

The International Criminal Court & Terrorism

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Introduction

Terrorist activity has gained in frequency within the last few decades. Whereas “only” 300 terrorist acts worldwide were accounted for in 1970, over 5,000 incidents were recorded for the year 1999.¹ Many countries like Ireland, Spain, Turkey, and Colombia have been combating their own terrorist groups for years already. In Israel too, terrorism has become a tragic circumstance of everyday life and has resulted in a tremendous loss of lives. And now the United States has also become a victim of terrorist activities.

These dreadful terrorist attacks against the United States on September 11, 2001, have made it clearer than ever that the international community needs to cooperate and take actions against terrorism on an international level. Terrorism is not merely a domestic problem. Al Qaeda has proven that by operating on a network basis it can spread terrorists around the globe to undertake attacks in various parts of the world. In the future we will not be able to rely on domestic legislation only. It will be necessary to determine international concepts and approaches which tackle crimes of terrorism on an international level as well.

The purpose of this paper is to explore what role the International Criminal Court (hereinafter: ICC) might play in combating terrorism in terms of international law enforcement. In 2009 a review conference will take place to consider whether the Rome Statute should be amended. I argue in this paper that the ICC’s subject matter jurisdiction should be extended to encompass crimes of terrorism. I propose amendments to the ICC Statute with an express provision condemning and penalizing crimes of terrorism.

Many scholars assert that some terrorist acts could be prosecuted as crimes against humanity in the meantime. But I do not believe that this is a favorable solution. A more explicit jurisdiction over crimes of terrorism would be beneficial because terrorism is really a separate category of crimes and as such mandates separate prosecution. In addition, because terrorist activities are very closely linked, all those who are directly or indirectly involved should be liable to prosecution, not only those who ‘pull the trigger’.

The first part of this paper presents a short overview of the most important features of the ICC. It also assesses the current international legislative materials concerning terrorism and summarizes how terrorism has changed within the last few decades. Part II of the paper focuses on the role of the ICC in dealing with law enforcement issues of crimes of terrorism

and analyzes whether the current subject matter jurisdiction of the ICC presents an adequate framework to prosecute terrorists. This part suggests an explicit provision for crimes of terrorism consisting of already existing anti-terrorist conventions as well a definition of terrorism. Finally, part III will offer some concluding observations.

I. Background

1. The International Criminal Court

On July 17, 1998, the Rome Statute was signed establishing a permanent international criminal court with a seat in The Hague.² After the sixtieth ratification, the Statute entered into force on July 1, 2002, in accordance with Art. 126 (1).³ Art. 1 of the Rome Statute states that “[the Court] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern”. These crimes comprise genocide (Art. 6), crimes against humanity (Art. 7), and war crimes (Art. 8). After extensive debates, the negotiators agreed to also include the crime of aggression. However, the ICC will not exercise jurisdiction over the crime of aggression unless agreement is reached regarding how to define the crime and regarding the conditions for the court’s exercise of jurisdiction over it.⁴

Jurisdiction of the ICC is based on the territoriality and nationality principle. Territorial jurisdiction is the exercise of jurisdiction by a state over persons, acts, or events occurring within its territory.⁵ Territorial jurisdiction is the most substantial basis for a state to claim jurisdiction, because it derives from the sovereign power of each state. As such, it is a universally acknowledged standard rule in international criminal law.⁶ Art. 12 of the ICC Statute contains this jurisdictional principle. Thus, irrespective of the offender’s nationality, the ICC may exercise jurisdiction over crimes committed in the territory of a state party, Art. 12 (2) (a). The offender will incur criminal responsibility even if the state of which he or she is a national is not a party to the Rome Statute.

¹ Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 DePaul Bus. L.J. 59, 75 (1999/2000).

² Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998).

³ Ratification list of the Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N6>.

⁴ Art. 5 (2), Rome Statute of the International Criminal Court, *supra* note 2, at 1004.

⁵ Stéphane Bourgon, *Jurisdiction Ratione Loci*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOLUME 1 543, 562 (Antonio Cassese et al. eds., 2002).

The second principle of jurisdiction incorporated in the ICC Statute is based on the offender's nationality, Art. 12 (2) (b). States exercise jurisdiction based on the active personality principle if one of their nationals committed a crime. The so-called nationality jurisdiction is equally recognized in domestic law of most states and in international law.⁷ Thus, the ICC will exercise jurisdiction over individuals, who are nationals of state parties or of states which have accepted ICC-jurisdiction.⁸ Offenders can be tried whether or not a crime has been committed in the territory of a state party. However, since non-state parties are not bound by the Statute, they need not cooperate with the authorities of the ICC in case a national of a state party committed a crime in their territory.⁹

Paragraph 10 of the Preamble as well as Art. 1 of the Rome Statute affirm the complementarity of national criminal jurisdiction and jurisdiction of the ICC. This is a very essential feature of the ICC. Initially, states were concerned that their sovereignty would be undermined by giving too much control to the ICC.¹⁰ The principle of complementarity, therefore, ensures that the intrusion on a state's sovereignty can be kept within reasonable limits. Consequently, the ICC will exercise its jurisdiction only if a state party is unwilling or unable to prosecute the offender, Art. 17 (1) (a). Unwillingness is at issue if a state investigates and prosecutes a case in a manner which reveals an attempt to shield a person from criminal responsibility or if the proceedings are unjustifiably delayed or not conducted independently or impartially, Art. 17 (2). There may also be situations in which a state will not be able to institute proceedings against persons due to a total or substantial collapse of a state's judicial system, Art. 17 (3).¹¹ In all other instances the states remain the principal prosecutor of terrorist acts.

Art. 13 of the Rome Statute lays out in which cases ICC jurisdiction is triggered. According to Art. 13 (a) and Art. 14, a State Party can refer a situation to the Prosecutor of the ICC, indicating the commission of crimes enumerated in Art. 5 (1) (a) – (c). The United Nations

⁶ Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME 1, *supra* note 5, at 583, 607.

⁷ ILIAS BANTEKAS ET AL., INTERNATIONAL CRIMINAL LAW 23-24 (Cavendish Publishing Limited ed., 2001).

⁸ Micaela Frulli, *Jurisdiction Ratione Personae*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME 1, *supra* note 5, at 527, 535.

⁹ Bourgon, *supra* note 5, at 563.

¹⁰ See John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME 1, *supra* note 5, at 667, 668.

¹¹ Examples for such a collapse are the inability to obtain the accused, or to gather necessary evidence or testimony.

Security Council has the authority to do so pursuant to Art. 13 (b). And last but not least, the Prosecutor himself can initiate investigations *proprio motu*, Art. 13 (c) and Art. 15.

2. Terrorism

a. An Assessment of the Current International Legislative Materials Concerning Terrorism

It can be suggested that since the late 1960's international terrorism became a constant of international life.¹² However, the targets of terrorist acts changed from decade to decade. The international community usually reacted by adopting specific conventions against corresponding terrorist acts. This resulted in a broad range of anti-terrorist treaties. Hence, the frequency of airplane hijackings in the 1960's and 1970's led to the adoption of several international agreements regarding seizure and interference with civil aviation.¹³ Other international agreements cover acts related to hostage taking¹⁴, crimes against diplomats and other internationally protected persons¹⁵, maritime terrorism¹⁶, terrorist attacks in public places¹⁷, and financing of terrorism¹⁸.

In addition, there are also several United Nations General Assembly resolutions and declarations concerning terrorism.¹⁹ Being resolutions or declarations of the General Assembly they do not have legal effect and thus, are not binding on the United Nations member states. However, they are not completely irrelevant because they have the status of

¹² Alexander, *supra* note 1, at 66.

¹³ Convention on Offences and Certain other Acts Committed on Board Aircraft, September 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 974 U.N.T.S. 177; *see also* BANTEKAS, *supra* note 1, at 229.

¹⁴ International Convention Against the Taking of Hostages, December 17, 1979, 1316 U.N.T.S. 205.

¹⁵ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, December 14, 1973, 1035 U.N.T.S. 167.

¹⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 U.N.T.S. 304.

¹⁷ International Convention for the Suppression of Terrorist Bombings, January 9, 1998, 37 I.L.M. 249 (1998); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988, 1589 U.N.T.S. 474.

¹⁸ International Convention for the Suppression of the Financing of Terrorism, 39 I.L.M. 270 (2000).

¹⁹ *See* Patrick Robinson, *The Missing Crime, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME 1, supra* note 5, at 497, 510-13.

recommendations.²⁰ Furthermore, there are also several regional conventions on terrorism in Latin America, Europe, and Asia.²¹

The thematic approach as well as regional agreements seem to have worked best in the past. Regional anti-terrorist treaties as well as domestic legislation are shaped by regional or domestic needs. Their aim is to consolidate and strengthen cooperation among the states concerned.²² In defining terrorism, regions or nations work with their own understanding of this term and do not have to heed other values.²³ This evidently facilitates the enactment of laws. The thematic approach is also advantageous because it guarantees relative consensus and international cooperation. However, these two schemes will not be good enough for future international law enforcement concepts for crimes of terrorism. For one, globalization and modern technology have broadened the terrorists' range of action - terrorism is not a domestic or regional problem any longer. Also, past experiences have proven that terrorism is an ever-changing issue. Terrorists find new targets and new means to carry out attacks. The thematic approach is therefore too slow to take such changes into consideration. Instead of reacting, the world community needs to be able to act based on an already present scheme.

Defining terrorism should be at the top of the agenda and is the first step toward successful reduction or elimination of terrorism. For as long as there is not be an accepted definition we will always find ourselves preoccupied with dealing with the differences of who is a terrorist, a freedom fighter, or a *guerrillero*. Those are questions that require an answer now. Terrorism is not likely to vanish in the next few years, on the contrary. This is why we need to finally tackle the problem at its roots. It will be by no means an easy task to define terrorism, but the world body has to overcome its political reasons and excuses. The international community cannot afford to renounce a universally accepted definition of terrorism.

²⁰ Art. 10 & 14 United Nations Charter; Art. 25 in contrast states that members of the United Nations have to accept and carry out the decision of the Security Council.

²¹ European Convention on Suppression of Terrorism, December 4, 1979, 19 I.L.M. 325; Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, February 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195.

²² BANTEKAS, *supra* note 7, at 244.

²³ *Id.* at 231.

b. Terrorism Then and Now

Terrorism has undergone many changes since the 1960s. In his article Michael Whine illustrates six aspects, which distinguish new forms of terrorism from terrorist acts prior to 1990.²⁴

Before 1990, terrorism tended to be an outgrowth of national liberation struggles or anti-capitalist movements, whereas today far right and religious terrorism are prevalent. The “new” far right terrorism does not have fixed organizational structures within a group. Instead, far right terrorists, like Timothy McVeigh for example, follow models such as “leaderless resistance” and commit “lone-wolf” terrorist acts. Religious terrorism, the other prevalent category, has experienced quite an impetus in the last few years and should not be underestimated. Terrorists, driven by their religious beliefs, usually consider their religion as the sole key to a messianic age - other perspectives are sternly rejected.

Compared to the 1970’s and 1980’s, terrorists today rely on a network of various groups; hierarchical structures are avoided as far as possible. Modern technology and globalization have aided this transformation process. Thus, several terrorist groups are said to have links to each other and support each other in carrying out attacks.²⁵ The advantages of dispersing geographically and acting on a decentralized basis are obvious: terrorists can act more securely which complicates the process of detecting and apprehending them.²⁶

Another new aspect is that terrorists sometimes do not claim responsibility for their actions.²⁷ At the beginning of March 2003 for example, a terrorist blew up a bus in Haifa, Israel. The suicide bomber was identified within the following day, but no terrorist organization had claimed responsibility for the attack.²⁸ Religious terrorists particularly evidence such behavior. Because God is and shall be the only witness, they must not warrant

²⁴ Michael Whine, *The New Terrorism*, Stephen Roth Institute for the Study of Contemporary Anti-Semitism and Racism at Tel Aviv University: Anti-Semitism Worldwide 2000/1 at <http://www.tau.ac.il/Anti-Semitism/asw2000-1/whine.htm>; see also Alexander, *supra* note 1, at 66; see also M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harv. Int’l L.J. 83, 87-88 (2002).

²⁵ Alexander, *supra* note 1, at 71 (Osama bin Laden maintains (in-)formal relationships with like minded Sunni Islamic terrorist groups throughout the world); see also *id.* at 79; see also Council of Foreign Relations in Cooperation with the Markle Foundation, *Terrorism: Questions & Answers available at* <http://www.terrorismanswers.com/groups/jamaat.html> and <http://www.terrorismanswers.com/groups/jemaah.html> (Jamaat al Islamiyya and Egyptian Islamic Jihad are both said to have links to Al Qaeda); Jemaah Islamiyya, which is mainly operating in Southeast Asia, is also said to have ties to Al Qaeda).

²⁶ Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 Ind. J. Global Leg. Stud. 685, 713 (1999).

²⁷ See also Yoram Schweitzer, *Denying Responsibility and Liability* (October 4, 2001) at <http://www.ict.org.il>.

²⁸ Haaretz English Edition, *Haifa Police checking if bomber was aided by people in city* (March 6, 2003), available at <http://www.haaretzdaily.com/hasen/spages/269513.html>.

their actions in public. Undoubtedly, this makes it very difficult to apprehend the perpetrators and dismantle terrorist organizations.

Often, it is also difficult to link terrorists with religious motives to organizations or bases.²⁹ Consequently, they do not feel constrained by boundaries. Recent attacks have showed that terrorists seek to kill as many people as possible at once, e.g. Oklahoma City bombing in 1995, the World Trade Center bombing in 1993 as well of course the attack on September 11, 2001, the bombing of the AMIA building in Buenos Aires in 1994 etc.³⁰

All these changes and new characteristics make it much more difficult to monitor and prevent terrorist acts.

c. Defining Terrorism

Statements like “one man’s terrorist is another man’s freedom fighter” hinder the accomplishment of reaching a useful, and much needed, definition of terrorism. They have become a cliché and an obstacle to efforts to successfully deal with terrorism.³¹ If nothing else, these statements lead to the questionable assumption that the ends justify the means.³² The statement’s approach to terrorism is particularly problematic because it privileges the perspective and worldview of the person defining the term.³³ Such a culturally relativist approach, however, should not be accepted as it may sanction all causes, and create more terrorism.³⁴ In order to achieve a universally accepted definition, we have to rely on objective and authoritative principles. The definition must be founded on a system of principles and laws of war, legislated and ratified in many countries.³⁵

²⁹ Whine, *supra* note 24, at <http://www.tau.ac.il/Anti-Semitism/asw2000-1/whine.htm>; see also Alexander, *supra* note 1, at 69-71 (describing state-sponsored terrorist groups).

³⁰ Alexander, *supra* note 1, at 69-71 (pointing out how the use of weapons of mass destruction will lead to even more devastating and large-scale destruction and damage to people).

³¹ Boaz Ganor, *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?*, (September 24, 1998), at <http://www.ict.org.il>; see also Carberry, *supra* note 26, at 711 (arguing that current definitional inconsistencies serve as distraction for unified international counter-terrorism).

³² See also Boaz Ganor, *Terrorism: No Prohibition Without Definition*, (October 7, 2001), at <http://www.ict.org.il>.

³³ Ganor, *supra* note 33 at <http://www.ict.org.il>; see also Todd M. Sailer, *The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 *Temp. Int’l & Comp. L.J.* 311, 320 (1999).

³⁴ Ganor, *supra* note 34, at <http://www.ict.org.il>.

³⁵ Ganor, *supra* note 33, at <http://www.ict.org.il>; see also Ganor, *supra* note 34, at <http://www.ict.org.il>.

II. Dealing with Terrorism on an International Level

1. Why the ICC's Subject Matter Jurisdiction Should Be Extended to Include Crimes of Terrorism

The ICC's subject matter jurisdiction encompasses the most serious crimes of international concern. According to the analysis developed thus far, terrorism certainly falls within that category.³⁶ The phenomena of 'leaderless resistance', networks that are difficult to detect, and the availability of technology – including weapons of mass destruction- that can be used against large numbers of civilizations highlights the changing nature of terrorism, and its heightened (global) threat in the current era.³⁷ Having established that crimes of terrorism would basically fit into the ICC's concept, I will now concentrate on the practical advantages of extending the subject matter jurisdiction of the ICC.

a. Advantages

aa. Small, Unstable and Weak Governments

Smaller states will particularly benefit from including crimes of terrorism in the ICC Statute. Several lack the financial resources to prosecute terrorists.³⁸ Compared to the United States, countries such as Egypt, Algeria, the Philippines or the Russian Federation, just to mention a few that have serious problems with terrorists, often lack the ability to put them on trial.³⁹ It is obvious that these states do not have the potential of the United States to carry out long distance operations. If the ICC could exercise jurisdiction over crimes of terrorism, a large economic burden could be lifted off of smaller states.

Unstable and weak governments are also faced with difficulties. In these states prosecution or extradition efforts can easily be thwarted by threatening the government with adverse political consequences or even more violent repercussions.⁴⁰ If these criminal forces – whether their background be terrorist or not – are more powerful than the government's forces, then the state will not be able to act in a controlling manner. Colombia, for example, has been faced with this dilemma time and again. So instead of complying with legal rules and procedures,

³⁶ See also Sailer, *supra* note 35, at 324; see also Robinson, *supra* note 19, at 515.

³⁷ See Sailer, *supra* note 35, at 324.

³⁸ Wright, *supra* note 31, at 145-46.

³⁹ Krohne, *supra* note 39, at 166-67; see also Emanuel Gross, Trying Terrorists - Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights, 13 *Ind. Int'l & Comp. L. Rev.* 1, 83 (2002).

⁴⁰ Krohne, *supra* note 39, at 180.

weak governments sometimes find themselves compelled to resort to illegal methods, like assassination for example.⁴¹

In light of the new characteristics of terrorism - in particular the network issue - it would be absolutely counterproductive to ignore these countries' requests. An international concerted effort against terrorism will be efficient only and if the claims of all states will be taken seriously.

bb. Neutrality of the ICC

The ICC is a neutral forum for prosecution on the international level. In accordance with Art. 36 (3) (a), judges working at the ICC "shall be chosen from among persons of high moral character, impartiality and integrity". Among many other criteria ensuring neutrality, Art. 36 (8) (a) (ii) guarantees that the panel of judges be selected according to an equitable geographical representation. The neutrality of the ICC could contribute to a more effective prosecution of terrorists. It could help avoid the possibility that terrorists seek safe haven in states that distrust the judicial system of the victimized state, do not want to extradite for political reasons, or are simply unwilling to prosecute.⁴² And it would potentially minimize the risk of states acting in violation of international law and against international concerns by refusing to extradite or prosecute.⁴³

Today, states have to rely on extradition treaties if the offender is not present in their territory. But sometimes national prejudice governs the extradition process. Libya for example refused to hand over the alleged suspects of the Pan Am Flight 103 bombing for a long time. Taking this incident as a test case: a sentence by an international court like the ICC would hurt Libya far more than a guilty verdict from an American court.⁴⁴ Because the United States is regarded as Libya's enemy, Libya assumes and expects that the suspects would be found guilty. The same will be true for trials regarding the September 11 attacks. International trials will be perceived as more objective and neutral because, again, Al Qaeda terrorists and states which grant them a safe haven, view the United States as being prejudiced and not able to exercise neutrality. The ICC on the contrary, consisting of an international and geographically equitable selected panel of judges, is an unbiased forum.

⁴¹ Wright, *supra* note 31, at 146; *see also* Krohne, *supra* note 39, at 181.

⁴² Sailer, *supra* note 35, at 329.

⁴³ All international conventions concerning terrorism contain a provision according to which states parties are obliged to either extradite or prosecute an alleged offender ("aut dedere aut judicare") BANTEKAS, *supra* note 7, at 32; Wright, *supra* note 31, at 147.

2. How to Extend the ICC's Subject Matter Jurisdiction for Crimes of Terrorism

a. Introductory Remarks

In this section I will evaluate which model would be the most appropriate to prosecute terrorists. Currently, the ICC does not have explicit jurisdiction to prosecute terrorists. However, some scholars have argued that terrorists could be put on trial for having committed war crimes or crimes against humanity.⁴⁵ I will not elaborate on the question whether or not terrorism can or should be defined as war and subsequently, whether terrorist acts could be interpreted as war crimes. It would go beyond the scope of this paper to discuss all the issues which are attached to this question. I would like to point to the fact that scholars are still debating this question.⁴⁶ Therefore, as long as it is not settled, we should refrain from trying terrorists for war crimes. Consequently, I will focus on the issue whether terrorists could be indicted for crimes against humanity.

b. Terrorism as Crime Against Humanity

aa. Crimes Against Humanity and Customary International Law

The concept 'crimes against humanity' evolved under the rules of customary international law and was proclaimed for the first time in the Charter of the International Military Tribunal of Nürnberg.⁴⁷ It is a serious crime of international concern because its acts are so abhorrent that they shock our sense of human dignity.⁴⁸ Murder, extermination, enslavement, deportation, torture and other acts amount to crimes against humanity, if the offense was part of a widespread or systematic practice, which must at least be tolerated by a state, government, or

⁴⁴ Krohne, *supra* note 39, at 182.

⁴⁵ See Gross, *supra* note 44, at 85 (supports the idea that crimes of terrorism are war crimes); *see also* Wright, *supra* note 31, at 144 (suggests that terrorism could be a war crime or genocide); *see* Robinson, *supra* note 19, at 517 (several countries at the Rome Conference supported the inclusion of crimes of terrorism as a crime against humanity); *but see* Sailer, *supra* note 35, at 321-22 (terrorism is neither likely to fit the definition of war crimes nor of genocide because of the random nature of terrorist attacks).

⁴⁶ See Ruth Wedgwood, Military Commissions: Al Qaeda, Terrorism, and Military Commissions, 96 A.J.I.L. 328, 328 (2002); *see* Michael P. Scharf, Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of too much Convergence between International Humanitarian Law and International Criminal Law?, 7 ILSA J. Int'l & Comp. L. 391, 392-393 (2001); *see* Gross, *supra* note 44, at 85.

⁴⁷ M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 9 (Kluwer Law International ed., 2nd rev. ed. 1999).

⁴⁸ See Antonio Cassese, *Crimes against Humanity*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME 1, *supra* note 5, at 353, 353-55.

entity holding de facto authority over a territory, be state-sponsored, or else, be part of a governmental policy.⁴⁹

Systematic practice is at hand if acts are carried out pursuant to an explicit or implicit plan or policy.⁵⁰ Such a policy can be deduced from the manner in which an act occurs. Namely, it suffices that a single act, committed within the framework of a systematic or widespread attack, has the potential to demonstrate such a policy.⁵¹ If a multiplicity of victims is targeted, we talk about a widespread attack.⁵² Such a large-scale attack encompasses the cumulative effect of a series of inhuman acts to a singular effect of one act of extraordinary magnitude.

As for the *mens rea* element the perpetrator has to have knowledge of the wider context in which his acts occur. However, he does not need to have a concrete idea of the consequences of his acts.⁵³

bb. Crimes Against Humanity and the ICC Statute

The provision concerning crimes against humanity in the ICC Statute is not identical with previous provisions of crimes against humanity.⁵⁴ While some of its aspects are construed more narrowly, others are broader. Art. 7 (1) of the ICC Statute condemns widespread or systematic attacks targeted at any civilian population. Art. 7 (2) (a) describes such an attack as a “course of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organizational policy to commit such an attack”. The perpetrator must be aware that his act built part of an overall widespread or systematic attack. This connection between the single act and the widespread attack is the central element.⁵⁵ It raises an ordinary crime to one of the most serious crimes. However, the offender must be aware of this central and essential connection.

⁴⁹ *Id.* at 356-57; see Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72 para. 654 (current customary international law takes also forces into account that are not part of a legitimate government, but nonetheless have de facto control over defined territory).

⁵⁰ I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, G.A.O.R., 51st Sess., Supp. No. 10, 30, U.N. Doc. A/51/10.

⁵¹ Prosecutor v. Dusko Tadic, para. 653.

⁵² I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind, *supra* note 55.

⁵³ Prosecutor v. Dusko Tadic, para. 657.

⁵⁴ BANTEKAS, *supra* note 7, at 126-27.

⁵⁵ Darryl Robinson, Developments in International Criminal Law: Defining “Crimes against Humanity” at the Rome Conference, 93 A.J.I.L. 43, 52 (1999).

Art. 7 (2) (a) refers to the possibility of crimes against humanity occurring in the context of an organizational policy. Customary international law has developed with respect to the policy argument and today also includes non-state actors such as terrorist organizations.⁵⁶

cc. Conclusion

Now that the category of offenders was extended to include terrorist organizations, the September 11 attacks could be theoretically viewed as crimes against humanity. It was not the first time Al Qaeda had attacked American facilities and there is more than ample ground for putting September 11 in the context of previous Al Qaeda strikes.⁵⁷ However, I do not believe that Art. 7 would be an adequate scheme to prosecute terrorists.

The concept of ‘systematic’ was defined by the International Criminal Tribunal for Rwanda (hereinafter: ICTR) as follows: “thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources”.⁵⁸ The state, or in this case the non-state actor, must not necessarily adopt a policy as the formal policy. However, there has to be some kind of preconceived plan or policy. Hence, all Al Qaeda attacks considered indicate a systematic policy which aims to target and destroy American symbols or facilities, like the World Trade Center, or American lives.

But what about the previous attacks? How many such single attacks have to occur in order to count as *systematic* in terms of crimes against humanity? Even if all these attacks are carried out by the same group, one could argue that the intervals in which they occurred are much too broad to reveal a regular pattern. Most troubling, however, is that one needs several attacks in order to prove such a regular pattern. It follows that the first few attacks could not be tried as crimes against humanity, unless they meet the widespread criteria.

The Trial Chamber I of the ICTR in Akayesu held that “widespread criteria may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁵⁹ Because a single attack causing a large number of victims could be described as widespread, the September 11 attacks surely can be

⁵⁶ See Prosecutor v. Dusko Tadic, para. 654 (court refers to organizations with de facto control over a territory but leaves open the possibility that other organizations might meet the test too); see also Bassiouni, *supra* note 24, at 90.

⁵⁷ Bombing of the World Trade Center in 1993, bombings of the Saudi Arabian National Guard training center in Riyadh and the United States military complex at al-Khobar in Saudi Arabia in 1995/1996, bombings of United States embassies in Kenya and Tanzania in 1998, and the U.S.S. Cole attack in 2000. See Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C.L. Rev. 1, 60 (2002).

⁵⁸ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T para. 580.

viewed as a crime against humanity. But what about smaller terrorist attacks? Does the bombing in Saudi Arabia in 1995 constitute a crime against humanity? “Only” seven people were killed then.⁶⁰ Or what about the bombing of the U.S.S. Cole in October 2000, when seventeen were killed and thirty-nine injured?⁶¹ Both these latter cases clearly do not meet the high threshold test requiring a substantial number of victims and therefore, could not be tried as crimes against humanity. Consequently, terrorists would escape ICC-prosecution.

There needs to be an opportunity to prosecute terrorists without having to prove that terrorist acts are part of a systematic or widespread attack. By including crimes of terrorism in Art. 7 of the ICC Statute certain terrorists, however, could not be prosecuted by the ICC. Therefore, other approaches need to be available to bring terrorists to justice on an international level.

c. Crimes of Terrorism as a Separate Provision in the ICC Statute

aa. The Rome Conference

The Preparatory Committee’s Working Group proposed a provision concerning the prohibition of crimes of terrorism. Yet, this provision was not adopted at the Rome Conference in 1998 mainly because there was and still is no generally accepted definition of it.⁶² This question involves sensitive and long disputed issues which could not be resolved at the conference because it had to conclude its work within five weeks.⁶³ It would have been hardly possible to arrive at an agreement within this short period of time, in which so many other questions still needed to be resolved. So, the participants decided to drop the terrorism provision.

In 2009 a review conference will take place to determine whether any amendments to the Rome Statute are appropriate. According to Art. 123 (1) the review will not only be limited to the list of crimes mentioned in Art. 5. As a matter of fact, the plenipotentiaries for the establishment of an ICC adopted a resolution for this purpose recommending to consider the inclusion of crimes of terrorism in the jurisdiction of the ICC.⁶⁴ The resolution recognizes terrorism as a serious crime of concern to the international community and consequently, a

⁵⁹ *Id.* para. 580.

⁶⁰ CNN, *Bombing probe looks at possible tie to 1995 terrorist attack* (June 28, 1996), available at <http://www.cnn.com/WORLD/9606/28/saudi.probe.pm/index.html>.

⁶¹ CNN, *US officials see similarities between USS Cole blast and embassy attacks* (October 23, 2000), available at <http://www.cnn.com/2000/US/10/23/uss.cole.01/>.

⁶² Robinson, *supra* note 19, at 517.

⁶³ BANTEKAS, *supra* note 7, at 125.

serious threat to international peace and security. Similar conclusions were drawn at the fifty-seventh session of the United Nations General Assembly. The report of the Policy Working Group on the United Nations and Terrorism also stated that international terrorism could be decreased, if the ICC would try the most serious crimes committed by terrorists.⁶⁵

bb. Recommendation for the Review Conference

The fact that several anti-terrorist conventions already exist should facilitate the formulation of a provision concerning crimes of terrorism. Certain delegates of the Preparatory Committee for the work for the Rome Conference opposed the inclusion of treaty-based crimes then, because they were concerned about the overburdening of the ICC.⁶⁶ They alleged that since the court only had limited financial and personnel resources, it could run the risk of jeopardizing its general acceptance. However, we should not be worried about that. According to the complementarity principle the ICC will only exercise jurisdiction if a state is not already doing so genuinely. It is expected that states will choose to prosecute offenders in their national courts whenever they will have an opportunity. Consequently, the states' struggle to preserve some sort of sovereignty will keep the ICC from being overburdened.⁶⁷ Certain states also contended that granting the ICC jurisdiction over crimes of terrorism would disrupt the functioning of already existing treaties.⁶⁸ Again, this is not a persuasive argument. The ICC will not seize jurisdiction in situations in which states exercise jurisdiction appropriately, be it on the basis of a treaty or otherwise.

Most of the existing treaties could be easily incorporated into the ICC Statute. Two of them, however, would not be suited for inclusion. The Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) prohibits acts, which may or do jeopardize the safety of the aircraft, persons or property therein, or good order and discipline on board.⁶⁹ This convention was not necessarily adopted to tackle terrorist acts aimed at civil aviation, but was rather viewed as reflecting customary law.⁷⁰ Art. 11 in particular demonstrates how inadequate this convention really is in terms of prosecution; it calls upon

⁶⁴ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, *available at* <http://www.un.org/law/icc/statute/finalfra.htm>.

⁶⁵ Report of the Policy Working Group on the United Nations and Terrorism, U.N. GAOR 57th Sess., Annex to U.N. Doc. A/57/273 (2002), *available at* <http://www.un.org/terrorism/a57273.htm>.

⁶⁶ Molly McConville, A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court, 37 *Am. Crim. L. Rev.* 75, 92 (2000).

⁶⁷ *See also* Krohne, *supra* note 39, at 177-78.

⁶⁸ *Id.* at 179.

⁶⁹ Art. 1 (1) (b), 704 U.N.T.S. 219.

states to take appropriate measures to restore control of hijacked aircrafts. Art. 11 is nothing but a hortatory provision. Besides, unlawful seizures of aircrafts are now covered by a separate convention, which was adopted in response to the inadequacy of the Tokyo Convention.⁷¹ Because of its flaws, the Tokyo Convention would not be suited to be included in the Rome Statute. The Convention on the Marking of Plastic Explosives for the Purpose of Detection should not be included in the ICC Statute either, because it is addressed to member states and contains hortatory provisions only.

The Convention on the Physical Protection of Nuclear Material, which entered into force on February 8, 1987, has a twofold objective. It establishes levels of physical protection for nuclear material on international transports, Art. 3-6, and provides for measures against unlawful acts involving nuclear material in domestic use, storage or national and international transport, Art. 7.⁷² As Art. 7 (1) clearly lays out which offenses should be made punishable in domestic law, I propose that this Convention should be included in an express provision concerning crimes of terrorism.⁷³

The remaining anti-terrorist conventions all clearly determine unlawful conduct and should be incorporated as well. Therefore, a provision regarding crimes of terrorism would encompass the following international agreements, which are already in force:

- Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970,⁷⁴
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971,⁷⁵
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973,⁷⁶
- International Convention Against the Taking of Hostages, December 17, 1979,⁷⁷
- Convention on the Physical Protection of Nuclear Material, March 3, 1980,⁷⁸
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988,⁷⁹

⁷⁰ BANTEKAS, *supra* note 7, at 234.

⁷¹ *See id.* at 234.

⁷² Convention on the Physical Protection of Nuclear Material, October 26, 1979, 1456 U.N.T.S. 124.

⁷³ This Convention was not part of the Preparatory Committee's proposal.

⁷⁴ 22 U.S.T. 1641.

⁷⁵ 974 U.N.T.S. 177.

⁷⁶ 1035 U.N.T.S. 167.

⁷⁷ 1316 U.N.T.S. 205.

⁷⁸ 1456 U.N.T.S. 124.

- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988,⁸⁰
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, March 10, 1988.⁸¹
- International Convention for the Suppression of Terrorist Bombings, January 9, 1998,⁸²
- International Convention for the Suppression of the Financing of Terrorism, December 9, 1999.⁸³

Most of these conventions were already included in the Preparatory Committee's proposal.⁸⁴ Since the proposal in 1997 two new international anti-terrorist conventions have entered into force. The International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism both penalize fundamental and widespread terrorist activities and thus, contribute substantially to decrease terrorism.⁸⁵ Both agreements must be included in an express provision dealing with crimes of terrorism.

Since terrorism is an ever-developing matter, new conventions will probably be adopted in the future. The Foreign Ministry of Israel for example has just completed a draft of an international convention against suicide bombers.⁸⁶ This convention is the brainchild of Alan Baker, the Foreign Ministry's legal adviser, and includes so far three articles concerning incitement to suicide attacks, prohibition of offering financial support to families of suicide bombers, and the establishment of a new international organization charged with combating the new phenomenon of suicide bombings. The United States, among other countries,

⁷⁹ 1589 U.N.T.S. 474.

⁸⁰ 1678 U.N.T.S. 221

⁸¹ 1678 U.N.T.S. 304.

⁸² 37 I.L.M. 249.

⁸³ 39 I.L.M. 270.

⁸⁴ See Robinson, *supra* note 19, at 517.

⁸⁵ The International Convention for the Suppression of Terrorist Bombings entered into force on May 23, 2001. Multilateral Treaties deposited with the Secretary-General, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty9.asp>; the International Convention for the Suppression of the Financing of Terrorism entered into force on April 10, 2002, Multilateral Treaties deposited with the Secretary-General, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>) (last updated Tuesday, 4 March 2003, at 5:15pm).

⁸⁶ Haaretz English Edition, *Prime Minister holds discussion on global terror threats* (March 5, 2003), *available at* <http://www.haaretzdaily.com/hasen/spages/269442.html>.

apparently has shown great interest in the draft, understandably so after the September 11 attacks.

Even if the international community does not succeed in agreeing on a definition of terrorism before the review conference in 2009, at least the international anti-terrorist conventions should be incorporated in a separate provision constituting crimes of terrorism. There is no reason for not including already existing treaties. The conventions demonstrate consensus and the crimes are already defined and would not need further amendments.

The prospects for adopting such an express provision are good. Well-reasoned opposition is hardly imaginable as laid out throughout this paper. States, which have ratified those treaties, operate on a “prosecute or extradite” basis. The only difference by including these treaties in the Rome Statute would be that a third actor would come into play in cases where states are unwilling or unable to prosecute terrorists. Consequently, it would simply fill an existing gap.

IV. Conclusion

In my opinion it is important to amend the ICC Statute with an express provision concerning crimes of terrorism. I maintain that the current Rome Statute has certain flaws in terms of prosecuting crimes of terrorism. One has to keep in mind that terrorism is a separate category and as such deserves separate contemplation and prosecution. Therefore, the ICC should not charge terrorists with already existing crimes like crimes against humanity or war crimes. As I have already laid out earlier, not all terrorist acts meet the high threshold of crimes against humanity. Consequently, certain terrorists could escape ICC jurisdiction even though their act was vile and a serious crime of international concern. We should avoid sending such a message to terrorist groups.

Additionally, every terrorist crime, whether it may be an airplane hijacking or a bombing, is despicable no matter how many victims are claimed. Financing terrorist acts and granting safe haven to terrorists is not any less appalling. Without adequate finance, terrorist attacks could not be carried out initially. Because all these activities are so interwoven and linked very closely, they must also be understood as such. Hence, it would be detrimental to split up prosecution of terrorist acts and charge terrorists with already existing ICC-crimes. Therefore, the ICC Statute should be amended to include an express provision regarding crimes of terrorism.

The ICC is currently the only capable international institution that could fill the current gap in the law and serve as an ideal tool in the battle against terrorism by upholding justice and maybe even deterring future crimes of terrorism.⁸⁷ The international community would send a very clear message to terrorist groups around the world that their acts are universally condemned and will trigger prosecution on the international level by a court, which only tries the most serious crimes of international concern. True, the ICC has not proven its efficacy and success yet and is also still missing the much-needed support of the United States. But the Rome Statute has entered into force and the court will start its work sooner or later - there is no way back.

⁸⁷ Wright, *supra* note 31, at 141; *see also* Sailer, *supra* note 35, at 319.