

10-31-2010

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### Recommended Citation

Galingging, Ridarson (2010) "PROSECUTING ACTS OF TERRORISM AS CRIMES AGAINST HUMANITY UNDER THE ICC TREATY," *Indonesian Journal of International Law*: Vol. 7: No. 4, Article 6.

DOI: 10.17304/ijil.vol7.4.245

Available at: <https://scholarhub.ui.ac.id/ijil/vol7/iss4/6>

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# Prosecuting Acts of Terrorism as Crimes Against Humanity Under The Icc Treaty

Ridarson Galingging<sup>1</sup>

*This article explores the possibility of prosecuting terrorism as crimes against humanity under the ICC treaty. Even-though terrorism is not explicitly mentioned as a crime that falls under the jurisdiction of the International Criminal Court, it can however be adjudicated at the ICC by interpreting it as included in Article 7 of the Rome Statute. Article 7 of the ICC Statute can be used as a legal basis for prosecuting terrorist acts if the acts fulfill the Article's general requirements. The text of the Rome Statute does not need to be amended in order to encompass acts of terrorism.*

**Keywords:** terrorism, crime against humanity, ICC treaty, Rome Statute

## I. Introduction

The idea of including terrorism under the jurisdiction of an international criminal court is not something new. Long before the existence of the International Criminal Court (the ICC) Statute, when the Convention for the Prevention and Punishment of Terrorism was adopted in 1937, terrorism was the jurisdiction of the international criminal court that was created under this Convention. However, the Convention never entered into force, and the court was never implemented.

When the ICC was still in its early stage, during the negotiation process of the ICC treaty, several states expressed the wish to include acts of international terrorism under ICC jurisdiction. Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Srilanka, Tajikistan, and Turkey all voiced the opinion that the treaty should address such crimes.<sup>2</sup>

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<sup>2</sup> Vincent-Joel Proulx, Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?, 19 Am. U. Int'l L. Rev. 1009, 2004, p. 5.

Extensive debate that occurred during the negotiation process of the ICC focused on the possibility of encompassing within the jurisdiction of the ICC certain "treaty crimes"-including the terrorism crimes defined in the treaties on hijacking and aircraft sabotage, crimes against internationally protected persons, hostage taking, sabotage of marine navigation, and the like.<sup>3</sup>

There are many strong reasons why states wish to include terrorism as ICC crimes. State sponsored terrorism is one of them. The international community needs an international authority to adjudicate international terrorism for terrorist acts that involve states. Resort to supra-national authority is sought to safeguard against perpetrator's being shielded from justice by the states that have sponsored their terrorist acts. The ICC would be intended to provide both the supra national authority to assure that the case would be pursued and also to provide the criminal forum in which the case would be tried.<sup>4</sup>

The support for adopting terrorism within the ICC crimes was clearly stated in International Law Commission's draft on the ICC Statute. International jurisdiction over terrorism was proposed in International Law Commission's 1994 Draft Statute for the ICC under the category of "treaty crimes" i.e., offenses criminalized under various treaty regimes, including terrorism, drug trafficking, apartheid, and grave breaches of the four 1949 Geneva Conventions.<sup>5</sup> However, the Rome Statute's Preparatory Committee dropped the treaty crimes proposed in the ILC's 1994 Draft Statute for the ICC. It felt strongly that the Court's Statute should define the crimes within its jurisdiction, rather than simply list them as the International Law Commission's Draft had done. The failure to reach a consensus on the definition of the treaty crimes prevented terrorism from falling under the Court's jurisdiction.<sup>6</sup>

Thus as we can see, the ICC currently does not have jurisdiction over

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<sup>3</sup> Madeline Morris, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Terrorism: The Politics of Prosecution*, 5 Chi. J. Int'l. L. 405, Winter, 2005, p.7.

<sup>4</sup> Madeline Morris, *Prosecuting Terrorism: The Quandaries Of Criminal Jurisdiction and International Relations* in Wybo P. Heere (ed), *Terrorism and the Military: International Legal Implications*, T.M.C. Asser Press, The Hague, 2003, p.135.

<sup>5</sup> Richard J. Goldstone and Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 Harv. Hum. Rts. J. 13, Spring, 2003, p 2.

<sup>6</sup> Richard J. Goldstone and Janine Simpson, *Id.* at 2.

acts of terrorism as a distinct category of international crime. There is no explicit term on terrorism written in Article 5 of the ICC Treaty that regulates its jurisdiction. The ICC has been provided with only jurisdiction on the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

Besides the non-existence of the treaty crimes' definition, the adoption of these Article 5 crimes within the ICC jurisdiction is based on the consideration that they are the most serious crimes of concern to the international community as a whole. Terrorism was still not considered as one of the most serious crimes. Different situation applies to the crimes of aggression which was adopted as ICC crimes, despite the fact that there is no consensus on its definition. Article 5 (2) of the ICC Statute delays the Court's jurisdiction over the crime of aggression once a provision defining the crime is adopted.

Furthermore, the exclusion of terrorism from ICC jurisdiction is also based on the fact that anti-terrorism treaties do not foresee universal jurisdiction, but only a subsidiary form, i.e., the *aut dedere aut iudicare principle*. This principle imposes on states the duty to either prosecute or, in the case where there lacks a jurisdictional basis, to extradite the accused. But this principle does not automatically provide for universal jurisdiction.<sup>7</sup> The drafters of the ICC wanted to limit the ICC's jurisdiction over customary law crimes which are already subject to universal jurisdiction in every potential member state.<sup>8</sup>

Lucy Martinez<sup>9</sup> provides detailed reasons for dropping the "treaty crimes". He opined that the decision at the Rome Conference to limit the Statute, and the Court, to the four crimes as stipulated in Article 5 and to drop the "treaty crimes" provision, was based on eight overlapping factors: the recognition that the core crimes were the crimes of the greatest concern to the international community; the conclusion that the core crimes enjoyed clear status under customary international law; the concern that the inclusion of other crimes, such as international drug trafficking and terrorism,

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<sup>7</sup> Roberta Arnold, *The ICC As A New Instrument For Repressing Terrorism*, Transnational Publishers, Ardsley, 2004, p 56.

<sup>8</sup> Roberta Arnold, *Id.* at 56.

<sup>9</sup> Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 Rutgers L. J. 1, Fall 2002, p.6-7.

would impede acceptance of the Rome Statute; the view that the treaty crimes were of a different character than the core crimes, and the related view that there were effective systems of international cooperation already in place for the treaty crimes; the concern to avoid overburdening the Court with cases that were considered to be less important; the lack of a generally accepted definition of the crime of terrorism; the concern that the inclusion of the crime of terrorism might politicize the Court to a very high degree; and the hope that limiting the Court's jurisdiction would facilitate a coherent and unified approach to the exercise of jurisdiction and requisite State cooperation.

In addition, those who advocated exclusion of terrorism argued that the ICC would be unable to investigate cases as efficiently and effectively as national governments would be able to do and, also, that the inclusion of terrorism and drug trafficking within the ICC jurisdiction would overburden the limited investigative and prosecutorial resources of the ICC.<sup>10</sup> The American delegation firmly opposed the inclusion of terrorism in the treaty, and remained a persistent objector.

Even though decision ultimately taken was to exclude "treaty crimes" from the jurisdiction of the ICC, resolution E, adopted at the last moments of the Rome conference at which the ICC Treaty was adopted, provides for reconsideration of the inclusion of the "treaty crimes".<sup>11</sup> Resolution E states that the Rome Conference, "Affirms that the Statute of the ICC provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court, and recommends that a Review Conference...consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".<sup>12</sup>

The need for adjudicating terrorism at the international fora has not faded away with the adoption of the ICC treaty that explicitly excludes terrorism in Article 5. September 11<sup>th</sup> attacks on the US have revived the international concern to terrorism.

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<sup>10</sup> Madeline Morris, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Terrorism: The Politics of Terrorism*, 5 *Chi. J. Int'l L.* 405, Winter, p. 11.

<sup>11</sup> Madeline Morris, *Id.* at 7.

<sup>12</sup> Madeline Morris, *Id.* at 7.

In the light of the priority now being given to anti-terrorist measures, the question have arisen in academic contexts as to the extent to which terrorist offences can fall under the definition of 'crimes against humanity' and 'war crimes' as stated in the ICC Statute. Some authors still defend the inclusion of terrorism under ICC jurisdiction, and their argument is growing stronger, particularly as global consensus denouncing the acts of September 11<sup>th</sup> and seeking to prevent the recurrence of such a tragedy has grown.<sup>13</sup>

Prior to September 11<sup>th</sup>, 2001, the international community was much less inclined to consider terrorism as a global concern. Now days there is widespread conviction that terrorism may pose a threat to international peace and security, as expressed in UN SC Res 1368, 2001.<sup>14</sup>

There are two ways on how to include international terrorism within the ICC jurisdiction. The first way is by amending the ICC Statute, which can happen no earlier than seven years after the Statute has come into force (i.e., 2009). Moreover, if such an amendment is made to the Statute, it will only be binding on those States Parties that accept it. In the interim, other kinds of fora must be used to prosecute any acts of terrorism that occur.<sup>15</sup> The second way is done without amending the ICC Statute but by interpreting acts of terrorism as crimes that fall under the definition of one of the crimes already within the ICC competence.

Vincent-Joel Proulx<sup>16</sup> has identified at least five situations where the ICC could exercise jurisdiction: *First*, the Lockerbie situation<sup>17</sup> In this case, referral of the matter to an independent tribunal like the ICC might have been the proper response to the Lockerbie dilemma. Here, two governments are deadlocked over the surrender of suspected terrorists; *Second*, a human rights/due process perspective warrants consideration. In a situation where a government does not believe that its nationals will receive the full benefit of procedural and human rights guarantees if they are prosecuted in the state requesting extradition, referring the matter to the ICC would be a

<sup>13</sup> Vincent-Joel Proulx, *supra* note 1, at 6.

<sup>14</sup> Roberta Arnold, *supra* note 6, at 60.

<sup>15</sup> Richard J. Goldstone and Janine Simpson, *supra* note 4, at 6.

<sup>16</sup> Vincent-Joel Proulx, *supra* note 1, at 2-3.

<sup>17</sup> See case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie in Libyan Arab Jamahiriya v. United Kingdom, 1992 I.C.J. 3, April 14, 1992.

<sup>18</sup> See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).



reasonable middle ground. *Third*, as in the Yunis situation<sup>18</sup>, government resorts to a forcible abduction of suspected terrorists as the only means to bring them to trial, where other avenues have failed. In this case, undercover FBI agents lured Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal and arrested him once the vessel entered international waters, then transferred him to a Navy munitions ship for interrogation; *Fourth*, the third framework above should address the problem of guerilla and rebel groups. There may be circumstances where guerilla and rebel groups illegitimately overthrow democratic governments. In the aftermath of terrorist acts leading up to their rise to power, it is likely that these rebel group would not agree to stand trial for their actions. This situation raises the question of impunity and reaffirms the validity of ICC jurisdiction as a well-tailored mechanism by which to condemn unpunished acts of terrorism. This proposition would inevitably entail the involvement of the UN Security Council; *Fifth*, the role of the U.N. Security Council in establishing ICC jurisdiction is pertinent. In some instances, the international community may call upon the Security Council to decide the fate of a suspected terrorist. In making such a determination amidst a politically-hostile climate, referring the matter to the ICC could constitute an effective and expeditious solution. In other words, as a response to those difficult cases, the decision of the UN Security Council can be the basis for establishing jurisdiction under the ICC.

Thus it can be stated here that the new permanent international criminal court may be a new judicial fora for repressing international terrorism. The ICC Statute is applicable to prosecute individual actors of terrorist acts under the heading of crimes against humanity.

For the purpose of prosecuting terrorists at the ICC, it is necessary to refer to specific terrorist acts.

## **II. Terrorism as a Crime against Humanity**

### **A. The Concept of Crimes against Humanity before the ICC Statute**

A crime against humanity is a crime against 'humaneness' that offends certain general principles of law and which becomes the concern of international community. It has repercussions beyond international frontiers or exceeds in magnitude or savagery any limits tolerated by modern civiliza-

tion. Crimes against humanity differ from genocide in that no *dolus specialis* to destroy members of a particular group is required in case of crimes against humanity.<sup>19</sup>

The notion of crimes against humanity was propounded for the first time in 1915, on the occasion of mass killings of Armenian in the Ottoman Empire. On 28 May 1915 the French, British, and Russian Governments decided to react strongly. They therefore jointly issued a declaration stating that: "in view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres."<sup>20</sup> The phrase "crimes against civilization and humanity" appeared in a 1919 proposal to conduct trials of the Turkish perpetrators. But the United States objected at that time that so-called "laws of humanity" had no specific content, and the proposal to try Turks was scuttled.<sup>21</sup>

The terminology was also used in subsequent statements concerning WWI. The Commission of Fifteen Members was established by the Preliminary Peace Conference in January 1919 to inquire into responsibilities relating to WWI. Chapter II of the Commission's report, dated 29 March 1919, stated, *inter alia*, that 'all persons belonging to enemy countries... who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'.<sup>22</sup>

The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II. It suggests in at least two distinct ways, the enormity of these offenses. *First*, the phrase "crimes against humanity" suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. *Second*, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.<sup>23</sup>

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<sup>19</sup> Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press, New York, 2001, p 85.

<sup>20</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, p. 67.

<sup>21</sup> David Luban, *A Theory of Crimes Against Humanity*, 29 *Yale J. Int'l L.* 85, Winter, 2004, at 1-2.

<sup>22</sup> Kittichaisaree, *supra* note 18, at 86.



The London Agreement embodying the Charter of IMT included a provision under which the Tribunal was to try and punish person guilty, among other things, of crimes against humanity. These were defined as: "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or connexion with any crimes within the jurisdiction of the Tribunal [i.e. either 'crime against peace' or 'war crimes'], whether or not in violation of the domestic law of the country where perpetrated."<sup>24</sup>

No record exists of how the term "crimes against humanity" came to be chosen by the framers of the Nuremberg Charter. The term was selected by the U.S. Supreme Court Justice Robert Jackson, the chief U.S. prosecutor at Nuremberg and the head of the American delegation to the London Conference that framed the Charter. Jackson consulted with the great international law scholar Hersch Lauterpacht, but they decided to leave their deliberations unrecorded, apparently to avoid courting controversy.<sup>25</sup>

Crimes against humanity under the Nuremberg fell into two main categories: (i) murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; and (ii) persecutions on political, racial, or religious grounds.<sup>26</sup>

One major shortcoming of this definition is that it closely linked crimes against humanity to the other two categories of offences. Article 6 (c) indeed required, for crimes against humanity to come under the jurisdiction of the IMT, that they be perpetrated 'in execution of or in connection with' war crimes or crimes against peace. This link was not spelled out, but it was clear that it was only within the context of a war or of the unleashing aggression that these crimes could be prosecuted and punished.<sup>27</sup> Therefore, a crime against humanity was treated as an 'accompanying' or 'accessory' crime to either crimes against peace or war crimes.<sup>28</sup>

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<sup>23</sup> David Luban, *supra* note 20, at 2.

<sup>24</sup> Cassese, *supra* note 19, at 69.

<sup>25</sup> David Luban, *supra* note 20, at 1.

<sup>26</sup> Kittichaisaree, *supra* note 18, at 87.

<sup>27</sup> Cassese, *supra* note 19, at 69.

<sup>28</sup> Kittichaisaree, *supra* note 18, at 87.

Allied Control Council Law No. 10, drafted by the Allied Control Council for Germany on 20 December 1945, also included crimes against humanity. It was a mixture between German and international law. The crime against humanity was enumerated in Article II (1) (c) as "atrocities and Offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated".<sup>29</sup>

Control Council Law No. 10 added imprisonment, torture, and rape to the list of crimes against humanity under the Nuremberg. Although the list of crimes against humanity under the Nuremberg Charter was exhaustive and that under Control Council Law No. 10 was illustrative, there was no practical difference between the two as the words 'other inhumane acts' in Article 6 (c) of the Nuremberg Charter were sufficiently broad to cover other crimes of similar nature.<sup>30</sup> Trials under this law by American courts in the American zone resulted in the convictions of hundreds of Nazi soldiers and officials for crimes against humanity before and during the war.<sup>31</sup>

Article 5 (c) of the Charter of the IMT for the Far East conferred jurisdiction on the Tokyo Tribunal to prosecute and punish crimes against peace, war crimes and crimes against humanity. The provision of the Nuremberg Charter on crimes against humanity was followed in the Tokyo Charter, except that religious grounds for prosecution were omitted, probably because persecutions on religious ground had not been committed on a large scale in connection with the Japanese war effort.<sup>32</sup> In contrast to the Nuremberg trial, however, no one was convicted of crimes against humanity in Tokyo.<sup>33</sup>

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<sup>29</sup> Roberta Arnold, *supra* note 6, at 211 citing Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) at [www.umn.edu/humanrts/instree/ccno10.htm](http://www.umn.edu/humanrts/instree/ccno10.htm).

<sup>30</sup> Kittichaisaree, *supra* note 18, at 88.

<sup>31</sup> Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford University Press, New York, 2001, at 48.

<sup>32</sup> Kittichaisaree, *supra* note 18, at 88.

<sup>33</sup> Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, at 217.

In the wake of the major war trials, momentous changes in international law took place. On 11 December 1946 the UN GA unanimously adopted a resolution 'affirming' the principles of the Charter of the Nuremberg International Tribunal and its judgment. On 13 February 1946 it passed resolution 3 (1) recommending the extradition and punishment of persons accused of the crimes provided for in the Nuremberg Charter. These resolutions show that the category of crimes against humanity was in the process of becoming part of customary international law.<sup>34</sup>

The Statutes of the Yugoslavia and Rwanda Tribunals also provide power to the ICTY and the ICTR to prosecute persons responsible for the crimes against humanity. However, there are differences between the texts of the relevant provisions. The ICTY Statute states, in Article 5, that a crime must occur "in armed conflict, whether international or internal in character", but the *nexus* with "armed conflict" does not exist in Article 3 of the Statute of the International Criminal Tribunal for Rwanda.

In 1995, in its celebrated *Tadic* jurisdiction decision, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia described the *nexus* as 'obsolescent', and said that 'there is no logical basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Since then, the Appeals Chamber has described the *nexus* with armed conflict set out in Article 5 of the Statute of the Yugoslav Tribunal as being 'purely jurisdictional'.<sup>35</sup>

Now, it is a settled rule of customary international law that crimes against humanity are international crimes and the perpetrators of these crimes incur individual criminal responsibility. Moreover, crimes against humanity under customary international law need not be linked to international armed conflict, as required in the Nuremberg and Tokyo Charters, or any conflict at all.<sup>36</sup>

#### B. Crimes against Humanity under Article 7 ICC Statute

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<sup>34</sup> Cassese, *supra* note 19, at 69.

<sup>35</sup> William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, New York, 2004, at 43.

<sup>36</sup> Kittichaisaree, *supra* note 18, at 88.

Article 7 (1) of the ICC Statute defines “crimes against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Article 7 (1) (a)-(k) sets out the specific acts required to constitute a crime against humanity namely:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, 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;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The above Article 7 (1) (a)-(k) does not only include conduct contrary to international law but also covers “other inhumane acts” within the jurisdiction of the court and refers to acts of a similar nature to those set out in Article 7 (1) (a)-(j).<sup>37</sup> The ‘Elements of Crimes’ adopted by the Preparatory Commission elaborate the elements of crimes for each enumerated offence for crimes against humanity.

Antonio Cassese<sup>38</sup> summarizes concisely that crimes against humanity cover actions that share a set of common features:

1. The offences are particularly egregious in that they constitute a serious attack on human dignity or grave degradation or humiliation of one or more human beings;
2. They are not isolated or sporadic events, but are acts that form part

of governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or *de facto* authority;

3. Third prohibition extends regardless of whether they are perpetrated in time of war or peace;
4. The victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities.

From the Article 7 (1) it can be stated that the *actus reus* of a crime against humanity involves the commission of an attack that is inhumane in nature, causing great suffering or serious injury to body or to mental or physical health. The act must be committed as part of a widespread or systematic attack against members of a civilian population.<sup>39</sup> In addition to the specific elements contained in each individual crime against humanity, in order to transform a crime into a crime against humanity, the perpetrator must *knowingly* commit the crime in the sense that he must understand the overall or broader context in which his act occurs.<sup>40</sup>

The attack on a civilian population represents the contextual element of the crime. The mental element requires intent and knowledge (Article 30 of the ICC Statute) regarding the material elements of the crime, including the contextual element.<sup>41</sup>

### **1.No Nexus with the War**

Today in international criminal law the *nexus* between crimes against humanity and war has disappeared, and customary international law prohibits these crimes whether they are committed in time of war or peace. Article 7 of the Rome Statute codifies this position, albeit implicitly. There is no mention that the attack must take place in an international armed con-

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<sup>37</sup> Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, Sweet & Maxwell, London, 2003, at 115.

<sup>38</sup> Cassese, *supra* note 19, at 69.

<sup>39</sup> Kittichaisaree, *supra* note 18, at 90-91.

<sup>40</sup> Kittichaisaree, *Id.* at 90-91.

<sup>41</sup> Gerhard Werle, *supra* note 32, at 220.



flict for it to be a crime against humanity.<sup>42</sup>

The important threshold that elevates the 'acts' set out in Article 7 (1) (a)-(K) to the level of crimes against humanity are the requirement that these acts be part of a 'widespread or systematic attack against a civilian population' and that the perpetrator must have 'knowledge of the attack'.

## **2. Widespread or Systematic attack against a civilian population**

Article 7 of the ICC statute does not define what it means by 'widespread'. Under established international jurisprudence, a widespread attack is an attack directed against a multiplicity of victims, whereas a systematic attack is an attack carried out pursuant to a preconceived policy or plan.<sup>43</sup> In practice, however, it is difficult to separate the widespread and the systematic nature of the attack since the widespread attack aimed at a large number of victims is generally carried out with some kind of planning or organization.<sup>44</sup>

The requirement that the attack have a widespread or systematic nature does not mean that a crime against humanity cannot be perpetrated by an individual who commits only one or two of the designated acts, or who engages in only one such offence against only one or a few civilians. So long as the individual's act or acts are part of a consistent pattern of offences by a number of persons linked to that offender, he or she may be properly charged with crimes against humanity.<sup>45</sup> For instance, the act of denouncing a Jewish neighbor to the Nazi authorities committed against the background of widespread persecution against the Jews has been held to be a crime against humanity.<sup>46</sup>

The 'systematic' nature of the attack, or its 'policy' element, is made explicit in Article 7 (2) of the ICC Statute through the requirement that the specific acts must be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack". The accused's act of murder,

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<sup>42</sup> Ben Brandon and Max du Plessis, *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States*, Commonwealth Secretariat, London, 2005, at 44.

<sup>43</sup> Kittichaisaree, *supra* note 18, at 96.

<sup>44</sup> Kittichaisaree, *Id.* at 96.

<sup>45</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 53.

<sup>46</sup> Kittichaisaree, *supra* note 18, at 97.

torture, etc. must be pursuant to a policy; it is the existence of this policy that endows the criminal act with the character of a crime against humanity. The policy need not be countrywide; it may be localized in a particular geographical region.<sup>47</sup> For example, the policy of ethnic cleansing over the region of Vlasenica alone, or the policy to commit inhumane acts against the civilian population of the territory of Opstina Prijedor in order to achieve the creation of a Greater Serbia, have been held to fulfill the policy requirement for the ICTY to exercise its jurisdiction over the crimes against humanity brought before it.<sup>48</sup>

The law regarding crimes against humanity has developed to the extent that crimes against humanity can be committed on behalf of the entities with *de facto* control over a particular territory although those entities have no international recognition or formal status of a *de jure* State; it can also be committed by a terrorist group or organization. Private individuals with the aforesaid *de facto* power or organized in criminal gangs or groups might also be in the position to commit crimes against humanity.<sup>49</sup>

The ICTR explained that, 'widespread' means 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'; while 'systematic' means 'thoroughly organized and following a regular pattern of the basis of a common policy involving substantial public or private resources' although this policy may not be adopted formally as the policy of a State.<sup>50</sup>

The requirement that the attack must be directed against a civilian population distinguishes crimes against humanity from many war crimes that may be targeted at both civilians and combatants, and also distinguishes the Rome Statute from customary international law, which allows that a crime against humanity may be committed against civilians and military personnel.<sup>51</sup>

According to various authors, in Article 7 ICC Statute, like in the ICTY and the ICTR Statutes, the word "civilians" implies persons of any nation-

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<sup>47</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 53.

<sup>48</sup> Kittichaisaree, *supra* note 18, at 98-99.

<sup>49</sup> Kittichaisaree, *Id.* at 98.

<sup>50</sup> Kittichaisaree, *Id.* at 96.

<sup>51</sup> Antonio Cassese et al (eds), *The International Criminal Court: A Commentary*, Vol. I, Oxford University Press, New York, 2004, at 93.



ality who have not taken an active part in hostilities, or are no longer doing so.<sup>52</sup>

### 3. Knowledge of the Attack

Another threshold that must be crossed before a particular offence can be regarded as a crime against humanity is that the perpetrator must have 'knowledge of the attack'. This amounts to a specific intent.<sup>53</sup>

Clearly each of the underlying acts committed (in terms of the greater event: the attack) require their own form of intent. However, overall, these acts must be committed with a specific intention that is associated with the main event- the attack that gives the individual acts their 'crime against humanity character'.<sup>54</sup> In *Kupreskic*, for example, the ICTY Trial Chamber described the mental element for a crime against humanity thus: "[T] he requisite *mens rea* for crimes against humanity appears to be the *intent* to commit the underlying offence, combined with the *knowledge* of the broader context in which that offence occurs."<sup>55</sup>

'Knowledge of the broader context' means that the perpetrator must have actual or constructive knowledge that his act or acts is or are part of a widespread or systematic attack on a civilian population and pursuant to a policy or plan. It must be proved that the accused knew that his crime were related to the attack on a civilian population in the sense of forming part of a context of mass crimes or fitting into such a pattern.<sup>56</sup> Without the requisite 'big picture' intention, he would only have the *mens rea* for his individual act and would not have formed the overall intention to associate his individual act with the widespread or systematic attack.<sup>57</sup> If this knowledge is not present, the perpetrator would only have the *mens rea* for an ordinary crime and not a crime against humanity.<sup>58</sup>

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<sup>52</sup> Roberta Arnold, *supra* note 6, at 259.

<sup>53</sup> Schabas, *supra* note 34, at 45.

<sup>54</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 54.

<sup>55</sup> *Kupreskic and Other*, ICTY Trial Chamber, judgment of 14 January 2000 (case no. IT-95-16-T), para.556.

<sup>56</sup> Kittichaisaree, *supra* note 18, at 91.

<sup>57</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 91.

<sup>58</sup> Kittichaisaree, *supra* note 18, at 91.

This requirement may be established by, for example, proof of the participation of the perpetrator in the planning, organization or execution of a large-scale commission of vicious acts of inhumanity.<sup>59</sup> The requisite knowledge can be inferred from, for example, the historical or political circumstances in which the acts occur; the functions of the accused at the time of the crimes; the accused's responsibilities in the political or military hierarchy; the widespread nature and seriousness of the acts committed; and the nature of the crimes committed as well as their notoriety.<sup>60</sup>

In respect of the 'persecution-style' offences that are crimes against humanity, an additional subjective mental element of a persecutory or discriminatory animus is required. This intent must be to subject a person or group to discrimination, ill-treatment or harassment so as to bring about great suffering or injury to that person or group on religious, political or other such grounds. As such, this additional form of intent amounts to a *special form of intent*, or *dolus specialis*.<sup>61</sup>

### **III. The Applicability of Article 7 ICC Statute to Terrorism**

In the context of exploring the possibility of prosecuting terrorists at the ICC, it is important to remember that we are focusing on individual actors, not a theory of terrorism in the abstract. One person regardless of whether he or she can be labeled a "terrorist", who commits a crime falling within the jurisdiction of the Court, falls within the jurisdiction of the Court.<sup>62</sup>

Under Article 10 (1) of the ICC Statute, the court has jurisdiction only with respect to crimes committed after the entry into force of the Statute on July 1, 2002.

Most cases of terrorism used as examples here occurred before the entry into force of the Statute. These cases are taken for the purposes of illustrating the possibilities of prosecuting terrorists of committing crimes against humanity under Article 7 of the ICC Statute.

Article 7 (1) of the ICC Statute defines "crime against humanity" as "any of the following acts when committed as part of a widespread or sys-

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<sup>59</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 55.

<sup>60</sup> Kittichaisaree, *supra* note 18, at 92.

<sup>61</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 56.

<sup>62</sup> Lucy Martinez, *supra* note 8, at 5.



tematic attack directed against any civilian population, with knowledge of the attack,” and lists eleven separate acts. Consequently, under Article 7 there are three elements of a crime against humanity, and three requirements for terrorism to be eligible for prosecution at the ICC as a crime against humanity<sup>63</sup>:

1. the commission of at least one of the acts enumerated in Article 7;
2. the act was committed as part of a widespread or systematic attack directed against a civilian population;
3. the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Under Article 7 of the ICC Statute, terrorism can be prosecuted under the headings of the crime against humanity of murder, deportation or forcible transfer of the population, imprisonment or other severe deprivation of physical liberty, torture, persecution and enforced disappearance. Terrorism can also be prosecuted as “other Inhumane acts” stipulated in Article 7 (1) (k).<sup>64</sup>

#### A. Terrorism as the Crime against Humanity of Murder

Murder was one specific act constituting a crime against humanity deemed not to require a clarification of intended meaning in Article 7 (2) of the Statute. The notion of murder as the unlawful killing of a human being is well understood in every legal system and in every independent sovereign nation State. Although the *actus reus* may be similar (to cause the death) the *mens rea* may vary considerably (as it does in Art 7 (1) (a) and the Elements).<sup>65</sup>

According to the *Elements*, beyond the general requirements that the conduct was part of a widespread or systematic attack, that it was directed at civilians, and that it contributed to a state or organizational policy, a specific criterion of murder is that the perpetrator killed one or more persons.<sup>66</sup>

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<sup>63</sup> Lucy Martinez, Id. at 10.

<sup>64</sup> Roberta Arnold, *supra* note 6, at 262-271, Lucy Martinez, Id. at 10.

<sup>65</sup> Timothy LH McCormack, Crimes Against Humanity, in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Portland, 2004, at 189.

<sup>66</sup> Roberta Arnold, *supra* note 6, at 262.

Murder as a crime against humanity under the ICC Statute is thus the unlawful killing of a human being as part of a widespread or systematic attack against a civilian population of which the victim is a member. The requisite elements of this crime are that the victim is dead as a result of an unlawful act or omission of the accused or his subordinate who, at the time of the killing, intended to kill or cause grievous bodily harm to the deceased with the knowledge that such bodily harm was likely to cause the victim's death, and was reckless whether death ensued or not.<sup>67</sup>

The terrorist attacks of September 11 satisfy all of the elements enumerated above for a crime against humanity of murder. The acts were multiple and coordinated, causing the death of thousands of people, in furtherance of Al Qaeda's terrorist policy against the United States. Thus, they were "systematic".<sup>68</sup> Since they were aimed at several targets (the Twin Towers, the Pentagon and the White House), they were also "widespread". The victims were civilian, at least in the case of the World Trade Center. With regard to 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 army hostilities. Thus, as non-military targets, they could be considered civilians for purposes of Article 7 (1) (a) ICC Statute.<sup>69</sup>

#### **Terrorism as the Crime against Humanity of Deportation or Forcible Transfer of the Population**

'Deportation' is usually understood to mean the forcible removal of people from one State across an international border to another State whereas 'forcible transfer of population' usually means the forcible movement of people from one place to another within the territorial borders of one State.<sup>70</sup>

Article 7 (2) (d) of the ICC Statute defines 'Deportation or Forcible Transfer of the Population' as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.

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<sup>67</sup> Kittichaisare, *supra* note 18, at 104.

<sup>68</sup> Roberta Arnold, *supra* note 6, at 263 citing James 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.

<sup>69</sup> Roberta Arnold, *Id.* at 263.

<sup>70</sup> Timothy LH McCormac, *supra* note 64, at 192.

Article 7 (2) (d) was based on the crime against humanity of deportation contained in the IMT and IMTFE Charters. The IMT and IMTFE's jurisprudence indicates that this practice, if undertaken to implement a policy of terrorization against civilians, may constitute crimes against humanity. Similar conclusions were drawn also in the ICTY's jurisprudence on the displacement of Kosovo Albanians and Bosnian Muslims. Thus, deportation and unlawful transfer may be a form of state terrorism that could be prosecuted under this heading, even if this is not a conduct usually resorted to by terrorists.<sup>71</sup>

The ICC Statute's use of the words 'forcible transfer of population' has therefore updated the original term 'deportation' to express condemnation of what in recent years (witness the events in Rwanda and Yugoslavia) has come to be known as 'ethnic cleansing' within a country's borders.<sup>72</sup>

#### B. Terrorism as the Crime against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty

Article 7 (1) (e) of the ICC Statute encompasses 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'. The Elements of Crimes require that the perpetrator have imprisoned one or more persons or deprived them of their liberty.

The term *imprisonment* includes cases in which a person is, literally, 'imprisoned' in an enclosed space and thus prevented from moving to another place. Cases classed as other severe deprivations of physical liberty include those in which a person can continue to move in a specific area, for example within a ghetto or concentration camp. House arrest may also fall under this definition. Deprivation of liberty for a short period of time should not be viewed as 'severe' in terms of Article 7 (1) (e) of the ICC Statute.<sup>73</sup>

The IMT considered a crime against humanity the unlawful internment of German political opponents in concentration camps, adopted as a tool to implement the Nazis' terrorist campaign against the German civilian population. Thus, this provision may prove useful to address state terrorism, as

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<sup>71</sup> Roberta Arnold, *supra* note 6, at 266.

<sup>72</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 47.

<sup>73</sup> Gerald Werle, *supra* note 32, at 243.

<sup>74</sup> Roberta Arnold, *supra* note 6, at 266-267.

in the case of several arrests and disappearances of political opponents orchestrated by the Argentine and Chilean military in the 1970s. Also in this case, the advantage is that no nexus with an armed conflict is required.<sup>74</sup>

### C. Terrorism as the Crime against Humanity of Torture

Article 7 (2) (e) of the ICC Statute defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused”, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. The definition of torture in Article 7 (2) (e) of the ICC Statute clearly goes farther than the definition in the Torture Convention of 10 December 1984.<sup>75</sup>

There is nothing in Article 7 (2) (e) to suggest the perpetrator must be in some official capacity, or that the torture must be conducted for a prohibited purpose.<sup>76</sup> Torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions. However, legalization by the state does not automatically make torture “lawful;” the decisive factor is the international law standard.<sup>77</sup>

The Article 7 (2) (e) of the CC Statute definition of torture deviates from definition of torture under general international law. Under general international law torture is only committed where, amongst other things, a public official was involved, either as the perpetrator or as one of the participants or accomplices.<sup>78</sup> The Trial Chamber of the Yugoslav Tribunal in *Prosecutor v. Kvočka et al.* specifically referred to the Rome Statute as evidence that customary law does not impose an official capacity criterion as part of the crime of torture.<sup>79</sup>

Article 7 of the ICC Statute broadens the definition of torture so that torture may amount to a crime against humanity even if committed by civilians against other civilian without any involvement of public officials or military personnel. Having said that, it should be noted that some sort of involvement of public authorities is required by the Elements of Crimes.<sup>80</sup>

<sup>75</sup> Gerald Werle, *supra* note 32, at 246.

<sup>76</sup> William A. Schabas, *supra* note 32, at 50.

<sup>77</sup> Gerhard Werle, *supra* note 32, at 246.

<sup>78</sup> Cassese, *supra* note 50, at 374.

<sup>79</sup> Schabas, *supra* note 34, at 51.

<sup>80</sup> Ben Brandon and Max du Plessis, *supra* note 41, at 48.

As long as the single act of torture is part of widespread or systematic (which takes place pursuant to or in furtherance of a State or organizational policy of torture), even torture inflicted by one citizen against another without any participation of a public official is punishable as a crime against humanity.<sup>81</sup>

While it is not possible to formulate a complete catalogue of torture practices, the following conduct is, as a rule, classified as torture per se: “pulling out teeth, fingernails or toenails; electric shocks to sensitive parts of the body; blows to the ears that cause the eardrums to burst; breaking bones; burning parts of the body; spraying eyes or other sensitive parts of the body with acid; hanging from a pole; submersion in water until symptoms of drowning occur; plugging nose and mouth to cause asphyxiation; causing hypothermia with strong fans; administration of medication (psychotropic drugs); withholding food; water or sleep; rape.”<sup>82</sup>

The kidnapping, torture and murder of an American journalist in the Philippines by the Abu Sayyaf group can be prosecuted as the crime against humanity of torture under Article 7 (2) (e) of the ICC Statute.<sup>83</sup>

#### D. Terrorism as the Crime against Humanity of Persecution

Article 7 (1) (h) 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”. Thus, the crime of persecution under the ICC Statute must be committed ‘in connection with any act [enumerated as crimes against humanity in Article 7 (1) of the ICC Statute] or any crime within the jurisdiction of the ICC.

Article 7 (2) (g) defines ‘persecution’ as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. It requires discriminatory intent based on political, racial, national, ethnic, cultural, religious, gender, and other grounds universally recognized as impermissible under international law.<sup>84</sup> This definition is based on the judgments of the Yugoslavia Tribunal, espe-

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<sup>81</sup> Ben Brandon and Max du Plessis, *Id.* at 48.

<sup>82</sup> Gerhard Werle, *supra* note 32, at 245.

<sup>83</sup> Lucy Martinez, *supra* note 8, at 5.

<sup>84</sup> Roberta Arnold, *supra* note 6, at 269.



cially the leading *Tadic* case, and is also geared toward Article 18 of the 1996 *Darf* Code.<sup>85</sup> The Elements of Crimes make it clear that deprivation of the rights of a single is enough to satisfy the requirements of the definition.

The ICC Statute deals with persecution only if it is committed "in connection with" any act referred to in paragraph 1 or any crime within the jurisdiction of the Court. The requirement of a connection was intended to take account of concerns about the breath of the crime of persecution.<sup>86</sup>

The perpetrator of the crime of persecution must either target a group or collectivity as such, or attack a person specifically because of his or her membership in this group or collectivity. In the latter case, the individual is attacked as a representative of the group. For the perpetrator, then, the issue must always be discrimination against the group or collectivity as such.<sup>87</sup>

In dealing with the crime of persecution, Article 7 greatly expands the category of discriminatory grounds. While under customary international law these grounds may be political, racial, ethnic, or religious, Article 7(1) (h) adds 'cultural grounds', 'gender as defined in paragraph 3 [of the same provision], as well as 'other grounds that are universally recognized as impermissible under international law'.<sup>88</sup>

Classic features of the crime of persecution include the perpetrator's political, racial or religious motivations. A perpetrator acts on political grounds if he or she discriminates against the victim because of his or her political beliefs. The victim is not required to be a member of a political party or group. If the perpetrator discriminates against the victim because the victim is of a certain race, he or she is acting on racial grounds. If the perpetrator discriminates against the victim because of the victim's specific religious faith, he or she is acting on religious grounds.<sup>89</sup>

The attack on the coastal city of Kuta in the Indonesian island of Bali on October 12, 2002, may come closer to the crime against humanity of persecution. It may be recalled, in fact, that the place was chosen for the

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<sup>85</sup> Gerhard Werle, *supra* note 32, at 254.

<sup>86</sup> Gerhard Werle, *supra* note 32, at 257.

<sup>87</sup> Gerhard Werle, *Id.* at 257.

<sup>88</sup> Antonio Cassese, *supra* note 50, at 376-377.

<sup>89</sup> Gerhard Werle, *supra* note 32, at 258.

high presence of Australian tourists, targeted by movements linked to Al-Qaeda because of Australia's alliance with the US in the war on terror. Thus it may be argued that there was a discriminatory intent based on nationality and political views.<sup>90</sup>

#### E. Terrorism as the Crime against Humanity of Enforced Disappearance

Article 7 (2) (i) of the ICC Statute defines "enforced disappearance of persons" as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

In *Velasquez-Rodriguez*, the Inter-American Court of Human Rights held that when the existence of a policy or practice of disappearances has been shown, the disappearance of a particular individual may be proved 'through circumstantial or indirect evidence or by logical inference'; otherwise, it would be impossible to prove that an individual has disappeared because 'this type of repression is characterized by an attempt to suppress any information about the kidnapping or the whereabouts and fate of the victim.'<sup>91</sup> This is especially so where investigation by an international body will have to depend on the cooperation of the State implementing a policy of enforced disappearance and in whose territory the investigation will be carried out.<sup>92</sup> It is submitted that this logical inference is also applicable to the prosecution of the crime of enforced disappearance before the ICC. However, for an accused to be found guilty for this offence under the ICC Statute, the requisite elements for this offence will have to be satisfied beyond all reasonable doubt.<sup>93</sup>

The kidnapping, torture and murder of an American journalist in the Philippines by the Abu Sayyaf group qualify for prosecution under this Article.<sup>94</sup>

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<sup>90</sup> Roberta Arnold, *supra* note 6, at 270.

<sup>91</sup> Kittichaisaree, *supra* note 18, at 124 citing Inter-American Court of Human Rights, 1998, Ser.C, No. 4 (1988) 9 Human Rights L. J. 212, paras.124, 131.

<sup>92</sup> Kittichaisaree, *Id.* at 124.

<sup>93</sup> Kittichaisaree, *Id.* at 124-125.

<sup>94</sup> Lucy Martinez, *supra* note 8, at 12.

#### F. Terrorism as Other Inhuman Acts

Article 7 (1) (k) of the ICC Statute criminalizes “other inhumane acts of a similar character.” It requires that the perpetrator commit “other inhumane acts of a similar character,” which cause “great suffering, or serious injury to body or to mental or physical health”. Only an act that attains the same degree of severity is “similar” to the other individual crimes. In this spirit, the Elements of Crimes make clear that the necessary conduct must be comparable in “nature and severity” with the other acts listed in Article 7 (1).<sup>95</sup>

For the mental element, Article 30 (2) of the ICC Statute applies. Article 7 (1) (k)’s provision that the infliction of pain must be “intentional” is not a deviation from the general requirements for the mental element.<sup>96</sup> The intent requirement in Article 30 (2) of the ICC Statute is satisfied where the perpetrator, at the time of the act or omission, had the “intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or where he knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack on human dignity.”<sup>97</sup>

This category of “other inhumane acts” is to ensure that there be no *lacuna* in the law with regard to categories of crimes against humanity that need to evolve to catch up with the imagination and creativity of criminals against humanity.<sup>98</sup> Thus, any particular atrocity not covered by the other specific acts which is directed at a civilian population and meets the other threshold criteria can be prosecuted as the crime against humanity of “other inhumane acts”.<sup>99</sup>

Thus, Article 7 (1) (k) of the ICC Statute 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.<sup>100</sup> Examples may include the 1995 sarin nerve gas attack in a Tokyo subway by the Japanese religious cult Aum Shinriyko and the acid throwing campaign against unveiled women

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<sup>95</sup> Gerhard Werle, *supra* note 32, at 264.

<sup>96</sup> Gerhard Werle, *supra* note 32, at 265.

<sup>97</sup> Gerhard Werle, *Id.*, at 265.

<sup>98</sup> Kittichaisaree, *supra* note 18, at 126.

<sup>99</sup> Timothy LH McCormack, *supra* note 64, at 201.

<sup>100</sup> Roberta Arnold, *supra* note 6, at 272.

by Islamist terrorist group Al Tawhid, now part of Ansar al Islam. The charges would relate to the individuals who were injured, but not killed, in the attacks.<sup>101</sup>

#### **IV. Requirements for Prosecution**

The requirements for prosecution are entirely external to the concept of crimes under international law. They are by nature part of international criminal procedure, and concern not criminality, but admissibility of criminal prosecution. If a requirement for prosecution is not present, no trial may be held.<sup>102</sup>

The prohibition of double jeopardy or *ne bis in idem* sets out in Article 20 of the ICC Statute, is one requirement that must be followed for prosecution before ICC. Article 20 (3) extends the prohibition of double jeopardy to all cases in which the perpetrator has been acquitted or convicted by the courts of any state.

Article 26 of the ICC Statute requires that defendant before the ICC be at least 18 years of age at the time the crime was committed.

Finally, of considerable practical significance are the ICC Statute's provisions under which statutes of limitations and immunity do not prevent prosecution before the International Criminal Court. Thus statutes of limitations and immunity are no bar to trial.<sup>103</sup>

Under Article 27 (2) of the ICC Statute, the perpetrator's procedural immunity, which might arise, for example, from his position as head of state or government, is no bar to trial before international criminal court. Article 29 of the ICC Statutes establishes that crimes under international law, as the most serious international crimes, are not subject to statutes of limitations.<sup>104</sup>

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<sup>101</sup> Lucy Martinez, *supra* note 8 , at 12.

<sup>102</sup> Gerhard Werle, *supra* note 30, at 183.

<sup>103</sup> Gerhard Werle, *Id.* at 184.

<sup>104</sup> Gerhard Werle, *Id.* at 184.

## V. Conclusion

The responsibility for investigating and prosecuting perpetrators of crimes within the ICC's jurisdiction remain first with domestic courts. This responsibility arises from the principle of complementarity, which grants jurisdiction to the ICC only when a country with primary competency is unwilling or unable to investigate or prosecute the crime at issue.<sup>105</sup> Thus the ICC should only act as an adjudicative body of "last resort," where genuine national proceedings prove illusory. However, it is still necessary to acknowledge the jurisdiction of the ICC over international terrorism, as several specific situations warrant the involvement of an international tribunal like the ICC, such as state passiveness, inaction, or impunity.<sup>106</sup>

Trial before ICC could occur before a diverse panel of judges. Such diversity could be important in avoiding potential accusations of "victor's justice"-or countering any accusations of "anti-Muslim justice" in light of September 11- and creating a widely accepted verdict. ICC could also emphasize that (a) the crimes committed are truly international crimes condemned by all civilized nations and (b) terrorism is not an ordinary crime, but rather deserves treatment similar to genocide and crimes against humanity, which are prosecuted before international tribunal.<sup>107</sup>

The text of the Rome Statute does not need to be amended in order to encompass acts of terrorism. Both, terrorism and certain Article 7 crimes share tangible similarities: they are viewed as some of the most repugnant crimes to humanity; they employ similar language and philosophy, i.e. prohibiting the targeting of civilians; they depart from the classic criminal standard of *mens rea* and impose a different degree of preparation and structure; in their most irreducible form, they constitute crimes which strike the very core of human decency, claim innocent lives, and devastate population.<sup>108</sup>

Article 7 of the ICC Statute can be used as a legal basis for prosecuting terrorist acts if the acts fulfill the Article's general requirements: be committed as part of a widespread or systematic attack, against a civilian population and in furtherance of a policy, be this of a state or an international

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<sup>105</sup> Richard J. Goldstone and Janine Simpson, *supra* note 4, at 5.

<sup>106</sup> Vincent-Joel Proulx, *supra* note 1, at 2.

<sup>107</sup> Jennifer Trahan, *Trying a Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 *Hous. J. Int'L* 475, Spring, 2002, at 8.

<sup>108</sup> Vincent-Joel Proulx, *supra* note 1, at 17.



organization. A nexus with the war is not required and everyone can be a perpetrator.<sup>109</sup>

Under Article 7, the terrorist acts may be prosecuted as the crimes against humanity of murder, deportation or forcible transfer of the population, imprisonment or other severe deprivation of physical liberty, torture, persecution, enforced disappearance of persons, and more generally as other inhumane acts.

There are several advantages gained by prosecuting terrorist acts as crimes against humanity under Article 7 of the ICC Statute<sup>110</sup>:

1. The offences can be committed by anyone, on the basis of either a governmental or non-governmental policy. Thus, both state and non-state terrorism is addressed.
2. There is no need for the existence of a conflict. Thus, all categories of terrorism may be covered, independent of whether they occur in peace or wartime.
3. A wide range of victims is covered. Unlike in IHL [International Humanitarian Law], the notion of civilian population is extended to every person who is not performing *de facto* combat functions, independently from his or her nationality. 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 have the same nationality as the perpetrators. What matters is the function exercised during the attack, rather than the status.
4. The crime of torture does not require a purpose element as required by the 1984 UN Torture Convention. As long as severe mental or bodily pain is imparted, which is often the case during terrorist attacks, Article 7 (1) (f) applies.
5. Article 7 ICC statute-rather than existing customary law on crimes against humanity- is an innovative instrument in the repression of terrorist acts, an alternative to the anti-terrorism conventions.

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<sup>109</sup> Roberta Arnold, *supra* note 6, at 273.

<sup>110</sup> Roberta Arnold, *Id.* at 272-275.

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