Can acts of international terrorism be regarded as crimes against humanity?

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After the terrorist attacks on the World Trade Centre and the Pentagon on September 11, 2001, several internationally renowned figures qualified them as “crimes against humanity”. Although one has to see those statements in the context of the emotional atmosphere, it nevertheless poses some interesting questions under international law. The purpose of this short paper is to analyse whether acts of international terrorism of a large scale can be regarded as crimes against humanity under contemporary international criminal law. First, I will examine what is the feature that makes a crime against humanity an international crime. Then I will discuss whether the qualification of these acts of international terrorism as crimes against humanity is warranted and whether they are likely to be prosecuted in the newly established International Criminal Court.

The concept of crimes against humanity has been rather ambiguous, since, unlike genocide and war crimes, there is no specific international convention on the issue. What are common to core crimes under international law are the one or many features that elevate the act to the spotlight of international concern, the so-called “international” element. This is not so acute in case of the two international crimes under the jurisdiction of the International Criminal Court, since genocide, by its very essence and gravity would be inconceivable without State involvement; in case of war crimes they are to be committed in the context of an armed conflict thereby raising the international concern for impunity.

The Allied Powers gathered in London in 1945 to discuss the legal basis under which the German supreme officials should be tried. Amongst others, the negotiators had to face the lack of clear positive rules under international law that prohibit atrocities within the borders of a State. 60 years ago the international law system was much more concentrated on the sovereignty of a State and refraining from outside interventions than it is today. Therefore, the Nuremberg Code solved the problem of applying international law to internal offences by a supranational tribunal by connecting them to the other crimes under the jurisdiction of the International Military Tribunal, which clearly had an international element – aggression and war crimes. This logically brought about the limited jurisprudence of the Tribunal solely on crimes against humanity, since it was difficult to
substantiate why the crimes against the Jews in Germany in the thirties were connected to the war that started in 1939.

The war nexus – the need for crimes against humanity to be connected to armed conflicts – disappeared. Therefore, it was gradually accepted that crimes against humanity could be committed during peacetime. When one looks at the subsequent international texts and national case laws after Nuremberg, one can conclude that the internationalising element can be found rather in the link between the crimes and authority, expressed in the “policy element” of the crime. When the Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993 – the first international court dealing with questions of individual responsibility for international crimes after Nuremberg – it had to deal with the same issues, although its statute does not foresee the requirement that the crimes against humanity have to be connected to State or quasi-state elements. The general conclusion that one can draw from that jurisprudence is that the policy element is accepted as a feature – something that can always be inferred from the commission of crimes against humanity – if not a legal requirement.

This conclusion is however contrasted with the Rome Statute of the International Criminal Court, adopted in 1998, which explicitly requires a connection to a State's or organisation's policy to be part of the attack against the civilian population, which has to be on a large scale or systematic. Taking into account the Rome Statute as an effort of codification of substantive international criminal law and also the significance the States have attached to it when adopting implementing legislation, one cannot disregard its impact on customary international law. Customary law is created by the way States act and their convictions on the legality of their acts. Therefore, it can be argued that it gradually embraces the elements of the crime as provided in the Rome Statute, as many countries also have drafted their penal laws in the same vein.

As to the source of the policy, which the attacks against civilians have to further or be in line with - one can note the recent departure of the law from the traditional understanding that the commission of the crimes against humanity necessarily requires connection to a State through complying with its policy. The work of the UN-sponsored International Law Commission opened the door to connect these crimes to non-state entities, which was followed by the ad hoc tribunals and the Rome Statute. A more important question is the qualification of the non-state entity. While it has been said that any group could satisfy the criteria, I would support the view that it should be the organisations exercising de facto highest authority over certain parts of the territory. Other interpretations would bring about an unwarranted extension of the crime and make the crime indistinguishable from “ordinary” crimes e.g. a mass murderer. The connection with quasi-State organisations connotes the structural nature of the crimes that warrants the international enforcement of the rules – there is a fear that these crimes will be left unpunished.
The policy can take several forms – it can be active encouragement by the State through its own agents, or it can also be a policy of tolerance or acquiescence. Tolerance is helpful in understanding how this element can be a condition in case of a widespread attack, since a certain degree of policy is intrinsic in the systematic attack. If the authority chooses deliberately not to oppose the atrocities under its territorial domain, this suffices to qualify it as implementation of the policy.

In order to epitomize the conclusions on the policy element, one can ask whether the grave acts of ideologically motivated terrorist groups, traditionally understood as acts of international terrorism can be regarded as crimes against humanity. Terrorists select particular targets and carry out acts of violence in order to demonstrate the Government’s vulnerability or inability to protect the population with the aim of inflicting fear on the population, or compelling the Government to do or to abstain from doing a certain act. Therefore the perpetrators must be politically motivated (not by private goals) and therefore have a special intent. In order to illustrate such activities with concrete examples one could name the attacks by al-Qaeda against US Embassies in 1998, the kidnapping, torture and murder of the Abu Sayyaf group in the Philippines, the attacks of September 11, 2001 in New York and Washington or the attacks in Madrid in March 2004. One has to keep in mind that terrorism was explicitly left out from the jurisdiction of the ICC. The main reasons were the inability to reach an agreement as well as the conviction that they could be more effectively prosecuted in their national jurisdiction, something, which was not so evident with respect to those crimes currently listed. I argue that the notion of crimes against humanity should not apply to acts of international terrorism, because it does not conform with the policy element. Terrorist groupings cannot be seen as organisations whose policy is implemented by the crimes since they do not wield authority over a territory with same type of entitlements and responsibilities as quasi-States. These groups do not have the means and motives for that. Albeit the widening of the concept of entity, it should cover States or “State-like” entities such as Republika Srpska or the Columbian insurgency movement FARC, as has been noted by commentators, otherwise it would cover an uncontrollable number of criminal groupings, which may or may not have a domestic terrorist agenda. The acts of international terrorism are not usually structural crimes, which create the threat of inapt domestic adjudication.

I would corroborate this argument with the overall legal framework of the International Criminal Court, since its Statute provides the most contemporary up-to-date codification of the crime. The Court should be careful not to extend the scope of the crimes, since it is restricted by the principle of nullum crimen and should be mindful that the founding fathers expressly excluded the crime. The Court will, at least in the first years, operate on a politically fragile ice, since it does not have the backing of the Security Council. The complementarity principle – enabling action by the Court only in cases of unwillingness or inability of the domestic system - also supports the view that ter-
rorist acts and crimes against humanity are by their nature different crimes. Terrorism was not included in the Rome Statute, therefore the drafters did not view it as a similar threat as the other current crimes, therefore the guarantee of complementarity was not felt as necessary: domestic systems are very willing to prosecute the perpetrators. The question of inability was obviously not seen as necessitating the insertion of terrorism, which may indicate that in most of the cases terrorists attack countries with functioning governmental and judicial systems. Admittedly, there could be some situations where terrorism as a distinct crime in the Rome Statute could be useful taking into account the current regime of the Court – in post-conflict situations with malfunctioning judiciaries or cases where the domestic system has not followed the due process principles, however the latter cases probably would not form a large portion of the docket of the Court, since the interest of the Court should be on the *mala fide* proceedings.

Only time will show whether the suggestions put forward in this paper will be followed by the ICC. However, adjudicators such as the ICC should be careful when considering the crimes against humanity in the context of non-state actors’ activities. If they do not connect the crime with the territorial authority it denotes the departure from the conception underpinning the norm.