Chapter 5
Armed Conflicts, Sexual Violence and the Mens Rea of the War Crime of Terrorism

Introduction

We saw, in Chapter 1, during our review of the explanations for the evil of sexual violence, that the infliction of terror on a civilian population partly explains why some warring parties commit sexual assault during armed conflicts. We saw how it was that some fighting forces would deliberately rape women belonging to the enemy side, with the aim of demoralising—and instilling paralysing fear within—the enemy population. There is a universal agreement, even by military die-hards who acknowledge such behaviour as ‘effective military tactics’, that these conducts amount to evil during armed conflicts. Regrettably, this is an area of international criminal law that has not received much attention. The aim of this chapter is to review developments in international criminal law, with the view to assessing the adequacy of the responses which international law has thus far made in relevant respects.

The Conventional Source of the War Crime of Terrorism

Terrorism enjoys unique stature as one of the most angst-ridden concepts in the annals of contemporary public international law. Controversy has persistently prevented the settling of a generally-accepted definition of the concept.\textsuperscript{57} This is notwithstanding credible efforts on the part of the international community.\textsuperscript{58}

\textsuperscript{57} See, for instance, Antonio Cassese, \textit{International Criminal Law} [Oxford: OUP, 2003] pp 120–125; and Kriangsak Kittichaisaree, \textit{International Criminal Law} [Oxford: OUP, 2001] pp 227–228.

\textsuperscript{58} In 1937, the League of Nations adopted the Convention for the Prevention and Punishment of Terrorism. Article 1(2) defined terrorism as ‘criminal acts directed against a State and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.’ But the 1937 Convention never came into force. Notably, it was adopted at a period when wars of liberation—and the attendant question of self-determination—of colonised territories and peoples had not exercised international law with the fervour seen in later years: see Malcolm Shaw, \textit{International Law} [Cambridge: CUP, 1997] p 177–178. In subsequent instruments of the United Nations, it was recognized that ‘[a] ll peoples have the right to self-determination’: UN General Assembly Resolution
The best that has been achieved are definitions in specific international conventions with discrete fields of application.59 Happily for students and practitioners of international criminal law, the law of international law of armed conflicts is one of those specific fields. That ‘definition’ is achieved through the roundabout way of forbidding conducts of a certain character whose primary purpose is to spread terror.

59 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the ‘Tokyo Convention’), adopted in Tokyo 1963; Convention for the Suppression of Unlawful Seizure of Aircraft (the ‘Hague Convention’), adopted at The Hague 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the ‘Montreal Convention’), adopted in Montreal in 1971; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (the ‘Montreal Protocol’), adopted in Montreal, in 1988; Convention on the Physical Protection of Nuclear Material (the ‘Vienna Convention’), adopted in Vienna 1985; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the ‘Rome Convention’), adopted in Rome in 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the ‘Rome Protocol’), adopted in Rome in 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, adopted in Montreal in 1991; International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly in 2005.
The impetus for that definition may be found in the First Protocol of 1977 Additional to the Geneva Conventions of 1949 ['Additional Protocol I'] having international armed conflict as its field of application. In article 51 of that instrument, terrorism is given the following treatment:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances.

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

A similar provision appears in article 13 of the Second Protocol of 1977 Additional to the Geneva Conventions of 1949 ['Additional Protocol II'], applying in armed conflicts not of an international character.

The concepts engaged in these provisions make it unavoidable to address the incidence of attacks against civilian women, in the manner of sexual violence, during armed conflicts, as incidents of terrorism during armed conflicts. This is the case, given the central nature of terrorism as the conduct of making civilians the object of attack, by virtue of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.

The Origins of the Jurisprudence of Specific Intent

There has been a dearth of opportunities at the international criminal tribunals to adjudicate the crime of terrorism, even on the basis of the provisions of Additional Protocols I and II. Given the lack of jurisprudential activity at the International Criminal Court at the time of writing, its case law lends no assistance. The International Criminal Tribunal for Rwanda is preoccupied with cases of genocide: hence it has not had much scope to develop thought in the sphere of war crimes, including terrorism as a war crime. With a lesser focus on the crime of genocide at the International Criminal Tribunal for the former Yugoslavia, and with no jurisdiction at all in the Special Court for Sierra Leone over the crime of genocide, these two courts have had more scope to consider the finer points of war crimes. Within their jurisprudential compass has come the occasional charge of terrorism as a war crime. Their analyses, however, are not free from lingering questions of correctness or adequacy.

Of particular interest in this regard is the current view that the war crime of terrorism is a crime of specific intent. It is important to stress, perhaps, that this view is ‘current’ not because it is a settled view as such; but because it is the only one followed in the two or three cases in which the definition of the war crime
of terrorism has been broached. The view was pioneered by the ICTY Appeals Chamber in *Prosecutor v Galić*.\(^{60}\) According to the Appeals Chamber:

The nature of the acts or threat of violence directed against the civilian population can vary; the primary concern ... is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population. Further, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of “extensive trauma and psychological damage” being caused by “attacks [which] were designed to keep the inhabitants in a constant state of terror.”\(^{61}\)

This analysis is rather hazardous. Some of the hazards were quickly—and unwittingly—brought home in the judgment of a Trial Chamber of the Special Court for Sierra Leone in *Brima & 2 ors* (colloquially known as the *AFRC Case*), in relation to rape and sexual slavery of civilians, among other conducts proscribed by norms of international criminal law.\(^{62}\) The facts of the *AFRC Case* are these. The accused had been indicted in Count 1 with the crime of terrorism. They were also indicted in Count 2 with the crime of collective punishment. The factual bases for terrorism and collective punishment comprised the allegations pleaded in support of Counts 3 through 14 of the Indictment,\(^{63}\) involving the following crimes:

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\(^{60}\) *Prosecutor v Galić (Judgment)* 30 November 2006 [ICTY Appeals Chamber].

\(^{61}\) *Ibid*, para 102. See also para 104 where the Chamber said *inter alia*: ‘The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, the Appeals Chamber finds that a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population was principal among the aims.’

\(^{62}\) *Prosecutor v Brima & Ors*, *supra*, [SCSL Trial Chamber].

\(^{63}\) The concise statements of facts of which are pleaded in paragraphs 42 through 79 of the Indictment. See *Prosecutor v Brima & Ors (Further Amended Consolidated Indictment)* dated 18 February 2005, para 41. See also *Prosecutor v Brima & Ors (Final Trial Brief)* dated 1 December 2006, paras 543, 560, 1373, 1288, 1488, 1517 and 1562; *Prosecutor v Brima & Ors (Prosecution Supplemental Pre-Trial Brief pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004)* dated 21 April 2004, para 14.
The Prosecution’s case for terrorism, as pleaded in Count 1 (as with collective punishment as pleaded in Count 2), rested on the theory that, in addition to their own eponymous crimes, sexual violence (with particular reference to sexual slavery), among other crimes, also amounted to acts of terrorism (as well as of collective punishment). This is in the same way that mutilation of civilians, their unlawful killings, and the burning and looting of their property amounted to acts of terrorism and of collective punishment.\textsuperscript{70}

In their Judgment, the Trial Chamber did convict the accused of terrorism and collective punishment, as respectively charged in Count 1 and Count 2. But for purposes of these convictions, the Chamber took into account only the acts comprising unlawful killings,\textsuperscript{71} mutilations,\textsuperscript{72} and looting and burning.\textsuperscript{73} [Given that the focus of this Chapter is the crime of terrorism, discussion will henceforth be limited to terrorism to the general exclusion of collective punishment. It is also

\begin{itemize}
\item Unlawful Killings (Counts 3-5)\textsuperscript{64}
\item Sexual Violence (Counts 6-9)\textsuperscript{65}
\item Physical Violence involving mutilations (Counts 10-11)\textsuperscript{66}
\item Use of Children as Soldiers (Count 12)\textsuperscript{67}
\item Abductions and Forced Labour (Count 13);\textsuperscript{68} and
\item Looting and Burning (Count 14).\textsuperscript{69}
\end{itemize}
worth noting that the analysis of the Chamber took its overall bearing from the crime of terrorism, while making no analytical distinction between terrorism and collective punishment.

Upon the reasoning—evidently inspired by Galić—that they did not amount to acts whose ‘primary purpose was to terrorise the civilian population’, the Trial Chamber discounted from the crimes of terrorism the acts comprising sexual violence (with particular reference to sexual slavery). According to the Trial Chamber, it was not the primary purpose of spreading terror that actuated the commission of the sexual crimes. Rather, it was the urge to ‘take advantage of the spoils of war, by treating women as property and using them to satisfy [the perpetrators’] sexual desires and to fulfil other conjugal needs.’

Notably, the Trial Chamber did not ‘discount that abduction and detention of persons from their homes and their subjection to forced labour under conditions of violence [did] spread terror among the civilian population.’ But these, held the Chamber, were mere “side effects” of terror, which are insufficient to establish ‘the specific intent element of the crime’ of terror.

In the view of the Chamber, the foregoing conclusions remain undisturbed by the fact that the abduction of civilians and their use as slaves, including as sexual slaves, may have been committed simultaneously with other acts of violence accepted by the Chamber as acts of terrorism. As the Chamber put it:

> [T]he primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs. As with evidence of the other enslavement crimes, namely the abduction and use of child soldiers and forced labour therefore, even where sexual slavery occurred simultaneously with other acts of violence examined by this Chamber with regards to the crime of terror, the Trial Chamber is of the opinion that such acts cannot be considered to have been committed with the primary purpose to terrorise the civilian population.

The Prosecution appealed the Trial Chamber’s reasoning and the resultant acquittal on the count of terrorism. But the Appeals Chamber dismissed the appeal. The dismissal, however, was not on the merit of the issues engaged; but rather on grounds that the prosecution appeal was unduly pedantic. In an apparent rebuke, the Appeals Chamber held that the Prosecution was being too officious in appealing for purposes of securing a conviction for terrorism, when conviction had already been entered on the underlying crimes of sexual violence, abduction and

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74 See Trial Judgment, paras 1455 and 1459.
75 See Trial Judgment, para 1453.
76 See Trial Judgment, para 1450, 1452 and 1459.
77 Ibid, para 1459.
enslavement of civilians, and as well as conscription of children and their active use in combat. Hence, the Appeals Chamber exercised what it described as ‘discretion not to entertain’ the Prosecution’s appeal ground of terrorism.78

The dismissal of the Prosecution appeal necessarily leaves undisturbed the reasoning of the Trial Chamber in the AFRC Case. As already indicated, that reasoning was the direct bi-product of the view, taken by the ICTY Appeals Chamber in Galić, that terrorism is a crime of specific intent—a professed interpretation and application of the texts of Additional Protocols I and II which contain the phrase ‘acts or threats of violence the primary purpose of which is to spread terror’.

For the reasons that follow, it is submitted that the analysis of the Trial Chamber in the AFRC Case and its inspiring conclusion appearing in Galić are flawed. The criticism attends both the Trial Chamber’s appreciation of the significance of the facts in the particular circumstances of the case before the Trial Chamber—being the particular facts of the Sierra Leone civil war—as well as a matter of general principles of international humanitarian law portended in the Galić judgment.

Terrorism and the Mens Rea of Sexual Slavery

Based strictly on the facts of the crimes as committed during the Sierra Leone civil war, the SCSL Trial Chamber’s reasoning is vulnerable in light of, at least, the following failures attributable to the Trial Chamber: (a) the failure to infer the mens rea of war crime of terrorism from the nature and circumstances of the crimes of sexual slavery and other enslavement crimes; (b) the failure to adopt the multiple-purpose approach to the assessment of the intent for the war crime of terrorism; and (c) the failure to take a total view of the conducts of the perpetrators, in the assessment of the intent for the war crime of terrorism.

(a) The Primary Purpose of Spreading Terror and the Nature and Circumstances of the Acts

It was open to the Trial Chamber to infer the primary purpose of spreading terror from the nature and circumstances of the crimes of sexual slavery and other enslavement crimes committed during the Sierra Leone civil war. The Trial Chamber’s failure to draw that inference was an error. In the Galić case itself,
the ICTY Appeals Chamber stated that the primary purpose of spreading terror among a civilian population ‘can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.’

It is to be recalled that the crimes at issue are sexual slavery; abduction of civilians and their subjection to forced labour; and, conscription of children and their use as soldiers. The timing and duration of those crimes in the circumstances of the Sierra Leone civil war could be easily stated as follows: these crimes were committed during the Sierra Leone civil war and for the duration of that war.

Nor is it too complicated to see that the nature of those crimes and the manner of their commission also make them susceptible of appreciation as terrorism. Those crimes were necessarily accomplished through the use or threat of use of repressive violence. The factual findings made by the Chamber revealed that the victims were held against their will; they dreaded their fate if they tried to escape; they were threatened with death if they tried to escape; orders were issued to kill any victim who tried to escape; and some of the victims who tried to escape were indeed killed or beaten or otherwise mistreated. In particular, the Trial Chamber made the following factual findings, among others, in ways that were relevant to sexual slavery and the other enslavement crimes.

In relation to sexual slavery, in particular, the Trial Chamber noted, among other things, evidence of one witness who had testified that she was abducted by an ‘STF from Liberia.’ Although there was no evidence to suggest with which of the warring sides, if any, the abductors were affiliated, the Trial Chamber was satisfied that the abductors were members of the AFRC/RUF faction—the faction to which the accused belonged. The Trial Chamber further accepted testimony that women were captured; that captured civilians who tried to escape were executed; that captured women were placed under the ‘full control’ of commanders and became their ‘wives’; and, that these women cooked for the commanders and other soldiers is indicative of the deprivation of the captured women’s liberty and the exercise of ownership over them by members of the AFRC.

In relation to the conscription of children and their use as soldiers, the Trial Chamber emphasized the fact that expert witnesses for both the Prosecution and the Defence agreed that persons under the age of 15 were used for military purposes by all factions, including the AFRC, during the conflict. Hence, the Trial Chamber found that the AFRC fighting forces conscripted children under the age of 15 years old and/or used them to participate actively in hostilities during the period covered by the Indictment. In particular, the Trial Chamber found the

79 Prosecutor v Galić (Appeal Judgment), para 104.
80 The Trial Chamber’s finding in this regard was partly based on the witness’s description of her abductors as ‘rebels’; and the route taken by the persons who captured the witness, namely from Wellington to Allen Town to Waterloo to Masiaka, Port Loko District where she was held for several months, was consistent with the known route taken by AFRC/RUF forces on the retreat from Freetown: ibid, para 1098.
81 Ibid, para 1105.
82 Ibid, para 1251
evidence to be conclusive that most, if not all, of the children in question were forcibly abducted from their families or legal guardians. In addition to having been kidnapped, former child soldiers described having been forced into hard labour and military training, and sent into battle, often on the frontlines. They were also beaten; forced to watch the commission of crimes against family members; injected with narcotics to make them fearless; compelled to commit crimes including rape, murder, amputation and abduction; used as human shields; and threatened with death if they tried to escape or refused to obey orders.83

And as regards abduction and enslavement in general, the Chamber heard evidence to the effect that during the 1999 invasion of Freetown, ‘Gullit’ (the first defendant was known by that sobriquet) ordered the capture of civilians, saying that it would attract the attention of the international community. Notably, in a similar attack in Karina, the hometown of President Kabbah (against whom the accused and their fellow rebels were fighting), the same accused was heard saying that he had intended ‘to shock the whole country and the international community’.84 In the Freetown attack, approximately 300 abducted civilians were taken by the fighters from Freetown to Benguema.85 The Chamber heard evidence that at a certain diamond mine called ‘Cyborg Pit’, civilians would not refuse to work on ‘government days’ out of fear that such refusal would attract disciplinary measures from the AFRC/RUF.86 The AFRC/RUF began capturing civilians on the order of the notorious Johnny Paul Koroma, especially the strong men and the young women, from Tombodu, Yamadu and other surrounding villages in Kono District. ‘Civilians who tried to escape were executed.’ The AFRC/RUF used the civilians to carry their food, and trained some of them as soldiers for the movement.87 One witness testified that ‘while under their command, he felt that he had to accept anything they did to him or otherwise they would kill him.88 There was evidence that at some point ‘almost everybody had civilians,’ including the commanders. It was the responsibility of the abducting commander to ensure that the civilians were ‘well-secured’, which the witness explained meant that they could not escape.89

83 Ibid, para 1275.
84 Trial Judgment, para 1553.
85 Ibid, para 1272. Among those captured were ‘many’ small boys, including some as young as nine or ten years old.
86 Ibid, para 1292. One witness stated, as an example, that one of his workers hid in an attempt to avoid work, but was found and beaten: ibid, para 1293. “The supervising soldiers at Cyborg Pit were armed with guns, such as RPGs, LMGs, G-3s, and AK-47s, and would watch the civilian miners to ensure that all diamonds found were surrendered. Civilians who attempted to keep diamonds found during a government mining day would be flogged almost to death: ibid.
87 Ibid, para 1313.
88 Ibid, para 1317.
89 Ibid, para 1380.
From the foregoing review of the Trial Chamber’s findings, it is clear that the systematic use of violence to capture and keep the civilian victims did not escape the Trial Chamber. What is surprising is that the jural significance of such systematic use of violence would escape the Trial Chamber.

This systematic violence is necessarily the primary instrument of capturing the victims and subjugating them to sexual slavery and/or other conditions of enslavement. Such use of violence or the threat of it to accomplish the enslavement crimes here at issue necessarily spreads terror among the civilian population—and the individual civilians—made victims to such acts of violence. In other words, the use of violence in the maintenance of this system of repression is a classic expression of the notion of the ‘reign of terror.’

To the extent that terrifying violence was both needed and used to sustain the system, it is reasonable to say that the victims were subjected to a reign of terror. The primary purpose of spreading terror was thus clearly established, as a matter of first principles. Consequently, it becomes immaterial that there might have been other purposes also bound up in the crimes. Indeed, it does not stretch reason to contend that the systematic use of violence to capture and press the victims into sexual slavery and other conditions of enslavement would have been the first and foremost instance of use of terror, before deducing the other or ultimate motive behind the enslavement. All this is to say that once the primary purpose of spreading terror is present for one reason, such as to capture the captives and subdue them in the first place into a state of sexual slavery, such a purpose is never displaced by the presence of other ulterior motives for the conduct, such as to use the victims for sexual gratification. And this is quite apart from the nature of the evil of sexual violence seen earlier in Chapter 1, according to which sexual violence itself is but one tactical weapon used by warring parties to terrify the spirit of resistance out of enemy communities.

The consideration here goes beyond the general proposition, noted by the ICTY Appeals Chamber,\(^90\) that the violence of war necessarily spreads terror among the civilian population. But more specifically, the evidential findings sampled above do clearly establish a deliberate use of terror to sustain a system of criminal conduct in the nature of sexual slavery and the other enslavement crimes committed in the particular circumstances of the Sierra Leone civil war.

The remaining question becomes this: Are sexual slavery and the other enslavement crimes and their circumstances saved by any theory of lawfulness or legitimacy, such as could anchor an alternative primary purpose in a manner that

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\(^90\) In Galić, the ICTY Appeals Chamber said as follows: ‘As noted by the representative of France [during the negotiation of the Additional Protocol I to the Geneva Conventions], the waging of war would almost automatically lead to the spreading of terror among the civilian population and the intent to spread terror is that had to be prohibited’: *ibid*, para 103. And at footnote 326, the Appeals Chamber quoted the representative of France as follows: ‘in traditional war, attacks could not fail to spread terror among the civilian population: what would be prohibited […] was the intention to do so.’
would override the purpose of terror that the very nature of these crimes compels one to infer? In the circumstances of the Sierra Leone civil war, there is no theory known to international law, which could convert the sexual slavery and the other enslavement crimes into lawful and legitimate uses of war with a primary purpose that overrode the terror attendant upon those crimes. And the Trial Chamber did not indicate that there was.

In view of the foregoing reasoning, it was an error on the part of the SCSL Trial Chamber to not have inferred the primary purpose of spreading terror from the nature and circumstances of the crimes of sexual slavery and other enslavement crimes committed during the Sierra Leone civil war.

(b) The Multi-Purpose Approach

It was also open to the Trial Chamber to have adopted the multi-purpose approach, as articulated in earlier jurisprudence, as to the meaning of ‘primary purpose.’ Under this rule, the existence of other purposes for the conduct does not discount the purpose of spreading terror. Hence, it would not be acceptable for a terrorist group to blow up an aeroplane with a new type of bomb, and then hope to escape culpability for terrorism merely by saying: ‘Terrorising the civilian population was not really the primary purpose of our act. Our primary intent was merely to test a new type of bomb: never mind that we also intended to terrorise civilians in the process.’

The Trial Chamber’s failure to reflect the jurisprudence of the multi-purpose analysis is specifically evident in relation to the evidence of Witness TF1-334. According to this witness, during the 1999 invasion of Freetown, the accused Brima (a.k.a. ‘Gullit’) ordered the abduction of civilians, saying, as noted earlier, that it would attract the attention of the international community. Although it was not specifically clear in the evidence, it is reasonable to presume that some of the abductees were women and that they would have been subjected to the system of sexual slavery that was widely practiced by the accused Brima and his colleagues in the AFRC and RUF. The declaration of the accused Brima that the capture would attract the attention of the international community clearly reveals a primary purpose of spreading terror among a civilian population. For, the attention of an international community remotely situated could not be attracted without attracting the attention of the immediate local civilian population who were the victims of the conduct. And the attention of the immediate local civilian population, in the circumstances, would necessarily have taken the shape of terror. This was surely the case in relation to a similar attack on Karina in relation to which Brima was heard saying that he wanted ‘to shock the whole country and the international community.’

91 See especially Prosecutor v Galić (Judgment) 30 November 2006, Case No IT-98-29-A, [ICTY Appeals Chamber] para 104.

92 Trial Judgment, para 1449.
The Chamber attempted to discount the jural significance of this incident by analysing the conduct from the perspective of the presence of children among the abductees and military use of children. The Chamber was wrong to have discounted this consideration from its analysis, upon the reasoning that this 'non-military purpose [that] also drove the AFRC to abduct children … was subordinate given the overwhelming evidence of the conscription and use of child soldiers for military purposes.' What the Chamber did in this reasoning was to treat the actus reus and mens rea differently. This occurred when the Chamber began the reasoning process, perhaps unwittingly, with recognising the abduction of adult civilians and children as discrete factual events; and then considered them together as a related group of acts. But when it came to the assessment of the mental element for these crimes, the Chamber abandoned its initial approach of looking at abduction of adult civilians and children as discrete events; and then considered them together as a related group of acts. Rather, the Chamber adopted a composite view of all the different acts of abduction, such that the mens rea for the abduction meant to attract the attention of—or shock—the international community lost its uniqueness in the mélange of mentes reae for all the other abductions.

One trouble with this reasoning process is that it was not applied consistently by the Trial Chamber. Indeed, as is argued presently below, such a global view of the acts of violence is desirable. Applied consistently, this approach would have resulted in the finding of a primary purpose of spreading terror among the civilian population, as has been argued below.

If, on the other hand, the global view of the attack is not to be taken, then the abduction of civilians, including women, to attract international attention or shock ought to have been treated separately and considered on its own individual merit. Had that been done, it would then have become clear that the particular incident in question (abducting civilians for the purpose of attracting international attention or shock) did, at least, engage the primary purpose of spreading terror. Hence any crime of sexual slavery or other crime of enslavement traceable to the abduction would qualify as a war crime of terror.

(c) A Holistic View of Attack: A Campaign of Terror

If, on the other hand, sexual slavery, abductions and forced labour are to be considered as a whole, then the whole to be considered should not be limited to a whole made up only of sexual slavery and the other enslavement crimes, to which the test of ‘primary purpose of spreading terror’ is then applied in isolation. Rather, the better view of the whole is a whole that includes all the atrocities committed by the perpetrators as part of the general mayhem of crimes which the perpetrators intentionally inflicted upon the civilian population. In addition to sexual slavery and the other enslavement crimes, that whole would include the unlawful killings, the mutilations, and the lootings and burnings (which the Chamber found to have amounted to terrorism). That whole will indeed portray a picture of ‘campaign of
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terror’. To that campaign sensibly belong the rampant crimes of sexual violence against women.

Much legal authority recommends such a holistic view of the concept of attack. For instance, in discussing the notion of ‘attack’ for purposes of the general elements of crimes against humanity, and ICTR Trial Chamber in Kayishema and Ruzindana observed as follows:

The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.\(^\text{94}\)

In Akayesu, an ICTR Trial Chamber held an attack to comprise ‘an unlawful act, event or series of events.’\(^\text{95}\) In Tadić, an ICTY Trial Chamber held in a pre-trial decision that an attack must involve ‘a course of conduct’.\(^\text{96}\) And in article 7(2)(a) of the Rome Statute, it is provided that an attack against a civilian population is ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’\(^\text{97}\) Notably, the offences listed in paragraph 1 of article 7 of the Rome Statute include the following: rape, sexual slavery, any other form of sexual violence, enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. Clearly, these offences are the same or tantamount to the offences of sexual slavery and the enslavement crimes with which the accused had been charged. For purposes of article 7(i) of the Rome Statute, in particular, either or both of the offences of ‘enslavement’ or ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’, as there indicated, ought amply to cover the offences of abductions, forced labour and conscription and militarisation of children which the Prosecution submitted as also amounting to acts of terrorism in the context of the Sierra Leone conflict.

The foregoing analysis and the authorities cited in support afford an ample legal basis for the view that an examination of what amounts to an act of violence that spreads terror among the civilian population, as is pleaded in paragraphs 38 and 39 of the Indictment in the AFRC case, must take a total account of all the acts committed against the civilian population as part of the same campaign of violations against the civilian population.

To take the totality of the circumstances of the acts of violence into account in the assessment of terrorism in the context of the Sierra Leone conflict would have required the Trial Chamber to take sexual slavery, abductions, forced labour and militarisation of children committed by the accused and their junta follow-

\(^{94}\) Prosecutor v Kayishema and Ruzindana, supra, [ICTR Trial Chamber] para 122.

\(^{95}\) Prosecutor v Akayesu, supra, para 581.

\(^{96}\) Prosecutor v Tadić (Decision on the Form of the Indictment) 14 November 1995, Case No IT-94-1-T [ICTY Trial Chamber] para 11.

\(^{97}\) ICC Statute art 7(2)(a).
ers, together with amputations,\textsuperscript{98} killings, burnings,\textsuperscript{99} etc, which the Chamber had recognised as acts of terror. All those conducts comprised the acts of violence—or attack, so to speak—against the civilian population.

Certainly, there is authority in international law for such treatment of the war crime of terrorism. In the \textit{Motomura} case,\textsuperscript{100} the charge of terrorism included the ‘seizing of men and women on grounds of wild rumours … which led to or at least contributed to the death, severe physical and mental suffering.’\textsuperscript{101} The \textit{Motomura} court-martial convicted 13 of the 15 accused of ‘systematic terrorism practiced against civilians’ for acts including unlawful mass arrests. The court found that those arrests had the effect of terrorising the population, ‘for nobody, even the most innocent, was any longer certain of his liberty, and a person once arrested, even if absolutely innocent, could no longer be sure of health and life.’\textsuperscript{102} There is little doubt that the sorts of fears here recognised as amounting to terror in the minds of victim population do amply apply to a victim population who have been forced to live under an incubus of a systematic pattern of sexual violence.

A compelling authority for the view that sexual violence can form part of a campaign of terror, unleashed as part of an armed conflict, is the acceptance of such a view by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In its resolution 1998/18 it endorsed an ‘accepted view’ that included the recognition that sexual violence in armed conflicts may occur ‘on an apparently sporadic basis or as part of a comprehensive plan to attack and terrorise a targeted population’. In the words of the Sub-Commission:

\textit{The Sub-Commission on Prevention of Discrimination and Protection of Minorities,}

[...]

\textit{Endorses} the accepted view that regardless of whether sexual violence in armed conflict occurs on an apparently sporadic basis or as part of a comprehensive plan to attack and terrorize a targeted population, all acts of sexual violence, in particular during armed conflict, including all acts of rape and sexual slavery, must be condemned and prosecuted;\textsuperscript{103}...

\textsuperscript{98} Trial Judgment, paras 1462, 1475, 1493, 1495.
\textsuperscript{99} Trial Judgment, paras 1482, 1485, 1495, 1496, 1510, 1571.
\textsuperscript{100} The \textit{Motomura} case was recognised in the \textit{Galić} case as the first War Crimes trial for the crime of terrorism.
\textsuperscript{101} \textit{Trial of Shigeki Motomura \\& Ors}, 13 Law R Trials War Crim 138, cited in \textit{Galić (Trial Judgment)} paras 114, 115 and 132.
\textsuperscript{102} See \textit{Galić (Trial Judgment)} para 115. See also para 132.
\textsuperscript{103} UN Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1998/18 (Systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict) dated 21 August 1998, para 2.
If sexual violence could be recognised as a part of a comprehensive campaign of terror against a civilian population, a correspondence of reasoning will recommend a similar treatment for abduction of adults and children. In this connection, it is recalled that the Trial Chamber had accepted the testimony of TF1-334 regarding the division of troops at the Sierra Leonean town of Kamagbengbeh in June 1998. One section of troops was sent to Karina, hometown of President Kabbah, on Brima’s orders to demonstrate the junta’s powers, burn down Karina, capture strong male civilians, and to amputate civilians. The Chamber accepted evidence that accused Brima had stated that the ‘he wanted the attack on Karina to shock the whole country and the international community.’

In view of the foregoing, it is reasonable to conclude that the sexual slavery and other enslavement crimes, committed during the Sierra Leone civil war, did amount to acts of terrorism, considering especially that they had been committed ‘simultaneously’ with other acts of violence accepted by the Special Court’s Trial Chamber as acts of terrorism.

**Terrorism and Specific Intent: a Matter of General Principle**

Besides the weaknesses of the reasoning of the SCSL Trial Chamber, in light of the peculiar facts at play in that AFRC case, the judgment is also questionable inasmuch as it advances the theory, first articulated in Galić, that terrorism is a crime of specific intent. In this part of the discussion, it is contended that this theory is neither necessary nor desirable as a matter of general principles of international humanitarian law.

**A Purposive Analysis of Terrorism as War Crime**

From first principles, in the interpretation of the meaning of ‘primary purpose’ of an attack, for purposes of the war crime of terrorism, it is crucial to keep in view at all times the object and purpose of the mischief proscribed, as well as the context of the provision in which the expression appears. These values do become readily apparent upon a close examination of the provisions of the entire article 51 of Additional Protocol I and article 13 of Additional Protocol II—beyond the narrow phrase: ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’.

The net objectives of article 51 of Additional Protocol I—and article 13 of Additional Protocol II—are these. First, it involves a reiteration of the principle of distinction. According to this principle, only military objects may be the targets of military attacks, and civilians must be protected from military operations.

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104 Trial Judgment, para 1553.
105 Loc cit.
106 Loc cit.
107 See Trial Judgment, para 1450, 1452 and 1459.
And the second net objective is to except, from the scope of culpability for war crimes, collateral civilian damages resulting from attacks on legitimate military targets; for, the doctrine of military necessity ‘permits the destruction of life or armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of war.’ These two objectives, it is submitted, are the basic considerations that must guide the interpretation of the notion of ‘primary purpose’ of spreading terror, as well as give it context, for purposes of the war crime of terrorism.

The notion of ‘primary purpose’ of spreading terror as it appears in article 51(2) of Additional Protocol I—and in article 13(2) of Additional Protocol II—could not upon any reasonable view ever be seen as possibly intended to legitimise direct and deliberate attacks against civilians. Sadly, this was, surely unwittingly, the result to be deduced in the AFRC trial judgment, upon the view that such attacks were somehow intended by the perpetrators as attacks against ‘military targets in the sense that [some] discernible strategic advantage [may be] gained from the attacks.’ Such a view would rest upon a jural foundation that is just as tenuous as the related—but now widely rejected—view that a commander is permitted to ignore the laws of war if to do so is perceived as necessary to ‘avoid defeat, to escape from extreme danger, or for the realisation of the purpose of the war.’ Such ideas of necessity are no longer current. The better view is that ‘[t]he means to achieve military victory are not unlimited.’ If that is the case, what then is the discernible strategic advantage which the sexual violence against women would legitimatley produce to the perpetrators? The answer to this question takes us back to the discussion in Chapter 1, where we reviewed sexual violence as actuated by policy. There, we saw that sexual violence often gets used as policy during armed conflicts, in the manner of an instrument of terror. One such use is to frighten the enemy away from where they are not wanted, or to terrorise them into surrender. We recall one US officer describing it as an ‘effective tactic.’ According to him, ‘If you scare people enough they will keep away from you.’ We also recall that during the conflict in the former Yugoslavia, Serbian forces did use this tactic

108 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* [Oxford: Oxford University Press, 2004] p 22. The exemption of collateral civilian damages from the purview of war crimes is particularly underscored in article 51(7) of Additional Protocol I which provides as follows: ‘The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.’

109 *Prosecutor v Brima & Ors (Trial Judgment)*, supra, para 1568.

110 UK Ministry of Defence, *The Manual of the Law of Armed Conflict, supra*, p 23.

111 Ibid.

112 Bourke, supra, p 362.
as a method of ethnic cleansing. In 1746, King George's troops led by the Duke of Cumberland used various methods of terror, including sexual violence against women, in an effort to force Scottish Highlanders into a surrender following the Battle of Culloden. But all that was terrorism without a doubt.

Subjective and Objective Examination of Primary Purpose of Attack

In view of these considerations, it is submitted that the question of what is the ‘primary purpose’ of an attack in terms of the war crime of terrorism is better assessed from both the subjective and the objective perspectives. In the subjective assessment, the perpetrator’s dominant intention in conducting the attack ought to be examined. If the dominant intention was found to be nothing more than to spread terror among the civilian population, then the inquiry ends there. It may then be held that the war crime of terrorism had been established. If, however, the evidence does not readily reveal such a dominant intention, then the inquiry will need to shift into the objective mode.

In the objective analysis, the crucial question ought to be whether the ‘primary purpose’ of the impugned attack could reasonably be viewed as an attack against a legitimate military target, though it regrettably resulted in collateral civilian damages within the permissible scope of military necessity as generally understood. If the attack was against a legitimate military target which resulted in unavoidable incidental or collateral civilian damages, then the primary purpose of the attack may be seen as having a military objective. Hence, the attack may not rightly be viewed as embarked upon for the ‘primary purpose’ of spreading terror among the civilian population. But if the attack could not be seen as an attack against a legitimate military target, but rather a direct and deliberate attack against civilians, the inquiry then needs to turn to whether such an attack had the effect of terrorising the civilian population. If the attack had that effect, it will then become harder to avoid characterising it as having a primary purpose of terrorising the civilian population. This may be described as the ‘effects theory’ of primary purpose of spreading terror. It is consistent with both the usages of language as well as the objective theory of mens rea which hinges upon the reasonable foresight of the given harm, as explained below.

Indeed, this focus on effect or outcome is adequately accommodated within the large and liberal usage of the word ‘purpose’. In The Oxford Thesaurus, for instance, the noun ‘purpose’ also includes the following meanings, in addition to ‘intent’:

113 See Vetlesen, supra, pp 197–198.
114 Brownmiller, supra, p 38.
use, practicality, **avail, effect**, utility, usefulness, **outcome, result**, advantage, profit, gain, good, **benefit**; ... I cannot see the purpose in pursuing this line of questioning ..."[Bold emphasis added.]

The point is this. An attack that has no military purpose must be given the full legal significance that it can bear, if it resulted in foreseeable civilian casualties. It thus becomes reasonable to say that a naked act of violence against a civilian population—and not a military target—is an act of violence whose primary purpose is the spreading of terror, if it in fact spreads terror. Indeed, the ICTY Trial Chamber recognized this in the case of *Prosecutor v Dragomir Milošević*. There, the Trial Chamber considered that ‘long term and persistent attacks against civilians, as well as indiscriminate attacks, may be taken as indicia of the intent to spread terror.’ The Trial Chamber considered that ‘the specific intent may also be inferred from the site of the attack.’ According to the Trial Chamber, the fact that during the siege, ‘civilians were targeted and attacked at sites, well-known to be frequented by them during their daily activities, such as market places, water distribution points, on public transport, and so on, provide strong indicia of the intent to spread terror.’ The Trial Chamber’s analysis of intent to spread terror fully bears out the ‘effects theory’. In concentrating their attacks against civilian population—and not on military targets—in a manner that foreseeably resulted in terror in the minds of the targeted civilian population, the perpetrators must be taken to have intended the resultant terror in the minds of the civilian population.

This construction of ‘primary purpose’ is not a mere linguistic contrivance. Indeed, it also rests on two important legal foundations. First, as already adumbrated, it is consistent with the objective theory of **mens rea**, which encompasses reasonable foresight of a given harm. This is generally viewed as the essence of the principle of **mens rea**. For it is accepted that the intent to commit a crime involves not only a deliberate desire to occasion the criminal outcome, but also the perpetration of a course of conduct with reasonable foresight of a certain criminal outcome. Ashworth explained the principle in the following way:

The essence of the principle of **mens rea** is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, that they can fairly be said to have chosen the behaviour and its consequences. This approach is grounded in the principle of autonomy ...: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices."[Emphasis added.]

115 Laurence Urdang, *The Oxford Thesaurus* [Oxford: Clarendon Press, 1991] p 366.
116 *Prosecutor v Dragomir Milošević (Judgment)* 12 December 2007 [ICTY Trial Chamber] para 881.
117 Andrew Ashworth, *Principles of Criminal Law*, 3rd edn [Oxford: Oxford University Press, 1999] pp 160–161.
The essence of the principle of *mens rea* thus explained has now been woven into the fabric of the jurisprudence of international criminal law. It is discernible within the doctrine of *dolus eventualis* as explained in the following statement made by an ICTY Trial Chamber in *Prosecutor v Stakić* in the context of murder as a war crime:

Turning to the *mens rea* element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3. In French and German law, the standard form of criminal homicide (*meurtre, Totschlag*) is defined simply as intentionally killing another human being. German law takes *dolus eventualis* as sufficient to constitute intentional killing. The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he “reconciles himself” or “makes peace” with the likelihood of death. Thus, if the killing is committed with “manifest indifference to the value of human life”, even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.118

The essence of the objective theory of *mens rea* is also clearly evident in the settled jurisprudence of international criminal law that the *mens rea* for murder as a crime against humanity is not limited to premeditated killing.119

In these circumstances, the offence of terrorism proscribed under article 51(2) of Additional Protocol I—and article 13(2) of Additional Protocol II—is much more clearly appreciated from the prism of its mischief—i.e. as the conduct of causing terror among the civilian population by attacking civilian targets instead of legitimate military targets. Upon the doctrine of *mens rea* commonly found in the principle of autonomy (explained by Professor Ashworth as seen above) as well as in the doctrine of *dolus eventualis* (enunciated by ICTY Judges in *Stakić*), where combatants in an armed conflict choose to attack civilian targets and not legitimate military targets, the objective analysis will make it neither necessary nor desirable to look for any other purpose (on the mind of the perpetrator) beyond the direct incidence of the attack upon the civilian population in question. To do so will be to confuse motive or desire with *mens rea* as an element of crime. Here, one may readily call into service the definition of intent which I suggested in Chapter 1: ‘intent, for purposes of criminal law may be defined as the existence of consciousness of the mind in correlative proximity to the foreseeable results of one’s action.’ If in attacking the civilian population there existed in the perpetra-

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118 *Prosecutor v Stakić (Judgment)*, supra, [ICTY Trial Chamber] para 587.
119 See generally, C Eboe-Osuji, ‘Murder as a Crime against Humanity at the Ad Hoc Tribunals: Reconciling Differing Languages’, *Canadian Yearbook of International Law* (2005) p 145.
tors’ consciousness of the mind in correlative proximity to foreseeable terror in the minds of the targeted population as a result of the attacks, then the requirement of intent to spread terror would have been satisfied.

That is to say, the incidence of attacks during armed conflicts will necessarily spread terror among the civilian population. Legitimate military objectives, however, afford a saving grace for such attacks; thus insulating them from the quality of sheer terrorism. In the absence, however, of a reasonable claim to legitimate military operations, deliberate attacks against a civilian population will not be saved from the charge of terrorism committed under the cover of armed conflict. Upon this reasoning, rape, sexual slavery, and other sexual violence, at least, forming part of a direct attack against the civilian population, could not reasonably be claimed as legitimate military operations. They would necessarily have the effect of terrorising the civilian population against whom they were committed. Therefore, the conducts may properly be viewed as acts of terrorism.

The foregoing reasoning sufficiently weakens the idea of terrorism as crime of specific intent: thus making it unnecessary also to consider fully whether the reasoning applies as easily to the offences of militarisation of children and forced labour.120

Furthermore, the effects theory of ‘primary purpose of spreading terror’, as articulated above, is also consistent with the meaning of terrorist act as clearly indicated in the International Convention for the Suppression of the Financing of Terrorism (2000). This Convention affords a useful guide to the interpretation of primary purpose of spreading terror, especially given its relevance to armed conflicts. Of interest in this regard is article 2(1) which provides as follows:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

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

In making clear that the ‘purpose’ of an act, in terms of the crime of terrorism, is not limited to the declared intents of the perpetrators, but encompasses the ‘nature

120 Admittedly, this reasoning does not apply with as much force to the offences of militarisation of children and forced labour, also involved in the AFRC case, without the aid of the rule that combatants are not unrestrained in their choice of means of warfare. Hence, requiring them to obey the dictates against militarisation of children and forced labour.
and context’ of the acts of the perpetrator, the Convention is to be seen as providing a concrete legal support for the effects theory of the conception of intent to spread terror.

Once more, it must be stressed that the foregoing analysis gives full scope to the anxious result sought to be avoided in article 13(2) of Additional Protocol II and article 51(2) of Additional Protocol I—i.e. the criminalisation of collateral civilian damages resulting from attacks on legitimate military targets is to be avoided.

The Statute of Rome on the War Crime of Terrorism

In the era of international criminal law after the adoption of the Rome Statute, it is compelling to consider just how the debate as to the meaning of terrorism is influenced or shaped by the provisions of that instrument. Regrettably, the picture is not straightforward, in the sense of the Rome Statute providing a definitive answer either way. Interestingly, the Rome Statute makes no mention at all of the term ‘terror’ or ‘terrorism’, nor does it indicate that any crime akin to terror must be committed with the specific intent to alarm the civilian population. But the silence of the Rome Statute puts no end to the inquiry on the significance of that instrument to the debate on the definition of terrorism as a war crime within the meaning of Additional Protocols I and II.

Quite the contrary, it is arguable that the silence of the Rome Statute has the curious result of tilting the scale in favour of the case against the view that terrorism is a crime of specific intent. This conclusion is borne out by the fact that while silent on both the concept of terror and on the notion of specific intent to spread alarm in the mind of the civilian population, the Rome Statute does proceed to make repeated and elaborate provisions—and justifiably so—against the crime of subjecting the civilian population and objects to attacks. In particular, it is a war crime under the Rome Statute to do any of the following:

- intentionally direct attacks against the civilian population as such or against individual civilians not directly participating in the hostilities;\footnote{See Rome Statute, article 8(2)(b)(i) as regards international armed conflicts, and article 8(2)(e)(i) for non-international armed conflicts.}
- intentionally direct attacks against civilian objects;\footnote{Ibid, article 8(2)(b)(ii).}
- intentionally direct attacks against personnel, installations, units, etc, involved in humanitarian assistance or such UN-authorised peacekeeping missions as are entitled to the protection given to civilians and civilian objects;\footnote{Ibid, article 8(2)(b)(iii) as regards international armed conflicts, and article 8(2)(e)(iii) for non-international armed conflicts.}
- intentionally launching an attack knowing that civilians will suffer incidental loss of life or injury, or that incidental damage will be occasioned to civilian objects, or that widespread, long-term and severe damage will result to the

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\textsuperscript{121} See Rome Statute, article 8(2)(b)(i) as regards international armed conflicts, and article 8(2)(e)(i) for non-international armed conflicts.

\textsuperscript{122} Ibid, article 8(2)(b)(ii).

\textsuperscript{123} Ibid, article 8(2)(b)(iii) as regards international armed conflicts, and article 8(2)(e)(iii) for non-international armed conflicts.
natural environment, in excessive levels in comparison to the concrete and direct overall anticipated military advantages;\textsuperscript{124}

- attacking or bombarding undefended towns, villages, dwellings or buildings which are not military objectives;\textsuperscript{125}

- intentionally directing attacks against buildings dedicated to religion, education, art, science, charity, and historic monuments, hospitals and health care centres, which are not military objectives;\textsuperscript{126}

- pillaging a town or place;\textsuperscript{127}

- employing weapons, projectiles, materiel and methods of warfare which are inherently indiscriminate and which have been prohibited by the international community;\textsuperscript{128}

- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions;\textsuperscript{129}

- intentionally using starvation of civilians as a method of warfare by depriving civilians of necessaries of life, including deliberately impeding relief supplies;\textsuperscript{130}

- militarization of children under 15 years of age;\textsuperscript{131} and

- ordering the displacement of the civilian population for reasons related to the conflict in circumstances not dictated by their security or military necessity.\textsuperscript{132}

Amidst this over-arching concern for the welfare of civilians during armed conflicts, the silence of the Rome Statute as regards both the concept of terrorism and the notion of specific intent to alarm the civilian population arguably suggests that the chief concern of humanitarian law in this sphere is the prevention of deliberate attacks against civilian populations, rather than the technical descriptions and modalities of such attacks.

The net result is this. At the ICC, a case revealing an unlawful attack against a civilian population will be adjudged without the distraction of the added inquiry as to whether such a conduct had been perpetrated for the primary purpose of

\textsuperscript{124} Ibid, article 8(2)(b)(iv).

\textsuperscript{125} Ibid, article 8(2)(b)(v).

\textsuperscript{126} Ibid, article 8(2)(b)(ix) as regards international armed conflicts, and article 8(2)(e)(iv) for non-international armed conflicts.

\textsuperscript{127} Ibid, article 8(2)(b)(xvi) as regards international armed conflicts, and article 8(2)(e)(v) for non-international armed conflicts.

\textsuperscript{128} Ibid, article 8(2)(b)(xx).

\textsuperscript{129} Ibid, article 8(2)(b)(xxiv) as regards international armed conflicts, and article 8(2)(e)(ii) for non-international armed conflicts.

\textsuperscript{130} Ibid, article 8(2)(b)(xxv).

\textsuperscript{131} Ibid, article 8(2)(b)(xxvi) as regards international armed conflicts, and article 8(2)(e)(vii) for non-international armed conflicts.

\textsuperscript{132} Ibid, article 8(2)(e)(viii) for non-international armed conflicts.
spreading terror. Hence, while counsel and Judges at the Special Court for Sierra Leone may exercise their minds with that added inquiry in the face of sexual slavery and other enslavement crimes, the provisions of the Rome Statute leave little room for such a debate.

Conclusion

In an apparent effort to interpret and apply the provisions of the Additional Protocols I and II which forbid ‘[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population’, a Trial Chamber of the SCSL and the Appeals Chamber of the ICTY have concluded that the war crime of terrorism is a crime of specific intent. This interpretation is not necessary, since it does not strictly follow from the language of the provisions being interpreted. Nor is the interpretation desirable, as it is fraught with the danger of legitimising conducts that are clearly criminal in international law, simply because those conduct may have the ultimate result of advancing the objectives of the perpetrators in the context of a given armed conflict. The latter danger was evident in the result of the AFRC case before the SCSL where the Chamber held that sexual slavery and other enslavement crimes served some ultimate military objectives, hence were not acts of terror. Among other things, that reasoning failed to consider that a systematic use of violence was employed to capture and subjugate the victims, as a primary event, while the realisation of the ultimate utilitarian objective in each case was only achieved after that primary act of violence. There is a flaw in the reasoning that wholly ignores the jural significance of that primary event, while concentrating on the secondary event. That flaw sets back rather than advances the objectives of international humanitarian law.

Having reviewed the evil of sexual violence from the perspective of the war crime of terrorism, we will consider in the next chapter the question of perception of the enormity of evil of sexual violence from the perspective of typology of the armed conflict as either or not of an international character, as is engaged in the notion of ‘grave breaches.’