

ABHANDLUNGEN

The Prosecution of Terrorism as a Crime Against Humanity

*Roberta Arnold**

The 9/11 attacks led to a US military campaign without precedents. The concept of “war against terrorism” was coined by politicians to justify the use of military force to track down terrorist suspects. The legal argument used to support this new strategy was every state’s inherent right to self-defence. It is beyond the scope of this paper to discuss the legality of this new type of “war”. However, this had several implications under the laws of armed conflict and, in particular, international criminal law. The focus of this paper will be on the question whether terrorism, the prosecution of which seems to have been quite unsuccessful under the existing anti-terrorism conventions, may be prosecuted as a crime against humanity. This approach, as it will be discussed later, presents several advantages, particularly from a procedural point of view.

The paper, therefore, will be structured as follows. The first part will discuss whether there is a working definition of terrorism. The second part will examine the definition of crimes against humanity under existing international law. The third part will consider the international jurisprudence on terrorism as a crime against humanity. The fourth will look at the possibility of prosecuting terrorism under the heading of crimes against humanity contained in the Statute for an International Criminal Court (ICC). The fifth and final part will draw the conclusions.

* Dr. jur., LLMM, Legal adviser, Swiss Dept. of Defence, Laws of Armed Conflict Section. The views expressed in this paper are the author’s solely and do not necessarily reflect those of the Swiss Dept. of Defence. A detailed analysis of the issues dealt in this paper is undertaken in R. Arnold, *The ICC as a New Instrument for Repressing Terrorism*, New York 2004.

A. A Working Definition of Terrorism

There is no universally accepted legal definition of terrorism, yet.¹ In some people's view, this is due to the fact that terrorism is a subjective notion, which "exists in the mind of the beholder, depending upon one's political views and national origins".² However, when the media and the politicians use this term, the average people seem to think of a violent and intimidating act – usually directed against innocent targets – aimed at coercing a government or a community to comply with the perpetrators' political requests. The issue is whether this common understanding may provide the basis for a universal legal definition of "terrorism". In a different forum³ it was discussed whether international humanitarian law (IHL) may provide for one. The conclusion was that acts of terrorism referred to in Article 33 IV Geneva Convention of 1949, Article 51(2) Additional Protocol I of 1977 and Article 3 and 14 Additional Protocol II of 1977, indicate an act of violence in breach of the principles of military necessity, proportionality and distinction, which is primarily aimed at spreading fear among the civilian population.⁴ The outcome was that the notion provided by IHL contains the same elements of the definition used in the common language: the element of innocent victims (civilians), a violent act and the existence of a political end which, however, does not justify the means, because of their disproportionality. Thus, since the four Geneva Conventions of 1949 amount to customary law, it could be argued that the meaning of "terror" under Article 33 IV GC could be used universally. However, the focus of this paper is not on the definition of terrorism. The one just being referred to will be simply adopted as a "working definition" to assess whether "so-called" terrorist acts may be prosecuted as crimes against humanity.

B. The Definition of Crimes Against Humanity

1. The IMT Charter of 1945

The first prosecutions for crimes against humanity were based on the Charter of the International Military Tribunal of Nuremberg (IMT), 1945.⁵ The idea was that

¹ E. Chadwick, *Self-determination, Terrorism and the International Humanitarian Law of Armed Conflict*, The Hague 1996, at 2; A. Zimmermann, *Commentary to Article 5: Crimes Within the Jurisdiction of the Court*, in: O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 1st ed., Baden-Baden 1999, 97-106, at 99.

² R.A. Friedlander, "Terrorism", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 9, Amsterdam 1981, 371-376, 372.

³ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism*, New York 2004, at 69 et seq.

⁴ *Ibid.*, at 71 et seq.

⁵ Charter of the International Military Tribunal (IMT), in: *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, August 8, 1945, at <<http://www1.umn.edu/humanrts/instree/imt1945.htm>>. See Arnold, *supra*, note 3, at 204 et seq.

the breach of fundamental aspects of the human being should be repressed independently from the nationality of the victim. The nationality criterion had in fact been a major hurdle for the prosecution of the acts committed by the Nazis against the German population as war crimes. Article 6(c) IMT Charter defines crimes against humanity as:

“Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁶

This illustrative list of crimes⁷ can be divided in:

- Murder type crimes (murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war)
- Persecution on political, racial, or religious grounds.

The “nexus to the war” requirement was introduced to limit the tribunal’s jurisdiction.⁸ Everyone may be a perpetrator.⁹ The victims, however, can only be members of the civilian population. With regard to the numeric issue, the ICTY in *Tadic* held that:

“The emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds.”¹⁰

This definition was restated¹¹ in Article 5 ICTY Statute and Article 3 ICTR Statute. The two UN ad hoc tribunals’ jurisprudence helped to clarify the elements of these crimes.

⁶ Nuremberg Trial Proceedings, Vol. 1, at <<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>>.

⁷ See Arnold, *supra*, note 3, at 210 et seq.

⁸ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty’s Stationery Office) (1948), at 196.

⁹ E. Greppi, *I crimini di Guerra e Contro l’Umanità nel Diritto Internazionale*, Turin 2001, at 111.

¹⁰ *Prosecutor v Tadic*, TC Judgement of May 7, 1997, Case IT-94-1, para. 644.

¹¹ *Prosecutor v Blaskic*, TC Judgement of March 3, 2000, Case No. IT-95-14, para. 188.

2. The ICTY and ICTR Statutes

a. The *actus reus*

Article 5 ICTY Statute reintroduces the “nexus” criterion, which is no longer required under customary law.¹² This, however, may have been simply done to restrict the tribunal’s jurisdiction to the conflict in the Former Yugoslavia.¹³ For example, in *Tadic* the AC held that:

“The ‘attack on the civilian population’ is here equated to ‘the armed conflict’. The two concepts cannot, however, be identical because then crimes against humanity would, by definition, always take place in armed conflict, whereas under customary international law these crimes may also be committed in times of peace ...”¹⁴

The *Kunarac Case*¹⁵ stated that the following elements need to be met under the ICTY Statute:

- There must be an attack.
- The acts of the perpetrator must be part of the attack.
- The attack must be “directed against any civilian population”.
- The attack must be “widespread or systematic”.

The ICTR Statute – the jurisprudence of which is nevertheless limited to cover armed conflicts of a non-international character – requires similar elements:¹⁶

- the act must be committed as part of a widespread or systematic attack;
- the act must be committed against members of the civilian population;
- the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds;
- the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.

However, the ICTR does not require a nexus with an armed conflict. Moreover, the acts – or at least the attack – must have been committed on discriminatory grounds. According to the *Kunarac Case*, an “attack” is:

“A course of conduct involving the commission of acts of violence. The Trial Chamber in the *Tadic* case stated that: “The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be «di-

¹² *Prosecutor v Tadic*, AC Judgment of July 15, 1999, Case IT-94-1, para. 78.

¹³ F. Lattanzi, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in: H. Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin 2001, 473-504, at 473.

¹⁴ *Prosecutor v Tadic*, AC, *supra*, note 12, para. 251; *Prosecutor v Mladen Naletilic*, TC Case IT 98-34, Judgement of March 31, 2003, para. 233.

¹⁵ *Prosecutor v Kunarac et al.*, IT-96-23T and IT-96-23/1-T, February 22, 2001, para. 410; *Prosecutor v Mladen Naletilic*, TC, *supra*, note 14, para. 232.

¹⁶ *Prosecutor v Akayesu*, TC, Judgment of September 2, 1998, para. 578; *Prosecutor v Rutaganda*, TC Judgement of December 6, 1999, Case ICTR-96-3, para. 66; *Prosecutor v Musema*, TC Judgement of January 27, 2000, Case ICTR-96-13, para 201.

rected against any civilian population», ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.”¹⁷

This is not to be confused with an armed conflict.¹⁸ An attack, in fact:

“may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target”.¹⁹

The underlying offences do not need to constitute the attack itself. It is sufficient that they form part of it or that they “comprise part of a pattern of widespread and systematic crimes directed against a civilian population.”²⁰ The ICTR went further, in stating that an attack indicates an:

“unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”²¹

Thus, unlike under the UN Charter, pursuant to the ICTR Statute the attack does not need to be armed. However, it must have been directed against the civilian population. According to the TC in *Akayesu*, the latter is formed by:

“People who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.”²²

This is important, since combatants are not generally protected from acts of terror, under the laws of war. According to the TC in *Kayishema*, the notion of “civilian population” must be interpreted broadly. In a context short of an armed conflict, it should be read as including all persons, except those entrusted with the maintenance of order and those possessing legitimate means to exercise force. For instance, non-civilians would include members of the police²³ and other representatives of the executive power. In *Bagilishema*, however, which referred to the ICTY’s *Blaskic* Case, the ICTR Trial Chamber held that it depends

¹⁷ *Prosecutor v Kunarac et al.*, TC Judgement of February 22, 2001, Case No. IT-96-23, para. 415; *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Form of the Indictment, November 14, 1995, para. 11.

¹⁸ *Prosecutor v Tadic*, AC, *supra*, note 12, para. 251; *Prosecutor v Kunarac*, Case IT-96-23, AC Judgment of June 12, 2002, para. 86.

¹⁹ *Prosecutor v Kunarac*, TC, *supra*, note 17, para. 416.

²⁰ *Prosecutor v Kunarac*, *supra*, note 17, para. 417; *Prosecutor v Tadic*, AC, *supra*, note 12, paras. 248 and 255.

²¹ *Prosecutor v Akayesu*, TC, *supra*, note 16, para. 581; *Prosecutor v Musema*, TC, *supra*, note 16, para. 205; *Prosecutor v Rutaganda*, TC, *supra*, note 16, para. 70.

²² *Prosecutor v Akayesu*, TC, *supra*, note 16, at para. 582; *Prosecutor v Rutaganda*, TC, *supra*, note 16, para. 72; *Prosecutor v Musema*, TC, *supra*, note 16, para. 207.

²³ *Prosecutor v Kayishema and Ruzindana*, TC Judgement of May 21, 1999, Case ICTR-95-1-T, para. 127.

on the specific situation of the victim at the moment the crimes were committed, rather than on his/her status.²⁴

Pursuant to the jurisprudence of both tribunals the targeted population must only be predominantly civilian in nature. The presence of certain non-civilians does not change the character of that population.²⁵

Also under the ICTY Statute a crucial element is that the act be primarily addressed against a civilian population.²⁶ Unfortunately, the latter does not provide for a definition. According to the *Kunarac* Case, this has to be a self-contained group of individuals, either geographically or because of common distinctive features.²⁷ However, it is sufficient that the victim was a civilian and that he/she was targeted as part of an attack against a civilian population.²⁸ In the *Tadic* Case, the TC held that:

“This definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy.”²⁹

It concluded that a wide interpretation is required and that:

“The presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”³⁰

In particular the Commission of Experts observed that:

“It seems obvious that article 5 [ICTY Statute] applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms.”³¹

Another requirement under Article 3 ICTR Statute is that the acts were widespread or systematic. “Widespread” refers to the large-scale of the attack and the number of the victims, whereas “systematic” requires an organised structure.³² Article 5 ICTY Statute, instead, does not explicitly provide for this. However, in the *Tadic* Case the TC observed that:

²⁴ *Prosecutor v Bagilishema*, TC, *supra*, note 25, para. 79; *Prosecutor v Blaskic*, TC, *supra*, note 11, para. 214.

²⁵ *Prosecutor v Kayishema*, TC, *supra*, note 23, para. 128; *Prosecutor v Bagilishema*, TC Judgment of June 7, 2001, Case ICTR-95-1A-T, para. 79; *Prosecutor v Musema*, TC, *supra*, note 16, para. 207. *Prosecutor v Tadic*, TC, *supra*, note 10, para. 644.

²⁶ *Prosecutor v Kunarac*, AC, *supra*, note 32, para. 92.

²⁷ G. Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 2002 (43) *Harvard International Law Journal* 237, 255, referring to *Prosecutor v Kunarac*, TC, *supra*, note 17, para. 32.

²⁸ Mettraux, *supra*, note 27, at 256.

²⁹ *Prosecutor v Tadic*, TC, *supra*, note 10, para. 639.

³⁰ *Ibid.*, para. 643.

³¹ Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), (“Final Report of the Commission of Experts”), U.N. Doc. S/1994/674, para. 78, reported in *Prosecutor v Tadic*, TC, *supra*, note 10, para. 640. See also *Prosecutor v Kupreskic*, TC, Case IT-95-16-T, TC, Judgment of January 14, 2000, para. 547; *Prosecutor v Kunarac*, TC, *supra*, note 17, para. 435.

³² *Prosecutor v Naletilic*, *supra*, note 14, para. 236; *Prosecutor v Kunarac*, AC Judgement of June 12, 2002, Case IT-96-23, para. 429.

“It is now well established that the requirement that the acts be directed against a civilian ‘population’ can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts. The Report of the Secretary-General stipulates that crimes against humanity refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population.”³³

Pursuant to the French version of the ICTR Statute, the widespread and systematic criteria are cumulative. However, in view of customary law and the English text, which considers them as alternatives to one another, the ICTR concluded that there must have been a translation error.³⁴

According to the ICTR’s jurisprudence, the concept of “widespread” indicates a:

“massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”³⁵

“Systematic”, instead, means:

“thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.”³⁶

The TC furthermore concluded that:

“[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”³⁷

It is only the attack, not the individual acts of the accused, that must be widespread or systematic.³⁸ The *Blaskic* Case identified the elements of a systematic occurrence as follows:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another
- the preparation and use of significant public or private resources, whether military or other

³³ *Prosecutor v Tadic*, TC, *supra*, note 10, para. 646; *Prosecutor v Tadic*, AC, *supra*, note 12, para. 248.

³⁴ *Prosecutor v Akayesu*, TC, *supra*, note 16, para. 579, FN 144; *Prosecutor v Kayishema*, *supra*, note 23, para. 123; *Prosecutor v Bagilishema*, *supra*, note 25, para. 77; *Prosecutor v Musema*, TC, *supra*, note 16, para. 203.

³⁵ *Prosecutor v Akayesu*, TC, *supra*, note 16, para. 580; *Prosecutor v Musema*, TC, *supra*, note 16, para. 204; *Prosecutor v Rutaganda*, *supra*, note 16, para. 69.

³⁶ *Prosecutor v Akayesu*, TC, *supra*, note 16, para. 580; *Prosecutor v Bagilishema*, TC, *supra*, note 25, para. 77; *Prosecutor v Musema*, TC, *supra*, note 16, para. 204; *Prosecutor v Rutaganda*, *supra*, note 16, para. 69 et seq.

³⁷ *Prosecutor v Tadic*, TC, *supra*, note 10, para. 649.

³⁸ *Prosecutor v Kunarac*, *supra*, note 17, para. 438; *Prosecutor v Kupreskic*, TC, *supra*, note 31, para. 550; *Prosecutor v Tadic*, TC, *supra*, note 10, para. 649.

- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.³⁹

The requirement that an attack be widespread or systematic and directed against a civilian population implies the existence of a plan or a policy.⁴⁰ This may be inferred from a series of elements.⁴¹ It does not need to have been conceived at the “highest levels of the State machinery”: individuals with *de facto* power or organised in a criminal gang can also be liable.⁴²

b. The *mens rea*

The essential mental element is the “knowledge of the broader context in which the offence occurs”.⁴³ This can either be actual or constructive.⁴⁴ It suffices that the act was related to an attack against a civilian population and to an armed conflict. The motivation, under the ICTY Statute, is irrelevant.⁴⁵ According to *Kayishema*, instead, under the ICTR Statute the execution of crimes for purely personal motives is excluded.⁴⁶

The UN Security Council observed that under customary law discriminatory grounds are no longer required for non-persecution crimes.⁴⁷ As observed by the AC in the *Tadic* Case:

“The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely ‘persecutions’ provided for in Article 5(h).”⁴⁸

However, the ICTR Statute requires that the attack was committed on national, political, ethnic, racial, or religious discrimination grounds. In the *Rutaganda* Case it was observed that:

³⁹ *Prosecutor v Blaskic*, TC, *supra*, note 11, para. 203. The existence of a plan does not however constitute a separate and additional legal element of the crime as it is neither enshrined in the Statute of the Tribunal nor a requirement under customary law. See *Prosecutor v Naletilic*, *supra*, note 14, para. 233.

⁴⁰ *Prosecutor v Kayishema*, TC, *supra*, note 23, para. 124; *Prosecutor v Bagilishema*, TC, *supra*, note 25, para. 78.

⁴¹ *Prosecutor v Blaskic*, TC, *supra*, note 11, para. 204.

⁴² *Ibid.*, para. 205.

⁴³ *Prosecutor v Kupreskic*, TC, *supra*, note 31, para. 556.

⁴⁴ *Prosecutor v Kayishema*, TC, *supra*, note 23, para. 134; *Prosecutor v Musema*, TC, *supra*, note 16, para. 206.

⁴⁵ *Prosecutor v Tadic*, AC *supra*, note 12, para. 251; *Prosecutor v Kunarac*, TC, *supra*, note 17, para. 433.

⁴⁶ *Prosecutor v Kayishema*, TC, *supra*, note 23, paras. 122 and 134. On the issue whether the ICTR and ICTY are divergent, see Arnold, *supra*, note 3, at 236.

⁴⁷ S. Ratner/J. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 2nd ed., Oxford 2001, at 64.

⁴⁸ *Prosecutor v Tadic*, AC, *supra*, note 12, para. 283.

“The Appeals Chamber in the *Tadic* Appeal ruled that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. The Appeals Chamber stated that a discriminatory intent is an indispensable element of the offence only with regard to those crimes for which this is expressly required, that is the offence of persecution, pursuant to Article 5(h) of the Statute of the International Criminal Tribunal for the former Yugoslavia (the ‘ICTY’). The Chamber considers the provisions of Article 5 of the ICTY Statute, as compared to the provisions of Article 3 of the ICTR Statute and notes that, although the provisions of both the aforementioned Articles pertain to crimes against humanity, except for persecution, there is a material and substantial difference in the elements of the offence that constitute crimes against humanity. This stems from the fact that Article 3 of the ICTR Statute expressly provides the enumerated discriminatory grounds of ‘national, political, ethnic, racial or religious’, in respect of the offences of Murder; Extermination; Deportation; Imprisonment; Torture; Rape; and; Other Inhumane Acts, whilst the ICTY Statute does not stipulate any discriminatory grounds in respect of these offences.”⁴⁹

In the Trial Chamber’s view, there is a substantial difference between Article 3 ICTR and Article 5 ICTY. Pursuant to the former, all the offences enlisted as crimes against humanity require a specific discriminatory intent. However, in the *Akayesu Appeal Judgment*, the ICTR observed that:

“Except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity.”⁵⁰

Apparently, the requirement of a discriminatory intent pursuant to the chapeau of Article 3 ICTR is a jurisdictional limitation.⁵¹ Therefore, with the exception of the crime of persecution,⁵² it must only be proven in relation to the overall attack. Another important aspect is that:

“It is the intent of the perpetrator to discriminate against a group that is important rather than whether the victim was, in fact, a member of that targeted group.”⁵³

Thus, as long as a victim was chosen to attack a group on discriminatory grounds, even if he or she does not belong to a specific targeted group, the act constitutes a crime against humanity.⁵⁴

C. International Jurisprudence on Terrorism as a Crime Against Humanity

Instances as early as the findings of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties prove that “systematic

⁴⁹ *Prosecutor v Rutaganda*, TC, *supra*, note 16, paras. 75-76; *Prosecutor v Musema*, TC, *supra*, note 16, para. 211.

⁵⁰ *Prosecutor v Akayesu*, AC, Case ICTR-94-4, Judgement of June 6, 2001, para. 464.

⁵¹ *Ibid.*, para. 465.

⁵² *Ibid.*, paras. 468-469.

⁵³ *Prosecutor v Kayishema*, TC, *supra*, note 23, para. 131.

⁵⁴ *Ibid.*, para. 132.

terrorism” was considered a crime against humanity.⁵⁵ However, the first trials for this count were held on the basis of the IMT Charter.

1. The IMT Jurisprudence

The IMT considered the terrorisation of civilians both as a war crime and a crime against humanity.⁵⁶ It held that:

“After the Nazi advent to power, and particularly after the elections of 5th March, 1933, the SA played an important role in establishing a Nazi reign of terror over Germany. The SA was involved in outbreaks of violence against the Jews and was used to arrest political opponents and to guard concentration camps, where they subjected their prisoners to brutal mistreatment ... Isolated units of the SA were even involved in the steps leading up to aggressive war and in the commission of war crimes and crimes against humanity.”⁵⁷

Particular reference was made to the “pacification” policy of the *Wehrmacht*, aimed at repressing any political opposition to the Nazi regime in the occupied territories.⁵⁸

For example Mr. Dodd, Executive Trial Counsel for the US, remarked that:

“All knew that the Gestapo was organized for the specific purpose of persecuting the victims of Nazi oppression – the Jews, the Communists, and the Churches. The right to use torture in interrogations had to be known to all who interrogated. There could be no secrecy as to the criminal aims of the Gestapo or the criminal methods by which this primary agency of terror carried out its work. And that it was an instrument of terror was known not merely to the membership – it was known throughout Germany and Europe, and in every country of the world, where the very name Gestapo became the watchword of terror and of fear ... they shall not escape condemnation for the vast crimes they have committed through a false and flimsy defense of ignorance in their own circles. For long, long years after this hall is emptied and for centuries beyond present perspective, the roll call of terror against mankind will be led by these appellations-Nazi, Nazi Party Leadership, SA, SD, SS, and Gestapo.”⁵⁹

⁵⁵ See Greppi, *supra*, note 9, at 114.

⁵⁶ The distinction between the two counts has never been clear. E.g. the IMT *Rosenberg* and the *Frank* judgements, respectively at <www.yale.edu/lawweb/avalon/imt/proc/judrosen.htm> and <<http://www.yale.edu/lawweb/avalon/imt/proc/judfrank.htm>>, found the accused guilty for both war crimes and crimes against humanity, without specifying in details the differences.

⁵⁷ IMT Judgement: The Accused Organizations, at <<http://www.yale.edu/lawweb/avalon/imt/proc/judorg.htm#sa>>. However, since it could not be proven that, beyond some specific units, the members of the SA had generally participated in or even known of the criminal acts, the Tribunal did not declare the SA to be a criminal organisation within the meaning of Article 9 IMT Charter.

⁵⁸ See the remarks of T. Taylor, Associate Trial Counsel for the US Nuremberg Trial Proceedings, Vol. 22, 215th day, Friday, 30th August 1946, at 283, at <<http://www.yale.edu/lawweb/avalon/imt/proc/08-30-46.htm>>. See also p. 276. Nuremberg Trial Proceedings, Vol. 22, 215th day, Friday, 30th August 1946, <<http://www.yale.edu/lawweb/avalon/imt/proc/08-30-46.htm>>, at 286. See also p. 287.

⁵⁹ Nuremberg Trial Proceedings, Vol. 22, 214th day, 29th August 1946, at 264-265.

General Rudenko condemned the role of the SA,⁶⁰ the SS, and the Gestapo⁶¹ in similar terms. He concluded that the Gestapo⁶² and the SD⁶³ were terrorist tools of Germany to implement its policy of crimes against humanity:

“Hitlerite Germany prepared itself for the conduct of the most ruthless war in complete contempt of the laws and customs of war. The war crimes and the crimes against humanity were committed not only against the soldiers of the peace-loving nations united against the Fascist aggressors, but also against the innocent civilian populations. Long before the treacherous aggression against the Soviet Union took place, the Government of Hitlerite Germany carefully laid plans for the monstrous extermination of the most highly cultured elements of the Soviet peoples.”⁶⁴

These considerations were recalled in the IMT’s Judgement on Crimes against Humanity:

“With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out ... The persecution of the Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the tribunal.”⁶⁵

Also the use of concentration camps was considered a terrorist tool to implement a policy of crimes against humanity.⁶⁶ This was confirmed in the *Frick*,⁶⁷

⁶⁰ Remarks of Gen. Rudenko, Chief Prosecutor for the USSR, Nuremberg Trial Proceedings, Vol. 22, 215th day, Friday 30th August 1946, <<http://www.yale.edu/lawweb/avalon/imt/proc/08-30-46.htm>> at 313-314 and 333.

⁶¹ Ibid., at 337-338.

⁶² Ibid., at 345.

⁶³ The SD was a secret organization within the SS system which, after the seizure of power by the Hitlerites, had speedily merged with the police agencies and had promptly been installed in the leading secret police positions and the cadres of both the SA and the SS. It had played a leading role in the German scheme of political intelligence and “preventive examination” of the undesirable elements both before and after the formation of the RSHA. See Gen. Rudenko, *supra*, note 60, at 345 et seq. and 357-358.

⁶⁴ Remarks of Gen. Rudenko, *supra*, note 60, at 360.

⁶⁵ Judgement: The Law relating to War Crimes and Crimes Against Humanity, at <<http://www.yale.edu/lawweb/avalon/imt/proc/judlawre.htm>>.

⁶⁶ See also the Trial Proceedings, Vol. 22, 29th August 1946, at <www.yale.edu/lawweb/avalon/imt/proc/08-29-46.htm> and the comments of Mr. T.J. Dodd (Executive Trial Counsel for the US), 260, 262.

⁶⁷ IMT Judgement: *Frick*, at <www.yale.edu/lawweb/avalon/imt/proc/judfrick.htm>. As the Supreme Reich Authority in Bohemia and Moravia, *Frick* bear general responsibility for the acts of oppression in that territory after 20th August 1943, such as terrorism of the population, slave labour, and the deportation of Jews to the concentration camps for extermination.

*Rosenberg*⁶⁸ and *Seyss-Inquart*⁶⁹ judgements. Thus, the IMT's jurisprudence is rich of precedents proving that terrorism may be a crime against humanity.

2. ICTY and ICTR Jurisprudence

In the jurisprudence of the ICTY the use of a policy of terror has been usually charged under the heading of persecution or inhumane acts.⁷⁰ For instance in *Krstic*, the accused was found guilty of persecution for having terrorised Bosnian Muslim civilians in the enclave of Srebrenica from 11 July 1995:

"The Trial Chamber characterises the humanitarian crisis, the crimes of terror and the forcible transfer of the women, children and elderly at Potocari as constituting crimes against humanity, that is, persecution and inhumane acts."⁷¹

It was concluded that:

"... On the basis of the humanitarian crisis and crimes of terror at Potocari and the forcible transfer of the women, children and elderly from Potocari to Bosnian Muslim held territory, from 11 to 13 July, General Krstic incurs responsibility under Article 7(1) for inhumane acts (forcible transfer, count 8 of the Indictment) and persecution (murder, cruel and inhumane treatment, terrorism, destruction of personal property and forcible transfer, count 6 of the Indictment)."⁷²

Also the use of concentration camps as terrorist tool was considered a crime against humanity. E.g. in the *Kvočka* Case, it was held that the use of the Omarska, Keraterm and Trnopolje camps to terrorise the Muslims, Croat and other non-Serbs detainees, amounted to persecution.⁷³ Since all the alleged offences had been committed against non-Serb detainees, it was concluded that the attack had been committed on discriminatory grounds.⁷⁴ While analysing the *mens rea*, the TC held that the accused, *Kvočka*, *Prcac*, and *Kos*, had undoubtedly known about the systematic use of physical and mental violence to threaten and terrorise the detainees.⁷⁵ Thus, they were found guilty.⁷⁶ The creation of an atmosphere of terror in these camps was considered a form of persecution also in the *Tadic* Case.⁷⁷

⁶⁸ IMT Judgement: *Rosenberg*, at <www.yale.edu/lawweb/avalon/imt/proc/judrosen.htm>. "Rosenberg had knowledge of the brutal treatment and terror to which the Eastern people were subjected. ... The Tribunal finds that Rosenberg is guilty on all four counts." (Including count four on crimes against humanity.)

⁶⁹ Judgement of *Seyss-Inquart*, at <<http://www.yale.edu/lawweb/avalon/imt/proc/judseyss.htm>>: "As Reichs Commissioner for Occupied Netherlands, Seyss-Inquart was ruthless in applying terrorism to suppress all opposition to the German occupation, a programme which he described as "annihilating" his opponents. ... The Tribunal finds that Seyss-Inquart is guilty under Counts Two, Three and Four."

⁷⁰ For details, see Arnold, *supra*, note 3, at 246 et seq.

⁷¹ *Prosecutor v Krstic*, TC Judgment of August 2, 2001, Case No. IT-98-33, para. 607. See also paras. 533, 537, 538, 727.

⁷² *Prosecutor v Krstic*, TC, *supra*, note 71, para. 653.

⁷³ *Prosecutor v Kvočka*, TC Judgment of November 2, 2001, Case IT-98-30/1, para 117.

⁷⁴ *Ibid.*, para. 197.

⁷⁵ *Ibid.*, para. 384, 448, 488.

Indications, as *obiter dicta*, that conducts aimed at implementing a policy of terror are crimes against humanity, were provided in the *Foca* and *Kupreskic* cases.⁷⁶ In *Kupreskic*, the TC referred to the *Tadic* Case, which held that:

“[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”⁷⁹

The TC found that the killing and wounding of the inhabitants of Ahmici, a small village in central Bosnia, and the destroying of 169 houses and two mosques, had had:

“the ultimate goal to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes.”

It was concluded that this had amounted to the crime against humanity of persecution.⁸⁰ Other decisions like *Kordic* and *Cerkez* prove that acts like plundering and wanton destruction, when aimed at terrorising the population and based on discriminatory intent, may amount to crimes against humanity.⁸¹ In conclusion, there is no doubt that the ICTY considered acts based on a policy of terror as a breach of the provisions on crimes against humanity.

The jurisprudence of the ICTR is not rich of precedents on whether terrorist acts may constitute crimes against humanity. The only interesting case is *Kayishema and Ruzindana*, in which the Prosecutor observed that the use of terrorist methods may cause such a serious mental and physical harm to amount to genocide, provided that it was committed with the required *mens rea*:

“The Prosecution ... submits that non-physical aggressions such as the infliction of strong fear or strong terror, intimidation or threat are also serious mental harm ... The phrase “serious mental harm” should ... be determined on a case-by-case. The Prosecution submits that there is no prerequisite that mental suffering should be the result of physical harm. The Prosecution relies upon the commentary offered in the Preparatory Committee’s Definition of Crimes that suggests that serious mental harm should include ‘more than minor or temporary impairment on mental faculties’. The Prosecution suggested that the inflicting of strong fear or terror, intimidation or threat may amount to serious mental harm.”⁸²

It should be recalled that genocide is a special type of crime against humanity, which distinguishes itself from the others through the requirement of a special genocidal intent. Thus, the jurisprudence of the ICTY and ICTR, the statutes of

⁷⁶ Ibid., para. 419, 470, 504.

⁷⁷ *Prosecutor v Tadic*, Second amended Indictment of December 14, 1995, Case No. IT-94-1-I, para. 4, at <<http://www.un.org/icty/indictment/english/tad-2ai951214e.htm>>.

⁷⁸ *US v Milch*, Judgement of July 31, 1948, reprinted in: *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. II* (1997), at 789-791, cited in *Prosecutor v Kunarac*, *supra*, note 17, at FN 1272.

⁷⁹ *Prosecutor v Kupreskic*, TC, *supra*, note 31, at 550, FN 809.

⁸⁰ Ibid., paras. 749/751.

⁸¹ *Prosecutor v Kordic and Cerkez*, TC Judgement of February 26, 2001, Case IT-95-14/2, at para. 205.

⁸² *Prosecutor v Kayishema*, TC, *supra*, note 23, paras. 107, 110.

which restate the customary definition of crimes against humanity, show that acts of terrorism, given the circumstances, may be prosecuted under this heading. However, the jurisdiction of these tribunals is limited to the conflicts which occurred in Rwanda and the Former Yugoslavia in the 1990s. It is therefore interesting to examine whether these acts may be prosecuted as crimes against humanity also under the statute of the recently constituted permanent International Criminal Court.

D. Terrorism as a Crime Against Humanity Under the ICC Statute

1. The Definition of Crimes Against Humanity Under the ICC Statute⁸³

Article 7 ICC Statute is based on customary law.⁸⁴ As such, it does not provide for any nexus with the war.⁸⁵ Common requirements are the commission of the crimes within the framework of a widespread or systematic attack, on the basis of a policy – be this state or non-state based – and against a civilian population. However, the attack needs neither to be armed – as under the UN Charter – nor based on discriminatory grounds – as required by the ICTR Statute. Another important element is that the notion of “civilians”, within the context of crimes against humanity, may also encompass POWs and former combatants. An aspect that will need to be clarified by the ICC, is whether its Statute may also cover combatants.

The ICC Statute further conforms to international law regarding perpetrators, who can be civilians or military personnel, state or non-state representatives.

a. The *actus reus*

The ICC Statute enumerates eleven offences, including (a novelty) crimes of sexual violence and forcible transfer of the population.⁸⁶ This list is illustrative,⁸⁷ due to the open provision of “inhumane acts”. The only restriction is that the latter must be “of a similar character (of the other enlisted conducts) aimed at intentionally causing great suffering, or serious injury to body or to mental, or physical health”.⁸⁸

⁸³ For details, see Arnold, *supra*, note 3, at 255 et seq.

⁸⁴ R. Dixon, Crimes Against Humanity, in: Triffterer, *supra*, note 1, 117-128, at 123.

⁸⁵ *Ibid.*, at 125, 127; R.S. Lee, The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results, The Hague 1999, at 92-93.

⁸⁶ On the drafting history, see Lee, *supra*, note 85, at 101.

⁸⁷ M. Boot, Crimes Against Humanity, in: Triffterer, *supra*, note 1, 129-166, at 155; Greppi, *supra*, note 9, at 180.

⁸⁸ K. Kittichaisaree, International Criminal Law, Oxford 2001, at 90.

Like the ICTY Statute,⁸⁹ also Article 7 ICC Statute requires a discriminatory ground only for the crime of persecution, enshrined in paragraph (1)(h).⁹⁰

Similarly, also under the ICC Statute the acts must occur as part of an attack.⁹¹ This criterion is a jurisdictional threshold.⁹² There must be a sufficient nexus between the acts and the overall attack, even though the required degree is not specified.⁹³

An attack is a “course of conduct involving the multiple commission of acts referred to in Article 7”⁹⁴ which does not need to be military.⁹⁵ Thus, it does not equate to an “armed conflict” in the sense of IHL.⁹⁶ According to Article 7(2)(1), it must be widespread or systematic, meaning that it has to involve at least multiple acts and emanate from (follow) or contribute (promote) to a State or organisational policy.⁹⁷

The attack must be based on a policy. This may be promoted both by state and non-state actors with *de facto* powers.⁹⁸ The policy can be pursued actively or by omission. As indicated by the Elements of Crime:

“It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.”⁹⁹

With regard to the requirements of “widespread or systematic” the drafters of the Elements of Crimes decided to leave the matter to the evolving jurisprudence of the ICC.¹⁰⁰ The same approach was adopted in relation to the meaning of “civilian population”.¹⁰¹ However, according to various authors, under Article 7 ICC

⁸⁹ *Prosecutor v Tadic*, AC, *supra*, note 12, para. 283.

⁹⁰ Dixon, *supra*, note 84, at 123; H. von Hebel/D. Robinson, Crimes Within the Jurisdiction of the Court, in: Lee, *supra*, note 85, 79-126, at 93.

⁹¹ Dixon, *supra*, note 84, at 124; Greppi, *supra*, note 9, at 178.

⁹² R. Clark, Crimes Against Humanity and the Rome Statute of the International Criminal Court, in: R. Clark *et al.* (eds.), *Essays in Honor of George Ginsburgs: International and National Law in Russia and Eastern Europe*, The Hague 2001, 139-156, at 152.

⁹³ Dixon, *supra*, note 84, at 125.

⁹⁴ Elements of Crime, UN Doc. PCNICC/2000/1/Add.2, Introduction to Article 7. See also Dixon, *supra*, note 84, at 124. For the notion of attack under the ICTY Statute, see *Prosecutor v Kunarac*, *supra*, note 17, para. 415, referring to *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Form of the Indictment, November 14, 1995, para. 11.

⁹⁵ Elements of Crime, *supra*, note 94, Introduction to Article 7. See also Dixon, *supra*, note 84, at 124.

⁹⁶ Greppi, *supra*, note 9, at 174.

⁹⁷ Boot, *supra*, note 87, at 158.

⁹⁸ Elements of Crime, *supra*, note 94, Introduction to Article 7. See also Boot, *supra*, note 87, at 159.

⁹⁹ Elements of Crime, *supra*, note 94, Introduction to Article 7.

¹⁰⁰ D. Robinson, The Context of Crimes Against Humanity, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley 2001, 61-79, at 78. Debates arose on whether the threshold should be lower than the one imposed by the ICTR in the *Akayesu Case*, *supra*, note 16. See also the analysis of this work on the notion of crimes against humanity under the ICTR Statute.

¹⁰¹ Robinson, *supra*, note 100, at 78.

Statute, the word “civilians” implies persons of any nationality who have not taken an active part in hostilities, or are no longer doing so.¹⁰²

b. The *mens rea*

As long as the perpetrator knew about the widespread or systematic attack on the civilian population, his/her personal reasons are irrelevant.¹⁰³ With regard to the existence of a policy, some delegations held that according to the jurisprudence of the UN *ad hoc* tribunals, knowledge of it by the perpetrator is required.¹⁰⁴ Although the Elements do not seem to provide for this, paragraph two of the introduction indicates that the perpetrator needs not to know all the details of the policy. This suggests that he must have had at least some awareness of it. The ambiguities will have to be cleared by the ICC.¹⁰⁵

2. The Applicability of Article 7 ICC Statute to Terrorism

Terrorism was excluded from Article 7 ICC Statute.¹⁰⁶ Nevertheless, there may be two ways in which terrorism may be prosecuted under this provision: as one of the enlisted sub-categories of crimes against humanity, or as an “inhumane act” pursuant to Article 7(1)(k).¹⁰⁷

a. Terrorism as One of the Enlisted Sub-Conducts

One of the most relevant provisions is murder (Article 7(1)(a)). A specific requirement is that the perpetrator killed or “caused the death” of one or more persons. The two terms are interchangeable.¹⁰⁸ Events like the 11th September attacks could be prosecuted under this heading. The acts were multiple and co-ordinated, causing the death of thousands of people, in furtherance of Al Qaeda’s terrorist policy against the United States.¹⁰⁹ Thus, they were “systematic”. Since they were aimed at several targets (the Twin Towers, the Pentagon and the White House),

¹⁰² Dixon, *supra*, note 84, at 127; Greppi, *supra*, note 9, at 179.

¹⁰³ See the Elements of Crime, *supra*, note 94, Introduction to Article 7; Greppi, *supra*, note 9, at 179; Robinson, *supra*, note 97, at 73.

¹⁰⁴ *Prosecutor v Kayishema*, *supra*, note 23, para. 133.

¹⁰⁵ Robinson, *supra*, note 100, at 73.

¹⁰⁶ See UN Doc. A/CONF.183/C.1/L.27.

¹⁰⁷ For details see Arnold, *supra*, note 3, at 262 et seq. See also A. Casese, Terrorism is also Disrupting Some Crucial Legal Categories of International Law, 2001 (12) European Journal of International Law 993, at 993.

¹⁰⁸ Elements of Crime, *supra*, note 94, at 159.

¹⁰⁹ J.D. Fry, Terrorism as a Crime Against Humanity and Genocide: the Backdoor to Universal Jurisdiction, (2002) 7 UCLA Journal of International Law and Foreign Affairs 169, 190.

they were also “widespread”. The victims were civilians, at least in the case of the World Trade Centre. With regard to the army officials working at the Pentagon, it could be argued that at the moment of the attack, they were performing administrative functions. They were not involved in any armed hostilities. Thus, as non-military targets, they could be considered civilians under Article 7 ICC Statute.¹¹⁰

More problematic is the case of “classical” forms of terrorism, which often occur as isolated events. It is, e.g., questionable whether the Lockerbie incident would amount to a widespread and systematic attack. It caused a great number of victims (270) and it was grave, as underlined by the UN Security Council,¹¹¹ which declared to be:

“Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardise the security of States.”¹¹²

Thus, it was widespread. Whether these acts were systematic, depends on whether they were based on a policy of the Libyan government or another organisation. None of the Lockerbie trials dealt with state responsibility.¹¹³ At Camp Zeist (NL), the Scottish courts only dealt with the individual criminal responsibility of two Libyan suspects. In the ICJ dispute between Libya and the UK, the matter was the interpretation of the 1971 Montreal Convention.¹¹⁴ On the other hand, other sources suggest a link with the Libyan Intelligence Services.¹¹⁵ Similarly, in UN Resolution 731 (1992), the SC declared to be “Deeply concerned over results of investigations which implicate officials of the Libyan Government”. The circumstances are unclear. However, they indicate the existence of a detailed plan which would suggest that events like the Lockerbie incident may be prosecuted as crimes against humanity.

¹¹⁰ See *Prosecutor v Bagilishema*, *supra*, note 25, para. 79; Fry, *supra*, note 109, at 191, stating that what matters is the victim’s role at the moment of the attack, rather than his/her status.

¹¹¹ Res. 731 (1992), 21st January 1992; Res. 748 (1992), 31st March 1992; Res. 883 (1993), 11th November 1993; Res. 1192 (1998), 27th August 1998.

¹¹² UN SC Res. 731 (1992), 21st January 1992

¹¹³ A deal has been made between the governments of Libya and France according to which Libya will pay compensation for the bombing of the PanAm flight. Although this may amount, *de facto*, to a recognition of guilt by the Libyan government, there has been no court establishing its criminal responsibility. On this see BBC, “Libya Agrees Bombing Deal”, BBC News, UK Edition, 1st September 2003, at <<http://news.bbc.co.uk/1/hi/world/europe/3197095.stm>>.

¹¹⁴ Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v UK*) (1992), ICJ, 27th February 1998, at <<http://www.icj-cij.org/icjwww/idocket/iluk/iluk2frame.htm>>.

¹¹⁵ Appeal Judgement in the Case *Lord Justice General in Appeal against conviction of Abdelbaset Ali Mohmed Al Megrabi vs Her Majesty’s Advocate*, Appeal No: C104/01, 14th March 2000, at 5, para. 3, available at <http://www.scotcourts.gov.uk/html/lockerbie_appeal.htm>. See also para. 82 of the Trial Judgement, *Her Majesty’s Advocate v Abdelbaset Ali Mohmed Al Megrabi and Al Amin Khalifa Fhimah, High Court of Justiciary at Camp Zeist (Kamp van Zeist)*, The Netherlands, Case No: 1475/99, at <<http://www.scotcourts.gov.uk/html/lockerbie.htm#verdict>>: “The clear inference which can be drawn from this evidence is that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin.”

With regard to the hijackings perpetrated by Palestinian movements in the 1970s-1980s the situation is clearer, since these were based on a policy of self-determination by political movements like the PLO.¹¹⁶ As seen, it is sufficient that there was a single killing, perpetrated in the knowledge of the existence of a policy aimed at a widespread and systematic attack. Analogously, also suicide bombing attacks could be viewed as forming part of a widespread and systematic attack and considered as crimes against humanity.¹¹⁷

An interesting question, however, is the time that may elapse between different acts, in order for these to be considered as forming part of the same overall attack. If time is irrelevant, the attacks of 28th November 2002 in Mombasa (Kenya) against an Israeli-owned hotel and the Bali terrorist attack in 2002 could be considered as forming part of the same widespread and systematic attack, in furtherance of Al Qaeda's terrorist policy.¹¹⁸ Thus, even though the killing of thirteen people in Mombasa may not appear, *prima facie*, as a widespread attack, if considered within the broader picture, it may constitute a crime against humanity, too.¹¹⁹ All depends on the understanding of the notion of "attack". It is questionable whether it may be constructed on the basis of a sort of "accumulation of events theory", like the one developed by Israel to justify recourse to self-defence under Article 51 UN Charter.¹²⁰

With regard to the *mens rea*, the advantage is that only the intentional commission of the sub-offences (like murder etc. ...) needs to be proven. This does not constitute a problem in relation to acts of terrorism.

A further relevant norm is Article 7(1)(e), which outlaws "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". The IMT considered a crime against humanity the unlawful internment of German political opponents in concentration camps.¹²¹ Thus, this provision may address state terrorism, in particular the case of enforced disappearances of political opponents. Unlike Article 8, Article 7 ICC Statute additionally addresses this phenomenon in a specific sub-heading, i.e. paragraph (1)(a)(i). The Elements require that the perpetrator arrested, detained, or abducted one or more persons and that he refused to acknowledge

¹¹⁶ E.g. the Popular Front for the Liberation of Palestine (PFLP), Hamas, Force 17. See HRW, "Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians", October 2002, Chapter V, at <www.hrw.org/reports/2002/isrl-pa/>.

¹¹⁷ See HRW, *supra*, note 116, Chapter IV.

¹¹⁸ Information available on the website of the International Policy Institute for Counter-Terrorism (ICT), Herzliya (Israel), at <<http://www.ict.org.il/>>.

¹¹⁹ See Fry, *supra*, note 109, at 190, who considers the 11th September attacks as part of a "coordinated assault against the United States that has continued for almost a decade". However, in his view acts like the 1993 bombing of the World Trade Center and the two US Embassy bombings in 1998 are not part of the same attack, but part of the same "battle" of Bin Laden vs the US.

¹²⁰ See Arnold, *supra*, note 3, at 265.

¹²¹ Nuremberg Trial Proceedings, Vol. 1, Indictment: Count One, para. 3 (a): consolidation of control, at <www.yale.edu/lawweb/avalon/imt/proc/count1.htm>. See the jurisprudence of the IMT on the prosecution of terrorism as a crime against humanity.

that deprivation of freedom or to give information on the fate or whereabouts of such person or persons. The case of the enforced disappearances organised by states to terrorise the internal political opposition is simpler as it occurred in relation to the Night and Fog Decree implemented by the Nazi regime during WWII and was condemned as a crime against humanity by the IMT.¹²²

Article 7(1)(e) ICC may cover also hostage-taking, which implies the unlawful severe deprivation of a person's physical liberty. However, this should occur along with other acts forming part of a widespread and systematic attack. It may be argued, for instance, that the Dubrovka Theatre hostage taking in October 2002, together with the Beslan school attack in September 2004, perpetrated in furtherance of the Chechenian battle for independence,¹²³ was policy based and systematic. Moreover, due to the large number of victims, it was also widespread and, therefore, it constituted a crime against humanity.

Terrorism may further be prosecuted under the heading of torture, Article 7(1)(f). Like Article 8(2)(a)(ii), this provision was based on the 1984 Torture Convention and, likewise, it omits the requirement of a connection to a public official.¹²⁴ Since no purpose is required, the difference between terrorism constituting torture under Article 7(1)(f) or an inhumane act under Article 7(1)(k) lies in gravity of the harm inflicted.¹²⁵ As long as a terrorist attack has a grave effect on the mental state of a person, it may be prosecuted under this heading. A final relevant provision is Article 7(1)(h), which outlaws:

“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

Pursuant to Article 7(2)(g), persecution is the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of the group or a collectivity to which an individual belongs.¹²⁶ It requires discriminatory intent based on political, racial, national, ethnic, cultural, religious, gender, and other grounds universally recognised as impermissible under international law.¹²⁷ Unlike under the heading of genocide, cultural and political groups are pro-

¹²² See the IMT jurisprudence on crimes against humanity referred to earlier. See also Ch.K. Hall, *Enforced Disappearance of Persons*, in: Triffterer, *supra*, note 1, 151-152, 151.

¹²³ BBC, “Hostages Speak of Storming Terror”, BBC News World Edition, 26th October 2002, at <<http://news.bbc.co.uk/2/hi/europe/2363679.stm>>; BBC, “How Special Forces Ended Siege”, BBC News World Edition, 29th October 2002, at <<http://news.bbc.co.uk/2/hi/europe/2363601.stm>>. BBC, Excerpts: Basayev Claims Beslan, 17th September 2004, at <<http://news.bbc.co.uk/1/hi/world/europe/3665136.stm>>.

¹²⁴ D. Robinson, *Article 7(1)(f) – Crime Against Humanity of Torture*, in: Roy S. Lee (Ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague 1999, 80-122, at 90-92.

¹²⁵ Kittichaisaree, *supra*, note 88, at 112.

¹²⁶ Article 7(1)(h) and (2)(g) ICC Statute. The provision was loosely based on the approach of the 1996 ILC Draft Code and the ICTY.

¹²⁷ Bot, *supra*, note 87, at 148.

tected, too. The persecutory act, however, must have a link with another crime within the jurisdiction of the Court (e.g. war crimes), or an act referred to in Article 7(1).¹²⁸

If a “but for test” is applied, meaning that unless the victims had a specific identity (political, racial, national, ethnic, cultural, religious, etc. ...) the crime against humanity of persecution would have not been committed, it may be argued that the 11th September attack would not fall within this category. Most victims were US citizens. However, they were not the primary targets of the attack, nor were they targeted because of their nationality. The real target were the Twin Towers and what they represented, i.e. Western society.

The Bali attack of 12th October 2002, instead, may come closer to the crime against humanity of persecution. The site was in fact chosen to hit the numerous Australian tourists, as a reprisal by Al Qaeda against Australia’s alliance with the US in the war on terror.¹²⁹ Thus, it may be argued that there was a discriminatory intent based on nationality and political views.

The case of the series of aircraft and ship hijackings perpetrated by Palestinian movements is even clearer. These had a discriminatory intent, in that they were primarily aimed at Israeli citizens, as for example, in the Entebbe incident, the 1972 Munich Olympic attacks, or the Achille Lauro hijacking.

b. Terrorism as an “Inhumane Act”¹³⁰

The relevant elements of Article 7(1)(k)¹³¹ are that:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.

This provision was intended to encompass all inhumane acts.¹³² It only requires that these be of a character similar to the other acts enlisted in Article 7(1).¹³³ As clarified by the 1996 ILC Draft Code, these must be acts:

¹²⁸ G. Witschel/W. Rückert, Article 7(1)(h) – Crime Against Humanity of Persecution, in: Lee, *supra*, note 100, 94-97, at 95.

¹²⁹ BBC, “Bali Attack “Targeted Australians””, 10th February 2003, BBC News World Edition, at <<http://news.bbc.co.uk/2/hi/asia-pacific/2743679.stm>>; A. Shubert, “Bali Bombing Trial Opens”, 12th May 2003, CNN.com World, at <<http://edition.cnn.com/2003/WORLD/asiapcf/southeast/05/12/bali.bomb/index.html>>. The attack was apparently perpetrated by the Jemaah Islamiyah, which has close links to Al Qaeda.

¹³⁰ See Arnold, *supra*, note 3, at 271 et seq.

¹³¹ Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹³² G. Witschel/W. Rückert, Article 7(1)(k) – Crime Against Humanity of Other Inhumane Acts, in: Lee, *supra*, note 100, 106-108, at 106.

¹³³ Witschel/Rückert, *supra*, note 128, at 108.

“which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.¹³⁴

As mentioned, the difference from the crime of torture lies in the lower gravity of the harm inflicted, which, pursuant to the general *mens rea* criteria set by Article 30 ICC Statute, must be intentional.

Thus, this provision may be used as an “all catch up norm” for cases of terrorism not falling under any other sub-heading of crimes against humanity, as long as the acts were intended to inflict the kind of damage envisaged by this provision.

E. Conclusions

Although terrorism was excluded as a specific provision from the ICC Statute, there are several elements suggesting that it may nevertheless be prosecuted under the heading of crimes against humanity. In particular, it could be addressed as the sub-offence of murder, torture, deportation, or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, persecution, enforced disappearance, and, more generally, as an inhumane act pursuant to Article 7(1)(k).

This approach finds support in the post WWII jurisprudence, as proven by the numerous instances provided both by the International Military Tribunal of Nuremberg and the two UN ad hoc tribunals.

The advantages of prosecuting terrorism under this heading are numerous. First of all, the offences can be committed by everyone, including non state actors. Secondly, a wide range of victims is covered, including every person who is not performing *de facto* combating functions, independently from his or her nationality. The latter aspect proves to be a major advantage to the prosecution of acts of terrorism under the heading of war crimes, particularly where such acts are perpetrated by a state against its own nationals. Thus, crimes against humanity cover diplomats, government representatives, detainees, prisoners of war, members of the armed forces who are either sick, wounded or more generally *hors de combat*, as well as common civilians who own the same nationality of the perpetrators. What matters is the function exercised during the attack. It is moreover possible that the ICC’s jurisprudence may develop the notion of civilians so as to encompass combatants as well, thereby filling a gap of IHL. Under humanitarian law, in fact, the idea is that terror is intrinsic to war. Since it is the combatants’ job to fight and deal with such strategies, terrorist attacks against them do not constitute a breach of the laws of war.

Thirdly, it would not be necessary to discuss whether the policy lying behind such acts was legitimate or not. As long as an act is committed in furtherance of a policy, it shall be banned.

¹³⁴ 1996 International Law Commission Report, Chapter II, Draft Code of Crimes Against the Peace and Security of Mankind, Article 18, at <<http://www.un.org/law/ilc/texts/dcodefra.htm>>.

With regard to the fact that terrorist attacks are often single events, it could be argued that as long as these had a sufficient nexus with other similar acts, they formed part of an overall widespread or systematic attack, constituting a crime against humanity. Those acts which would not be “caught” by Article 7 ICC Statute, are probably so random and low profiled that they are probably better addressed by national legal provisions like murder.

There would be, in particular, several procedural advantages in prosecuting terrorism as a crime against humanity, particularly in respect of the law enforcement mechanisms. These for instance, often do not provide for the principle of universal jurisdiction. They rather encompass the principle “*aut dedere aut iudicare*”, which, however, as shown in the *Lockerbie* Case, does not always work as it should.¹³⁵ International and national legal instruments referring to the category of crimes against humanity, instead, subject these to the principle of universal jurisdiction, which permits to reduce the risk of terrorist suspects finding safe havens. Moreover, as long as a crime is subject to the jurisdiction of the ICC, where a state should prove to be unwilling or unable to prosecute a suspect, the court may intervene as a “watchdog”. In very grave cases, moreover, the case may be referred to it by the UN Security Council.

Another advantage, related to the prosecution of terrorism as a crime against humanity under the ICC Statute, is that the other restrictions imposed by extradition law would not apply. In fact, the ICC Statute only refers to an act of “surrendering the suspects” to the court, a different notion.¹³⁶

In conclusion, the possibility to prosecute acts of terrorism under the heading of crimes against humanity may prove to be a valid alternative to the existing anti-terrorism law enforcement mechanisms, which have often proven to be impeded by the lack of international cooperation in penal matters, or by the hurdles created by extradition law. This holds true both for member and non-member states to the ICC, since the heading on crimes against humanity is based on customary law, i.e. it is applicable universally. Thus, such acts could be prosecuted universally by every state who has adopted legislation on crimes against humanity. Additionally, particularly where a state would feel uneasy about prosecuting himself a case because of its political sensitivity, it may address the case to a partial, independent and international court, where also the judicial guarantees of the accused would be guaranteed.

¹³⁵ Arnold, *supra*, note 3, at 12 et seq.

¹³⁶ *Ibid.*, at 63 et seq.