

## PROSECUTING TERRORISM IN INTERNATIONAL TRIBUNALS

*Johan D. van der Vyver\**

Prosecution of the crime of terrorism in an international criminal tribunal depends on several basic norms of criminal justice.

(1) To comply with the legal certainty prong of the principle of legality, the crime must be defined with sufficient clarity that would “provide effective safeguards against arbitrary prosecution, conviction and punishment.”<sup>1</sup>

(2) To substantiate the competence of an international tribunal to be seized with the acts of terrorism, the crime as defined must be included in the subject matter jurisdiction of an international criminal tribunal.

(3) To secure a conviction, conduct of an accused must not fall within the confines of any of the circumstances that have been accepted as grounds of justification for conduct that comes within the definition of the crime.

This Article explores the feasibility of prosecuting terrorism in international tribunals considering, respectively, the above three principles. Part I shows that terrorism comprises willful acts of violence directed against civilians with the intent to spread terror within a civilian population, plus the further intent for such terror to be the instrument through which the perpetrators seek to intimidate the powers that be into submitting to certain (mostly) political, ideological, or religious demands. Part II shows that the subject matter jurisdiction of some, but not all, international tribunals includes international terrorism. Part III seeks to discredit the view that a certain noble cause can legitimize terror violence as an instrument to realize such causes.

Part IV is devoted in greater detail to the status of terrorism within the context of prosecutions in the International Criminal Court (“ICC”) and the ad hoc tribunals. It shows that the subject matter jurisdiction of the ICC does not include terrorism, but terrorism can come within the confines of certain crimes

---

\* I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law.

<sup>1</sup> S.W. v. United Kingdom, 335-B Eur. Ct. H.R. (ser. A) (1995); *see also* C.R. v. United Kingdom, 335-C Eur. Ct. H.R. (ser. A) (1995).

over which the ICC has jurisdiction. Although the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY Statute”) does not mention terrorism by name, instances of terrorism have been prosecuted in the International Criminal Tribunal for the former Yugoslavia (“ICTY”) as violations of the rules and customs of armed conflict that prohibit “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.”<sup>2</sup>

Part V is devoted to brief comments on criminal prosecutions as a means to combat particular instances of terrorism or international terrorism in general. Although acts of terrorism should never go unpunished, this Part argues that negotiation, mediation, and conciliation eliminate terrorism more effectively than law enforcement and armed conflict.

### I. TERRORISM DEFINED

Terrorism, which comprises violence against innocent civilians or civilian objects, is used to intimidate the powers that be to submit to the perpetrator’s demands.<sup>3</sup> Terrorism has been defined as:

Any 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 and context, is to intimidate a population, or to compel a Government or any international organization to do or to abstain from doing an act.<sup>4</sup>

---

<sup>2</sup> Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf) (quoting Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions) (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

<sup>3</sup> See INGRID DETTER DE LUPIS, *THE LAW OF WAR* 19–23 (1987); Johan D. van der Vyver, *State Sponsored Terror Violence*, 4 S. AFR. J. HUM. RTS. 55, 59–60 (1988).

<sup>4</sup> *International Convention for the Suppression of Terrorist Bombings*, G.A. Res. 52/164, U.N. GAOR, 52d Sess., Supp. No. 49, (Vol. I), U.N. Doc. A/52/49, at 389 (Dec. 15, 1997); see also Hanne Sophie Greve, *Acts of Terrorism and Crimes Within the Jurisdiction of the International Criminal Court*, in *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE* 75, 92–93 (Morten Bergsmo ed., 2003); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terror*, 16 EMORY INT’L L. REV. 445, 451 (2002) (singling out “its aspiration to spread terror and instill fear among the civilian population and the design of its activities to cause injury and destruction to the property of the citizens of the democratic state” as factors common to various definitions of terrorism).

Resolutions of the General Assembly refer more generally to “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes . . . whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”<sup>5</sup>

Terrorism can more precisely be defined as acts of violence<sup>6</sup> deliberately aimed at civilian targets<sup>7</sup> with a view to promoting (mostly) a preconceived political objective.<sup>8</sup> This political objective is achieved by intimidating the target of such violence (which need not be, and seldom is, the victims themselves)<sup>9</sup> to submit to the demands of the perpetrators<sup>10</sup> out of fear emanating from the threat or actual abhorrence of the act.<sup>11</sup>

---

<sup>5</sup> *Measures to Eliminate International Terrorism*, G.A. Res. 53/108 ¶¶ 2, 4, 53 U.N. Doc. A/53/49 (Dec. 8, 1998); *Measures to Eliminate International Terrorism*, G.A. Res. 51/210 ¶ 2, U.N. Doc. A/51/49 (Dec. 17, 1996).

<sup>6</sup> Carlos Marighella referred to the following strategies of terror: “Bank assaults, ambushes, desertions and diverting of arms, the rescue of prisoners, executions, kidnappings, sabotage, terrorism, and the war of nerves.” CARLOS MARIGHELLA, *MINIMANUAL OF THE URBAN GUERRILLA* 103 (1971). Yonah Alexander referred to the terrorist’s “instruments of psychological and physical force—including intimidation, coercion, repression, and, ultimately, destruction of lives and property.” Yonah Alexander, *Terrorism and the Media: Some Considerations*, in *TERRORISM: THEORY AND PRACTICE* 159 (Yonah Alexander et al. eds., 1979).

<sup>7</sup> Mario’n Mushkat singled out civilian targets and “the suffering of innocent people” as the main targets of a terrorist. Mario’n Mushkat, *The Soviet Concept of Guerilla Warfare*, 7 S. AFR. Y.B. INT’L L. 1, 4 (1981).

<sup>8</sup> Many writers emphasize the political nature of a terrorist’s objective. Yonah Alexander thus referred to terrorism as “an expedient tactical and strategic tool of politics in the struggle for power within and among nations . . . .” Alexander, *supra* note 6, at 159. David Carlton included in the concept of a terrorist “any perpetrator of substate violence whose motives are broadly of a political character.” David Carlton, *The Future of Political Substate Violence*, in *TERRORISM: THEORY AND PRACTICE*, *supra* note 6, at 201. However, terrorism need not be politically motivated, and ordinary criminals and psychopaths might resort to it. See GRANT WARDLAW, *POLITICAL TERRORISM: THEORY, TACTICS AND COUNTER-MEASURES* 8–9 (1982). Either social or political grievances might motivate terrorism. T.M. Kühn, *Terrorism and the Right of Self-Defence*, 6 S. AFR. Y.B. INT’L L. 42, 42 (1980) (quoting F.C. Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Co-operation*, 8 TOLEDO L. REV. 209 (1976)).

<sup>9</sup> Abraham H. Miller, *Hostage Negotiations and the Concept of Transference*, in *TERRORISM: THEORY AND PRACTICE*, *supra* note 6, at 155 (defining terrorism as “an act that seeks to influence a population significantly larger than the immediate target”); see also WARDLAW, *supra* note 8, at 10.

<sup>10</sup> John Baylis, *Revolutionary Warfare*, in *CONTEMPORARY STRATEGIES: THEORY AND POLITICS* 132, 137 (John Baylis et al. eds., 1975) (“Intimidation and terrorism are used not only to publicize the movement, to demoralize the government, and to polarize society but also at times to ensure that people have no alternative but compliance, unless and until the government is able to protect them.”).

<sup>11</sup> WARDLAW, *supra* note 8, at 10 (designating “the design to create anxiety” as the distinguishing feature of terrorism). See also Lawrence Freedman, *Terrorism and Strategy*, in *TERRORISM AND INTERNATIONAL ORDER* 56 (Lawrence Freedman et al. eds., 1986); T.P. Thornton, *Terror as a Weapon of Political Agitation*, in *INTERNAL WAR* 73 (Harry Eckstein ed., 1964) (maintaining that terrorism is characterized by its high symbolic content); C.J. Botha, *Clausewitz’s ‘Kleinkrieg’ and Mao’s ‘Fishes in the Water’: Mushkat in Proper Conceptual Perspective*, 8 S. AFR. Y.B. INT’L L. 141, 147 (1982) (depicting terrorism as “a combination of

Typical terrorists fanatically devote themselves to their objective and act from inflated feelings of self-righteousness. They are motivated by feelings of “misery, frustration, grievance and despair,”<sup>12</sup> which result from their inability to achieve their objective using regular or lawful means, or through an armed struggle conducted in accordance with the laws and customs of war. The victims of their violent acts are seldom the people or institutions whose attention they seek to attract through their evil deeds. In some cases, the terrorists are quite prepared to sacrifice their own lives to advance the cause and execute the violent act. They might even intend to commit suicide as a strategy for success and/or to add personal martyrdom to their cause.

Terrorism is thus a crime based on intent—or to be more precise, on special intent, or to be even more precise, on special intent on two fronts. An act of violence must be willfully committed against individual civilians or against the civilian population, and must furthermore be committed with special intent to spread terror within the civilian population and with the further special intent to achieve a particular political, ideological, or religious objective.

## II. CONDEMNATION OF ACTS OF TERROR VIOLENCE

The United Nations often addressed international terrorism,<sup>13</sup> culminating in the 1994 Declaration on Measures to Eliminate International Terrorism,<sup>14</sup> which was supplemented in 1996 by further measures,<sup>15</sup> the 1998 International Convention for the Suppression of Terrorist Bombings,<sup>16</sup> and the 1999 International Convention for the Suppression of the Financing of Terrorism.<sup>17</sup> Following the September 11th terrorist attacks, the Security Council added its voice to the ongoing concerns regarding terrorism, noting, amongst other things, that “acts, methods, and practices of terrorism are contrary to the

---

threats and the actual use of terror to create a psychological effect”); *see generally* WARDLAW, *supra* note 8, at 8–10.

<sup>12</sup> *See* G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53, at 301 (Dec. 9, 1985).

<sup>13</sup> WAYNE McCORMACK, *LEGAL RESPONSES TO TERRORISM* 17 (2008); Patrick Robinson, *The Missing Crimes*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 497, 510–13 (Antonio Cassese et al. eds., 2002).

<sup>14</sup> Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60 U.N. GAOR, 49th Sess., Supp. No. 49, U.N. Doc. A/49/49, at 303 (Dec. 9, 1994).

<sup>15</sup> G.A. Res. 51/210, *supra* note 5, at 346.

<sup>16</sup> International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/146, U.N. GAOR, 52d Sess., Supp. No. 49, U.N. Doc. A/52/49, at 389 (Dec. 15, 1997).

<sup>17</sup> International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49, at 408 (Dec. 9, 1999).

purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”<sup>18</sup>

International conventions are binding on states parties to those conventions only and cannot, therefore, create binding obligations enforced against natural persons (commonly referred to in Anglo-American sources as “individuals”).<sup>19</sup> If a state party to a crime-creating treaty undertakes to subject the conduct of its private citizens to punishment, it must do so through its municipal criminal justice system.<sup>20</sup> On the other hand, in international criminal law, violations of customary international law may produce individual criminal responsibility.<sup>21</sup> But then, the crime must be clearly defined and must be included by international agreement in the subject matter jurisdiction of the international criminal tribunal where the perpetrator is to be brought to justice.<sup>22</sup> Customary international law has thus far criminalized acts of terror violence as a war crime only.<sup>23</sup>

In the *Čelebići* case, a Trial Chamber of the ICTY stated that civil unrest and terrorism do not constitute armed conflicts, absent the “protracted extent of the armed violence” and the “extent of organisation of the parties involved” required for violent conduct to qualify as an armed conflict not of an international character.<sup>24</sup> France added a declaration to its instrument of ratification of the ICC Statute which likewise proclaimed that “the term ‘armed conflict’ . . . in and of itself and in its context, refers to a situation of a kind which does not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated.”<sup>25</sup>

---

<sup>18</sup> S.C. Res. 1373 ¶ 5, U.N. Doc. S/INF/57 (Sept. 28, 2001).

<sup>19</sup> See Gennady M. Danilenko, *ICC Statute and Third States*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, at 1871, 1883 (Antonio Cassese et al. eds., 2002).

<sup>20</sup> See *id.*

<sup>21</sup> Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia March 11, 2005).

<sup>22</sup> See Prosecutor v. Delalić (*Čelebići*), Case No. IT-96-21-T, Judgment, ¶ 406 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

<sup>23</sup> See Andreas Zimmermann, *Preliminary Remarks on Par. 2(c)-(f) and Par. 3: War Crimes Committed in Armed Conflicts not of an International Character*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 262, 276 (Otto Triffterer ed., 1999).

<sup>24</sup> *Čelebići*, *supra* note 22; see also Zimmermann, *supra* note 23, at 276.

<sup>25</sup> Reservation by France, *Rome Statute of the International Criminal Court*, ¶ 3, U.N. Doc. A/CONF.183/9 (July 7, 1998). “ICC Statute” refers to the International Criminal Court Statute. Statute of the International Criminal Court, art. 7(1), U.N. Doc. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 1002 (1998) [hereinafter ICC Statute].

This must not be taken to mean that resorting to acts of terror committed as a strategy of war by an organized armed group engaged in protracted violence against governmental armed forces—or against the forces of another armed group not aligned with any Government—would disqualify the struggle from being an armed conflict not of an international character. The events of September 11th have again reminded us that terror violence is not confined to individual perpetrators but, at the other end of the spectrum, has also come to be a strategy of belligerency with international dimensions. Resistance strategies in Palestine, past armed struggles of Africans subject to colonial rule or a racist regime, and militant efforts to bring about political change, or to retain the constitutional status quo, in regions such as Northern Ireland, Kashmir, and the Basque regions of Spain, have all included acts of terror violence.<sup>26</sup> Terrorism has indeed in this day and age become a potent means of combat—both on the national and international level.

Terrorism is not expressly included in the subject matter jurisdiction of the ICTY or of the ICC.<sup>27</sup> The Statute of the International Criminal Tribunal for Rwanda (“ICTR”), and the Statute of the Special Court for Sierra Leone (“SCSL”), on the other hand, do include terrorism as a crime within the jurisdiction of those Tribunals.<sup>28</sup>

### III. LEGITIMATION OF ACTS OF TERROR VIOLENCE

Although the UN instruments referred to above were based on the obvious premise, that terrorism is a crime, there are also those who believe that acts of terror embarked upon for certain “noble causes” are legitimate and should therefore not be punished.<sup>29</sup> It has thus been argued, somewhat obscurely, that law excludes the struggle for self-determination and independence from the concept of terrorism, even though some of the militant acts resorted to by freedom fighters might in themselves contain all the elements of terrorism.<sup>30</sup> This view is based on the assumption that the norm against terrorism is subordinate to the right to self-determination of peoples under colonial rule or

---

<sup>26</sup> See van der Vyver, *supra* note 3, at 55–62.

<sup>27</sup> ICC Statute, *supra* note 25, art. 5.

<sup>28</sup> Statute of the International Tribunal for Rwanda, U.N. Doc. S/Res/955 (Nov. 8, 1994) art. 4(d) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, U.N. Doc. S/2000/915 art. 3(d) (Oct. 4, 2000).

<sup>29</sup> See, e.g., U.N. Sixth Comm., Rep. of the 29th Meeting, 42nd Sess., Oct. 22, 1987, U.N. Doc. A/C.6/42/SR29 ¶¶ 2–9 (Oct. 27, 1987) (statement of Mr. Robinson of Jamaica).

<sup>30</sup> See *id.* ¶¶ 2–9.

foreign domination, which right must admittedly be exercised in accordance with the UN Charter and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* (instruments which, according to this view, do not prohibit acts of terrorism).<sup>31</sup> Judge Hanne Greve noted more broadly that international law does not outlaw terrorism per se, but only prohibits certain types of violence (which in some instances include acts of terror violence).<sup>32</sup>

This view finds support to some extent in the resolutions of the UN General Assembly adopted during the 1980s.<sup>33</sup> In the preamble to the 1985 resolution on *Measures to Prevent International Terrorism*, the General Assembly reaffirmed “the legitimacy of their struggle, in particular the struggle of national liberation movements . . . under colonial and racist regimes and other forms of alien domination,”<sup>34</sup> thereby suggesting that the armed operations of liberation movements ought not to be perceived as acts of terrorism.<sup>35</sup>

This view is most unfortunate, since terrorism is terrorism, and the fact that acts of terror are included in the military strategy of liberation armies does not change the essential character of those deeds. As noted by Judge Greve: “Even the most noble of causes—a struggle for the most sacred of values—cannot be fought without any restrictions as to means and methods. That some means and methods are rejected and outlawed, does not entail a moral or legal judgment concerning the aims fought for.”<sup>36</sup>

Nor does the end justify the means.<sup>37</sup> The truism attributed, in part, to Justice Louis D. Brandeis states:

“One can never be sure of ends—political, social, economic. There must always be doubt and difference of opinion; one can be 51 per cent sure.” There is not the same margin of doubt as to means. Here fundamentals do not change; centuries of thought have established

---

<sup>31</sup> See *id.* ¶ 2.

<sup>32</sup> Greve, *supra* note 4, at 100.

<sup>33</sup> See, e.g., G.A. Res. 40/61, *supra* note 12, at 301.

<sup>34</sup> *Id.*; see also G.A. Res. 3034 (XXVII), ¶ 3, U.N. Doc. A/8730, at 119 (Dec. 18, 1972).

<sup>35</sup> See Richard Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 425 (1969) (arguing that the use of terror as an instrument of change derived a certain legitimacy to the extent that its use received the endorsement of international instruments).

<sup>36</sup> Greve, *supra* note 4, at 101.

<sup>37</sup> Gross, *supra* note 4, at 467, 522–23; see Jenny Teichman, *How to Define Terrorism*, 64 PHILOSOPHY 505, 514–17 (1989) (expressing reservations as to the grounds upon which some analysts attempt to legitimize terrorism in certain circumstances).

standards. Lying and sneaking are always bad, no matter what the ends.<sup>38</sup>

In subsequent resolutions, the General Assembly did proclaim unequivocally that “all acts, methods and practices of terrorism” are criminal and unjustifiable, “wherever and by whomever committed.”<sup>39</sup> It called on states to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts,<sup>40</sup> and to cooperate and exchange information as a means of facilitating the prevention and combating of international terrorism.<sup>41</sup>

#### IV. PROSECUTION OF INTERNATIONAL TERRORISM

Terrorism was deliberately omitted from the subject matter jurisdiction of the ICC and is not expressly mentioned as a crime that can be prosecuted in the ICTY. It is mentioned by name in the jurisdictional provisions of the Statute of the International Criminal Tribunal for Rwanda and in the Statute of the Special Court for Sierra Leone. There have thus far been no prosecutions of terrorism in the ICTR, but quite ironically, there have been several in the ICTY.

##### A. *Prosecuting Terrorism in the ICC*

The 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission (“ILC”) did not define the crimes that were to be prosecuted in the ICC.<sup>42</sup> Drafters thought that crimes defined by international treaties in force, along with crimes included in the Draft Code of Crimes Against the Peace and Security of Mankind, which the ILC was in the process of drafting,<sup>43</sup> and crimes considered part of customary international

---

<sup>38</sup> A.T. MASON, BRANDEIS: A FREE MAN’S LIFE 569 (1956).

<sup>39</sup> G.A. Res. 53/108, U.N. GAOR, 53d Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/53/49, at 364 (Dec. 8, 1998); G.A. Res. 51/210, *supra* note 5; G.A. Res. 46/51, U.N. GAOR, 46th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/46/49, at 283 (Dec. 9, 1991); G.A. Res. 44/29, U.N. GAOR, 44th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/53/49, at 364 (Dec. 4, 1989); G.A. Res. 42/159, U.N. GAOR, 42d Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/42/49, at 300 (Dec. 7, 1987).

<sup>40</sup> G.A. Res. 46/51, *supra* note 39, ¶ 3; G.A. Res. 44/29, *supra* note 39, ¶ 4(b); G.A. Res. 42/159, *supra* note 39, ¶ 5(b).

<sup>41</sup> G.A. Res. 53/108, *supra* note 39, ¶¶ 3, 4; G.A. Res. 51/210, *supra* note 5, ¶ 3; G.A. Res. 46/51, *supra* note 39, ¶ 4(d); G.A. Res. 44/29, *supra* note 39, ¶ 4(d).

<sup>42</sup> Draft Statute for an International Criminal Court, Rep. of the Int’l Law Comm’n, 46th Sess., U.N. Doc. A/49/10, U.N. GAOR, 49th Sess., Supp. No. 10 (1994) [hereinafter Draft Statute].

<sup>43</sup> See Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, at 14 (1996).

law, should comprise the subject matter jurisdiction of the ICC.<sup>44</sup> However, from the outset, there was overwhelming support among delegations that participated in the pre-Rome Ad Hoc Committee (1995) and Preparatory Committee (1996–1998) to include definitions of crimes to be prosecuted in the ICC Statute.<sup>45</sup> This inclusion, after all, would do justice to the legal certainty prong of the principle of legality.<sup>46</sup>

As early as 1995, the United States approached the very first sessions of the Ad Hoc Committee on a Permanent International Criminal Court with a very special mission: to exclude international drug trafficking and terrorism from the subject matter jurisdiction of the ICC.<sup>47</sup> In a position paper of March 30, 1995, drafted in anticipation of the Ad Hoc Committee's first sessions of April 3–13, 1995, the United States argued:

The United States Government is deeply concerned that the draft statute could undermine the extensive investigative work undertaken in national prosecutions of international terrorists and narcotic traffickers. . . . As a country that is a frequent target for international terrorists and narcotic traffickers, the United States is properly concerned that the work of an international criminal court not compromise important, complex, and costly investigations carried out by its criminal, justice or military authorities.

For the most part, neither drug crimes nor crimes of terrorism occur as isolated criminal acts. Rather, they are the acts of criminal organizations as part of ongoing patterns of criminal activity. The United States commits hundreds of millions of dollars each year to the investigation of crimes of international character and develops highly sophisticated and wide-ranging inquiries into groups of individuals who participate in criminal conspiracies and cartels. The object is not only to prosecute crimes but also to prevent them. . . . A great deal of sensitive and confidential information is gathered and used in a variety of ways to track criminal activity and target suspects for apprehension and prosecution. . . . Effective investigation and

---

<sup>44</sup> Report of the Working Group on the Question of an International Criminal Jurisdiction, Rep. of the Int'l Law Comm'n, 44th Sess., May 4–June 24, 1992, ¶ 451, U.N. Doc. A/47/10; GAOR, 47th Sess., Supp. No. 10 (1992); *see also id.* ¶ 492.

<sup>45</sup> *See id.* at 11, 25–104.

<sup>46</sup> *Čelebići*, *supra* note 22, ¶ 402.

<sup>47</sup> As to the objections of the United States in this regard, *see* Steven W. Krohne, *The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT'L L. REV. 159 (1997); Monroe Leigh, *Evaluating Present Options for an International Criminal Court*, 149 MIL. L. REV. 113, 124–25 (1995); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999).

prosecution at the national level and close bilateral and multilateral cooperation by countries around the world is essential to addressing the grave problems caused by ongoing criminal enterprises.

Particularly where serious crimes of international importance in the areas of terrorism and narcotics are concerned, the strategy developed by cooperating Governments to penetrate criminal organizations and conspiracies frequently involves careful, multi-tiered decisions as to when and where (and on occasion, whether) certain individuals are apprehended. . . . Any interference by the Prosecutor of the international criminal court in this national and bilateral investigative work could jeopardize bringing criminals to justice and have the unfortunate result of the Prosecutor acting as a shield to effective law enforcement.<sup>48</sup>

The paper later questions the Prosecutor's ability to effectively investigate these crimes.<sup>49</sup>

Specifics of the United States's concerns regarding terrorism followed a discernable pattern:<sup>50</sup> (1) expressing the fear that the ICC "might actually undermine the investigation, protection against or prosecution of crimes of international terrorism";<sup>51</sup> (2) noting that the international conventions on terrorism "aim at the development of strong national investigative capabilities within effective law enforcement agencies working in an increasingly cooperative manner with their counterparts in other countries";<sup>52</sup> (3) reiterating that the Prosecutor is ill-equipped "to conduct investigations of complex terrorist cases as competently as national Governments";<sup>53</sup> (4) emphasizing that "considerable ongoing permanent efforts to detect and prevent terrorist activity, utilizing diplomatic, intelligence, and law-enforcement resources," are in place in national criminal justice systems;<sup>54</sup> (5) lamenting the absence of "precise definitions of crimes" in the terrorist conventions;<sup>55</sup> and (6) again

---

<sup>48</sup> United States Comments to Ad Hoc Committee Report, U.N. GAOR, 50th Sess., ¶¶ 27–29, U.N. Doc. A/AC.244/1/Add.2 (1995) [hereinafter United States Comments].

<sup>49</sup> *Id.* ¶ 30; see also Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 146, 147 (1999).

<sup>50</sup> See also Cassese, *supra* note 49, at 146.

<sup>51</sup> United States Comments, *supra* note 48, ¶ 37.

<sup>52</sup> *Id.* ¶ 38.

<sup>53</sup> *Id.* ¶ 41. The paper refers to the Lockerbie disaster. *Id.* ¶ 42. ("[I]t took a massive, highly expert forensic effort of well over a year, and at times employing more than 1,000 persons, to collect and examine all the debris from the mid-air bombing of Pan Am 103—an effort that ultimately proved critical in solving the case.")

<sup>54</sup> *Id.* ¶ 41.

<sup>55</sup> *Id.* ¶ 45.

referencing “highly sensitive national security information” involved in international terrorism investigations and the need to protect such classified information.<sup>56</sup>

The Draft Statute for an International Criminal Court that the Committee forwarded to Rome contained the following provision in brackets (meaning that its inclusion in the ICC Statute was still a matter of dispute):

#### Crimes of terrorism

For the purposes of the present Statute, crimes of terrorism means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetuate indiscriminate violence involving death or serious bodily injury to

---

<sup>56</sup> *Id.* ¶ 48.

persons or groups of persons or populations or serious damage to property.<sup>57</sup>

On the second day of the Rome Conference, Spain submitted a proposal to include terrorism in the jurisdiction provisions of the ICC Statute, but the proposal did not define terrorism.<sup>58</sup> Algeria, India, Sri Lanka, and Turkey subsequently submitted a formal proposal for reinstating terrorism as a crime within the subject matter jurisdiction of the ICC.<sup>59</sup> A revised version of this proposal defined an act of terrorism as follows:

- (i) An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime.
- (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.<sup>60</sup>

Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago, and Turkey submitted a further proposal urging that the Preparatory Commission elaborate upon the definition and elements of the crime of terrorism.<sup>61</sup>

There were also attempts made in Rome to include terrorism in the Statute under the rubric of crimes against humanity.<sup>62</sup> Terrorism is by definition an

---

<sup>57</sup> Draft Statute for an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 27–28 (Apr. 14, 1998).

<sup>58</sup> See *Proposal Submitted by Spain*, U.N. Doc. A/CONF.183/C.1/L.1 (June 16, 1998) (re-issued the following day “for technical reasons”).

<sup>59</sup> *Proposal Submitted by Algeria, India, Sri Lanka and Turkey*, U.N. Doc. A/CONF.183/C.1/L.27 (June 29, 1998).

<sup>60</sup> *Proposal Submitted by India, Sri Lanka and Turkey*, U.N. Doc. A/CONF.183/C.1/L.27/Rev.1 (July 6, 1998). Algeria was not cited as a party to the Revised Proposal.

<sup>61</sup> *Proposal Submitted by Barbados, Dominica, India, Jamaica, Sri Lanka and Trinidad and Tobago*, U.N. Doc. A/CONF.183/C.1/L.71 (July 14, 1998).

<sup>62</sup> See *Recommendation of the Coordinator on “Crimes within the Jurisdiction of the Court”*, U.N. Doc. A/CONF.183/C.1/L.44 (July 7, 1998); U.N. Doc. A/CONF.183/C.1/L.44/Corr.1 (July 7, 1998), art. 5(2)(j) bis). This proposal contains the same definition of terrorism as the one proposed by India, Sri Lanka, and Turkey. See *supra* note 60.

attack directed against a civilian population, as required in the ICC Statute by the Chapeau for crimes against humanity,<sup>63</sup> and provided it is executed pursuant to, or in furtherance of, a State or organizational policy,<sup>64</sup> it would fall neatly within the jurisdictional requirements for prosecution in the ICC as a crime against humanity.<sup>65</sup> Being an instance of “inhumane acts . . . causing great suffering, or serious injury to body or mental or physical health,” terrorism clearly qualifies for purposes of ICC jurisdiction as a crime against humanity.<sup>66</sup> However, there might be instances of terrorism that would not come within the threshold confines of crimes against humanity but should be brought to justice in the ICC if the custodial State is either unwilling or unable to prosecute the terrorists.

Proponents for including drug-related crimes and/or acts of terrorism in the subject matter jurisdiction of the ICC could, in the end, not convince a sufficient number of delegations to support the idea and/or any particular definition of those crimes.<sup>67</sup> The *Bureau Proposal* of July 10, 1998,<sup>68</sup> contains a comment stating that one or more treaty-based crimes (with special mention of terrorism, drug trafficking, and crimes against UN personnel) could possibly be inserted in the ICC Statute “if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July.”<sup>69</sup> The Bureau held out the promise that if no generally acceptable definitions would be forthcoming, these crimes could possibly be reflected in some other manner, such as by way of a Protocol or a review conference.<sup>70</sup>

In the end, though, no mention was made of terrorism or drug trafficking in the ICC Statute.<sup>71</sup> However, the Rome Conference did adopt a Resolution

---

<sup>63</sup> See ICC Statute, *supra* note 25.

<sup>64</sup> *Id.* art. 7(2)(a).

<sup>65</sup> *Contra* William A. Schabas, *The International Criminal Court: The Secret of Its Success*, 12 CRIM. L.F. 415, 426–27 (2001) (stating that terrorism is not within the jurisdiction of the ICC as a crime against humanity), *reprinted in* WILLIAM A. SCHABAS, *WAR CRIMES AND HUMAN RIGHTS* 333, 345–47 (2008).

<sup>66</sup> ICC Statute, *supra* note 25, art. 7(1)(k).

<sup>67</sup> In the debate in the Committee of the Whole on the Bureau’s *Discussion Paper*, U.N. Doc. A/CONF.183/C.1/L.53 (July 6, 1998), fourteen delegations indicated that they wanted to retain one or more treaty-based crimes, while thirty-eight delegations stated that those crimes should not be included in the jurisdiction of the ICC. Thirteen of the thirty-eight delegations stated that this was due to a lack of time to reach general agreement on the issue. See Alejandro Kirk, *Treaty? What Treaty?*, TERRA VIVA (July 13, 1998), <http://www.ips.org/icc/tv130701.htm>.

<sup>68</sup> *Bureau Proposal*, U.N. Doc. A/CONF.183/C.1/L.59 (July 10, 1998).

<sup>69</sup> *Id.* art. 5.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Robinson, *supra* note 13, at 498–506 (drug trafficking) and 515–18 (international terrorism).

recommending that “a Review Conference . . . consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”<sup>72</sup> The Netherlands has submitted a proposal for the inclusion of terrorism in the subject matter jurisdiction of the ICC.<sup>73</sup> However, it was decided not to consider this proposal at the Review Conference held in Kampala, Uganda on May 31 to June 11, 2010. The Assembly of States Parties instead established a Working Group to consider the proposed amendments following its ninth session.<sup>74</sup> At its ninth session held in New York on December 6 to 10, 2010, the Working Group on Amendments decided to consider the proposed amendments in informal consultations in New York between the ninth and tenth sessions of the Assembly of States Parties. i.e. during 2011.<sup>75</sup>

The events of September 11th, perhaps more than anything else, underscored the need to bring terrorism within the jurisdiction of the ICC as a crime in its own right. It is quite ironic that the United States entered the initial debate on the establishment of the ICC with a clear resolve to exclude the crime of terrorism from the subject matter jurisdiction of the ICC.

Even though terrorism was deliberately excluded from the subject matter jurisdiction of the ICC<sup>76</sup>—at least as a separate crime under that name—terrorism constitutes an added component of crimes that do fall within the subject matter jurisdiction of the ICC.<sup>77</sup> If terrorism is resorted to as an

---

<sup>72</sup> Resolution E, *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 (July 17, 1998).

<sup>73</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18–26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III (at 65–66).

<sup>74</sup> Resolution ICC-ASP/8/Res.6, ¶ 4 (Nov. 26, 2009); Press Release, Int'l Criminal Court, The Assembly of States Parties to the Rome Statute Opens Its Ninth Session (July 12, 2010), available at <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202010/the%20assembly%20of%20states%20parties%20to%20the%20rome%20statute%20opens%20its%20ninth%20session>.

<sup>75</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, Ninth Session, New York, U.S., Dec. 6–10, 2010, *Official Records*, para. 7, ICC-ASP/9/20 (Vol. I), Annex II.

<sup>76</sup> Resolution E, *supra* note 72; see also Andreas Zimmermann, *Introduction: Crimes not included in the Statute of the ICC*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 98, 98–99, *supra* note 23; Greve, *supra* note 4, at 106–07.

<sup>77</sup> LLOYD AXWORTHY, NAVIGATING A NEW WORLD: CANADA'S GLOBAL FUTURE 210–11 (2003); Greve, *supra* note 4, at 107; Roy S. Lee, *An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750, 756–57 (2002) (stating that terrorism can be prosecuted under art. 7(1)(a) as an instance of murder coupled with the other constituent requirements of crimes against humanity). *Contra* BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 39–40 (2003) (maintaining that terrorism is not a core crime that can be prosecuted under international law, but recognizing that there is an overlap between genocide, war crimes, and crimes against humanity on the one hand, and “most of the acts that a definition of ‘terrorism’ might encompass” on the other).

instrument of war, it can be prosecuted as, for example, an intentional attack directed against the civilian population as such or against individual civilians not taking direct part in the hostilities. These examples are irrespective of whether the hostilities qualify as an international armed conflict<sup>78</sup> or as an armed conflict not of an international character.<sup>79</sup> The taking of hostages can also involve an act of terrorism. Hostage-taking constitutes a war crime in international armed conflicts<sup>80</sup> as well as in armed conflicts not of an international character.<sup>81</sup> As stated in the *Elements of Crimes*, the perpetrator taking hostages “intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons”<sup>82</sup>—which clearly spells out the typical motivation of a certain brand of terrorists.<sup>83</sup>

### B. Prosecution of Terrorism in the Ad Hoc Tribunals

Although terrorism is included by name in the subject matter jurisdiction of the ICTR, there have thus far been no documented prosecutions for terrorism in the ICTR.<sup>84</sup> Terrorism is not mentioned in the ICTY Statute; however, the Statute expressly states that the subject matter jurisdiction of the ICTY “shall include, but not be limited to” those instances of violations of the laws and customs of war mentioned by name.<sup>85</sup>

In order to establish whether committing or threatening to commit acts of violence with a view to spreading terror among a civilian population can be prosecuted in the ICTY, two fundamental questions must be asked: (1) is this a war crime?; and (2) if so, is it a crime under the norms of customary international law? The second question derives from a basic rule of international law confining the liability of individuals for an international

---

<sup>78</sup> ICC Statute, *supra* note 25, art. 8(2)(b)(i).

<sup>79</sup> *Id.* art. 8(2)(e)(i).

<sup>80</sup> *Id.* art. 8(2)(a)(viii).

<sup>81</sup> *Id.* art. 8(2)(c)(iii).

<sup>82</sup> Preparatory Commission for the International Criminal Court, *Elements of Crimes*, arts. 8(2)(a)(viii) ¶ 3, 8(2)(c)(iii) ¶ 3, U.N. Doc. PCNICC/2000/INF/3/Add.2 (July 6, 2000) [hereinafter *Elements of Crimes*]; ASPOR (First Session), ICC-ASP/1/3 Pt. II.B, at 108 (Sept. 3, 2002).

<sup>83</sup> See Greve, *supra* note 4, at 106.

<sup>84</sup> See *Statute of the International Criminal Tribunal for Rwanda*, art. 4(d) (Jan. 31, 2010), <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>.

<sup>85</sup> *Statute of the International Criminal Tribunal*, art. 3, contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in 32 I.L.M. 1192 (1993) [hereinafter *ICTY Statute*].

offense to instances where the criminal proscription has come to be accepted as a customary law crime.<sup>86</sup>

International humanitarian law expressly prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population” as a war crime in international armed conflicts, as well as in armed conflicts not of an international character.<sup>87</sup> It is interesting to note, though, that the ICTY initially prosecuted criminal conduct that amounted to terrorism under the rubric of other violations of the laws and customs of armed conflict.<sup>88</sup>

In the *Čelebići* case, for example, the Trial Chamber merely condemned “the frequent cruel and violent deeds committed in the prison-camp,” noting that the detainees “were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse,” and “were thus subjected to an immense psychological pressure which may accurately be characterized as ‘an atmosphere of terror.’”<sup>89</sup> The charges against Radislav Krstić included the crime of persecution based on his participation in the terrorizing of Bosnian Muslims.<sup>90</sup> Tihomir Blaškić faced charges based on Article 51(2) of Protocol I (Count 3), though it does seem that this particular charge was confined to making the civilian population the object of attack and not so much on spreading terror.<sup>91</sup> However, the Trial Chamber decided that the nature and scale of offensives against certain villages showed that the soldiers were not merely fighting to overcome armed resistance, “they terrorised the civilians by intensive shelling, murders and sheer violence.”<sup>92</sup>

Prosecutions for acts of terror violence as such entered the arena of ICTY jurisprudence in the case of *Prosecutor v. Stanislav Galić*,<sup>93</sup> and subsequently

---

<sup>86</sup> DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 76–81 (3d ed. 2010).

<sup>87</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13(2), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>88</sup> *See Čelebići*, *supra* note 22, ¶ 1091.

<sup>89</sup> *Id.*

<sup>90</sup> *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, ¶ 533 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

<sup>91</sup> *See Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, ¶ 12 n.26 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

<sup>92</sup> *Id.* ¶ 630.

<sup>93</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

also featured in the prosecution of Vidoje Blagojević and Dragan Jokić.<sup>94</sup> The crime is more precisely depicted in the second sentence of Article 51(2) of Protocol I, which provides: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>95</sup>

The Appeals Chamber of the ICTY endorsed the Trial Chamber’s analysis of this provision, denoting the following essential elements of the crime:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully [sic] made the civilian population or individual civilians not taking direct part in the hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.<sup>96</sup>

In order to confirm that individuals can be prosecuted for this crime, the Appeals Chamber of the ICTY also considered whether the proscription defined in the second sentence of Article 51(2) had become part of customary international law.<sup>97</sup> The Appeals Chamber decided that terror against the civilian population was indeed a crime under customary international law,<sup>98</sup> and by majority vote (Judge Schomburg partially dissenting) that customary international law does entail individual criminal liability for acts of terror against a civilian population.<sup>99</sup> It has thus been noted that while “terrorizing the civilian population” is not mentioned in the ICTY Statute, prosecutions for the crime of terrorism can be based on the proscription of “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.”<sup>100</sup>

---

<sup>94</sup> Prosecutor v. Vidoje Blagojević & Dragan Jokić, Case No. IT-02-60-T (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

<sup>95</sup> *Protocol I*, *supra* note 86, art. 51(2)

<sup>96</sup> Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, ¶ 100 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Galić, *supra* note 93, ¶ 133; *see also* Prosecutor v. Blagojević & Jokić, *supra* note 94, ¶ 589.

<sup>97</sup> Prosecutor v. Galić, *supra* note 96, ¶¶ 86–90.

<sup>98</sup> Prosecutor v. Galić, *supra* note 96, ¶¶ 87–90; *see also* Prosecutor v. Alex Tamba Brima, Case No. SCSL-04-16-T, ¶ 666 (Special Ct. for Sierra Leone, June 20, 2007).

<sup>99</sup> Prosecutor v. Galić, *supra* note 96, ¶¶ 91–98.

<sup>100</sup> Prosecutor v. Blagojević & Jokić, *supra* note 94, ¶ 589.

Judge Schomburg dissented to the Tribunal's decision in *Galić*, in part due to the fact that terrorism was not included in the subject matter jurisdiction of the ICC.<sup>101</sup> He noted that if terrorism had been part of customary international law when the ICC Statute was drafted, "states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute."<sup>102</sup> Drafters of the ICC Statute had indeed decided to confine the subject matter jurisdiction of the ICC to international customary law crimes only.<sup>103</sup> The truth of the matter is that terrorism was not excluded from the subject matter jurisdiction of the ICC on the assumption that its prohibition was not part of customary international law. The exclusion of terrorism in part reflected a compromise with the United States at a time when many delegations were anxious to accommodate the American demands—if for no other reason, then simply to keep the discontented American delegation on board—and in the final analysis because the delegations could not agree on a definition of the crime. The customary-law disposition of terrorism was not the issue.

The actus reus constituting the offence under consideration in *Galić* comprised "acts or threats of violence" and not "attacks or threats of attacks."<sup>104</sup> Article 49(1) of Protocol I defines "attacks" as "acts of violence against the adversary,"<sup>105</sup> and the Court consequently concluded that acts or threats of violence executed with the primary purpose of spreading terror among the civilian population can include attacks against the civilian population.<sup>106</sup>

The acts or threats of violence must be committed with the specific intent to spread terror among the civilian population.<sup>107</sup> Spreading terror denotes

---

<sup>101</sup> Prosecutor v. *Galić*, *supra* note 96, ¶ 21 (Schomburg, J., partially dissenting).

<sup>102</sup> *Id.* ¶ 20.

<sup>103</sup> Confining the jurisdiction of the ICC to customary-law crimes derived from a proposal submitted by Denmark to the Preparatory Committee in 1996. *Proposal submitted by Denmark for Article 20*, U.N. Doc. A/AC.249/WP.50 (1996).

<sup>104</sup> Prosecutor v. *Galić*, *supra* note 96, ¶¶ 101–02; Prosecutor v. *Galić*, *supra* note 93, ¶ 130.

<sup>105</sup> *Protocol I*, *supra* note 87, art. 49(1).

<sup>106</sup> Prosecutor v. *Galić*, *supra* note 93, ¶ 102; *see also* Prosecutor v. Dragoljub Kunarać, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 415 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (defining "attack" as "a course of conduct involving the commission of acts of violence"), confirmed on appeal in Prosecutor v. Dragoljub Kunarać, Case No. IT-96-23-A & IT-96-23/1-A, ¶¶ 86, 89 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

<sup>107</sup> Prosecutor v. *Galić*, *supra* note 96, ¶ 102.

“extreme fear,”<sup>108</sup> or “extensive trauma and psychological damage” resulting from attacks “designed to keep the inhabitants in a constant state of terror.”<sup>109</sup> The acts or threats of violence need not actually spread terror among the civilian population, as long as those acts or threats were specifically intended to spread terror among the civilian population.<sup>110</sup>

Terrorism is thus a specific-intent crime. This means that the perpetrator must comply with a particular mens rea requirement at two levels: he or she must intend to commit acts or threats of violence (general intent); and he or she must intend those acts or threats of violence to spread terror among the civilian population (specific intent).<sup>111</sup> If terror among the civilian population is an incidental consequence of acts or threats of violence designed to achieve another primary objective, the specific intent requirement will not have been satisfied and a conviction of the crime of terrorism would then not be feasible.<sup>112</sup> On the other hand, spreading terror among the civilian population need not be the only purpose of the act or threat of violence, provided the specific intent to spread terror among the civilian population was the primary or principal objective of the act or threat.<sup>113</sup> The specific intent to spread terror among the civilian population can be inferred from the circumstances attending the acts or threats of violence, namely “their nature, manner, timing and duration.”<sup>114</sup>

It should be noted in conclusion that the crimes prosecuted in the ICTY (and also in the Special Court for Sierra Leone) include important elements of terrorism (acts or threats of violence willfully committed with the primary purpose of spreading terror among the civilian population), but lack an important defining component of terrorism, namely the further special intent to intimidate persons in authority to submit to the political, ideological, and/or religious demands of the perpetrators.<sup>115</sup> Therefore, cases prosecuted under the

---

<sup>108</sup> Prosecutor v. Galić, *supra* note 96, ¶ 137; *see also* Prosecutor v. Blagojević & Jokić, *supra* note 94, ¶ 590.

<sup>109</sup> Prosecutor v. Galić, *supra* note 96, ¶ 102.

<sup>110</sup> *Id.* ¶¶ 103–04; Prosecutor v. Galić, *supra* note 96, ¶ 77; *see also* Prosecutor v. Galić, *supra* note 93, ¶ 134; Prosecutor v. Blagojević & Jokić, *supra* note 94.

<sup>111</sup> Prosecutor v. Galić, *supra* note 96, ¶ 104.

<sup>112</sup> *See id.* ¶ 103.

<sup>113</sup> *Id.* ¶ 104; Prosecutor v. Blagojević & Jokić, *supra* note 94, ¶ 591.

<sup>114</sup> Prosecutor v. Galić, *supra* note 96, ¶ 104.

<sup>115</sup> *See, e.g.*, Prosecutor v. Issa Hassan Sesay, Case No. SCSL-04-15-A, ¶ 1198 (Special Ct. for Sierra Leone, Oct. 26, 2009) (holding that terrorism requires proof of an intention to spread terror among the civilian population); *see also* Prosecutor v. Galić, *supra* note 93, ¶ 133; Prosecutor v. Galić, *supra* note 96, ¶ 100; Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, ¶ 589 (Int'l Crim. Trib. for the Former Yugoslavia

rubric of terrorism might—in actual fact—not have been instances of terrorism strictly so called.

#### V. LAW ENFORCEMENT AS AN INSTRUMENT TO COMBAT TERRORISM

The killing, mutilation and/or humiliation of civilians, and/or the destruction of or damage to civilian objects, as a strategy in war or peace for the achievement of certain political, ideological, or religiously inspired objectives, is a heinous crime and should never go unpunished—irrespective of sympathies one might have in any particular circumstance for the ideologies or ideals that drove the perpetrators to infinite desperation. However, empirical history is testimony to the fact that retributive justice is at best but a feeble ally in the struggle against terrorism. Even the most resolute endeavors to eradicate terrorism through law enforcement—or through armed intervention—are bound to fail. Convictions and punishment of perpetrators of terror violence cause frustration and contempt in the minds of victims and among those who share the aspirations that prompted the criminal acts. Such contempt in turn breeds the kind of despair which provides fertile soil for the cultivation of further acts of terror violence.

The UN General Assembly has on occasion called on states to find just and peaceful solutions to the underlying causes of acts of terror violence,<sup>116</sup> or more specifically:

[T]o contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and occupation, that may give rise to international terrorism and may endanger international peace and security.<sup>117</sup>

That was good advice, because the typical terrorist is more often than not obsessed with a political ideal or religious calling that he or she cannot achieve through legal or military means. Addressing those beliefs that have driven him or her to acts of desperation could be a *sine qua non* for lasting tranquility and peace.

---

May 9, 2007); *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Case No SCSL-04-14-A, ¶¶ 350, 353 (Special Ct. for Sierra Leone, May 28, 2008).

<sup>116</sup> G.A. Res. 3034 (XXVII), *supra* note 34, ¶ 3.

<sup>117</sup> G.A. Res. 42/159, *supra* note 39, ¶ 8; G.A. Res. 44/29, *supra* note 39, ¶ 6; G.A. Res. 46/51, *supra* note 39, ¶ 6.

The General Assembly directive also corresponds with the UN Charter, which calls on “parties to any dispute” to “first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>118</sup>

The time for meaningful, sincere, and effective mediation between persons in authority and the leadership of terrorist organizations must eventually come to pass.

---

<sup>118</sup> U.N. Charter art. 33.