THE INTERNATIONAL CRIMINAL COURT (ICC) AND TERRORISM AS AN INTERNATIONAL CRIME

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INTRODUCTION

Today's symposium is entitled "From Nuremberg to Abu Ghraib." This title makes sense if understood as defining the period of time that is under consideration in this symposium: 1945 to 2004. However, if "Nuremberg to Abu Ghraib" was to be understood as a road sign, it should be corrected with a sticker reading "wrong way," and replaced with a sign reading "From Abu Ghraib to Nuremberg," or to its current equivalent: The Hague.

I will try to argue that the ICC can play a useful role in fighting terrorism, limited however to the most serious forms of terrorism. I will first give you a brief introduction to the ICC and to the changing nature of international terrorism. I will then discuss where we stand today on qualifying terrorist acts as "international crimes." Finally, I will highlight the relevance of the ICC in dealing with these crimes: the potential added value of the ICC, as well as some legal and political impediments.[1]

I. THE INTERNATIONAL CRIMINAL COURT AND THE CHANGING NATURE OF INTERNATIONAL TERRORISM

The International Criminal Court is an independent, permanent Tribunal, established by an international treaty known as the Rome Statute. Today, 97 States around the world, i.e. more than half of all States, are parties to that treaty. The primary mission of the Court is to investigate and prosecute individuals who commit the "most serious

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1. An extremely insightful book on the value added by the ICC to the fight against terrorism has been written by Roberta Arnold, a legal advisor within the Swiss Department of Defense. See ROBERTA ARNOLD, *The ICC as a New Instrument for Repressing Terrorism* (2004).

crimes of concern to the international community as a whole."[2] These crimes are, for the time being, crimes against humanity, genocide, war crimes, and the crime of aggression – the latter pending the definition of the crime.[3] This list may be expanded at the Review Conference that will take place in 2009. I will return to that later. The ICC has jurisdiction over crimes committed in the territories of a State Party and crimes committed anywhere in the world by citizens of a State Party. Jurisdiction is not retroactive: It exists only with respect to crimes committed after the entry into force of the Rome Statute, i.e. July 1, 2002. Cases can be brought to the Court by a State Party, the Security Council, or they can be initiated by the ICC Prosecutor. There is a very important limitation on the jurisdiction of the Court, known as the "principle of complementarity." Under this principle, the ICC may only exercise its jurisdiction where the State having jurisdiction over the crime(s) is unwilling or unable genuinely to investigate and prosecute the case.[4]

A. The Changing Nature of International Terrorism

Before I turn to the questions of whether terrorism is an international crime and whether the ICC can play a useful role in combating it, I would like to say a few words about the changing nature of terrorism, and methods of fighting it.

Terrorism is not a single phenomenon. It does not spring from any single ethnic or religious group, but it has existed in almost every part of the world. Since 1990, there may have been a shift in prevalent motives, but also, and more significantly, in structure and method. Terrorists today rely on trans-national networks of various groups, sometimes working in symbiosis with organized crime groups, such as drug and arms traffickers. Hierarchical structures are avoided as far as possible. Supported by modern technology and globalization, the trend towards trans-national terrorist structures and the increasing awareness that terrorism needs to be countered at the multilateral level—started well before September 11, 2001. Indeed, most of the existing legal

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2. Rome Statute of the International Criminal Court, art. 5(1), U.N. Doc. A/CONF 183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

3. *Id.* art. 5(2).

4. *Id.* art. 17.

framework against terrorism, notably all of the 12 UN Conventions and Protocols against terrorism, date from years before 2001. But September 11th turned a dramatic spotlight on terrorism and gave new impetus to combating it.

Two expert bodies installed by the United Nations—the "Policy Working Group on the United Nations and Terrorism," established in October 2001[5] and the "High-Level Panel on Threats, Challenges, and Change," established in 2003, made the point that combating terrorism needs a comprehensive strategy that incorporates, but is broader than, coercive measures.[6] Among the policy recommendations formulated by these two expert bodies, two may be of particular interest to the ICC:

- The High-Level Panel recommended that the fight against terrorism be conducted "within a legal framework that is respectful of civil liberties and human rights, including in the area of law enforcement."[7] The rationale for this recommendation can be summed up in the following words of Secretary-General Kofi Annan: "While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities, such as human rights, in the process."[8]
- The other recommendation by the High-Level Panel is that the UN General Assembly should conclude its negotiations on a universally acceptable definition of terrorism, and make terrorism a crime under international law.[9] The Policy Working Group went one step further and recommended explicitly that most serious crimes committed by terrorists be tried before the ICC.[10]

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5. Report of the Policy Working Group on the United Nations and Terrorism. Annex to UN Doc. S/2002/875 (= A/57/273), http://www.un.org/terrorism/a57273.htm [hereinafter Report, Policy Working Group].

6. The Secretary-General, *Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our shared responsibility*, ¶ 148, U.N. Doc. A/59/565 (Dec. 2004), http://www.un.org/secureworld [hereinafter Report of the High-Level Panel].

7. *Id.* ¶ 148(d).

8. Report, Policy Working Group, *supra* note 5, ¶ 27.

9. *See* Report of the High-Level Panel, *supra* note 6, ¶ 163, 164.

10. *See* Report, Policy Working Group, *supra* note 5, ¶ 26.

II. THE CRIME OF TERRORISM—AN "INTERNATIONAL CRIME?"

International crimes are crimes that are substantively regulated in international law. For example, genocide, war crimes, crimes against humanity and piracy are deemed to belong to this category. They are of universal concern, form part of (codified or customary) international law, and are often subject to the principle of universal jurisdiction.[11] International crimes are distinct from so-called treaty crimes. They are part of national criminal law and as such only binding on the contracting parties of the treaties proscribing them. The international element lies in the fact that States choose to cooperate to ensure the prosecution of the crime. States do so mainly by applying the aut dedere aut iudicare principle (extradite, or bring to justice).

For the ICC, the distinction between international and treaty crimes is not just a matter of academic interest, but of legitimacy. The territorial jurisdiction of the ICC allows for the prosecution of crimes committed on the territory of a State Party, regardless of the nationality of the perpetrator (also when the perpetrator is not the national of a State Party).[12] It is quite obvious that the ICC will be on much safer grounds, in terms of public acceptance, if it exercises such jurisdiction with regard to crimes that enjoy universal recognition, as part of international law (international crimes), rather than with regard to crimes that can only count on recognition by a less than universal number of States (treaty crimes).

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11. This definition is inspired by M.C. Bassiouni, *Characteristics of International Criminal Law Conventions, in* INTERNATIONAL CRIMINAL LAW: CRIMES 4-5 (M.C. Bassiouni ed., 1986).

12. According to some critics, including the US Government, the ICC's jurisdiction over persons that are not nationals of a State Party violates the principle of international law according to which States cannot be bound by treaties that they have not accepted. This argument is wrong, inasmuch as it mixes up two very different issues: a State's obligations under a treaty and legitimate "anchors" for jurisdiction. Undeniably, a non-State Party to the Rome Statute has no obligation to cooperate with the ICC. But it is equally undeniable that "territory" is one of the universally recognized criteria for a State to establish its jurisdiction over a crime and that this is irrespective of the perpetrator's nationality (e.g. US courts have jurisdiction over a crime committed by a German in the USA, and vice versa). The Rome Statute does not change this principle: (1) The principle of complementarity recognizes that the State has a priority right to prosecute; in this sense the Rome Statute reaffirms the State's judicial sovereignty. (2) The effect of the Rome Statute is only that State Parties cede some of their sovereign judicial competences to an international organisation – the ICC.

Until recent times, terrorist acts were considered serious offences to be punished under national law.[13] This is confirmed by the wording of the anti-terrorist conventions that followed the emergence of trans-national terrorism. These conventions define some "sectoral" terrorist acts (bombing, hostage-taking, airplane hijacking, etc.) and oblige State Parties to establish these acts as criminal offences under their domestic law[14] and to cooperate with each other, notably through applying the aut dedere aut iudicare principle.

In terms of international criminal law, terrorist acts were thus conceived as treaty crimes. I believe, however, that by now it is safe to say that terrorist acts—at least the most severe ones—have advanced into the category of international crimes. Security Council resolutions denouncing terrorist acts (of the magnitude of the events of 9/11) as threats to international peace and security[15] and a sharp increase after 2001 in the ratification of the 12 UN anti-terrorist conventions and protocols are strong evidence supporting this affirmation.

Interestingly, the Rome Conference[16] can be viewed as another important milestone in this development. While the 1994 Draft Statute for an ICC, proposed by the International Law Commission, had provided for the inclusion of some terrorist acts as "treaty crimes," in

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13. *See* Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, www.ejil.org/forum_WTC/NY-Cassese.pdf (last visited Jan. 18, 2006). Cassese mentions a few examples: In *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), the Court of Appeals held that since there is no agreement on the definition of terrorism as an international crime under customary law, this offence does not attract universal jurisdiction. Additionally, in March 2001, the French Cour de Cassation held that terrorism was not an international crime entailing the lifting of immunity for heads of State; it therefore quashed proceedings against the Libyan leader Qaddafi.

14. *Cf.* International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (1999); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52d Sess., Supp. No. 49, U.N. Doc. A/52/49 (1997); International Convention Against the Taking of Hostages, G.A. Res. 146, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105 (1970).

15. *See* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); , *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); *See* S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

16. The Rome Conference, or the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, was the diplomatic conference that negotiated the Rome Statute. It was held in Rome, Italy, on June 15 – July 17, 1998.

1998 at Rome a group of countries (Algeria, India, Sri Lanka, Turkey) proposed the inclusion of terrorism in the ICC Statute as a crime against humanity, i.e. as a crime with a solid reputation as an "international crime."[17] Although the proposal[18] was eventually rejected, it is noteworthy that this was not so much out of objections to the qualification of terrorism as an international crime. Indeed, in the Final Act of the Rome Conference, Governments' recognized that "terrorist acts...are serious crimes of concern to the international community"[19] and recommended that a Review Conference, which shall take place in 2009, should "consider the crime of terrorism...with a view to arriving at an acceptable definition and its inclusion in the list of crimes within the jurisdiction of the Court."[20]

Hesitation to include terrorist acts in the ICC Statute was due to the following three grounds:

1. The offence was not well defined. Indeed, from 1996 to the present, the General Assembly has been unable to reach a universally acceptable definition of terrorism, and attempts by the Rome Conference to correct this situation would in all likelihood have failed;
2. Some acts of terrorism were not deemed to be sufficiently serious to warrant prosecution by the ICC, whose mission is to try "the most serious crimes of concern to the international community as a whole."[21]
3. There was considerable concern that the inclusion of terrorist crimes in the Statute would politicize the Court.

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17. See The International Criminal Court: Making the Right Choices, (Jan. 1997), http://web.amnesty.org/library/index/engior400011997. (The Draft Statute is reprinted in the Annex to the Amnesty International document).

18. The final (revised) version of this proposal is contained in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Official Records*, 242, A/CONF.183/13 (Vol. III), http://www.un.org/law/icc/rome/proceedings/contents.htm.

19. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Official Records*, 71, A/CONF.183/13 (Vol. I), http://www.un.org/law/icc/rome/proceedings/contents.htm.

20. *Id.*, at 72.

21. *See* Rome Statute, *supra* note 2, art. 5(1).

III. THE RELEVANCE OF THE ICC TO THE FIGHT AGAINST TERRORISM

These or similar considerations may also guide the 2009 Review Conference when it has to decide on the inclusion of the crime of terrorism in the Rome Statute. ICC State Parties should continue to take a cautious approach, and they can afford to do so: There is a broadly accepted view[22] that regardless of whether the Rome Statute will contain an explicit reference to the crime of terrorism or not, the ICC has jurisdiction, even now, to prosecute terrorists—for having committed crimes against humanity. Crimes against humanity have a solid reputation as an international crime[23] and were included in the Rome Statute, under Article 7.

Article 7(1) of the Rome Statute defines crimes against humanity as murder, extermination, torture, etc., "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." In Article 7(2), the term "attack" is defined as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." "Attack" is not limited to "military" attacks[24] and does not equate to an "armed attack" in the sense of international humanitarian law. The term "civilian population" implies persons of any nationality who have not taken an active part in hostilities, or are no longer doing so. Although some elements of these thresholds are not entirely clear,[25]

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22. *Cf.* ARNOLD, *supra* note 1, 255-276; *See also* Cassese, *supra* note 13, at 5. Cassese also points out that soon after September 11, 2001, UN Secretary-General Kofi Annan and then UN High Commissioner for Human Rights Mary Robinson qualified the attacks as crimes against humanity.

23. *See* Rome Statute, *supra* note 2, art. 7.

24. Assembly of States Parties to the Rome Statute of the International Criminal Court, Sept. 3 – 10, 2002, *First Session Official Records*, 116, ICC-ASP/1/3, http://daccessdds.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf?OpenElement.

25. ARNOLD, *supra* note 1, 258-259; *See* Darryl Robinson, *The Elements of Crimes*, in THE INTERNATIONAL CRIMINAL COURT—ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy Lee ed., 2001). In particular, two issues are not entirely clear: (1) The first set of thresholds ("systematic" or "widespread") seems largely to coincide with the second set of thresholds ("pursuant to a policy" and "multiple commission"). While the first set is alternative, the second one is cumulative. (2) The "Elements of Crime" that further interpret the Rome Statute deliberately avoided a definition of the term "civilian population" as it was felt that international law is evolving in this area and that the matter should be left to the ICC's

the key elements "widespread" and "systematic" indicate that events such as those of 9/11, Lockerbie, Bali, Madrid and Beslan would be included. Other terrorist acts would not: notably single and random acts, as well as acts that do not constitute an attack, such as the collection of funds intended to be used in a terrorist act.[26] From this perspective, the question is indeed not whether the ICC should prosecute terrorist acts, but whether doing so explicitly offers judicial and political advantages that outweigh hesitations such as those raised at the Rome Conference. My recommendation to the Review Conference would be as follows:[27]

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jurisprudence. This applies, for example, to the questions of whether to include combatants and whether to consider *all* persons as civilians in times of no armed conflict.

26. An offence according to the International Convention for the Suppression of the Financing of Terrorism. *See* G.A. Res. 109, *supra* note 2, art. 2. For a more ambitious view, *see* Mira BANCHIK, *The International Criminal Court & Terrorism*, http://www.peacestudiesjournal.org.uk/docs/ICC%20and%20Terrorism.PDF (last visited Jan. 18, 2006). While Banchik shares the view that serious forms of terrorism could be tried as crimes against humanity, she advises that the crime of terrorism should be included in the Rome Statute as a separate category of crimes. According to her, there needs to be an opportunity to prosecute terrorists without having to prove that terrorist acts are part of a systematic or widespread attack. Also, all those who are directly or indirectly involved should be liable to prosecution, not only those who 'pull the trigger'. Consequently, she believes that the financing of terrorism should also be included in the ICC's jurisdiction. With regard to Banchik's objective to extend ICC jurisdiction to 'less than most serious' crimes, it is hard not to sympathize with the intention behind her proposal: to ensure, to the largest possible extent, the prosecution of terrorists. But a deviation from the ICC's mandate to try only the most serious crimes would also be a departure from the complementarity principle, and would raise serious questions as to whether the ICC could actually deliver on a much broader mandate. With regard to Banchik's proposal to treat the crime of terrorism as a separate category of crime, she may have a point (which she does not raise explicitly): The crime of terrorism is, in some regard, broader than crimes against humanity, and the meaning of "crime of terrorism" may thus be limited by the frame set by "crimes against humanity". For example, crimes against humanity must be directed against civilians, whereas the crime of terrorism may also be directed against private or public property, an infrastructure facility or the environment. It may be argued that a terrorist crime committed against one of these goods with such an amount of destruction as to qualify as a 'most serious crime', will inevitably also constitute an—indirect, but powerful—attack against the civilian population. It may also be argued that the intimidation of the population that is one of the elements of the crime of terrorism is tantamount to an 'attack against the civilian population.' Jurisprudence may resolve these questions over the longer term; in the short term, there might be a grey area.

27. The recommendations reflect my personal views and do not engage the German Government, which has not taken a position on this issue, as of now.

The Review Conference should recognize the crime of terrorism as a crime against humanity, and include it in Article 7 of the Rome Statute, under the following three conditions:

- If a universal definition of terrorism will be agreed by then,
- If it will be possible to limit the ICC's jurisdiction to the most severe terrorist crimes (as a safety valve against the ICC being flooded with politically motivated allegations of terrorist crimes),
- If countries endowed with a sizeable anti-terrorist police and intelligence potential would be willing to cooperate with ICC efforts to prosecute the crime of terrorism.

A. Legal Definition of the Crime of Terrorism

Efforts to include the "crime of terrorism" in the Rome Statute only make sense if a worldwide agreement will be reached in or before 2009 on a definition of the crime of terrorism. Such endeavours are under way at the United Nations, and have been since 1996. If the UN is unable to resolve this issue between 1996 and 2009, i.e. over a time span of 13 years, then it would be unrealistic to expect a one-month Conference to do the trick.

The current situation in negotiations at the United Nations gives cause for moderate optimism, in spite of the facts that the World Summit, celebrated in New York in September 2005, failed to de-block negotiations on the draft Comprehensive Convention on Terrorism, and that the political context does not look too encouraging after the recent parliamentary elections in Palestine. But there is reason for hope, too: It is not uncommon that political circumstances in the Middle East take unexpected turns, and some very important legal groundwork has already been accomplished.

Indeed, negotiations on a Comprehensive Convention on Terrorism produced, in 2001, an article that defines the crime of terrorism. It is one committed by any person that causes death, serious bodily injury, or serious damage to public or private property. The purpose of the conduct must be to intimidate a population, compel a Government, or coerce an international organization to do or abstain from doing any act. The article also goes on to penalize credible and serious terrorist threats,

as well as complicity in, or instigation of a terrorist offence.[28] While this definition seems to be widely accepted, disagreement persists over two issues.

The first is the question of whether the definition should include States' use of armed forces against civilians. The second is the question of whether the definition of the crime of terrorism should categorically exempt acts of resistance committed by peoples under foreign occupation. Against the backdrop of the Middle East conflict, it has been impossible, time and again, to resolve these disagreements. Two events have the potential to reinvigorate the debate:

- In October 2004, the Security Council adopted resolution 1566[29] in which it recalled "that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public...intimidate a population or compel a government or an international organization to do or abstain from doing any act."

  This definition is very close to the one reached in the General Assembly (draft Comprehensive Convention on Terrorism); however, there are also some significant discrepancies, certainly owing to the fact that the Council uses "political" language, whereas the lawyers negotiating the Comprehensive Convention attempt to formulate legally applicable language. Notably, the draft Comprehensive Convention penalizes acts that cause death, injury or harm, whereas the Security Council seems to considerably lower the stakes by incriminating acts committed with the intent to cause death, injury or harm. Human rights lawyers were concerned that this could be tantamount to extending the—usually harsh—anti-terrorism penalties to acts that are usually qualified as attempt, or even to criminalizing intentions, opinions or beliefs. But, whatever the merits of this concern may be,[30] both the wording of the resolution and the

28. Ad Hoc Committee established by General Assembly Resolution 51/210, *Report of the Ad Hoc Committee*, Jan. 28 – Feb. 1, 2002, 6, U.N. Doc. A/57/37 (Feb. 11, 2002).

29. S.C. Res. 1566, *supra* note 15, ¶ 3.

30. Those who defend the wording of Security Council resolution 1566 usually point out that the clause "*intent* to cause death etc" is almost literally drawn from Article 2 of the International Convention for the Suppression of the Financing of Terrorism. S.C. Res. 1566, *supra* note 15, ¶ 3. While this is true, it must be taken into account that the context is different.

statements made at its adoption indicate that it cannot be construed as containing a binding definition.[31]

- In December 2004, the Report of the "High-Level Panel on Threats, Challenges and Change" urged the General Assembly, "given its unique legitimacy in normative terms," to complete rapidly negotiations on the Comprehensive Convention on Terrorism, defining terrorism along the lines set out in Security Council resolution 1566(2004), and to declare that acts under the 12 anti-terrorism conventions are a "crime under international law." Addressing the issue of State terrorism, the Panel recommended that the General Assembly reaffirm that "State use of force against civilians is regulated by the Geneva conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned, or a crime against humanity."[32] Addressing the issue of terrorism being used by liberation movements against foreign occupation, the Panel simply held that "there is nothing in the fact of occupation that justifies the targeting and killing of civilians."[33]

From a legal perspective, the Panel's proposals may also be unsatisfactory. The Panel should have referred to the General Assembly's, not the Security Council's, definition of the crime of

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Article 2 of the Financing Convention penalizes a person who provides or collects funds for the purpose of "carrying out an act *intended to* cause death or ...injury." *See* G.A. Res. 109, *supra* note 14, art. 2. Obviously, at the time of the collection of funds, the act that is to be financed has not yet been carried out, and it makes perfect sense to refer to this act as an *intended* act. But in the context of defining terrorist acts themselves, and not preparatory acts, the criminalization of intentions raises concern, particularly when considering that there are countries where labeling opponents or adversaries as terrorists is a time-tested technique to de-legitimize and demonize them.

31. S.C. Res. 1566, *supra* note 15, ¶ 3. The quoted text continues as follows: "...which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism". This implies that the phrasing contained in the Security Council's resolution is not meant to go beyond the definitions contained in conventions. Also, several Security Council members stressed in the course of negotiations that they would support the resolution on the understanding that para. 3 did not contain a legal definition of terrorism. The Brazilian Ambassador said this explicitly in a statement after the adoption of resolution 1566(2004): "In our view, operative paragraph 3 reflects compromise language that contains a clear political message, but is not an attempt to define the concept of terrorism." U.N. SCOR, 59th Sess., 5053d mtg. at 7, U.N. Doc. S/PV.5053 (Oct. 8, 2004).

32. Report of the High-Level Panel, *supra* note 6, ¶ 164(a).

33. *Id.*, ¶ 160.

terrorism.[34] The Panel should have been more cautious in qualifying all "acts under the 12 anti-terrorism conventions" as international crimes.[35] The points about State terrorism and the use of terrorist violence against foreign occupation are reasonable from a common-sense perspective. But it remains to be seen whether they stand the test of legal scrutiny.

In spite of their shortcomings, both the Security Council's resolutions and the High Level Panel's recommendations will continue to steer negotiations on the Comprehensive Convention on Terrorism in the right direction. It does not appear to be impossible that a result may be reached before 2009.

B. Keeping the Focus on The "Most Serious Crimes"

Article 1 of the Rome Statute clearly reserves the ICC's jurisdiction to "the most serious crimes of international concern."[36] Article 7 of the Statute (on crimes against humanity) makes the same point by first listing a number of acts—notably murder, extermination, enslavement, deportation, torture, rape and other sexual violence, enforced disappearance—that can constitute, under certain aggravating circumstances,[37] a crime against humanity, and then adding the catch-all provision of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

The limitation to "most serious crimes of international concern" has two major functions:

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34. Two reasons: (1) The Assembly's version reflects the most up-to-date state of negotiations among legal experts; (2) As the Panel rightly pointed out, the Assembly enjoys a "unique legitimacy in normative terms."

35. Some of the conventions do not contain any definition of a "terrorist act"; others define acts that *may*, but do not necessarily constitute a terrorist act (e.g. hijacking planes); with regard to some of the acts defined in other conventions, it is dubious whether the international community considers them of such gravity as to constitute a *delicto ius gentium*. For an exhaustive review of the status, the strengths and the weaknesses of the principal international anti-terrorist conventions *see* ARNOLD, *supra* note 1.

36. *See* Rome Statute, *supra* note 2, art. 1. Preambular paragraphs 4 and 9, as well as Article 5(1) use the formula "most serious crimes of concern to the international community as a whole." However, there is no difference in meaning. *Id.*, art. 5(1).

37. *Id.*, art. 7. ("widespread or systematic attack directed against any civilian population").

- One function is to give practical meaning to the principle of complementarity, enshrined in Article 1 of the Rome Statute: The ICC builds on and reinforces the traditional repression system of international humanitarian law, according to which the principal responsibility for its enforcement lies with States.[38]
- Another, more pragmatic, function is to prevent the ICC from being overburdened.

Drawing the line between most serious and less serious crimes is no easy undertaking, and there do not seem to be any objective, quantifiable criteria—the death toll in one serious crime can hardly be measured against the death toll in another, and "international concern" cannot be measured either. Yet, there needs to be some filter, maybe particularly so in the context of terrorist crimes. "Terrorism" is not only a phenomenon, it is also an invective, and there are many examples of States using this invective in a most subjective manner to de-legitimize and demonize political opponents, associations or other States. The ICC must be able to protect itself against becoming the platform on which States Parties try to score political points against another State Party, by generously referring to the ICC situations that they consider to imply the commission of crimes of terrorism.

The most obvious way[39] to achieve such a focus on most serious terrorist crimes is to apply to the crime of terrorism no lesser thresholds than those applicable to crimes against humanity.

The thresholds mentioned in Article 7(1) are, particularly, that the crime must be committed "as part of a widespread or systematic attack." As I discussed before, these thresholds permit prosecution of events such as: 9/11, Lockerbie, Bali, Madrid and Beslan, but would exclude single and random acts, as well as acts that do not constitute an attack.

Practically speaking, the "crime of terrorism" could be added to the list of acts already contained in Article 7(1), and it could be defined in Article 7(2) in the exact terms of the universally agreed definition of the

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38. Cf. Morten BERGSMO, *Preamble*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, marginal note 22 (Otto Triffterer ed., 1999).

39. There may be other ways. For instance, one could exclude the applicability of Article 14 (Referral of a situation by a State Party) to crimes of terrorism, with the effect that only *proprio motu* investigations by the Prosecutor (Article 15) or a referral by the Security Council (Article 13 b) could initiate proceedings in terrorist cases. This would, however, set a negative precedent with regard to jurisdiction over other crimes.

crime of terrorism.[40] This definition could be further broken down in the "Elements of Crime"[41] to clarify that the universal definition of acts of terrorism encompasses violent acts that are spelled out in greater detail in some of the anti-terrorist conventions.[42]

C. Legal and Political Added Value

Incorporating the crime of terrorism into crimes against humanity would probably do little, if anything, to expand the ICC's jurisdiction. In almost all cases, the most serious crimes of terrorism could also be prosecuted as one of the already existing forms of crimes against humanity. However, the inclusion of the crime of terrorism in the Rome Statute may offer important practical and political benefits.

- On the practical side, explicit jurisdiction of the ICC over the crime of terrorism may be particularly welcomed by States that are willing to bring large-scale terrorists to justice, but feel too vulnerable, for

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40. It would also be conceivable to include the crime of terrorism in Article 8 of the Rome Statute, as one manifestation of "war crimes." *See* Rome Statute, *supra* note 2, art. 8. However, this would create unnecessary confusion (mainly over the question whether the laws of war apply to the "war" on terrorism) and limit the scope of applicability, in comparison to the inclusion of the crime of terrorism in the category of crimes against humanity: While crimes against humanity can be committed by any person, anywhere, in or outside the context of an armed conflict, on the basis of either a governmental or non-governmental policy, war crimes only apply in situations of armed conflict and on the territory of a country involved in the conflict. The notion of "civilian" under international humanitarian law seems to be narrower than under crimes against humanity. Persons that are only loosely associated with a party to the conflict, e.g. suicide bombers, may not be covered. More traditional forms of terrorism, e.g. aircraft hijackings, the kidnapping of diplomats or the blasting of public facilities in countries not affected by a war, would equally not be covered.—This finding does not exclude the possibility of prosecuting "terrorism in wartime"—i.e. terrorist acts committed by a person associated with a party to the conflict, in the context of the (international or internal) conflict, and on the theatre of the conflict—as war crimes under Article 8 of the Rome Statute.

41. *See* Rome Statute, *supra* note 2, art. 9. Article 9 of the Rome Statute provides that, "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8." *Id.* They were elaborated in 1999 and 2000, with strong and helpful input from the US delegation, and adopted in 2002. The Elements of Crime are not binding on the Court ("shall assist"), but will undoubtedly have persuasive force. For additional information, *see* Herman von Hebel, *The Making of the Elements of Crimes*, *in* THE INTERNATIONAL CRIMINAL COURT—ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy Lee ed., 2001).

42. *See* G.A. Res. 164, *supra* note 14; G.A. Res. 146, *supra* note 14. However, simple cross-references to these conventions should be avoided because the Conventions are only binding to the States that have ratified them.

domestic reasons, to put that will into practice.[43] In such a situation, referring the situation to the ICC, or surrendering a suspect to the ICC, rather than extraditing him to another country, may be an elegant way out (and certainly preferable either to doing nothing, or to treating the arrested suspects in a manner irreconcilable with standards of justice). Also, particularly in highly sensitive cases of terrorism, ICC jurisdiction may convey a far greater sense of fairness and objectivity than a trial at the national level, and the ICC's investigative and other logistical capacities may be superior to those of many of the national judiciaries around the world.

- On the political side, explicit jurisdiction of the ICC over the crime of terrorism would deliver the strong political signal from the international community—called for by the UN High Level Panel – that terrorism is a crime under international law, and that the international community accepts no impunity in this regard. It would also deliver the important signal that the international community intends to fight terrorism not only by means of military action but also, and maybe more importantly, with the means of judicial repression, within the bounds of due process and human rights. After all, only non-military means will drain the breeding grounds of terrorism, and the battle for hearts and minds will involve a "war of ideas" that must lead to the victory of reason.[44]

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43. *See* Banchik, *supra* note 27, http://www.peacestudiesjournal.org.uk/docs/ICC%20and%20Terrorism.PDF (last visited Jan. 18, 2006).

44. Christoph MÜLLER, *The Right of Self-Defense in the Global Fight Against Terrorism*, U.S (to be published in the 2005 volume of the U.S. Naval War College's 'Blue Book' series); Margot ALEXANDER, The Appropriate Response to the Targeting of Civilians for a Military Purpose, www.usafa.af.mil/jscope/JSCOPE03/Alexander03.html, (last visited Feb. 1, 2006). Alexander expressed the same idea in the following eloquent manner:

> The War on Terrorism is not by any means traditional war; our enemy is undefined, extremist, and unpredictable. Wars were fought in the 20th century where there was a defined front and a clear enemy; where victory was won by killing and demoralizing the enemy and then negotiating specific peace terms. The War on Terror cannot be won this way. Terrorists do not situate on a specific front, their leaders are hidden, and they wear no uniform. We cannot kill an enemy we cannot see. Even if every terrorist were killed, the War on Terror would not be won because new terrorists would emerge. Terrorism is based on an ideology, and it is that ideology that must be destroyed. The focus of the War on Terror should be prevention, not retribution, in order to stop terrorism forever and be truly victorious. The International Criminal Court is a necessary vehicle to this end, because it puts the focus of the War on Terror on justice and condemnation of violence.

- It may also be noted that ICC jurisdiction may, over time, produce important case law regarding the various aspects of the crime of terrorism, which will also be beneficial to national jurisprudence.

These benefits, however, must be weighed against some limiting factors. The most limiting factor, for the time being, is that not all countries that have a declared policy of combating terrorism would actually assist the ICC in bringing terrorists to justice. This refers as much to States' capacities to apprehend suspected terrorists, and to make available to the ICC all necessary, even classified, evidence.[45] I am, of course, referring to the USA, whose anti-ICC policy stands in disturbing contrast to its declared policy of promoting the rule of law and accountability. But I also refer to other important countries whose active support for the ICC in anti-terrorist trials would be crucial. A strong commitment by these countries to that effect—at least by some of them—would offer the necessary assurances that the ICC, if it were to embark on anti-terrorist trials, would not be heading for a mission impossible that would do little to bring terrorists behind bars, and much to make the ICC look like a toothless tiger. Once again, the USA has the chance to lead, and let us hope that it will be in the right direction: to The Hague.

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45. It may be recalled that in 2004 the Upper Regional Court of Hamburg/Germany *(Oberlandesgericht)* was obliged to overturn the conviction of two persons (*Mottassadeq* and *Mzoudi*) who were suspected of having assisted the 9/11 hijackers. In spite of strong evidence against them, the *Bundesgerichtshof* (German Supreme Court) ruled that the convictions were flawed because the Upper Regional Court had been unable to consider crucial evidence from a key witness in US custody (*Bin al-Shibh*, held by US authorities at a secret location). The Supreme Court held that the State's interest to keep information secret for national security reasons may not play to the disadvantage of the defendant and that his right to a fair trial had been unduly restricted. For a comprehensive analysis see Loammi Blaaw-Wolf, *The Hamburg Terrorist Trials – American Political Poker and German Legal Procedure: An unlikely Combination to Fight International Terrorism*,,7 F.R.G L. J.791, http://www.germanlawjournal.com/pdf/Vol05No07/PDF_Vol_05_No_07_791-828_Public_Wolf.pdf.

Rome Statute
Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means 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:
   (a) Murder;
   (b) Extermination,
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   (i) Enforced disappearance of persons;
   (j) The crime of apartheid;
   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant or in furtherance of a State or organizational policy to commit such attack;

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Comprehensive Convention on International Terrorism
Article 2

1. Any person commits an offence within the meaning of this 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 the environment; or
   (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this 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 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 this article;
3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this 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 this article;
   (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of this article;
   (c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with 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 this 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 this article.

Security Council Resolution 1566(2004)
Paragraph 3
The Security Council
Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.