[H]CAN TERRORIST ACTS BE PROSECUTED AS A CRIME AGAINST HUMANITY? AN ANALYSIS UNDER INTERNATIONAL AND TURKISH LAW

Dr. Öğr. Üyesi Rifat Murat ÖNOK*

Abstract

The purpose of this study is to explore whether it is possible or not to qualify, and try, terrorist acts as "crimes against humanity". In order to delimit the scope of the study, I have not sought to answer the question regarding the meaning of a "terrorist act" since this constitutes the object of a separate study; I have only mentioned the debates on the issue under international and domestic law. Instead, I have researched whether it is possible or not to incorporate acts that are commonly regarded in public opinion and the press as "terrorist attacks" into the category of crimes against humanity.

As a result, I have explained, with reference to international academic writings and case-law, that while it is not possible to qualify every terrorist act per se as a crime against humanity, it is possible for terrorist acts fulfilling certain conditions to constitute a crime against humanity.

I have particularly dealt with the main subsumption and interpretation problems posed by the effort to incorporate terrorist attacks into the category of crimes against humanity. Further, I have discussed the specific problems posed in this regard by the definition of crimes against humanity embodied in Art. 77 of the Turkish Penal Code (Law no. 5237). Therefore, I have sought to answer the main question under both customary international law and Turkish penal law.

Finally, I have dealt with the legal and political advantages of qualifying terrorist attacks as crimes against humanity, and argued why Turkey should opt for this course.

Keywords

Terörizm, insanlığa karşı suçlar, Türk Ceza Kanunu m. 77, Roma Statüsü, sınıraşan terör örgütleri

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H Hakem incelemesinden geçmiştir.

* Koç Üniversitesi Hukuk Fakültesi, Ceza ve Ceza Muhakemesi Hukuku Anabilim Dalı Öğretim Üyesi (e-posta: monok@ku.edu.tr) ORCID: https://orcid.org/0000-0002-9758-2769
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TERÖR EYLEMLERİ İNSANLIĞA KARŞI SUÇ OLARAK YARGILANABİLİR Mİ? ULUSLARARASI HUKUK VE TÜRK HUKUKU ALTINDA BİR İNCELEME

Öz

Bu makalenin amacı, terör eylemlerinin "insanlığa karşı suç" olarak nitelendirilmesinin ve bu kapsamda yargılanmasının mümkün olup olmadığını değerlendirmektir. Çalışma kapsamını sınırlandırmak amacıyla, aslında ayrı bir çalışmanın konusunu teşkil etmesi gereken "terör eylemi nedir?" sorusunun cevabı aranmamıştır; sadece konuya dair ulusal ve uluslararası hukuktaki tartışmalara değinilmiştir. Kamouyunda ve basında herkesçe "terör saldırısı" olarak ortak kabul gören türden eylemlerden hareketle, bunların insanlığa karşı suç kategorisine dahil edilip edilmeyeceğini araştırdım. Keza, insanlığa karşı suçun anlamını başka çalışmalarımda zaten ele aldığım için, söz konusu suçun unsurlarını sadece ana hatlarıyla özetlemekle yetindim

Netice olarak, her terör eyleminin başlı başına insanlığa karşı suç olarak nitelendirilmesi mümkün olmasa da, belirli koşulları haiz terörist saldırıların insanlığa karşı suç kapsamına gireceği, uluslararası literatüre ve içtihada atıfla, izah edilmiştir.

Terör saldırılarını insanlığa karşı suç kategorisine dahil etmek bakımından karşılaşılan başlıca altlama ve yorum sorunlarına özellikle değinilmiştir. Keza, 5237 sayılı Türk Ceza Kanunu'nun 77. maddesindeki insanlığa karşı tanımının bu hususta ortaya çıkardığı özel sorunlar da tartışılmıştır. Bu bakımdan, hem uluslararası örfi hukuk hem de Türk Ceza Hukuku ışığında ana sorunsalın cevabı araştırılmıştır.

Son olarak, terör saldırılarını insanlığa karşı suç olarak nitelendirmenin hukuki ve siyasi açıdan sağlayacağı faydalar ele alınmış; Türkiye'nin neden bu yolu tercih etmesi gerektiği tartışılmıştır.

Anahtar Kelimeler

Terörizm, insanlığa karşı suçlar, Türk Ceza Kanunu m. 77, Roma Statüsü, sınıraşan terör örgütleri

Introduction

In order to answer the main question, ie whether terrorist acts can constitute a crime against humanity, two preliminary questions should be answered: (i) what is a terrorist act? (ii) when does an act constitute a crime against humanity? Obviously, both questions constitute the object of separate studies. Therefore, I shall only deal with their answers very shortly, and insofar as it is indispensable to answer the main question.

An important introductory clarification is required: as explained *infra*, my analysis of crimes against humanity under international law is largely based on the relevant provision of the Rome Statute establishing the International Criminal Court at the Hague. Whereas it is open to debate whether or not that provision is reflective of customary international law, in the lack of a general treaty defining crimes against humanity, it seems the ideal comparison point. However, whether terrorist acts can actually be tried before the ICC begs the answer to further questions, a notable one being the following: how to interpret the intentional exclusion of terrorism from the Rome Statute? The purpose of this study is not to deal with that question, though. The provision in the Rome Statute is taken as a yardstick for the *substantive* meaning (in other words, the foundational legal elements) of crimes against humanity. Therefore, my analysis focuses on whether terrorist acts fulfil the required definitional elements under Turkish law, and international law, regardless of whether a trial before the ICC is possible or not. That question is also the object of a separate study/

A terminological clarification is also required. In academic writings the term "international terrorism" is used as a technical term referring to the use of terror within one country with the support of a foreign state or institution, and/or referring to terrorism employed against the nationals, institutions or government of a foreign state[1]. In my study I am not using the words "international" or "transnational" (as qualifiers of terrorism) in a technical sense. I am simply referring to terrorist organisations comprising members of different nationality and acting in a variety of states[2]. Therefore, an act of terrorism – whether international or not – may constitute a crime against humanity, and it is this aspect of the phenomenon that is considered in my study.

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1 **Fatma Taşdemir**, Uluslararası Terörizme Karşı Devletlerin Kuvvete Başvurma Yetkisi, USAK Yayınları: 10, Ankara, 2006, p. 44. Further see and compare **Robert Kolb**, "The Exercise of Criminal Jurisdiction over International Terrorists", in: Enforcing International Law Norms Against Terrorism (ed. A. Bianchi), Oxford and Portland Oregon: Hart Publishing, 2004, pp. 243-244.

2 In fact, it is argued that a core notion of terrorism to which the international community seems to adhere does not require the conduct to be of transnational nature (**Marcello di Filippo**, "The definition(s) of terrorism in international law", in: Research Handbook on International Law and Terrorism (ed. Ben Saul), Cheltenham, UK/Northampton, MA, USA: Edward Elgar, 2014, p. 18).

In addition, whether a terrorist act may be *attributed* to a given state or not[3] is not a factor in my study: either way, the individuals perpetrating (or being an accomplice) in the act may be charged with crimes against humanity. Therefore, whether state responsibility may arise or not, there might be an act of terrorism committed by a "transnational" terrorist group or network, at least for the purpose of the current study.

§ 1. The Meaning of Terrorism

The meaning of terms such as terrorism, terrorist, terrorist act, *etc*. has been the subject of extensive doctrinal debate for decades. It is not the purpose of this study to conduct a review over that literature. What can be said for the purpose of the current study is that each state's national law will provide a different answer to what constitutes a terrorist act[4]. These national laws will vary according to the (perceived) threat's nature and the cultural (and political) characteristics of the state in question[5]. Indeed, the authoritative study by *Saul* demonstrates that "wide divergences" exist between different national definitions[6]. Likewise, *di Filippo* argues that "the variations are practically infinite and it is virtually impossible to extrapolate a common denominator"[7]. In fact, the definition adopted *within one state* may change in time in accordance

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3 For an extensive analysis on the issue of attribution you may refer to **Tal Becker**, Terrorism and the State: Rethinking the Rules of State Responsibility, Oxford and Portland, Oregon: Hart Publishing, 2006.

4 Although some countries have not adopted a definition as such (**Becker**, p. 113).

5 **Hasan Köni**, "Terörizme Karşı Savaş", in: Criminal Law in the Global Risk Society (eds. Feridun Yenisey & Ulrich Sieber), Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group, Volume T 1, 2011, p. 503. For some examples (of definitions under domestic law) see **İbrahim Kaya**, Terörle Mücadele ve Uluslararası Hukuk, USAK Yayınları, Ankara, 2005, pp. 13-17.

6 **Ben Saul**, Defining Terrorism in International Law, Oxford: Oxford University Press, 2008, p. 262, see pp. 263 *et seq*. for details. In the same vein **Kolb**, p. 228. Cfr **Becker**, pp. 113-115: the author argues that with regard to those states that have adopted a definition, there is strong resemblance with the definition of the draft comprehensive convention on international terrorism (the attempt to draft such convention has been on the agenda of the UN General Assembly since 1996). In 1998 the UN GA decided that the Ad Hoc Committee established under GA Res. 51/210 should consider the elaboration of a comprehensive convention on international terrorism. In addition, another subsidiary body of the UN GA, the Working Group established each year by the Sixth Committee during the works of the annual sessions of the GA is also working on the same issue (**di Filippo**, in: Research Handbook, p. 7, fn. 23). Further cfr **Antonio Cassese**, "Terrorism as an International Crime", in: Enforcing International Law Norms Against Terrorism (ed. A. Bianchi), Oxford and Portland Oregon: Hart Publishing, 2004, p. 216: the author argues that national law definitions "substantially converge". The author is of the view that the lack of consensus in not on the definition, but on the exceptions to the notion of terrorism. In my opinion, a lack of consensus on the exceptions to the rule is not substantially different, in this context, to a lack of consensus on the meaning and scope of terrorism. At the end of the day, states disagree on whether certain types of acts constitute terrorism or not.

7 **di Filippo**, in: Research Handbook, p. 10.

with the changing political interests of that state[8]. Even more, the definition adopted by different state organs *at the same date* may also vary[9]! In addition, there might be "acute divergences" in criminal law definitions between different states in federal States[10]. Therefore, a survey of national laws may only help to identify certain common denominators, but even in that case, there will not be a general convergence.

On the other hand, it is not the purpose of this study to explain the meaning and scope of terrorism or terrorist acts within Turkish law. Whether a given act can be qualified as a terrorist crime within Turkish law (and, in particular, under the Law no. 3713 on the Fight Against Terrorism) is the subject of another discussion. The purpose of this study is to determine whether such "acts of terrorism" (whatever they consist of) can be qualified as a crime against humanity, and if so, when and how.

As for international law, although there are many treaties dealing with specific aspects of terrorism and the fight against it, there is no general definition which has a general scope of application[11]. The 1937 Convention for the Prevention and Punishment of Terrorism had incorporated a rather insufficient[12] definition[13], but this treaty never entered into force[14]. Today, the

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8 **Ahmet Hamdi Topal**, Uluslararası Terörizm ve Terörist Eylemlere Karşı Kuvvet Kullanımı, İstanbul, 2005, p. 9.

9 **Taşdemir**, p. 9.

10 **Saul**, p. 263.

11 **Anthony Aust**, Handbook of International Law, 2nd ed., Cambridge: Cambridge University Press, 2010, p. 266 ("there is still no internationally agreed comprehensive definition of terrorism"); **Ronald C. Slye & Beth Van Schaack**, International Criminal Law: Essentials, Wolters Kluwer Law & Business, 2009, p. 185 ("Terrorism is a concept with a colloquial meaning that lacks a consensus definition under international law."); **Roberta Arnold**, "The Prosecution of Terrorism as a Crime Against Humanity", ZaöRV 64 (2004), 979-1000, at 980; **Michael A. Newton & Michael P. Scharf**, "Terrorism and Crimes Against Humanity", in: Forging a Convention for Crimes Against Humanity (ed. Leila Nadya Sadat), Cambridge: Cambridge University Press (2011), p. 266; **Fiona de Londras**, "Terrorism as an International Crime", in: Routledge Handbook in International Criminal Law (London: Routledge, 2010), p. 167; **Ilias Bantekas & Susan Nash**, International Criminal Law, 3rd ed., London-New York: Routledge-Cavendish, 2007, p. 195 ("[the term] is elusive and one that has never been singly defined under international law, at least at the global level"); **Becker**, p. 85 ([the proposed definitions "have failed to acquire the status of a universally accepted legal definition"); **Neil Boister**, An Introduction to Transnational Criminal Law, Oxford: Oxford University Press, 2012, p. 73; **Kaya**, p. 9; **Topal**, p. 9; **Taşdemir**, p. 9; **Köni**, p. 504.

12 **Hans-Peter Gasser** (translated by **Fulya Eroğlu**), "Terör Eylemleri, "Terörizm" ve Uluslararası İnsancıl Hukuk", in: Terör ve Düşman Ceza Hukuku (project director Kayıhan İçel, editor Yener Ünver), Karşılaştırmalı Güncel Ceza Hukuku Serisi – 8 (Prof. Dr. Wolfgang Frisch'e Armağan), Ankara, 2008, p. 102.

13 According to Art. 2 (1) of said Convention all "criminal acts directed against a State and intended or calculated to create state of terror in the minds of particular persons or a group of persons or the general public" amount to terrorism.

only definition may be found in Art. 2 (1) of the 1999 International Convention for the Suppression of the Financing of Terrorism[15], but this is for the purpose of this treaty alone[16]. Hence, there is no international treaty (or other instrument) defining a crime of terrorism "writ large"[17]. Despite many scepticist views about the possibility of elaborating a legal definition of terrorism[18], I agree with the view that "there is no technical impossibility in defining terrorism; disagreement is fundamentally political"[19]. The two major stumbling blocks are (i) how to distinguish between terrorist acts and acts in furtherance of a people's right to self-determination; and (ii) whether state organs can commit acts of terrorism[20]. The stalemate on these points seems very hard to overcome, at least for the time being.

One way or another, what international law could do was to follow a "thematic approach"[21] - various specialised conventions dealing with specific types of terrorism have been adopted[22]. This shows that, at least, "Legal developments relating to terrorism have not…been paralysed by the impasse in achieving a global definition."[23] Even so, *O'Keefe*'s following observations bears importance: "the relevant universal conventions deal with specific acts that over the years have formed part of the *modus operandi* of international terrorism and not with 'terrorist' acts as such"[24]. The author further underlines that the most recent conventions (the ones on Terrorist Bombings, the Financing of

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14 Precisely because of the difficulties in achieving consensus around the definition provided by the Convention (**Helen Duffy**, The 'War on Terror' and the Framework of International Law, Cambridge: Cambridge University Press, 2007, p. 19).

15 Terrorism is defined as "any act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or abstain from doing an act".

16 **Kolb**, p. 234; **Aust**, p. 267; **John F. Murphy**, 'Challenges of the "new terrorism"', in: Routledge Handbook of International Law (ed. David Armstrong), London & New York: Routledge, 2009, p. 283.

17 **Slye & Van Schaack**, p. 186.

18 See di **Filippo**, in: Research Handbook, p. 5, fn. 10 for references to such authors.

19 **Saul**, p. 57. In the same vein **Becker**, p. 86.

20 **Roger O'Keefe**, International Criminal Law, Oxford: Oxford University Press, 2015, mn. 7.106. The Ad Hoc committed remains deadlocked over these issues (mn. 7.109). Also see **Amrith Rohan Perera**, "The draft United Nations Comprehensive Convention on International Terrorism", in: Research Handbook on International Law and Terrorism (ed. Ben Saul), Cheltenham, UK/Northampton, MA, USA: Edward Elgar, 2014, p. 158. Further see **Kolb**, p. 227: disagreements on "whether the motives of terrorists should be taken into account or only their acts, the question of who is an "innocent" target" is also a problem

21 **Bantekas & Nash** at 197.

22 **Kaya**, p. 9; **Murphy**, p. 282. This approach has been qualified by many authors as "sectoral", see for example **Kolb**, p. 229; **di Filippo**, in: Research Handbook, p. 6; **Perera**, p. 154.

23 **Duffy**, p. 18.

24 **O'Keefe**, mn. 7.40.

Terrorism, and Nuclear Terrorism) only employ the word terrorism in their title, and not in their provisions[25]. All in all, these conventions are concerned only with specific types of terrorist acts and (apart from the 1999 Convention on the financing of terrorism) they do not contain any general definition of terrorism[26].

In sum, the heavily prevalent academic opinion argues that there is no established definition of terrorism (as a crime) under customary international law[27]. Indeed, a survey of international legislation on the issue "indicates a lack of coherence in the definition of terrorism."[28]

However, a different conclusion was reached by the Appeals Chamber of the Special Tribunal for Lebanon which stated on February 16 of 2011[29] that "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society", there exists a definition of terrorism under customary international law[30]. The Chamber declared that the customary international law crime of terrorism consists of three key elements:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;

(ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;

(iii) when the act involves a transnational element.

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25 **O'Keefe**, mn. 7.40.

26 **Kolb**, p. 233.

27 **Saul**, p. 270, 319; **Duffy**, p. 39 (although the writer notes as a *possible* exception the war crime of inflicting terror on the civilian population), further see p. 41; **Slye & Van Schaack**, p. 187; **O'Keefe**, mn. 4.104. Also see **Boister**, p. 73 for a doubting approach.

28 **di Filippo**, in: Research Handbook, p. 8. The author argues that there are different approaches to two issues in particular: "the listing of protected goods or interests; and the definition of one or more special intentions (*dolus specialis*)".

29 *The Prosecutor v Salim Jamil* Ayyash et al., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I

30 This determination was strongly influenced by the (then) Court President Antonio Cassese's personal academic opinion on the issue. Cassese had long argued that "it may safely be contended that, in addition, at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category" of international crimes (**Antonio Cassese**, "Terrorism Is Also Disrupting Some Crucial Categories of International Law", EJIL (2001), Vol. 12, No. 5 (993-1001) at 994.) Also see **Antonio Cassese**, "The Multifaceted Criminal Notion of Terrorism in International Law", Journal of International Criminal Justice 2006 4(5):933-958.

Even so, later academic writings have criticized this finding by the Court: the general belief[31], to which I subscribe, is that the Appeals Chamber erred[32]. In my opinion, there is simply no consistent and general State practice which can confirm the bold assertion made by the Tribunal[33]. Therefore, it is not possible to provide a clear and certain definition of terrorism for the purpose of international law[34]. Even so, I can base my study on the premise that certain acts are universally accepted as terrorist acts (yo may think of certain Al Qaeda or ISIS or Boko Haram or PKK attacks), and analyse whether such acts can constitute a crime against humanity.

§ 2. The Meaning of Crimes Against Humanity

I may now turn to the second question, ie when is there a crime against humanity? Since I have dealt with this matter in other studies[35], in order to avoid

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31 **Kai Ambos & Anina Timmermann**, "Terrorism and customary international law", in: Research Handbook on International Law and Terrorism (ed. Ben Saul), Cheltenham, UK/Northampton, MA, USA: Edward Elgar, 2014, p. 28, further see p. 36, fn. 95 for references. Further see **Guénaël Mettraux**, "The United Nations Special Tribunal for Lebanon: Prosecuting terrorism", in: Research Handbook on International Law and Terrorism (ed. Ben Saul), Cheltenham, UK/Northampton, MA, USA: Edward Elgar, 2014, p. 652: "The STL's extraordinary judicial pronuncement was greeted by a mixture of scepticism and disapproval". Also see **Madeline Morris**, "Arresting Terrorism: Criminal Jurisdiction and International Relations", in: Enforcing International Law Norms Against Terrorism (ed. A. Bianchi), Oxford and Portland, Oregon: Hart Publishing, 2004, p. 63: "the term "terrorism" has no international legal definition".

32 **Gerhard Werle & Florian Jessberger** (in cooperation with **J Geneuss**, **B Burghardt**, **V Nerlich**, **P Bornkamm**, **P Viebig** & **B Cooper**), Principles of International Criminal Law, Oxford: Oxford University Press, 2014, mn. 131; **Ambos & Timmermann**, pp. 20, 36-38; **Mettraux**, Prosecuting terrorism, p. 653. Further see **S. Kirsch and A. Oehmichen**, "Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon", 1 Durham Law Review (2011) 32; **B. Saul**, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", 24 Leiden Journal of International Law (2011) 655; **E. Stier**, "The Expense of Innovation: Judicial Innovation at the Special Tribunal for Lebanon", 36 B.C. Int'l & Comp. L. Rev. E. Supp. (2014) 115. Further see **Cassese**, in: Enforcing…, p. 213, fn. 4 for a long list of references to authors arguing that a definition is missing under international law. For a rare view in favour of the Court see **Aviv Cohen**, "Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism", Michigan State International Law Review, Vol. 20:2, at 230-231.

33 For reasoned argumentation you may refer to **Ambos & Timmermann**, pp. 28 *et seq*.; **Mettraux**, Prosecuting terrorism, pp. 656 *et seq*. In fact, the Prosecution itself was of the view that no definition of terrorism existed under international law (ibid at 654-655).

34 In fact, the definition provided by the STL is vague and lacks specificity (**Mettraux**, Prosecuting terrorism, p. 664). The author argues (at 665) that the Tribunal's "definition might end up being little more than one among the many definitions competing for international acceptance".

35 You may refer to **Durmuş Tezcan, Mustafa Ruhan Erdem & R. Murat Önok**, Teorik ve Pratik Ceza Özel Hukuku, 16th ed., Ankara: Seçkin, 2018, pp. 74 *et seq*. for detailed information on the scope of the crime under Turkish law, and to **Durmuş Tezcan, Mustafa**

duplication, I shall only highlight the basic features of the crime in question, and/or deal with issues not already tackled before in those studies.

To put it in very general terms, crimes against humanity are mass crimes committed against a civilian population[36]. There is no international treaty defining crimes against humanity. However, the Statutes of the various international criminal tribunals established so far provide for definitions, which are not, however, consistent with each other[37].

It is debatable whether or not the Rome Statute establishing the International Criminal Court provides for a definition which is reflective of customary international law[38]. Even so, in the lack of an international treaty on the matter, this Statute seems the ideal basis for comparison. According to Art. 7 of the Rome Statute, "crime against humanity" means the commission of certain acts enumerated in the Article "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Crimes against humanity require the commission of one of the acts ("underlying crimes") described in Art. 7. These individual acts become a crime against humanity when committed within a certain context. This 'contextual element', for the purpose of the Rome Statute, is the widespread or systematic attack on a civilian population.

Crimes against humanity under international law are broader than genocide in that they do not need to target a specific national, racial, ethnical or religious group, and it is not necessary for the perpetrator to bear "specific intent" (dolus specialis) in the form of the intent to destroy (in whole or in part) a group as such.

However, Art. 77 of the Turkish Penal Code provides for a different definition of crimes against humanity. According to Turkish penal law, "the systematic commission of certain acts, in accordance with a plan, and with political, philosophical, racial or religious motives, against a part of society shall

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Ruhan Erdem & R. Murat Önok, Uluslararası Ceza Hukuku, 4th ed., Ankara: Seçkin, 2017, pp. 505-520 for information concerning the scope of the crime under international law.

36 **Werle & Jessberger**, mn. 867.

37 Art. 5 ICTY Statute: The International Tribunal shall have the power to prosecute persons responsible for the following crimes **when committed in armed conflict, whether international or internal in character, and directed against any civilian population**: (.....)

Art. 3 ICTR Statute: The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes **when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds**: (....)

Art. 2 SCSL Statute: The Special Court shall have the power to prosecute **persons who committed the following crimes as part of a widespread or systematic attack against any civilian population**: (...)

38 For the view that it is "probably" not see **William A. Schabas**, The International Criminal Court: A Commentary on the Rome Statute Oxford: Oxford University Press, 2010, p. 144.

constitute a crime against humanity". The official explanation of the provision states that the provision has been inspired from Art. 6/c of the Nuremberg Statute, and Art. 212-1 of the French Penal Code. Academic writings have criticized this approach in that framing the definition in the Rome Statute would have been a much better choice[39].

It may be said that the TPC differs in the following aspects from the Rome Statute[40]:

- The TPC requires a "discriminatory animus": the crime may only be committed "with political, philosophical, racial or religious motives". Thus, specific intent is required. Our legislator has drawn from the French Penal Code, a state where where such requirement is also supported in a few cases (*Barbie*[41] and *Touvier*). This is an inappropriate understanding, since current customary law accepts that crimes against humanity do not require a discriminatory intent (except for persecution)- they can be committed with general intent[42].

- The Rome Statute speaks of an attack directed against any civilian population, whereas the TPC requires the acts to be committed "against a part of society". The meaning to be drawn from this difference is discussed further on.

- The TPC only considers systematic attacks to amount to a crime against humanity. The common point between the Statutes of the ICTR, ICC and Special Court for Sierra Leone is that acts committed as part of a **widespread or** systematic attack (directed) against any civilian population may constitute crimes against humanity[43]. For some reason, the TPC seeks the existence of a systematic attack, by furher requiring it to be performed in accordance with a plan, but makes no reference to widespread attacks.

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39 **Faruk Turhan**, "Yeni Türk Ceza Kanunu'na Göre Uluslararası Suçların Cezalandırılması", Hukuki Perspektifler Dergisi, Sayı 3, Nisan 2005, p. 16; **Elif Başkaracaoğlu**, "Uluslararası Hukuk Işığında Yeni Türk Ceza Kanunundaki "İnsanlığa Karşı Suçlar" Tanımının Değerlendirilmesi", MHB, Yıl 24, 2004, p. 256; **Volkan Maviş**, "Crimes Against Humanity in the Turkish Criminal Code: A Critical Review in the Light of International Mechanisms", Gazi Üniversitesi Hukuk Fakültesi Dergisi, C. XX, Sayı 2, 2016, pp. 688-689.

40 **Tezcan, Erdem & Önok**, Ceza Özel, pp. 74-75.

41 The definition adopted by the French Court of Cassation in 1984 is the following (Alexander Zahar & Göran Sluiter, International Criminal Law, Oxford: Oxford University Press, 2008, p. 202): "inhumane acts and persecution committed in systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition".

42 See *infra*, sub-section E. (entitled "mental elements of crimes against humanity") for references.

43 The ICTY Statute does not explicitly seek the existence of such framework, although this requirement has in fact been elaborated by the Trial Chambers of the ICTY (see **Zahar & Sluiter**, p. 209; however the authors are critical of the methodology adopted in doing so).

- Finally, the catalogue of acts enumerated by the TPC is narrower when compared with the Rome Statute. Deportation or forcible transfer of population, enforced disappearence of persons, persecution, apartheid, sexual slavery are not listed in the TPC as acts which may constitute a crimes against humanity. This is probably because such crimes do not exist under Turkish penal law, therefore it was not possible to make reference to them.

§ 3. Terrorist Acts as a Form of Crimes Against Humanity?

Having answered the preliminary questions, I may now consider whether acts of terrorism can be qualified as a crime against humanity. The short answer is that terrorist acts can amount to crimes against humanity, however only subject to certain conditions[44]. While the majority academic opinion argues that terrorism *per se* (or as such) does not qualify as a crime under international law[45], depending on the circumstances of the case, terrorist attacks may fulfil the elements of crimes against humanity[46].

Indeed, international tribunals have in the past treated acts of terror as a crime against humanity[47]. The IMT at Nuremberg considered the terrorisation of civilians by the Nazi regime as a crime against humanity (and as a war crime)[48]. Certain Post-WWII trials conducted at national level have also treated acts of terror as a crime against humanity[49]. In particular, the ICTY the treated the use of a policy of terror as a form of persecution or inhumane act[50]. Although

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44 **Cassese**, in: Enforcing…, p. 222; **Antonio Cassese *et al.***, Cassese's International Criminal Law, 3rd ed., Oxford: Oxford University Press, 2013, p. 157; **Andrea Bianchi & Yasmin Naqvi**, International Humanitarian Law and Terrorism, Oxford and Portland Oregon: Hart Publishing, 2011, p. 248; **Duffy**, p. 42. Also see **Becker**, p. 116: an act of terrorism "may or may not…amount to…a crime against humanity"; **Ambos & Timmermann**, p. 38: "extreme forms of terrorism may amount to…crimes against humanity".

45 **Werle & Jessberger**, mn. 129, further see fn. 266 for supporting references. Furher see Duffy, p. 39, 44.

46 **Werle & Jessberger**, mn. 131, mn. 129, further see fn. 270 for supporting references. Further see **Cassese**, in: Enforcing…, p. 222; **Vincen-Joël Proulx**, "Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?", Am. U. Internatıonal L. Rev 19, No. 5 (2003), p. 1084; **Cóman Kenny**, "Prosecuting Crimes of International Concern: Islamic State at the ICC?", Utrecht Journal of International and European Law 33 (84), 2017, p. 131; Morris, in: Enforcing…, p. 69-70; **Dino Carlos Caro Coria**, "La relación entre terrorismo, crímenes contra la humanidad y violaciones al derecho internacional humanitario", in: Terrorismo y Derecho Penal (Kai Ambos, Ezequiel Malarino y Christian Steiner (editores)), Berlin: Konrad-Adenauer-Stiftung e. V., 2015, p. 172.

47 See **Arnold**, pp. 987 *et seq*. for details.

48 **Bianchi & Naqvi**, IHL and Terrorism, p. 249. It is open to discussion, though, to what extent the Tribunal used the word terrorism (and related concepts) in a legal and/or technical sense.

49 **Bianchi & Naqvi**, IHL and Terrorism, pp. 249-250.

50 **Arnold**, p. 990. See in particular *Prosecutor v Blagojević and Jokić*, ICTY Trial Chamber, judgment of 17 January 2005 (ICTY-02-60-T) and *Prosecutor v Popović* et al., ICTY Trial Chamber judgment of 10 June 2010 (ICTY-05-88-T).

terrorism *per se* has been excluded from Art. 7 of the Rome Statute[51], acts of terrorism may still be prosecuted by the ICC as one of the enlisted sub-categories of crimes against humanity, such as murder or "inhumane act"[52].

It would be useful to get into some detail by analysing the material elements of crimes against humanity, under both international and Turkish law, and then scrutinizing whether or not terrorist acts fall within the relevant scope.

A. *Perpetrator*

Crimes against humanity may be committed by any person – the perpetrator does not need to bear any special status, and does not need to be a state official[53]. This is true for both international and Turkish law.

Therefore, where perpetrators of terrorist acts have no affiliation with official authorities, this is not a bar to the qualification of those acts as a crime against humanity[54].

B. *Victim*

Crimes against humanity may only be committed against a "civilian population". "Civilian" includes all those persons who are not granted the status of "combatants". The definition of civilian embodied in Art. 50/1 of Additional Protocol I to the Geneva Conventions[55] has been accepted by the ICTY and ICTR as reflective of custom[56].

As stated by the ICTY:

> "the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals"[57].

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51 For a brief summary of the reasons why, refer to **Tezcan, Erdem & Önok**, Uluslararası Ceza Hukuku, pp. 345-346. For detailed information see **Cohen**, pp. 223 *et seq*.

52 **Arnold**, p. 994.

53 **O'Keefe**, mn. 4.57.

54 **Cassese**, in: Enforcing…, p. 220.

55 "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.". According to para. 2 "The civilian population comprises all persons who are civilians" and according to para. 3 "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

56 **Schabas**, The ICC, p. 154; **O'Keefe**, mn. 4.51.

57 *Prosecutor v Kunarac*, ICTY Appeals Chamber, judgment of 12.6.2002, § 90.

As can be seen, crimes against humanity may only be committed against persons not actively participating in hostilities[58]. In addition, it suffices for the victim group to be *predominantly* civilian in nature[59].

If we think of examples such as Al Qaeda[60], ISIS/DAESH, PKK, Hizbullah, Boko Haram etc. most of their acts are committed by directly aiming at harming a large body of predominantly or exclusively civilian population. So, the criteria explained so far will be satisfied. This is true with regard to the attacks perpetrated by such groups outside Turkey, and, where relevant, within Turkish territory.

The civilian population must be the primary object of the attack and not just an incidental victim of the attack[61]. Provided that this condition is met, acts of terrorism which lead to a number of non-civilian casualties may also be qualified as a crime against humanity[62]. In fact, *Cassese* argues that when terrorist acts amount to crimes against humanity, the victims may embrace both civilians and state officials including members of armed forces. He argues the following:

> "Admittedly, the Statutes of international criminal tribunals, in granting jurisdiction to these tribunals over crimes against humanity, stipulate that the

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58 Acts committed against combatants of the parties to an armed conflict may amount to war crimes. According to the ICRC's interpretation of customary IHL, all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel (Rule 3). The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates (Rule 4). Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. (Rule 5). However, those who have the duty to maintain public order and have the legitimate means to exercise force, such as the police and the gendarmarie, have not been counted as civilians in the ICTR case-law (**Tezcan, Erdem & Önok**, Uluslararası Ceza, p. 507). An exception is persecution, which may also be committed against military personnel.

59 "The presence of certain non-civilians in their midst does not change the character of the population" (ICTY Trial Chamber in *Kordic*, 26.2.2001, § 180). However, a group may cease to be a civilian population if there are large numbers of combat-ready soldiers intermingled with it.

60 For example, it has been argued that the 9/11 attacks constitute a crime against humanity for the following reasons (**Scharf & Newton** at 274): "(1) they targeted civilians; (2) they resulted in the deaths of more than 3,000 people; (3) they were part of a string of attacks that included the earlier bombing of the World Trade Center in 1993, bombings in Saudi Arabia in 1995 and 1996, bombings of U.S. embassies in Africa in 1998, and the attack on the U.S.S. Cole in October 2000; and (4) they constituted a systematic attack against the two World Trade Center towers, the Pentagon, and an attempt against the White House". Also see for the view that the attacks constituted crimes against humanity **De Londras**, p. 171 and **Proulx**, p. 1083.

61 ICC Pre-T. Ch. in *Prosecutor* v. *Jean-Pierre Bemba Gombo*, decision of 15 June 2009, para. 76.

62 **Bianchi & Naqvi**, IHL and Terrorism, p. 256.

> victims of such crimes must be civilian. However, this limitation cannot be found in customary international law, which to my mind provides instead that crimes against humanity may also be perpetrated against military personnel and members of other enforcement agencies"[63].

There seems to be a problem with the TPC in that Art. 77 requires that the "acts" (ie the underlying crimes) be directed against the civilian population. Under customary international law, it is irrelevant "whether the accused intends to direct the impugned act solely against its victim or victims, rather than against the civilian population against which the attack is directed"[64]. This is confirmed by the ICTY: "It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof"[65]. The way it is formulated, it seems that the TPC requires each individual act to be committed against the targeted civilian population. If this interpretation is true, the scope of crimes against humanity under Turkish law would be significantly reduced. For example, acts committed against state targets would never fall under Art. 77, even when they are part of a larger attack directed against the civilian population[66].

There is a further problem with the wording of TPC Art. 77. For some reason, the provision requires that the acts be committed "against a part of society" ("toplumun bir kesimine karşı"). Interestingly, the text adopted by the Justice Commission of the Parliament referred to an attack committed against "a civilian group of the population". The official reason provided for the amendment made before the Parliament refers to the need to "provide compatibility of the text of the provision with international treaties". This is baffling! Admittedly, the initial wording seems to come closer to the formulation of the Rome Statute (and to the understanding under customary international law). The stated intention of the lawmaker was not to depart from international law, on the contrary, the purpose was to provide coherence with it.

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63 **Antonio Cassese**, "The Multifaceted Criminal Notion of Terrorism in International Law", Journal of International Criminal Justice 2006 4(5), p. 949. Therefore, he contends that atrocities committed in peacetime by terrorist groups against military or police personnel such as bombing barracks or blowing up police stations should be classified as crimes against humanity.

64 **O'Keefe**, mn. 4.62.

65 *Prosecutor v Kunarac* et al., ICTY Appeals Chamber, judgment of 12 June 2002, para. 103.

66 Cfr **Cassese's International Criminal Law**, p. 157-158: the authors argue that where terrorist acts amount to a crimes against humanity the victims may comprise both civilians and state officials, including members of armed forces. The authors also argue that the contextual element does not mean that the victims of the underlying crime must perforce be civilians. Further see **Kriangsak Kittichaisaree**, International Criminal Law, Oxford: Oxford University Press, 2005, p. 95: the victims of CaH may include military personnel, and **Bianchi & Naqvi**, IHL and Terrorism, p. 255-256: the personnel at the Pentagon during the 9/11 attacks may be regarded as the victim of a crime against humanity (in the same direction see **Cassese**, in: Enforcing…, p. 223).

Hence, a teleological approach may lead us to the conclusion that the relevant wording of TPC should be interpreted in parallel with the established understanding under international law. Therefore, I submit that the victim of crimes against humanity under Turkish penal law is also "a civilian population", which is to be understood in accordance with international law[67].

However, one could also plausibly argue that, regardless of the understanding adopted under international law with regard to the possible categories of victins, the wording of the penal code also encompasses parts of the population that would not be considered as "civilian"[68], i.e. armed groups representing a political group in an internal armed conflict. In that case, acts committed against combatants would also fall under TPC Art. 77.

Finally, the purpose of the word "population" is to indicate that a large body of victims must be targeted, and that random attacks against a given number of individuals does not amount to a crime against humanity[69]. Therefore, a crime of a collective nature is envisaged[70]. The same holds true for our TPC which refers to the victim as "part of society". Therefore, the crimes must not target a limited and specific number of randomly selected victims[71]. There is no problem here since terrorist attacks always aim at harming the people at large and a large number of unspecified victims, and not a select number of individuals.

C. *Conduct and Result*

The acts listed under Art. 7 of the Rome Statute are as follows:

(a) Murder;

(b) Extermination (includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population);

(c) Enslavement (means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children);

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67 In the same direction **Turhan**, HPD, p. 17.

68 In this direction see **Başkaracaoğlu**, p. 37.

69 **Robert Cryer *et al.***, An Introduction to Criminal Law and Procedure, Cambridge: Cambridge University Press, 2007, p. 192; **Canan Ateş Ekşi**, *Uluslararası Ceza Mahkemesinin İnsanlığa Karşı Suçlar Üzerindeki Yargı Yetkisi*, Ankara 2004, p. 122.

70 **Köksal Bayraktar**, Özel Ceza Hukuku, Cilt I (Uluslararası Suçlar), İstanbul: XII Levha, 2016, p. 76.

71 *Prosecutor v Milan Martić,* ICTY Appeals Chamber, judgment of 8.10.2008, para. 83; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC Pre-Trial Chamber II decision (ICC-01/05-01/08-424), 15.6.2009, para. 77.

(d) Deportation or forcible transfer of population (means 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);

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture (means 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);

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy (the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law), 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; ('Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity);

(i) Enforced disappearance of persons (means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a 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);

(j) The crime of apartheid (means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime);

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

As for Art. 77 TPC, the following acts may constitute the material element of crimes against humanity: intentional killing, intentional wounding, torture, "tormenting" (*eziyet*), slavery, deprivation of personal liberty, subjecting to scientific experiments, sexual assault, sexual exploitation of minors, forced pregnancy, forced prostitution.

Terrorist acts almost always take the shape of one or more of the above-listed acts, therefore there is no problem in this regard. In particular, terrorism almost always entails acts of intentional homicide.

The categories of conduct enumerated by the TPC is more restrictive when compared to the Rome Statute. Deportation or forcible transfer of population, enforced disappearence of persons, persecution, apartheid, sexual slavery are not listed in the TPC. This is not a practical problem since terrorist acts committed on Turkish territory have not (yet) taken any of the above shapes. However, with regard to terrorist acts committed abroad, if their trial were to be conducted in Turkey, certain instances of terrorism (for example Boko Haram atrocities) would escape the reach of TPC Art. 77.

On the other hand, TPC Art. 77 also lists intentional wounding as one of the underlying crimes. This is a jurisdictional advantage in that many terrorist acts entail this type of act.

D. *The Contextual Element Surrounding the Underlying Conduct*

A decisive material element of crimes against humanity under the Rome Statute is the so-called contextual element: the individual atcs must have been committed "as part of" a "widespread or systematic attack" which has been "directed against any civilian population".

a. "Attack directed against any civilian population"

Attack in this context does not need to be of a military nature. The acts of the accused have to be a 'part of' an attack against the civilian population. So, the 'attack'[72] for the purposes of crimes against humanity refers to the broader course of conduct, involving prohibited acts, of which the acts of the accused form part[73]. The reference to population implies crimes of a collective nature[74]. Therefore "single or isolated acts against individuals" fall outside crimes against

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[72] The 'attack' element describes a course of conduct involving the commission of acts of violence. For example, according to Art. 7 (2) (a) of the Rome Statute, 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

[73] As explained by the ICTY Appeals Chamber in *Tadic* (15.7.1999, § 271): "The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related."

[74] Population 'may be defined as a sizeable group of people who possess some distinctive features that mark them as targets of the attack' (**Guénaël Mettraux**, International Crimes and the Ad Hoc Tribunals, Oxford: Oxford University Press, 2006, p. 166).

humanity[75]. As shall be discussed below, TPC Art. 77 does not make reference to the existence of an attack, of which the individual act should be a part of. Instead, it speaks of a systematic act, to be performed pursuant to a plan.

Contrary to Art. 5 ICTY Statute, and in line with Art. 3 ICTR Statute and Art. 2 SCL Statute and Art. 7 Rome Statute, TPC Art. 77 requires no connection with an armed conflict[76]. In this aspect, our national provision is in conformity with customary international law[77]. In fact, the ICTY itself had accepted that the 'nexus to armed conflict' requirement was a deviation from customary law, and could, in any case, be explained with the background to the adoption of the ICTY Statute (the armed conflict in the former Yugoslavia)[78].

Therefore, terrorist attacks perpetrated in the absence of an armed conflict may qualify as a crime against humanity[79]. In the existence of an armed conflict, terrorist acts may be tried as a war crime[80]. This is confirmed by the case-law of the ICTY, ICTR, and Special Court for Sierra Leone[81]. However, the treatment of terrorist acts as a war crime is obviously not within the scope of this study.

As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. Hence, a crime against a single victim or against a limited number of victims might qualify as a crime against humanity if the act is part of the specific context identified above[82], and the accused is aware of this broader context[83].

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75 As was stated by the ICTY "the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals" (*Prosecutor v Kunarac*, ICTY Appeals Chamber, 12.6.2002, § 90.)

76 Interestingly, though, Turkey had argued in favour of a link with an armed conflict during the Rome Conference leading to the adoption of the ICC Statute (**Ateş Ekşi**, p. 111).

77 **Rodney Dixon**, in: O. Triffterer (ed.), Commentary on the Rome Statute (1999), article 7, margin n° 3; **Simon Chesterman**, "An Altogether Different Order: Defining the Elements of Crimes Against Humanity", Duke Journal of Comparative & International Law, Vol. 10, 2000, p. 310; **Kittichaisaree**, p. 93; **Slye & Van Schaack**, p. 229; **O'Keefe**, mn. 4.56.

78 **Ateş Ekşi**, p. 112; further see **Larry May**, Crimes Against Humanity – A Normative Account, Cambridge: Cambridge University Press, 2005, pp. 119-120 for the gradual "movement away from thinking that these crimes must be conducted during wartime".

79 **Cassese's International Criminal Law**, p. 157.

80 In this regard refer to **Andrea Bianchi and Yasmin Naqvi**, "Terrorism", in: The Oxford Handbook of International Law in Armed Conflict (eds. Andrew Clapham & Paola Gaeta), Oxford: Oxford University Press, 2015, pp. 574-604. For more detailed information you may refer to **Bianchi & Naqvi**, IHL and Terrorism, pp. 208 *et seq*.

81 **Bianchi & Naqvi**, in: Oxford Handbook, p. 592. See in particular *Prosecutor v Galić*, ICTY Appeals Chamber, judgment of 30.11.2006.

82 In short, a single act by the accused may constitute a crime against humanity if it forms part of the attack. When can the attack be considered to have been directed against the civilian population?

Where the perpetrator is a member to a terrorist organization, proving knowledge of the overall attack should not be a problem[84].

Therefore, a single suicide attack only harming a handful of people may still be prosecuted as a crime against humanity provided that it is part of an overall attack. Turkish law poses a problem, here, though: since TPC Art. 77 makes no reference to an "attack", and seeks the commission of "systematic" acts, it may be argued that a non-sophisticated terrorist attack may fail to fall under Art. 77, even if it is a part of a series of similar attacks.

In fact, the fact that our Penal Code does not include the "widespread" alternative may also mean that a single non-sophisticated attack, even if it harms a large number of victims, may fail to qualify as a crime against humanity. Indeed, it is argued that, exceptionally, in the absence of a context of an attack against the civilian population, a single act may *in itself* constitute the attack, if it is of great magnitude, as in the use of a biological weapon against the civilian population[85]. The lack of the adjective "widespread" could require a different conclusion with regard to Turkish law, where the single attack of massive consequences is nonetheless not systematic.

A crime committed months after, or some distance away from, the main attack may still constitute 'part of' the attack if sufficiently connected to it[86]. Therefore, a string of acts committed by the same terrorist organization may be considered to form a part of the same overall attack. The major problem here is to determine how much time may elapse between different acts in order for these to be considered as a part of the same overall attack[87]. So, if a terrorist organization is responsible for three different attacks two years apart from each other, can these three acts be assessed cumulatively as part of the same overall

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"*As stated by the Trial Chamber, the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war". Prosecutor v Kunarac*, ICTY Appeals Chamber, 12.6.2002, § 91.

83 In addition, the acts of the accused need not be of the same type as other acts committed during the attack (eg., others may be committing rape and murder, the accused might be committing torture and enslavement).

84 **Cohen**, p. 245.

85 For a contrary view see **Marcello di Filippo**, "Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *European* Journal of International Law, Volume 19, Issue 3, June 2008, p. 569.

86 ICTY Trial Chamber in *Krnojelac,* 15.3.2002, para. 127.

87 **Arnold**, p. 996.

attack? While it is certain that different acts do not have to be simultaneous, there is no guidance as to any maximum time-limit. Whereas there is no clear-cut answer to the question, it would defeat logic to argue that a certain and clear time-limit must be accepted in order to be able to regard different acts committed by the same terrorist organization (and in the same country) as part of the same overall attack. For example, the US regarded acts of terrorism perpetrated against US targets by Al Qaeda in 1993, 1998 and 2000 to be part of the same overall campaign against the US[88]. With regard to ISIS and PKK attacks on Turkish territory, there has been a consistent string of attacks, therefore the problem is accentuated. For example, the indictment concerning the attack on the Ankara train station lists sixteen different terrorist acts committed by ISIS on Turkish territory[89].

Another problem may concern the physical (geographical) distance between the larger attack and the single act in question[90]. An interesting question posed is the following: "Is the general campaign of radical Islam against the West sufficient to render every isolated terrorist attack carried out by a Muslim "part of a widespread or systematic attack?"[91]. Posed this way, it is difficult to provide a convincing affermative answer. However, when it comes to the Turkish context, if we think of PKK or ISIS attacks throughout Turkey, there should be no doubt in answering in the affirmative! The problem would rather be in "tying together" attacks by the *same* organization but committed in *different* states. With regard to terrorist attacks targeting Turkey, though, there is no such need: the major transnational terrorist organisations who have been responsible for various terrorist attacks perpetrated on Turkish territory have all been responsible for a string of attacks throughout our own territory.

All in all, if we think of terrorist campaigns perpetrated by large terrorist networks, the individual acts of terror will almost always form part of a larger framework where the civilian population is attacked by the terrorist organization. In that sense, the "part of an attack" criterion will be satisfied. The problem would be determining at what moment this attack becomes systematic, a point which I shall discuss below. As regards Turkey, rather than proving the existence of an overall attack, the prosecutor would have to prove the existence of a plan and the systematic nature of the act. Both points are discussed below.

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88 **Bianchi & Naqvi**, IHL and Terrorism, p. 255.

89 Ankara 4th Court of Assizes, judgment of 3 August 2018 (E. 2016/232).

90 **Cohen**, p. 244.

91 **Cohen**, p. 244. For an affirmative opinion in connection with 9/11 see **Proulx**, pp. 1068-1069 (citations omitted): "The acts perpetrated by members of Al Qaeda were part of a systematic campaign against U.S. civilian populations. There is also a direct link between the September 11th hijackings and the overall campaigns that Al Qaeda directed against Israel and U.S. troops in Saudi Arabia. Above all, these specific crimes converge into a greater objective, an ongoing, globaljihad aimed, among other things, at expelling infidels from Saudi soil."

What is certain is that *individual* acts of terror by "lone wolfs" will not qualify as a crime against humanity unless this one-time attack is widespread by itself[92] (as explained above). In fact, even *state-sponsored* single attacks may fall outside the definition of crimes against humanity, as seems to be the case with the bombing of Pan Am Flight 103[93].

b. The "widespread" or "systematic" nature of the attack

According to the ICTR, SCSL, ICC Statutes and the case-law of the ICTY, only acts committed as part of a widespread or systematic attack (directed against any civilian population) may constitute crimes against humanity[94].

These criteria are not conjunctive but disjunctive, the prosecutor need only satisfy one or the other threshold.

According to the case-law, "widespread" is a quantitative criterion which refers to the large-scale nature of the attack and the number of victims[95]. Obviously, no numerical limit can be set. There is no need, in regard of this criterion, for geographic spread[96].

While the term usually refers to the "cumulative effect of a series of inhumane acts", the widespread requirement could also, exceptionally, be satisfied by "the singular effect of an inhumane act of extraordinary magnitude"[97]. At least, one could comfortably argue that "the repetition of many acts of terrorism which cause only small number of victims at a time" may qualify as crime against humanity[98]. Therefore, terrorist acts committed in one city may amount to a crime against humanity, if all other definitional requirements are satisfied.

TPC Art. 77 seeks the existence of a systematic attack, by furher requiring it to be performed in accordance with a plan, but makes no reference to widespread attacks[99]. Even so, it may be argued that almost every widespread

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92 In similar fashion see **Cohen**, p. 244. This is not a big problem though. As explained by **Arnold** (at 1000): "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."

93 For a similar view see **Cohen**, p. 244.

94 See **May** (at 122) for the view that this is an "uncontroversial element" of the crime. Further see Duffy, p. 79.

95 **Tezcan, Erdem & Önok**, Uluslararası Ceza, p. 511.

96 **Duffy**, p. 81.

97 **Duffy**, p. 80, 81. Cfr **Bianchi & Naqvi**, IHL and Terrorism, p. 254: Art. 7(2)(a) of the Rome State could be taken to disallow this conclusion.

98 **Bianchi & Naqvi**, IHL and Terrorism, p. 254.

99 In fact, the initial draft did not mention either criterion!

attack will necessarily be "systematic". Admittedly, though, this *might* not always be the case. Indeed, there may be examples in which the act is hardly systematic, but still affects many victims (eg, think about injecting lethal amounts of poison into the municipal water distribution system). In such cases, Art. 77 of the TPC might fail to apply. Therefore, our penal code may fail to cover certain instances of crimes against humanity. As a critical observation, one cannot see why the drafters have departed from the established customary understanding in defining the nature of the attack on the civilian population[100].

"Systematic" is a qualitative criterion which refers to "the organised nature of the acts of violence and the improbability of their random occurrence"[101].

As stated in *Blaskic* (ICTY Trial Chamber, 3.3.2000) and repeated in *Kordic and Cerkez* (ICTY Trial Chamber, 26.2.2001, § 179), "systematic" refers to the following four requirements:

(1) 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; (a plan or objective)

(2) 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; (large-scale or continuous commission of linked crimes)

(3) the preparation and use of significant public or private resources, whether military or other; (significant resources)

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

However, it would be excessive to seek the cumulative existence of all these requirements. It is argued that to qualify an attack as systematic, the high degree of organization is the key notion, and all the other criteria indicated above are in reality important factors in assessing whether such degree of organization which shows the systematic nature of the attack exists[102].

Indeed, more recent case-law focuses on the organized nature of the acts of violence and the improbability of their random occurrence. In fact, the ICC also adopts a broad approach in determining the meaning of these terms: 'Consistent

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100 **Maviş**, p. 698.

101 However, the ICTR adopts a more stringent, and probably excessive standard by stating that "widespread", "is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims, while "systematic" constitutes organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources." (*Prosecutor v Musema*, ICTR Trial Chamber, judgment of 27.1.2000, § 204).

102 **Cryer *et al.***, p. 237.

with the established jurisprudence of the Court, the Chamber is of the view that the adjective "widespread" refers to "the large-scale nature of the attack and the number of targeted person", while the adjective "systematic" refers to the "organised nature of the acts of violence and the improbability of their random occurrence"'[103]. In this sense, a string of terrorist acts by transnational terrorist groups certainly satisfy this criterion.

Furthermore, it is the attack of which the accused's conduct forms part that needs to be widespread or systematic, not the accused's conduct itself[104]. As a result, a terrorist attack targeting and/or harming a limited number of individuals may still constitute a crime against humanity provided that it is part of a widespread and systematic attack, and not an isolated or random act[105]. However, as stated above, a plain reading of TPC Art. 77 seems to require that every act (ie, the underlying crime) itself is committed in a systematic manner and in accordance with a plan. If judicial interpretation were to be in that direction, the scope of crimes against humanity would be significantly narrowed down in comparison with customary international law.

To make an assessment, terrorist acts committed by larger and/or transnational organizations are widespread and/or systematic[106]. The problem here may be the following[107]: when there is a wave of coordinated attacks over a relatively concentrated period of time, at what point has this campaing reached the level which qualifies it as a 'systematic attack'? This will be difficult to determine. The additional question here is whether or not it is possible to consider cumulatively attacks committed in different nations. What can be said with regard to attacks committed by transnational terrorist groups operating in, or against Turkey is that since their acts are of a repetitive nature, there is a point in time where their cumulative effect will satisfy the criterion of being systematic. The problem here is that the first attack(s) may have to be excluded from the scope of crimes against humanity.

As for singular and individual attacks, many of them will not qualify as a crime against humanity. Especially, if there is a wave of incidents, such as a wave of suicide bombings, but these attacks are not centrally directed or organized, it will not be possible to speak of a systematic attack[108]. On the other hand, there would be no dogmatic value in trying to qualify such isolated acts as "international" crimes, so there is no theoretical problem here. Interestingly,

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103 Pre-Trial Chamber (Decision on the Prosecutor's Application for a Warrant of Arrest against Mbarushimana Callixte), No.: ICC-01/04-01/10, 28.09.2010, para. 24.

104 **O'Keefe**, mn. 4.55.

105 As confirmed by the ICTY Appeals Chamber in *Kunarac* et al (para. 96).

106 Also see **Caro Coria**, pp. 171-172.

107 **de Londras**, p. 170.

108 **de Londras**, p. 170.

though, since TPC Art. 77 does not refer to the existence of an overall attack, it may be that a single highly-planned act may still be found to fall under Art. 77.

c. Is there a policy or planning element of crimes against humanity?

A controversial point under customary international law is whether the existence of the policy element is an independent requirement[109].

National case-law after WWII regarded the existence of a *governmental* policy as a requirement. Later, in the 1990s, various authorities[110] required a policy or direction, instigation or encouragement by a State or organization.

According to one view, the existence of a policy or a plan is a component of this crime[111]. As stated by the ILC[112] and followed by the ICTR case-law, it is not essential for such policy to be adopted formally as a policy of a State. However, there must exist some form of preconceived plan or policy.

At the Rome Conference, following the authorities at that time, a policy element was also incorporated. A similar requirement is reported to appear 'in much national jurisprudence'[113].

However, later ICTY case-law has rejected the policy requirement as an element of the crime (ICTY A.Ch. in *Kunarac*, 12.6.2002, para. 98)[114].

Even if this interpretation by the ICTY was accepted to be reflective of customary law[115], it should be remembered that unconnected and random acts,

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109 Refer to **Tezcan, Erdem & Önok**, Uluslararası Ceza, pp. 512-513 for the debate.

110 **Cryer *et al.***,, p. 238, fn. 44.

111 See in this line **May**, pp. 121-122. Also see **Darryl Robinson**, "Crimes against Humanity: A Better Policy on 'Policy'", in: The Law and Practice of the International Criminal Court (Carsten Stahn ed.), Oxford: Oxford University Press, 2015, p. 706: "there is ample customary law authority for a policy element, if it is understood as a modest threshold.", and pp. 707-708 for the value in adopting a policy element ("or something similar"). Authors such as Claus Kress, William Schabas and Cherif Bassiouni have argued in favour of seeking this element (see **Robinson**, in: ICC (Stahn ed.), p. 712, fn. 21 for references).

112 Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996)

113 **Cryer *et al.***, p. 239.

114 The ICTY Appeals Chamber has concluded in *Kunarac* et al. (judgment of 12.6.2002, para. 98) that: "Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."

even if widespread, will not constitute a crime against humanity. In fact, according to one approach, the policy element "simply screens out 'ordinary' unconnected crimes of individuals acting on their own unprompted intitiative"[116]. According to this undestanding, no formal programmatic determination is needed; the term is interpreted in a broad sense as a planned, directed or organized crime, as opposed to spontaneous, isolated acts of violence. Indeed, the case law of international criminal tribunals has declared that a 'policy' need not be formally adopted, nor expressly declared, nor even stated clearly and precisely[117]. The important thing is for the string of acts to be connected to each other.

In any case, whereas the requirement of a plan element can be a problem with regard to other instances of crimes against humanity, one may comfortably argue that this element should not pose a major problem with regard to terrorist acts. Indeed, acts of terrorism committed by major criminal networks in the framework of a more general attack on the civilian population are always planned. Even where the details of each individual attack (including their planning and carrying out) are left to individual cells within the network, these attacks are the result of the implementation of a more general plan. In addition, transnational terrorist organizations operating in Turkey have formally adopted, and publicly declared political agendas and action plans.

As for the Elements of Crimes of the ICC, "*'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*".

The Court had initially adopted a rather broad approach to the policy requirement: '*The requirement of "a State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion*'[118].

If this is so, attacks perpetrated by large terrorist groups are never isolated acts of violence, but planned and organized acts. If the threshold is merely this,

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115 For criticism on this point see **Schabas**, The ICC, p. 151.

116 **Robinson**, in: ICC (Stahn ed.), p. 705.

117 See **Tezcan, Erdem & Önok**, Uluslararası Ceza, p. 513, fn. 191 for references; also see **Robinson**, in: ICC (Stahn ed.), p. 709.

118 *Prosecutor* v. *Bemba Gombo*, Pre-Trial Ch. II, decision of 15 June 2009, para. 81.

there would hardly be any problem in qualifying a string of terrorist acts carried out by transnation terrorist organizations as crimes against humanity.

It is interesting to note that in its first decisions, the ICC stated that with regard to a 'systematic attack on a civilian population' the policy element has no independent relevance as an element of the crime, but may serve as evidence of the systematic character of the attack[119]. Admittedly, equating "policy" with "systematic" is problematic[120].

With regard to TPC Art. 77 I am of the view that the "plan" and "systematic" elements are separate. Our law does not seek the existence of a "policy". Even so, it requires the systematic performance of certain acts, "in accordance with a plan". In that sense, it may be said that the existence of a policy will be a factor in determining whether the act was performed in a systematic way, and in accordance with a plan. As a matter of fact, the way it is formulated, the TPC is apt to be interpreted as having adopted a rather stringent approach: a (formal) programmatic determination seems to be required. On the other hand, it has also been argued that the plan element embodied in the definition of Art 77 is only for the purpose of explaining that the acts should be systematic[121]. This assertion may find support in the debate conducted before the Justice Commission - the parliamentary commission which drafted the final version of the Penal Code before it was submitted to the General Assembly[122]. If this is the case, just as with the policy element, it could be argued that the plan need not be formally adopted, nor expressly declared, nor even stated clearly and precisely.

On the other hand, other decisions by the Pre-Trial Chamber have adopted a rather strict understanding, which has led to criticism[123]. For example, in the case concerning the President of Ivory Coast, Mr. Gbagbo, a majority of the Chamber requested proof of the *formal* adoption of the policy[124]. This requirement is certainly inconsistent with past case-law[125]. Even so, as explained above, even a requirement of formal adoption would not exclude the acts of major terrorist groups which always act pursuant to a certain programme and objective which is publicly proclaimed.

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119 *Prosecutor* v. *Harun and Kushayb*, Pre-Trial Ch., decision of 27 April 2007, para. 62, *Prosecutor* v. *Bemba Gombo*, Pre-Trial Ch., decision of 10 June 2008, para. 33.

120 In this regard see **Robinson**, in: ICC (Stahn ed.), p. 713-714.

121 **Turhan**, HPD, p. 16.

122 **Başkaracaoğlu**, p. 260.

123 **Robert Cryer *et al.***, An Introduction to International Criminal Law and Procedure, 3r ed., Cambridge: Cambridge University Press, 2014, pp. 239-240; **Robinson**, in: ICC (Stahn ed.), p. 705, further see p. 729: "Early ICC jurisprudence shows some disturbing tendencies to infuse the policy element with requirements that are not required by the authorities, nor by theory of the crime…".

124 Pre-Trial Ch. I, decision of 3 June 2013, para. 44.

125 **Cryer *et al.*** (3), p. 240; **Robinson**, in: ICC (Stahn ed.), p. 705.

Furthermore, in the *Mbarushimana* case[126], the majority argued that organized atrocities did not satisfy the policy element because the purpose of the group behind the attacks was vengeance or intimidation. This finding is open to criticism: the existence of ulterior purposes does not undermine the existence of an organizational policy[127].

All in all, it seems that part of the ICC case-law has built too much into the policy element[128]. Turkish case-law should not follow the same mistake. Since Turkish law requires the existence of a plan, even if the unacceptably narrow interpretation by the ICC were to be applied, the existence of any ulterior motive would certainly not lead to a failure to accept that the crimes were committed through a plan[129]. In addition, just like with the policy element, in my opinion there is no need to seek a clear formal programmatic determination. Whereas Art. 77 requires the existence of a plan, there is no statutory requirement that this plan be in writing, or detailed, or officially proclaimed. A policy may be *inferred* from the manner in which the acts occur[130]; the same is true with regard to the existence of a plan. As stated in academic writings, "a special, deliberately adopted programme is not required by the precedents, nor is it required by any available theory of crimes against humanity"[131]. In fact, the more recent ICC pronouncements[132] seem to have reverted to a more modest expectation from the requirement of policy, one that is in line with the past case-law and the academic approaches explained above[133].

ICC case-law has confirmed that the policy need not be that of a state authority: private groups and organizations may also conceive such policy[134]. Organization in this sense can include terrorist groups, and any other group that

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126 Decision on the confirmation of charges, Situation in the Democratic Republic of Congo, ICC-01/04-01/10 – 465- Red, Pre-Trial Cahmeber I, 16 December 2011.

127 **Robinson**, in: ICC (Stahn ed.), p. 706.

128 See, in this regard, **Robinson**, in: ICC (Stahn ed.), pp. 705-706.

129 In fact, it has been argued (**Robinson**, in: ICC (Stahn ed.), p. 728) that the majority conclusion might have been caused by the incorrect belief that there should be a pure purpose, "a single unifying aim beneath the policy". Since Art. 77 TPC seeks the existence of a "plan", and not that of a policy, whatever is the policy underlying the plan (or the absence thereof), it will not matter with regard to the determination of the existence of a "plan".

130 **Robinson**, in: ICC (Stahn ed.), p. 709 (the author further states that international and national courts "have had little difficulty inferring policy from the circumstances surrounding the crimes", ibid at 723). Confirmed in *Prosecutor v Tadić*, ICTY Trial Chamber, judgment of 7 May 1997, para. 653.

131 **Robinson**, in: ICC (Stahn ed.), p. 711.

132 See the Katanga judgment of 7 March 2014 by Trial Chamber II in the application of Art. 74 of the Statute (ICC-01/04-01/07-3436), and the Decision on the confirmation of charges against Laurent Gbagbo, decision of 12 June 2014 by Pre-Trial Chamber I.

133 **Robinson**, in: ICC (Stahn ed.), p. 730.

134 In the same direction **Bantekas & Nash**, p. 131; **O'Keefe**, mn. 4.59.

has at its disposal, in material and personnel, the potential to commit a widespread/systematic attack on a civilian population[135].

Whether or not terrorist groups can constitute an organization for the purpose of the Rome Statute has been hotly debated in academic writings. The majority of the ICC has adopted a broad approach to the organizational element suggesting that any organization capable of directing mass crimes could be responsible for the "policy" [136]. However, a minority opinion (judge Kaul) argued that the organization in question must be «State-like». This is an academic view advanced by *Bassiouni*[137] but rejected by the majority academic writing[138]. Many academic writings argue that the term organization 'merely presumes the existence of a group of persons over a certain period of time and possessing established structures'[139].

If *Bassiouni*'s view were to be adopted, terrorist attacks perpetrated by non-state actors would remain outside the scope of crimes against humanity. However, the ICC accepted that the term may cover terrorist organizations[140]. Hence, even where a policy or plan requirement is seen as a constitutive element of a crime against humanity, terrorist groups may account for this policy or plan. The important thing is the ability of the group "to put into practice 'a course of conduct involving the multiple commission of serious violent acts undermining the protection of basic human values"[141]. In my opinion, the same broad understanding also applies to TPC Art. 77[142].

With regard to the Elements of Crimes "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." (however, Elements of Crimes, fn. 6 of Art. 7 then weaken this statement). This is similar to the requirement in Art. 18 of the 1996 ILC Draft Code of Crimes Against the Peace

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135 **Werle & Jessberger**, mn. 904.

136 ICC Trial Chamber II confirmed this in the Katanga decisions of 31 March 2010 (paras. 90 *et seq*.).

137 **Scharf & Newton** at 275. Indeed, *Bassiouni* is of the view that Art. 7 does not apply to non-state actors (**M. Cherif Bassiouni**, The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, Vol. I, New York: Transnational, 2005, pp. 151-152 (cited by **Schabas**, The ICC, p. 152). Further see **M. Cherif Bassiouni**, Crimes Against Humanity: Historical Evaluation and Contemporary Application, Cambridge: Cambridge Univesity Press, 2011, p. 13, 28.

138 **O'Keefe**, mn. 4.59; direction **Werle & Jessberger**, mn. 906. Cfr **Schabas**, The ICC, p. 152: the author is in favour of a narrow interpretation. However, he does not necessarily exclude large terrorist groups/networks.

139 **Werle & Jessberger**, mn. 904. Furher see *Saul*, p. 183.

140 Katanga, Trial Chamber, judgment of 7 March 2014, paras. 1118 *et seq*.

141 **Di Filippo**, EJIL, p. 567.

142 In fact, one author (**Başkaracaoğlu**, p. 263) argues that the way it is formulated, TPC Art. 77 is apt to be interpreted so that any group could be behind the plan.

and Security of Mankind which seeked *instigation* or *direction* by a government or any organization or group. Therefore, the mere fact that the State tolerates or condones certain acts will not constitute a crime against humanity. Similarly, acceptance or acquiescence in by the State (or organization) will not suffice to qualify a string of connected acts as a crime against humanity. However, due to fn. 6, it is argued[143] that (deliberate) inaction *designed to encourage* crimes would suffice. It is also argued that the requirement in the Elements of Crimes that such acts have to be actively promoted or encouraged is not supported by the wording of the Rome Statute itself and by case-law[144].

In any case, terrorist acts committed on Turkish soil pose no problems in this regard: there is always a policy element behind the attack. Whether or not a third state is behind those attacks, there is an organization actively promoting and implementing such policy (or plan). Indeed, it may be said that terrorist acts committed by larger and/or transnational organizations are always committed pursuant to a policy[145]. With regard to ISIS attacks on Turkish territory, every single attack has been ordered by the higher echelons of the terrorist organization, a clear demonstration of the fact that the acts have been planned.

As for sporadic attacks carried out by an individual, in most cases it will not qualify as a crimes against humanity, especially if the policy element is not constructed in a very broad way. Indeed, the requirement of an organizational policy should exclude individual acts of terror from the scope of the Rome Statute.

The same consideration should apply to TPC Art. 77 by virtue of the requirement of the act being systematic. Even so, it may be argued that unprompted individual attacks which are planned and systematic may still fall under the provision of our Penal Code. Indeed, there is no specific requirement of organizational policy in Art. 77. Furthermore, the same conclusion may be supported by virtue of another notable absence in the wording of the provision: no reference is made to the existence of a larger "attack". Academic writings have argued that "the policy element is simply the logical corollary of the proposition that an 'attack' cannot consist of random acts of individuals acting on their own criminal initiatives"[146]. Well, there is no "attack" requirement in our Penal Code! In that case, it may be that certain individual acts of terror are be covered by Art. 77. This result could be avoided by adopting a high threshold to the meaning and import of the "plan" element. But, as explained above, that is not a desirable approach. Therefore, a teleological approach to the creation of the concept of crimes against humanity seems to be the only way out. In this

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143 **Cryer *et al.***, p. 240; **Robinson**, in: ICC (Stahn ed.), p. 709. Cfr **Başkaracaoğlu**, pp. 262-263.

144 **Werle & Jessberger**, mn. 910.

145 ISIS is a clear example (**Kenny**, p. 132).

146 **Robinson**, in: ICC (Stahn ed.), p. 710.

regard, the case-law of international criminal tribunals should be carefully considered by the Turkish judge.

Even if TPC Art. 77 seems to require much less than Art. 7 of the Rome Statute with regard to the contextual elements, in the above-mentioned Ankara bombing case (which is currently before the regional Appeals court) the local court failed to consider the application of Art. 77 to the case at hand despite the repeated requests in that direction by lawyers representing the victim, and my own expert report submitted to the Court stating the applicability of Art. 77. The impugned terrorist act was only one of a string of massive terrorist attacks committed by ISIS throughout Turkey. The reasoning simply states the inapplicability of Art. 77, failing to provide any legal, factual (or logical) explanation to that conclusion.

E. *Mental Elements of Crimes against Humanity*

According to customary international law, the perpetrator's *mens rea* must encompass the facts constituting the contextual element. Thus, two mental elements are required for the crimes in question: (i) the *mens rea* proper to the underlying offence (eg., murder, rape, torture...); and (ii) awareness of the existence of a widespread or systematic attack.

In the first place, a crime against humanity has to be committed through one of the acts ("underlying offence") listed in the relevant rule. So, if the accused is charged of murder as a crime against humanity, he or she should have the intention to bring about the death of the victim[147].

In the second place, the accused must be cognisant of the link between his act, and the contextual element, which is the existence of a widespread or systematic practice[148]. This element will distinguish random and isolated individual acts from a crime against humanity. It is this additional element – awareness of the broader context[149] into which the crime fits – that turns

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147 In fact, with regard to the underlying offence, *dolus eventualis* may also suffice. Hence, it is sufficient for the accused to be aware of the risk that his action might bring about serious consequences for the victim, and act in disregard of that risk. However, specific intent is required with regard to persecution.

148 As the ICTY Appeals Chamber held in *Tadic*, the perpetrator needs to know that there is an attack on the civilian population and that his acts comprise part of the attack (§ 248). The ICTY Trial Chamber held in *Blaskic* that the perpetrator needs at least to be aware of the risk that his act is part of the attack, and then takes that risk (§ 247, 251).

The Elements of Crimes of the Rome Statute also explain that "The conduct should be committed as part of a widespread or systematic attack directed against a civilian population" and that "The perpetrator should know that the conduct was part of or should have intended the conduct to be part of a widespread or systematic attack against a civilian population."

149 Knowledge of the context may be inferred from the relevant facts and circumstances (ICTY Trial Chamber in *Blaskic*, § 259):

individual acts into an internationalcrime[150]. Hence, a single act which fits into the requisite contextual element will still constitute a crime against humanity[151]. As a result, the perpetrator(s) of the terrorist action must know that their action is part of a larger attack (on the civilian population)[152]. With regard to Art. 77, since there is no overall attack element, the perpetrator need only know that his or her act is systematic.

The accused does not need to know the details and characteristics of the attack[153]. Similarly, in case a policy or plan requirement is regarded as a component of the crime, the accused need not know the precise details of this policy or plan, but only its' general existence. The same applies to the plan element in TPC Art. 77. Where the plan has been prepared by third persons, it suffices for the physical perpetrator to know the existence and the general contours of such plan.

In addition, the accused himself need not be involved in the formation of the policy, need not be affiliated with the (State authority or private) group conceiving the plan, and need not share the ideological goals of the attack. Therefore, with regard to terrorist attacks, it is not necessary to prove that the individual participating in the attack shared the same motives. In addition, I submit that the defendant does not need to have been involved personally in the drafting of the plan, acting in the knowledge of its existence is sufficient.

All in all, with regard to terrorist acts committed by large organizations, these mental elements will be easily satisfied[154]. There is no doubt that the physical perpetrators know the framework within which they are acting, such as their connection with the terrorist organization and the fact that they are acting in pursuance of the organization's plan and/or policy.

"... knowledge of the political context in which the offence fits may be surmised from the concurrence of a number of concrete facts. Principally, these are:
- the historical and political circumstances in which the acts of violence occurred;
- the functions of the accused when the crimes were committed;
- his responsibilities within the political or military hierarchy;
- the direct and indirect relationship between the political and military hierarchy;
- the scope and gravity of the acts perpetrated;
- the nature of the crimes committed and the degree to which they are common knowledge."

150 **Bantekas & Nash**, p. 133; **Slye & Van Schaack**, p. 218; **Ateş Ekşi**, p. 125.

151 As explained by the ICTY Trial Chamber in *Kupreskic* (§ 550): "*Nevertheless, in certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context. For example, the act of denouncing a Jewish neighbour to the Nazi authorities - if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity. An isolated act, however – i.e. an atrocity which did not occur within such a context – cannot.*"

152 **Cassese's International Criminal Law**, p. 157.

153 ICTY Trial Chamber in *Kunarac*, § 434.

154 For an affirmative conclusion concerning Al Qaeda attacks see **Proulx**, p. 1079.

However, the TPC is rather problematic in that it requires an additional moral element. By requiring the *acts* to be committed "with political, philosophical, racial or religious motives" the TPC seeks the existence of a discriminatory *animus*, and thus, requires specific intent on part of the perpetrator with regard to the underlying crime.

This is not consonant with the current status of ICL which does not pay attention to the motive of the perpetrator[155]. Even with regard to the ICTR Statute, the only statute requiring special intent[156], the Court determined that a discriminatory intent is required only with regard to the attack, and not as regards every underlying crime[157]. The threshold under international customary law with regard to proving the required *mens rea* for the individual perpetrator is much lower: it is sufficient to prove that "the accused intended to commit the impugned act and knew that it formed or intended that it form part of a widespread or systematic attack against a civilian population"[158]. Our Penal Code requires the acts (underlying crimes) themselves to be committed with specific intent. Where the prosecution is unable to prove that the perpetrator has acted with the requisite specific intent, Art. 77 TPC will not apply. This is a major stumbling block before the application of this provision with regard to acts of terrorism.

To make things worse, the discriminatory grounds exclusively listed in TPC are more restrictive when compared with those in the ICTR Statute. Our code only lists "political, philosophical, racial or religious motives" but not discrimation based on nationality. This approach is hard to understand, and the preparatory works do not offer any guidance for the rationale behind this choice. As a way out, the terms "political" or "philosophical" could easily be interpreted as including "ideology", and the term "racial" could be interpreted broadly so as to encompass motives based on "ethnicity".

In fact, it would be easy to argue that terrorist acts committed by larger and/or transnational organizations are always committed pursuant to a certain *political* motive. Indeed, the distinguishing moral element of terrorism is the

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155 **Kittichaisaree**, p. 92; **Slye & Van Schaack**, p. 213; **O'Keefe**, mn. 4.53. See ICTY Trial Chamber in *Kupreskic*, 14.1.2000, § 558. For a rare view in defense of the usefulness of this element see **May**, pp. 125 *et seq*. There was initial debate at the Rome Conference on the inclusion of a requirement of discriminatory intent or motive, but the formulation including such requirement did not receive ant support in the general debate (see **Schabas**, The ICC, p. 157).

156 This requirement might have been seen as a means of restricting the Tribunal's jurisdiction to those crimes against humanity typical of the Rwanda situation (**Werle & Jessberger**, mn. 876).

157 **Başkaracaoğlu**, p. 264.

158 **O'Keefe**, mn. 4.61.

political motive of the perpetrator[159]. For example, the US law definition of terrorism speaks of "politically motivated violence"[160]. This motive may be defined as instilling terror amongst a civilian population for an ideological purpose[161]. I regard such motive to be a "political" one. A generally accepted definitional element concerning the motive element is the purpose to "intimidate a population, or to compel a government or an international organization to do or abstain from doing any act"[162]. Indeed, as stated *passim*, this is the approach adopted in Art. 2 (1) (b) of the 1999 Terrorist Financing Convention. In my opinion, this would also qualify as a political motive. More in general, the required motive may have any given philosophical, ideological, religious purpose[163]. In fact, *Saul* argues that a terrorist act is committed "wherever there is a public motive, aim, objective or purpose broadly defined: political, ideological, religious, ethnic, or philosophical"[164]. *Cassese* is also of the view that the definiton of terrorism as an international crime requires the relevant acts

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159 **Kittichaisaree**, p. 228; **Kenny**, p. 130; **Morris**, in: Enforcing…, p. 64; **Kaya**, p. 24; **Taşdemir**, p. 29; **Becker**, p. 111 (in reference to international documents regarding the definition of terrorism, the author argues that "many share a core meaning by defining terrorism in reference to the threat or use of violence against persons or property for the purpose of intimidating a target group or achieving a political objective, regardless of cause."). For example, according to *Bassiouni*, terrorism is "an ideologically motivated strategy"of violence (**M. Cherif Bassiouni**, "A Policy-Oriented Inquiry into the Differen Forms and Manifestations of 'International Terrorism'", in: Legal Responses to International Terrorism: US Procedural Aspects (ed. MC Bassiouni), Dordrecht: Nijhoff, 1988, p. 16). Also see **Duffy**, pp. 32-33. Cfr **di Filippo**, in: Research Handbook, p. 9: the author argues that "a political element is not always an essential requisite". However, the author does not take the intent to spread terror as a political motive. In my opinion, this purpose would also qualify as a political motive. Also note that *di Filippo* rejects in general tha the aim pursued by the perpetrator, or the motives inspiring him or her, are necessary ingredients of a legal definition of terrorism (ibid at 15).

160 22 USC § 2656f(d)(2). The definition provided by the International Law Association also lists certain acts committed "for political purposes" as terrorism (**Becker**, p. 115, fn. 138).

161 In the same vein **Taşdemir**, p. 30. Indeed, terrorism has been defined in Turkish academic literature in the following way: "the systematic application within a plan of terrorist acts pursuant to a strategy of suddenly terrifying human groups" ("insan gruplarını bir anda dehşete düşürme stratejisinden ibaret olan terör eylemlerinin belirli bir plan dahilinde sistematik olarak uygulanması", see **Hamide Zafer**, Sosyolojik Boyutuyla Terorizm, Beta, İstanbul 1999, p. 3). Also see **Gasser** (translated by **Eroğlu**), p. 105.

162 **Saul**, p. 60; **Becker**, p. 117.

163 **Kaya**, p. 24.

164 **Saul**, p. 61. Cfr **O'Keefe**, mn. 7.40: the author draws attention to the fact that the recent conventions on Terrorist Bombings, the Financing of Terrorism, and Nuclear Terrorism do not require that the acts be inspired by political, ideological, philosophical or similar motives. According to these texts, the acts within their reach may be committed for wholly personal motives. However, in my opinion, this is not because of the belief that terrorist acts can be committed absent any motivational inspiration. As stated by *O'Keefe* "the pertinent instruments deal with international 'terrorism' only insofar as the acts the subject of them have at some point formed part of the repertoire of international terrorists".

to "be politically, religiously or otherwise ideologically motivated, that is, not motivated by the pursuit of private ends."[165] As a matter of fact, "most prominent authors…include in their definition of terrorist crimes the pursuit of a political or ideological purpose"[166].

As a result, it may be argued that terrorist acts bear a political motive, thus fulfilling one of the alternative special intent requirements embodied in TPC Art. 77. With regard to the attack on the Ankara train station pepretrated by ISIS, the local court rejected the application of crimes against humanity to the case at hand. However, the indictment confirmed that the attack in question sought to realize certain political results, and that the victims were targeted on account of a specific (philosophical/religious) motive - being regarded as "enemies of Allah". This is a good example of a terrorist attack fulfilling the mental elements of TPC Art. 77. The meaning of acting with a political motive is not to act in the name of a political party or movement, or pursuant to a specific political view or ideology; but to try to attain any political end that the defendant serves. With regard to the ISIS examples, the political motive is to realize the aims and purposes of said organization. In fact, the indictment concerning the Ankara attack listed various political consequences to be obtained through the bombing. As defended in academic wirtings, the policies of unlawful criminal organizations is also covered by the term "political motive"[167].

A major problem with the *mens rea* requirement under our law is that an accomplice who does not entertain the requisite specific intent but makes a causal contribution to the perpetration of the crime, cannot be held responsible for crimes against humanity. This is because every defendant must personally fulfil all definitional elements of the crime charged to be convicted of that crime. An accomplice acting in the absence of special intent on his or her part could only be sentenced in relation to the relevant underlying crime.

On the other hand, with regard to the ICC, a trial based on crimes against humanity will not require an analysis of the perpetrator's motive since there is no need to prove *dolus specialis* under Art. 7 of the Rome Statute. While the perpetrator's motive may still be taken into account at the sentencing stage, not considering the distinguishing feature of terrorism when trying the perpetrator for a crime against humanity may mean a failure to accurately reflect the

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165 **Cassese**, in: Enforcing…, p. 219.

166 **di Filippo**, in: Research Handbook, p. 12-13. Further see **Ambos & Timmermann**, p. 35: "While the requirement of a political purpose is not included in the Draft Comprehensive Convention, it seems to better account fort he complex phenomenology of terrorism and helps to restrict the otherwise broad definition of terrorism."

167 **Ezeli Azarkan**, "Uluslararası Hukukta İnsanlığa Karşı Suçlar", AÜHFD, Cilt 52, Sayı 3, 2003, p. 287; **Bayraktar**, p. 85.

criminality of the act and moral responsibility of the author[168]. In other words, the core of what renders an act a terrorist one[169] would get lost.

Alternatively, it may be argued, as *Cassese* did[170], that terrorism as a crime against humanity requires specific intent in the form of compelling a private or public authority to take a particular course of action, or refraining from doing so. I disagree with this suggestion: there is not sufficient evidence under international customary law about the existence of such an additional requirement. As stated by *Bianchi & Naqvi*[171], this added requirement would only be useful in that it would allow the impugned act to be labelled as terrorism, however, for the purpose of international law, motive is irrelevant in establishing the required *mens rea* for a crime against humanity.

By Way of Conclusion

I have already explained when, why and how terrorist acts may qualify as a crime against humanity. Despite occasional views to the contrary[172], acts of

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168 **Kenny**, p. 130.

169 See **Slye & Van Schaack**, p. 188 for the view that the "emphasis on the perpetrator's motive markedly distinguishes" the crime of terrorism from all other crimes (be it ordinary crimes under national law or international crimes).

170 See **Cassese**, JICJ 4 (5), p. 993. In the same direction **Huffy**, p. 32.

171 **Bianchi & Naqvi**, p. 253.

172 **Ahmet Hamdi Topal**, Uluslararası Terörizm ve Uluslararası Ceza Mahkemesi, UHP, Yıl 1, Sayı 3, 2005, pp. 87-88: the author argues that the provision of Art. 22 Rome St. prevents this possibility. Therefore, the only option is to amend the Statute and provide explicitly the Court with jurisdiction over terrorist crimes. Indeed, it has been argued (**Cohen** at 240) that "beginning to interpret an existing crime to encompass behavior that it was not supposed to include, in our case acts of terrorism, is highly problematic. Article 22(2) of the Rome Statute addresses this issue and explicitly calls for strict interpretation of the offenses and precludes their expansion by way of analogy". However, what was rejected by the drafters is the inclusion of a self-standing crime of terrorism, or terrorism as a separate underlying offence under Art. 7. When an "act of terror" otherwise satisfies all definitional elements of Art. 7, there is no reason under criminal law principles to argue that the principle of legality is a bar to its' prosecution (in the same direction see **Kenny**, p.134).

However, as explained in the introduction, my focus is not on the possibility to try terrorism before the ICC, but on whether or not terrorist acts may fulfil the legal elements of the definition of crimes against humanity. It is in this regard that the objectors are fewer in number. One prominent objector is *W. Schabas* who argues that the application of crimes against humanity should continue to stick with the original and traditional categories (see **William Schabas**, "*Is Terrorism a Crime Against Humanity", Journal of International* Peacekeeping, Vol. 8 Issue 1 (September 2004), pp. 255-261). However, it should be borne in mind that this article was written as a response to the attempt to qualify the 9/11 attacks as a crime against humanity *per se*.

Also see for an objecting view **Muzaffer Yasin Aslan**, The Role of International Criminal Law in the Global War on Terrorism, Ankara Law Review, Vol.2, N° 1, Summer 2005, p. 35: the author subscribes to the view that terrorism cannot be a crime against humanity because it does not include acts as "part of a widespread or systematic attack." As explained in my study

terror may fall within the definition of crimes against humanity as formulated in the Rome Statute and accepted under customary internationallaw. Although various states, including Turkey, have pushed for, and failed to, incorporate a separate and discrete (or self-standing) crime of terrorism, or to list terrorism as an underlying crime under Art. 7 of the Rome Statute[173], as long as the terrorist acts in question meet the elements of any of the crimes defined in the Rome Statute, they will fall under the substantive jurisdiction of the ICC[174].

For example, some of the terror-like acts committed by Boko Haram in Nigeria were qualified as crimes against humanity by the ICC Prosecutor in her report of 2013[175]. Human rights organizations also tend to qualify terrorist acts as crimes against humanity[176]. The 9/11 attacks had been named as a crime

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text, this determination is not true with regard to most terrorist attacks perpetrated by large transnational terrorist organizations.

173 On the other hand, certain authors have argued that "a separate offense of "terrorism" as a subcomponent of crimes against humanity would not materially advance the core purposes of the international criminal law regime" (see **Scharf & Newton**, p. 264, also see **Cohen**, p. 246). In any case, unless an agreement is reached on the definition of terrorism, it is unlikely for such development to take place (**de Londras**, p. 176). *Scharf & Newton* conclude the following (at 278, citations omitted):

"*There are, nevertheless, no compelling values served by deeming terrorism as a crime against humanity through the vehicle of a new Convention. Indeed, in the opinion of the authors, the creation of a wholly new specified offense under the rubric of crimes against humanity is inadvisable for several reasons.*

First, most widespread terrorist acts are already covered by the laws of war or would constitute the existing crime against humanity of murder, without having to address the thorny defi nitional question of what is terrorism. There are no lacunae that can be constructively addressed.

Second, the determination of whether an alleged act short of mass murder (such as systematic kidnappings by a terrorist group) qualifi es as an "other inhumane act" type of crimes against humanity is best handled as a judicial determination made on a case-by-case basis, taking into account the nature of the alleged act, the context in which it took place, the personal circumstances of the victims, and the physical, mental, and moral effects of the perpetrator's conduct upon the victims.

Finally, the effort to achieve international consensus on the inclusion of a specifi c crime against humanity of "terrorism" would introduce a whole new level of uncertainty and politicization into the existing legal structures and defi nitions. The effort could therefore undermine the fundamental human rights of the perpetrator and the efficacy of existing prohibitions and punitive forums."

174 **Panos Merkouris**, "Can terrorist acts be considered war crimes, crimes against humanity, or genocide (with particular reference to the case of Nigeria)?" http://www.rug.nl/rechten/organization/vakgroepen/int/guild-blog/blogs/terrorism-warcrimes-crimesagainsthumanity-genocide?lang=en. For a more cautious conclusion see Cohen, p. 245.

175 Situation in Nigeria – Article 5 Report, 5 August 2013, pp. 21 et seq. (https://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF)

176 For example, see Human Rights Watch on the January 2017 suicide bombings in Iraq (https://www.hrw.org/news/2017/01/15/iraq-isis-bombings-are-crimes-against-humanity).

against humanity by the (then) UN Commissioner of Human Rights, Mary Robinson[177]. In Peru, Miguel Osvaldo Etchecolatz, a former police officer, was convicted for crimes against humanity on account of his acts of "state terrorism" [178]. It is further argued that recent international practice "shows a gradual accumulation of support for a 'humanitarian' approach" to the definition of terrorism, and that "reactions following 9/11 confirm that attacks on civilian populations are unanimously condemned as an offence against the whole international community"[179]. However, as warned by one author, "while terrorist acts seem to intuitively correlate to the notion of crime against humanity, the actual application of the requirements in Article 7 of the Rome Statute to acts of terrorism is not a perfect fit"[180].

On the other hand, as explained extensively in the text, there are many incongruences between the definition of crimes against humanity embodied in Art. 77 TPC, and that provided by Art. 7 Rome St. Therefore, certain terrorist acts that could qualify as crimes against humanity will fail to do so under our law, and conversely, certain terrorist acts that would not fall under Art. 7 of the Statute may still be covered by the provision of our penal code. I submit that a revision of Art. 77 is required to provide compatibility with international law.

In the final pary of this study, I want to explain the relevance of the effort to qualify acts of terror as crimes against humanity[181]. I do not argue that this would provide a particular advantage in terms of deterrence. In fact, as stated in general terms by one author, "Criminal law responses to terrorism are not a panacea"[182]. This is true whether terrorist acts are qualified as a crime against humanity or not. What are the advantages then?

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177 **Bianchi & Naqvi**, IHL and Terrorism, p. 248 (the authors concur, see pp. 254-255; alse concurring **Duffy**, p. 100).

178 Tribunal Oral Federal de La Plata (Juzg. Fed.) [Federal Court of La Plata], 19/9/2006; "Estado v. Etchecolatz, Miguel/juzgado penal", Cámara Nacional de Casacion Penal [highest federal court on criminal Court appeals], 18/5/2007; "Etchecolatz, Miguel Osvaldo/recursos de casacion e inconstitucionalidad"; Corte Suprema de Justicia de la Nación [highest court on constitutional and federal matters], 17/2/2009 (cited by **Bassiouni**, Crimes Against Humanity, pp. 689-690).

179 **di Filippo**, in: Research Handbook, p. 11.

180 **Cohen**, p. 245. Also see **di Filippo**, EJIL, p. 569: "It can be supposed, however, that some acts of core terrorism could not reach the threshold spelled out in the Rome Statute, depending on the interpretation that will be given to it by ICC judges (…)". Further see **Caro Coria**, p. 147: while the author argues that terrorist acts may constitute a crime against humanity, her further warns that "it is important not to lose sight of the fact that, in qualitative terms, terrorism responds to a criminal phenomenology which is not comparable to the one which underlies crimes against humanity".

181 Also see **Arnold**, pp. 999-1000.

182 **Saul**, p. 316. See **Murphy**, pp. 287-289 for possible effective responses. For detailed information on responses to terrorism you may refer to **Martha Crenshaw**, Explaining Terrorism: Causes, processes and consequences, London & New York: Routledge, 2011, pp.135 *et seq*.

An important advantage would concern requests for extradition directed at other states. As it is well known, despite various legal and political efforts to prevent the qualification of acts of terror as "political crimes"[183], Turkey (and states in a similar position) encounter various difficulties in this regard when it comes to obtaining the extradition of perpetrators of such acts. This is not all that surprising considering that there are diverging approaches under international and domestic law to "whether acts of terrorism can constitute 'political offences' and whether the political nature of an offence can constitute an exception to the duty to prosecute for terrorism."[184] Even if para. 3(g) of SC Res 1373 (2001) determines that "claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists", this clause has not proved to be of particular help to Turkey in her requests. All in all, the ineffectiveness of international cooperation with regard to alleged acts of terrorism is a well-known phenomenon[185]. In fact, more in general, there is a lack of enforcement: *Cassese* is of the view that "neither national nor international courts have made effective use of the existing potential of international legal rules, subject to a few exceptions…"[186].

On the other hand, it is well-established in comparative criminal law, but more important, under international law, that crimes against humanity cannot be qualified as political crimes[187]. While the ambiguous and inconsistent definition of terrorism allows national states considerable margin of appreciation in not regarding an act as one of terror, there is considerable less flexibility when it comes to the meaning of crimes against humanity[188].

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183 **Malcolm Shaw**, International Law, 6th ed., Cambridge: Cambridge University Press, 2008, p. 687. Recent sectoral conventions (see the 1997 Convention concerning the suppression of terrorist bombings, the 1999 Convention regarding the suppression of financing of terrorism and the 2005 Convention on nuclear terrorism) all include the rule that the offences in these conventions cannot be regarded as a political offence, an offence connected with a political offence, or an offence inspired by political motives with a view to rejecting extradition or mutual assistance requests (**Perera**, p. 155). For a detailed analysis on this point see **Kolb**, pp. 265-268.

184 **Duffy**, p. 34.

185 **Duffy**, p. 122. On the other hand, attempts at limiting the role of judicial review with a view to "enhancing" cooperation against terrorism (see **Duffy**, p. 370) are a source of very serious concern to the rule of law.

186 **Cassese**, in: Enforcing…, p. 225.

187 **Tezcan, Erdem & Önok**, Uluslararası Ceza, p. 203. This is also accepted by Turkish Law under Art. 11/2 of the Law no. 6706 on International Judicial Cooperation in Criminal Matters.

188 In similar vein see **Chibli Mallet**, The Original Sin: "Terrorism" or "Crime Against Humanity"?, 34 Case W. Res.J.InternationalL.245 (2002) at 246-247 (available at: http://scholarlycommons.law.case.edu/jil/vol34/iss2/11). The author has stated the following (at 247) on the 9/11 attacks: "The consequences of the definition are important. When the acts of September 11 are defined as a crime against humanity, rather than as terrorism, the response under international law must involve the whole of mankind. Every single person in

In addition, many states' national law extends universal jurisdiction over crimes against humanity, and, in addition, they are under an international law (customary) obligation to either try or extradite its' perpetrators[189]. With regard to terrorism, anti-terror treaties on *specific* matters impose a duty to try or extradite amongst states parties only[190]. According to the largely prevailing view, there is no basis yet under internationallaw for universal jurisdiction over acts of terrorism[191]. Therefore, there would be a jurisdictional advantage in treating terrorist acts as crimes against humanity[192].

Further, in case of crimes against humanity, statutory limitations do not apply due to international treaty commitments or national law provisions. In addition, functional immunities do not apply to international crimes[193], whereas terrorism has not been regarded by national courts as an exception to such immunity (see for example the French *Cour de Cassation* in *Gaddafi*)[194].

On the other hand, one should also bear in mind that the "special" judicial regimes applicable to terror crimes under many national laws, which are severely criticised by academics, are usually not envisaged for suspects of crimes against humanity. This is good for human rights[195]! There is also a legal advantage: it is well-known that certain restrictions are imposed under international human rights law to the ability of states to extradite persons within their jurisdiction to third states[196]. The "special regimes" concerning the detention, treatment and trial of terrorist suspects may infringe upon fundamental rights such as the prohibition of torture, inhuman or degrading treatment or punishment, or the right to a fair trial[197]. In this case, there would be

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the world is concerned, and every government is bound to cooperate to produce the suspects and culprits and assist in the investigation. This is not the case for acts of terrorism."

189 **Bassiouni**, Crimes Against Humanity, p. 270-271; **de Londras**, p.169; further see **Mallet** at 247 for analogous considerations.

190 **James Crawford**, Brownlie's Principles of Public International Law, 7th ed., Oxford: Oxford University Press, 2008, pp. 470-471, 690; **Shaw**, p. 1160.

191 **Kolb**, p. 276; **Werle & Jessberger**, mn. 215; **Aust**, p. 265; **Arnold**, p. 1000. For a detailed analysis of different opinions on this point see Kolb, pp. 276-278. In addition, The regime created through the sectoral conventions is not an example of universal jurisdiction since any state is not allowed to assert jurisdiction over the offence, but only states parties. The regime created by these treaties between states parties has sometimes been labelled as "quasi-universal" (see, for instance, **Shaw** at 1160 and **Aust** at 270-271).

192 **Scharf & Newton**, p. 277.

193 For the debate on the issue you may refer to **Tezcan, Erdem & Önok**, Uluslararası Ceza, pp. 438-442.

194 **Bassiouni**, Crimes Against Humanity, pp. 640-641.

195 In similar vein see **Boister**, p. 63: "It is true that special crimes enforced by special measures invariably have negative human rights impacts".

196 **Duffy**, pp. 112-114.

197 For a detailed treatment or related rights see **Duffy**, pp. 307 et seq.

a bar under international law to extraditing a suspect who would be under a serious a risk of violation to his or her stated rights[198].

A further advantage attached to the qualification as a crime against humanity is that a prosecution under national laws would have to result in a very serious sanction. The ICTY has determined[199] that it is "a general principle of law" that crimes against humanity require the most severe penalties available in a legal system. So, while an act of battery may only require a light sentence, the same act becomes the most serious crime when considered as an part of a campaing constituting a crime against humanity.

It may be argued in contrast to the above that acts of terrorism also entail very serious penalties. This is true but there is a catch. When states prosecute suspects for terrorism, often, the lack of a definition (or lack of a sufficiently precise definition) may put that state's legal position under risk *vis-à-vis* the principle of legality (ICCPR Art. 15, ECHR Art. 7)[200]. On the contrary, with regard to international crimes such as crimes against humanity, the principle of legality is not a bar to the trial of suspects (ICCPR art. 15 (2), ECHR Art. 7(2))[201].

Finally, perpetrators of crimes against humanity may be tried before the International Criminal Court[202]. This, of course, would have its risks and rewards, which depend on the particular circumstances of each case[203]. Even so, where a state cannot obtain the extradition of terrorist suspects, it may have an interest in pushing the states who have custody of these persons in surrendering them to the ICC.

In sum, when we think of large terrorist organizations, their intentional attacks against civilians will usually qualify as a crime against humanity. There may be considerable benefits in attaching this brand to those acts. As stated by one author[204]:

> "the possibility to prosecute acts of terrorism under the heading of crimes against humanity may prove to be a valid alternative to the existing

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198 However, it is argued that states have shown "little, or only selective respect" for human rights obligations "by transferring suspected terrorists despite a substantial risk to their basic rights" (**Duffy**, p. 139). While this statement is certainly true, most of these transfers concerned requests by the USA. In this case, the vast political (and economical) power in the hands of the US must have been the key factor. Obviously, Turkey is not in the same position as the US!

199 ICTY Trial Chamber judgment in *Erdemović*, 29.11.1996.

200 In similar vein **Huffy**, pp. 350-351.

201 **Durmuş Tezcan, Mustafa Ruhan Erdem, Oğuz Sancakdar & R. Murat Önok**, İnsan Hakları El Kitabı, 7th ed., Ankara: Seçkin, 2018, pp. 353 *et seq*.; **Huffy**, p. 352.

202 **Scharf & Newton**, p. 278; **de Londras**, p. 170.

203 For a general analysis of policy consideration *pro* and *contra*, see **Cohen**, pp. 251 *et seq*. Also see **Morris**, in: Enforcing…, pp. 69 *et seq*.

204 **Arnold**, p. 1000.

> antiterrorism 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."[205]

As a final note of particular importance to Turkey, all of the above should also be taken into account by Turkey with regard to her extradition requests concerning those involved in the *coup* attempt of July, 15. The many crimes committed in that framework against civilians would not be accepted as an act of terror by most states, and a *coup* attempt by itself will be considered a political crime by them. Again, a request for extradition based on membership to a terrorist organization would encounter (and is encountering) all the typical problems associated with such requests. However, there is no doubt that criminal acts which formed part of a widespread and/or systematic attack directed against a civilian population were intentionally committed. I am of the view that the qualification as crimes against humanity of acts such as murder and imprisonment committed in the framework of the failed attempt would put Turkey in a much stronger legal and political position[206].

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[205] (continued) "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.".

[206] For analogous considerations on the 9/11 attacks see **Mallet**, p. 248: "If the September 11 attacks were defined as a crime against humanity, rather than as terrorism, many would find it easier to follow the American lead in the search for the perpetrators of the massacres, rather than the open-ended and ill-defined crusade against an indeterminate foe".

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