

EXPLORING THE POSSIBILITY OF PROSECUTING TERRORISM AT INTERNATIONAL LEVEL

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INTRODUCTION

The international community has been discussing for decades about effective responses, sometimes judicial, to terrorism at international level. A first attempt for the establishment of an international criminal court with jurisdiction over terrorist acts occurred with the 1937 Convention for the Prevention and Punishment of Terrorism, which, however, never entered into force.² Since the 1960s, a number of UN Resolutions have condemned various forms of terrorist acts,³ but none of them managed to achieve consensus on the definition of terrorism. The international tools available in the fight against terrorism are still scattered in 16 international and 14 regional instruments⁴ with scope limited on specific terrorist acts.

In the last few years, the nature of terrorist attacks has changed with religious motivations becoming more and more often the drivers of such attacks.⁵ National judicial authorities often lack the capacity or the willingness to prosecute terrorism, especially since terrorism is increasingly internationalised with a group from one country operating in another or receiving training or arms from another country. Additionally, the lack of acceptance of a general definition of terrorism hinders international judicial cooperation. In light of this, the

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² Under Article 1 (2) of the Convention, terrorism was defined as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or groups of persons or the general public”. The idea for an international Court with jurisdiction over terrorist acts was only mentioned again in 1994 when the Draft Statute of the International Law Commission (ILC) foresaw an international court with jurisdiction over treaty crimes “which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern” and which included a number of terrorist acts, such as the unlawful seizure of an aircraft, the taking of hostages, and unlawful acts against the safety of maritime navigation. See Draft Statute for an International Criminal Court, Yearbook of the International Law Commission, Vol. II (Part Two) 1994, Art. 20(e) and Appendix II.

³ For example, GA Res. 46/51 (1991), GA Res. 49/60 (1994), GA Res. 59/195 (2004), GA Res. 59/191 (2004), SC Res. 579 (1985), SC Res. 1526 (2004), SC Res. 1566 (2004), SC Res. 1617 (2005).

⁴ Extract from the Report of the Secretary-General on Measures to Eliminate International Terrorism, UN Doc. A/63/173 and Add.1, at 18 (2009).

⁵ D. Rapoport, The Four Waves of Rebel Terror and September 11, *Anthropoetics* 8(1) (2002), available at www.anthropoetics.ucla.edu/ap0801/terror.htm#n1 (Last accessed on 29/08/2016)

debate as to potential responses to terrorism, one of which is the recognition of individual international criminal responsibility, becomes relevant again. This paper examines the possibility of prosecuting at international level acts of terrorism, the personal or territorial scope of which transcends the borders of a State and occur on such a large scale that they become a concern for the whole international community. For the purpose of examining whether terrorism could be prosecuted as an international crime, the Statute of the International Criminal Court (ICC) will be used, for being the latest effort for an international judicial response to terrorism.

EXCLUSION OF TERRORISM FROM THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Preparatory Committee on the Establishment of an International Criminal Court rejected in 1998 the inclusion of terrorism in the ICC Statute on the basis of not having had the “time to examine them as thoroughly as the other crimes”.⁶ However, Resolution E of the Final Act of the Rome Conference⁷ left the possibility of its inclusion in the future open. In particular, it recognized that “terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community” and invoked among the main reasons for this exclusion: the view of terrorism as not constituting a serious international crime; the fear that such an inclusion would politicize the Court; the regard of the national courts as more effective fora to prosecute terrorism; and most importantly, the lack of a common definition,⁸ to which the other reasons are to a certain extent related.

During the Review Conference held in Kampala in 2010, the issue revived with a proposal of the Netherlands suggesting the inclusion of the crime of terrorism under the crimes that are already within the Court’s jurisdiction.⁹ However, during the Working Group of the

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998), at 21, fn. 25.

⁷ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 (1998).

⁸ A. Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’, (2001) 12 *European Journal of International Law* 993, 993.

⁹ ICC-ASP/8/43/Add.1 (2009), p. 12-13; the Dutch delegation suggested that “the time [had] come to take the necessary preparatory steps, in order to defeat impunity for acts of terrorism”.

Assembly of State Parties on Amendments, which was to serve as a filtering mechanism of the issues that would be discussed at the Review Conference, it was decided to not forward this proposal. Although several delegations were supportive of the international efforts to fight terrorism, it was considered as premature to include terrorism in the ICC Statute with no concrete definition and was left to the UN to agree on a definition first.¹⁰ The ICC Assembly of States concluded that the existing anti-terrorist conventions are not sufficient to define terrorism as they define a multitude of acts constituting terrorism but leave unclear which other acts could be added.¹¹ However, the same way one could say that it is uncertain which acts would constitute war crimes or crimes against humanity, as the possibilities for including more than the provided sub-offenses, is endless. Terrorism has general characteristics, same as war crimes and crimes against humanity, as will be explained in the next section. The fear of risking the universality of the Court due to the political character of the crime was also mentioned.¹² However, fears of politicization regarding terrorism are not more relevant to terrorism as to any other crime prosecuted before the ICC.

ARE WE REALLY SO FAR FROM A COMMON DEFINITION OF TERRORISM?

The 1999 Convention for the Suppression of the Financing of Terrorism,¹³ which is one of the few documents to view terrorism in its entirety, and is until today “regarded as the closest that the United Nations has come to defining terrorism”¹⁴ contains a two-fold approach to the definition of terrorism: in Article 2(1) (a) it prohibits specific acts, and in Article 2(1) (b) it contains an all-inclusive provision, that does not refer to the political nature of terrorism:

“Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

¹⁰ ICC-ASP/8/20, paras. 43-44.

¹¹ ICC-ASP/8/20, para. 45.

¹² *Ibid.*, para. 46.

¹³ UN GA Res. 54/109 (1999).

¹⁴ L. Martinez, ‘Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems’ (2002-2003) 34 *Rutgers Law Journal* 1, 6.

The definition contained in the 1999 Convention does not differ much from the one in the 1937 Convention. Moreover, some Resolutions of the UN General Assembly,¹⁵ as well as regional Conventions¹⁶ define terrorism in a similar way. In fact, the members of a working group established by the UN General Assembly with the purpose of drafting a comprehensive Convention on terrorism nearly reached consensus on a definition of terrorism,¹⁷ but the problem was the recognition of exceptions to it.¹⁸ Therefore, what seems therefore to not be determined is not the definition of terrorism itself, but rather one of its exceptions,¹⁹ namely

¹⁵ For example, the UN Doc.A/RES/56/88, which reiterates the definition of the 1994 Declaration of Measures to Eliminate International Terrorism, and even recognizes “all acts, methods and practices of terrorism as criminal”. Still, however, the GA Res.49/60 (1994),UN Doc. A/RES/49/60, refers to political purposes as an element of the definition.

¹⁶ For example, Article 1(2) of the 1998 Arab Convention for the Suppression of Terrorism defines terrorism as “Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources”.

¹⁷ See Art. 2 Draft Comprehensive Convention Against International Terrorism, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37, at 6 (2002):

“1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or

(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, 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.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article. 4. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of the present article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of the present article.”

¹⁸ M. Scharf, ‘Terrorism on Trial: Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects’, (2004) 36 *Case Western Reserve Journal of International Law* 359, 360.

¹⁹ A. Cassese, *International Criminal Law* (Oxford University Press 2008), pp. 214-215, where Cassese makes an interesting comparison between the lack of agreement on the exceptions from the definition of terrorism and the exception of duress in the case of murder, arguing that claiming that no definition of terrorism exists because of the disagreement on this exception, would be *mutatis mutandis*, as if claiming that there is no definition of murder.

whether the cases where terrorist acts are conducted against foreign occupation or oppressive regimes should be exempted from the definition of terrorism.

However, “it is [actually] a profound insult to the right of self –determination to suggest a dichotomy between condemning terrorism and affirming basic human rights law”, including the right of all peoples to self-determination.²⁰ The UN High-level Panel notes in this regard that “there is nothing in the fact of occupation that justifies the targeting and killing of civilians”.²¹ As it was stated during the launch of the UN Global Counter-Terrorism Strategy, “[t]he passing of the resolution on the United Nations Global Counter-Terrorism Strategy represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated.”²² The fact that an agreement on a common definition of terrorism has not been reached is therefore rather due to the political unwillingness of States to accept that terrorism is under no circumstances justified. Interestingly, at national or regional level there seems to be a consensus that terrorism is to be punished by whomever committed and for whatever purposes.

A definition within the lines of the one included in the 1999 Convention setting out as objective elements the conduct of a criminal act and the civilian status of the victim, and as mental requirements the general intent to commit the underlying act and the special intent to cause terror, seems sufficient. Following these lines, the Special Tribunal for Lebanon in 2011 concluded *obiter dictum* that:

“...a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”²³

²⁰ J. Paust et al, *International Criminal Law: Cases and Materials* (2007), 830-831.

²¹ Report of the Secretary General’s High-level Panel on Threats, Challenges and Change, *A more Secure World: Our Shared Responsibility*, para.51.

²² Available at www.un.org/terrorism.

²³ STL-II-Oll1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 85.

EXPLORING WAYS OF PROSECUTING INTERNATIONAL TERRORISM AT INTERNATIONAL LEVEL

Terrorism as a Distinct International Crime?

Considering that the agreement on a common definition of terrorism is not that far if political obstacles are overcome, it should be considered which the prosecution of terrorism as a distinct crime would meet the threshold of severity required explicitly by the ICC Statute.²⁴ The drafters of the ICC Statute decided that only crimes which had been recognized in international customary law would be included in the Statute, so that their prosecution would be indeed a universal concern and the Court's jurisdiction would not be easily challenged with respect to them.²⁵ Terrorism, which was perceived to lack a general definition, could not be regarded as recognized in international customary law.²⁶

Individual criminal responsibility could also rise from serious violations not only of customary law, but also of applicable treaty law, as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY)²⁷ and of other international tribunals shows.²⁸ However, terrorism was only recognized as a crime under national law and none of the type-specific international treaties on terrorism has established individual criminal responsibility.²⁹ Indeed, the sectional international treaties simply impose obligations on the participating States and do not establish the criminal responsibility for the perpetrators of such acts. Even the draft Comprehensive Convention on Terrorism which provides a general definition of terrorism, still foresees its prosecution only at national level.³⁰ A 1985 UN

²⁴ ICC Statute, Article 1: “[The ICC] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”

²⁵ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 58. See also C. Agius & D. Attard, ‘For an Effective International Law: From the Preparatory Committee to the Diplomatic Conference for the Establishment of an International Criminal Court- The Commitment of the International Community’, 2(1) *Mediterranean Journal of Human Rights* (1998), 99, 102, according to whom crimes of international concern raise erga omnes obligations to all States.

²⁶ Cassese disagrees on this point arguing that the prohibition of terrorism has reached the status of customary law. See A. Cassese, ‘Terrorism as an International Crime’, in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (2004), 218.

²⁷ For example, ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-T, 5 December 2003, paras. 97-105.

²⁸ H. Duffy, *The ‘War on Terror’ and the Framework of International Law* (2005), 88.

²⁹ M. Saif-Alden Wattad, ‘Is Terrorism a Crime or an Aggravating Factor in Sentencing?’ (2006) 4 *Journal of International Criminal Justice* 1017, 1026.

³⁰ See Draft Comprehensive Convention Against International Terrorism, Article 2, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN Doc. A/57/37, at 6 (2002), Art.2 (Annex II) and Preamble 12 (Annex I).

General Assembly Resolution, which condemns all acts of terrorism and recognizes that terrorism is a criminal act,³¹ may be more relevant for the view of terrorism as a distinct international crime, but without foreseeing an enforcement mechanism it is not sufficient. Terrorist activities may have also been recognized as an offence against the peace and security of mankind in the 1954 Draft Code of Offences against the Peace and Security of Mankind³², but apart from the fact that reference was only made to state terrorism, a later draft of the Code included acts of terrorism only under the heading of war crimes.³³

Although the Policy Working Group on the United Nations and Terrorism in their 2002 Report, quite boldly, suggested that “the struggle against international terrorism will be further enhanced if the most serious crimes committed by terrorists are tried before the International Criminal Court”,³⁴ terrorism does not seem to qualify, yet, as a distinct international crime. No progress was actually made in view of the 2010 Review Conference or thereafter. Recognizing, however, the seriousness of the threat terrorism poses for the international community, the rest of this part examines whether terrorism can be prosecuted under the headings of the international crimes already within the ICC jurisdiction.

As Crime against Humanity

1. Crimes Against Humanity and Their Relation to Terrorism- Systematic terrorism was considered as a crime against humanity for the first time in 1919 at the Versailles Peace Conference Commission.³⁵ Since then the UN has often characterized acts of international terrorism as crimes against humanity³⁶. The International Military Tribunal at Nuremberg (IMT), the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have prosecuted acts contributing to the campaign of terror pursued by State authorities as a

³¹ UN Doc. A/RES/40/61 (1985).

³² Draft Code of Crimes against the Peace and Security of Mankind *Yearbook of the International Law Commission II* (1954), Article 2(6).

³³ Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission II* (1996), Article 20(f)(iv).

³⁴ Report of the Policy Working Group on the United Nations and Terrorism Annex to A/57/273 S/2002/875, para. 26.

³⁵ L. Martinez, ‘Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems’ (2002-2003) 34 *Rutgers Law Journal* 1, 39.

³⁶ For example, Res. GA of OAS (30 June 1970) Doc. AG/RES. 4 (I-E/70) Rev.1.

crime against humanity.³⁷ However, the proposal made by India and other countries to include terrorism under the heading of crimes against humanity was explicitly rejected by the majority of the delegations at the Rome Conference.³⁸

In order for terrorism to be prosecuted at the ICC, it must satisfy the conditions attached to the crimes against humanity as included in Article 7 of the Court's Statute. The *actus reus* elements are: i) the commission of at least one of the underlying offences mentioned in the article, ii) in the frame of an attack, iii) committed on a widespread or systematic basis, and iv) against any civilian population, while the *mens rea* elements are the intent to commit the underlying offence³⁹ and knowledge of the attack.

2. Application of the Elements of Crimes Against Humanity on Terrorism- The first concern when examining whether terrorism fits the definition of the crimes against humanity is to see which of the underlying offences could constitute terrorist acts. *Murder* (sub-offence a) seems to be of high relevance for terrorism, as very often terrorists resort to it with the aim to spread terror. Moreover, *deportation or forcible transfer of the population* (sub-offence d) although not a method to which terrorists frequently resort, has been recognized as a form of state terrorism by the IMT, the International Military Tribunal for the Far East (IMTFE) and the ICTY jurisprudence.⁴⁰ *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law* (sub-offence e) is also recognized as a form of state terrorism, as for example in the case of concentrations camps for political opponents,⁴¹ but also as covering the more classic form of terrorism of hostage-taking.⁴² Similarly, *enforced disappearance of persons* (sub-offence i), *torture* (sub-offence f) and *persecution* (sub-offence h) can also be used by terrorists. Even *sexual crimes* (sub-category g), could be part of a policy of state terror.⁴³

³⁷ ICTY, *Prosecutor v Krstić*, Judgement, IT-98-33-T, 2 August 2001, paras. 670-671.

³⁸ A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', (2001) 12 *European Journal of International Law* 993, 994. By contrast, other treaty crimes, such as torture and apartheid, although not included as separate crimes in the ICC Statute, entered the jurisdiction of the Court as sub-categories of the crimes against humanity. Art. 7(1)(f) and (j).

³⁹ Article 30(1) of the Statute: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

⁴⁰ ICTY, *Prosecutor v Krstić*, Judgement, IT-98-33-T, 2 August 2001, paras. 670-671.

⁴¹ R. Arnold, 'The Prosecution of Terrorism as a Crime Against Humanity', 64 *Heidelberg Journal of International Law* (2004), 974, 996.

⁴² R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 267-268.

⁴³ *Ibid.*, 271.

Last but not least, the term *inhumane acts* (sub-category k) leaves some discretion to the Court to punish acts that although not explicitly included in the category of crimes against humanity are of similar gravity to the offences explicitly mentioned.⁴⁴ Terrorism could constitute an inhumane offence,⁴⁵ at least in the cases where serious injuries to physical health are caused or where the aim to spread terror actually results in damages to mental health. In any case, this open provision shows that the enumeration of offences in Article 7 is not exhaustive.

Regarding the requirement of an attack, Article 7(2) (a) of the ICC Statute qualifies the attack to the existence of “a State or organizational policy to commit such attack”, which according to the clarification provided in the Elements of Crimes such policy exists when “the State or organization actively promote or encourage such an attack against a civilian population”. When applied to terrorist groups, the threshold of the organizational policy requires that the acts of terrorism occur within a wider campaign of violence organized by the group. Moreover, the attack must be widespread or systematic. International jurisprudence has viewed “widespread” as referring to the large-scale of the attack and the number of victims, whereas “systematic” as referring to the organized structure of the acts.⁴⁶ The attack must also be targeting predominantly civilian population.⁴⁷ As long as separate terrorist acts are in furtherance of the same policy, targeting “differently constituted members of the civilian

⁴⁴ R. Arnold, ‘The Prosecution of Terrorism as a Crime Against Humanity’, 64 *Heidelberg Journal of International Law* (2004), 974, 998. The difference of the inhumane acts and torture is related to the different degree of inflicted harm that each of these offences requires; while for the first the infliction of “great suffering, or serious injury” is sufficient, the latter requires severe “pain or suffering”. See R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 269.

⁴⁵ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 272.

⁴⁶ ICTY, *Prosecutor v Naletilić*, Judgement, IT-98-34-T, 31 March 2003, para.236. It has also been argued that killing important leaders can satisfy the requirements of “widespread” and “systematic”. See S. Ratner et al, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (2009), 61. However, at least “widespread” should be deemed a quantitative requirement so that it would be inappropriate to allow for such an interpretation, while systematic requires more than one incident.

⁴⁷ The notion of civilian encompasses not only those not taking part in the hostilities, but also those no longer taking part in the hostilities, “including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.”⁴⁷ See ICTR, *Prosecutor v Akayesu*, Judgement, ICTR-96-4-T, 2 September 2008, para.582 ICTY, *Prosecutor v Tadić*, Judgement, IT-94-1-T, 7 May 1997, para. 637; J. Fry, ‘Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction’, 7 *UCLA Journal of International Law & Foreign Affairs* (2002-2003), 179, 191. Note that the ad hoc tribunals have linked the characterization of a person as civilian to their specific situation at the moment of the occurrence of the attack rather than to their status under IHL. See ICTR, *Prosecutor v Bagilishema*, Judgement, ICTR-95-1A-T, 7 June 2001, para.79; ICTY, *Prosecutor v Blaškić*, Judgement, IT-95-14-Y-T, 3 March 2000, para.214.

population”⁴⁸ and any time gap between them are irrelevant for the determination of the existence of an attack.

The mental elements of the crimes against humanity consist not only of the intention to commit, at least, one of the underlying offences, but also, as mentioned in the Elements of Crimes, of the knowledge that the conduct was part of or of the intention that the conduct is part of a widespread or systematic attack directed against a civilian population, which does not mean that the perpetrator necessarily had “knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”. Therefore, a terrorist act could qualify as a crime against humanity, if:

- The act constitutes one of the underlying offenses mentioned above;
- It takes place within a wider campaign of violence in line with the terrorist group’s policy;
- It targets predominantly civilians;
- The perpetrator intended to commit the underlying offense and had some knowledge of the organisational policy of violence.

TERRORISM AS GENOCIDE

1. Genocide and its Relation to Terrorism - A serious consideration of terrorism as genocide emerged relatively recently in scholarship and the international jurisprudence does not have much to offer on the issue. Exceptionally, the Prosecutor in the *Kayishema* and *Ruzindana* case before the ICTR referred to the possibility of terrorist acts qualifying as genocide when they have resulted in serious physical or mental harm.⁴⁹

The definition of genocide as found in Article 6 of the ICC Statute reiterates the one included in Article 2 of the 1948 Genocide Convention,⁵⁰ which provided also for its prosecution by an international criminal court.⁵¹ The *actus reus* elements of genocide are: i) the commission of

⁴⁸ G. Niemann, ‘War Crimes, Crimes Against Humanity, and Genocide in International Criminal Law’, in P. Reichel (ed.), *Handbook of Transnational Crime & Justice* (2005) 204, 217.

⁴⁹ ICTR, *Prosecutor v Kayishema*, Judgment, ICTR-95-1-T, 21 May 1999, paras. 107,110.

⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide (1948).

⁵¹ Nevertheless, some parties to the Genocide Convention felt the need to make a reservation that prohibited the exercise of jurisdiction by foreign tribunals.

at least one of the offences included in Article 6 and ii) the contextual element found in the Elements of Crimes (ie. that the underlying offence must occur “in the context of a manifest pattern of similar conduct directed against that group” or be a conduct “that could itself cause such destruction”), while the *mens rea* elements: i) the intent to commit one of the underlying offences and ii) the special genocidal intent.

2. Application of the Elements of Genocide to Terrorism- The list of underlying offences included in Article 6 of the ICC Statute is exhaustive. Although all the five offences could potentially be used to cause terror, killing (offence a) and causing serious bodily or mental harm (offence b) would be of more relevance for terrorism, since the other three⁵² are rather dominated by the aim to cause the physical destruction of the group. The list of protected groups mentioned in the ICC Statute is the same with the one in the Genocide Convention and was intended to be exhaustive.⁵³ Therefore, acts against other groups, like those of political or cultural nature, which are often targets of terrorist groups, could generally be protected only under the heading of persecution as crimes against humanity.⁵⁴

The satisfaction of the general intent to commit the underlying offense is to be judged on a case-by-case basis. However, the second mental element, “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, clashes with the aim of terrorism. The phrase “to destroy” encompasses a physical or biological destruction.⁵⁵ Terrorist acts may result in physical or biological destruction of members of a group, but their aim of terrorism is primarily to cause terror. By contrast, acts of genocide may cause terror, but the main aim is the destruction of the group and terror is just an inevitable subsidiary consequence of these acts. For example, the IMT drew a distinction between concentration camps for political opponents and camps where the extermination of certain groups was attempted;⁵⁶ the first type of camps was viewed by the Court as terrorist acts punishable as crimes against humanity, while the second type was viewed as acts of genocide.

⁵² “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”; “Imposing measures intended to prevent births within the group”; “Forcibly transferring children of the group to another group”.

⁵³ R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2008), 170.

⁵⁴ See Article 7(1)(h) element 3 of the Elements of Crimes.

⁵⁵ ICTR, *Prosecutor v Kayishema*, Judgment, ICTR-95-1-T, 21 May 1999, para. 95.

⁵⁶ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 302.

TERRORISM AS WAR CRIME

1. War Crimes and Their Relation to Terrorism - Terrorism against civilians is explicitly prohibited as a method of warfare in Article 33 of the Geneva Convention IV, Article 51(2) of Additional Protocol I, as well as in Articles 4 and 13 of Additional Protocol II.⁵⁷ These treaties are perhaps the only international documents foreseeing international criminal responsibility for terrorism.⁵⁸ Geneva Convention IV and Additional Protocol I are more likely to address state terrorism, while Additional Protocol II is more suitable to address terrorist acts committed by non-state actors, as long as the non-state actor: constitutes “an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority”; can claim stable control over a territory; can carry out military operations in a continuous manner; and has the infrastructure to implement the provisions of the Protocol.⁵⁹

Even before the Geneva Conventions and Protocols were codified, the use of terror as a means of warfare against civilians was considered a war crime⁶⁰ by the 1907 IV Hague Convention, as well as by the jurisprudence of the IMT and the IMTFE.⁶¹ Acts of terrorism are also included under the heading of war crimes, as already mentioned earlier, in the 1996 Draft Code of Crimes against the Peace and Security of Mankind.⁶² More recently, the ICTY prosecuted terrorism as war crime,⁶³ although its Statute does not explicitly refer to it, while the Statutes of the ICTR⁶⁴ and the Special Court for Sierra Leone (SCSL)⁶⁵ include in their Statutes “acts of terrorism” under “Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”. It is noteworthy that both the ICTR and the SCSL relate to internal conflicts.

⁵⁷ The explicit prohibition of terrorism in the laws of war corroborates the position that terrorist acts should be prosecuted as crimes against humanity, since “what is forbidden in wartime cannot be admitted in peacetime”. See M. Di Filippo, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’, 19(3) *European Journal of International Law* (2008) 533, 544.

⁵⁸ H. Duffy, *The ‘War on Terror’ and the Framework of International Law* (2005), 91.

⁵⁹ ICRC Commentary on Additional Protocol II, Article 1(1).

⁶⁰ On the contrary, terrorist acts against combatants have always been considered a legitimate method of warfare. Accordingly, the prohibition of terrorism under the heading of war crimes must cover acts which are already illegal under the law of armed conflict. See Sébastien Jodoin, ‘Terrorism as a War Crime’ (2007) 7 *International Criminal Law Review* 77, 95.

⁶¹ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 100, 105.

⁶² Article 20(f)(iv).

⁶³ ICTY, *Prosecutor v Furundžija*, Judgement, IT-95-17/1-T, 10 December 1998, para.54.

⁶⁴ Article 4(d) ICTR Statute.

⁶⁵ Article 3(d) SCSL Statute.

Despite the general recognition of terrorism as a war crime, the ICC Statute does not include terrorism as a sub-category of the war crimes in Article 8. This seems to be a step backwards, especially since the prohibition of acts of terror in Articles 51(2) Additional Protocol I and 13(2) Additional Protocol II have been recognized by the ICTY Appeals Chamber as customary law giving rise to individual criminal responsibility already from the moment of their adoption.⁶⁶ Still, the non-inclusion of acts of terrorism in the Statute does not hinder the Court from exercising jurisdiction over terrorism when the conditions of war crimes are met.

Article 8 ICC Statute distinguishes four categories of war crimes: grave breaches (Art. 8(2)(a)) and other serious violations of the laws and customs of war (Art. 8 (2)(b)) during international armed conflicts, as well as serious violations of common article 3 of the Geneva Conventions (Art. 8(2)(d)) and other serious violations of the laws and customs of war (Art. 8(2)(e)) during non-international armed conflicts. Notably, war crimes are to be tried by the ICC “in particular when committed as part of a plan or policy or as part of a large-scale commission of such acts”.⁶⁷

2. Application of the Elements of War Crimes to Terrorism- Each of the articles 8(2)(a) and 8(2)(b) of the ICC Statute introduces an exhaustive list of war crimes which can occur during an international armed conflict. Terrorism fits five of the eight offences mentioned in the first category: willful killing (offence i), torture⁶⁸ or inhuman treatment (offence ii), willfully causing great suffering, or serious injury to body or health (offence iii), extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly (offence iv) and taking of hostages (offence viii).⁶⁹ From the 22 offences included in the second category, acts of terrorism can be regarded as attacks directed against civilians, humanitarian personnel, or resulting in the loss of civilians (offences i ,iii, iv), killing or wounding of civilians (offence xi) or of combatants hors de combat (offence vi), attacks against civilian objects and buildings for non-military purposes (offences iii, v, ix, xvi),

⁶⁶ ICTY, *Prosecutor v Galić*, Judgement, IT-98-29-A, 30 November 2006, para. 87.

⁶⁷ See Article 8 ICC Statute.

⁶⁸ Unlike torture as a crime against humanity, torture as a war crime requires the existence of a specific purpose; among the purposes mentioned is the intimidation of the victims, which satisfies the requirement in cases of terrorism. See R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 176, 269.

⁶⁹ L. Martinez, ‘Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems’ (2002-2003) 34 *Rutgers Law Journal* 1, 45. See also R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 179-180, where the author argues that considering “unlawful deportation or transfer or unlawful confinement” (offence vii) as a form of terrorism is not excluded, but is not “a typical expression of terrorism”.

destroying property (offence xxii), degrading treatment (offence xxi), as well as using a number of illegal weapons (offences xvii, xviii, xix, xx).⁷⁰ However, these offences do not correspond to traditional types of terrorist acts.⁷¹

Additionally, Articles 8(2)(c) and 8(2)(e) include exhaustive lists⁷² of offences during an armed conflict of non-international character which constitute serious violations of common article 3⁷³ and other serious violations of the laws and customs of war, respectively. With respect to the offences of the first category, violence to life and person (offence i), degrading treatment (offence ii) or taking of hostages (offence iii) can be regarded as terrorist acts.⁷⁴ With respect to the second category, although its provisions could potentially be used for terrorizing purposes, such as attacks against civilians or humanitarian personnel or buildings (offences i, ii, iii),⁷⁵ their relevance to terrorism is rather low.⁷⁶

The existence of an armed conflict is necessary for the establishment of a war crime;⁷⁷ an international one, which includes inter-state conflicts and self-determination wars,⁷⁸ in the cases of article 8(2)(a) and (b), and an internal one, which exceeds the threshold of “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature”,⁷⁹ in the cases of article 8(2)(c) and (e). With respect to the passive personal scope of war crimes, the ICC Statute chose to refer to “protected persons” without providing for any further explanation. Therefore we have to rely on the relevant provisions in international humanitarian law and the past jurisprudence of international tribunals, which, unless otherwise provided, extends the protection to civilians,

⁷⁰ L. Martinez, ‘Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems’ (2002-2003) 34 *Rutgers Law Journal* 1, 45-46; R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 182-188.

⁷¹ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 180-181.

⁷² Once again the word “namely” should be interpreted as prohibiting the inclusion of more acts under these articles.

⁷³ Common Article 3, upon which Article 8(2)(c) ICC Statute is based, is said to “in effect [outlaw] terrorism”. L. Sunga, *The emerging system of international criminal law: developments in codification and implementation* (1997), 200.

⁷⁴ L. Martinez, ‘Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems’ (2002-2003) 34 *Rutgers Law Journal* 1, 48.

⁷⁵ *Ibid.*, 49.

⁷⁶ R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 193.

⁷⁷ *Ibid.*, 194.

⁷⁸ *Ibid.*, 114. Article 1(4) AP I extends the scope of its application to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination”.

⁷⁹ Article 8(2)(d) and (f) ICC Statute.

as well as to other categories of persons hors de combat.⁸⁰ It is worth mentioning that exceptionally unlawful attacks against military targets might qualify as terrorist acts, if spreading terror against civilians was the primary target.⁸¹

Concerning the *mens rea* of war crimes, in addition to the intent to commit at least one of the underlying acts, which is to be determined, again, on a case-by-case basis, the Elements of Crimes require that the perpetrator was “aware of the factual circumstances that established the existence of an armed conflict”.⁸²

In light of the above, a terrorist act could qualify as a war crime, if:

- The act constitutes one of the underlying offenses mentioned above;
- The group is party to an armed conflict of an international or non-international character;
- The act targeted civilians or other persons hors de combat;
- The perpetrator intended to commit the underlying offense and was aware of the factual circumstances that established the existence of an armed conflict.

CONCLUSION

The international community, despite having repeatedly recognized terrorism as a serious universal threat, still hesitates to transfer the prosecution of terrorist acts from national courts to an international court. Although terrorism can still not be deemed as a crime *per se* under international law, it could satisfy the conditions to be prosecuted as a crime against humanity or as a war crime. In fact, international tribunals have previously prosecuted acts of terrorism under these headings. Nevertheless, it could be useful for adherence with the principle of *nullum crimen sine lege* to explicitly include terrorism as one of the underlying offenses in the categories of crimes against humanity and war crimes in the next review conference of the

⁸⁰ N. Keijzer, ‘Terrorism as a Crime’, in W. Heere (ed.), *Terrorism and the Military: International Legal Implications* (2003), 115, 129; Arnold, *The ICC as a New Instrument*, supra note 4 R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), 75, 78.

⁸¹ ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-T, 5 December 2003, paras. 564-577.

⁸² Article 8 Introduction, Elements of Crimes. It is, however, clarified that the perpetrator does not need to be able to evaluate the conflict as international or internal or to be aware of the facts that gave to the conflict the characterization as international or non-international.

ICC Statute.⁸³ A commonly agreed definition could be useful for such an inclusion, which at the same time could open the road for more efficient cooperation between national judicial authorities.

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⁸³ According to Article 123(2), “any time [after the first Review Conference], at the request of a State Party and for the purposes set out in paragraph 1 [to consider any amendments to the Statute, including the list of crimes] the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.”