER, HOTTELIER (eds.), *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni,* Schulthess, Geneve, 2007, pp. 375-395.
(Translation: (French) "International humanitarian law: Lex Specialis with Regards to Human Rights" in Auer, Fluckiger, Hottelier (eds.), Human Rights and the Constitution, Essays in Honor of Professor Giorgio Malinverni, Schulthess, Geneva, 2007.)

"L'estensione della disciplina della tutela <lei beni culturali ai conflitti armati non internazionali" in: BENVENUTI, SAPIENZA (eds.), *La tutela internazionale dei bent culturali nei conjlitti armati,* Giuffre, Milano, 2007, pp. 157-169.
(Translation: (Italian) "The extension of the framework of the law on the protection of cultural property in non-international armed conflict," in Benvenuti, Sapienza (eds.), THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT, Giuffre, Milano, 2007.)

New Challenges and Perspectives for the Protection of Human Rights, Dike, Zilrich, 2008, 72 pp. (ed., with STEPHAN BREITENMOSER/BERNHARD EHRENZELLER/WALTER STOFFEL/BEATRICE WAGNER PFEIFER).

"Human Shields and International Humanitarian Law", in: FISCHER-LESCANO/GASSER/MARAUHN/RONZITTI (eds.), *Peace in Liberty, Festschrift fur Michael Bothe zum 70. Geburtstag,* Nomos and Dike, Baden-Baden and Zilrich, 2008, pp. 567-578.

Entry "Guerre et conflit arme", in : ANDRIANTSIMBOVINA, GAUDIN, MARGUENAUD, RIALS and SUDRE (eds.), *Dictionnaire des Droits de !'Homme* Paris, PUF, 2008, pp. 466-471.
(Translation: (French) Entry, "War and Armed Conflict," in Andriantsimbovina, Gaudin, Marguenaud, Rials, and Sudre (eds.), DICTIONARY OF HUMAN RIGHTS, Paris, PUF, 2008.)

"Engaging Non-State Actors: The New Frontier for International Humanitarian Law", in: *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law and Human Rights Law,* PSIO, UNIDIR, Geneva Call, Geneva, 2008, pp. 8-12.

"The Implementation of International Humanitarian Law: Current and Inherent Challenges", Yearbook of International Humanitarian Law 10 (2007), pp. 45-73.

"The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict", International Review of the Red Cross 90, no. 871 (2008), pp. 599-627 (with Laura M. OLSON).

"Humanitarian Law and International Criminal Law", in: CASSESE (ed.), *The Oxford Companion to International Criminal Justice ,* Oxford University Press, Oxford, 2009, pp. 111-120.

"Reparation", in: CHETAIL (ed.), *Post-Conflict Peacebuilding: A Lexicon,* Oxford University Press, Oxford, 2009, pp. 279-290; also published in French: "Reparation", in: CHETAIL (ed.), *Lexique de la consolidation de la pa ix,* Bruylant, Bruxelles, 2009, pp. 435-450.

"The Approach of the Eritrea-Ethiopia Claims Commission towards the Treatment of Protected Persons in International Humanitarian Law", in: DE GUTTRY/POST/VENTURINI (eds.), *The 1998-2000 War Between Eritrea and Ethiopia,* The Hague, Asser, 2009, pp. 341-350.

"The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?", Israel Yearbook on Human Rights 39 (2009), pp. 177-212; also published in: U.S. Naval War College, International Law Studies, vol. 85 (2009), *The War in Afghanistan: A Legal Analysis,* pp. 431-463.

"The Concept of Security in International Law Relating to Armed Conflicts", in: BAILLET (ed.), *Security, A Multidisciplinary Approach,* Leiden, Nijhoff, 2009, pp. 7-22.

"Involving organized armed groups in the development of the law?", in: ODELLO and BERUTO (eds.), *Non-State Actors and International Humanitarian Law,* International Institute of Humanitarian Law/Franco Angeli, pp. 213-221.

"I gruppi armati organizzati tra incentive al rispetto del D.l.U. e criminalizzazione", in: *Atti [del] convegno, fl Diritto internazionale Umanitario tra esigenze giuridiche e realta operative negli scenari de! III Milennio,* Roma, Aeronautica militare, 2010, pp. 168-175.
(Translation: (Italian)"Organized armed groups and the incentive to respect customary international law and criminalization," in Conference Proceedings of International Humanitarian Law, including Legal Requirements and Operational Scenarios, Millenio, Rome, Air Force (Italy), 2010.)

"International humanitarian law and the increasing involvement of private military and security companies in armed conflicts", in : Jusletter 30 August 2010, online: http:// jusletter.weblaw.ch/article/fr/ 861 O?lang=fr.

Volkerrecht/Droit international public, Aide-memo ire, Dike, Ziirich/St. Gallen, 2010, 395 pp. (with SAMANTHA BESSON, STEPHAN BREITENMOSER and ANDREAS R. ZIEGLER).
(Translation: (German and French) "Public International Law," Dike, Zurich/St. Gallen, 2010.)

"Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", The Journal of International Humanitarian Legal Studies 1 (2010), pp. 5-51.

"The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in: BEN-NAFTALI (ed.), *International Human Rights and Humanitarian Law,* Oxford, OUP, 2011, pp. 34-94.

How Does Law Protect in War? 3rd ed., Geneva, ICRC, 2011, 3 Vol., 2580 pp. and CD-ROM (with ANTOINE BOUVIER and ANNE QUINTIN), since 2014 available and regularly updated online at: https://www.icrc.org/casebook/

"Legal basis of detention and determination of detainee status", in: ODELLO and BERUTO (eds.), *Global Violence: Consequences and Responses,* International Institute of Humanitarian Law/Franco Angeli, Milano, 2011, pp. 149-156.

"International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan", McGill Law Journal 56 (2011), pp. 959-1010 (with MARIE-LOUISE TOUGAS).

"Exportation d'armes: la curieuse interpretation du Conseil federal", Plaidoyer 4 (2011), pp. 24-25.
(Translation: (French) "Arms Exportation: The Curious Interpretation of the Federal Counsel," Pladoyer 4 (2011).)

"The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect", *Proceedings of the 104th Annual Meeting of the ASIL* 104 (2011), pp. 277-280.

Entries "Combatants", "Guantanamo, Detainees", "Internment", and "Military Objectives", in: WOLFRUM (ed.), The Max Planck Encyclopedia of Public International Law, Oxford, OUP, 2012, vol. II, pp. 350-360; vol. IV, 622-631; vol. VI, pp. 238-248 ; vol. VII, pp. 207-216.

"Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?", International Review of the Red Cross 93, no. 882 (2011), pp. 426-431.

Un droit dans la guerre? Cas, documents et supports d 'enseignement relatifs a la pratique du droit international humanitaire , 2nd ed., ICRC, Geneva, 2012, 3 vol., 3030 pp. and CD-ROM (with A. BOUVIER and A. QUINTIN and in cooperation with J. GARCIA).
(Translation: (French) "A Right to War? Cases, Documents, and Learning Materials Relating to the Practice of International Humanitarian Law," 2nd Ed., ICRC, Geneva (2012).)

"Les limites du droit international penal et de la justice penale dans la mise en oeuvre du droit international humanitaire", in: BIAD and TAVERNIER (eds), *Le droit international humanitaire face aux defis du XX!e siecle,* Bruxelles, Bruylant, 2012, pp. 133-154 (with J. GRIGNON).
(Translation: (French) "The Limits of International Criminal Law and Criminal Justice in the Implementation of International Humanitarian Law," in Biad and Tavernier (eds.), INTERNATIONAL HUMANITARIAN LAW IN LIGHT OF 21ST CENTURY CHALLENGES, Brussels, Bruylant, (2012).)

"Volkerrecht und Landesrecht : Pladoyer eines Volkerrechtlers fiir Schubert", in: BELLANGER and DE WERRA (eds), *Geneve au confluent du droit interne et du droit international. : melanges offerts par la Faculte de droit de l'Universite de Geneve a la Societe suisse desjuristes a /'occasion du congres 2012,* Geneva, Schulthess, 2012, pp. 185-201.
(Translation: (German and French) "International and Domestic Law, Pleas for Lawyers for Schubert," in Bellanger and De Werra (eds.), Geneva at the Confluence of Domestic and International Law: Compendium by the Faculty of Law at the University of Geneva to the Swiss Society of Jurists on the occasion of conference, Geneva, Schulthess, 2012.)

"A plea in defence of Pictet and the inhabitants of territories under invasion: the case for the applicability of the Fourth Geneva Convention during the invasion phase", International Review of the Red Cross 94, no. 885 (2012), pp. 42-50.

Volkerrecht/Droit international public, Aide-memoire, 2nd ed., Dike, Zurich/St. Gallen, 2013, 436 pp. (with SAMANTHA BESSON, STEPHAN BREITENMOSER and ANDREAS R. ZIEGLER).
(Translation: (German and French) "Public International Law," 2nd. Ed., Dike, Zurich/St. Gallen, 2013.)

"Combattants et combattants illegaux", in: CHETAIL (ed.), *Permanence et mutation du droit des conjlits armes,* Bruylant, Brussels, 2013, pp. 152-184.
(Translation: (French) "Combatants and Illegal Combatants," in Chetail (ed.), in Permanence and Changes in the Law of Armed Conflict, Bruylant, Brussels, 2013.)

"International Law and the Use and Conduct of Private Military and Security Companies in Armed Conflicts", in: ICIP Research 01, *Companies in conflict situations,* Institut Catala Internacional per la Pau, Barcelona, 2013, pp. 109-126, online:
http://www20.gencat.cat /docs/icip/Continguts/Publicacions/Arxi us%201CIP%20RESEARCH/WEB%20-%20ICIP RESEARCH NUM 01.pdf

"Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified", International Law Studies, US Naval War College 90 (2014), pp. 308-340.

"IHL mechanisms in armed conflict: where is the problem?", in: VEUTHEY (ed.), *Respecting International Humanitarian Law: Challenges and Responses,* International Institute of Humanitarian Law/Franco Angeli, 2014, pp. 109-115.

"Active and Passive Precautions in Air and Missile Warfare", Israel Yearbook on Human Rights 44 (2014), pp. 69-123 (with A. QUINTIN).

"Droit humanitaire", in: HERTIG RANDALL and HOTTELIER (eds), *Introduction aux droits de l 'homme,* Schulthess/Yvon Blais/Lextenso, Geneve 2014, pp. 140-154. (Translation: (French) "Humanitarian Law" in Hertig, Randall, and Hottelier (eds.), INTRODUCTION TO HUMAN RIGHTS, Schulthess/Yvon Blais/Lextenso, Geneva, 2014.)

"When do Medical and Religious Personnel Lose what Protection", Collegium 44 (Autumn 2014), *Proceedings of the Bruges Colloquium, Vulnerabilities in Armed Conflicts: Selected Issues, 17-18 October 2013,* pp. 50-57.

"Le principe de precaution dans la guerre aerienne", in : MILLET-DEVALLE (ed.), *Guerre aerienne et droit international humanitaire ,* Paris, Pedone, 2015, pp. 74-130. (Translation: (French) "The Precautionary Principle in Aerial Warfare," in Millet-Devalle (ed.), AERIAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, Paris, Pedone, 2015.)

"Challenges Faced by Non-State Armed Groups as regards the Respect for the Law Governing the Conduct of Hostilities", in GREPPI (ed.), *Conduct of hostilities : the Practice, the Law and the Future ,* International Institute of Humanitarian Law/Franco Angeli, 2014, pp. 171-176.

The 1949 Geneva Conventions, A Commentary (ed., with ANDREW CLAPHAM and PAOLA GAETA), Oxford, OUP, 2015 (1651 pp.).

"Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War", in: CLAPHAM, GAETA and SASSOLI (eds), *The 1949 Geneva Conventions, A Commentary,* Oxford, OUP, 2015, pp. 1039-1066.

"The Concept and the Beginning of Occupation", in: CLAPHAM, GAETA and SASSOLI (eds), *The 1949 Geneva Conventions, A Commentary,* Oxford, OUP, 2015, pp. 1389-1419.

"The Convergence of the International Humanitarian Law of Non-International and of International Armed Conflicts: Dark Side of a Good Idea", in: BIAGGINI, DIGGELMANN and KAUFMANN (eds), *Polis und Kosmopolis, Festschrift fiir Daniel Thiirer,* Zi.irich/Baden-Baden, Dike/Nomos, 2015, pp. 678-689.

"Legal Framework for Detention by States in Non-International Armed Conflict" Collegium 45 (Autumn 2015), *Proceedings of the Bruges Colloquium, Detention in Armed Conflicts, 16-17 October 2014,* pp. 51-65.

"Challenges to International Humanitarian Law", in: VON ARNAUD, MATZ-LUCK and ODENDAHL (eds), *J OO Years of Peace Through Law: Past and Future,* Berlin, Duncker & Humblot, 2015, pp. 181-235 (with YVETTE ISSAR).

"Specificites de la detention administrative en temps de conflits armes et conciliation avec la Convention europeenne des droits de l'homme", in: *Actes du Colloque « Les relations entre droit international humanitaire et droit europeen des droits de l 'homme : quelles perspectives ?* », Paris, Ecole militaire, 22 octobre 2014, Paris, Ministere de la Defense, 2015, pp. 94-107.
(Translation: (French) "Rules of Administrative Detention in Times of Armed Conflict and Conciliation, with the European Convention on Human Rights," in SYMPOSIUM PROCEEDINGS, THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND EUROPEAN HUMAN RIGHTS LAW: WHAT PERSPECTIVES? Paris, Military School, 22 October 2014, Paris, Ministry of Defense (2015).)

"Die Anwendbarkeit des humanitaren Volkerrechts auf Aufstandische und bewaffnete Gruppen", in: MATZ-LUCK (ed.), *Der Status von Gruppen im Volkerrecht,* Berlin, Duncker & Humblot, 2016, pp. 119-152.
(Translation: (German) "The Applicability of Humanitarian Law to Insurrection and Armed Groups," in Matz-Luck (ed.), THE STATUS OF GROUPS IN INTERNATIONAL LAW, Berlin, Duncker & Humblot, 2016)

"EU Law and International Humanitarian Law", in: PATTERSON et SODERSTEN (eds), *A Companion to European Union Law and International Law,* Chichester, Wiley-Blackwell, 2016, pp. 413-426 (with DJEMILA CARRON).

"Actores no estatales y desafios para el derecho internacional humanitario", Revista espaftola de derecho international 68/2 (2016), pp. 313-320.
(Translation: (Spanish) "Non-State Actors and Challenges for International Humanitarian Law," Spanish Review of International Law 68/2 (2016).)

"The obligation to take feasible passive precautions and the prohibition of the use of human Shields: can military considerations, including force protection, justify not to respect them?" Collegium 46 (Autumn 2016), *Proceedings of the Bruges Colloquium, Urban Warfare, 15-16 October 2015,* pp. 76-85.

ICRC, *Commentary on the First Geneva Convention,* 2nd ed., Cambridge/Geneva, Cambridge University Press/ICRC, 2016, 1344 pp. (member of the editorial committee)