

Should Terrorism be Regarded as an International Crime?

An Examination of the Theoretical Benefits and the Practical Reality

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Introduction

An international crime is 'an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances'.¹ This essay will firstly examine whether proposed definitions of terrorism as a crime under customary international law should be accepted, and then discuss whether terrorism should fall within the jurisdiction of the International Criminal Court (ICC). It will examine the arguments for and against, including the potential to politicise the Court, the effect on the war on terror, the benefits to defendants and the impact on the role of the Security Council. Ultimately, this essay will conclude that whilst adding terrorism to the ICC's jurisdiction could have an overall benefit, the practical reality renders this difficult to accomplish.

Terrorism in Customary International Law

To determine whether terrorism should be an international crime, it is important to establish a definition of terrorism. Traditionally, terrorism has been criminalised via a series of transnational treaties, which criminalise the *modus operandi* used by terrorists.² However, these treaties do not provide a general definition of

terrorism. Therefore, it is important to focus on treaties which seek to create a general definition of terrorism, as the specific definitions would criminalise that specific act, such as the hijacking of an aeroplane, rather than the broader concept of terrorist acts, which may take many different forms.³ Therefore, the two most important definitions to consider are found in The Convention for the Suppression of the Financing of Terrorism, as it is the most widely ratified treaty containing a general definition of terrorism, and the *Interlocutory Decision on the Applicable Law*, as this decision argued that terrorism already existed as a crime under customary international law.⁴

The Convention for the Suppression of the Financing of Terrorism includes a close generic definition of terrorism,⁵ however, it only applies in situations of armed conflict, and acts of terrorism can already be categorised as war crimes in this context.⁶ It is important to note that this definition did not have widespread consensus at its creation.⁷ Instead, most states ratified the Convention in response to United Nations Security Council Resolution 1373, which imposed an obligation on states to ratify it following 9/11.⁸ Therefore, this definition is unlikely to have strong support from states for the basis

1 *Re List and Others (US Military Tribunal at Nuremberg)* [1948] Case No 7, 1241.

2 Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019) 324.

3 Alan Greene, 'Defining Terrorism: One Size Fits All?' (2017) 66 ICLQ 411, 415-16.

4 STL-11-01/1/AC/R176bis [85].

5 (adopted 10 January 2000, entered into force 10 April 2002) art 2(1).

6 Michael P Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects' (2004) 36 Case Western Reserve JIL 359, 363.

7 Naomi Norberg, 'Terrorism and International Criminal Justice: Dim Prospects for a Future Together' (2010) 8 Santa Clara JIL 11, 24.

8 UN Doc S/RES/1373, 3(d).

of a crime of terrorism in international criminal law. Considering that states opted against including a crime of terrorism in the Rome Statute, it seems unlikely that they would agree on including a definition that they were largely required to ratify. Furthermore, the ICC already has jurisdiction over attacks aimed at civilians during armed conflict.⁹ As such, this definition should not be used to form the basis of defining terrorism as an international crime.

It has been argued that terrorism is already a crime under customary international law. The Appeals Chamber of the Special Tribunal for Lebanon (STL) concluded that the international crime of terrorism consisted of the perpetration or threatening of a criminal act, the intent to spread fear amongst the population or to coerce a government to take an action or refrain from taking one, and the involving of a transnational element.¹⁰ However, the Rome Statute does not allow the ICC to rely on customary international law,¹¹ and so this definition would still need to be transposed into the Statute. This essay argues that the STL definition should not be transposed as it is overinclusive and may encompass acts that are not within the understanding of terrorism. For example, a protest at another state's embassy where damage to property occurs may be included under this definition if the protest is to influence the embassy state's actions. Protests in Germany regarding Israel's actions towards Palestine have turned violent, with flags burned and stones thrown towards police officers.¹² In this case, there is the perpetration of a criminal act in the stone throwing, the intent to coerce a government to refrain from taking action, and arguably a transnational element should any of the offenders not be German nationals. These actions should not be labelled as 'terrorism' under international criminal law, as they are politically legitimate. Broadening the definition this wide could see all manners of protest included under international criminal law if the protest turned violent. These situations should instead be dealt with under domestic criminal law. The role of the ICC is to prosecute and deter the most serious crimes of concern to the international community.¹³ If terrorism is to be added to its jurisdiction, it must meet a threshold requirement of some kind to ensure that situations like protests turning violent are not on the same level as war crimes, crimes against humanity, and genocide.

Cassese claimed that terrorism was a crime under customary international law if: the act committed is already criminalised under domestic law; the conduct is transnational in nature; the goal of the act is to spread terror; the act is based on political, religious, or ideological motivations; and the act is carried out with the toleration or support of another state.¹⁴ However, this definition may be underinclusive, as it only encompasses terrorist acts which are carried out by the support or tolerance of another state. This excludes much of the actions of contemporary terrorism, where attacks by lone actors have higher fatalities than those committed by members of terrorist organisations.¹⁵ However, should this definition be

regarded as encompassing customary international law, instead of merely an ICC definition, it could allow for universal jurisdiction to be exercised when attacks are carried out with the support of a host state that is not willing to prosecute the perpetrators. This could potentially deter states from aiding terrorist organisations to carry out proxy wars, such as the conflict between Iran and Saudi Arabia.¹⁶ It would not remove the surrounding debate regarding national liberation movements,¹⁷ particularly where movements are supported by external states, such as Libya supplying arms to the Irish Republican Army,¹⁸ or China training members of the uMkhonto we Sizwe during apartheid in South Africa.¹⁹ As such, this definition would be preferable to the STL one as a crime under the Rome Statute, as it could allow prosecutions of instances of state-sponsored terrorism. However, it does not solve the disagreement amongst states as to whether national liberation movements should be regarded as terrorists.²⁰

Terrorism under the ICC

The previous section discussed two definitions of terrorism argued to have the status of customary international law and examined specific arguments for whether these two definitions should be incorporated into the Rome Statute. This section will appraise the merits of ICC jurisdiction over terrorism, notwithstanding disagreements over a precise definition.

One of the main issues regarding incorporating terrorism as an international crime is that the ICC has no enforcement body and relies on state co-operation to prosecute individuals.²¹ Furthermore, it has no intelligence service. Therefore, it would need to rely on intelligence gathered from domestic intelligence agencies as evidence for its prosecution. Governments may be reluctant to hand over this information, as the defendant would likely be granted access to it to build their defence.²² However, this problem may be overstated. States which have extensively gathered evidence regarding terrorism are likely to be able to prosecute terrorists after an attack has occurred. Indeed, the goal of intelligence gathering is to prevent an attack occurring in the first place.²³ If a state has the resources to focus on the prevention of attacks, it likely also has the resources to prosecute an attack in its domestic jurisdiction. This does not render the ICC irrelevant—the Court is one of last resort that acts complimentary to domestic legal systems.²⁴ Furthermore, the role of the Court is not to prevent attacks, but to prosecute after they occur. Therefore, should there be evidence that the attack took place, it may not need access to intelligence gathered before the commission of the act to aid in its prosecution.

more-severe-than-those-who-are-affiliated-with-groups/> accessed 26 December 2021.

16 Jonathan Marcus, 'Why Saudi Arabia and Iran are bitter rivals' *BBC News* (16 September 2019).

17 Sami Zeidan, 'Desperately Seeking Definition: The International Community's Quest for Identifying the Spectre of Terrorism' (2003) 36 *Cornell ILJ* 491, 492.

18 David McCullagh, Conor McMorrow, and Justin McCarthy, 'Extent of Libyan backing for IRA "shocked" British' *RTÉ News* (28 December 2021).

19 Stephen Ellis, 'The Genesis of the ANC's Armed Struggle in South Africa 1948-1961' (2011) 37 *JSAS* 657, 672.

20 *US v Yousef* 327 F.3d 56 C.A.2(NY) 2003, 84.

21 Rome Statute (n 9) art 86.

22 Jonathan Hafetz, 'Terrorism as an International Crime?: Mediating between Justice and Legality' (2015) 109 *ASIL Proceedings* 158, 161.

23 Andrew Ashworth and Lucia Zedner, *Preventative Justice* (Oxford University Press 2014) 171.

24 Rome Statute (n 9) Preamble.

9 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute) art 8(b), art 8(c).

10 *Interlocutory Decision on the Applicable Law* STL-11-01/1/AC/R176bis [85].

11 (n 9) art 21.

12 Kate Connolly, 'Anti-Israel protests in Germany prompt calls for antisemitism crackdown' *The Guardian* (London, 17 May 2021).

13 Rome Statute, Preamble.

14 Antonio Cassese and Paulo Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 150–51.

15 Noah Turner, Steven Chermak, and Joshua Freilich, 'Attacks from lone terrorists in the US are more severe than those who are affiliated with groups' (*LSE US Centre*, 25 June 2021) <<https://blogs.lse.ac.uk/usappblog/2021/06/25/attacks-from-lone-terrorists-in-the-us-are->

A second reason as to why the Court would not be best placed to adopt jurisdiction for a crime of terrorism is because the Court has faced criticism that it is politically motivated,²⁵ and terrorism is an inherently political label.²⁶ However, it has equally been argued that incorporating a crime of terrorism would remove contentious cases from domestic courts, and the ICC could be seen as a more impartial institution than a domestic court.²⁷ When considering the extent of the critiques directed towards the Court, the argument that adding terrorism to its jurisdiction would result in the Court being perceived in a more favourable manner is not a convincing one. As the ICC has faced numerous criticisms of being a political court and one that is dominated by powerful states,²⁸ it seems unlikely that adding a new crime of terrorism could help alleviate these fears. Indeed, as the Court is one of last resort, it is likely that its prosecutions would focus on individuals who commit terrorist acts in states that do not have the ability to prosecute for these crimes.²⁹ This would again steer the Court's focus towards Global South states, further adding fuel to the claims that the Court targets African states.³⁰ Thus, should the Court adopt jurisdiction over terrorism, it is extremely unlikely to help end the view that terrorism prosecutions can be politically motivated, as the exact opposite accusations have been directed at the Court since its inception. The extent to which these accusations are true is for another discussion, but they are there and cannot be ignored by international criminal law. As such, this points to evidence that terrorism should not be considered under the Court's jurisdiction.

Nevertheless, there are four clear benefits in allowing the ICC to prosecute terrorism. First, it could help end impunity for acts of state-sponsored terrorism. For instance, the British Army helped loyalist paramilitaries in Northern Ireland to kill civilians during the Troubles.³¹ Despite UK courts finding that there was a breach of the European Convention of Human Rights through the state's failure to adequately investigate certain instances during the Troubles,³² the UK has yet to begin a public inquiry into the matter. Allowing the ICC to have jurisdiction over terrorism would permit the Court to intervene where the domestic state fails to hold its actors accountable for such crimes.³³ This complies with the objectives of the ICC, which seeks to end impunity for the perpetrators of serious violations of international criminal law, including those in senior positions within states.³⁴ Thus, incorporating terrorism into

the Rome Statute could ensure that there is no impunity for acts of state-sponsored terrorism which the state refuses to investigate for its own political agenda.

Secondly, incorporating terrorism into international criminal law could help restrain the growing military response in the current war on terror.³⁵ The current military approach has seen mass human rights violations against suspected terrorists and civilians alike, with legal advisors stating that George W Bush had unlimited power to respond to 9/11,³⁶ and potentially issuing warrants to torture suspects if required.³⁷ Furthermore, innumerable civilians have been killed in the war on terror, with no prosecutions for any instance of wrongful death.³⁸ Including the crime of terrorism within the ICC's jurisdiction could encourage states to seek accountability through legal means, as opposed to the current route where *jus ad bellum* concepts are being stretched beyond recognition. Whilst the US is not a party to the Rome Statute, and has a history of opposing the Court,³⁹ it has also offered rewards for information leading to the capture of people subject to arrest warrants by the ICC, such as Joseph Kony.⁴⁰ Thus, the US still may choose to engage with the ICC on this issue in order to preserve an image of a law-abiding nation. In addition, whilst the US is not party to the Rome Statute, many states engaging in militaristic responses to the war on terror are, such as the UK, France, Germany, Australia, Canada, and the Netherlands. Therefore, adding terrorism to the ICC's jurisdiction would perhaps reduce the military response on terrorism, and encourage a legal response instead.

Thirdly, the ICC would ensure that the rights of people accused of terrorism would still be upheld. The accused is entitled to the presumption of innocence,⁴¹ guilt must be proven beyond reasonable doubt, and a range of other measures exist to protect their rights.⁴² In contrast, the UK has introduced crimes that allow for prosecution where articles are possessed in circumstances giving rise to a reasonable suspicion that it is for the purpose of the commission, preparation, or instigation of an act of terrorism,⁴³ or impose highly restrictive measures on individuals not convicted of a crime.⁴⁴ These instances can create feelings of injustice and exclusion, which in turn trigger some people to support terrorist causes.⁴⁵ Human rights must apply to all individuals equally, and it is important to ensure that these rights extend to those people who have committed heinous acts, or to whom it would be undeniably convenient to revoke rights in the name of national security.

25 Kevin Jon Heller, 'Poor ICC Outreach – Uganda Edition' (*Opinio Juris*, 22 September 2015) <<http://opiniojuris.org/2015/09/22/poor-icc-outreach-uganda-edition/>> accessed 30 December 2021.

26 Jørgen Staun, 'When, how and why elites frame terrorists: a Wittgensteinian analysis of terror and radicalisation' (2010) 3 *Crit Stud Terror* 403, 411.

27 Tim Stevens, 'International Criminal Law and the Response to International Terrorism' (2004) 27 *UNSW LJ* 454, 480–81.

28 Steven Roach, 'How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy' (2013) 19 *Global Governance* 507, 514.

29 Jonathan Hafetz, *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge University Press 2018) 179.

30 Benson Chinedu Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa' (2014) 7 *African J Leg Stu* 351, 353.

31 John Stevens, 'Stevens Enquiry 3: Overview and Recommendations' (17 April 2003) [4.7].

32 *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7.

33 Rome Statute (n 9) Preamble.

34 *The Prosecutor v Kenyatta* (ICC-01/09-02/11), Partially Dissenting Opinion of Judge Ozaki [11].

35 Kathleen Maloney-Dunn, 'Humanising Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC' (2010) 8 *Santa Clara J Int L* 69, 72.

36 Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) 240.

37 Alan Dershowitz, 'Want to Torture? Get a Warrant' (*San Francisco Chronicle*, 22 January 2002).

38 Azmat Khan, 'Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes' *The New York Times* (New York, 18 December 2021).

39 Lilian Faulhaber, 'American Servicemembers' Protection Act of 2002' (2003) 40 *Harv J on Legis* 537.

40 Office of Global Criminal Justice <<https://2009-2017.state.gov/j/gcj/wcrp/206078.htm>> accessed 1 January 2022.

41 Rome Statute (n 9) art 66.

42 *ibid* art 67.

43 Terrorism Act 2000, s 57.

44 Terrorism Prevention and Investigation Measures Act 2011.

45 Press Conference by Special Rapporteur on Human Rights and Countering Terrorism (22 October 2008) <https://www.un.org/press/en/2008/081022_Scheinin.doc.htm> accessed 1 January 2022.

Finally, incorporating terrorism under the Rome Statute could help to rein in the UNSC's quasi-legislative actions regarding counter terrorism measures.⁴⁶ UNSC resolutions combatting terrorism originally had no concern for human rights,⁴⁷ which was challenged by regional courts seeking to uphold their own human rights standards.⁴⁸ The UNSC is the body responsible for the maintenance of international peace and security,⁴⁹ however it is debateable as to whether global terrorism is truly a threat to international peace. The UNSC was formulated to prevent a nuclear conflict between the world's superpowers, and terrorism does not pose the same level of existential threat, save for perhaps ISIS to Syria and Iraq. However, this has been the exception rather than the norm. As such, granting the ICC jurisdiction over terrorism would help to wrestle power away from the UNSC.

Of course, the above points are all hypothetical benefits to adding terrorism to the ICC's jurisdiction. The reality is far more complicated than that. Considering that the Kampala Review Conference decided against considering the crime of terrorism, it seems unlikely that sufficient political will is there to grant the ICC jurisdiction over this matter. As such, it is better not to adopt the crime into the Rome Statute at this current time, as it will inevitably fail without the support of states.

Conclusion

This essay has examined current proposed definitions of terrorism as an international crime, namely the decision of the STL and Cassese's academic definition. Neither of these definitions should form the basis for an international crime of terrorism, although the academic definition would be preferable to the one formulated by the STL. Ultimately, whilst there are numerous valid reasons for including terrorism within the Court's jurisdiction, it should not, and indeed cannot, be done until there is sufficient enthusiasm from state parties to the Rome Statute. As there is currently very little, it would be better to leave the matter until the Court can effectively combat and prosecute terrorism.

⁴⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56 [96].

⁴⁷ Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaption and Embedded Ideas' (2007) 29 HRQ 489, 496.

⁴⁸ *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] C-402/05.

⁴⁹ UN Charter, art 24(1).