

# THE WAR CRIME OF TERROR: AN ANALYSIS OF INTERNATIONAL JURISPRUDENCE

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## ABSTRACT

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In 2003, Stanislav Galić, commander of the Bosnian Serb forces, became the first person to be convicted for the spreading of terror among the civilian population and, in particular, the first case in which terror was considered as an autonomous war crime. The purpose of this Brief is to examine the contribution of the jurisprudence of international criminal tribunals to the definition of the crime, in order to identify the elements of the crime of terror, as well as its controversial aspects.

## I. INTRODUCTION

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The prohibition of spreading terror among the civilian population is an extremely relevant provision in IHL, which has its basis in the more general norm concerning the protection of civilians and of the civilian population. It has its origins in the first years of the 20th century with the Report of the Commission on the Responsibilities for the First World War, which expressly suggested to include ‘systematic terror’<sup>1</sup> among the violations of the law and customs of war. After this first attempt, the prohibition of terror found its way into the Hague Convention on Air Warfare (1923)<sup>2</sup> and in the ILA Draft Convention on the Protection of Civilian Populations against New Engines of War (1938).<sup>3</sup> However, the real turning point in the history of its codification was the Geneva Conventions of 1949 and the two Additional Protocols of 1977. Article 33 of the Fourth Geneva Convention states that “*all measures of intimidation or terrorism are prohibited*”.<sup>4</sup>

This general formulation was further developed within the two Additional Protocols of 1977. In particular, according to articles 51(2) and 13: “*acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited*”.<sup>5</sup> These provisions prohibit the spreading of terror among the civilian population, that constitutes a violation of IHL; however nothing is said about its criminalisation and terror is not included within the list of ‘grave breaches’ that we find in the Geneva Conventions and in the first Additional Protocol.

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<sup>1</sup> Report submitted to the Preliminary Conference of Versailles by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Versailles, 29 March 1919.

<sup>2</sup> Art. 22: “*Any air bombardment for the purpose of terrorizing the civilian population or destroying or damaging private property without military character or injuring non-combatants*”. Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Part II, drafted by a Commission of Jurists, The Hague, December 1922-February 1923.

<sup>3</sup> Art. 4: “*Aerial bombardment for the purpose of terrorising the civilian population is expressly prohibited*”, ILA Draft Convention on the Protection of Civilian Populations against New Engines of War, adopted by the International Law Association, Fourtieth Conference, Amsterdam, 29 August-2 September 1938.

<sup>4</sup> Art. 33, Convention (IV), relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

<sup>5</sup> Art. 51(2), I Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977; Art. 13, II Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977. The number of conventions which include the prohibition is not limited to those mentioned above. Later, in relation to the ICTY analysis in *Galić*, reference will be made to other relevant conventional instruments.

The only references to terror as a crime can be found within the Statutes of some international criminal tribunals. The crime of ‘acts of terrorism’ is included among the war crimes listed in the Statutes of the ICTR<sup>6</sup> and of the SCSL.<sup>7</sup> Conversely, the ICTY and ICC Statutes omit any reference to this kind of war crime. This omission did not impede the ICTY from establishing its jurisdiction over the crime of terror. Galić became the first person to be convicted for ‘spreading terror among the civilian population’ and, more importantly, the first case in which terror was considered as a war crime.<sup>8</sup> As it has been noted, the jurisprudence, in particular the ICTY jurisprudence, played an important role in the evolution of terror as an autonomous war crime. The aim of this paper is to analyse this contribution and its controversial aspects.

## II. TERROR: FROM VIOLATION OF IHL TO AUTONOMOUS CRIME. THE GALIĆ JUDGEMENT

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Stanislav Galić, Commander of the Bosnian Serb forces, was accused of having conducted a protracted campaign of sniping and shelling against the civilian population in the area of Sarajevo. The first count of the indictment charged him with ‘inflicting terror upon the civilian population’, in line with articles 51(2) and 13 of the first and the second Additional Protocol to the Geneva Conventions.<sup>9</sup> After the issue of the Trial Judgement on 5 December 2003, that found him guilty on the first count of the Indictment, Galić challenged the TC’s finding, arguing that the Tribunal did not have jurisdiction because there existed no war crime of terror. In particular, Galić contended that the TC erred in considering treaty law to be sufficient to allow the Tribunal to exercise its jurisdiction on the ground that the ICTY could only exercise jurisdiction over customary law-based crimes.<sup>10</sup> Therefore, the AC was called to establish whether terror could fall under the jurisdiction of the ICTY, as the TC’s findings seemed to suggest. In particular, the AC had to establish: 1) Firstly, whether a crime, in order to fit within the list of art. 3<sup>11</sup> of the ICTY

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<sup>6</sup> Article 4(d), Statute of the International Criminal Tribunal for Rwanda, adopted by UN Security Council, Res. N. 955, 8 November 1994.

<sup>7</sup> Article 3(d),(h), Statute of the Special Court for Sierra Leone, UN Security Council Resolution 1315 (2000), 14 August 2000.

<sup>8</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006.

<sup>9</sup> “Count 1: Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under article 3 of the Statute of the Tribunal. From about 10 September 1992 to about 10 August 1994, STANISLAV GALIĆ, as Commander of Bosnian Serbs forces comprising or attached to the Sarajevo Romanija Corps, conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population”, Count 1: Infliction of terror, *Prosecutor v. Stanislav Galić* Case No. IT-98-29-I, Indictment, 26 March 1999. ,

<sup>10</sup> In more detail, *Galić’s* arguments were the following: 1) The ICTY has no jurisdiction because there is no international crime of terror; 2)The TC erred in considering treaty law to be sufficient to give jurisdiction to the Tribunal; 3) The TC erred in considering that the 22 May 1992 Agreement was binding upon the parties to the conflict; 4) The TC erred in the determination of the Elements of the crime; 5) The Prosecutor was not able to prove that the acts of sniping and shelling were conducted with the specific intent of spreading terror among the civilian population.

<sup>11</sup> Article 3, “Violations of the Laws and Customs of War”: “*The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a)*

Statute, should be based on customary international law, or if treaty law could be sufficient; 2) Secondly, if the prohibition of spreading terror among the civilian population was part of customary international law; 3) Thirdly, if customary international law entailed individual criminal liability for the perpetrators of the crime.<sup>12</sup>

In relation to the first issue, according to article 1 of the ICTY Statute, the Tribunal has jurisdiction over '*serious violations of international humanitarian law*', but there is no reference to what 'international humanitarian law' means and what it encompasses. As pointed out by the AC, further indications can be found in the Report of the Secretary-General recommending the establishment of the International Tribunal, in which he explains that 'international humanitarian law' includes both treaty law and customary international law.<sup>13</sup> The Report also adds that the International Tribunal must apply IHL norms that are beyond any doubt part of customary international law (this can be explained by the necessity of avoiding problems regarding the adherence of some States to specific conventions and by the importance of respecting the *nullum crimen sine lege* principle).<sup>14</sup>

However, throughout its mandate, the ICTY has been seen to interpret differently the scope of its jurisdiction. According to the jurisprudence of the Tribunal, the ICTY has jurisdiction not only on those IHL norms with a basis in customary international law but also on violations based on treaty law which are binding upon the parties to the conflict, provided there is respect of the following conditions: i) the instruments in question are unquestionably binding on the parties at the time of the alleged offence; and ii) the instruments in question are not in conflict with or do not derogate from peremptory norms of international law.<sup>15</sup> However, in *Galić* the AC held that "(...) *while conventional law can form the basis for the International Tribunal's jurisdiction, provided that the above conditions are met, an analysis of the jurisprudence of the International tribunal demonstrates that the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law*".<sup>16</sup>

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*employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property".*

<sup>12</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, paras. 69-98.

<sup>13</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, paragraph 33.

<sup>14</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, paragraph 34.

<sup>15</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 82.

<sup>16</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 83.

Therefore, although treaty law can form the basis of the jurisdiction of the Tribunal, practice shows that the ICTY judges have always tried to ascertain that the crimes in the Indictment: a) violated customary norms in the period they were committed; b) were sufficiently defined by the corresponding customary norms. This practice lies in the fact that treaty norms often comprise a simple prohibition of a specific conduct, without saying anything about its criminalisation, or because they do not define in a satisfactory way the elements of the unlawful conduct.<sup>17</sup>

### A. The prohibition of spreading terror as a customary norm

Although crimes within the jurisdiction of the ICTY can have a basis in treaty-law, the AC remarked that the judges had always tried to look at customary international law. Following this line and looking at customary international law in relation to 'terror', the AC made some interesting observations.

First, the prohibition of terror is included in art. 51(2) of the first Additional Protocol and art. 13(2) of the second Additional Protocol to the Geneva Conventions. Article 51 was adopted with a majority of 77 votes in favour, only one against and 16 abstentions. However, no concerns or reservations were expressed by States in relation to its second paragraph. Article 13 was adopted by *consensus*. Furthermore, when in other decisions the Tribunal held that the norms within these articles were customary in nature, this reference was intended to cover every single paragraph contained in these articles.<sup>18</sup>

Second, the prohibition of spreading terror among the civilian population is contained in other conventions and, thus, not limited to the two Additional Protocols to the Geneva Conventions. Examples are given by the Hague Rules of Air Warfare (1923);<sup>19</sup> the Draft Convention for the Protection of Civilian Population against New Engines of War (1938);<sup>20</sup> art. 33 of the Fourth Geneva Convention;<sup>21</sup> art. 6 of the New Delhi Draft Rules for protection of civilians (1956);<sup>22</sup> and art. 6 of the Turku Declaration of Minimum Humanitarian Standards.<sup>23</sup>

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<sup>17</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 83.

<sup>18</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 87.

<sup>19</sup> Art. 22 prohibits "*any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants*", Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Part II, Drafted by a Commission of Jurists, The Hague, December 1922-February 1923.

<sup>20</sup> Art. 4: "*Aerial bombardment for the purpose of terrorising the civilian population is expressly prohibited*" Draft Convention for the Protection Civilian Population against New Engines of War, adopted by the International Law Association, Fortieth Conference, Amsterdam, 29 August-2 September 1938.

<sup>21</sup> Art. 33: "*All measures of intimidation or of terrorism are prohibited*", Geneva Convention IV (1949).

<sup>22</sup> Art. 6: "*Attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited*", Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, Drafted by the International Committee of the Red Cross, submitted to governments for their

Third, the number of State parties to the first and the second Additional Protocol is indicative of the customary nature of the prohibition to terrorise the civilian population. By 1992, there were about 192 States in the world, 118 of which had ratified Additional Protocol I and 108 Additional Protocol II.<sup>24</sup> Finally, State practice, such as declarations by government officials and military manuals, further confirms the belonging of the prohibition to customary international law.<sup>25</sup> The AC concluded that: “[...] *the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties*”.<sup>26</sup>

## **B. Individual criminal responsibility for the ‘crime of terror’**

It is one thing to prove the customary nature of a violation of IHL, and, in this case, the customary nature of terror. It is another thing to establish that that particular violation is criminalised under customary international law. The subsequent step of the AC was thus to address the issue of the criminalisation of the prohibition of terror under customary international law.

As stated in Tadić, a breach of IHL can be included within article 3 of the ICTY Statute, provided that the following conditions are met:

- (i) the violation must constitute an infringement of a rule of IHL;
  - (ii) the rule must be customary in nature or it must belong to treaty law;<sup>27</sup>
  - (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.
- Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’, although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of

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consideration on behalf of the 19<sup>th</sup> International Conference of the Red Cross, New Dehli, 28 October-7 November 1956(3), Res. XIII.

<sup>23</sup> Art. 6: “*Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the civilian population are prohibited*”, Turku Declaration on Minimum Humanitarian Standards, adopted by an experts meeting convened by the Institute for Human Rights, Abo Akademi University, Turku/Abo, 30 November-2 December 1990.

<sup>24</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 89.

<sup>25</sup> A clear example is offered by the US, a State not party to the first Additional Protocol. In 1987 the US released a statement, through the person of their Deputy Legal Adviser, with an acknowledgement of the principle according to which the civilian population and individual civilians must not be the object of acts or threats the aim of which is to spread terror among the civilian population, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 89.

<sup>26</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 90.

<sup>27</sup> As previously reported, the requirements are the following: 1) the instruments in question are unquestionably binding on the parties at the time of the alleged offence; and 2) the instruments in question are not in conflict with or do not derogate from peremptory norms of international law.

the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>28</sup> As explained by the AC, the last requirement, individual criminal responsibility, can be evinced by State practice, which may represent an indicative factor of the intention to criminalise a specific unlawful behaviour. Declarations of government officials and international organisations are also relevant, as well as the prosecution of the offence by national or military courts.<sup>29</sup> In relation to terror, the AC found that "[...] *customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment*".<sup>30</sup>

However, the presence of a "*continuing trend of nations criminalising terror as a method of warfare*"<sup>31</sup> was not shared by all the ICTY Judges. In his dissenting opinion Judge Schomburg<sup>32</sup> held: "*There is no basis to find that this prohibited conduct as such was penalized beyond any doubt under customary international criminal law at the time relevant to the Indictment*".<sup>33</sup> Exactly for this reason, terror should have been considered '*as an aggravating factor in sentencing*'.<sup>34</sup> In his view, the prohibition of terror did not meet the fourth Tadić condition at the time the acts were committed: the existence of an individual criminal liability under customary international law.

Schomburg remarked that at the moment relevant for the Indictment, only six States had included the crime of terror within their national legislation: Côte d'Ivoire,<sup>35</sup> Czechoslovakia,<sup>36</sup> Ethiopia,<sup>37</sup>

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<sup>28</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 91.

<sup>29</sup> Regarding the question of individual criminal responsibility, Cassese distinguishes three scenarios. First, there may be a situation where national and international tribunals have always classified a violation of international humanitarian law as a war crime and in this case there are not many problems. A second scenario may be identified when a specific breach of international humanitarian law is envisaged as a war crime within the statute of an international tribunal. No problems seem to arise in relation to this second case. The third scenario is the trickiest one and it is the case of the lack of a provision concerning individual criminal liability both in case law and in the statutes of international tribunals. In this case, the problem is determining whether a violation of an international humanitarian rule can be considered a war crime. In this third scenario, it may be useful to examine: a) military manuals; b) States' national legislations; c) general principles of international criminal law recognized worldwide; d) legislation and national case law of the country of which the accused is a citizen or of the country in which the alleged offence was committed, CASSESE A., *International Criminal Law*, Oxford, 2008, pp. 84-84.

<sup>30</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 98.

<sup>31</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, footnote 297.

<sup>32</sup> Another relevant dissenting opinion was rendered by Judge Liu Daqun: *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun.

<sup>33</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 2.

<sup>34</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 2.

<sup>35</sup> "*Measures of terror*", art. 138(5), Cote d'Ivoire, Penal Code 1981.

<sup>36</sup> "*The imposition of measures of intimidation and terror*", art. 263(a)(1), Czech Republic, Criminal Code, 1961.

Netherlands,<sup>38</sup> Norway<sup>39</sup> and Switzerland. In conclusion, there was no evidence of the ‘trend’ identified in the majority judgement when the crime was committed; therefore, the judgement violated the important principle *nullum crimen sine lege*.<sup>40</sup> The *opinio iuris* of States was also evidence of the erroneous interpretation rendered by the majority. Moreover, the crime of terror was neither included in the Statutes of the Nuremberg and Tokyo International Military Tribunals nor in the more recent Statute of the ICC.<sup>41</sup>

In conclusion, according to the dissenting judge, while the prohibition of spreading terror among the civilian population is part of international customary law, an accurate analysis of the *opinio iuris* and State practice show that terror was not ‘criminalized’ at that time.<sup>42</sup> Consequently, Galić and Dragomir Milošević should not have been convicted for terrorist acts, but for attacks against civilians. Terror could be at least considered as an aggravating circumstance.<sup>43</sup>

### III. THE ELEMENTS OF THE CRIME OF TERROR

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The importance of the Galić Judgement lies not only in the fact that terror is qualified as a war crime. It is also relevant because the war crime of terror is defined in all its elements, and because the Galić case became a point of reference for the subsequent jurisprudence. Therefore, it is useful to start from Galić in order to understand the main features of the crime.<sup>44</sup>

The TC in Galić held that the war crime of terror comprises the following elements:

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<sup>37</sup> “Measures of intimidation or terror”, Art. 270(g), Ethiopia, Penal Code,

<sup>38</sup> “Systematic terrorism”, Art. 1, Netherlands, Definition of War Crimes Decree, 1946.

<sup>39</sup> Norway, Military Penal Code, 1902.

<sup>40</sup> “The International Tribunal is required to adhere strictly to the principle of *nullum crimen sine lege praevia* and must ascertain that a crime was ‘beyond any doubt part of customary international law’. It would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes - thus highly politicizing its functions - where the conduct in question was not without any doubt penalised at the time when it took place”, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 21; Judge Liu Daqun agreed with this view: *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, paras. 1-9.

<sup>41</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 14-20; *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, paras. 10-13.

<sup>42</sup> “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”, *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; see also: *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 24.

<sup>43</sup> *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; of the same view: *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 24.

<sup>44</sup> For an overview of other interesting cases related to terror, see: Sébastien Jodoin, Terrorism as a War Crime, in *International Criminal Law Review*, 7 (2007), p. 102-106.



“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”.<sup>45</sup>

## A. The Actus Reus

### THE UNLAWFUL CONDUCT

First, terror is committed through ‘acts of violence’. ‘Acts of violence’ is broader than the more specific term ‘attacks’, which is used in relation to the crime of unlawful attacks against civilians and the civilian population.<sup>46</sup> While ‘attacks’ are defined in article 49 of the first Additional Protocol as ‘acts of violence against the adversary, whether in offense or in defence’,<sup>47</sup> the term ‘acts of violence’ is not limited to attacks in which there is a resort to military force, but it encompasses all the acts of violence which by their nature are likely to spread terror among the civilian population. The peculiarity of the crime is that it can be satisfied by a broad range of conducts: torture, mistreatments, rape and other violent acts committed with the principal aim of terrorising the civilian population.<sup>48</sup> Moreover, as clarified in the case law of the two international criminal tribunals, terror is not only committed through ‘direct attacks’, but also through indiscriminate and disproportionate attacks.<sup>49</sup>

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<sup>45</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 133.

<sup>46</sup> “[...] The definition of terror of the civilian population uses the terms ‘acts or threats of violence’ and not ‘attacks or threats of attacks’. However, the Appeals Chamber notes that Article 49(1) of Additional Protocol I defines ‘attacks’ as ‘acts of violence’. Accordingly, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population can comprise attacks or threats of attacks against the civilian population. The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary; the primary concern, as explained below, is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population.”, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 102.

<sup>47</sup> Art. 49(1), Additional Protocol I (1977). In the same way: *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 52; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgement, 17 December 2004, para. 47; *Prosecutor and Pavle Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgement, 31 January 2005, para. 282.

<sup>48</sup> The TC made the example of the Martial Court of Makassar: “To the Majority’s knowledge, the first conviction for terror against a civilian population was delivered in July 1947 by a court-martial sitting in Makassar in the Netherlands East-Indies (N.E.I.). The offences alleged in *Motomura et al.* were charged in the indictment as “systematic terrorism against persons suspected by the Japanese of punishable acts [...] this systematic terrorism taking the form of repeated, regular and lengthy torture and/or ill-treatment, the seizing of men and women on the grounds of wild rumours, repeatedly striking them [...] the aforesaid acts having led or at least contributed to the death, severe physical and mental suffering of many””, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 114.

<sup>49</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 104; In the same way: *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 877; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals

As far as the 'victims' of the crime of terror are concerned, the acts of violence must be directed against the civilian population or individual civilians not taking direct part in the hostilities. According to article 50(1): "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian".<sup>50</sup> Civilians are thus all the individuals who are not combatants.<sup>51</sup> Therefore, the prohibited conduct is acts or threats of violence directed against civilians or the civilian population, provided that civilians do not take direct part in the hostilities. Indeed, as explained in article 51(3), if a civilian engages in the hostilities, he loses the protection accorded by IHL, and he becomes a legitimate military target during the period of his participation in the hostilities.<sup>52</sup> In relation to the meaning of 'direct participation in the hostilities', the AC referred to its previous jurisprudence, according to which: "To take a "direct" part in the hostilities means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces".<sup>53</sup> Thus, in order to establish whether a civilian is taking a direct part in the hostilities, the Tribunal must evaluate whether the acts of war undertaken are, in scope and nature, likely to cause actual damage to the personnel or to the equipment of the enemy armed forces.

In conclusion, according to the ICTY jurisprudence, the crime of terror is committed against persons and the unlawful conducts must be directed against civilians. However, the SCSL seemed to interpret differently the crime of 'acts of terrorism' included in its Statute. According to the SCSL, the crime of terror is also committed when directed against 'property', provided the existence of the aim of spreading terror among the civilian population.<sup>54</sup> In line with this view, "the

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Chamber, Judgement, 28 May 2008, para. 351; *Prosecutor v. Alex Tamba Brima et al.*, SCSL-2004-16-T, Trial Chamber, Judgement, 20 June 2007, para. 668.

<sup>50</sup> Art. 50(1), Additional Protocol I (1977).

<sup>51</sup> Art. 50, ICRC Commentaries, (<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>). Article 50(2) states: "The civilian population comprises all persons who are civilians". The term 'civilian population' refers to the civilian population as a group and this means that the protection under art. 51 extends both to the civilian population as a whole and to each individual civilian.

<sup>52</sup> "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities", art. 51(3), Additional Protocol I (1977).

<sup>53</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 48. The same view is shared by: *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgement, 7 June 2001, para. 104; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgement, 17 December 2004, para. 51; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para.947; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgement, 2 August 2007, paras. 134-135.

<sup>54</sup> "Indeed, as the Chamber held in the Rule 98 Decision in this case, the offence "extend[s] beyond acts or threats of violence committed against protected persons to 'acts directed against installations which would cause victims as a side-effect'". Thus, if attacks on property are carried out with the specific intent of spreading terror among the protected population, this will fall within the proscriptive ambit of the offence of acts of terrorism. The Chamber emphasises that all types of civilian property, including that which belongs to individual civilians, are protected. The focus of the offence is clearly on protecting persons from being subjected to acts of terrorism and the means used to spread this terror may include acts or threats of violence against persons or property",

*ambit of acts of terrorism ‘extends beyond acts or threats of violence committed against protected persons to acts directed against installations [...]’ where such acts were committed with the primary purpose of spreading terror amongst the civilian population”.*<sup>55</sup> As clearly explained in *Brima*, it is not the property in itself to be protected: the object of protection remains the civilian population. However, attacks against property can also be used to inflict terror upon people. In conclusion, as clarified by the SCSL: “*The attacks on, or destruction of, property thus plays an important role in defining the contours of this crime. What places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population. The acts or threats of violence committed in furtherance of such a purpose are innumerable and may well encompass attacks on property through which the perpetrators intend to terrorise the population*”.<sup>56</sup>

The SCSL seems to depart from the idea that the acts or threats of violence should be directed against civilians. In defining the crime the SCSL refers to acts or threats of violence directed against ‘persons’ or ‘protected persons’.<sup>57</sup> ‘Persons’ is broader than ‘civilians’ and it may include also other individuals not taking direct part in hostilities (for example, individuals *hors de combat*). However, the SCSL has never clarified this discrepancy with the elements set out by the ICTY. On the contrary, it has constantly referred to the previous ICTY jurisprudence. Thus, one may wonder whether this wording is really intended to include persons other than civilians.

## **A RESULT REQUIREMENT FOR THE CRIME OF TERROR?**

Another interesting issue addressed by the ICTY concerned the existence of a result requirement as an element of the crime of terror. In *Galić* the TC defined the crime as “*acts of violence [...] causing death or serious injury to body or health within the civilian population*”. This definition, confirmed on appeal, seemed to require a specific result consisting of death or serious injury to body or health within the civilian population.<sup>58</sup> However, in the *Dragomir Milosevic* case the AC reversed the TC’s findings and found that the AC in *Galić* was not properly understood: “*The Appeals Chamber finds that the Trial Chamber misinterpreted the Galić jurisprudence by stating that ‘actual infliction of death or serious harm to body or health is a required element of the crime*

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*Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgement, 2 August 2007, para. 173.

<sup>55</sup> *Prosecutor v. Alex Tamba Brima et al.*, SCSL-2004-16-T, Trial Chamber, Judgement, 20 June 2007, paras. 670-671.

<sup>56</sup> *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Trial Chamber, Judgement, 20 June 2007, paras. 670-671.

<sup>57</sup> See: *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Trial Chamber, Judgement, 20 June 2007, par. 667; *Prosecutor v. Charles Ghanchay Taylor*, Case No. SCSL-03-01-T, 18 May 2012, para. 403.

<sup>58</sup> Causing death or serious injury to body or health is for instance required for the crime of attacks against civilian objects, see: *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgement, 17 December 2004, para. 63; *Prosecutor and Pavle Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgement, 31 January 2005, para. 283.

of terror', and thus committed an error of law. Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence per se. What is required, however, in order for the offence to fall under the jurisdiction of this Tribunal, is that the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include, but are not limited to death or serious injury to body or health. [...].<sup>59</sup> Taking into consideration other relevant jurisprudence on the subject,<sup>60</sup> it is possible to reach the conclusion that there is no requirement of causing death or serious injury to body or health.

Whether 'terror' should also result from the acts of the perpetrator was another debated point in Galić. According to the defence, terror must be experienced by the civilian population.<sup>61</sup> However, the Trial Chamber concluded: "... that actual terrorisation of the civilian populations is not an element of the crime".<sup>62</sup> Therefore, no actual terror needs to be experienced by the civilian population since what is really relevant is that the unlawful behaviour is carried out with the aim of terrorising the civilian population.<sup>63</sup>

Another question raised in Galić concerned the meaning of 'terror'. In Galić, both the TC and the AC did not give a definition of 'terror', accepting its association with the concept of 'extreme fear'.<sup>64</sup> In *Dragomir Milošević*, the TC recalled the definition rendered by the prosecution in the Galić case, which explained the concept in the following terms: "No one knew whether they might be the next victim. It affected every waking moment of their lives. People for 15 months over the period of this indictment knew absolutely no sense of safety anywhere in the city.

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<sup>59</sup> *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, para. 33.

<sup>60</sup> In particular, the SCSL does not include within the elements of the crime the result requirement of causing death or serious injury to body or health among the civilian population.

<sup>61</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 47.

<sup>62</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 104.

<sup>63</sup> "The Majority rejects the Parties submissions that actual infliction of terror is an element of the crime of terror. The plain wording of article 51(2), as well as the travaux préparatoires of the Diplomatic Conference, exclude this from the definition of the offence. Since actual infliction of terror is not a constitutive legal element of the crime of terror, there is also no requirement to prove a causal connection between the unlawful acts of violence and the production of terror, as suggested by the Parties", ICTY, 5 December 2003 (Galić, TC), § 134; "As the Trial Chamber correctly noted, a plain reading of Article 51(2) of Additional Protocol I does not support a conclusion that the acts or threats of violence must have actually spread terror among the civilian population [...]. In light of the foregoing, the Appeals Chamber finds that actual terrorisation of the civilian populations is not an element of the crime [...]", *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, paras. 103, 104.

<sup>64</sup> "Terror' is the key term in the formulation of the crime of terror. The Trial Chamber in the Galić case noted that the Prosecution did not provide a definition of 'terror' in its preliminary submissions, but that, in the course of the trial, it adopted a definition given by an expert which equated 'terror' with 'extreme fear'. That Trial Chamber also cited the Defence submission that "terror has to be of the highest intensity. It has to be long-term. It has to be direct. And it has to be capable of causing long-term-consequences". The TC in Galić ultimately accepted the Prosecution's rendering of terror as 'extreme fear'. As the TC, the AC in Galić did not define the term 'terror'. In a footnote, the AC briefly noted that "terror could be defined, as the Trial Chamber did, as 'extreme fear'". As such, neither the TC nor the AC in Galić carried out an examination of the term 'terror', *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 883.

Terror is [...] the intentional deprivation of a sense of security. It's been the primal fear that people feel when they see someone in front of them gunned down and that moment of panic when they try and run to help the victim, waiting for the next shots to come, and you've had ample evidence about that." "And it's not just [...] the fear that comes from being nearby the combat. This is a fear calculated to demoralise, to disrupt, to take away any sense of security from a body of people who have nothing [...] to do with the combat."<sup>65</sup> It is clear that the definition of 'terror' plays an important role. In particular, the key question is what type of objective evaluation needs to be made in order to establish the capability of a specific unlawful behaviour to spread terror among the civilian population. The lack of an explanation on this point could lead to the conclusion that terror is just a normal feeling during every armed conflict. This was exactly the objection raised by Galić, who tried to challenge the definition given by the counterpart.<sup>66</sup> Terror can be defined as the 'extreme fear' and it needs to be distinguished from the ordinary state of terror that every person experiences in the context of an armed conflict.<sup>67</sup> Clearly, a similar definition lacks of precision; this is perfectly understandable since it seems impossible to give a satisfactory definition of terror and this is the reason why a case-by-case analysis seems to be the best solution to the problem.

In his dissenting opinion in the Dragomir Milošević case, Judge Liu Daqun carried out an interesting analysis of the elements identified by the ICTY jurisprudence as part of the crime of terror. In particular, he underlined that "*the majority fails to specify the constitutive elements of the crime. According to this definition, the actus reus of the crime of terror may be established wherever the civilian population is attacked or threatened with an attack. The offence would thus*

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<sup>65</sup> *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 884.

<sup>66</sup> "During its closing arguments, the defence stated the following when addressing the issue of terror: "The terror that my learned friend spoke about, the primordial fear which the primal fear, this fear was there for everyone, it was felt by everyone, civilians and soldiers alike. If someone had a strategy of terrorising and killing civilians, it would not have been possible for several thousand of their soldiers to be killed. [...] This shows that that area was a theatre of heavy fighting, of serious conflicts, and one cannot characterise this as a civilian area and speak of civilians as the sole targets at the time of the events in this indictment." The defence thereby appeared to challenge the terror charge on the basis that there was heavy fighting in all of Sarajevo that caused terror among everyone. "The Trial Chamber finds that the response of the Prosecution captures the essence of what the term terror denotes", *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, paras. 885, 886.

<sup>67</sup> In *Dragomir Milošević* it is explained in the following way: "The Trial Chamber also notes that the crime of terror only covers acts or threats of violence which are specifically intended to spread terror among the civilian population. It must be established that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. The prohibition of spreading terror among a civilian population must therefore always be distinguished from the effects that acts of legitimate warfare can have on a civilian population. The Trial Chamber notes that a certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict. The closer the theatre of war is to the civilian population, the more it will suffer from fear and intimidation. This is particularly the case in an armed conflict conducted in an urban environment, where even legitimate attacks against combatants may result in intense fear and intimidation among the civilian population, but to constitute terror, an intent to instil fear beyond this level is required. Therefore, the circumstances of a particular armed conflict must be taken into account in determining whether the crime of terror has been committed, or whether the perpetrators intended to 'spread terror among a civilian population'", *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 888.

appear to lack a clear minimum threshold, particularly where threats constitute the *actus reus* of the offence in the absence of any result requirement of actual terrorisation”.<sup>68</sup> And concluded saying that the principle of specificity had been violated. According to the dissenting Judge “... *the majority fails to specify the constitutive elements of the crime*”<sup>69</sup>. Liu Daqun’s opinion is that, since a gravity threshold is lacking, any acts or threats of violence could satisfy the elements of the crime and, consequently, this constitutes a violation of the important principle of specificity that represents a pillar in criminal law.<sup>70</sup> In his opinion, the acts of the perpetrator should result in ‘serious trauma or psychological harm’. An answer to this objection can be found in *Galić*, where the TC remarked that ‘extensive trauma and psychological damage’ are a component of the acts and threats of violence: “*the primary concern, as explained below, 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’. Such extensive trauma and psychological damage form part of the acts or threats of violence*”.<sup>71</sup> The gravity threshold should thus be determined on a case-by-case basis, but there is no need of a result requirement because ‘extensive trauma and psychological harm’ already characterises the acts and threats of violence.

Moreover, according to the SCSL, even if there is not a requirement of actual terrorisation of the civilian population, the acts and threats must be capable of spreading terror: “*Acts of terrorism may therefore be established by acts or threats of violence independent of whether such acts or threats of violence satisfy the elements of any other criminal offence. Not every act or threat of violence, however, will be sufficient to satisfy the first element of the crime of ‘acts of terrorism’.* *The Appeals Chamber is of the view that whilst actual terrorisation of the civilian population is not an element of the crime, the acts or threats of violence alleged must, nonetheless, be such that are at the very least capable of spreading terror. Whether any given act or threat of violence is capable of spreading terror is to be judged on a case-by-case basis within the particular context involved. For this purpose, the Appeals Chamber agrees with the Trial Chamber in Galić that*

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<sup>68</sup> *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 17.

<sup>69</sup> *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 17.

<sup>70</sup> Indeed, it is important to keep in mind the fact that the crime of terror not only pertains to ‘acts’, but also to ‘threats’ of violence. Consequently, if the unlawful conduct consists of menacing behaviours in order to spread terror among civilians, it is highly difficult to say that the intimidating conduct causes death or serious injury to body or health to the civilian population. It therefore seems correct to hold that this last requirement is not a constitutive element of the crime of terror.

<sup>71</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 102.

*terror should be understood as the causing of the extreme fear*".<sup>72</sup> This has led to say that the SCSL departed from the third Tadić condition<sup>73</sup>. Indeed, in Dragomir Milosevic the AC pointed out that the definition of the *actus reus* of the crime of terror suggested by the Prosecution, notably 'acts capable of spreading terror', did not necessarily imply grave consequences for the civilian population and thus did not per se render the violation of the said prohibition serious enough for it to become a war crime within the Tribunal's jurisdiction. Indeed, the Prosecution argued that to satisfy the Tribunal's jurisdictional requirements, the acts should have been capable of causing extreme fear in the population. In this regard, it is important to remember that the Tadić conditions relate to the jurisdiction of the ICTY and the gravity requirement is common to all war crimes. A completely different matter is the elements of each war crime. Probably, the SCSL did not intend to depart from the 'grave consequences' requirement. Even though it did not qualify the 'capability of spreading terror' as an element of the crime, it is possible that the SCSL was just looking for another standard instead of 'actual terrorisation'. The 'capability of spreading terror' could maybe help in evaluating 'threats' of violence. However, what is certain is that the SCSL was unclear. In Taylor the Trial Chamber of the SCSL referred to the Milosevic jurisprudence and did not say anything about the 'capability of spreading terror'<sup>74</sup>.

## **B. The Mens Rea**

Starting from Galić, the jurisprudence identified two mental elements: a general intent: "*The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence*"; and a specific intent: "*The above offence was committed with the primary purpose of spreading terror among the civilian population*".<sup>75</sup>

The first generic intent relates to the unlawful act of the perpetrator. The unlawful conduct - that, as already explained, may include a broad range of behaviours such as murder, torture, mistreatments, attacks on civilians, etc. - must be committed '*wilfully*'. This term generally indicates that the acts must be committed with '*recklessness*'.<sup>76</sup> However, the generic intent is not enough to satisfy the elements of the crime of terror. In addition to the generic intent, it is required

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<sup>72</sup> *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008, para. 350.

<sup>73</sup> See: Julinda Beqiraj, *Terror and Terrorism in Armed Conflicts: Developments in International Criminal Law*, in Fausto Pocar, Marco Pedrazzi, Micaela Frulli (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudications and Investigations*, Edward Elgar (Cheltenham, UK, Northampton, MA, USA), 2013, pp. 273-274.

<sup>74</sup> *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgement, 18 May 2012, Para. 407.

<sup>75</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 133; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 100; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, paras. 875, 878.

<sup>76</sup> '*Recklessness*' is a known concept in common law systems. In civil law countries it can be equated to the concept of *dolus eventualis*, that is to say, when a person undertakes an unlawful behaviour being aware of the possibility that a specific event will occur as a consequence of his action and accepting the risk of its happening.

that the perpetrator acts with a specific intent: the primary intent of spreading terror among the civilian population.<sup>77</sup> As noted in Galić, “*the crime of terror is a specific-intent crime*”.<sup>78</sup> This *dolus specialis* is the distinctive feature of the crime of terror and it is what contributes to differentiate it from other crimes. The perpetrator may aim at reaching other purposes, provided that spreading terror among the civilian population is the principal purpose.<sup>79</sup> Judge Liu Daqun criticised the conclusions of the majority stating that “*the purpose requirement is entirely novel to this crime of terror. All other specific intent crimes merely require that the requisite mens rea be established: there is no hierarchy of intent*”.<sup>80</sup> According to this interpretation, the use of the adjective ‘principal’ is a wanton condition, because “*prior to the Galić case, the ranking of intent had no place in international criminal law*”.<sup>81</sup> However, the concept of ‘principal intent’ is based on the two Additional Protocols to the Geneva Conventions that contain the expression ‘primary purpose’. Spreading terror may not be the only aim behind the acts of an individual. It is well known that terror was often used in the course of history as a method of warfare, aimed at creating a deep sense of insecurity and anxiety within the enemy population, in order to destabilise the adversary. Thus, without the word ‘principal’ the crime would be far more difficult to prove.

Regarding the complexity of proving the *dolus specialis*, the jurisprudence tried to make it less arduous: “*the specific intent of the crime of terror can be inferred from the circumstances of the acts or threats of violence, that is, from their nature, manner, timing, and duration*”.<sup>82</sup> For instance, attacks during cease-fires, prolonged or indiscriminate attacks against civilians may be indicative of the intent to inflict terror upon the civilian population. Furthermore, the specific intent can also be inferred by the site of the attack. A good example is offered in Galić, where the targets were markets, water distribution points, public transports, mainly places well known to be frequented by civilians. The examples provided by the TC help understand conducts that can constitute evidence of an intent to spread terror among civilians: “*The attacks on civilians had no*

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<sup>77</sup> “‘Primary purpose’ signifies the mens rea of the crime of terror. It 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. *The crime of terror is a specific-intent crime*”, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 136. See also: *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, paras. 878, 879; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008, paras. 353-357.

<sup>78</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 137; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 878.

<sup>79</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 104. See also: ICTY, 17 January 2005 (*Blagojevic and Jokic*, TC), § 591; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006 Galić, para. 104; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgement, 12 December 2007, para. 879; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008, para. 357.

<sup>80</sup> *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 19.

<sup>81</sup> *Prosecutor v. Dragomir Milošević*, Case No. 98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, Partly Dissenting Opinion of Judge Liu Daqun, para. 19.

<sup>82</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 104.



*discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo".<sup>83</sup>*

#### **IV. CONCLUDING REMARKS**

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The case law of the ICTY and the SCSL has given a strong contribution to the development of a definition of terror. The crime of terror is clearly a different offence from the crime of attacks on civilians and it can be committed through different kind of behaviours. The distinctive element of the crime is its specific intent, since it is necessary to prove that the perpetrator had the primary intent to spread terror among the civilian population. However, some contentious issues remain.

Firstly, the exclusion of a result requirement has been criticized. A person can be convicted for 'terror' even though civilians are not terrorized by the acts of the perpetrator. Instead, the ICTY held that the acts must result in 'grave consequences' for the victims, in accordance with the third Tadić condition. It is evident that the lack of a result requirement lowers the gravity threshold of the crime. However, proving actual terrorisation of civilians could not be that easy; the prosecution would need to prove not only the intent of the perpetrator to terrorise, but also that terrorisation actually occurred. As to what 'terror' means, its association with 'extreme fear' is not at all satisfactory, but one may wonder whether it is possible to find a better definition. Thus, a case-by-case analysis seems to be the best solution to the problem and the approach adopted by the ICTY seems the correct one. Another critical issue is the discrepancy between the case law of the two Tribunals. The SCSL broadened the scope of the crime, including attacks against property. Differently, the ICTY's 'terror' is limited to acts or threats of violence directed against 'civilians'. Again, the SCSL refers to 'protected persons' rather than to 'civilians', leaving some doubts about the real meaning of this difference in terminology. Finally, the SCSL seems to say that the acts or threats of violence must be at least capable of spreading terror, whereas such a requisite is not mentioned by the ICTY, as well as by the Trial Chamber in Taylor.

In conclusion, the analysed jurisprudence is a step forward and a good basis for the prosecution of terrorism in time of armed conflict. However, developments in this field should not stop where the ICTY and the SCSL left off, given that there are still many issues that need to be clarified.

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<sup>83</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Chamber, Judgement, 5 December 2003, para. 593.