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## Terrorism in War: The Law of War Crimes

# Terrorism in War: The Law of War Crimes

REVIEWED BY L.C. GREEN\*

LEVIE, HOWARD S., *TERRORISM IN WAR: THE LAW OF WAR CRIMES*; Oceana, Dobbs Ferry (1993); (\$65.00); ISBN 0-379-20148-8; 721 pp. (hardcover).

Those interested in the law of war crimes have often been hindered in their research by the lack of anything in the nature of a single volume compendium. Researchers have had to rely on the very lengthy Nuremberg and Tokyo judgments, the reports of the subsidiary trials held by the United States at Nuremberg, the thirteen volumes published by the United Nations War Crimes Commission, together with isolated issues of the *Annual Digest* or the *International Law Reports*. The need for a more readily available guide to the actual practice in this field of the law of armed conflict has become of major significance with the establishment of the tribunal to try offenses committed in the former Yugoslavia, especially as it is so difficult to produce a comprehensive statement as to what amounts to a war crime or even a crime against humanity. In fact, "[i]n view of the doctrine of *ejusdem generis*, it is probably preferable not to attempt to list war crimes as each conflict will produce new types of offenses, new types of violations of the law of war, which should be punished" (at 2 n. 8). One must also bear in mind the differences between an "accused" and a "war criminal," with the latter term reserved for one who has been found guilty by a properly appointed tribunal (at iii), something that the news media seem constantly to overlook.

To some extent this lacuna has been filled by Howard Levie with the publication of his *Terrorism in War: The Law of War Crimes*. Here will be found the most extensive summary of the jurisprudence produced in this field, together with a classification of the various trials according to the nature of the offenses charged. In addition to fascinating chapters on the history of the treatment of war crimes from earliest times to date, classified under such headings as procedural matters; conventional war crimes; other offenses, including crimes against peace and humanity, conspiracy, criminal organizations and command responsibility; the accused, their victims, and their defenses. There are further subclassifications enabling the reader, with the assistance of a fairly comprehensive index and table of cases, to find his way about in what might otherwise be a frightening morass of material. Because of the historical approach adopted it is possible to give the lie to those who maintain that trials of offenders against the laws and customs of

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war are a modern creation established to satisfy the demands for vengeance of the victors. In this connection it may be interesting to refer to the 1966 trial in the German Democratic Republic of Heissmeyer for conducting medical experiments on Jewish children and then arranging with the local SS commander, Strippel, to have them hanged "to prevent their prior treatment from being discovered." Heissmeyer was sentenced to life imprisonment, while Strippel, who had relocated to the Federal Republic, was not tried for this offense, although he was convicted for aiding in the murder of forty one Russian prisoners of war and sentenced to a mere three and one-half years, which he never served (at 441-42).

In the preface, the author states that

[a]part from battlefield war crimes, and to a certain extent even there (denial of quarter and shooting of recently captured prisoners of war and wounded soldiers), many categories of war crimes committed by the Nazis during World War II were intended to establish a reign of terror among various elements of the enemy. The inmates of the concentration camps were terrorized . . . ; the civilian inhabitants of occupied territories were terrorized . . . ; members of resistance movements were terrorized . . . ; attempts were made to terrorize merchant seamen by a program of slaughtering the members of shipwrecked crews in order to encourage experienced personnel from making the Atlantic crossing; etc.; etc. (at i-ii).

What Levie says is perfectly true, but it is probably equally true to state that every member of the armed forces experienced some sense of terror when in action and under fire, and many a bombardment has been directed with the intention of terrorizing the enemy. For this reason, this reviewer considers it a little unfortunate that this major work on war crimes has been issued as a volume in the series entitled *Terrorism: Documents of International and Local Control* (3rd Vol., 2nd Series). This is particularly so in view of the fact that, apart from relatively brief extracts from some twenty five instruments, there are no documents in the volume. Moreover, it is a little difficult to find these extracts since there is no table of appendices. Further, in view of the current usage of the term "terrorism" both in national and international law, the issue of war crimes is sufficiently significant to stand on its own, with Levie's book as one of the most important in the literature on this subject.

In a work of this character it is only possible to draw attention to some of the inclusions, exclusions, and comments. It is always interesting to find references to the trial and execution of Captain Fryatt by the Germans in 1916 (at 20-21), considered by the British as judicial murder. But there is no discussion of the trial of Edith Cavell, whose execution caused even more emotional reaction in both Britain and the United States, even though it could well be argued that there was

some justification for trying her since it is beyond the limits of a nursing sister's claim to immunity to assist escaping personnel to rejoin their lines.<sup>1</sup> Commenting on the paucity of war crimes decisions relating to naval warfare, Levie criticizes the Nuremberg findings against Doenitz (at 63-8) and tends to agree that the sentences imposed by United States tribunals were "too lenient" (at 98). Perhaps the most well-known maritime decision after World War II was that arising from the *Peleus* sinking. Here, Levie fails to mention that one of the accused was a medical officer. Contrary to the statement at p. 106, one of the officers, in fact the one who willingly took part in the shooting of the shipwrecked crew, was not executed but received a life sentence, only to be reprieved later as a result of debates instituted by senior naval officers in the British House of Lords. While Levie is critical of the dissents by Pal and Roling at Tokyo (at 149, etc.), he overlooks the fact that Webb, the presiding judge, ordered one of the defense counsel from the court for refusing to confine his examination in chief solely to issues referred to by the prosecution.<sup>2</sup> Regrettably, when discussing the *Gozawa* case (at 174) he does not comment upon the *heiho* defense and the contention therein that a prisoner of war can have his status changed either by his own decision or that of his captor while the conflict continues.

It has been suggested that the use of the term "grave breaches" in the Geneva Conventions of 1949 and Protocol I of 1977 has meant that other breaches of the law might not amount to punishable war crimes. It is pleasant to find Levie agreeing with those who have no doubt that "grave breaches" are still "war crimes" governed by the same system of law (at 190). In this connection it is interesting to note that he is critical of the lack of adequate United States legislation to try American personnel for "grave breaches" (at 237-38), although they would, as was Calley, be liable to trial under United States military and criminal law. He does not think that the "United States Senate would give its advice and consent" to ratification of a convention establishing an international criminal court (at 225 n. 16), although he does not state why he has this feeling. He also suggests that, in view of the requirement in the 1949 Prisoners of War Convention that prisoners of war must be tried in the same manner as one's own forces, it might not be possible to establish such an international tribunal to try non-nationals in one's control unless the Geneva Convention is amended (at 257-59; see also 511). However, in the course of a two-page Epilogue he mentions the Security Council decision, reached with the active support of the United States, to establish an ad hoc international tribunal "for the prosecution of persons responsible for serious violations of

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1. See, e.g., GARNER, *INTERNATIONAL LAW AND THE WORLD WAR*, Vol. II at 97-105 (1920).

2. THE TIMES (London), March 6, 1947; for similar 'strange' decisions by the tribunal, see *id.*, June 21, 1947 and September 26, 1947.

international humanitarian law committed in the territory of the former Yugoslavia since 1991" (at 528). This may well indicate that the United States may now be willing to accept an international criminal court, in line with his overall conclusion:

There were undoubtedly defects in many of the post-World War II war crimes programs. However, on the whole these programs were successful in their objectives of weeding out the guilty from the innocent, in providing appropriate punishment for the guilty, and in establishing precedents which, hopefully, will have their impact on future international relations by making the leaders of nations more reluctant to embark upon adventurous wars of aggression and by making individuals more reluctant to commit violations of the law of war should they become involved in armed conflict. If this hope is fulfilled, then the war crimes conducted [sic] after World War II will have served the dual purpose of punishing the guilty and of giving effective warning to members of subsequent generations that "war crimes do not pay"! (at 526).

On the other hand, we cannot overlook the fact that events in the Gulf after the invasion of Kuwait as well as during the conflict in Bosnia suggest that we still live in a world in which political leaders will resort to aggression, and their troops, either spontaneously or by command, will continue to commit atrocities comparable with many of those perpetrated in the past. However, we must still be cautious before accepting the horror stories produced by propagandists or careless organs of the media. Thus, in the *Report on Iraqi War Crimes* prepared by the United States Secretary of the Army, it is stated that "[t]he [civilian] deaths included 120 babies left to die after being removed from incubators that were taken to Iraq" (at 527), although it has long been accepted that this "atrocious" never occurred.

Should there be any war crimes trials held in response to the conflict in Bosnia we may be sure that superior orders will be pleaded by way of defence. Should this be so, Levie's warning that we must distinguish between "duress" and "superior orders" (at 478) becomes important. It is equally necessary to remember that, with the possible exception of General Blaustein, who was relieved of his command, and General Thoen, who was dismissed from the service, there is no evidence that anyone in Nazi Germany suffered for refusing to obey an atrocity order (at 485). However, Levie implies that with the adoption of Article 102 of the 1949 Prisoners of War Convention he is no longer convinced that this may not constitute a defense (at 520). But we must also not overlook the fact that most national systems of law only require compliance with a lawful order, that is to say one that is not manifestly unlawful in the eyes of a reasonable soldier. Even more significant is the requirement in Protocol I of 1977 that the legal advisers be attached to the armed forces. This should mean that superiors warned by their advisers that their orders may be illegal will carry a clear responsibility for such orders, while if the adviser indicates

that the order was lawful the ordinary soldier whose knowledge of the law will be minimal should have every right to plead superior orders in his defense and perhaps not only by way of mitigation of punishment.

Perhaps, in conclusion, attention may be drawn to a couple of errors that have been overlooked in proofreading. At p. 204 and again in the Index at p. 714 Earl Russell's name appears as "Bertram" instead of "Bertrand"; and we read:

It is interesting to note that an Englishman who had taught in a German law school has expressed the opinion that during the inter-war period the majority of German law students had been brought up to believe that during World War I the Allies had completely ignored the law of war (at 18 n. 76).

The author in question is Ernst J. Cohn who was a refugee German law teacher living in England. More important is another footnote that refers to the invasion by the Pakistan Army of East Pakistan, the war with India, and the creation of Bangladesh:

For the alleged maltreatment of Bengali civilians (Hindus) by the Pakistani Army (Moslems) in what was then East Pakistan (now Bangladesh), from the Indian point of view (genocide), see Mehrish, *passim*; for the alleged maltreatment of non-Bengali civilians (Moslems) by the Bengali Awami League (Hindu) in what was then East Pakistan (now Bangladesh), from the Pakistani point of view (genocide), see Aziz, *passim*. (at 208 n. 89).

In fact, the majority of the East Bengali civilians were Moslems, which is why that part of Bengal was given to Pakistan, while the Awami League is a Moslem organization.

Regardless of whether one agrees with every comment made by Professor Levie in this study of *Terrorism in War: The Law of War Crimes*, one cannot help but admire the learning and energy that have gone into preparing this work, which will undoubtedly stand for many years as one of the most important contributions to the study of this subject that has been produced since the issue became one of debate and consideration at the end of World War I.

