

Reflections to prosecuting terrorism as an ICC crime

1. Introduction

a. Establishment of the ICC

On 17th July 1998, fifty years after the Nuremberg Judgments, the founding treaty for the International Criminal Court ('the ICC') was adopted at the Rome Conference.¹ On 1st July 2002, the Rome statute ('the statute') entered into force.² The Statute establishes a permanent international criminal court with a seat in The Hague.³ The jurisdiction of the court is limited *rationae temporis* to offences committed after the entry into force of the statute.⁴ The ICC does not have jurisdiction over crimes committed before the statute entered into force.⁵

On the face of it, the Rome statute is a carefully negotiated instrument that seeks to intervene on contentious world matters whilst maintaining global acceptance. This is manifest in three important pillars that provide a foundation for the statute. Firstly, the ICC is premised on the principle of complementarity. On this principle, the court assumes jurisdiction over a matter only when a state party is either unable or unwilling to exercise jurisdiction. In all cases the national courts have priority of action. This principle is unique when it is considered that Article 9 of the Yugoslavia Tribunal and Article 8 of the Rwanda Tribunal clearly spelt out the primacy of these tribunals over the domestic courts. Secondly, and this is relevant when dealing with terrorism, the statute is designed to deal only with the most serious crimes of concern to the international community. Thirdly, it was intended that the statute remains within the realm of customary international law.

¹ Hans Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 AM.J. INT'L. L. 370 (2005)

² Article 126 of the Rome Statute provides that the Statute shall come to force upon ratification by sixty members. See

² Article 126 of the Rome Statute provides that the Statute shall come to force upon ratification by sixty members. See *Rome Statute of the International Criminal Court*, 37 I.L.M. 999 (1998). 123 countries are States Parties to the Rome Statute of the International Criminal Court. Of these 123, as of June 2015, 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States

³ Article 3

⁴ Art. 11. It is arguable whether if the court had been in existence when 9/11 occurred or when the Nairobi and Dar es Salaam bombings of 1998 happened it would have assumed jurisdiction. Mary Robinson, United Nations High Commissioner for Human Rights and former President of Ireland notes that the September 11th attack was covered "both because of the nature and scale of the attack, and because it was aimed against civilians."

⁵ Article 24.

b. Jurisdiction

A cardinal issue of concern throughout the negotiations of the Rome statute, beginning during the deliberations of the preparatory committee and continuing to the last five weeks before the signing of the statute was which crimes should fall within the jurisdiction of the court.⁶

Unlike the International Criminal Tribunals for Rwanda and Yugoslavia, which were set up by UN Security Council Resolutions,⁷ the jurisdiction of the ICC is not geographically limited. The preamble to the Rome statute provides that the ICC is established 'to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole.' Under article 1, the jurisdiction of the court is restricted to 'the most serious crimes of international concern.' The statute does not, however, define with any measure of specificity what constitutes a 'serious crime.' The 'serious crime' element is embalmed in Article 5, which appears to be the definitive part of the statute. It is not clear however whether a crime is serious because of the scale of the victims or the sentence it attracts.⁸

Under Art 12 of the Statute, the court can automatically exercise jurisdiction over a statute crime committed in the territory of a state party or by a national of a state party.⁹ The court does not have jurisdiction over a person who may have committed a crime in a non-state party and fled to yet another state that is not a party to the Rome statute. The Court however will exercise jurisdiction if a person who is a citizen of a state party commits a crime in a non-state party and seeks refuge in another state even if the state of shelter is not a party to the statute.

Article 1 of the Statute, which provides that 'the court shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern' does not define those crimes.

⁶ Manhoush H Arsanjani, *American J of Int'l L* Vol.93, 22-43 at 29

⁷ The International Criminal Tribunal for the Yugoslavia was established by SC Res. 827 under Chapter V11 on 25th May 1993 and the International Criminal Tribunal for Rwanda was set p by SC Res. 955 in 1994.

⁸The 2007 post-election violence in Kenya led to the death of 1500 persons. The court assumed jurisdiction and charges were confirmed against 4 suspects. The single 9/11 terrorist act in New York consumed 3700 victims. Even if the court had been in existence in 2001, it would not have taken jurisdiction over the act. Is it not paradoxical that numbers do not count as a measure of the severity of an offence? Further, the violence in Kenya was entirely local. 9/11 was an international crime. Why would the ICC assume jurisdiction in a localized event and deny jurisdiction over an event with international propositions?

⁹ Art. 12 (2) (a), and Art. 12 (2) (b).

These are spelt out under Article 5 as the crime of genocide, crimes against humanity, war crimes and the crime of aggression as defined in the statute and the adopted elements of the crime.¹⁰ To prove the crime of genocide requires that the prosecution shows 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group. An offence such as murder, enslavement, or torture qualifies to be tried under the rubric of a crime against humanity if it is 'committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.' War crimes such as intentionally attacking a civilian population or deprivations against POWs must be 'committed as part of a plan or policy or as part of a large scale commission of such crimes.'

Thus far the court has undertaken judicial proceedings with respect to nine situations.¹¹

The ICC is the ultimate weapon of judicial intervention in the international criminal justice system. It is the normative evolutionary step from the Nuremberg trials through the ad hoc war crimes tribunals in Bosnia and Rwanda. In this sense it may appear as though the ICC is the logical rung in history's orderly march towards a peaceful settlement of international disputes.¹² The ICC stands as a pillar for the realization of international criminal law. It is a beacon of light that points out hope for victims of crime against perpetrators of impunity, which has hitherto remained unchallenged. An effective ICC could contribute to justice, deterrence, diplomacy, and global norms and ultimately to a more humane world.¹³

2. Terrorism as an ICC crime?

For a long time, there has been a debate as to whether the international community should utilize the ICC as a tool in the war against terrorism. The theoretical world wide view is that the fight against terrorism is restricted and is state based making it appear as though it is a fight against countries that choose to fight terrorism on one part and those who do not wish to do so or have no resources and capacity to engage on the other. This is unfortunate because all civilized nations

¹⁰ Rome Statute, *supra* note 2.

¹¹ As of June 2015, 22 cases in 9 situations have been brought before the International Criminal Court.

¹² Secretary General says the establishment of the international criminal court is a major step in the march towards universal human rights and the rule of law. Accessed from the United Nations Press release, L/ROM/23(1998)

¹³ Douglas Cassell, *The Rome Statute for the International Criminal Court, A flawed but Essential First Step*, 6 Brown J. World Aff. 41,44 (1999)

believe that those who commit terrorist acts should be identified, arrested, and punished. The fight against terrorism should be a war against those who believe in justice and the lawless.

When you analyze possibilities of domestic terrorist prosecutions against trials in an international court it is evident that the latter offers several advantages: it guarantees investigative continuity; vast resources and proper management of evidence; it has ready expertise to engage in any situation; it has sufficient reach and communication for the victims and permits effective knowledge of the process; lastly, the ICC process assures a cultural shift from impunity to accountability.

How about the argument that terrorism should only be tried in the country where the crime was committed? There can be no question that criminal trials should be held in the states where the crimes were committed. It is very important for courts, especially criminal courts, to be accessible to the victims so that they feel part of the process.¹⁴ Terrorist attacks in one state should be tried in the courts of that state. That is the ideal. However terrorist attacks are not in the planning or execution confined to one state. Relying in the domestic courts of one state against a group that plans in one state, purchases the instruments of terror in another and executes their evil intentions in yet a third state then fleeing to a fourth is very difficult. Further, victims of terrorism often belong to different countries.¹⁵

3. Admissibility

Article 17 of the Rome statute defines the admissibility configuration of the ICC system. The framework of the Rome statute limits the court's reach and admissibility on the basis of state sovereignty and the active personality principle combined with an admissibility regime based on complementarity.¹⁶

¹⁴ Justice Richard Goldstone, *The Trial of Saddam Hussein: What Type of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses*, 27 *FORDHAM INT'L L.J.* 1490, 1497 (2004).

¹⁵ The cases that have been initiated against members of al Qaeda in the U.S., Germany, and Spain demonstrate the difficulties in proceeding against a multinational terrorist organization in separate jurisdictions.

¹⁶ See Rome statute, Article 12 (2), *supra* note 2. Also see Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction in the Rome Statute of the International Criminal Court: A Commentary*, 583, Antonio Cassese, Paolo Gaeta & John, R. W. D. Jones eds. 2002

Under the principle of admissibility the court must determine whether the case is of 'sufficient gravity to justify further action by the court.'¹⁷ This means that when a matter is brought before the court it must make a determination, at first instance, as to whether the case is of serious concern to the international community. Under this rubric the court considers how widespread the attacks were and whether there was a plan or a policy to attack. Only when the answer to this early inquiry is in the affirmative does the court proceed to entertain the matter.

4. Complementarity

Whilst undertaking an analysis of admissibility the court also considers the 'complimentarity' principle.¹⁸ The ICC is designed to compliment, not to replace domestic courts. Under the complimentarity principal, the ICC will exercise jurisdiction over a situation only if a state party is unwilling or unable to investigate and prosecute the offender.¹⁹ Unwillingness is demonstrated when a state makes an explicit decision not to investigate or prosecute or when it investigates or prosecutes in a manner that manifests a desire to shield the offender either by presenting the case before a judicial institution which is not considered impartial or independent or even when such investigations are tilted towards withholding essential evidence so that no guilt may be found against the offender. The court will therefore defer to the domestic jurisdiction if the state has commenced investigations even if the matter does not proceed to trial 'unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute or having investigated the state has decided not to prosecute, unless the decision is borne of, unwillingness or inability to prosecute'²⁰ or 'the person concerned has already been tried and in situations where the case is not of sufficient gravity to justify further action by the court.'²¹ In other words the ICC will get involved only in cases where it is clear that the investigations were not conducted in good faith or were directed at shielding perpetrators of crime. The principle of complementarity requires that the ICC process becomes operational only when a state with jurisdiction is unable or unwilling to prosecute. With respect to terrorism this would apply with states, which either sponsor or abet acts

¹⁷ Article 17

¹⁸ Both the Preamble and Article 1 of the Rome Statute provide for the complimentarity of national criminal jurisdiction and the jurisdiction of the ICC.

¹⁹ Article 17 (1) (a)

²⁰ Article 17(1)(b)

²¹ Article 17(1)© and 17(1)(d)

of terror. An ICC jurisdiction over terrorism would afford a sure and definite alternative to national prosecution. The court would be an institution of last resort.

5. Territorial jurisdiction

Article 12 of the Rome statute provides that the court's jurisdiction is based on the territoriality and nationality principle. Under the principle of territoriality a state exercises jurisdiction over persons, acts or events occurring within its territory.

In the exercise of territorial jurisdiction a state is, in essence, exercising sovereign power. This is a universally accepted rule in international law.²² Following on this principle, the ICC may assume jurisdiction over an offence committed in the territory of a state irrespective of the fact that the offender is a citizen of a state that is not a party to the treaty.²³

Under the principle of nationality,²⁴ states exercise jurisdiction based on the 'active personality principle' of the offender. On this basis, the ICC may exercise jurisdiction over individuals who are nationals of state parties or of states, which have accepted ICC jurisdiction.²⁵ The principle of nationality permits the ICC to exercise jurisdiction over citizens of states parties even when the crime is committed in a state that is not a party to the statute.

In all cases in which the ICC's jurisdiction is available, article 13 of the statute spells out the court's trigger mechanism. Under Article 13 and Article 14, a state party may refer a situation to the prosecutor of the ICC.²⁶ The reference shall contain a narrative in support of allegations that any of Article 5 crimes have been committed. Under Article 13 (b) the UN Security Council may refer a situation to the court.²⁷ Finally under Article 13 (c) and 15 the ICC prosecutor may initiate

²² Hans-Peter Kaul Preconditions to the Exercise of Jurisdiction in the Rome Statute of the International Criminal Court; a Commentary, Volume 1 at pg 583 (Antonio Cassese et al, eds, 2002).

²³ Article 12 (2) (a).

²⁴ Article 12 (2) (b)

²⁵ Micaela Frulli, *Jurisdiction Rationae Personae, in the Rome Statute of the International Criminal Court; A commentary*, Volume 1 at 527, 535).

²⁶ Uganda, the Democratic Republic of Congo and the Central Africa Republic

²⁷ The Darfur, Sudan case

investigations *proprio motu*.²⁸ It is however true to state that the primary responsibility to prosecute the Rome statute offences rests with states. The statute merely creates an alternative, second tier jurisdiction that is operationalised when the first tier fails to deliver.

6. Terrorism as an ICC crime

The ICC was set up to deal with egregious crimes. The Court is meant to deal with cases of extreme notoriety; cases which shock the common conscience of humanity and are of concern to the international community. The principle aim of establishing the ICC was to defeat impunity by ensuring all those who commit such crimes are brought to justice. Curiously, terrorism was not brought under the jurisdiction of the ICC. This raises concern since historically attempts to establish an international criminal court have often followed a terrorist attack or a significant terrorist threat.²⁹ It is to be recalled that subsequent to 1998 when the Rome Statute was signed there has been an upsurge in terrorism to unprecedented levels.³⁰

A scrutiny of contemporary terrorist profiles and trends reveals one constant fact; terrorist activities are almost exclusively cross border activities. Either in the preparation, training or execution, terrorism touches on more than one state. Terrorists organize their activities without respect for state borders. There is no doubt that a unified global effort is essential, if not critical in the fight against terrorism. Unilateral solutions, whether political, military or judicial, will not succeed. A probable answer to the problem perhaps lies outside a single state apparatus.

In attempts to shield and guard their activities, terrorists are in constant motion; shaking off traces of their presence anywhere, appearing where they are least expected and only when the dreadful subject of their plan is ready for implementation. Acts of terror and their effects transcend boundaries, over-ride class and creed as well as race and religion. Humanity as a whole is the unfortunate recipient of terror effects. The fact that state borders are often porous and that frequent mobility is one of the hallmarks of terrorists requires an increased level of co-operation between states. Advances in communication technology, travel and money transfers are some of

²⁸ The Kenya Elections case

²⁹ Article 15

³⁰ 9/11, the Bali Bombing in which more than 200 people died; the Madrid train bombings which killed almost 200 persons; London bus & train bombings etc

the factors that permit global terrorism to thrive. To effectively deter terrorists, a unified and atomized action is required. For this reason, an effective counter-terrorism effort must be global in nature. It must be recognized that the problems and challenges which terrorism presents transcend state's capabilities to deal with as autonomous activities. The acknowledged mobility of terrorists, their ability to cross borders, to acquire weapons in one state, to find asylum in foreign sanctuaries, to commit crime in one state with weapons from another state against the citizen of a third state and flee yet to a fourth, has meant that a unilateral terrorist policy is problematic.³¹

As already stated, terrorism stretches the abilities of individual states to absolute limits. Whilst there are a number of state co-operation efforts at place, common counter-terrorism efforts are limited by such factors as differences in the definition of terrorism, capacities in investigation and prosecution and differences in legal systems. It is un-doubtedly apparent that counter-terrorism requires a higher degree of integration, uniformity and harmonization.

Outside an agreed international forum, any other method of prosecuting terrorist suspects is imbued with disagreements on extradition proceedings, place of trial, nationality of the judges and the appropriate law to be applied.³²

If terrorism were included as an ICC crime, the court could 'contribute to justice, deterrence, diplomacy and global norms and ultimately to a more humane world.'³³ Terrorists must know that there can be no hiding place anywhere in the world, no place of refuge or comfort; that global judicial mechanisms exist with sufficient reach to apprehend and punish them. The essence of the matter is that there should be a unified judicial process that compels states to recognize and adopt a definite set of law, which makes no exception to terrorist activities.

In essence, admitting terrorism to an ICC crime would remove the difficulty of having different legal frameworks, which significantly affect executive powers to counter terrorism. British law, for example, grants more power to its government to control terrorism than does American

³¹ Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, 21 Fletcher F. World. Affairs, 153 at 155

³² The Lockerbie case

³³ Douglas Cassell, *The Rome Treaty for the International Criminal Court, a Flawed but Essential First Step*, 6 Brown J. World Aff. 41, 44 (1999)

legislation.³⁴ An ICC front will provide an inter-connecting opportunity, accepted by a large section of the international community, thus a more effective deterrence to terrorist activities otherwise terrorists will continue to benefit from disjointed efforts.

It is contended that the modern state is capable only of a kind of policing that some call prevention or of judgement and punishment that exiles perpetrators, figured as inherently evil, from any notion of the body politic. The ethics are in place, but the symbolic dynamics are askew: none of them leads to a re-evaluation of the parental role of the state. Such a re-evaluation would point, I think to some new authority other than that of the nation state. It would point perhaps to an institutionalization of forms of trans-national governance, seeds of which exist at present in such instruments as trade agreements, Interpol, international conventions and protocols against war crimes and genocide and human rights legislation. We might envision a body to which prospective perpetrators do not enjoy legitimation as a state, as is currently necessary to qualify for jurisdiction of the world court.³⁵

Because the international legal order lacks a good central law enforcement authority it is necessary to look towards the ICC system for assistance to tackling the crime of terrorism. The ICC will provide a unified process in combating terrorism.³⁶ It would provide a fair and impartial forum within which to try accused offenders.³⁷ The integrity and fairness of the court in the discharge of international duties is enhanced by the diverse membership of its court officers.³⁸ Further, the architecture of the court permits it a wide reach in investigations and delivery of exhibits and in obtaining witnesses to testify. No request for an accused person shall be denied on account of extradition laws and no fear shall attend the trials, as the court shall apply a unified code of law and procedures. The court shall still act under be complementally principle but obtain jurisdiction where the state is unwilling or unable to investigate and prosecute.

³⁴ Roberta Smith, *American tries to come to terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 V British Anti-Terrorism Law and International Responses*, 5 *Cardozo J. Int. L & Comp. L.* 249 at 283

³⁵ Beverly Allen, *Talking "Terrorism": Ideologies and Paradigms in a Post-modern World*, 22 *Syracuse J. Int'l L. & Com* (1996) at 11-12

³⁶ Josh Delbruck, *A more Effective International Law or a New "World Law"? Some Aspects of the Development of International law in a Changing International System*, 68 *IND. L. J* 20 (1993)

³⁷ William M. Gianaris, *The New World Order and the Need for and International Criminal Court*, 16 *Fordham Int'l L. J.* 88 at 110)

³⁸ Art. 36(7) of the Rome statute

7. Background to admitting terrorism as an ICC crime

The idea of dealing with terrorism through an international criminal justice system is not new. The 1937 still born International Convention for the Prevention of Terrorism was accompanied by a separate treaty establishing an International Criminal Court to try and punish terrorists.³⁹ The failure to obtain sufficient ratifications for this treaty led to a multiplicity of stand-alone treaties, which criminalize and punish specific acts of terror without affording both the forum and the commonality of action.

Frequently, within the General Assembly of the UN and in several international forums, discussions on the possibility of finding a unified forum for the prosecution of terrorist suspects is always present. In particular during the preparatory negotiations leading to the agreement on the Rome statute, terrorism was listed as a prospective ICC crime. This proposal was strongly supported by Algeria, Sri Lanka and Turkey.⁴⁰ These are countries that have suffered frequent terror attacks. The argument was that grave acts of terrorism – not all forms of terrorism – should be included.⁴¹ Unfortunately not even such a mild request could succeed. The feeling among many states was that although terrorism is a matter of serious concern to the international community, it is an issue that can be dealt with at the national level of the countries affected. The argument advanced was that terrorist prosecutions would preoccupy the ICC and crowd the docket making it impossible for it to deal with other matters. Other states feared that an inclusion of terrorism would draw the court into issues that are blurred and political thus making its work contentious.⁴² This argument is an outflow of the everlasting contention as to what constitutes terrorism. If this difficulty were to be overcome, a strong point would be made permitting the establishment of an ICC Division that would deal solely with terrorism cases thereby addressing the fear that cases of terrorism would pre-occupy all the court's time.

³⁹ See, the Treaties of 16th Nov 1937, reproduced in Hudson, International Legislation Vol. V11 No. 499 & 500. The negotiation of these treaties was undertaken under a cloud of grievance following the assassination of King Alexander 1 of Yugoslavia and the French Foreign Minister Louis Berthou in Marseilles in October 1934. The Treaties however did not obtain sufficient ratifications and were abandoned to the fury of the 2nd World war

⁴⁰ See A/ CON. /183/ C.1/ L.27 and A/ CONF.183/ C.L / L.27/ Rev.1

⁴¹ Ibid

⁴² Ibid

In the early stages of the draft Rome Statute conceptualization of ICC crimes, the international law commission had proposed the inclusion of another category of crimes within the court's jurisdiction: treaty crimes, that is, offences criminalized under the various treaty regimes, including terrorism, drug trafficking, apartheid, and grave breaches of the four 1944 Geneva Conventions. The Rome statute's preparatory committee, however, felt strongly that the court's statute should define the crimes within its jurisdiction rather than simply list them as the International Law Commission Draft had done. There being no agreement on a definition of treaty crimes prevented terrorism from falling under the court's jurisdiction. Resolution E of the Final Act of the United Nations Diplomatic Conference of plenipotentiaries on the establishment of an International Criminal Court did, however, note that the Assembly of states parties could add the crime of terrorism to the ICC's jurisdiction at a later stage.⁴³ There was an understanding that the issue would be raised as early as the first review after the mandatory seven years. However, the first Review that came up in Kampala in 2010 did not consider this issue. This was not for lack of trying.

Prior to the 2010 Kampala Review Conference, the Netherlands sought to have the conference discuss and admit terrorism as an ICC offence.⁴⁴ This proposal recognised the difficulties with a definition of terrorism but requested that the crime be admitted as a placeholder while a definition is being sought. In any case this would manifest the urgency in finding a definition and would keep terrorism on the centre stage. This was not a new proposal. It had been done for the crime of aggression. Unfortunately this suggestion did not receive the necessary support required to pass it on for substantive discussion and was shelved. In spite of this failure there is an acknowledgement that the ICC's subject matter jurisdiction is going to get broader not narrower. The ICC treaty stands open to amendment, modification, extension and the definition and re-definition of existing and future crimes. This is contemplated explicitly in the document itself.⁴⁵

There are a number of scholars who suggest that terrorism is already an ICC crime and that there is no need to seek an amendment of the Rome Statute to warrant the court to exercise jurisdiction

⁴³ Richard Goldstone and Janine Simpson *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 Harv. Hum Right Journal 13 at page 14 quoted from Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court, Annex 1, Res. E., Doc.A/conf. 183/10(1998)

⁴⁴ See Review Conference of the Rome Statute, INT'L CRIM. CT, <http://www.icc-cpi.int/Menus/ASP/ReviewConferenceRomeStatute>.

⁴⁵ Madeline Morris, *The Democratic Dilemma of the ICC*, Buffalo Criminal Law Review; Vol.5, 590.

over it. The argument is that certain acts of terrorism qualify as war crimes, crimes against humanity or genocide.⁴⁶

8. Consideration of terrorism under article 5 crimes

a. Crimes against humanity

It has been suggested that the ICC may, even in the present wording of the statute, undertake terrorism trials under the umbrella of 'crimes against humanity.' This argument borrows from the definition of crimes against humanity in the Statute⁴⁷ and an analysis of the elements of the crime as set out in Appendix 3 to the Statute.⁴⁸ In support of this proposal the Policy Working Group on the United Nations and Terrorism has recommended that serious thought should be given towards treating terrorism as a crime against humanity.⁴⁹ Whether an act fits the description of 'crimes against humanity' however depends on the scale of the attack. The question is whether a single attack even when it is pervasive and insidious, may be regarded as a 'widespread attack.' Without the qualification of a 'widespread attack' a critical requirement of the offence is absent and prosecution may fail.

Terrorism does not always present in any methodical manner. Indeed terrorism manifests in sporadic, random and asymmetrical style. Terrorism is often indiscriminate. It follows no particular pattern and is erratic. The conclusion is that terrorism does not follow the clean-cut prototype of a crime against humanity. This does not however dismiss the proposal wholly. Taken together in totality acts of terror may be regarded as fitting the 'widespread or systematic attack' representation particularly when it is considered that the motive and goal of the attacks is singular; the desire to influence a government or governments. It may well be that this criteria will be left to an assessment of individual cases and that no blanket consideration will suffice. Small, sporadic, hit and run assaults may be dismissed but a strong case may be made for a massive and devastating attack if there is a clear and identifiable policy behind the attack.

⁴⁶ See Richard J Goldstone & Janine Simpson, Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism, 16 Harv. Human Rights J. 13, 15. (2003); Christian Much, *The International Criminal Court and Terrorism as an International Crime*, 14 MICH.ST.J.INT'L L 121, 127 (2006)

⁴⁷ Article 7

⁴⁸ Murder, inhumane acts committed as part of a widespread or systematic attack directed against a civilian population. Supra 36

⁴⁹ Recommendation 1754 of 27th June 2006. See A/57/273-S/2002/875 No. 26

b. War Crimes

A path least considered but worthy of our deliberation is whether terrorism may amount to war crimes as set out in article 5 of the Rome statute. War crimes are serious violations of international humanitarian law committed in the context and within the framework of international law of armed conflict.⁵⁰ There is another element to making a finding on war crimes; the acts complained of must have been committed 'as part of a plan or policy or part of a large scale commission of such crime.'⁵¹ It is clear that single, uncoordinated acts will not do. When considered in whole, however, one may argue that certain terrorist organisations have placed themselves in a position where they have assumed a status of armed conflict with certain countries. In a trial, a prosecutor may lead evidence to show a line of action that points out to a consistent attack against citizens of particular countries and therefore an unbroken chain of perpetrator and victim or complainant against accused.⁵² It is noteworthy that the Statutes of the International Criminal tribunal for Rwanda and the Special Court for Sierra Leone provided for certain acts that may be regarded as war crimes.⁵³ Those acts are nevertheless statute specific and do not amount to a general definition of terrorism and do not therefore render any assistance in an assessment as to whether the ICC could adopt the criteria set out in those statutes.

c. Crimes against humanity

It is sometimes argued that terrorism may be prosecuted as an article 5 crime as 'crimes against humanity.' The constitutive elements of terrorism, the motive and severity of all acts of terror do not necessarily qualify as acts against humanity. It is unfavorable to seek to prosecute a select number of terrorism incidents as crimes against humanity whilst isolating others as not meeting the required threshold. Terrorism as an offence should occupy its own pedestal in the ICC, whatever the severity of the act. Terrorism should be treated as a sporadic category of crimes under an independent provision.

⁵⁰ See Art. 8 (a) (i)

⁵¹ Ibid

⁵² Al Qaeda as against Western interests fit this description

⁵³ See ICTR Statute Art. 4 and Art. 3 of the Statute of the Special Court for Sierra Leone

The concept of 'crimes against humanity' refers to acts that are so abhorrent that they shock our sense of humanity.⁵⁴ Murder, extermination, enslavement, deportation, torture and other acts amongst the crimes against humanity if the offense was part of a widespread or systematic practice which must at least be tolerated by a staff, government or entity holding the factor authority over a territory, be state sponsored or else be part of a governmental policy. It is noteworthy however that the concept of crimes against humanity under the Rome statute differs slightly from the common understanding of that concept as previously understood.

Under article 7(1) of the Rome statute, reference is made to a widespread or systematic attack against a civilian population.⁵⁵ The attacks should manifest 'a course of conduct involving the multiple commissions of acts.... Pursuant to or in furtherance of a state or organizational policy to commit such an attack.' It would appear that single un-connected acts do not meet the threshold of crimes against humanity. There must be a thread connecting the attacks as part of a common plan; an intention to achieve a common purpose. The fact that the statute refers to acts occurring in the context of an organizational policy assumes that single person acts may not qualify. However, activities of terrorist organizations, though non-state actors, do qualify.⁵⁶

Does the frequency of international terrorists' attacks qualify as crimes against humanity when you consider that the incidence may not be carried out under a single command or that there is sometimes a long period between one attack and the next? How about the fact that the attacks do not always fall into a pattern or do not follow a particular sequence? On this criterion it would appear that there have to be several attacks before acts of terror would qualify as crimes against humanity.

In the Akayesu case the ICTR held that 'wide-spread criteria may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The use of the words massive and large scale may immediately raise some terror incidents to a level of terrorism but how about the low level, minor attacks? There is a need,

⁵⁴ Antonio Cassese, *The Rome statute of the ICC: A commentary* Vol.1 at 353-355

⁵⁵ A systematic attack was defined by the international criminal tribunal for Rwanda as "thoroughly organized [attack] following a regular pattern on the basis of a common policy involving substantial public or private resources." (Prosecutor vs. Jean-Paul Akayesu case no. ICTR-96-4-T. PAR 580)

⁵⁶Prosecutor v Dusko Tadic, Case no IT-94-1-AR72 par. 654

in practical terms, to deal with terrorism without the requirement that terror incidents manifest a systematic or even widespread pattern.

d. Genocide

An even more improbable debate may be a consideration as to whether there are instances where acts of terror may amount to genocide and thus lie within the jurisdiction of the ICC. Genocide involves a *mens rea* of the 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group.'⁵⁷ This motive must be followed by the commission of any of the acts set out in article 6 of the Rome statute.⁵⁸ It is reasonable to conclude that if terrorists employ the use of biological or nuclear weapons it may be possible to argue in favor of genocide and therefore to utilize the jurisdiction of the ICC.

This argument, though attractive, runs into one singular problem. It relies entirely on interpretation and a subjective evaluation of the circumstances to withstand public and defense scrutiny. Indeed this will be seeking to short-circuit states which opposed the inclusion of terrorism in the Rome statute for exactly the same reasons; that the offence would be abused and rendered to subjective application.

9. Extension of the ICC subject matter Jurisdiction

As already pointed out, in the discussions leading to the Rome conference, the preparatory Committee's group proposed a provision to include the offence of terrorism in the subject matter jurisdiction of the ICC. Later, at the Rome Conference several countries supported the inclusion of the crime of terrorism in the Statute.⁵⁹ However, in spite of spirited efforts, the crime of terrorism had to be dropped because of preliminary objections on a definition of terrorism. In as much as no effort was spared in the five week period it took to finalize the conference, the period was not sufficient to conclude on the age long struggle on a definition of terrorism. There are several reasons why there is still hope in this matter.

⁵⁷ Art. 6 of the Rome Statute and Also Art. 2 of the Convention on the Prevention and Punishment of Genocide

⁵⁸ See Art. 6 Sections (a), (b), (c), (d) and (e)

⁵⁹ Todd M Sauler, *The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of US Objections*, 13 Temp.int'l Comp.L.J.311 at 334 and Patrick Robinson, *The Missing Crime in the Rome Statute of the International Criminal Court; A Commentary*, Vol 1, 515 at 517

Article 10 of the Rome statute states that nothing in the substantive jurisdictional provision 'shall be interpreted as limiting or prejudicial in any way existing or developing rules of international law for proposes other than this statute.' It would appear that the statute acknowledges that the crimes within the jurisdiction of the court as set down under article 5 is only illustrative and the boundaries of this Article may be expanded.

The preamble to the ICC defines the court's subject matter jurisdiction as 'the most serious crimes of concern to the international community.'⁶⁰ There appears to be an agreement that terrorism fits the subject matter jurisdiction of the court.⁶¹ It is on this ground that it has sometimes been argued that even without an explicit provision terrorists can still be tried by the ICC as having committed war crimes or crimes against humanity.⁶² In the same breath are other scholars who think that the sporadic nature of the crime of terrorism takes it out of the purview of the crimes described under article 5 of the statute.⁶³

10. What advantages does the ICC confer on terrorism trials?

The debate as to whether terrorism should graduate and qualify to be imposed, as an ICC offence, should be based on the utility value of such an action. On the positive end are many reasons.

First, it is true to say that the ICC is widely perceived to be a neutral arbiter in trials that attract political connotations. The architecture of the ICC is intended to inspire confidence in the proceedings before the court. Several reasons may be advanced. Judges of the ICC are regarded as persons of the highest integrity without any inclination to political bias.⁶⁴ ICC judges are selected

⁶⁰ These are crimes *delicta juris gentium*; crimes that shock the conscience of nations and address the criminal responsibility of individuals

⁶¹ Patrick Robinson, *The Missing crime, in the Rome statute of the International Criminal Court: A commentary*, Volume, I. at 515.

⁶² Patrick Robinson above; at 519-states that several countries at the Rome conference supported the inclusion of crimes of terrorism as a crime against humanity.) (Sauler argues that terrorism is unlikely to fit the definition of war crimes or genocide because of the sporadic nature of terrorist attacks).

⁶³ Todd M. Sauler, *The International Criminal Court: An Agreement to Extend its Jurisdiction to Terrorism and a Dismissal of US Objections*, 13 *Temp. Int & Comp. L. J.* 311 at 329

⁶⁴ Art. 37(a)) under Article 36(3)(a) judges of the ICC "shall be chosen from among persons of high moral character, impartiality and integrity

on an equitable geographic representation.⁶⁵ The judges are nominated by the United Nations Security Council and elected by the two-third majority of the Assembly of the states.⁶⁶ They are thus an acceptable mix of the legal terrain, as it exists at any one time in the international community. Under Article 15 the prosecutor's investigative role is supervised by a three-judge pre-trial chamber. The prosecutor cannot therefore embark on his own frolics influenced, as feared during the negotiations on the statute, by politics and vendetta.

Under Article 19, when a referral is made against an accused whose home country is not a state party to the statute, either the accused or his country may challenge the court's jurisdiction. Article 85 provides guarantees to due process. An accused person is permitted a choice of his own counsel and is entitled to compensation in case of wrongful arrest or prosecution. The fear of judicial persecution in the hands of a hostile bench is thus reduced. For this reason, other than the usual debate on the death penalty, states should feel safe to extradite citizens to a court which is not made up of judicial officers from the victim state. This is not an idle argument. Countries, which have been affected by terrorism, are not often regarded as neutral arbiters in the ensuing trials. The ICC would thus present a sense of objectivity and independence in the prosecutions.

Secondly, under the principle of complementarity the ICC will provide an opportunity to try suspects whose states are either unwilling or unable to prosecute. The ICC stands at the nether end. ICC engages its machinery to protect against impunity. If a state party is able and willing to prosecute the ICC will stand aside.

The court will ensure that no offender is protected from a trial simply because he is a citizen of a state that is sympathetic to the offender's activities. In that way, the ICC will ensure that serious crimes do not go unpunished and that offenders are brought to justice.

Thirdly, it must be recognized that investigations and prosecutions into serious crimes, like terrorism, are tedious and complex. They require time and resources. They require patience, industry and commitment. In order to undertake an effective prosecution of terrorist suspects, it is

⁶⁵ Article 36(8)(a)

⁶⁶ Article 36

necessary to initiate investigations into a complicated web of events, which often runs through more than one country and often involves many obscure details. This takes a long time and may require facilities and personnel that may not be available in all states that may be affected. The ICC would be an ideal forum because it is seized of an adequate set up and capacity for an elaborate processing of evidence and gathering of witnesses. There are countries, which may be willing to bring terrorist offenders to justice but lack the requisite machinery to collect evidence, process and present it before a trial court. The prosecutor of the ICC may then play a crucial role in ensuring that evidence is collected in a manner that meets the standards which may obtain a conviction: that witnesses are given proper protection; and that victims are adequately compensated.

It has already been argued that an agreement on a definition of terrorism is a critical cog in the fight against terrorism. It is expected that prosecutions of terrorism suspects will take advantage of a unified set of procedural and substantive law that the ICC confers therefore standardizing terrorism trials globally.

Fourth, including terrorism in the subject matter jurisdiction of the ICC will ensure that no offender shall escape judicial proceedings for any act of terrorism. The ICC obtains jurisdiction on the principles of nationality and territoriality. A state party may refer a situation when the accused is a national of that or state or when a crime has been committed in that state.⁶⁷ The upshot of this is that a perpetrator cannot escape the jurisdiction of the ICC merely by fleeing to a country, which is not a party to the ICC. Even if neither state in such a scenario is party to the ICC, either can specially submit to ICC jurisdiction for the prosecution of the alleged perpetrator⁶⁸ It scarcely needs saying that in these cases the ICC will not have the power to compel a non-party state to surrender a suspect, but that is true of any tribunal in the absence of a prior agreement with the surrendering state or the conferral powers under chapter VII of the UN Charter.

There are other reasons why terrorism should be brought within the jurisdiction of the ICC. Somalia, for example, presents a situation where a state is both incapable and unwilling to bring terrorism perpetrators to justice. Somalia is a failed state where terrorists appear to be in control of

⁶⁷ Art. 12(2)(a)-(b))

⁶⁸ (Goldstone

the state machinery. In such circumstances there can be no doubt that the state is itself engaged in terrorism and cannot be expected to deal with it in any positive manner. Even if Somalia were in control of its state apparatus, it has no infrastructural capacity to collect and present a strong case before a trial court. This is not unwillingness. It is incapacity. There, however, cases where a state has got the capacity but refuses to prosecute terrorist suspects.⁶⁹ There is of course a weakness to the amendment of the Rome statute to include terrorism as an ICC crime. Under Article 125 (5), any amendment to the statute is only operative as against those states that explicitly accept to be bound by it.⁷⁰

A great deal of terrorist offences is committed, if not by governments, then by individuals or organizations with implicit support of state institutions. There may not be direct state policy and authorization but by conduct, those states give aid and assistance, which permit either the planning or the execution of acts of terror. Such governments will not bring the offenders to justice. At the very best they will engage in sham trials but are intended to shield the suspects from the consequences of their activities. It is in such circumstances that the ICC is best suited to deal with. The ICC structure is designed to deal with situations where domestic judicial processes are intended to shield perpetrators from genuine prosecutions, or prosecutions at all. The ICC process provides a secondary mechanism outside the control of the governmental authorities that maybe complicit in the crime.

10. Objections to ICC Jurisdiction

The ICC is a permanent, international judicial institution with jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression. The relationship between the ICC and domestic state courts is governed under the “complementarity principle.”⁷¹ Accordingly article 17 provides that a case shall not be admissible before the ICC if the case is being investigated or prosecuted by a state which has jurisdiction over it unless the state is unable or unwilling genuinely

⁶⁹ The Lockerbie case comes to mind. For many years Libya held on to the two suspects allegedly involved in planting the bomb that exploded a PaAm plane over Lockerbie but refused to surrender them desiring to place them on trial. The international community felt that a trial in Libya would not guarantee justice and instead insisted on a trial outside Libya.

⁷⁰ The Democratic Dilemma of the ICC Madeline Morris Buffalo Criminal Law Review: Vol. 5:590

⁷¹ Under article 17, the ICC mechanism is called into operation when a state is unable or unwilling to investigate and prosecute.

to carry out the investigation or prosecution. States therefore, have the first priority to undertake investigations and trials.

In instances where a crime is alleged to have occurred in a state party to the ICC, or in a state which gives ad hoc consent to the jurisdiction of the ICC, then the ICC obtains jurisdiction even if the alleged offender is a national of a state which is not a party to the Rome statute and that state has not given consent to ICC jurisdiction (Art. 12).

There are strong arguments presented by non-state parties, led by the USA as to how and why the ICC should not exercise jurisdiction over persons who are nationals of states not party to the Rome statute. At the core of the US objection to the ICC is the fear that other nations would use the ICC as a political forum to challenge actions deemed legitimate by responsible governments.⁷² While the Rome statute embodies a core humanitarian law principle (the right not to be subjected to genocide, war crimes and crimes against humanity), it fails to accommodate the human right to democratic governance.⁷³ This is manifest in instances where the ICC moves in to assert jurisdiction to deal with matters where the citizen of a non-party state is tried before the ICC. In such circumstances the ICC will prosecute and punish individuals on behalf of the international community but without a nexus between the court and the accused since the state has not given consent. Here the ICC's claim to democratic legitimacy breaks down. There is no linkage between the ICC and those non-party nationals over whom it would exercise authority.⁷⁴ This is a departure from other international institutions like the WTO where this sort of 'democratic deficit' has been intensely debated.⁷⁵ The issue of democratic will to be bound by the ICC is most manifest in circumstances where there are claims of policies, and not law, driving the process. Such will be the case of terrorism where the suspect is seen at once as a criminal and also as a freedom fighter.

⁷² Congressional Research Service, The Library of Congress, The International Criminal Court Treaty: Description, Policy Issues and Congressional Concerns, Jan 6, 1999.

⁷³ The 1949 Universal Declaration of Human Rights, the 1966 ICCPR and a host of other human rights instruments affirm a right to democratic governance.

⁷⁴ Madeline Morris, *The Democratic Dilemma of the ICC*, Buffalo Criminal Law Review, Vol 5:591 at 596

⁷⁵ See Jeffery Atik, *Democratizing the WTO*, 33 Geo. Wash. Int'l L. Rev 451 (2000-2001); Joseph S. Nge *Globalizations Democratic Deficit; How to make International Institutions more Accountable*, Foreign Affairs Vol. 80 no. 4 at 2-6.

Conclusion

Terrorism has become a tragic circumstance of everyday life. It has resulted in a huge and dreadful loss of lives and destruction of property. An international web of terrorists interlinked through a network of verbal and advanced communications has reduced our world into a village of terror. Al Qaeda, for example, has proven that numerous terror cells, if simultaneously activated can render terror in every region in the globe. No continent or region is safe. Terrorism is no longer a domestic concern affecting Israel or a regional concern for the Middle East. It is a matter for the international community. For this reason, state or regional efforts cannot offer a solution. It is vital that a global effort is made towards combating terrorism.

It would appear that the ideal is to introduce terrorism as an ICC crime on its own right. This proposal is made on the recognition of the fact that terrorism is an offence with its unique and distinct features and it would be an abuse of the law to try and subsume it in other crimes.

Of course, the beginning of an ICC assumption of jurisdiction over terrorism is finding an agreed definition of terrorism. It is obvious that the present inconsistencies in a definition of terrorism hinder a common counter terrorism strategy. We must realize that the world can no longer afford to continue in the less than satisfactory state of uncertainty as to a definition of terrorism. Terrorism is not a crime *sui generis* under the Rome Statute.

The Kampala Review Conference has demonstrated that it is possible to obtain an agreed definition of terrorism just like the conference did on aggression. Granted that the difficulties and complexities of a definition of terrorism are legion, but what is the solution? It should be possible to find an objective criteria for a definition of terrorism away from the culturally and relativist oriented definitions. The trauma caused by terrorism has sufficiently demonstrated that the international community must find a solution to the scourge otherwise no one will be safe.