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Amending the ICC to Include Terrorism as a Core Crime

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I. Introduction

The ICC should amend the Rome statute to add “Terrorism” as a core crime under the ICC’s subject matter jurisdiction. Ever since September 11, 2001, there has been an added focus on preventing the crime of international terrorism. The ICC was created in order to prosecute the most serious crimes facing the international community.¹ In fact, one of the main reasons the ICC was successfully enacted in 2002 was the international response to the terror attacks of 9/11.² International terrorism is certainly a crime that effects the international community with the same level of severity as war crimes, crimes against humanity, genocide, and aggression. This paper takes the position that in order to ensure that justice is served upon international terrorists the ICC needs to have jurisdiction to prosecute international terrorists by way of amending the Rome Statute to include terrorism as a core crime.

One of the many difficulties in prosecuting international terrorism is the theory that there is no international consensus on the definition of terrorism. However, part II of this article will examine The Special Tribunal for Lebanon (STL), treaty law, United Nations General Assembly and Security Council action, and commentary to show that there are at least some core tenants of terrorism that most of the international community can agree on.

It is likely that certain acts of terrorism already can be prosecuted under the Rome statutes article 7 Crimes Against Humanity provision, or article 8 War Crimes provision.³ However, only

¹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, (1998) [hereinafter Rome Statute].

² Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 Rutgers L/J. 1, 16 (2002).

³ *Id.* at 2.

prosecuting international terrorism acts that qualify for these two provisions will leave gaps of acts of terror that cannot be reached under the ICC. Part III of this article will examine what terror acts may already be able to be prosecuted under the existing core crimes of the Rome Statute, and explain why in the interest of justice prosecuting terrorism under the existing Rome Statute is insufficient because there are certain terroristic acts that would not qualify for subject matter jurisdiction under the current Rome Statute, and therefore cannot be prosecuted at the ICC.

Part IV of this Article will examine some potential problems of prosecuting terrorism at the ICC. Problems with adding terrorism as a core crime to the Rome statute will be discussed, as well as potential problems the ICC would have prosecuting terror acts under the Rome Statute.

Scholars have determined that many acts of terror may be prosecuted under the Rome Statute's War Crimes or Crimes Against Humanity provisions. However, this method of prosecuting terrorism in the international court is insufficient. There are numerous acts of terrorism that do not fit within the jurisdiction of the War Crimes or Crimes Against Humanity Provisions of the Rome Statute, and are therefore untouchable by the ICC. This leaves a gap in prosecution where a terrorist can escape prosecution in circumstances where the act of terror does not fit the existing Rome Statute and the National tribunal with jurisdiction over the case is unable or unwilling to prosecute the terrorist. Also, the method of trying to squeeze an act of terror into one of the existing provisions to prosecute the crime under the ICC is not an ideal solution. In the interest of justice and the international community, the Rome statute should be amended to include terrorism as one of its core crimes.

II. Defining Terrorism

Acts of Terrorism have increased in frequency and severity as we have entered the 21st century.⁴ The international community is aware of the risks of terrorism, and even agrees that international cooperation is necessary in order to combat terrorism.⁵ A common reason the international community gives for not including “Terrorism” in the Rome statute is that there is no consensus in the international community of the definition of terrorism.⁶ However, by examining the Special Tribunal for Lebanon, treaty law, United Nations General Assembly Resolutions and Declarations, United Nations Security Council Action, and Scholarly Commentary, it is possible to pull out some core tenants of the term terrorism that the international community does agree on.

1. The Special Tribunal for Lebanon (STL)

The STL is an Ad-Hoc tribunal created in order to prosecute terrorism. The STL Interlocutory decision is the first time that an international tribunal established a universal definition of terrorism under international law.⁷ The definition of terrorism under the STL has three elements: (i) The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or the threatening of such act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly

⁴ *Id.* at 59.

⁵ For example, in 1971, the United Nations General Assembly passed the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which affirmed that every State "has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

⁶ Martinez, *supra* note 2 at 3.

⁷ Heather Noel Doherty, *Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity?*, 43 Case W. Res. J. Int'l L. 831, 868 (2011).

coerce a national or international authority to take action, or to refrain from taking it; and (iii) when the act involves a transnational element.⁸

It is important to note that under the STL definition, terrorism must have a mens rea of intending to cause fear to the public or coercing an authority into a decision. The STL definition also requires that there be some type of transnational element to the crime.

2. Treaty Law

Like the STL, several attempts to define terrorism in treaty law included the mens rea requirement of causing fear in the public or coercing a national or international authority.

Different from the STL, many attempts to define terrorism under treaty law require that the act of terror be committed upon a civilian population. Additionally, certain attempts to prosecute terror under treaty law expressly extended criminal liability to acts that intend cause a significant amount of property damage. Treaty law has also responded to specific acts of terrorism, which can be examined to further illustrate the types of acts that the international community considers to be an act of terror.

The first recorded attempt to define terrorism in international law was the League of Nations in 1937.⁹ The League of Nations defined terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”¹⁰ This attempt to define terrorism recognized the Mens Rea element of the intent to cause fear.

⁸ *Id.*

⁹ See Convention for the Prevention and Punishment of Terrorism, opened for signature Nov. 16, 1937, 19 League of Nations O.J. 23 (1938) (never entered into force)

¹⁰ Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, art. I(2), 19 League of Nations O.J. 23 (1938).

The closest the United Nations has ever come to defining the term terrorism was in 1999, at the International Convention for the Suppression of the financing of terrorism.¹¹ The relevant part of the convention described terrorism as an act “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”¹² It is important to note that this definition requires the victim be a civilian and that the act intend to cause death or serious bodily injury. The definition also contains a similar mens rea requirement as the STL. The act must have been committed for the purpose to intimidate a population, or to compel a government to act or abstain from action.

An act of terror also needed to be committed against civilians in *Prosecutor v. Galic*.¹³ This definition was created when the ICTY was prosecuting an act of terror under the ICTY War Crimes Provision. The case was prosecuted at the ICTY tribunal and used the treaty of the Diplomatic Conference of 1974-1977 Article 51(2) of Additional Protocol I.¹⁴ Article 51(2) of Additional Protocol one defines terrorism as “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”¹⁵ The ICTY held that in order to qualify for Article 51(2) acts of terror the defendant must: (1) Direct violence against the civilian population or individual civilians not taking an active part in the hostilities of an armed conflict; (2) Willfully Target Civilian population or individual civilians not taking an active part in the hostilities of an armed conflict; and (3) Possess the intent that the primary purpose of the act was

¹¹ G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, at 408, U.N. Doc. A/54/109 (1999).

¹² Martinez, *supra* note 2, at 6.

¹³ Beth Van Schaak & Ronald C. Slye, *International Criminal Law and its Enforcement*, 743 (4th ed. 2020).

¹⁴ *Id.*

¹⁵ *Id.*

to cause terror among the civilian population.¹⁶ The defendant in this case was the General of a Bosnian Serb military force who ordered the sniping and shelling of a civilian population.¹⁷ The court found that the General ordered this attack upon the civilian population with the primary purpose of causing fear amongst the civilian population.¹⁸ The court held that the General's actions were within the jurisdiction of the ICTY because the actions fell under the War Crimes provision of the ICTY, and the specific elements of terrorism under Article 51(2).¹⁹

The United Nations General Assembly has not only expressed the interest in prosecuting terror attacks that intend to cause death or serious injury to people, but also acts of terror that cause a significant amount of property damage. In 1997, the United Nations General Assembly adopted the International Convention for the Suppression of Terrorist Bombings.²⁰ This convention did not actually define the term terrorism. The convention simply stated that a person violated the convention if he or she “unlawfully and intentionally delivers, places, discharges or detonates an explosive, or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”²¹

Instead of trying to define terrorism, several United Nations conventions have been adopted in reaction to specific acts of terrorism. These conventions are useful in the pursuit of defining

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jan. 9, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 251.

²¹ Martinez, *supra* note 2, at 6.

terrorism because it highlights the acts, we know the international criminal community desires to prosecute. These conventions prohibit the following acts associated with terrorism: Hijacking²², Unlawful acts against the safety of civil aviation²³, crimes against internationally protected persons²⁴, hostage taking²⁵, unlawful acts against maritime navigation²⁶, and unlawful acts against fixed platforms at sea²⁷. Additional United Nations conventions have been made regarding the use of explosives and nuclear materials.²⁸

3. United Nations Declarations and Resolutions

Like the STL and various treaties the United Nations General Assembly also identified that terrorism requires a mens rea of instilling fear in the general public.

The United Nations General Assembly has acknowledged that acts of terror are often motivated by political, ideological, or religious beliefs. In 1994, the United Nations General Assembly unanimously adopted the Declaration on Measures to Eliminate International Terrorism.²⁹ The declaration stated that all acts intended to provoke a state of terror in the

²² Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

²³ Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. Treaty Doc. No. 100-19, 27 I.L.M. 627.

²⁴ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

²⁵ International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

²⁶ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, S..

²⁷ Treaty Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. Treaty Doc. No. 101-1, 27 I.L.M. 685.y Doc. No. 101-1, 27 I.L.M. 668.

²⁸ Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. Treaty Doc. No. 103-8, 30 I.L.M. 726.

²⁹ G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, U.N. Doc. A49/743 (1994).

general public, a group of persons for political purposes are unjustifiable, regardless of any consideration that may be invoked to justify them.³⁰

4. United Nations Security Council Action

We can also try to gather a definition of terrorism by drawing upon certain acts that the United Nation Security Council have deemed to be “terror attacks”. Many of the acts deemed to be “terror attacks” have been committed against civilians. Additionally, the attacks deemed “terror attacks” by the UN Security council can usually be tied to a motive or intent to cause fear in the population or to coerce a national or international authority.

The United Nations Security Council has classified the 1988 shooting down of Pan Am flight 103 over Lockerbie Scotland as a “terrorist attack”.³¹ This attack was against civilians on a civilian aircraft, and the alleged motive for the bombing was related to the Libyan Governments displeasure of the US navy’s presence in the Gulf of Sidra. This act has the elements of attacking a civilian population as seen in article 51(2) of the ICTY. The act likely had the mens rea of coercing a national or international authority required under the STL if the bombing was in fact conducted to coerce the US Navy into leaving the gulf of Sidra.

The United Nations Security Council also declared Al Queda’s actions on 9/11 to be “terror attacks”.³² This attack was committed against a civilian population, and was likely committed for the primary purpose of instilling fear in the western world, and promoting the ideology and notoriety of AL Queda.

³⁰ *Id.*

³¹ Martinez, *supra* note 2, at 7.

³² See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1-4, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

5. Commentators

Many commentators definition of terrorism also requires the mens rea of instilling fear, or coercing a national or international authority. However, there is not a consensus on whether the attack must be committed against a civilian population.

Commentators state that, the strategy of terrorism is to instill fear in a segment of society in order to achieve a power outcome, or in furtherance of the group's propaganda/ideology.³³

The goal of this power outcome is often to promote the groups ideology, draw attention the groups beliefs, gain popular support, or to influence the intended audience of the attack to do or abstain from doing something.³⁴

Terror attacks are usually acts of violence or threats of violence that harm the victim groups physical or mental well-being.³⁵

The victims of terrorism are generally randomly chosen by convenience or are symbolically chosen. This is done in order to cause fear in the other members of the victim's group. Therefore, the primary target of terrorism is not the victim being attacked but rather the other individuals of that class who will become "terrorized" as a result of the attack.³⁶

When looking at how commentators describe the goal of terrorism, you can see that they mention one of the goals is to influence the audience of the attack to do or abstain from doing something. This is similar to the mens rea requirement of the STL, where one of the ways to satisfy the mens rea requirement was to commit the act with the primary purpose of coercing a

³³ Martinez, *supra* note 2, at 9.

³⁴ *Id.*

³⁵ Hanz Chiappetta, Rome, 11/15/1998: *Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan?*, 13 Pace Int'l L. Rev. 117, 130-31 (2001).

³⁶ Martinez, *Supra* note 2, at 9.

national or international authority to take action or refrain from taking action. When looking at how commentators discuss the victim selection of terrorism, the commentators mention that the real target of the attack is not the victim, but the other individuals of a class who will become terrorized as a result of the attack. This notion is like the mens rea requirement of the STL, requiring an act be committed for the primary purpose of instilling fear in a population.

6. International Consensus on the Definition of Terrorism

From gathering definitions of terrorism in the STL, treaty law, UN General Assembly Conventions, UN Security Council Actions, and Scholarly Commentators there are a few principles of terrorism that the international community are likely to agree on.

The international criminal community can likely agree that an act of violence intended to cause death or serious bodily injury should be included within a universal definition of terrorism. Most of the definitions of terrorism included violence intended to cause the death or serious bodily injury, or the threat of such violence. Examples of such violence was outlined in the several UN General Assembly conventions listed above. Such as: Bombing, Hijacking, Kidnapping, and Murder. The STL is broader than many of the other definitions, the STL merely required that the act of terror be a criminal act.³⁷ However, an act of violence with the intent to cause death or serious bodily injury, or a threat of such violence, would be encompassed by the STL's definition of terrorism.

The international community is unlikely to agree on whether attacks that cause or threaten to cause significant property damage should be included in the definition of terrorism. The UN General Assembly's international convention for the Suppression of Terrorist Bombings

³⁷ Doherty, *supra* note 7, at 868.

expressly extended the definition of terrorism to include the bombing or attempted bombing of a place, facility, or system where the destruction results or is likely to result in major economic loss.³⁸ The STL's definition of terrorism also would likely encompass a criminal act that caused a substantial amount of property damage. However, a lot of the definitions of terrorism expressly limited the definition of terrorism to acts of violence against people.

The international criminal law community is likely to agree that in a universal definition of terrorism the victims are limited to civilians and individuals who are not taking an active part in the hostilities of an armed conflict. The STL did not require the victims be a member of a particular class and may disagree with limiting the victims of terrorism to this group. However, most of the definitions of terrorism did mention that the acts of violence must be committed against civilians or people not taking an active part in an armed conflict. Also, most of the acts that the UN has classified as acts of terror were committed against civilians.

There is also likely an agreement on the mens rea required in the definition of terrorism. The STL's mens rea required the intent to cause fear in the civilian population, or coerce a national or international authority to act or refrain from acting.³⁹ This mens rea was similarly defined in the UN's International Convention for the Suppression of the Financing of Terrorism, and from the commentator's discussion of terrorism. Additionally, all attempts to define terrorism included a mens rea requiring that the acts primary purpose be to cause some type of fear.

Therefore, the international community is likely to agree that the definition of terror is: (1) an act of violence that causes death or serious injury, or the threat of such act; (2) against a civilian population, or individuals who are not taking an active part in the hostilities of an active conflict;

³⁸ Jan. 9, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 251.

³⁹ Doherty, *supra* note 7, at 868.

and (3) for the primary purpose of causing fear in the civilian population, or to coerce a national or international authority to act or refrain from action. In the Next section I will examine how some acts that fall under this definition of terrorism could be prosecuted under the current Rome Statute of the ICC, and why prosecuting terrorism in that way creates gaps of conduct impermissible in the search for justice.

III. Prosecuting Terror Under the Current Rome Statute

It may be possible to prosecute certain acts of terror under the current Rome Statute.⁴⁰ The current Rome Statute recognizes four core crimes over which the ICC has jurisdiction: (1) War Crimes; (2) Crimes Against Humanity; (3) Genocide; and (4) Aggression. It is likely that certain acts of terrorism will fall under the jurisdiction of War crimes or crimes against humanity. However, using war crimes or crimes against humanity statutes to prosecute terror at the ICC is insufficient. There are gaps of terror conduct that will not fall into either of those categories, and thus be unreachable by ICC jurisdiction. That is why the ICC must amend the Rome Statute to add Terrorism as a core crime.

It is unlikely that acts of terrorism will fall under the crimes of genocide or aggression. Genocide's mens rea requires that the purpose of the killings be to wipe out the victim group.⁴¹ Terrorisms mens rea requires that the acts are conducted to induce terror or a response from the victim group. It is unlikely that these two mens rea requirements can mesh, you either have one purpose for the act or the other.⁴² Therefore, it is unlikely that acts of terror can be punished under the core crime of Genocide.⁴³ Terrorism also is unlikely to fall under the Rome Statutes

⁴⁰ Martinez, *supra* note 2, at 2.

⁴¹ See Rome Statute, *supra* note 1, at art. 6.

⁴² Martinez, *supra* note 2, at 26.

⁴³ *Id* at 14.

definition of aggression. This is because the crime of aggression is usually reserved for state actors taking action against another state.⁴⁴ Therefore, this article will focus on prosecuting terror under the war crimes and crimes against humanity statutes, and the gaps in conduct prosecuting terror in this way would leave.

1. War Crimes

There are likely certain acts of terror that fall within the jurisdiction of War Crimes in the Rome Statute. However, there are large gaps of terror, that do not occur within the context of an armed conflict, that cannot be prosecuted under this provision. Article 8(1) of the Rome Statute establishes that the ICC has jurisdiction over war crimes.⁴⁵ Article 8(2) then gives a definition of war crime. The statute deals with both crimes committed during international armed conflict and those committed during armed conflict not of an international nature.⁴⁶ Within the statute there are two types of enumerated crimes: (1) “Grave Breaches of the Geneva Conventions”; and (2) “other serious violations of the laws and customs applicable” in the relevant type of armed conflict.⁴⁷ Therefore, for an act to fall within the jurisdiction of war crimes the act must have occurred in the context of an armed conflict. The ICC does not define armed conflict, but we can look to international ad-hoc tribunals that have defined armed conflict in the context of war crimes. The ICTY defined an armed conflict as “whenever there is resort to armed force between

⁴⁴ The Ninth Session of the Preparatory Commission for the International Criminal Court discussed proposed definitions of the crime of aggression and mechanisms for the exercise of jurisdiction. See Working Group on the Crime of Aggression, Preparatory Commission for the International Criminal Court, 9th Sess., April 8-19, 2002, available at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last updated July 31, 2002).

⁴⁵ Rome Statute, *supra* note 1, at art. 8(1).

⁴⁶ Rome Statute, *supra* note 1, at art. 8(2).

⁴⁷ *Id.* at arts. 8(2)(b), 8(2)(e).

States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁴⁸

A singular act of terror does not create an armed conflict. The ICTY has stated that situations of civil unrest and acts of terrorism do not amount to armed conflicts.⁴⁹ The ICTY distinguished a terror attack from an armed conflict by highlighting the protracted extent of armed violence and the extent of organization of the parties involved.⁵⁰ Therefore, there are two scenarios where an act of terror may be considered to be within the context of an armed conflict: (1) The acts of terror occurred within the context of an existing international armed conflict; or (2) acts of terrorism that occur within the context of an existing intranational armed conflict.⁵¹

It is likely that an act of terror committed within the context of a preexisting armed conflict could be within the jurisdiction of article 8 war crimes. Article 33 of the Geneva convention suggests that acts of terror may occur within the context of an international armed conflict by stating, “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”⁵² Article 34 of the Geneva convention additionally adds that the taking of hostages are prohibited.⁵³ It is important to note however, that articles 33 and 34 of the Geneva convention are limited to the scope of protecting civilians in an area that is occupied by an adversary of an armed conflict.

⁴⁸Martinez, *supra* note 2, at 42.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 43.

⁵² Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], at art. 33.

⁵³ *Id.* at art. 34.

The scope of civilians protected has been expanded however by Article 51(2) of the first protocol of 1977. This protocol extends protection to all civilians who are not taking an active part in the hostilities of an armed conflict by stating, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”⁵⁴ Therefore, acts of terrorism that occur within the context of an overarching international armed conflict may fall under the ICC war crimes jurisdiction.

In addition to occurring during an armed conflict the terrorist attack must also either: (1) be a grave breach of the Geneva Convention; or (2) be a serious violation of laws and customs applicable in international armed conflict. Examples of grave breaches of the Geneva convention that would likely trigger jurisdiction are: (1) willful killing; (2) torture or inhuman treatment; (3) willfully causing great suffering, serious bodily injury, or death; (4) extensive destruction and appropriation of property, not justified by military necessity; and (5) taking of hostages.⁵⁵ There are also numerous customs or laws applicable to international armed conflict that an act of terror may violate, giving the ICC jurisdiction.⁵⁶ Therefore, terror acts that occur within the context of an international armed conflict and either consist of a major breach of the Geneva convention or a serious violation of international armed conflict law or customs may be prosecuted as a war crime by the ICC.

Terror attacks conducted within the context of an overarching internal armed conflict may also fall under the jurisdiction of war crimes in the ICC. Articles 8(2)(c) and (e) of the Rome

⁵⁴Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Internal Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], at art. 51(2).

⁵⁵ Rome Statute, *supra* note 1, at art. 8(2)(a).

⁵⁶ Martinez, *supra* note 2, at 45-46

statute gives the ICC jurisdiction of war crimes committed within the context of internal armed conflicts.⁵⁷ The Tadic case provides us with a definition of an internal armed conflict within the jurisdiction of international criminal law, “protracted armed violence between governmental authorities and organized armed groups within a State, or between such groups within a State.”⁵⁸ The Geneva convention and Article 51(2) of protocol 1 both expressly include “acts of terrorism” as prohibited offenses in the context of internal armed conflicts.⁵⁹ Therefore, acts of terror that are grave breaches of the Geneva convention, and other serious violations of laws and customs applicable to internal armed conflict will likely fall within the War Crimes provision of the Rome statute. Grave Breaches of the Geneva convention in regard to internal armed conflict must be “against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.”⁶⁰ There are several acts of terror that would likely fall within the parameters of war crimes in the context of an internal armed conflict. For example, the Galic case was an act of terror that occurred within the context of an internal armed conflict and satisfied the ICTY’s war crime provision.⁶¹ The more important part of the analysis is that there must be some sort of armed conflict going on, and that the acts of terror are going to be some type of war crime intended to terrorize non-combatant civilians, or maltreatment of surrendered soldiers, or the taking of hostages.

The issue with prosecuting terrorism through the war crime statute, however, is the requirement of an overarching armed conflict. It is unlikely that terror attacks themselves will be

⁵⁷ Philippe Kirsch & John T. Holmes, *Developments in International Criminal Law: The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 Am. J. Int’l. L. 2, 7 (1999).

⁵⁸ Martinez, *supra* note 2, at 46.

⁵⁹ Van Schaak & Slye, *supra* note 13, at 743.

⁶⁰ Rome Statute, *supra* note 1, at art. 8(2)(c).

⁶¹ Van Schaak & Slye, *supra* note 13, at 758.

considered an armed conflict. Many terror attacks are attacks were the terrorist group commits an act of terror against un-armed civilians not within the context of some armed conflict. None of these types of terror attacks would be reachable by the War Crimes Provision of the Rome Statute.

2. Crimes Against Humanity

There are likely certain acts of terror that fall within the Rome Statutes Article 7 crimes against humanity jurisdiction. However, there are large gaps of terror that cannot be prosecuted under this provision. Article 7 of the Rome statute gives the ICC jurisdiction over crimes against humanity. Article 7 defines crimes against humanity as, "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," and lists out eleven separate acts that violate the crimes against humanity.⁶² There are three elements that must be met for an act to be considered a crime against humanity: (1) the commission of at least one of the acts enumerated in article 7; (2) the act was committed as part of a systematic and widespread attack against a civilian population; and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁶³

The first step in analyzing if an act of terror falls within the definition of a crime against humanity is to determine if one of the enumerated acts in article seven has been violated. There are eleven acts enumerated in article seven, six of which could potentially be violated by an act of terror.⁶⁴

⁶² Rome Statute, *supra* note 1, at art. 7(1)(a).

⁶³ *Id.*

⁶⁴ Martinez, *supra* note 2, at 28.

The first crime enumerated is murder.⁶⁵ This would cover acts of terrorism in which the terrorist willfully killed another, for the primary purpose of causing fear or to coerce a national or international authority.

Another enumerated crime that may be applicable is extermination.⁶⁶ Extermination is defined as "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population."⁶⁷ Extermination also can be described as the physical elimination on one or many individuals of a group in the context of a murderous enterprise. It is a similar crime to genocide however there is no mens rea requirement that the killings be committed for the purpose of exterminating the group. Many acts of terror could fall within extermination such as a targeted killing of a large group of a certain type of people with the purpose to cause terror amongst that class of people. Or the destruction of infrastructure etc.

Another enumerated crime is torture.⁶⁸ There are certainly scenarios I can imagine where terrorists may torture someone. An act of terror may fit under this category if in the act of torture the terrorist causes death or serious bodily injury to the victim, or threatens to do so.

Another enumerated crime that terrorists may violate is persecution.⁶⁹ In relevant part the enumerated crime of persecution prohibits criminal acts against individuals targeted because of, "political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally

⁶⁵ Rome Statute, *supra* note 1, at art. 7(1)(a).

⁶⁶ *Id.* at 7(2)(b)

⁶⁷ *Id.*

⁶⁸ Rome Statute, *supra* note 1, at art. 7(1)(f).

⁶⁹ *Id.* at art. 7(1)(h).

recognized as impermissible under international law."⁷⁰ Many acts of terror are motivated by these factors impermissible under the persecution definition.

Another crime is the forced disappearance of persons.⁷¹ This would cover kidnapping which many terrorist groups have committed in the past.

Lastly, there is other inhumane acts.⁷² An example of inhuman acts committed by terrorist groups is the acid throwing campaign against unveiled women by Islamist terrorist group Al Tawhid, now part of Ansar al-Islam.⁷³ As you can see there are a number of different terror attacks that would fit into one or more of the eleven enumerated acts of article seven.

The second step in establishing an act of terror as a crime against humanity is to determine if the act was a part of a systematic or widespread attack against a civilian population. Article 7(2)(a) establishes three elements that must be satisfied in order for the act to be considered part of a widespread or systematic attack: (1) a course of conduct; (2) involving multiple commissions of acts enumerated in 7(1); and (3) pursuant to or in furtherance of a state or organizational policy to commit such an attack.⁷⁴ Certain acts of terror can likely meet these requirements. To meet the first two requirements terror groups must commit acts of terror as a part of a sustained campaign of terror.⁷⁵ This means that an individual terrorist working alone committing one act of terror will not be sufficient. Nor will attacks by terror groups that do not fall within their sustained campaign of terror/general scope of their group. The scope of terror acts applicable to crimes against humanity are therefore limited to terror attacks committed by a

⁷⁰ *Id.* at art. 7(1)(h)(3).

⁷¹ *Id.* at art. 7(1)(i).

⁷² *Id.* at art. 7(1)(k).

⁷³ Martinez, *supra* note 2, at 32.

⁷⁴ Rome Statute, *supra* note 1, at art. 7(2)(a).

⁷⁵ Martinez, *supra* note 2, at 35.

terrorist group who has committed multiple acts of terror as a part of a campaign of terror. The third element of the offense is that the attack must be in furtherance of the state or organizations policy. Terrorist groups should not have trouble meeting this requirement. The Rome conference accepted that the term “organization” was intended to include terrorist organizations.⁷⁶ Therefore, the attack need only to be in furtherance of the goals/policy of the terrorist organization in order to meet this element of the offense.

The third step is the knowledge requirement. The knowledge requirement merely requires that the perpetrator of the act had the intent to further such an attack.⁷⁷ The perpetrator need know about all of the elements of the attack or that the attack would rise to the level of a crime against humanity, merely that the perpetrator knew/ had intent to carry out the attack.

There are terror attacks that could be prosecuted under the crimes against humanity provision of the Rome Statute. Mainly, attacks that are committed by established terrorist groups against civilian population in furtherance of the policy of that group. For example, the ICC is currently pursuing the prosecution of Saif Al-Islam Gaddafi for terrorism under the enumerated crimes against humanity of murder, and persecution.⁷⁸ The alleged crime in this case is that the defendant targeted and attacked civilian populations who spoke out against the regime of Muammar Gaddafi.⁷⁹ However, prosecuting terrorism under this act leaves gaps of unprotected conduct. For example, an act committed by a terrorist who has no proven ties to an established organization. Therefore, it is my position that the ICC should amend the Rome statute to include terrorism as a core crime to get rid of these gaps in unprotected conduct.

⁷⁶ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l L. 22, 131 (1999).

⁷⁷ Rome Statute, *supra* note 1, at art. 7(2)(a).

⁷⁸ *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC (2011).

⁷⁹ *Id.*

3. The Gaps of Unprotected conduct in prosecuting terrorism under the current Rome Statute

There are several acts of terror that would not be covered by either the crimes against humanity provision or the war crimes provision of the Rome Statute. This means that there are several types of terror attacks that the ICC would have no way of obtaining jurisdiction over. For example, the crimes against humanity statute is not likely to cover attacks that purely target property or financial resources. And the War Crimes statute could only cover attacks against property if the attack were within the context of an armed conflict. Therefore, an attack against purely property by a terrorist not within the context of an armed conflict would be unreachable by the ICC no matter how heinous. Additionally, individuals working alone, not in the context of an armed conflict, who commit singular heinous international or domestic terroristic acts would not be able to be prosecuted under war crimes or crimes against humanity. For example, a mass shooter with no allegiance to a terror organization could not be prosecuted. He could not be prosecuted under the War crimes statute because an individual mass shooter attacking civilians is not acting within the context of an armed conflict. He could not be prosecuted under the crimes against humanity because his act was a singular act and not part of a widespread or systemic attack, and he was not acting in furtherance of an organization. Additionally, the process of taking an individual act of terror and trying to figure out which of the two core crimes of the Rome statute it might fit in in order to prosecute it is not an ideal process. If the ICC amended the Rome statute to include terrorism as a core crime the gaps of unprotected conduct could be filled in, and we would not have to try and fit acts of terror into one of the other core crime definitions.

IV. Problems Prosecuting Terror at the ICC

The first issue in adding Terrorism as a core crime in the Rome Statute is amending the Rome statute. Even if the ICC were granted subject matter jurisdiction over an act of terror by either fitting the act under one of the existing Rome statutes, or by amending the Rome statute to include terrorism as a core crime, there would be a few difficulties in actually prosecuting the case at the ICC. These problems are: (1) the rule of Complementarity; (2) Jurisdictional and Referral Issues; (3) the inability to gain custody of the defendant; and (4) The Non-Involvement of the United States.

1. Amending the Rome Statute

The process of amending the Rome statute is not that difficult. States can propose an amendment to the Rome Statute at any time.⁸⁰ Once a proposal is made, the legislative body of the ICC decides whether or not to take up the proposal.⁸¹ The legislative body meets on an annual basis to determine if any said proposals will be taken up. If an amendment is taken up it can be passed by a two thirds majority of state parties. If the ICC votes to amend the Rome statute it will only be enforced upon the parties who voted to amend the Rome Statute. It is likely that the majority of nations party to the Rome Statute would agree to amend the Rome statute.⁸² 94% of ICC state parties are either parties or signatories to the financing convention to combat terror.⁸³ If the definition of terror proposed to amend the ICC is similar to the definition of the financing convention, it is likely that a large majority of parties to the ICC would agree to amend the Rome Statute. The issue in getting this amendment passed would be political issues, as lobbying to get this amendment passed would likely face the common obstacle of optics.

⁸⁰ Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 Mich. St. Int'l L. Rev. 219, 236 (2012).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

2. Issue of Complementarity

After amending the Rome Statute to add terrorism as a core crime, the ICC would face a problem in prosecuting suspected terrorists in the ICC role that the ICC plays in the court system. The Preamble of the Rome Statute emphasizes that the jurisdiction of the International Criminal Court is "complementary to national criminal jurisdictions."⁸⁴ Therefore, a case is inadmissible to the ICC where: "(1) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (2) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; and (3) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3."⁸⁵ This rule means that National tribunals have primary jurisdiction over terrorism cases. National tribunals generally have shown that they possess a strong will to try terrorism cases involving the attacks against their own nationals.⁸⁶ National Tribunals have also shown the ability to prosecute international terrorism cases successfully.⁸⁷ Therefore, it is likely that many terrorism cases will be gladly prosecuted by the National Tribunals who have jurisdiction over the specific act in question. In fact, the national tribunals usually strongly desire to prosecute these cases. This sentiment will likely

⁸⁴ Rome Statute, *supra* note 1, at Pmb. <para> 10.

⁸⁵ *Id.* at art. 17(1)(a)-(c). Article 20(3) provides:

No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 [genocide, crimes against humanity and war crimes respectively] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court . . . (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

⁸⁶ Note, *Responding to Terrorism: Crime, Punishment and War*, 115 Harv. L. Rev. 1217, 1218-19 (2002); Martinez, *supra* note 2, at 52.

⁸⁷ Martinez, *supra* note 2, at 52-53.

result in very few cases being passed from a National Tribunal to the ICC. However, I do not think that this fact makes the ability of the ICC to prosecute terrorism pointless or unnecessary. There are several circumstances where the ICC could be the more appropriate forum, and circumstances in which the National Tribunal would benefit from transferring jurisdiction of the case to the ICC.

The first example in which the ICC could be a better forum than a National Tribunal is the situation exemplified in the *Lockerbie* case.⁸⁸ In *Lockerbie*, two Libyan Nationals were suspected to have participated in the shooting down of Pan-Am flight 103.⁸⁹ Several US citizens were killed as the plane crashed down in Scotland.⁹⁰ The case was tried in the United States. After the US grand jury indictment, the Libyan government refused to extradite its nationals to the US for trial. The Libyan leader, Ghaddafi, did not trust that his nationals would get a fair trial in the United States. The United States did not trust that the Libyan Nationals would receive a harsh enough sentence or even be punished at all if the suspected terrorists were able to dodge extradition to the United States. Thus, both countries were deadlocked over the extradition of the suspected terrorists. If the case were able to be prosecuted at the ICC it may have been able to assuage the fears of both governments and enable the suspected terrorists to be prosecuted more efficiently.⁹¹

The Second Scenario in which the ICC would be a more appropriate or useful tool to prosecute an act of terror is when there are human rights/ due process concerns of trying the case

⁸⁸ See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), 1992 I.C.J. 3 (April 14, 1992) [hereinafter *Lockerbie*] (detailing the events surrounding the bombing of a commercial airline flight over Scotland).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 Am. U. Int'l L. Rev. 1009, 1016 (2004).

at a National Tribunal.⁹² Countries have been routinely accused of violating suspects of terrorisms due process rights when trying acts of terrorism in their National Tribunals.⁹³ If there is a case where the suspect may have a valid due process violation claim against a National Tribunal, it would be useful if the National Tribunal could voluntarily give Jurisdiction to the ICC to try the case.

Another Scenario where the ICC could have been a more appropriate forum to try an act of terror is the *Yunis* case.⁹⁴ In *Yunis*, the government resorted to an increasingly more common practice of forcibly abducting suspects in order to obtain custody/jurisdiction of the suspect.⁹⁵ The suspect in *Yunis*, was lured on to a yacht by undercover FBI agents who promised him a drug deal would happen on the Yacht.⁹⁶ The FBI agents brought the Yacht out to international waters, and once in international waters abducted the suspect and brought him to court in the US.⁹⁷ In many cases The ICC could potentially have the same issues in obtaining jurisdiction over a suspect that the US did in *Yunis*. However, my theory is that in certain circumstances countries who would be unwilling to extradite or help locate a National Suspect to extradite to the US may be more willing to extradite and give jurisdiction to the ICC. Under this circumstance it would enable the ICC to obtain jurisdiction of a suspect instead of the US forcibly abducting a foreign national to bring to trial. Even if this circumstance is rare, it is

⁹² *Id.*

⁹³ See *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (stating that some detainees in Guantanamo Bay are not entitled to due process).

⁹⁴ *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

⁹⁵ *Id.* at 1089 (detailing how undercover FBI agents lured Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal and arrested him once the vessel entered international waters, then transferred him to a Navy munitions ship for interrogation)

⁹⁶ *Id.*

⁹⁷ *Id.*

beneficial, as it is not ideal to due process to routinely forcibly abduct people in order to gain jurisdiction over them.⁹⁸

3. Jurisdiction and Referral

The Third problem the ICC would have in prosecuting terrorism is the issue of Jurisdiction and referral. Assuming a National tribunal is unwilling to prosecute a case of terrorism the case can be elevated to the ICC in three ways: (1) Referral of the case to the ICC by a state party⁹⁹; (2) referral of a situation to the Prosecutor of the ICC by the Security Council, acting under Chapter VII of the Charter of the United Nations¹⁰⁰, or (3) the initiation of an investigation by the Prosecutor, *proprio motu*.¹⁰¹ The issue of these rules is that the ICC can only gain jurisdiction of the case if the UN Security Council assigns the ICC the case, or if the State Party gives the ICC permission of jurisdiction. The State party can give permission by either, expressly passing the case over to the ICC, or being a member of the Rome Statute. The Issue here is that not all countries are a party to the Rome statute. Therefore, the ICC would have difficulty prosecuting cases were the National tribunal is unwilling to prosecute the case and is not a party to the Rome Statute.

4. Securing Custody of Suspects

The fourth issue the ICC would face would be the inability to secure custody of the suspects. The ICTY has had this very issue where a number of their suspects of terrorism remain at large

⁹⁸ See *Id.* (holding that the U.S. military is usually prohibited from participation in domestic law enforcement but may participate in law enforcement abroad).

⁹⁹ See Rome Statute, *supra* note 1, at arts. 13(a), 14.

¹⁰⁰ See *Id.* at art. 13(b).

¹⁰¹ See *Id.* at arts. 13(c), 15. At the Rome Conference, this power of the Prosecutor was considered necessary to cover circumstances where States' Parties and the Security Council may be reluctant to initiate cases for political reasons.

as the ICTY has been unable secure custody of the suspects.¹⁰² The issue is that there is no international force tasked with securing the custody of these defendants. Instead the ICC relies on cooperation of other nations in apprehending defendants.¹⁰³ The reality is, that certain nations may be aiding and abetting these suspects, or generally unwilling to help the ICC. For Example, the United States was unwilling to extradite certain members suspected of IRA terrorism to the United Kingdom due to the political nature of these actions.¹⁰⁴ With no enforcement arm of the ICC it will be difficult to obtain custody of suspects of terrorism on a consistent basis.

5. Non-Involvement of the US in the ICC

The last problem that the ICC would face in prosecuting terrorism is the non-involvement of the US as a member of the ICC. The United States is not a member of the Rome Statute.¹⁰⁵ The United States also happens to be the main country engaging in the war on terror. The United States has created military tribunals to prosecute terrorists.¹⁰⁶ This allows the US to travel throughout the world as a part of the “War on Terror” and capture suspected terrorists to be tried in their military tribunal. This is a much stronger ability to gain custody of terrorists than the ICC has. Once the US has these suspects in custody it is unlikely that the US would be willing to extradite custody to the ICC. This will inevitably prevent the ICC from having access to many suspected international terrorists.

¹⁰² Martinez, *supra* note 2, at 55.

¹⁰³ Rome Statute, *supra* note 1, at pt. 9; International Cooperation and Judicial Assistance, arts. 86-102.

¹⁰⁴ Martinez, *Supra* note 2, at 56.

¹⁰⁵ The Bush administration announced that "the United States does not intend to become a party to the treaty [the Rome Statute], [and thus] has no legal obligation arising from its signature on December 31, 2000" United States renounces signature on ICC treaty, Wash. Letter (A.B.A. Legislative & Governmental Advocacy Publications, Wash., D.C.), June 2002 (quoting from a letter submitted by U.S. Undersecretary of State John R. Bolton to U.N. Secretary-General Kofi Annan), available at <http://www.abanet.org/poladv/letter/02june.html>.

¹⁰⁶ Military Order--Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

V. Conclusion

While certain acts of terror may be within the jurisdiction of the current Rome Statute, prosecuting terror in this way is insufficient as it leaves gaps of unprotected conduct. Adding terrorism to the core crimes of the Rome statute would fill in these gaps and ensure that acts of terror do not go unpunished. It is likely true that even after adding terrorism to the Rome Statute very few cases would be brought to the ICC due to the various problems with prosecuting terrorism in the ICC listed above. Despite these problems, adding terrorism to the Rome Statute is worthwhile. The ICC has always been intended to be a court of secondary jurisdiction or a court of last resort. The ability of the ICC to prosecute terrorism would not be created for the purpose of prosecuting suspected terrorists instead of the United States military tribunal. Rather, the purpose would be for the ICC to be able to step in when a country is unwilling to prosecute or is not able to prosecute an act of terror, to ensure that in the name of justice acts of terror do not go unpunished.