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# WAR CRIMES AND CRIMES AGAINST HUMANITY: AN ALTERNATIVE ORGANISING PRINCIPLE?<sup>1</sup>

STEPHEN KEIM SC\*

*National leaders often misuse the concept of terrorism as a political tool, making it an unsatisfactory concept around which to organise models of criminal law. It is particularly unsuited to a coordinated and worldwide law enforcement campaign, which has extended to invasion of sovereign countries; removal and execution of heads of state; the use of torture and killing of civilians. Terrorism is currently defined and prosecuted under criminal law, lending itself to both politicisation and becoming the basis of propaganda. This article seeks to offer alternative organising principles for the prosecution of terrorism — those of international humanitarian law and crimes against humanity.*

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<sup>1</sup> An early draft of this paper was presented to the Queensland Chapter of the Australian Institute of International Affairs in Brisbane, Tuesday 18 March 2014. I am particularly grateful to law and journalism student Tom Serafin for his research and drafting assistance in respect to this paper.

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## I INTRODUCTION

There are obvious disadvantages in using the concept of terrorism as a seminal organising concept for the criminal law in its operation against political violence. The discussion of terrorism in the mouths of national leaders has a tendency to become a means of denigrating the political opponents of the political leader engaged in the discussion.<sup>2</sup> At the same time, counter-terrorism has represented the means by which political violence by the state against political opponents has been sanctified and made immune from accountability. The meme of the political leader in an expensive suit, lauding, in the lead up to a forthcoming election with her stern actions in opposing domestic terrorists, is widespread. “They all sound alike” is a forgivable response.

The propaganda value of calling the actions of others terrorism has spiked since the attack on the Twin Towers. Hans-Peter Gasser has identified that, in the wake of the September 11 events, a number of States, in the name of preventing terrorism, have taken steps which include tighter police surveillance, (especially of foreign residents), adopting harsher interrogation procedures, cutting back on the right to a fair trial where

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<sup>2</sup> President Rajapaksa of Sri Lanka is always a good example, see, eg ‘Sri Lanka, India united against terrorism: Mahinda Rajapaksa’, *Z News* (online), May 2014 <[http://zeenews.india.com/news/nation/sri-lanka-india-united-against-terrorism-mahinda-rajapaksa\\_935128.html](http://zeenews.india.com/news/nation/sri-lanka-india-united-against-terrorism-mahinda-rajapaksa_935128.html)>.

terrorist acts are alleged, and refoulement of asylum seekers and refugees. Many of these actions are in breach of international human rights and humanitarian law.<sup>3</sup>

Most activities correctly categorised as terrorism deserve to be treated as criminal offences. The political motivation accompanying such offences makes them no less worthy of moral condemnation and punishment in accord with, and by application of, the criminal law. The widespread misuse of the concept of terrorism as a political tool by governments worldwide makes it an unsatisfactory concept around which to organise concepts of the criminal law for the prosecution of such activities. It is particularly unsuited to a coordinated and worldwide law enforcement campaign, which has extended to invasion of sovereign countries, removal and execution of heads of state, organised use of torture, and widespread killing of civilians.<sup>4</sup>

By its nature, terrorism is a crime that can be committed by any political actor. It is as capable of being committed by government leaders and state armed forces as by insurgency groups and sole actors. It is as likely to be committed by the insurgency groups that the governments allied to the United States arm and support, such as in Libya and Syria, as it is by the insurgency groups that these governments ruthlessly oppose, as in Iraq. The emergence of the control by ISIS of large slabs of territory in both Iraq and Syria in the middle of 2014, provides an extraordinary example of the way in which support for one lot of insurgency groups may have unintended consequences.<sup>5</sup>

The long use of the terrorism concept as a propaganda tool by governments has meant that the chances of state terrorism being identified and prosecuted as criminal activity are low — the prospect seems counter-intuitive. The concept is also ill-suited to distinguishing between legitimate use of force by government-backed armed forces and that which is illegitimate and, possibly, illegal by whomever carries it out. Gasser cites Adam Roberts for the observation that military operations punitively directed against terrorists frequently engage in operations including mistreatment and torture of prisoners in breach of domestic law, human rights obligations and international

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<sup>3</sup> Hans-Peter Gasser, 'Acts of terror, "terrorism" and international humanitarian law' (2002) 84 *International Review of the Red Cross* 547, 566.

<sup>4</sup> I refer here particularly to the invasions of Iraq and Afghanistan.

<sup>5</sup> Zack Beauchamp, 'How the US, its allies and its enemies all made ISIS possible', *Vox Media* (online), August 2014 <<http://www.vox.com/2014/8/25/6065529/isis-rise>>.

humanitarian law.<sup>6</sup> The fact that the operations target terrorism makes it more difficult to have the norms usually applied to military operations respected and enforced.

This paper urges using other well-known methods as the organising principles for prosecution of politically motivated violence. The concepts of war crimes, developed as a key part of international humanitarian law, and of crimes against humanity, developed in the aftermath of the World Wars, are better adapted to addressing the nature of the conduct in question, whether committed by state or non-state actors. They are better suited to achieving an objective analysis of the conduct in question, without being influenced by whether it was committed by perceived friends or perceived enemies. These methods are also less susceptible to the use of propaganda that has been the plight of terrorism. They also have the advantage of having been developed in the context of state directed action, such that their application to actions by the State, as well as by persons opposed to the State, is more obvious and less easy to avoid. The idea of reciprocal restraints seems to be reflected in their operation.

This article looks first at an example of the use of the concept of terrorism in the criminal law to prosecute terrorist activity. It then looks briefly at examples of domestic criminal law using the alternative concepts of war crimes and crimes against humanity. Thirdly, this article discusses a specific example of the way that anti-terrorism has become institutionalised as part of western military strategy, and how this bears out the reality that truth is the first casualty of war.<sup>7</sup> The next two sections consider, respectively, how the prosecution of conduct normally amounting to terrorist acts would look and the prospects of prosecuting conduct normally understood as amounting to terrorist acts as either war crimes or crimes against humanity. The final section explores lessons learned from this discussion.<sup>8</sup> The ethical and practical advantages of using war crimes and crimes against humanity as the means of identifying

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<sup>6</sup> Adam Roberts, 'Counter-terrorism, armed force and the laws of war' (2002) 44(1) *Survival* 13, cited in Gasser, above n 3, 566.

<sup>7</sup> The credit for the phrase seems to be shared by Senator Hiram Johnson of California in 1918 and Samuel Johnson (whose 1758 quote is more prolix): see The Guardian, *Who coined the phrase, "The first casualty of War is Truth"?* <<http://www.theguardian.com/notesandqueries/query/0,5753-21510,00.html>>.

<sup>8</sup> The phrase seems apt since its use in naming an inquiry whose principal purpose seems to have been to deflect any prospect of accountability for state war crimes (and state terrorism) in Sri Lanka: see Crisis Group, 'Statement on the Report of Sri Lanka's Lessons Learnt and Reconciliation Commission' (Media Release, 22 December 2011) <<http://www.crisisgroup.org/en/publication-type/media-releases/2011/asia/statement-on-the-report-of-sri-lanka-s-lessons-learnt-and-reconciliation-commission.aspx>>.

and prosecuting unacceptable criminal violence, rather than the morally tainted and ideologically pliable concept of terrorism, are by then evident.

## II "TERRORISM" IN THE CRIMINAL LAW: AN EXAMPLE

### *A The Provisions*

Gasser sets out a number of elements that capture the broad sense of what is meant by the term 'terrorism'. He lists:

- Terrorism is violence or the threat of violence against ordinary citizens including physical violence against persons or property;
- Terrorism is a means to attain a political goal not regarded as attainable under lawful constitutional means;
- Terrorist acts are usually part of a strategy carried out by organised groups over a period of time;
- Terrorist acts are often perpetrated against civilians who have no means of influencing the changes which are being sought;
- The purpose of such acts is to cause fear in the population; and
- Terrorism is intended to humiliate fellow human beings.<sup>9</sup>

An example of the manner in which the concept of terrorism is given practical legal effect in a domestic legal system can be found in the definition of 'terrorist act' as it appears in the *Criminal Code Act 1995* (Cth). The definition is used as the basis of a series of derivative offences in addition to actually engaging in a terrorist act. Section 100.1 of Schedule 1 (the *Criminal Code*, hereafter referred to as the 'Code') defines 'terrorist act' in the following terms:

- (1) *terrorist act* means an action or threat of action where:
- (a) the action falls within subsection (2) and does not fall within subsection (3);  
and
  - (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
  - (c) the action is done or the threat is made with the intention of:

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<sup>9</sup> Gasser, above n 3, 553.



- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
  - (ii) intimidating the public or a section of the public. ...
- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
  - (b) causes serious damage to property; or
  - (c) causes a person's death; or
  - (d) endangers a person's life other than the person taking the action; or
  - (e) creates a serious risk to the health or safety of the public or a section of the public; or
  - (f) seriously interferes with, seriously disrupts or destroys, and electronic system included but not limited to:
    - (i) an information system; or
    - (ii) a telecommunications system; or
    - (iii) a financial system; or
    - (iv) a system used for the delivery of essential government services; or
    - (v) a system used for, or by, an essential public utility; or
    - (vi) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
  - (b) is not intended:
    - (i) to cause serious harm to a person; or
    - (ii) to cause a person's death; or
    - (iii) to endanger the life of a person, other than the person taking the action; or
    - (iv) to create a serious risk to the health or safety of the public or a section of the public.<sup>10</sup>

Examples abound of offences created using this definition of a terrorist act. Section 101.1 of the Code uses the definition to create the offence of engaging in a terrorist act; s 101.2 creates an offence of providing or receiving training connected with terrorist acts; s 101.4 creates the offence of possessing a thing associated with a terrorist act; s 102.2 creates the offence of directing the affairs of a terrorist organisation; and s 102.3 creates the offence of being a member of a terrorist organisation.

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<sup>10</sup> *Criminal Code Act 1995* (Cth) sch 1 ('*The Code*') s 100.1.

The political nature of the definition of terrorist act can also be easily observed. The intention of advancing a political, religious or ideological cause is an important element of the definition. In one sense, it can be argued that the element is of advantage to a person accused of a terrorism offence in that an additional mental element must be proved by the prosecution for an offence to be made out. However, the element also ensures that many prejudicial aspects of a person's intellectual history may be placed before the court that might not otherwise be admissible. One may also observe that the alternative elements of violence to people or destruction of property, or even the somewhat removed alternative of bringing down communication networks, are each likely to be serious criminal offences carrying heavy criminal penalties in their own right in most legal systems of the world. While this suggests that creating terrorist offences is not strictly necessary, the political and forensic objectives of doing so are not difficult to divine.

The definition of terrorist act may be used to create a series of derivative offences that may not be politically possible for a non-political offence such as murder.<sup>11</sup> The offences associated with the concept of 'terrorist organisation',<sup>12</sup> because they involve no necessary act of wrongdoing on the part of the individual charged, would be more difficult to create if the cachet of counter-terrorism could not be enlisted by the law maker. In the same way, increased powers for law enforcement bodies can be justified as required to prevent terrorist offences in a way that might not be accepted even for other offences of serious violence.<sup>13</sup>

Most importantly, for the purposes of this paper, is the denunciatory effect of a terrorism offence. Non-political offences of violence may, in some respects, be more violent and gruesome than some crimes associated with terrorism. A series of murders by a person with no political intent may terrorise a community much more than recklessly donating a small amount of money to a resistance organisation in Occupied Palestine, which, unbeknownst to the reckless donor, carries out military attacks as well as nursing the injured.<sup>14</sup> Nonetheless, the use of violence to achieve political objectives

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<sup>11</sup> Ibid ss 101.4, 101.5.

<sup>12</sup> Ibid ss 101.3, 101.4, 102.7.

<sup>13</sup> The miscarriage of such powers can be observed in the long term detention without charge of wholly innocent terrorist suspect, Dr Mohamed Haneef, as documented in the report of the Honourable John Clarke: John Clarke, Submission to Clarke Inquiry into the Case of Dr Mohamed Haneef, 16 May 2008 <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilSubmissiontoHaneefInquiry-Final.pdf>>.

<sup>14</sup> *The Code* s 102.6(2).

by coercing governments or intimidating the public served by that government is considered to be a unique form of wickedness, and is seen to be deserving of the special condemnation that goes with the idea of being a terrorist.

Thus, a key problem with political violence is that its use is not restricted to insurgents and those who are without political power but would seek to seize it. State authorities and formal armed forces are as likely as insurgent groups to use such violence. Another problem is that the use of political violence is not ideology specific. It is used by those whose causes may be generally considered just, as well as by those whose causes are, in and of themselves, abhorrent.

### *B All Political Violence is Captured*

The provisions in the Code are intended to have extra-territorial effect. Section 100(4) provides that pt 5(3) of the Code applies to all actions or threats of actions no matter where the action occurs, where the threat is made, or what action would actually occur if the threat were carried out. The definition captures politically motivated violence anywhere in the world. There is no excusatory clause for officially sanctioned acts of violence.

Almost any hostile military act is intended to cause death or serious property damage.<sup>15</sup> Such actions are pursued to achieve the political or ideological objective that underpins the war or military campaign of which it forms part.<sup>16</sup> Whether a government, including a foreign government, is intended to be intimidated may depend on whether the military action is that of an insurgency or counter-insurgency group where the war is not an international war between states led by governments.<sup>17</sup> Any military act, however, has, at some level, the intention of intimidating some part of some public.<sup>18</sup> This is as true of counter-insurgency actions as it is of insurgencies.<sup>19</sup> The definition of terrorist act, as a result, extends well beyond domestic terrorism and what might be accepted, popularly, as terrorist activity. To avoid its wide scope running into political and practical difficulty, the enforcement of the law is subject to unspoken ideological limits.

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<sup>15</sup> Ibid ss 100.1(2)(a)–(c).

<sup>16</sup> See the definition of ‘terrorist act’: Ibid s 100.1(1)(b).

<sup>17</sup> Ibid s 100.1(1)(c)(i).

<sup>18</sup> Ibid s 100.1(1)(c)(ii).

<sup>19</sup> The objective is reflected in terms such as ‘shock and awe’: see, eg, Cable News Network, “*Shock and Awe*” *The Beginning of the 2003 Invasion of Iraq (CNN Live Coverage)* (19 March 2013) <<https://www.youtube.com/watch?v=f7iorfwcmeY>>.

State actors of whom the Australian government approves, such as members of the armed forces of the United States, a country with whom Australia is allied, with its destructive invasions of Iraq or Afghanistan, are not considered subject to the sweeping extra-territorial effects of the law. Insurgency forces of which Australia officially disapproves, such as the erstwhile LTTE in Sri Lanka, are considered subject to the law. Support in Australia for such military groups would be considered clearly a breach of one of the derivative offences in pt 5(3) of the Code. Insurgency groups in Libya,<sup>20</sup> and some insurgency groups in Syria,<sup>21</sup> highlight the fraughtness of the distinctions; Australia's allies, if not Australia itself, provide material aid to such insurgency groups, which may well place them in breach of the terrorism provisions of the Code.

Such ideological screening of the law comes easy for those familiar with the dominant ideological framework. Applying the modern laws to notional situations from the past becomes trickier. Were Nelson Mandela,<sup>22</sup> the founders of Israel,<sup>23</sup> and the founders of the Republic of Ireland,<sup>24</sup> all just common criminals? Were they all equally worthy of moral condemnation? Turning to the present, President Assad of Syria might be condemned by many as a terrorist notwithstanding his status as a head of state. His opponents were worthy insurgents for the early part of the civil war, and were armed by various western countries. The situation became more complex when many of these insurgents turned out to be the politically untouchable Al Qaeda,<sup>25</sup> who are attempting

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<sup>20</sup> See Mark Hosenball, 'Exclusive: Obama authorizes secret help for Libya rebels', *Reuters* (online), 30 March 2011 <<http://www.reuters.com/article/2011/03/30/us-libya-usa-order-idUSTRE72T6H220110330>>.

<sup>21</sup> See, eg, Christopher Brauchli, 'Stung by Stingers', *Huffington Post* (online), 20 August 2013 <[http://www.huffingtonpost.com/christopher-brauchli/stung-by-stingers\\_b\\_3474568.html](http://www.huffingtonpost.com/christopher-brauchli/stung-by-stingers_b_3474568.html)>; Matt Spetalnick, 'U.S. Syrian Rebel Aid: Non-Lethal Military Assistance Could Be Part of New \$100 Million Package', *Reuters* (online), 19 April 2013 <[http://www.huffingtonpost.com/2013/04/19/us-syrian-rebel-aid-non-lethal-military\\_n\\_3118261.html](http://www.huffingtonpost.com/2013/04/19/us-syrian-rebel-aid-non-lethal-military_n_3118261.html)>; Albert Aji and Zeina Karam, 'U.S. To Send Aid to Syria Regels: Syria, Iran Accuse Washington of 'Double Standards'', *Huffington Post* (Online), 2 March 2013 <[http://www.huffingtonpost.com/2013/03/02/us-to-send-aid-to-syria-rebels-iran\\_n\\_2796230.html](http://www.huffingtonpost.com/2013/03/02/us-to-send-aid-to-syria-rebels-iran_n_2796230.html)>.

<sup>22</sup> For dissenting opinions see, eg, Erin Conway-Smith, 'Leader, savior, terrorist: How white South Africans remember Nelson Mandela', *NBC News* (Online), 10 December 2013 <<http://www.nbcnews.com/news/other/leader-savior-terrorist-how-white-south-africans-remember-nelson-mandela-f2D11721099>>.

<sup>23</sup> For an academic consideration of this question see, eg, Charles Laffiteau, *Jewish Terrorism and the Creation of the State of Israel*, Academia <[https://www.academia.edu/1449704/Jewish\\_Terrorism\\_and\\_the\\_Creation\\_of\\_the\\_State\\_of\\_Israel](https://www.academia.edu/1449704/Jewish_Terrorism_and_the_Creation_of_the_State_of_Israel)>.

<sup>24</sup> See, eg, Max Boot, 'Kick the Bully': Michael Collins Launches the 1921 Irish Rebellion', *The Quarterly Journal of Military History* (Online), 2 November 2012 <<http://www.historynet.com/kick-the-bully-michael-collins-launches-the-1921-irish-rebellion.htm>>.

<sup>25</sup> See, eg, Tim Arango, Anne Barnard and Hwaida Saad, 'Syrian Rebels Tied to Al Qaeda Play Key Role in War', *The New York Times* (Online), 8 December 2012

to bring down the government of Iraq.<sup>26</sup> Are Australia's own soldiers guilty of terrorism every time they are asked to fire shots in anger?<sup>27</sup>

### III THE ALTERNATIVE CONCEPTS IN THE CRIMINAL LAW

Instead of terrorism, the criminal law should emphasise the three crimes that form the basis of the jurisdiction of the International Criminal Court ('ICC'), pursuant to the *Rome Statute of the International Criminal Court* ('*Rome Statute*') — genocide, crimes against humanity, and war crimes.<sup>28</sup> The two most likely to be applicable to actions amounting to terrorism are war crimes and crimes against humanity. As events in Europe in recent decades highlight, however, state-backed terrorist activity often has a genocidal element at its core.<sup>29</sup> Each of these concepts is sufficiently serious and narrowly focussed enough that it would justify the creation of ancillary crimes and additional powers without polluting the whole of the criminal law with infringements of traditional rights.

These concepts are known to our jurisprudence; The *War Crimes Act 1945* (Cth) ('the War Crimes Act') makes one form of war crime a crime against Australian law. The War Crimes Act defines 'serious offence' starting with murder, manslaughter, and rape,<sup>30</sup> then 'war',<sup>31</sup> later using these terms to define 'war crime'.<sup>32</sup> However, the War Crimes Act only considers war crimes to be indictable offences if they occurred between 1 September 1939 and 8 May 1945.<sup>33</sup> In 2000, Canada passed the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, passing into its domestic law the concepts enshrined in the *Rome Statute*. In 2002, the Commonwealth Parliament passed two pieces of legislation to facilitate Australia's obligations pursuant to the *Rome Statute*, namely the *International Criminal Court Act 2002* (Cth) and the *International Criminal*

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<<http://www.nytimes.com/2012/12/09/world/middleeast/syrian-rebels-tied-to-al-qaeda-play-key-role-in-war.html?pagewanted=all>>.

<sup>26</sup> A careful analysis of the group can be found at: Zachary Laub and Jonathan Masters, *Islamic State in Iraq and Syria* (8 August 2014) Council on Foreign Relations <<http://www.cfr.org/iraq/islamic-state-iraq-greater-syria/p14811>>.

<sup>27</sup> Bret Walker, 'Declassified Annual Report' (Report, Independent National Security Legislation Monitor, 20 December 2012) 101–3.

<sup>28</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 5–8 <[www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> (*Rome Statute*).

<sup>29</sup> This concept is developed at length by Amir Ali, 'Terrorism and Genocide: Making Sense of Senselessness' (2004) 39(6) *Economic and Political Weekly* 521.

<sup>30</sup> *War Crimes Act 1945* (Cth) ('*War Crimes Act*') s 6.

<sup>31</sup> *Ibid* s 5.

<sup>32</sup> *Ibid* s 7.

<sup>33</sup> *Ibid* s 9.

*Court (Consequential Amendments) Act 2002* (Cth). Schedule 1 of the latter Act amended the Code to insert provisions creating various offences comprising different forms of genocide, war crimes, and crimes against humanity.

Chapter 8 of the Code is entitled 'Crimes Against Humanity and Other Offences'. Division 268 of the Code is entitled 'Genocide, crimes against humanity, war crimes, and crimes against the administration of the justice of the International Criminal Court'. Section 268 (1) of the Code identifies the purpose of the Division as the creation of certain offences of international concern. It is expressly stated that Parliament's intention is that the jurisdiction of the ICC is complementary to Australia's domestic jurisdiction concerning offences created by the Division, which are also crimes within the jurisdiction of the ICC. The Code then goes on to create a series of genocide offences. They include 'genocide by killing',<sup>34</sup> 'genocide by serious bodily or mental harm' (which is defined to include acts amounting to torture, rape, sexual violence, or inhuman or degrading treatment),<sup>35</sup> and 'genocide by forcibly transferring children'.<sup>36</sup>

Division 268 sub-div C creates a series of crimes that are said to be crimes against humanity. The first such offence is called 'Crime against humanity — murder'.<sup>37</sup> The offence consists of the offence of causing the death of another person,<sup>38</sup> where that conduct is carried out intentionally or knowingly as part of a widespread or systematic attack against a civilian population.<sup>39</sup> The offence of 'Crime against humanity — extermination' occurs where the offender causes the death of one or more persons,<sup>40</sup> the conduct occurs as part of a mass killing of members of a civilian population,<sup>41</sup> and, as an element common to all the crimes against humanity offences, the conduct is carried out intentionally or knowingly as part of a widespread or systematic attack against a civilian population.<sup>42</sup> Other crimes against humanity under the Code include enslavement,<sup>43</sup> deportation or forcible transfer of population,<sup>44</sup> torture,<sup>45</sup> rape,<sup>46</sup> sexual slavery,<sup>47</sup>

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<sup>34</sup> *The Code* s 268.3.

<sup>35</sup> *Ibid* s 268.4.

<sup>36</sup> *Ibid* s 268.7.

<sup>37</sup> *Ibid* s 268.8.

<sup>38</sup> *Ibid* s 268.8(a).

<sup>39</sup> *Ibid* s 268.8(b).

<sup>40</sup> *Ibid* s 268.9(a).

<sup>41</sup> *Ibid* s 268.9(b).

<sup>42</sup> *Ibid* s 268.9(c).

<sup>43</sup> *Ibid* s 268.10.

<sup>44</sup> *Ibid* s 268.11.

enforced pregnancy,<sup>48</sup> enforced sterilisation,<sup>49</sup> persecution,<sup>50</sup> enforced disappearance,<sup>51</sup> and apartheid.<sup>52</sup> Subdivision D further creates a number of war crimes offences. The first war crime offence is 'War crime — wilful killing'.<sup>53</sup> This offence is committed if the offender causes the death of one or more persons,<sup>54</sup> the victims are protected persons under one or more of the Geneva Conventions or Protocol I to the Geneva Conventions,<sup>55</sup> the offender knows or is reckless concerning the facts that establish that the victims are protected,<sup>56</sup> and the conduct occurs in the context of or is associated with an international armed conflict.<sup>57</sup>

Protected persons are persons outside the combat that constitutes the armed conflict. They include the wounded, sick, shipwrecked,<sup>58</sup> prisoners of war,<sup>59</sup> civilians,<sup>60</sup> and an extended set of protected categories including civilian medical units.<sup>61</sup> The term international armed conflict limits the application of the existing law (as contained in the Code) to a large number of war crimes. A large number of war crimes (and a large

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<sup>45</sup> Ibid s 268.13.

<sup>46</sup> Ibid s 268.14.

<sup>47</sup> Ibid s 268.15.

<sup>48</sup> Ibid s 268.17.

<sup>49</sup> Ibid s 268.18.

<sup>50</sup> Ibid s 268.20.

<sup>51</sup> Ibid s 268.21.

<sup>52</sup> Ibid s 268.22.

<sup>53</sup> Ibid s 268.24.

<sup>54</sup> Ibid s 268.24(a).

<sup>55</sup> Ibid s 268.24(b).

<sup>56</sup> Ibid s 268.24(c).

<sup>57</sup> Ibid s 268.24(d).

<sup>58</sup> *The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*First Geneva Convention*') art 13 <<http://www.icrc.org/applic/ihl/ihl.nsf/ART/365-570017?OpenDocument>>; *The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 13 <<http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F743996A6E529C2C12563CD0051A5E6>>.

<sup>59</sup> *The Third Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4 <<http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051AA8D>>.

<sup>60</sup> *The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 4 <<http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=78EB50EAD6EE7AA1C12563CD0051B9D4>>.

<sup>61</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 8–34 ('*Protocol I*') <<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>>.

amount of terrorist activity that might fall within the concept of war crimes) occur in the course of domestic armed conflict, that is, conflict that falls below the level of international armed conflict. This limitation is unnecessary because, as is discussed below, Common Article 3 ('CA3') to the Geneva Conventions provides for the war crime prohibition to apply to armed conflicts which are not of an international character.<sup>62</sup>

What is clear, however, from this quick survey of Division 268 of the Criminal Code is that the crimes that figure so prominently in the *Rome Statute*, and thereby in the jurisdiction of the ICC, translate easily into domestic criminal law and are capable of being prosecuted as part of the domestic legal system. I consider below the extent to which such crimes are applicable to acts of terrorism in its commonly understood form.

#### IV PROPAGANDA AND TERRORISM

Most governments use terrorism and the need to prevent terrorism as a means of obtaining political advantage both at home and abroad.<sup>63</sup> The war against terrorism has involved the unprecedented action of countries repeatedly engaging their armed forces on the territory of foreign states to combat and kill those whom they describe as terrorists, leading to international conflicts.<sup>64</sup> The example used in this paper is the conduct of the allies (the United States and the United Kingdom) since the attack on targets in New York and Washington on 11 September 2001.

David Miller and Rizwan Sabir,<sup>65</sup> identify in their analysis a considerable number of institutions directed to generate propaganda.<sup>66</sup> These include a series of Coalition Information Centres used during the conflicts in Kosovo and Afghanistan, subsequently consolidated into the Office of Global Communications ('OGC') in July 2002.<sup>67</sup> The OGC operated under the direction of the White House and was responsible for supplying lies

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<sup>62</sup> *First Geneva Convention* art 3.

<sup>63</sup> The military regime in Egypt is conspicuous for their use of the concept, see, eg 'Egypt: Sisi — I Pledge to You I Will Retaliate for Martyrs of Black Terrorism', *allAfrica* (online), 1 July 2014 <<http://allafrica.com/stories/201407011394.html>>.

<sup>64</sup> Gasser, above n 3, 549.

<sup>65</sup> Some background as to Mr. Sabir's recent experience can be gained at Sam Jones, 'Student in al-Qaeda raid paid £20,000 by police', *The Guardian* (online), 15 September 2011 <<http://www.theguardian.com/uk/2011/sep/14/police-pay-student-damages-al-qaida>>.

<sup>66</sup> David Miller and Rizwan Sabir, 'Propaganda and Terrorism' in Des Freeman and Daya Kishan Thussu (eds), *Media & Terrorism: Global Perspectives* (Sage Publications, 2012) 77.

<sup>67</sup> *Ibid* 80.



about the threat posed by the Saddam Regime in Iraq.<sup>68</sup> There were specific institutions for distributing propaganda produced by the OGC, including the UK Office of Public Diplomacy in the US State Department, as well as the Ministry of Defence and the Foreign and Commonwealth Office.<sup>69</sup> In the UK, a cross departmental committee known as the Iraq Communication Group was located in Downing Street and was responsible for running a campaign to mislead the media on Iraq's alleged possession of weapons of mass destruction, including dossiers of misinformation.<sup>70</sup> Another UK propaganda institution was the Civil Contingencies Secretariat ('CGS') established in 2001. The CGS issued information to media outlets about an alleged Ricin Plot. Subsequent research indicated that there was no Ricin involved and, very probably, no plot.<sup>71</sup>

The authors identify the doctrinal approach to counterinsurgency propaganda by quoting the theory articulated by those responsible for the propaganda operations. This goes well beyond explaining events; it is an integrated aspect of an interventionist strategy that includes the coercive effects of physical force. Propaganda or strategic communication, as it is sometimes euphemistically called, includes the use of hard power and is directed at internal audiences as well as an externally identified enemy. This goes well beyond persuasive communication. It is, say the authors, 'a highly coercive strategy intended to manage the behaviour of the British public'.<sup>72</sup>

In addressing modern use of propaganda the authors use the term weaponisation of information. By way of example, the scandalous photographs taken of prisoners in compromising positions at the Abu Ghraib prison in Baghdad were not trophy pictures,<sup>73</sup> but a method of coercing the humiliated subjects of the photographs to spy on and betray their associates in order to avoid dissemination of the photographs to their family and friends.<sup>74</sup> The effect of anti-terrorist propaganda in the UK is illustrated by the difference between the focus of anti-terrorist policy and reality. Official sources proclaim a severe national security threat from Islamist or Jihadi violence. The authors

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid 80–1.

<sup>70</sup> Ibid 81.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 83–4.

<sup>73</sup> See The Guardian, *Torture Scandal: The images that shamed America* (2004) <<http://www.theguardian.com/gall/0,8542,1211872,00.html>>.

<sup>74</sup> Miller and Sabir, above n 66, 85–6, citing Seymour Hersh, 'The Gray Zone: How a secret Pentagon program came to Abu Ghraib', *New Yorker* (online), 24 May 2004 <[http://www.newyorker.com/archive/2004/05/24/040524fa\\_fact](http://www.newyorker.com/archive/2004/05/24/040524fa_fact)>.

reveal, however, that data obtained under freedom of information legislation indicate that the major threat of political violence in the United Kingdom is from armed groups in Northern Ireland. Over a four year period to 2009, the Northern Island groups were responsible for nearly 2000 failed, foiled, or successful attacks, while Islamist groups produced only six such attacks.<sup>75</sup>

Government sources at different times, sometimes as little as a month apart, give highly inconsistent accounts of the number of Islamist plots. Government sources have given such estimates that vary as much as from 20–70 or from 30–80.<sup>76</sup> The reliability of such statements can be assessed by reference to Operation Volga, an actual operation against a specific alleged plot in which a house was raided and two brothers of Muslim heritage were arrested, one of whom was shot by police. High profile allegations of a dangerous chemical bomb were made with suggestions that large-scale loss of life was potentially imminent.<sup>77</sup> The police denied responsibility for the shooting and made allegations that the shooting occurred when the victim tried to take the gun from an officer. Much later, the truth was revealed that the shot had been fired in error because of the officer's bulky clothes.<sup>78</sup> No bomb was found and the two brothers were released without charge.<sup>79</sup>

Miller and Sabir conclude that government anti-terrorist propaganda has moved well beyond a matter of communication to a systematic propaganda management of society. There is no fixed barrier, say the authors, between propaganda and terrorism.<sup>80</sup> The phenomena discussed by Miller and Sabir highlight the tainted nature of official anti-terrorist activity. The same taint attaches to the definitions of terrorism or terrorist acts as a means by which the criminal law defines the difference between acceptable and criminal political violence. The dishonest, unethical, and criminal nature of conduct engaged in, in the name of stopping or preventing terrorism, illustrates the need for new criminal law concepts that can be used to prosecute perpetrators of terrorist acts, applicable impartially across ideological divides, and able to be used to deal with and

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<sup>75</sup> Miller and Sabir, above n 66, 87–8.

<sup>76</sup> Ibid 88.

<sup>77</sup> Ibid 89. The Elite Forces website carries a report of the incident: Elite UK Forces, *CO19 (SO19) — Operations* <<http://www.eliteukforces.info/police/CO19/operations/>>.

<sup>78</sup> Miller and Sabir, above n 66, 89; 'Forest Gate shooting ruled accidental', *The Guardian* (online), 4 August 2006 <<http://www.theguardian.com/world/2006/aug/03/terrorism.uk>>.

<sup>79</sup> Miller and Sabir, above n 66, 89.

<sup>80</sup> Ibid 90.

identify those forms of unacceptable political violence that deserve to be treated as criminal — whenever and by whomever they have been perpetrated.

#### V USING INTERNATIONAL HUMANITARIAN LAW AS A BASIS TO PROSECUTE TERRORIST ACTS

For terrorist actions to be prosecuted as war crimes it must be clear that the types of acts normally thought of as terrorist acts fall within the definition of a war crime. War crimes have been traditionally defined under the Geneva Conventions; this definition has been used to establish the war crime jurisdiction of the ICC in the *Rome Statute*.<sup>81</sup> Since war crimes are thought of as arising in war, the concept does have the advantage of being a measure that applies to governments and the official armed forces of states. It is less easily manipulated for propaganda purposes as a concept that only applies to opponents of the party in power, whoever that might be. State terrorism is thus very likely to be a war crime. The long-established criteria of the Geneva Conventions provide standards by which one can tell the difference between the legitimate violence of war and conduct that goes beyond those accepted norms and is, rightfully so, illegal.

International humanitarian law is not so obviously directed against the actions of domestic terrorists that may not be engaged in an international conflict. However, CA3, which is common to each of the four Geneva Conventions of 1949, is directed to actions taking place in a non-international conflict.<sup>82</sup> Common Article 3 applies to any armed conflict not of an international character if it occurs in the territory of any State party to the Convention.<sup>83</sup> Civil wars are obviously covered, as are any forms of insurgency.<sup>84</sup> The political element contained in the notion of terrorism (as well as the levels of violence involved in any terrorist act resulting in significant death and injury) almost certainly constitutes a non-State perpetrator as a party to an armed conflict as understood by the Convention.

The persons protected by CA3 include persons taking no active part in the hostilities, including members of the armed forces who are no longer involved in the fighting, whether by sickness, injury, abandoning the conflict, or because they have been

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<sup>81</sup> *Rome Statute* arts 5, 8.

<sup>82</sup> For a discussion on CA3 and Protocol II see Gasser, above n 3, 561.

<sup>83</sup> *First Geneva Convention* art 3.

<sup>84</sup> Even where a terrorist act signals the commencement of a campaign, it might readily be categorised as signalling the start of a domestic (or international) conflict, as it were, a declaration of war.

captured.<sup>85</sup> This includes non-fighting soldiers but, of course, also includes the civilians who have never been part of the conflict and who are the usual targets of terrorist attacks. Prohibited conduct against the protected persons includes 'violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture'.<sup>86</sup> It also includes the taking of hostages and outrages upon personal dignity, including humiliating and degrading treatment.<sup>87</sup> Summary executions are also prohibited.<sup>88</sup>

The 1977 Protocol II to the Conventions supplements CA3. Article 1 of Protocol II defines its application; it applies to all armed conflicts not covered by the First Protocol provided they occur in the territory of a State Party between the armed forces of the State and organised dissident armed groups that hold control over sufficient territory to allow them to launch sustained and concerted military attacks.<sup>89</sup> This definition is restrictive in some respects. However, any terrorist group capable of more than ad hoc one-off attacks are likely to bring themselves within its coverage. Article 4 of Protocol II expands the prohibited acts in respect of non-combatants, including the prohibition of collective punishments and, expressly, terrorism.

The coverage of Protocol I, by which Protocol II defines its coverage, is described in art 1 by reference to Common Article 2 of the Geneva Conventions. Essentially, this refers to any conflict between two or more of the State parties who are parties to the Convention.<sup>90</sup> Paragraph 4 of art 1 extends the protection and obligations of Protocol I to wars of national liberation. However, an important principle is stated in art 1 para 2. The parties to the Protocol agree that, in cases not covered by the Protocol or by other international agreements, civilians and combatants remain under the protection and authority of customary international law, the principles of humanity, and the dictates of public conscience. While the limits of this additional protection may be difficult to define, it certainly provides a considerable further area in which domestic authorities

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<sup>85</sup> *First Geneva Convention* art 3.

<sup>86</sup> *First Geneva Convention* art 3 (1)(a).

<sup>87</sup> *First Geneva Convention* art 3 (1)(b), 1(c).

<sup>88</sup> *First Geneva Convention* art 3 (1)(d).

<sup>89</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609, art 1.

<sup>90</sup> *Protocol I* art 1.

are authorised by international law to prohibit the types of conduct with which the Protocol deals.<sup>91</sup>

Gasser concludes that terrorist acts causing death or serious injury to civilians are grave breaches of the Fourth Geneva Convention and are, thereby, war crimes.<sup>92</sup> He particularly relies on the prohibitions in arts 51 and 52 of Protocol I. As serious breaches of the Conventions, such acts are war crimes and may be prosecuted as such pursuant to art 8 of the *Rome Statute*.<sup>93</sup> Gasser is equally confident that terrorist acts committed in non-international armed conflict are covered by the Geneva Conventions.<sup>94</sup> He relies on CA3 and Additional Protocol II, concluding that the norms in non-international conflict are basically identical with those in international armed conflict.<sup>95</sup> Gasser does identify that neither CA3 nor Protocol II expressly provides for criminal responsibility. However, he points out that there is case law from the International Criminal Tribunal for the Former Yugoslavia ('ICTY') to the effect that more egregious conduct in non-international armed conflict can amount to international crimes and be prosecuted, for example, at the ICC.<sup>96</sup>

It seems clear that the reach of CA3, applying as it does to any non-international conflict, will cover the actions of all terrorist groups if the conduct falls within the actions prohibited by the article. The basic prohibition of violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture would cover and form a proper basis for prosecuting the most important actions of terrorists. The political motive comprehended by the definition of 'terrorist act' is likely to be sufficient to make the actions part of an armed conflict,<sup>97</sup> albeit, one of a non-international character rather than a random act of violence uncomprehended by the Geneva Conventions.

The qualification in art 1 of Protocol II that the non-international conflict must involve organised dissident armed groups that hold control over sufficient territory to allow

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<sup>91</sup> *Protocol I* art 48 demands that the parties to any conflict only direct their operations against military targets and not against either civilians or civilian objects.

<sup>92</sup> Gasser, above n 3, 556.

<sup>93</sup> Gasser, above n 3, 556.

<sup>94</sup> Gasser, above n 3, 560.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* 562, citing *Prosecutor v Duska Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-I-AR 72, 2 October 1996).

<sup>97</sup> Para (b) of the definition of 'terrorist act': *The Code* s 100.1.

them to launch sustained and concerted military attacks may mean that some terrorist activity by 'lone wolves' and smaller groups of terrorists will not come within the coverage of Protocol II.<sup>98</sup> In those cases, CA3 would not have the support and extension of Protocol II. This restriction can be seen to derive from the fact that international humanitarian law, as codified in the Geneva Conventions, is the law of war. Some terrorist activity that has a political element, but falls below the level of armed conflict, may not be covered by international humanitarian law and may therefore not be a war crime. These forms of terrorist activity are likely to be covered by another basis for prosecution and condemnation: the idea of crimes against humanity.

#### VI USING CRIMES AGAINST HUMANITY AS A BASIS TO PROSECUTE TERRORIST ACTS

The concept of crimes against humanity is generally traced back to the phrase 'crimes against civilisation and humanity' used in 1915 to denounce Turkey's Armenian genocide.<sup>99</sup> The same phrase was used in a 1919 proposal to conduct trials of those responsible for the genocide.<sup>100</sup> The term gained prominence, however, after the chief United States prosecutor at the Nuremberg Tribunal, Justice Robert Jackson, caused the term to be part of the charges provided for in the Nuremberg Charter and, thereby, part of the jurisdiction of the International Military Tribunal.<sup>101</sup> Article 6(c) of the Charter provides for jurisdiction in respect of 'Crimes Against Humanity, namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war. It also includes persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'<sup>102</sup> Article II of a subsequent document, the Allied Control Council Law No. 10,<sup>103</sup> also provided for crimes against humanity and added to

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<sup>98</sup> The concept is explained in Irina Sukhoparova, 'Why 'lone wolf' attacks are becoming a major feature in modern terrorism', *RT* (online), 17 January 2014 <<http://rt.com/op-edge/terrorism-individual-jihad-strategy-763/>>.

<sup>99</sup> Cherif Bassouni, *Crimes Against Humanity in International Criminal Law* (2d ed, 1999) 17–18, cited in David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85, 86.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* 87.

<sup>102</sup> United Nations, *Charter of the International Military Tribunal — Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('Nuremberg Charter')*, 8 August 1945 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614>>.

<sup>103</sup> Yale Law School, *Nuremberg Trials Final Report Appendix D: Control Council Law No. 10* (2008) The Avalon Project <<http://avalon.law.yale.edu/imt/imt10.asp>>.

the Charter list the crimes of imprisonment, torture, and rape.<sup>104</sup> Galingging notes that hundreds of Nazi soldiers and officials were convicted by American courts in the American zone for crimes against humanity committed before and after the war.<sup>105</sup>

The Nuremberg Charter required that crimes against humanity within its jurisdiction be linked to international armed conflict. However, that link was not required for the International Criminal Tribunal for Rwanda and, although included in the Charter for the ICTY, has been regarded as both obsolescent and purely jurisdictional in judicial decisions by that Tribunal. Galingging concludes, drawing on Kittichaisaree, that it is a settled rule of international law that crimes against humanity are international crimes and no longer need to be linked to international armed conflict.<sup>106</sup> This means that any lingering questions about the level of conflict necessary to make terrorism available to be prosecuted as a war crime do not exist in respect to crimes against humanity.

The question remains whether acts falling within the concept of terrorism also fall within the concept of crimes against humanity as it has been developed in international law. Its most authoritative codification is in the *Rome Statute*; the context in which one or more of those acts must be committed to amount to a crime against humanity is set out in the prefatory part of art 7(1) as follows: 'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

Most terrorist acts are directed against the civilian population of the territory on which they occur. Systematic attack and widespread attack are alternatives. Many terrorist actions are part of a long-running campaign. Others are more one-off but must be systematic to get off the ground. The third element, knowledge of the attack, involves the individual defendant having some knowledge of the broader context in which their actions take place. This mental element would be no more difficult to prove than the mental element associated with the definition of terrorist act in s 100(1)(c) of the Code, namely the intention of advancing a political, religious, or ideological cause. The list of

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<sup>104</sup> Ridarson Galingging, 'Prosecuting Acts of terrorism as Crimes Against Humanity Under the ICC Treaty' (2010) 7(4) *Jurnal Hukum Internasional* 746, 754.

<sup>105</sup> Ibid, citing Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford University Press, 2001) 48.

<sup>106</sup> Kriangsac Kittaichaisaree, *International Criminal Law* (Oxford University Press, 2001) 88, cited in Galingging, above n 104, 753.

specific acts which will amount to a crime against humanity if committed in the presence of those three elements is long and includes murder, extermination, enslavement, torture, rape, sexual slavery, enforced prostitution, and enforced disappearances. The list has a catchall: other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) provides a definition of some of the terms used in art 7(1). Of most importance is the definition of attack, which provides: 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in para 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'. The definition is hardly limiting, since very few terrorist actions are directed against only a single person, nor are they committed without being pursuant to some form of organisational policy. Galingging takes as an example the terrorist attacks of September 11 and concludes that they fall within the definition of attack in the *Rome Statute*. The acts were systematic and widespread. They were in pursuit of Al Qaeda's terrorist policy against the United States. Multiple deaths were caused. The victims were civilians and even the military officers in the Pentagon could be regarded as carrying out administrative duties, making them civilians for the purpose of the definition.<sup>107</sup>

Because crimes against humanity were conceived in the context of government-directed activities and used to prosecute government-sourced terrorism in Germany, Rwanda, and the Former Yugoslavia, the concept is much more difficult to misuse as a propaganda device to gloss over state terrorism and focuses on even peaceful dissent of political opponents. Galingging lists the following as advantages of using crimes against humanity to prosecute terrorist acts:

- (a) the concept applies to both state and non-state terrorism;
  - (b) there is no need for the existence of a conflict;
  - (c) the notion of civilians is broader than in International Humanitarian Law;
- and

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<sup>107</sup> Galingging, above n 104, 763.



- (d) the crime of torture does not require a purpose element as it does under the Torture Convention.<sup>108</sup>

## VII LESSONS LEARNED

The presence of offences of genocide, war crimes, and crimes against humanity in the Code indicates that domestic prosecution of ICC offences is regarded as feasible. If the Commonwealth were serious about prosecuting war crimes and crimes against humanity, wherever they occur, the investigative and prosecuting authorities would benefit from the creation of some derivative offences (as is the case with the concept of a terrorist act) and some provisions assisting in investigation of such offences (again as has occurred with the concept of terrorism). One would also expect some degree of enthusiasm to be addressed by government and police spokespersons. While a war on war crimes is hardly to be recommended when one addresses the excesses and failures of the war on terrorism, a discussion of the unacceptability of war crimes and crimes against humanity would assist in the educational purpose expected of the criminal law.

The concepts and the new offences can apply equally to state and non-state players, to Australia's putative allies as well as to its enemies, to rebels with a just cause (such as the authors of the 1776 Declaration of Independence), and to rebels who are attacking the rule of law for no good reason (the ones those in power for the moment call terrorists). By relying on the concepts of war crimes and crimes against humanity, law enforcement gains an answer to most terrorists' putative moral justification for their murderous actions. They murder, they claim, because they are fighting some form of oppressive opponent. The moral response is that, no matter how oppressive your opponent, what you cannot do is engage in war crimes and crimes against humanity. Blowing up a train or plane full of people is a crime against humanity.

We do not have to distinguish between "our" freedom fighters and "their" terrorists. As the offences apply without distinction, they do not need an ideological filter to prevent them from applying to Australia's armed forces and those of its allies. By applying to all objectively, the offences gain greater moral power. They also gain moral power from having been used to prosecute Nazis after World War II and people from different backgrounds in the Former Yugoslavia. Crimes against humanity and war crimes also do

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<sup>108</sup> Ibid 772.

not lend themselves in quite the same way to the propaganda mill. No doubt, they can and will be used for propaganda purposes. Every time they are used, however, they invite a comparison with the conduct of the person who mouths the words. Their objectivity and their pedigree give them a validity of which even propagandists should be wary.

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