

PROSECUTING TERRORISTS AT THE INTERNATIONAL CRIMINAL COURT: REEVALUATING AN UNUSED LEGAL TOOL TO COMBAT TERRORISM

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INTRODUCTION

International terrorism has come to be a fact of life. In many regions of the world it is a fact of everyday life, while in others it is a topic on the agenda. But wherever one chooses to look, the effects of terrorism will be there in one form or another. Just this past year we witnessed continuing terrorist attacks in Iraq, a suicide bomb on a bus in Jerusalem, but also the killing of Osama bin-Laden, whose name needs no introduction. The international community, as well as independent states, has employed a wide range of measures to suppress terrorism. Legal measures are just a part of those, as education, culture, the media and other spheres have no lesser role.

One instrument in the international community's toolkit against terrorism is international criminal law, which has led in particular to the development of several international and regional conventions designed to combat certain aspects of terrorism.¹ However, the latest and greatest development in the field of international criminal law, the International Criminal Court (ICC), is still not being used for this purpose. The Rome Statute establishing the ICC and its governing document² (Rome Statute) does not include terrorism within its jurisdiction.

This paper examines that lack of jurisdiction and shows that the principal question is not whether terrorism could be included in the Rome Statute but what the international community and the ICC itself has to gain by doing so. While the existing literature generally discusses the option of including terrorism under the ICC, it lacks an A to Z analysis of how it could be done and an extensive evaluation of the consequences of such a move. Such an analysis is of special importance today because of the changes that occurred in international criminal law with respect to terrorism in the previous year—namely, the Review Conference in the summer of 2010, where the topic of terrorism was not mentioned once, a path-breaking decision by the Special Tribunal of Lebanon concerning the definition of terrorism,³ and the killing of bin-Laden, which illustrated that discussion surrounding the proper method to deal with mega-terrorists is not all theoretical. With respect to the ICC, it is time to see the reality for what it is a viable option to help strengthen international combat against terrorism is not being used due to political impediments.

The paper consists of seven parts. Following this introduction, Part 2 provides a background to the inclusion of terrorism in the Rome Statute and

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1. Another international law discipline to approach terrorist acts is the laws of war, as seen, for example, in the approach of Israel towards Palestinian terrorist organizations, and the approach of the United States against Al Qaeda. The issue of applying international criminal law along with or instead of the laws of war in the combat against terrorism is a complex issue worthy of its own research, which this paper will touch on only to a limited extent in the discussion on war crimes. See *infra* part 5.2.3. It is also interesting to note a growing trend to use civil suits, mainly tort claims against terrorists and terrorist organizations. For further reading on this topic, see Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307 (2009).

2. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

3. See *infra* note 49 and accompanying text.

looks into the attempt at inclusion when the Rome Statute was drafted back in 1998. It surveys the arguments for rejecting ICC jurisdiction over terrorism and examines whether they are still relevant today. Concluding that the only viable argument left concerns the lack of agreeable definition of international terrorism, Part 3 delves into the issue of defining terrorism. It suggests that there is in fact a definition found in the Convention for the Suppression of the Financing of Terrorism⁴ that is widely recognized and may suffice for the purposes of drafting the international crime of terrorism.

Part 4 of the paper examines the procedural aspects of including a new crime in the Rome Statute, namely how the Statute can be amended. It shows that the Statute can be amended at any given time following a proposal by a Member State. Part 5 addresses the actual way in which terrorism could be included; it examines the possibility of drafting a standalone crime of terrorism, an “Article 8ter” to the Statute, based on the aforementioned procedure. It also discusses the possibility of interpreting the existing crimes (genocide, crimes against humanity, war crimes and aggression) so as to include terrorist acts even without explicitly referring to them as such.

Part 6 of the paper deals with the policy considerations with regard to creating ICC jurisdiction over terrorist acts. It presents the advantages and disadvantages of such jurisdiction from the points of view of combating terrorism, the ICC itself, and Member and non-Member States. Finally, Part 7 concludes the discussion. The general argument is that, as in many other fields of international law, where there is a political will there is a legal way. There are currently no legal impediments to including terrorism in the Rome Statute; even the definitional issue is not insurmountable.

To illustrate this point, three case studies of terrorist attacks will accompany the analysis. These involve state-led terrorism versus non-state terrorist organizations; attacks that are directed against a distinct group of people because of national affiliation versus attacks that are planned to cause as many casualties as possible with little regard to the nationality of the victims. Most interestingly, the response in each of these events was different, from a single state operating in covert operations through an international sanctions mechanism, to full-scale war. In the later parts of the paper, the following question arises: had the ICC been an option for those affected states, could these acts have been dealt with under the auspices of the ICC?⁵

4. See *infra* note 21 and accompanying text.

5. In order for a case to be considered within the jurisdiction of the ICC several thresholds need to be met, such as referral of a case to the ICC (according to Articles 12 and 13 of the Rome Statute) and issues of admissibility (according to Articles 17-19 of the Rome Statute). The case studies discussed here may raise questions with regard to these requirements, for instance the proper way of referring the case of 9-11 in light of the United States not being a member of the Court. These difficulties notwithstanding, it is the purpose

The first case study is the massacre of Israeli athletes in the 1972 Munich Olympic Games, where eight Palestinian members of the terrorist organization Black September took hostages and later murdered eleven Israeli athletes. The terrorists' demands were to release two hundred and twenty-three Palestinians prisoners held in Israel and two held in Germany. During the failed rescue operation, five terrorists were killed and three were taken into custody of German police but were released after less than two months.⁶ Israel responded with massive air strikes of terrorists' bases in Syria and Lebanon, and a few years later as a consequence, Israeli Mosad agents allegedly hunted down and killed at least eight of the terrorists involved in the attack.

The second terrorist attack to be used as an example is the Pan-Am flight 103 bombing. On the evening of December 21, 1988, Pan-Am flight 103 was en route from London to New York when it exploded over Lockerbie, Scotland. Including all the people on board the flight as well as people on the ground, the total number of casualties was 270 from over twenty different countries. Investigation of the attack discovered the involvement and responsibility of the Libyan government. International sanctions on Libya led by the United Nations followed in 1992 and 1994, as well as an embargo on arms and certain oil supplies. These sanctions were suspended in 1999 after Libya surrendered two suspects to stand trial in Scotland. In 2003, Libya officially took responsibility for the attack and began paying reparations to the families of the victims.

The third example is the terrorist attack of September 11, 2001 (9/11) on the World Trade Center in New York and the Pentagon in Washington D.C. The largest terrorist attack in history, 9/11 took the lives of approximately three thousand people when nineteen terrorists belonging to the terrorist organization Al-Qaeda took over four commercial flights in the United States. The attack was furthered by anti-American sentiments among Muslim extremist groups opposing American involvement in the Middle East. Less than a month after the attack, the United States led coalition forces into Afghanistan where the architect of the attack, Osama Bin-Laden, was supposedly hiding. Almost ten years later, Bin-Laden was killed in Pakistan during an operation of an elite unit of the U.S. Armed Forces. With these three case studies in mind, we now turn to examine the relationship between terrorism and the ICC.

of the current paper to focus on the nature of the acts themselves and the jurisdiction *ratione materiae* alone.

6. Their release was facilitated by yet another terrorist attack by Black September, which kidnapped an airplane of the German airliner Lufthansa, and demanded their release in exchange of the safety of the passengers.

I. TERRORISM AND THE ICC

Under the Rome Statute, the ICC does not have jurisdiction over acts of terrorism as a distinct offense. This situation is no accident but rather the express intention of the majority of states parties to the Rome Conference, which rejected the inclusion of terrorism in the Rome Statute.⁷ The suggested provision defined the crime of terrorism as falling into one of three categories:⁸ First, acts which constitute terrorism under a standalone definition that the provision provided;⁹ Second, an offense under six existing international counter terrorism conventions;¹⁰ or Third, offenses involving use of firearms, weapons, explosives, and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.¹¹

This proposed provision was not approved by the states parties to the Rome Conference. At the conclusion of the conference, the only mention of

7. See, e.g., statements made by the delegates of Syria, Official Records of the Rome Conference, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, 3d plen. mtg. at 172, ¶ 25, U.N. Doc. A/CONF.183/13 [hereinafter Official Records of the Rome Conference]; see also Morocco, *id.* at 173, ¶ 52; Iraq, *Id.* at 174, ¶ 55; Belgium, *id.* at 174, ¶ 65; Greece, *id.* at 175, ¶ 70; Sweden, *id.* at 176, ¶ 89; Senegal, *id.* at 176, ¶ 90; United Kingdom, *id.* at 177, ¶ 117; Brazil, *id.* at 179, ¶ 142; Ethiopia, *id.* at 179, ¶ 148; Iran, *id.* at 179, ¶ 150; Netherlands, *id.* at 181, ¶ 20. Some of the state parties did not oppose the inclusion of terrorism in the statute, see the statements made by the delegates of Tunisia, *id.* at 174, ¶ 66; Republic of Korea, *id.* at 175, ¶ 77; Algeria, *id.* at 177, ¶ 110; India, *id.* at 177, ¶ 120; New Zealand, *id.* at 178, ¶ 124; Turkey, *id.* at 179, ¶ 146; Cuba, *id.* at 181, ¶ 22. It should also be noted that this is in contrast to the initial idea of establishing the ICC, which was originally proposed by Trinidad and Tobago to deal with offences of drug trafficking and terrorism.

8. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, p. 21, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998) [hereinafter Report of the Preparatory Committee].

9. See Report of the Preparatory Committee, *supra* note 8, at 21 (defining acts of terrorism as those “[u]ndertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purpose of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them.”).

10. The conventions referred to in the provision are: Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. See Report of the Preparatory Committee, *supra* note 8, at 21.

11. Report of the Preparatory Committee, *supra* note 8, at 21.

terrorism was in Resolution E in the Annex to the Final Act, which recommended revisiting the issue of including terrorism when a Review Conference met.¹² Reading the records from the Rome Conference reveals six reasons underlying the rejection of the suggested terrorism provision.¹³ The following paragraphs will address each of these arguments and examine whether now, almost thirteen years after the Rome Conference, they are still valid.

The first and foremost obstacle to the inclusion of terrorism in the Rome Statute was the lack of a clear and universally accepted definition of what constitutes terrorism, including dissatisfaction with the proposed definition in the text of the draft.¹⁴ In contrast, an argument has been put forward that the lack of acceptable definition should not stand in the way of employing a workable definition and move along with the prosecution of terrorists in the ICC.¹⁵ One commentator has even suggested defining terrorism in a “transitional format” until a universally agreed definition will be achieved.¹⁶ The issue of definition was and remains the most serious obstacle in any discussion of terrorism, and the current discussion is no exception. However, since July of 1998, there have been some developments in the road towards finding a universally accepted definition of terrorism. Due to the centrality of the issue, it deserves a thorough review, and it will be explored at length in the following part of the paper.

The second reason for states’ reluctance to include terrorism in the Rome Statute was the notion that the three core crimes—war crimes, crimes against humanity, and genocide—represented the crimes of greatest concern to the international community, and terrorism does not rise to this level of international concern.¹⁷ However, examining the way in which the

12. Official Records of the Rome Conference, *supra* note 7, at vol. 1.

13. See also Eric Bales, *Torturing the Rome Statute: The Attempt to Bring Guantanamo’s Detainees within the Jurisdiction of the International Criminal Court*, 16 TULSA J. COMP. & INT’L L. 173, 188 (2009); Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 18 (2002); Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. J. INT’L L. 121, 126 (2006); Pouyan Afshar Mazandaran, *An International Legal Response to an International Problem: Prosecuting International Terrorists*, 6 INT’L CRIM. L. REV. 503, 528 (2006); ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM* 56 (2004).

14. See Official Records of the Rome Conference, *supra* note 7, at 172, 173, 180 for statements made by the delegates of Syria, Pakistan, and Oman respectively. See also Bales, *supra* note 13, at 185; Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 14 (2003).

15. Michael Lawless, *Terrorism: An International Crime*, 63 INT’L J. 139, 159 (2007-2008).

16. Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT’L L.J. 249, 286 (2006).

17. See Official Records of the Rome Conference, *supra* note 7, at 72 (statements made by the delegate of Slovakia); Much, *supra* note 13, at 124.

international community as a whole and states individually have addressed terrorism can lead to the conclusion that nowadays terrorists are as *hostis humani generis* as war criminals or perpetrators of genocide or crimes against humanity.¹⁸ For instance, comparing the status¹⁹ of the Genocide Convention²⁰ to that of the Terrorism Financing Convention²¹ shows that while the former has forty-one signatories and 141 parties; the latter has 132 signatories and 173 parties. In addition, the Security Council has affirmed that acts of international terrorism constitute threats to international peace and security.²²

Even on a more basic level, the notion of an international crime originated with piracy. Piracy hampered transnational trade and was in the common interest of every country to criminalize. Since piracy occurred on the high seas, no one state could assert the responsibility to combat piracy, and an international cooperation was necessary. Thus, it developed through state practice to be an international crime.²³ While terrorist acts occur within territorial boundaries, there can be an analogy between piracy and terrorism: terrorist acts were initially considered as “mere” treaty crimes, but as they became more international in nature and carried more disastrous results, they generated a need for an international cooperation to combat them and were the subject of growing international condemnation. Thus, this development has led some commentators to argue that terrorist acts have advanced to be regarded as international crimes.²⁴ Is terrorism less heinous than piracy? The most likely answer would probably be no. Does it disturb the conscience of the international community just like genocide or crimes against humanity? Ten years ago before 9/11 and the global war on terror the answer would have been most likely not. Today it is not that simple. For example, the attacks of 9/11 in the United States and following attacks in various cities in Europe, North Africa, and South Asia probably troubled more people than the atrocities and genocide committed in Darfur during the same years.

The third ground for rejecting the inclusion of terrorism in the Rome Statute was the desire to avoid overburdening the ICC and the need for a

18. Martinez, *supra* note 13, at 40-41; Mazandaran, *supra* note 13, at 527.

19. See UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants (showing the current status of the Genocide Convention).

20. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

21. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 [hereinafter Financing Convention].

22. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

23. Lawless, *supra* note 15, at 140.

24. Much, *supra* note 13, at 125.

gravity threshold.²⁵ The counter argument to this claim is that the fear from a work overload of the court is not unique to terrorism and has already been addressed in the Rome Statute itself. The drafters of the Rome Statute knew that the ICC should be reserved for a special class of the most atrocious acts, and they have put some safety valves in the text to accomplish that. These built-in mechanisms will ensure that the ICC will have jurisdiction over the most severe terrorist acts just like it has jurisdiction over the most severe crimes against humanity or any of the other crimes.²⁶

Article 1 of the Rome Statute set forth clearly that the ICC will exercise jurisdiction only for the “most serious crimes of international concern.”²⁷ Article 5, which specifies crimes within the jurisdiction of the ICC, reiterates this language.²⁸ In addition, the principle of complementarity, according to which the ICC will defer to national jurisdictions, was designed to prevent an overload of cases in the international court system while the national courts have more direct access to evidence and manpower.²⁹ Thus, the fears about overburdening the Court with a flood of terrorist cases do not seem realistic in light of the safeguards already directing the Court’s work.³⁰

The fourth argument against the initial inclusion of terrorism in the Rome Statute was that such an inclusion would impede the acceptance of the Rome Statute.³¹ This concern is irrelevant today because the Rome Statute did, in fact, come into force and currently has 114 member states. However, similar concerns may rise with respect to the acceptance of a new crime of terrorism. As will be elaborated ahead,³² any amendment to the Rome Statute does not apply automatically to all the states parties but rather applies only to those states parties that have ratified it specifically.

A fifth argument is based on a more practical level; some states questioned the need to include terrorism in the Rome Statute because, as a

25. See Official Records of the Rome Conference, *supra* note 7, at 176 ¶ 96 for statement made by the delegate of Ukraine; *id.* at 176 ¶ 99 for statement made by the delegate of the United States. See also Much, *supra* note 13, at 129.

26. ARNOLD, *supra* note 13, at 195.

27. Rome Statute, *supra* note 2, art. 1.

28. *Id.* art. 5.

29. The other rationale for the principle of complementarity was maintaining state sovereignty. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 351 (2003); Mark S. Ellis, *The International Criminal Court and its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215, 222 (2002); Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 134 (2010); ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 127 (2007).

30. Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 U. NEW S. WALES L. J. 454, 480 (2004); Martinez, *supra* note 13, at 52.

31. See Official Records of the Rome Conference, *supra* note 7, at 178 for statement by the delegate of Italy.

32. See *infra* Part 4.

treaty crime, there was already in place a system of international cooperation to deal with it.³³ While it may be true that the counter-terrorism conventions attempt to create a regime of “extradite or prosecute” between their member states and ensure the cooperation between them, this is not a good enough reason to deny ICC jurisdiction. For instance, genocide, an undisputed core crime, was also under the regime of an international treaty already in place in 1948.³⁴ In addition, most of the war crimes under the Rome Statute were already dealt with in the Geneva Conventions.³⁵

This argument asserts that terrorism has a solid basis as a treaty crime to be dealt with on the international level. This is the exact opposite of the argument made earlier, namely, that terrorism is *not* a well-established crime compared to the other core crimes. The fact of the matter is that the existing legal instruments to deal with what the international community perceives as a criminal conduct are simply irrelevant when determining whether a crime should be included in the Rome Statute. The purpose of including an international crime in the Rome Statute is to generate ICC jurisdiction over it, not to fill a vacuum in international law where there is no existing regime to suppress a certain crime. And even if it did, it is not at all clear that the current counter-terrorism regime created by these conventions is successful enough to justify not creating ICC jurisdiction over terrorism as an additional tool.³⁶

As discussed in the following sections, if the definition of the crime of terrorism will include a reference to counter-terrorism treaties, then a whole array of questions arises regarding the relationship between the Rome Statute and these treaties, especially in cases where a country is a party to the Rome Statute but not to a specific treaty. This conundrum notwithstanding, the mere fact that legal instruments exist to suppress certain manifestations of terrorist acts does not preclude in any way the ICC from exercising jurisdiction over terrorism as well.

The sixth and final objection to the inclusion of the terrorism in the Rome Statute argued that since terrorism is such a politically-sensitive term,

33. See Official Records of the Rome Conference, *supra* note 7, at 174 ¶ 59 for statements made by the delegates of Japan; see *id.* at 176, for statements by the delegate of Sweden.

34. Genocide Convention, *supra* note 20.

35. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention for the Armed Forces]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention for the Armed Forces at Sea]; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention for Prisoners of War]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention for Persons in Time of War].

36. For more elaboration on the deficiencies of the existing counter-terrorism treaties see ARNOLD, *supra* note 13, at 49.

if the ICC would deal with cases of terrorism, it will be forced into the political realm and thus will hurt its legitimacy and credibility as an impartial judicial institution.³⁷ The first part of this argument is true. Terrorist acts stir political debates about why a certain act is an act of terrorism and not merely a legitimate act of protest.

Having said that, the fear of politicization is not unique to terrorism. In the summer of 2010, the Member States activated the ICC's jurisdiction over the crime of aggression, a matter that was also not resolved in the Rome Conference. In the modern reality where non-state actors are operating from the sovereign territory of certain failed states; where most of the armed conflicts are of non-international character; and 'a low-intensity armed conflict short of war' is the title given to one of the most prolonged conflicts in the middle east, there is no doubt that cases involving the crime of aggression will touch the very heart and soul of international politics—the infringement on a state's sovereignty.³⁸

Moreover, even with other crimes, the ICC is not sheltered from concerns of politicization. For example, the official reason why Israel did not join the ICC, despite its active role in advocating its importance, is the inclusion of transfer of population as a war crime in a language that would render Israeli settlements in the occupied territories a war crime.³⁹ This is a highly political issue and one of the recurring themes in the Israeli-Palestinian dispute. More recently, the case of the arrest warrant issued in March 2009 against the President of Sudan, Al-Bashir, on account of his involvement in acts of genocide, crimes against humanity, and war crimes committed in Sudan⁴⁰ also illustrate this point. Is an arrest warrant against an acting head of state any less political than possible charges against a terrorist? In sum, all international crimes involve political sensitivities to some extent, and this argument could have been raised with respect to any of the crimes within the jurisdiction of the court.

37. See Official Records of the Rome Conference, *supra* note 7, at 278 for statement by the delegate of Ghana. Such statements are still made today. See e.g., Luz E. Nagle, *Terrorism and Universal Jurisdiction: Opening a Pandora's Box?*, 27 GA. ST. U. L. REV. 339, 361 (2011).

38. See Keith A. Petty, *Sixty Years In The Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 531, 532 (2008) (discussing the political nature of aggression as an impediment to finding a legal definition of aggression). See also Marek Meleško, *The Definition of the Crime of Aggression in the Context of the Rome Statute*, 4 ACTA SOCIETATIS MARTENSIS 139, 156-158 (2009-2010) (discussing whether the crime of aggression can be prosecuted effectively, among other reasons, due to the political considerations the Prosecutor would have to take into account).

39. Allen Baker, *The International Criminal Court*, 16 IDFL REV. 879, 891 (2003).

40. Press Release, International Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008) ICC-OTP-20080714-PR341-ENG, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/a?lan=en-GB>.

The conclusion from the above discussion is that out of the six arguments presented in the Rome Conference in 1998 against the inclusion of terrorism within the jurisdiction of the ICC, today, five seem not credible. With the perspective of almost a decade of work of the court and in light of recent developments, such as the adoption of the crime of aggression, the stakes have changed. Only one issue may still prove to be a real obstacle. That issue is the lack of an acceptable definition of terrorism. Because of the centrality of this matter, it will be dealt with at length in the following portions of this paper.

Before turning to the complex and controversial issue of defining terrorism, it is worth noting the results of the Rome Conference with respect to terrorism, namely that it will “be considered at a later stage”.⁴¹ About a year ago, in the summer of 2010, that “later stage” finally arrived, and the States Parties were convened in the Review Conference held in Kampala, Uganda. The agenda for the Review Conference, however, did not include terrorism⁴², and the official records of the conference do not mention the words “terrorism” or “terror” even once.⁴³ Despite this failure, a proposal to include terrorism in the Rome Statute does not have to wait another seven years, a fact that enhances the relevance of this discussion. The crime of terrorism suggested here can be endorsed by a state party and amended into the Rome Statute as early as the next Assembly of State Parties convene, as elaborated ahead.⁴⁴

II. DEFINING THE CRIME OF TERRORISM

In the past, the word terrorism was referred to as a descriptive term, an adjective found along acts that were criminalized, such as bombing, hijacking aircrafts, taking hostages, etc. With time, the word began to take a legal life of its own. “Terrorism” is now the subject of criminalization and, thus, requires a legal definition of what constitutes terrorism.⁴⁵ The number of definitions given to terrorism might directly correspond to the number of people asked. This diversity notwithstanding, most of the definitions of terrorism address the same core elements.⁴⁶ These are first, the use or threat

41. See Official Records of the Rome Conference, *supra* note 7, at vol. 1.

42. International Criminal Court, Provisional Agenda, Doc. RC/1, May 11 2010.

43. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *Official Records*, Doc. RC/11 [hereinafter Review Conference].

44. See discussion on the procedural aspects of amending the Rome Statute, *infra*, Part 4.

45. James D. Fry, *The Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda*, 43 NEW ENG. L. REV. 377, 393-94 (2009).

46. Bales, *supra* note 13, at 180; Martinez, *supra* note 13, at 10; Jackson Nyamuya Maotogo, *Countering Terrorism: From Wiggled Judges to Helmeted Soldiers—Legal Perspectives in America’s Counter-Terrorism Responses*, 6 SAN DIEGO INT’L L.J. 243

of use of violence; second, the act is indiscriminate in that the immediate victims are chosen randomly and are not the ultimate audience of the act;⁴⁷ third, the violence is intentionally targeted towards civilians as opposed to combatant forces; and finally, the purpose of the act is to compel a government or an organization to perform or abstain from performing a certain action.⁴⁸ The distinction between domestic and international terrorism depends on the existence of a transnational element in the act.⁴⁹

A support for this argument is found in a recent seminal decision by the Appeal Chamber of the Special Tribunal for Lebanon (STL), which identified a definition of international terrorism under customary international law.⁵⁰ After examining state practice in suppressing terrorism through international cooperation, domestic legislation, and judgments, the STL Appeal Chamber concluded that there exists a crime of terrorism under customary international law, which is composed of the three aforementioned elements.⁵¹

The remainder of this part will examine the current state of affairs with respect to finding a universally acceptable definition of terrorism. It will explore the principal impediments and how they could be dealt with in the context of ICC jurisdiction. The main argument presented here is that, as the STL Appeal Chamber rightly held, a *de facto* internationally acceptable

(2005); Lawless, *supra* note 15, at 150; ARNOLD, *supra* note 13, at 4; Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B. C. INT'L & COMP. L. REV. 23, 25 (2006); Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1034 (2004).

47. While the victims are usually affiliated with a larger targeted group, the individual identities of most terrorist victims are not a determined factor. This is as opposed to the criminal offence of homicide, where the identity of the victims is a vital factor in the circumstances of the offence.

48. How strong the link is between a specific act and the greater purpose could vary. For instance, the November 2008 Mumbai attack was not directed against the Indian government, but rather was part of a larger campaign against Israel; as opposed to the terrorist attack in March 2011 in Itamar (an Israeli settlement where a Palestinian massacred a family, including a three month old infant), was directed against the Israeli settlements. It is also worth noting that one controversial issue is whether terrorist acts include damage to property as the main act, in contrast to damage to property as a side effect of an act designed to hurt people. Contrary to the common view in the literature, the Special Court of Sierra Leone held that terrorism does encompass damage to property, and noted that "the destruction of people's home or means of livelihood and, in turn, their means of survival, will operate to install fear and terror." See *Prosecutor v. Brima*, Case no. SCSL-04-16-T, Judgment of Trial Chamber II, ¶ 670 (June 20, 2007), available at <http://www.scs-l.org/LinkClick.aspx?fileticket=vjmJCKSU01E%3d&tabid=173>.

49. This could be, for example, that the perpetrator is not a national of the country where the act took place, that the victims were of multiple nationalities, etc. See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I, ¶ 89, Feb. 16, 2011.

50. *Id.* ¶ 83.

51. *Id.* ¶ 85-86.

definition of terrorism already exists and is found in the Convention for the Suppression of the Financing of Terrorism.⁵² This definition will be adopted for the purpose of this study.

A. Defining Terrorism: Where We Are and Why

The current state of affairs with respect to defining terrorism has not changed a great deal in the last decade. Most individual states have their own domestic definitions in national legislation;⁵³ the United Nations Security Council has adopted resolutions some of which describe terrorism but do not provide a clear definition of it; and a handful of regional conventions and international conventions exhibit definitions that exist with a certain scenario in mind. Although at first sight these various instruments might seem inherently different, the STL Appeal Chamber revealed that they are actually very much alike, and leaving out the transnational element, domestic definitions are almost identical to those found in international instruments.⁵⁴

In 1996, following an initiative by India,⁵⁵ a Draft International Convention on the Suppression of Terrorism (Draft Comprehensive Convention) was the new hope to agree on a definition and unite the international counter terrorism measures under one single instrument. The current version of the Draft Comprehensive Convention is still being debated at the Ad Hoc Committee dealing with this matter in the United Nations, which is responsible to correspond with the different countries and address their concerns with the hopes of concluding an agreeable text to pass on to the Sixth (Legal) Committee.

There are two main obstacles that have been holding back any progress on the Draft Comprehensive Convention for almost ten years now.⁵⁶ These

52. *Id.* ¶ 88.

53. A useful source of state legislation in the field of counter terrorism can be found in the U.N. Counter Terrorism Committee web-site, which contains reports submitted by U.N. member states to the Committee in accordance with Security Council Resolution 1373. In these reports, states specify their legal means to combat terrorism and specifically to implement the Resolution. Examples of different definitions of terrorism in state legislation can be found in Argentina's Act No. 25,241 on Repentant Offenders (U.N. Doc. S/2001/1340); Australia's Crimes (Foreign Incursions and Recruitment) Act of 1978, (using the term "engage in a hostile activity in a foreign state") (U.N. Doc. S/2001/1247); Egypt's Law No. 97, as well as Article 86(a) of the Penal Law (U.N. Doc. S/2001/1237); India's Prevention of Terrorism Ordinance Section 3(1) (U.N. Doc. S/2001/1278); and South Africa's Internal Security Act of 1982, Section 54(1) (U.N. Doc. s/2001/1281).

54. STL Appeal Chamber decision, *supra* note 49, ¶ 91.

55. Letter dated Nov. 1, 1996 from the permanent representative of India to the United Nations to the Secretary-General, U.N. Doc. A/C.6/51/6 (Nov. 11, 1996).

56. Compare the report by the Ad Hoc Committee from 2010 with the Article published in 2003. Rep. of the Ad Hoc Comm., 14th Sess., Apr. 12-16, 2010, U.N. Doc. A/65/37; Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT'L & COMP. L. REV. 493, 533 (2003).

are the matter of state's use of force against its own civilians and the controversy over creating an exception to the definition in the case of opposition to foreign occupation.⁵⁷ With respect to the former, state's terrorism is a complex issue which in itself generated voluminous writing. It raises questions regarding the legality of the use of force,⁵⁸ and a thorough examination of it exceeds the scope of the current study. In any event, the ICC has jurisdiction only over natural persons, and thus any claims against states in the context of terrorism cannot be brought before the ICC. They could arguably fall under the jurisdiction of the International Court of Justice.⁵⁹ A natural person following governmental orders or acting in their official capacity when carrying out a terrorist attack could be tried before the ICC without the need to determine whether the State itself committed acts of terrorism. This is similar to prosecuting war crimes, for instance, but contrary to the crime of aggression.⁶⁰

The second area of dispute is more complex, as it touches the politically-sensitive right of self-determination and the recourse to force used by groups who assert such a right and countries that support them. Professor Ben Saul, for example, vigorously condemns the criminalization of such groups as terrorists, and asserts that "legitimate liberation movements" should be accorded the status of lawful combatants.⁶¹ However, Saul's argument lacks the clear notion that even if the said groups are treated as, in his words, "lawful combatants," it is still illegal under international law for them to target civilians. His argument seems to work against the goal he is attempting to advocate since parties to an armed conflict bear more responsibilities under international law than parties to violence that does not amount to an armed conflict.⁶² Thus, if accepted, Saul's argument would still enable prosecuting terrorists, in some circumstances, as war criminals.

Even without treating terrorist groups as "lawful combatants," and as legitimate as claims for self-determination may be, they still do not justify the use of violence against civilians. The use of aggressive force was

57. Stephens, *supra* note 30, at 458; Much, *supra* note 13, at 130; Bruce Broomhall, *Terrorism at Trial: State Actors in an International Definition of Terrorism from a Human Rights Perspective*, 37 CASE W. RES. J. INT'L L. 421, 434 (2005); Goldstone & Simpson, *supra* note 14, at 13.

58. Kielsingard, *supra* note 16, at 272.

59. Goldstone & Simpson, *supra* note 14, at 19.

60. For discussion on the requirement to determine that a state committed an act of aggression before charging a person with the crime of aggression, see *infra* Part 5.2.4.

61. Ben Saul, *Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law*, 25 AUST. Y. B. I. L. 177, 186 (2006).

62. Violence that amounts to "armed conflict," whether international or non-international in nature, is governed by the laws and customs of war, whereas violence that does not amount to an "armed conflict" is usually considered within the scope of the exceptions to these laws, and as governed by the principle of non-intervention in a state's internal affairs.

explicitly prohibited in the UN Charter,⁶³ and since it applies to all existing states, the proper policy point of view is that it should apply similarly to those groups who perceive themselves as independent states. If the international community is serious about its desire to suppress terrorism, then there can be no exceptions. Intentional targeting of innocent civilians should be deemed illegal in times of peace as it is in times of war regardless of the political aspirations of the entity responsible for such acts.⁶⁴

Debates on the Comprehensive Convention and the role of resistance movements in the definition of terrorism will probably not come to an end in the near future. Perhaps the events in Egypt in February 2011 will demonstrate to extremist groups how a political revolution can be carried out in a non-violent manner by showing the strength of the population rather than its willingness to kill innocent civilians of the opponent side.⁶⁵ These debates notwithstanding, a crime of terrorism must still be defined in order to apply ICC jurisdiction over it. For the purposes of this study the definition in the Financing Convention⁶⁶ was chosen.

B. The Definition in the Financing Convention

The Convention for the Suppression of the Financing of Terrorism was signed in 1999, and in many respects, it provides the first general definition of terrorism since the failed attempt to do so in the League of Nations Convention for the Prevention and Punishment of Terrorism in 1937.⁶⁷ Article 2 of the Financing Convention sets forth the prohibition on the various forms of financing terrorism. By defining which conduct the finance of which is prohibited, the Convention provides a legal definition of terrorism. The definition is twofold. Article 2(1)(a) refers to acts previously prohibited in prior international counter-terrorism conventions, and Article 2(1)(b) refers to “any other act” of terrorism or, in the language of the provision:

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or

63. UN Charter art. 2, para. 4.

64. ROBERT J. CURRIE, *INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW* 299 (2010).

65. Compare the demonstrations and cries for democracy and political within Egyptian political system to the demonstrations that took place in front of the Israeli consulate in Alexandria, Egypt, where calls were for a third Intifada and another war with Israel. See Roe Nahmias, *Hundreds Rally Outside Israeli Consulate in Alexandria*, YNETNEWS.COM (Israel)(Apr. 15, 2011), <http://www.ynetnews.com/articles/0,7340,L-4057217,00.html>.

66. Financing Convention, *supra* note 21.

67. Young, *supra* note 46, at 53.

context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

This definition addresses the *actus reus* of a terrorist act, namely the infliction of physical harm.⁶⁸ The targets are civilians or persons not taking direct part in hostilities. It also addresses the special *mens rea* which signifies terrorist acts from “mere” criminal conduct—the purpose is to bring about a political change or to intimidate a population. Article 2(1)(b) does not, however, deal with the identity of the perpetrator, and thus may potentially apply to both state and non-state entities and individuals. This definition is acceptable to the majority of states, and it provides a sound basis for a crime of terrorism to be introduced to the Rome Statute.

Furthermore, the general language used in this definition with respect to the terrorist act itself, namely not limiting it to certain behavior using specific means, makes this definition suitable in the long run as it will be able to address issues like cyber-terrorism and future manifestations of terrorism.⁶⁹ It is also worth noting that this definition does not exclude “freedom fighters” from its scope. Other than Syria, no contracting party made any reservation or declaration regarding resistance to foreign occupation and its exclusion from the definition of terrorism.⁷⁰

The wide acceptance of the Financing Convention and the abstract manner in which it describes terrorism have risen it to a level where most commentators in the field regard it as the most advanced definition of terrorism yet.⁷¹ Professor Reuven Young argued “the evident willingness of states to rapidly assume binding treaty obligations [with regard to the counter-terrorism conventions] illustrates how the momentum and extent of state behavior can establish the dual element of [international] custom.”⁷² When he wrote those lines in 2006, he observed that while the counter-

68. It is worth noting that in some states in Europe terrorists are criminalized without a requirement of *actus reus* being met. This means that terrorist suspects are criminalized at a preliminary stage, before any terrorist attack has occurred. In the Netherlands, for instance, terrorists could be criminalized subjectively based on their terrorist purpose alone. For further elaboration on European legislation and the criticism against such legislation see Elies Van Sliedregt, *European Approaches to Fighting Terrorism*, 20 DUKE J. COMP. & INT’L L. 413, 424-26 (2010) (arguing it does not comply with the presumption of innocence).

69. For a review of the applicability of certain counter-terrorism conventions to cases of cyber-terrorism and a specific analysis of the Financing Convention in that respect, see Aviv Cohen, *Cyberterrorism: Are We Legally Ready?* 9 J. INT’L BUS. & L. 1 (2010).

70. See the status of ratifications and reservations on the UNODC website. International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/RES/54/109 (Dec. 9, 1999), available at <http://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf>.

71. Bales, *supra* note 13, at 176; Stephens, *supra* note 30, at 461; Martinez, *supra* note 13, at 6.

72. Young, *supra* note 46, at 65.

terrorism conventions were “norm creating,” they were still far from the threshold of creating a customary prohibition.⁷³

This observation is still valid today. While the Financing Convention enjoys a large number of state parties to meet the ‘state practice’ requirement of customary international law, the second element, ‘*opinio juris*,’ is harder to satisfy. As Professor Naomi Norberg pointed out, the definition in the Financing Convention cannot be said to represent consensus since the overwhelming majority of state parties joined the convention only after the terrorist attack of 9/11 because United Nation Security Council Resolution 1373 required them to do so.⁷⁴ Thus, the motives behind the signing of the convention could be attributed to the legal obligation on states to comply with Security Council resolutions adopted under Chapter VII of the UN Charter, rather than to a sense of obligation to suppress the financing of terrorism as defined in this convention.

This is a compelling argument, although the magnitude of the events of 9/11 makes it difficult to determine whether and to what degree they had an effect on the great number of states who subsequently joined the convention. It is possible to argue that 9/11 was a turning point in how most countries in the world treated terrorism, and a thorough survey of state behavior before and after 9/11 may support this claim. It is worth noting that the STL Appeal Chamber found that *opinio juris* does exist through examining legislation and decisions of domestic courts from countries all over the world.⁷⁵ In any event, whether the definition does or does not rise to the normative level of customary international law does not diminish from the value of its wide acceptance.

With respect to the Draft Comprehensive Convention, the greatest advantage of the Financing Convention over it is implied in the difference between their names. The Financing Convention has already been in force for more than a decade; it is a finished product. It is also worth noting that the definition of terrorist act in the Draft Comprehensive Convention is built upon the definition in the Financing Convention. Thus, as long as the Draft Comprehensive Convention remains a “draft” and the support for the Financing Convention remains almost universal, the reminder of the analysis will use the definition of terrorist acts as referred to in the

73. *Id.*

74. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT’L L. 11, 25 (2010).

75. This determination was made with respect to what the STL defined as the international crime of terrorism under customary international law, which, as was discussed earlier, corresponds to the elements in the definition of the Financing Convention. See STL Appeal Chamber decision, *supra* note 49, ¶ 100. The Appeal Chamber continued explaining that the practice of states to prevent and punish acts of terrorism is “evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitateis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*).” *Id.* ¶ 102.

Financing Convention to form the basis of the future definition of the international crime of terrorism.

A word of caution is in order here. In the legal discourse the same word can have different meanings in different contexts. Thus, for example, the words “crimes against humanity” mean different things in the context of the ICTY, the ICTR, and the ICC.⁷⁶ Thus, finding a meaning to the word “terrorism” is only the first step. Importing that meaning from an external legal context, such as the Financing Convention, requires examination of whether that meaning will be acceptable in a different context. In other words, while states widely accepted the aforementioned definition for the purpose of the Financing Convention, they may have other interests to take into account that preclude adopting the same definition for ICC purposes. This paper suggests that, in light of the above discussion on the features of the definition in the Financing Convention, this definition is not only the suitable definition for terrorism *per se*, but it is also the appropriate definition for the crime of terrorism under the scope of ICC jurisdiction.

III. INCLUDING TERRORISM IN THE ROME STATUTE: PROCEDURAL ASPECTS

The Rome Statute includes instructions on how to amend it. These instructions are divided into amendments regarding the bodies of the ICC⁷⁷ and amendments regarding the scope and substance of the Court’s jurisdiction.⁷⁸ Paragraph 1 of Article 121 sets forth that the first amendments were to be suggested seven years after the entry into force of

76. Compare Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (defining “crimes against humanity” to be any of the following crimes committed in armed conflict and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; or other inhumane acts) with Statute of the International Criminal Tribunal for Rwanda art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (defining “crimes against humanity” to be any of the following when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; or other inhumane acts), and the Rome Statute of the International Criminal Court, *supra* note 2, art. 7 (defining “crimes against humanity” to be any of the following crimes when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparative gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; enforced disappearance of persons; apartheid; or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health).

77. Rome Statute, *supra* note 2, art. 122.

78. *Id.* art. 121.

the Rome Statute, which was the legal basis for the amendments made in the Review Conference last summer.⁷⁹ Once the seven years period has passed, Article 121 does not set any additional time limits for proposing amendments. Thus, any State Party may propose an amendment to include terrorism as a crime under Article 5 of the Statute at any given time.⁸⁰

Of course, this kind of a proposal does not pop up out of the blue. Prior to submitting an official proposal there will need to be some behind the scenes diplomatic efforts to get the support of State Parties for such a move. Once an official proposal is made, the Assembly of States Parties, the legislative body of the ICC, decides whether to take up the proposal or not.⁸¹ The Assembly meets on an annual basis with the next meeting at the time of writing, its tenth session, scheduled to take place in December, 2011. In addition, Article 121 allows the States Parties to convene a special review conference in addition to its annual meetings, so in theory, a suggestion to include terrorism in the Rome Statute could be discussed as soon as the Assembly next convenes.

An amendment may be adopted by a consensus or a two-thirds majority of States Parties.⁸² If changes are made in the list of offenses or in their definitions, the ICC will exercise jurisdiction only with respect to States Parties that have accepted these amendments.⁸³ In cases where the amendment was welcomed by an overwhelming majority of seven-eighths States Parties, just short of unanimous, approximately 100 out of the current 114 States Parties, then the opposing state may immediately withdraw from the entire Statute.⁸⁴

The procedure with respect to including terrorism as a crime in the Rome Statute is quite simple. It will take two thirds of the States Parties to approve such an amendment to the Rome Statute in order for it to be adopted, and it can happen as soon as a single State Party puts a suggestion of this sort on the table. There are currently no procedural obstacles preventing terrorism from being included in the Rome Statute as a matter of principle. However, the politics and diplomacy efforts undertaken to get the support for such a proposal may prove to overshadow any notions of optimism and enhance the conclusion that amending the Rome Statute is as much a political move as it is a legal one.

79. Review Conference, *supra* note 43.

80. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 190 (2004).

81. Rome Statute, *supra* note 2, art. 121(2).

82. *Id.* art. 121(3).

83. *Id.* art. 121(5).

84. *Id.* art. 121(6).

IV. INCLUDING TERRORISM IN THE ROME STATUTE: SUBSTANTIVE LAW ASPECTS

While the procedure for amending the Rome Statute is, at least on its face, clear and straightforward, the substance of such an amendment is anything but those superlatives. Generally speaking, there are two ways in which the ICC can exercise jurisdiction over terrorism as an international crime.⁸⁵ The first is through introducing an independent crime of terrorism as a fifth crime under Article 5. This is a rocky road, which involves defining the crime and whether or not it should include a reference to existing international counter-terrorism conventions. The second way to include terrorism within ICC jurisdiction is through interpreting the language of existing crimes as lending itself to terrorism. While this may seem much more appealing in that it does not require changes to the Rome Statute, it nonetheless raises serious questions of treaty interpretation, as well as questions of policy. Specifically, this concerns the purpose that underlies the inclusion of terrorism in the Rome Statute—is it to accomplish prosecution of terrorists with less importance attributed to the actual charges; or is it to prosecute terrorists *because* they are terrorists? This latter path is more problematic. The following part will explore both these avenues.

A. An Independent Crime

One alternative to encompass terrorist acts within the jurisdiction of the ICC is the direct and explicit way of introducing a new crime into the Rome Statute according to the amendment procedure. The new crime could be structured similarly to the suggestion made at the Rome Conference by introducing a general definition of the offense as well as reference to the offenses under existing international counter-terrorism conventions. As noted above, this is the approach in the Financing Convention, and thus, the new crime would be consistent with the existing counter-terror regime.

A standalone crime of terrorism sounds more dramatic than it really is, assuming it follows the definition in the Financing Convention. Out of the 114 States Parties to the ICC, 108 are either parties, signatories, or both to the Financing Convention, with the six exceptions being Chad, Gambia, Saint Lucia, Suriname, Timor Leste, and Zambia. Thus, 94.7% percent of ICC State Parties have already acknowledged that terrorist acts are those falling within this definition. The only innovation of this crime within the Rome Statute will be to introduce ICC jurisdiction over it. Regardless, a State Party may refuse to accept the application of the new amendment. For states like India, which is currently not a State Party to the ICC but is to the Financing Convention and was one of the more adamant participants in the

85. Stephens, *supra* note 30, at 479.

Rome Conference favoring the inclusion of terrorism within the jurisdiction of the ICC, this may provide an incentive to consider joining the ICC.

The same analysis can be made with respect to any of the international counter-terrorism conventions referred to with respect to the crime of terrorism. Contrary to concerns raised by at least one commentator,⁸⁶ there is no need for a perfect correlation between the States Parties to the ICC and the States Parties to each and every one of these conventions. This is true as long as the nature of the reference to other conventions is to create a list of illustrative examples of terrorist acts and not to import all the obligations in those said conventions.

A model formulation of the offense according to the above guidelines could potentially be:

Article 8ter: Crime of Terrorism

1. The Court shall have jurisdiction over acts of terrorism.
2. For the purpose of this Statute, “terrorism” includes, but is not limited to:
 - a. An offense according to [specified international counter-terrorism conventions]
 - b. act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the 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 organization to do or to abstain from doing any act.

B. Terrorism as Part of Existing Crimes

Certain acts of terrorism might fulfill the requirements of the core crimes and thus be within the jurisdiction of the ICC, even if not under the title of “terrorist acts.”⁸⁷ This brings about the matter of treaty interpretation. When interpreting an international treaty, such as the Rome Statute, the principal guidelines are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention),⁸⁸ which are widely considered as reflecting customary international law. Article 31 gives preference to the treaty’s text, and Article 32 expands the interpreter’s tool kit to include also the negotiating history and preparatory work of the treaty (*travaux préparatoires*).

86. Neil Boister, *Treaty Crimes, International Criminal Court?*, 12 NEW CRIM. L. REV. 341, 348 (2009).

87. Martinez, *supra* note 13, at 19.

88. Vienna Convention on the Law of Treaties, arts. 31 and 32, May 23, 1969, 1155 U.N.T.S. 331.

Whenever the matter of treaty interpretation arises, there will always exist a tension between two basic points of view: whether to use the text in its literal meaning as understood at the time the treaty was concluded; or to look at the purpose the text was attempting to achieve and, thus, pour new meanings into it as circumstances change, and realities pose new challenges not envisioned at the time of drafting.

Treaty interpretation in the field of criminal law is to be carried out with even greater caution as the consequences for the accused may be irreversible.⁸⁹ The basic principle of criminal law, international and domestic, that of *Nullum Crimen Sine Lege* prohibits punishing a person for conduct that was not considered an offense at the time of its commission. Thus, 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.⁹⁰ Interpreting the crimes of the Rome Statute must also rely on the guidelines set forth in the Elements of Crimes, a document elaborating on each element of the offenses designed to assist the Court in the interpretation and application of those provisions.⁹¹

The prudent approach does not come without a cost. If we stick to the plain language of the offenses in the Rome Statute we may lose some of the normative value of prosecuting terrorists as such. Terrorist acts can take many forms. What characterizes an act as terrorism and not as “merely” criminal is the intention behind it and the political motives it aims to achieve. While common criminal acts carry a private purpose, such as vendetta or passion, terrorist acts derive from political or ideological purposes.⁹² Prosecuting terrorists as murders,⁹³ even as a crime against humanity, may not take this special intent into consideration and, thus, could raise serious doubts as to the benefits of such prosecution in the first

89. In this context see note by the ICTY Trial Chamber in Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment and Opinion of Trial Chamber I, ¶ 93 (Dec. 5, 2003), available at <http://www.unhcr.org/refworld/docid/4147fb1c4.html>.

90. Rome Statute, *supra* note 2, art. 22(2). For a discussion on how Article 22(2) was constructed as a reaction to the “liberal” interpretation endorsed by the International Criminal Tribunal for Yugoslavia, see SCHABAS, *supra* note 80, at 93-95.

91. Consistent with Article 9 of the Rome Statute.

92. Nagle, *supra* note 37, at 351-52; STL Appeal Chamber decision, *supra* note 49, ¶106. It should be noted that the STL Appeal Chamber acknowledged that this element of terrorist acts appears inconsistently and differently among states’ legislation and judicial decision, and thus this element does not arise to form part of the customary international law definition of terrorism.

93. Murder is a criminal offence in virtually every criminal legal system. It can also be prosecuted in the ICC as a crime against humanity, as set forth in Article 7(1)(a) of the Rome Statute.

place⁹⁴ although it could come into play in later stages such as in the sentencing.⁹⁵

What stems from the above discussion is an exclamation mark and a question mark that are inseparable from the following offense-specific analysis. The exclamation mark stands for the reminder that the language of the relevant provision does not tolerate much linguistic and legal juggling. Even if the offense as is may encompass the terrorist act, there is a question mark as to whether it is also capable of expressing the special intent accompanying it. With these in mind we now turn to examine each of the current four crimes within the jurisdiction of the ICC: genocide, crimes against humanity, war crimes, and the crime of aggression. Using the three case studies presented earlier, the analysis examines to what extent the ICC could have provided an alternative recourse to the one that was taken.

1. Genocide

Based on the definition in the Genocide Convention,⁹⁶ Article 6 of the Rome Statute defines genocide as one of five possible behaviors when committed with a special genocidal intent—“to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Some terrorist acts would fill the requirements of at least some of the enumerated acts, such as “killing members of the group”⁹⁷ or “causing serious bodily... to members of the group.”⁹⁸ For instance, in all three case studies people were killed, but were they “members of a group?” The Israeli athletes were undoubtedly members of a distinct national group. The victims of Pan Am flight 103 and 9/11 can be said to belong to a much larger group, that of Westerners, or arguably American nationals since both incidents were carried out against American dominant targets.

Even if the terrorist act was committed against members of a distinct group, it would have a much harder time meeting the specific intent requirement.⁹⁹ The purpose of terrorist acts is rarely the annihilation of the victimized group.¹⁰⁰ Instead, and as exhibited in the definition of terrorism in the Financing Convention, terrorists use the deaths and injuries they cause as leverage to achieve another goal, and those deaths and injuries are not an end in itself. There may be exceptions, such as in the case of Hezbollah, a terrorist organization that had declared that one of its primary goals was to destroy the State of Israel, thus arguably qualifying as intent to

94. ARNOLD, *supra* note 13, at 193; Boister, *supra* note 86, at 356.

95. Mazandaran, *supra* note 13, at 530.

96. Genocide Convention, *supra* note 20.

97. Rome Statute, *supra* note 2, Article 6(a).

98. *Id.* art. 6(b).

99. Martinez, *supra* note 13, at 25; ARNOLD, *supra* note 13, at 300.

100. ARNOLD, *supra* note 13, at 300.

destroy part of the religious group of Jews or national group of Israelis.¹⁰¹ Whether their terrorist acts actually amount to destroying “part” of the group is a different question.¹⁰²

Returning to the three case studies, the stated purpose of the Munich massacre was the release of Palestinian prisoners, not the destruction of the Israeli people. In the cases of Pan Am flight 103 and 9/11, on the other hand, the purpose of the acts was to hurt American interests as part of a larger campaign against the West in general and the U.S. in particular. Thus, it is possible to argue that, on its face, the perpetrators of both Pan Am flight 103 and 9/11 possessed genocidal intent.

There is, however, an uneasy feeling left by this conclusion. This is because comparing the historical examples of genocide with both Pan Am flight 103 and 9/11, as devastating as those latter events were, is not a straightforward equivalence. Even though Article 6 satisfies itself with destroying not the entire group but only part of it, it seems that this part should be substantial, whether in percentage of the entire group or because of the quality of the victims (i.e. all the political, religious or spiritual leadership of the group).¹⁰³ Neither the victims of Pan Am flight 103 nor the victims of 9/11 meet this understanding of the term “part.”

2. Crimes Against Humanity

Of all the core crimes currently under the jurisdiction of the ICC, crimes against humanity require the least legal juggling in order to lend itself to terrorism.¹⁰⁴ There are many commentators who believe that terrorism could be prosecuted under crimes against humanity as currently formulated in Article 7 of the Rome Statute and thereby overcome the definitional obstacles.¹⁰⁵ The strong support for considering terrorism a crime against humanity is due to what the definition in Article 7 does not include—a requirement that the acts will be committed within the context of war.¹⁰⁶

101. *Id.* at 301.

102. In this regard the STL Appeal Chamber noted that the victims of fear, terror or panic “need not necessarily make up the whole population.” STL Appeal Chamber decision, *supra* note 49, ¶ 112.

103. This is the approach adopted by the United States Statute. *See* 18 U.S.C. § 1091 (2011). *See also* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment of the Appeals Chamber, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>.

104. Stephens, *supra* note 30, at 479.

105. Much, *supra* note 13, at 127; Boister, *supra* note 86, at 356; Mazandaran, *supra* note 13, at 527; Goldstone & Simpson, *supra* note 14, at 15; Proulx, *supra* note 46, at 1012.

106. By this, the ICC has followed the path created by the International Criminal Tribunal for Rwanda, which for the first time omitted the war nexus that was found in definitions of crimes against humanity until that point. *See* DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 955-61 (2010); ARNOLD, *supra* note 13, at 273.

Thus, the definition of crimes against humanity may encompass terrorist acts that are committed during peace times, as is often the case.

Article 7(1) of the Rome Statute includes several elements in the definition of crime against humanity: the commission of any of the acts specified in paragraphs (a)-(k); a requirements that the act will be committed as part of a widespread or systematic attack; that the attack should be directed against civilian population; and the perpetrator must have knowledge of the attack. The following paragraphs will discuss each of these four elements.

First, terrorist acts need to fit into one of the eleven acts enumerated in Article 7(1). Those eleven acts are divided into ten specific acts and one catch-all phrase in paragraph (k). Of the ten specific acts listed in paragraphs (a) through (j), the general notion is that different manifestations of terrorism could fit into at least four, those being murder,¹⁰⁷ torture,¹⁰⁸ persecution,¹⁰⁹ and imprisonment and deprivation of liberty.¹¹⁰ In all three case studies the perpetrators could have been charged with multiple acts of murders.

Paragraph (k) sets forth that crimes against humanity could also be “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” On the one hand, terrorist acts, whether they are executed through detonation of bombs, taking of hostages, or any other violent manner, are of the same nature as those that the Article spells out.¹¹¹ On the other hand, the history and development of crimes against humanity, dating back to the Nuremberg Charter, reveals that this crime developed against the background of crimes against peace and war crimes. Thus, it can be argued that there is no ground to assert that terrorism, a concept well established at that time crimes against humanity were recognized, was intended in any way to be included under this category.¹¹² The latter approach seems more suitable to the spirit of strict interpretation of Article 22(2) as discussed earlier.

The second element constituting a crime against humanity is that the act be committed as part of a widespread or systematic attack. This may prove to be a difficult standard to meet in the case of terrorist acts.¹¹³ While single terrorist acts are usually the expression of a larger radical campaign, the

107. Martinez, *supra* note 13, at 28-32; Mazandaran, *supra* note 13, at 531; ARNOLD, *supra* note 13, at 262.

108. Martinez, *supra* note 13, at 28-32; Mazandaran, *supra* note 13, at 531; ARNOLD, *supra* note 13, at 268.

109. Martinez, *supra* note 13, at 28-32; ARNOLD, *supra* note 13, at 269.

110. Martinez, *supra* note 13, at 28-32; ARNOLD, *supra* note 13, at 266.

111. Martinez, *supra* note 13, at 28-32; Mazandaran, *supra* note 13, at 531; ARNOLD, *supra* note 13, at 271.

112. Bales, *supra* note 13, at 182.

113. Martinez, *supra* note 13, at 33; Mazandaran, *supra* note 13, at 533; ARNOLD, *supra* note 13, at 263.

question arises as to the nature of the required linkage between a single attack and that larger plan. More specifically, how much distance between the larger plan and the single act can the provision tolerate? 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?”¹¹⁴ How much time can elapse between two terrorist acts but still make them part of a general greater plan?¹¹⁵ In cases where the perpetrators of a terrorist attack are not affiliated with a larger terrorist organization, or if no such organization have claimed responsibility for the attack, this requirements is even harder to satisfy.¹¹⁶

In the case of the Munich massacre, the responsible terrorist organization, the “Black September,” indeed carried out other attacks against Israeli targets, but it also operated against Jordanian targets and attacked the Saudi embassy in Sudan. Do the different agendas of the Black September render the Munich massacre not part of a widespread or systematic attack? Or is it possible to argue that one terrorist organization can carry out several widespread or systematic attacks? The preferable way will be to argue in favor of the second option, that attacks of several different spheres of interests do not exclude each of them as constituting a widespread or systematic attack in itself.

The Lockerbie incident of Pan Am flight 103 is more difficult to handle. The investigation did reveal Libya’s involvement in the attack, but Libya did not admit to its part only until a few years had passed. Furthermore, while Libya’s name was mentioned as a state sponsor of terrorists, this attack seemed to be an isolated attack, and there is no evidence of a widespread or systematic attack on behalf of Libya against American targets. This is in contrast to the events of 9/11, which were another incident in a long chain of terrorist attacks of Al-Qaeda against American targets.¹¹⁷

The third element of Article 7(1) requires the attack to be directed against any civilian population. As further explained in Article 7(2)(a), this means that the act must be pursuant to some sort of organizational policy, not necessarily attributed to a state. This means that terrorist organizations with a clear policy to attack civilians will fall within the scope of the Article. Terrorist acts are, by the definition adopted above,¹¹⁸ directed

114. It should be reminded that in the context of ICC jurisdiction, due to the threshold barriers, not every isolated terrorist attack would end up in the ICC, but if such an attack would, then the question of the larger campaign would arise.

115. Compare to the U.S. Supreme Court jurisprudence on “pattern of racketeering activity” which may, in some circumstances, consist even of two or more acts that were committed within the period of ten years. *See Tafflin v. Levitt*, 493 U.S. 455 (1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *United States v. Jennings*, 842 F.2d 159 (6th Cir. 1988).

116. Mazandaran, *supra* note 13, at 533.

117. Proulx, *supra* note 46, at 1039, 1068-69.

118. *See supra* § 3.2.

towards civilian population.¹¹⁹ Whether or not they are committed in furtherance of an organizational policy is a different question, one that involves similar problems as the second condition aforementioned, and it will be left to be tested on a case-by-case basis.

In the three examples of this discussion, it is clear that all of them were attacks directed against a civilian population. The organizational policy requirement is easier to meet in the cases of Black September and Al-Qaeda; both are terrorist organizations whose stated purposes and repertoire of acts clearly illustrate that they target civilians. Whether the Libyan government had a policy of committing terrorist acts will be harder to prove, and it is also related to the difficulty stemming from the second condition discussed above, that the Pan Am flight 103 was an isolated event.¹²⁰ A single incident does not point to the existence of a general policy, and more indications of terrorist attacks furthered by Libya will be needed to make the case.

With respect to the fourth element of Article 7, the requirement of knowledge that the terrorist act is part of a larger attack means that the accused has a sense of the overall context in which he or she is operating.¹²¹ This should not pose insurmountable problems if the connection to a terrorist organization has already been proven. As distinct from the case of a state or government policy, terrorist organizations usually declare publicly and take pride in their violent agenda, thus rendering any lack of knowledge to a minimum. Both Black September and Al-Qaeda follow this pattern, have claimed responsibility for past attacks, and use anti-western sentiments in their recruiting mechanisms. Indeed, when the sole purpose of the organization is to carry out terrorist attacks, it will be difficult to argue that a person did not know his actions are part of the widespread or systematic attack.

The conclusion from the above analysis is that 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. Even the most blunt and clear terrorist attacks, such as the Munich massacre, the Pan Am flight 103 bombing, and 9/11, will encounter difficulties if prosecuted under Article 7. Much depends upon the circumstances of the specific attack and the strength of the connection between it and a larger plan by a terrorist organization and other terrorist acts that organization has executed.

119. Martinez, *supra* note 13, at 33.

120. Isolated, though it could arguably be connected to the Berlin discotheque bombing of April 5, 1986, in which a bomb was placed in discotheque frequented by members of the United States Armed Forces. Libya was blamed for this incident, and the U.S. retaliated with bombing cities in Libya. No individual was ever charged or prosecuted as being responsible for this event.

121. Proulx, *supra* note 46, at 1062.

Before moving on to examine the next core crime, it should be noted that there is a possibility of adding terrorism as a separate act to the list in Article 7(1). This will enable the creation of a crime that will include a requirement of the special motivation of terrorist acts, thus addressing the symbolic matter of prosecuting terrorists. However, it will not solve any of the aforementioned difficulties as this offense will still be subject to the general requirements of the Article.

3. War Crimes

War crimes are unlawful acts committed during an armed conflict.¹²² They are defined in Article 8 of the Rome Statute, which distinguishes between war crimes committed during the course of an international armed conflict¹²³ and those committed during an armed conflict not of an international character.¹²⁴ Hence, for terrorist acts to be regarded as war crimes, the first requirement is that an armed conflict exists, and then the question arises as to the classification of that armed conflict as international or non-international. This distinction is of great importance as it determines which set of rules will apply and, consequently, whether a certain behavior will be considered as a war crime.

The Rome Statute itself does not provide a definition of what constitutes an armed conflict of either type. Thus, the Court has to resort to “the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”¹²⁵ This refers to the Geneva Conventions¹²⁶ and their Additional Protocols.¹²⁷ Common Article 2 of the Geneva Conventions characterizes an international armed conflict as occurring between states.¹²⁸ This is a relatively easy and objective test to be determined,¹²⁹ although more

122. Luban et al., *supra* note 106, at 1037.

123. Rome Statute, *supra* note 2, Article 8(2)(a)-(b).

124. *Id.*, art. 8(2)(c)-(f).

125. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 205 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>.

126. Geneva Convention for the Armed Forces, *supra* note 35; Geneva Convention for the Armed Forces at Sea, *supra* note 35; Geneva Convention for Persons in Time of War, *supra* note 35; Geneva Convention for Prisoners of War, *supra* note 35.

127. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, Jun. 8, 1977, 1125 U.N.T.S. 609.

128. Geneva Convention for the Armed Forces, *supra* note 35, art. 2; Geneva Convention for the Armed Forces at Sea, *supra* note 35, art. 2; Geneva Convention for Persons in Time of War, *supra* note 35, art. 2; Geneva Convention for Prisoners of War, *supra* note 35, art. 2.

129. CURRIE, *supra* note 64, at 136.

controversial examples could arise, such as in the case of the unilateral declaration of independence of Kosovo.

The law of armed conflict addresses non-international armed conflicts in Common Article 3 of the Geneva Conventions as well as in Additional Protocol I. Common Article 3 sets forth a minimum standard that should apply to non-international armed conflicts. It confines its scope of application to any armed conflict involving only one state (or, arguably, no state entity) and a limited geographical scope. This wide definition of non-international armed conflict was narrowed in Additional Protocol II.¹³⁰ Article 2 of Additional Protocol II excludes from the application of the protocol “situation(s) of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹³¹ There is no minimum threshold with respect to the length or intensity of the conflict. The only condition that is required is that the non-state actor will exhibit some form of structure and hierarchy.

As a matter of practice, it is quite difficult to identify modern armed conflicts as belonging to one type or the other. One of the more recent and particularly atrocious of armed conflicts, the Balkan war in the early 1990s, offers a fitting example of this difficulty. As the International Criminal Tribunal for Yugoslavia’s Appeals Chamber in the *Tadic* case observed—

In 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.¹³²

This complex issue is worthy of its own extensive examination. The following analysis will examine the possibility of terrorist acts be considered as war crimes in both scenarios, assuming that the existence of an armed conflict has been proved.

The second tier of the examination is to see if terrorist acts can constitute any of the listed war crimes.¹³³ Following the definition in the Financing

130. Additional Protocol II, *supra* note 121, art. 1.

131. *Id.* art. 2.

132. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal of Jurisdiction, ¶ 72 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=47fdfb520&skip=0&query=IT-94-1-I>.

133. It is worth noting that in contrast to the Rome Statute, the Fourth Geneva Convention as well as both Additional Protocols do include a specific prohibition against terrorism within their scope. See Article 33 of the Fourth Geneva Convention (“No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”). Article

Convention, which highlights that terrorist acts are committed against civilian population or against persons not taking direct part in hostilities, the answer is affirmative. Each category of crimes includes, as a war crime, the intentional targeting and killing or injuring any of these protected persons,¹³⁴ in accordance with one of the fundamental principles of the laws of armed conflict—the principle of distinction, or noncombatant immunity.¹³⁵ This is also supported by the ICTY Trial Chamber in the Galić case, which held that prohibition against terror is a specific prohibition within the general prohibition of attack on civilians.¹³⁶

The conclusion of this analysis is that terrorist acts, as defined above, may be prosecuted as war crimes, conditioned upon the existence of an armed conflict, whether an international or non-international. Some authors claim that most terrorist acts are committed in times of peace.¹³⁷ The STL Appeal Chamber also stated that the extent of the customary rule of an international crime of terrorism extends only to terrorist acts committed in times of peace.¹³⁸ For instance, there was no non-international armed conflict between Israel and Black September¹³⁹ and no international armed conflict between Libya and the United States.

On the other hand, the vast majority of terrorist bombings in the last decade occurred in Iraq during the war. Additionally, the case of 9/11 illustrates another challenge because Al-Qaeda's leader, Osama Bin-Laden, already declared war on the United States in his infamous *fatwa* from 1996, and the attack on the U.S.S. Cole in 2000 seems to be another example of this non-international armed conflict emerging before 9/11.

Even if 9/11 and other terrorist acts are perceived as part of an armed conflict, the prohibition on targeting protected persons in times of hostilities

51(2) of AP1 and Article 13(2) of AP2 use identical language and state that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” The Appeal Chamber of the ICTY recognized that these provisions reflect customary international law. *See Prosecutor v. Galić*, Case No. IT-98-29-A, Appeal Chamber: Judgment, ¶¶86-88 (Nov. 30, 2006).

134. *See, e.g.*, Rome Statute, *supra* note 2, arts. 8(2)(a)(i), 8(2)(a)(iii), 8(2)(b)(i), 8(2)(c)(i), 8(2)(e)(i).

135. Luban et al., *supra* note 106, at 1040.

136. This was said with respect to Article 51(2) of Additional Protocol I. *See Galić Trial Chamber I*, *supra* note 89, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), <http://www.unhcr.org/refworld/docid/4147fb1c4.html>.

137. ARNOLD, *supra* note 13, at 194.

138. STL Appeal Chamber decision, *supra* note 49, ¶ 107.

139. However, it is worth noting that in 2006 the Israeli Supreme Court classified the conflict between Israel and Hamas as an international armed conflict, even though Hamas was not acting on behalf of an independent sovereign state. Thus, one could make a parallel argument with regard to Black September, although the circumstances of the two organizations are quite different, as Black September targeted sites outside the context of the Israeli-Palestinian conflict and Hamas is not. *See H CJ 769/02 Public Comm. Against Torture in Israel v. Gov. of Israel*, ¶ 21, (Dec. 13, 2006).

is a very well established regime in international humanitarian law, and it is hard to think of a case that will not be covered under this protection until terrorist acts will also be included within it. Thus, the added value of declaring that terrorist acts can be prosecuted as war crimes will not result in prosecuting cases that until now were left unaddressed.

4. *The Crime of Aggression*

The Review Conference held in the summer of 2010 adopted a definition of the crime of aggression,¹⁴⁰ which will be in force with respect to the States Parties that have ratified it in accordance with the amendment procedure described above.¹⁴¹ The new Article 8bis defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹⁴²

This definition consists of several key elements of crucial importance to the consideration of terrorist acts as crimes of aggression.¹⁴³ First, the act of aggression is defined as an act of *a state*.¹⁴⁴ Thus, a first step is to determine that a state committed an *act* of aggression, and only then would certain individuals be liable for the *crime* of aggression.¹⁴⁵ This observation stands at the heart of many controversies as to what body will determine the existence of an act of aggression on the part of a state, one choice being the Security Council the other is the ICC itself; and what will be the nature of the relationship between this external political decision, or lack thereof, on the actions of the Prosecutor.¹⁴⁶

The reference to acts of states excludes individual members of non-state terrorist organizations from the scope of jurisdiction and, thus, effectively leaves out the majority of terrorist acts.¹⁴⁷ In this respect it is worth mentioning that the Security Council has regarded a non-state actor as an aggressor at least in one case in the late 1970s.¹⁴⁸ In addition, few

140. Review Conference, *supra* note 43, at 18.

141. *See* Part 4, *supra*.

142. Review Conference, *supra* note 43, at 18.

143. For a historical survey of the development of the legal definition of criminal aggression and its main elements, see Petty, *supra* note 38; Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOB. STUD. L. REV. 551 (2007).

144. Review Conference, *supra* note 43, at 21.

145. Judith Lichtenberg, *The Crime of Aggression and the International Criminal Court*, 13 TILBURG FOREIGN L. REV. 160, 165 (2006).

146. For further elaboration on this point, see *id.*

147. Martinez, *supra* note 13, at 50.

148. S.C. Res. 405, U.N. Doc. S/RES/405 (Apr. 14, 1977) (involving aggression against Benin).

commentators regarded acts of aggression as acts that can be carried out by states or “similar entities.”¹⁴⁹ However, these sources cannot by themselves indicate any change or a nascent perception of the ability of non-state actors to carry out acts of aggression and, thus, the ability of their members to be liable for the crime of aggression.

Out of the three case studies examined in this paper, the Munich massacre and 9/11 cannot be considered as acts of aggression because they were not perpetrated by a state. Within the relatively narrow spectrum of terrorist acts committed by agents of a state against another state, it can be argued that acts such as the Lockerbie case meet the definition of aggression. By exploding a bomb over British soil, Libya arguably committed an act of aggression against the United Kingdom, and by exploding an American courier it can similarly be argued that it committed an act of aggression against the United States. Thus, both the United Kingdom and the United States could have viewed Libya’s leaders’ furtherance of the Pan Am flight 103 bombing as a crime of aggression.

C. Including the Crime of Terrorism in the Rome Statute: A Summation

The above analysis demonstrates the problems involved with trying to fit terrorist acts into existing molds of the current core crimes. Each one of the four crimes described was designed to deal with certain circumstances, and terrorist acts do not always manifest themselves in such a manner. The crime of genocide poses a difficult challenge with respect to the special intention it requires, as terrorists usually seek to change the status quo rather than to annihilate a protected group. Crimes against humanity are arguably the most suitable format to prosecute terrorist acts although they also require a wider context of a wide spread or systematic attack and, thus, raise the threshold for the more common isolated terrorist acts. While these may meet the gravity threshold in and of themselves, the lack of a broader campaign prevents them from being tried as crimes against humanity. War crimes are conditioned upon the existence of an armed conflict and, thus, will not encompass terrorist acts committed in times of peace; the newly introduced crime of aggression excludes terrorist acts committed by non-state actors, thus casting serious doubts as to its relevancy to most acts of terrorism. Taken together, it appears that prosecution of terrorist acts will be more likely to succeed under a separate individual crime of terrorism with due regard to the challenges this avenue poses.

149. Ferencz, *supra* note 143, at 562.

V. POLICY CONSIDERATIONS

The previous section presented the various options to incorporate terrorism into the Rome Statute, either explicitly or through interpretation of existing crimes. Like most things in the realm of international relations and international law, where there is a will there is a way. If states will fully commit to using the ICC as means to suppress terrorist acts, they will adopt any of the abovementioned legal platforms to do so. The problem then comes to generating the will. This part will explore the pros and cons of including terrorism under the auspices of the ICC. Prosecuting terrorists in the ICC offers prominent advantages, and encompasses various issues, from the rights of the accused to the normative message it represents. However, there are practical downsides that should not be underestimated.

A. Advantages of ICC Jurisdiction over Terrorism

The ICC's advantages in terms of legal procedure are fairly clear.¹⁵⁰ Compared to some national legal systems, some of which are ineffective or are perceived as ineffective, the ICC provides a more capable forum.¹⁵¹ The ICC provides the highest standards of due process and secures the rights of the accused to an extent that terrorist suspects will probably not enjoy elsewhere.¹⁵² The ICC also allows a great deal of victims' participation in the proceedings, a concept that is foreign at least in common law systems and may generate wide public support for prosecuting terrorists in the ICC as opposed to national forums.¹⁵³

From the point of view of States Parties, the ICC offers a neutral and impartial forum and will enable them to discard any judicial and political impasses that they would have encountered had they pursued the prosecution in national courts.¹⁵⁴ From the other side of the coin, the ICC provides a solution to a situation where a terrorist attack affects several States Parties which hold competing claims of jurisdiction.¹⁵⁵

While important and viable, this argument is also slightly naïve as illustrated by Vincent-Joel Proulx, who argued that if the ICC had been in

150. For more thorough review of the procedural aspects of the ICC, see M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 522-23 (2003).

151. Neil Boister, *supra* note 86, at 341.

152. Bales, *supra* note 13, at 189; Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC*, 8 SANTA CLARA J. INT'L L. 69, 74 (2010); Mazandarani, *supra* note 13, at 540; Goldstone & Simpson, *supra* note 14, at 23.

153. Maloney-Dunn, *supra* note 152, at 74. The issue of victims' participation is discussed at length in SCHABAS, *supra* note 80, at 171-75.

154. Bales, *supra* note 13, at 189; Stephens, *supra* note 30, at 480-481; Much, *supra* note 13, at 135; Boister, *supra* note 86, at 355.

155. Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 354 (2003).

place during the Lockerbie incidents, Gaddafi would have surrendered the Libyan nationals to the ICC.¹⁵⁶ While states may be suspicious of other states' judicial systems trying their own nationals, the notion that Gaddafi and other leaders of his sort would have trusted the ICC is, at best, farfetched. We are now experiencing the living proof of this point as the recent events in Libya and the international intervention against Gaddafi included a statement by the Prosecutor that he will start an investigation of the situation in Libya beginning February 15, 2011.¹⁵⁷ The prospects of Gaddafi surrendering to the ICC are not promising. It is more plausible that the ICC will come into play between several like-minded countries with a common interest in ICC prosecution than by third world leaders on their own initiative surrendering their nationals to the ICC.

Examining ICC jurisdiction over terrorism from a counter-terrorism standpoint also reveals several benefits. The scope of the ICC jurisdiction will cover members of terrorist groups that hold powerful positions within a country's formal institutions, whether political parties or others.¹⁵⁸ This is particularly important since in these cases the prospects of national prosecutions are virtually null.¹⁵⁹

Another important feature that makes the ICC attractive as a counter-terrorism measure is found in Article 25 of the Rome Statute. According to this Article, the ICC can exercise jurisdiction not only over the main perpetrator of the offense but also over a wide variety of his accomplices. What makes this provision especially important in the terrorism context is the fact that many terrorist acts are committed through some sort of suicide attacks.¹⁶⁰ In these cases the perpetrator himself obviously cannot stand trial, but the people who aided and abetted him, incited him, or otherwise facilitated the act could.

Furthermore, ICC jurisdiction over terrorism might strengthen domestic enforcement of counter-terrorism measures.¹⁶¹ Evidently, in the relatively short period since its establishment, the ICC had the effect of facilitating and strengthening domestic initiatives to outlaw the crimes that were under its jurisdiction.¹⁶² This is arguably due to the aforementioned complementarity principle. If states were reluctant to find themselves in The Hague with respect to the other core crimes, so as to render their domestic

156. Proulx, *supra* note 46, at 1015-17.

157. Press Release, ICC Prosecutor to Open an Investigation in Libya (Mar. 2, 2011), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/statement%20020311>.

158. This assumes that that the country would be a State Party to the ICC, which at the current state of events, rules out many key players in the international arena, unless the Security Council would refer a case to the ICC.

159. Bales, *supra* note 13, at 189; Proulx, *supra* note 46, at 1018.

160. Martinez, *supra* note 13, at 17.

161. Stephens, *supra* note 30, at 479.

162. *Id.*

enforcement efforts more effective, the same process could be anticipated with respect to terrorism. Not only that, the ICC will set the standard regarding prosecution of terrorists and will thus generate cohesiveness and legal predictability.¹⁶³

In this regard, Professor Nagle argued that the lack of cooperation among states to extradite terrorist suspects is an obstacle to seeing terrorism as an international crime within the jurisdiction of the ICC.¹⁶⁴ The point made here is exactly the opposite. While states may act suspiciously in a bilateral basis, on a multilateral basis, like the ICC, the safeguards against abusing rights are higher, and the expectations for cooperation are higher as well. Thus, while a state “can get away” with stalling or refusing extradition of terrorist suspects to another state, it can be argued that it will not have the same leeway to do it before the ICC. In order to avoid being portrayed as “unwilling” or “unable,” it is expected that ICC jurisdiction over terrorism will increase bilateral cooperation, rather than reflect any lack thereof.

Finally, on a more normative level, ICC jurisdiction will send a clear signal that the international community condemns terrorism in the utmost way. ICC jurisdiction will enhance the universal condemnation of terrorist acts and will strengthen the rejection of terrorism as a means to bring political change.¹⁶⁵ As Goldstone and Simpson correctly noted, “the important link between peace and prosecution by an impartial court should not be underestimated.”¹⁶⁶ From a general human rights perspective, ICC jurisdiction over acts of terrorism would arguably present an alternative to combating terrorism through the use of forceful measures.¹⁶⁷

According to this argument, prosecuting Al-Qaeda members in the ICC could have been an alternative to United States engagement in Afghanistan following 9/11. It would have likewise allowed the Israeli government another course of action before resorting to a covert, global manhunt for the members of Black September. On the other hand, since the ICC does not have its own police force and is dependent on cooperation from Member States in surrendering suspects, it could equally be argued that an ICC arrest warrant would have still required United States involvement in Afghanistan and Israeli covert actions to apprehend the perpetrators, even if only to eventually transfer them to The Hague.

B. Disadvantages of ICC Jurisdiction over Terrorism

The abovementioned values of prosecuting terrorists in the ICC carry a lot of weight. However, they are being overshadowed by practical

163. Goldstone & Simpson, *supra* note 14, at 22.

164. Nagle, *supra* note 37, at 375.

165. Much, *supra* note 13, at 135.

166. Goldstone & Simpson, *supra* note 14, at 26.

167. Maloney-Dunn, *supra* note 152, at 74.

disadvantages. As will be elaborated ahead, the downsides of including terrorism within ICC jurisdiction are mostly practical ones and derive their strength from the realpolitik of the work of the ICC and cooperation among states when it comes to terrorism.

First and foremost among those is, as mentioned before, the fact that the ICC does not have its own police force and is dependent on the good will and cooperation of States Parties in every step of the way,¹⁶⁸ from sharing intelligence, through the collection of evidence, to the apprehension of the suspect.¹⁶⁹ At the end of the day, if the ICC will not be able to get terrorists to stand trial, then why go through all the trouble of a politically sensitive problem of generating jurisdiction over terrorism? Instead, it might prove more useful to put more effort into strengthening domestic legal systems in their fight against terrorism with a tailor made strategy for each country.¹⁷⁰

Another practical problem is that the United States is currently not a member of the ICC.¹⁷¹ With the United States running its own worldwide campaign against terrorists, introducing ICC jurisdiction over terrorist acts might create two competing routes. Thus, third states might face a dilemma with which of the two to cooperate. Suppose a state party to the Rome Statute has apprehended a terrorist suspect that an arrest warrant was issued against but is also wanted by the United States; to whom should that state surrender the suspect? Which obligation comes first—an obligation to cooperate with the ICC or an obligation to respond to an extradition request by the United States?¹⁷²

From the ICC's own perspective, including terrorism under its jurisdiction might not be self-serving. The ICC is a relatively young institution that is still developing and proving its credibility and legitimacy. It is struggling with claims against it being a court for "African States"¹⁷³ and with the embarrassing reality of its limited powers, as shown by the non-enforced arrest warrant against Al-Bashir. In this context, bringing an

168. A cooperation that State Parties take upon themselves when they sign the Rome Statute, in accordance with the provisions of Part 9 of the Rome Statute.

169. Mazandaran, *supra* note 13, at 542; Goldstone & Simpson, *supra* note 14, at 24; Martinez, *supra* note 13, at 55; Much, *supra* note 13, at 129; Nagle, *supra* note 37, at 376.

170. An interesting example of an international cooperation between law enforcement authorities in the field of counter terrorism is found in the European Union, which enacted the European Arrest Warrant (EAW) which offers expedient extradition procedures in case of terrorist suspects and applies the principle of mutual recognition of judicial decisions. See Van Sliedregt, *supra* note 68, at 415.

171. Bales, *supra* note 13, at 174; Martinez, *supra* note 13, at 59; Mazandaran, *supra* note 13, at 537. For a more in depth survey of the relationship between the United States and the ICC, see Fiona McKey, *US Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L. J. 455 (2004).

172. It should be noted that Article 90 of the Rome Statute sets forth the rules governing such a procedure, although it leaves quite a large margin of appreciation to the state to consider whether to surrender the suspect to the ICC or to extradite him to a non-member state. Rome Statute, *supra* note 2, art. 90(6).

173. Luban et al., *supra* note 106, at 1040.

internationally sensitive and controversial matter such as terrorism into the Court's jurisdiction might not contribute to strengthening the Court's reputation and status.

Additionally, prosecuting terrorists in the ICC, as mentioned previously, is likely to generate more national prosecutions of terrorists. This may seem as a shortcoming rather than an advantage because, as Professor Naomi Norberg argues, "unlike genocide or crimes against humanity, for example, terrorism is the subject of ongoing police operations and measures that at times violate the very human rights the ICC at least indirectly protects."¹⁷⁴ She claims that in the name of following ICC's directions, national law enforcement authorities will enjoy a greater shield to violate human rights of suspects and detainees.¹⁷⁵ This is indeed a concern, but it is not as threatening as Norberg asserts. Mistreating suspects and detainees could be regarded as a state "unwillingness" or "inability" to exercise a just criminal trial and thus generate ICC jurisdiction. Within the ICC itself, as mentioned earlier, the rights of the suspects are vigorously maintained, and arguments as to compromising those rights could cost the prosecution its case.

Finally, from a deterrence point of view, some optimistic views see the international criminal adjudication as the most effective deterrent for future terrorism.¹⁷⁶ This view is questionable at best.¹⁷⁷ Terrorist organizations do not hold any respect for the rule of law or they would not choose to work outside the law and target innocent civilians in the first place. They motivate their people by talking in terms of ideology, religion, martyrs, and the like.¹⁷⁸ If a person is willing to wear explosives on his body and bomb himself it is doubtful that his thoughts wander to The Hague before he pushes the button. A criminal trial will probably not deter the perpetrators or the men who send them, and addressing terrorist acts only *ex post facto* makes it seem less attractive than alternative avenues of international law, such as the laws of armed conflict, which have a more substantial deterrence effect.¹⁷⁹

CONCLUSIONS

Since the end of World War II major institutional developments have happened in international criminal law, the most prominent of those being the establishment of a permanent international criminal court. This

174. Norberg, *supra* note 74, at 27.

175. Similar criticism was made by Prof. Van Sliedregt with respect to European legislation. See Van Sliedregt, *supra* note 68, at 426 (arguing that parts of the counter terrorism legislation at the European Union and within its Member States "strengthen the Executive's power and weaken judicial control").

176. Lawless, *supra* note 15, at 159.

177. Maogoto, *supra* note 46, at 254.

178. Norberg, *supra* note 74, at 47.

179. Maogoto, *supra* note 46, at 254.

institution has been operating for almost a decade, and it embodies the aspiration of its member states to end impunity for the perpetrators of the most heinous of crimes. Though still in its infancy, the ICC is gaining legitimacy and credibility and induces enforcement of international criminal law within national boundaries.

Parallel to this development, the last decades have also witnessed a sharp escalation in international terrorist acts, both in numbers and the magnitude of the harm they generate. Terrorist groups, whether operating independently or under the auspices of a state, target civilian populations with the hopes that their acts will influence a decision making process. Whether they explode a bomb on a bus in Jerusalem, on trains in Madrid, in the streets of New Delhi or fly commercial airplanes into the World Trade Center in New York, terrorists groups have been largely successful in getting away with it. Furthermore, states that experienced terrorist attacks on their soil adopt measures in order to better face the new threat, measures that carry great costs.

The question that arises is why these two parallel developments do not collide? More precisely, why is the ICC not being used in the international effort to suppress terrorism? This paper suggested that including terrorist acts as an international crime in the Rome Statute is more a question of policy considerations and *realpolitik* constraints than it is a question of law. To support this claim, it has been illustrated how the core legal questions arising from the inclusion of terrorism in the Rome Statute can be answered.

First and foremost, Part 2 looked at the historical reasons for rejecting the inclusion of terrorism within the ICC jurisdiction as presented at the Rome Conference. It concluded that out of the six primary concerns that prevented the adoption of terrorism as an international crime, only the definitional issue may still be valid today. However, as seen, even the definition of terrorist acts, the one issue that has been constantly regarded as insolvable, is illuminated in a different light as the STL Appeal Chambers decision acknowledged the existence of a definition of terrorism under customary international law. While legal scholars were busy hiding behind idioms like “one man’s terrorist is another man’s freedom fighter,” states’ legislation and practice created a common sense definition of what terrorism is.

This customary definition correlates to the most widely accepted international definition of terrorism, which is found in Article 2 of the Financing Convention, as elaborated in Part 3. The prospects of adopting a Comprehensive Convention by the UN do not seem to be coming true in the near future, leaving the Financing Convention the most comprehensive and recognized reference for defining terrorism. This definition is both practical and appropriate. Its language allows its application to contemporary threats, such as terrorism by non-state actors (in addition to state terrorism) and cyber-terrorism. It was recognized by a vast majority of states and was included in Security Council Resolution 1373, calling for its immediate

integration to national legislation. Thus, even the most controversial issue of defining terrorism proves to be not insurmountable.

As to the ICC itself, the procedure to amend the Rome Statute is straightforward and can be utilized at any given time. As demonstrated in Part 4, in order to trigger this procedure and ensure it is a successful one, diplomatic lobbying for promoting the idea of a crime of terrorism will be needed behind the scenes, getting the support of States Parties prior to making the official proposal for amendment. This is tied to the conclusion in Part 5, which surveyed the four crimes currently within the jurisdiction of the ICC and concluded that while they may lend themselves to terrorist acts in some cases, it is subject to legal interpretation, and persuasive arguments can be made either way. Prosecutions of major terrorists ought not to be based upon such vagueness, and a crime of terrorism needs to be articulated by itself and to stand alone as an independent crime.

Amending the Rome Statute so as to include an independent crime of terrorism requires, as previously noted, a great deal of political and diplomatic efforts to make such an amendment possible. These political and diplomatic efforts will be influenced by a set of pros and cons, such as the ones discussed in Part 6. The advantages of the ICC are mainly of normative value, such as maintaining due process rights for the accused as well as for the victims; allowing a neutral and impartial forum in cases of conflicting jurisdiction claims between several states; and reinforcing the international community's denunciation of terrorist acts. The shortcomings of the ICC are more practical in nature. Most notably of those shortcomings are the absence of U.S. membership in the institution, the lack of independent enforcement capabilities of the ICC, and its dependence on the cooperation of State Parties, notwithstanding the fact that they committed themselves to cooperate when they joined the institution.

International criminal law can be a powerful instrument. It generated the conviction of perpetrators of the most devastating atrocities such as World War II and the Holocaust, the Rwandan Genocide, the Srebrenica Genocide, and more. This powerful instrument should also be employed to combat terrorism. It is easy to put on a serious face and blame the lawyers and the legal complexities, but the fact of the matter is that the law is not an impediment in treating terrorist acts as the grave international crimes they are. The reason the two parallel routes of the establishment of the ICC and the advancement of international terrorism have not yet collided is politics, not law. As a matter of law, the road is open for including terrorism as a crime in the Rome Statute and by this to add another tier to the international fight against terrorism.

