

**TERRORISM AND INTERNATIONAL CRIMINAL COURT: THE ISSUE
OF SUBJECT MATTER JURISDICTION**

by

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Declaration

I declare that this dissertation is my original work and it has not been submitted for the award of a degree at any other university or institution.

Signed: -----

Mireille Mabtue Kamga

This work is dedicated to my lovely father, Kamga Kamga Martin who passed away on April 1982

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Summary

Terrorism is not a new threat to the international order but it is a threat that has grown more urgent in the last few years. Terrorism has become a tragic circumstance of everyday life and has caused a remarkable loss of lives.

It was only after the terrorist attacks against the United States on September 11 2001, that the international community realised it needed to co-operate and take actions against terrorism on an international level.

One response has been the adoption of international rules for the suppression and eradication of terrorism and terrorist activities and making accountable the perpetrators of such acts.

In fact, the contingent character of *ad hoc* tribunals encourages states to carry out their idea of establishing a permanent penal jurisdiction.

The establishment of the International Criminal Court is considered a crowning achievement for preventing and prosecuting abominable crimes. The jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole; this includes crime of genocide, crimes against humanity, war crimes and eventually crime of aggression. However disagreement over a definition of what constitutes terrorist activity made it impossible to include within the jurisdiction of the Court such serious crime named terrorism. There have been multiple approaches to the issue, but despite all efforts to pursue individuals who committed human rights violations, the ICC's subject matter jurisdiction is limited since the international community could not reach to a consensual definition on what should be understood as terrorism. Consequently the Court does not have jurisdiction over international terrorism.

There is therefore no standing, permanent international body with criminal jurisdiction over individuals accused of terrorist acts, although such acts may in extreme case fall within the rubric of crime against humanity.

The various instruments and international directives dedicated to the eradication and suppression of terrorism have not resolved the impasse of its definition; nor is there any 'unified' international law approach to combating terrorism.

CHAPTER 1: INTRODUCTION

1.1. Background of the research

Terrorism activities have gained in frequency within the last few decades. In 1970 only 300 acts of terrorism were accounted for, but over 5000 incidents were recorded in 1999.¹ Many countries such as Turkey and Spain have been combating terrorist group for years. Terrorism has become a tragic circumstance of everyday live and has caused a remarkable loss of lives. Recently the United States have also become a victim of terrorist activities. Many crimes were committed throughout the international community and most of these crimes were unpunished. Individuals who committed human rights violations were until recently not held accountable for their crimes through international legal instruments. As a result of this lack of prosecution, crime was increasing. Koffi Annan (the former General Secretary of the United Nations) stated that the 20th century has proved to have the most sufferers in the whole history of humanity. According to him, more than 250 conflicts have been taken place in the world over the last 50 years, and more than 86 million civilians, mainly women and children, were killed. Furthermore, more than 170 million people have been deprived of their rights, property and dignity. Most of the victims have been neglected and only a few perpetrators were prosecuted.²

At the end of the World War 2, the international community became conscious of the gravity of war crimes and kept attention on the issue by starting to prosecute anyone who violated human rights at such a level. Consequently, between 1945 and 1948 *ad hoc* tribunals have been held such as the Nuremberg and the Tokyo war crimes trials to pursue odious crimes such as genocide, sexual slavery and so forth. From 1948 to 1993 attempts were made through various international conventions to encourage the establishment of an International Criminal Court. In 1948 the majority of States adopted the Convention on Prevention and Punishment of the Crime of Genocide, (the Genocide Convention). In addition, after the

¹ A Yonah 'Terrorism in the Twenty- first Century: Threats and responses' 12 DePaul Bus. L.J. 59, 75 (1999/2000).

² A Koffi 'The International Criminal Court: Questions-Answers'
<http://docs.google.com/viewer?a=v&q=cache:1QkIoD-1nbIJ:www.coalitionfortheicc.org/documents/FS_ICC_QA.pdf+KOFI+ANNAN+The+International+Criminal+Court+QuestionsAnswers&hl=fr&pid=bl&srcid=ADGEESiYahMhmekikqtVNp7o0SnMiXa5THUgINKFLHM1XeDJJZW0c7uELecIpvR272XFWPtCwVH67KQomvWIMYKC7sWGOLVvJslPWq5UAo7IsBkj7HybTsGUZz2NwbpUg3liX2BehSZWo&sig=AHIEtbQg-cjZZkSWJJx2cq3BVWSFI0deZg> (accessed 29 March 2010).

genocide and war crimes in Rwanda and the former Yugoslavia, the Security Council's reaction was the establishment of two specialized tribunals in order to bring perpetrators of horrible crimes before the court. By establishing these international tribunals, the international community intended to prevent and prosecute grave breaches of international law. However, the tribunals were always limited with regards to their jurisdiction and established mandate. In fact, the contingent character of these *ad hoc* tribunals encourages states to carry out their idea of establishing a permanent penal jurisdiction. Consequently, the International Criminal Court was established in 1998 and after the sixtieth ratification, the Statute came into force on July 1st 2002, in accordance with article 126(1).³ The Rome Statute, which was passed when 120 voted for it, seven against it and 21 abstained, provides for jurisdiction over war crimes, crimes against humanity, genocide and eventually aggression as well.

The Court does not have jurisdiction over international terrorism, but scholars emphasize that some terrorist acts could be prosecuted either as crimes against humanity⁴, war crimes or genocide.⁵ It was only after the terrorist attacks against the United States on September 11 2001, that the international community realised it needed to co-operate and take action against terrorism on an international level.

The purpose of International Criminal Court is to prosecute individuals rather than States (article 25 of Rome Statute).⁶ It provides a solution to the lack of laws concerning the repression of international crimes such as genocide, crimes against humanity and eventually aggression (article 5 of Rome Statute). The establishment of the International Criminal Court is considered a crowning achievement for preventing and prosecuting abominable crimes. This means that unpunished acts at international level would be eradicated.

However, despite all the efforts to pursue individuals who committed human rights violations, it is important to note that – according to the Rome Statute – the ICC's subject matter jurisdiction is limited. Therefore one can ask why international terrorism, which is an offence committed worldwide and which threatens international peace and security, is not

³ H Verweij 'La Cour penale Internationale' *Diplomatie judiciaire* (no-85) 12.

⁴ M Banchik 'International Criminal Court and Terrorism' <<http://www.legalserviceindia.com/article/1247--International-Criminal-Court---Terrorism.html>> (accessed 29 March 2010).

⁵ Note 4 above.

⁶ PGR et ASF 'Recueil d'instruments internationaux relatifs aux droits de l'homme et à l'administration de la justice' ASF, Kigali and Bruxelles ed (2005) 350-351.

included within the ICC's mandate? All the above mentioned facts demonstrate the substance of research on the ICC's subject matter jurisdiction concerning the prosecution of perpetrators of international terrorism. Hence the formulation of my topic: "International Terrorism and the International Criminal Court: The issue of subject matter jurisdiction". Attention should be given to this topic because it tries to propose appropriate solutions for combating unpunished crimes of terrorism internationally.

1.2. Delineation and limitation of the research.

My study is limited according to time, space and domain. Firstly, regarding time, I intend to cover the period starting from the date of the ICC entering into force up to the present. Secondly, for spatial limitation, my study covers the international community. Then, finally, my study essentially covers the domain of international criminal law.

1.3. Research question.

As stated in article 1 of the Rome Statute, the International Criminal Court has the power to exercise its jurisdiction over persons for the most serious crimes of international concern. However, although the Court is a universal criminal court, the subject matter jurisdiction is still limited. Therefore article 5 of the Rome Statute states "crimes within the jurisdiction of the Court", but does not include "international terrorism", which is an inhuman and grave offence committed everywhere in the world.

In Rome a debate was held on the possible inclusion of terrorism in the Rome Statute of the International Criminal Court, but the final decision was that international terrorism is not part of the ICC subject matter jurisdiction.⁷ Certain States such as India and Turkey have further proposed to include crimes related to terrorism in the Rome Statute, but once again the idea was not accepted.⁸ The following questions are raised and will be answered in this topic:

- 1) Why is terrorism, which is an offence committed worldwide, not included in the ICC's Statute?

⁷ Note 3 above.

⁸ M Cesoni ' *Infractions terroristes et Cour Pénale Internationale : problème de définition et de compétence*' <<http://www.google.com/search?q=CESONI%2C+M.%2C+L.%2C+%C2%AB+Infractions+terroristes+et+Cour+P%C3%A9nale+Internationale+%3A+probl%C3%A8me+de+d%C3%A9finition+et+de+comp%C3%A9tence+%C2%BB%2C+&ie=utf-8&oe=utf-8&aq=t&client=firefox&rlz>> (accessed 29 March 2010).

- 2) What is the appropriate model of law that should be applied to events such as September 11 and terrorism in general?
- 3) Is the ICC incompetent to prosecute terrorism, and if so, what are the legal reasons for this lack of competence?
- 4) What can be done to combat the perpetration and impunity of terrorist acts that threaten international peace and security?

1.4. Hypothesis of the research

According to questions mentioned above, this study aims to verify the following hypothesis: The ICC's subject matter jurisdiction does not give it the authority to prosecute international terrorism, because it is not included in the ICC's mandate. The fundamental legal reason for this incapacity still prevails. The problem lies in defining 'terrorism', which does not have a universal definition. Combating the perpetration and impunity of international terrorist activities needs a clear definition of what 'terrorism' is. Consequently, subject matter jurisdiction should be extended, so that perpetrators of terrorism could be held accountable.

1.5. Objectives of the research.

Attention should be paid to this topic because it first analyses the incompetence of the ICC in combating the crime of terrorism by giving the legal reasons for the incompetence. Secondly the study proposes a legal mechanism for combating crimes of terrorism. I will show the importance and relevance of evaluating the issue of the ICC's subject matter jurisdiction and the role that the ICC may play in prosecuting terrorist crimes. In this regard the ICC will be compared to other criminal tribunals proficient in prosecuting terrorist acts. The ICC's jurisdiction is different from other international criminal tribunals and national courts.⁹ The study aims to improve the understanding of the judicial powers, functions and the operating mechanisms of the ICC, as well as the relation between the jurisdiction of the ICC and the criminal jurisdictions of national's courts. Ultimately the evaluation will improve the accurate understanding of the ICC's subject matter jurisdiction. The aim of this method is to emphasize any breakdown in the other international tribunals and draw attention to whether the ICC might be a better court¹⁰ to prosecute terrorist crimes. Most people are not well

⁹ Note 4 above.

¹⁰ Note 4 above.

informed about the potential of the ICC in combating terrorist activities. The study will then open a field of research on this topic.

1.6. Technique and methodology

In order to provide adequate answers to the research question and get to the objectives set out above, I shall follow a certain technique and methodology. These two concepts are interdependent since technique is considered as the manner putting at the disposal of method to answer questions.¹¹ In fact, before getting to the reality of my task, I have exclusively used a documentary approach, which helps me to achieve my objectives by the historical, analytical, comparative and exegetical method or approach.

By using the documentary approach (documentation), the research was based on the evaluation of published as well as unpublished materials such as books, journals, articles and research papers in order to have more information on the ICC and international terrorism. The historical approach provides a background overview on the ICC and terrorism. The analytical approach is relevant for evaluating different notes collected from books in order to build my study. According to the exegetic approach, it is useful to understand legislation and international instruments. Finally, the comparative approach improves the understanding of judicial powers, functions and operating mechanisms of the ICC, as well as the relation between the jurisdiction of the court and other international criminal jurisdictions such as the ICTY, ICTR, and the International Court of Justice.

1.7. Overview of chapters

In addition to chapter one, based on a general introduction, the rest of this study is divided into four chapters. Chapter two will address some preliminary issues and address the main issues and theoretical considerations relevant to the topic; and it will discuss the controversial debate on the concept of terrorism. Chapter three focuses on the incompetence of the ICC to prosecute terrorism and the reasons for this incompetence. The study will be followed with chapter four exploring a universal criminal response to crimes of terrorism, and finally chapter five will deal with the conclusion and possible recommendations.

¹¹ M Grawitz et R Pinto *‘Les méthodes de recherche en science sociale’* 4th ed Paris, Dalloz (1991) 19.

CHAPTER 2: THEORETICAL CONSIDERATIONS

This part of the study will discuss the controversial debate on the concept of terrorism before addressing the ICC's problem.

2.1. Terrorism

The international community faces many problems which have serious impacts on peace and security at national, regional and international level. This situation challenges the developmental progress made, and terrorism, according to Caser, is one of worst manifestations of these problems.¹² The problem of terrorism has regularly gained political importance and has remained one of the most important matters affecting populations directly. Terrorism still constitutes a priority for various governments. It can be suggested that since the late 1960s, international terrorism became a constant of international life.¹³ Two situations can explain this phenomenon: On the one hand, terrorism constitutes a modern political violence *par excellence* and on the other hand, it is a danger to humanity. The question, however, is: What exactly is terrorism and when did terrorist activities start affecting the world? These questions will help determine an historical context and a definition for terrorism.

2.1.1. The historical background of terrorism

Terrorist acts have existed for millennia. Despite having a history longer than the modern nation-state, “the use of terror by governments and those that contest their power remains poorly understood. While the meaning of the word ‘terror’ itself is clear, its application to acts and actors in the real world becomes confusing.”¹⁴ Part of this is due to the use of terror tactics by actors at all levels of the social and political environment. “Over the past 20 years, terrorists have committed extremely violent acts for alleged political or religious reasons. Political ideology ranges from the far left to the far right. For example, the far left can consist of groups such as Marxists and Leninists who propose a revolution of workers led by revolutionary elite. On the far right, we find dictatorships that typically believe in the

¹² S Caser ‘*Le terrorisme international et ses aspects*’ Revue international de droit comparé Bayard (ed) paris (1973) 52.

¹³ Note 1 above.

¹⁴ Terrorism Resarch ‘*early History of Terrorism*’ <<http://www.terrorism-research.com/history/early.php>> (accessed 31 March 2010).

merging of state and business leadership.”¹⁵ In a general, the practice of terrorism can be attributed to the following groups: Nationalists, religious extremists and special interests groups.

“Nationalism is the devotion to the interests or culture of a group of people or a nation. Typically, nationalists share a common ethnic background and wish to establish or regain a homeland.”¹⁶

“Religious extremists often reject the authority of secular governments and view legal systems that are not based on their religious beliefs as illegitimate. They often view modernization efforts as corrupting influences on traditional culture.”¹⁷

Special interest groups include people on the radical fringe of many legitimate causes for example, people who use terrorism to uphold anti-abortion views, animal rights or radical environmentalism. These groups believe that violence is morally justifiable to achieve their goals.”¹⁸

The history of terrorism can be classified into many periods: Firstly, there was terror in antiquity, from the 1st to the 14th Century AD. The earliest known organization that exhibited aspects of a modern terrorist organization was the Zealots of Judea. Zealots¹⁹ conducted a violent terror campaign against the Roman occupiers of the eastern Mediterranean. The Zealots enlisted Sicarii²⁰ to strike down rich Jewish collaborators and others who were friendly to the Romans. Known to the Romans as sicarii, or dagger-men, they carried on an underground campaign of assassination of Roman occupation forces, as well as any Jews they felt had collaborated with the Romans. Their motive was an uncompromising belief that they could not remain faithful to the dictates of Judaism while living as Roman subjects.

¹⁵ Note 14 above.

¹⁶ Note 14 above.

¹⁷ Note 14 above.

¹⁸ Note 14 above.

¹⁹ Zealot: a member of a radical, warlike, ardently patriotic group of Jews in Judea, particularly prominent from a.d. 69 to 81, advocating the violent overthrow of Roman rule and vigorously resisting the efforts of the Romans and their supporters to heathenize the Jews. Synonyms, extremist, crank, bigot. fanatic.<<http://dictionary.reference.com/browse/zealot>> (accessed on 29 March 2010).

²⁰ Sicarii comes from the Latin word for dagger sica, and means assassins or murderers. The Sicarii or "dagger men" carried out murders and assassinations with short daggers. The Sicarii are frequently described as the same as or a subset of the Zealots, a political party who opposed Roman rule in Judea in the period just before Jesus' birth. The role of the Zealots and their relationship to an earlier movement, the Maccabees, has also been the object of much dispute. <<http://terrorism.about.com/od/groupsleader1/p/Sicarii.htm>> (accessed on 29 March 2010).

Eventually, the Zealot revolt became open, and they were finally besieged and committed mass suicide at the fortification of Masada. The Assassins were the next group to show recognizable characteristics of terrorism, as we know it today. A breakaway faction of Shia Islam called the Nizari Ismalis adopted the tactic of assassination of enemy leaders because the cult's limited man power prevented open combat.²¹ “Even though both the Zealots and the Assassins operated in antiquity, they are relevant today: Firstly, as forerunners of modern terrorists in aspects of motivation, organization, targeting, and goals. Secondly, although both were ultimate a failure, the fact that they are remembered hundreds of years later, demonstrates the deep psychological impact they caused.”²²

Secondly, I will discuss terrorism between the 14th and the 18th Century. “From the time of the Assassins, terror and barbarism were widely used in warfare and conflict, but key ingredients for terrorism were lacking.”²³ “Until the rise of the modern nation state after the Treaty of Westphalia in 1648, the sort of central authority and cohesive society that terrorism attempts to influence barely existed. Communications were inadequate and controlled, and the causes that might inspire terrorism (religious schism, insurrection, ethnic strife) typically led to open warfare.”²⁴ “The French Revolution provided the first uses of the words ‘Terrorist’ and ‘Terrorism’. The majority of authors state that terrorism was born during the 1789 French Revolution. They referred to the regime of terror,”²⁵ starting on August 10, 1792, and ending on July 27, 1794 with the arrest of Robespierre.²⁶ France of 1792 had a system of exceptional legality where actions focused on violence and the use of emergency powers. This was state terrorism, because it was aimed at manipulating political opponents. The French Revolution provided an example to future states in oppressing their populations. It also inspired a reaction by royalists and other opponents of the Revolution who employed terrorist tactics such as assassination and intimidation in resistance to the Revolutionary agents.

Thirdly, I will now discuss terrorism in the 19th century. During this time, radical political theories and improvements in weapons technology spurred the formation of small groups of revolutionaries who effectively attacked nation-states. “Anarchists espousing belief in the

²¹ Note 14 above.

²² Note 14 above.

²³ Note 14 above.

²⁴ Note 14 above.

²⁵ J Servier ‘*Le terrorisme*’ French Publ 4th ed Paris (1992) 73.

²⁶ Note 20 above.

‘propaganda of the deed’ produced some striking successes, assassinating heads of state from Russia, France, Spain, Italy, and the United States.”²⁷ Another trend in the late 19th century was the increasing tide of nationalism throughout the world, in which the nation (the identity of a people) and the political state were combined. “As states began to emphasize national identities, peoples that had been conquered or colonized could, like the Jews at the times of the Zealots, opt for assimilation or struggle. The best-known nationalist conflict from this time is still unresolved – the century-long struggle of Irish nationalism. Nationalism, like communism, became a much greater ideological force in the 20th century.”²⁸

Lastly, the 20th and 21st century period: “The first half of the 20th century saw events that influenced the nature of conflict to the present day. Talking about rising nationalism, it rose and intensified during the early 20th century throughout the world.”²⁹ It became an especially powerful force for various colonial empires. Although dissent and resistance were common in many colonial possessions, sometimes resulting in open warfare, nationalist identities became a focal point for these actions.³⁰

Regarding damaged legitimacy, the ‘total war’ practices of all combatants of World War II provided further justification for the ‘everybody does it’ view of the use of terror and violations of the law of war. The desensitization of people and communities to violence that started in World War I accelerated during World War II.³¹

Regarding Cold War development, “the bi-polarization of the world between the West and the East changed the perception of conflicts the world over. Then, during the immediate post-war period, terrorism was more of a tactical choice by leaders of nationalist insurgencies and revolutions.”³² “Successful campaigns for independence from colonial rule occurred throughout the world and many employed terrorism as a supporting tactic. When terrorism was used, it was used within the framework of larger movements, and co-ordinated with political, social, and military action.”³³ “Even when terrorism came to dominate the other aspects of a nationalist struggle, such as the Palestinian campaign against Israel, it was (and

²⁷ Note 14 above.

²⁸ Note 14 above.

²⁹ ‘Recent history of terrorism’ <<http://www.terrorismresearch.com/history/recent.php>> (accessed March 31 2010).

³⁰ Note 29 above.

³¹ Note 29 above.

³² Note 29 above.

³³ Note 29 above.

continue to be) combined with other activities. The policy of the Soviet Union to support revolutionary struggles everywhere, and to export revolution to non-communist countries, provided extremists willing to employ violence and terror as the means to realize their ambitions.”³⁴

Regarding the Internationalization of terror, “the age of modern terrorism might be said to have begun in 1968 when the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al airliner en route from Tel Aviv to Rome. While hijackings of airliners had occurred before, this was the first time that the nationality of the carrier (Israeli) and its symbolic value was a specific operational aim.”³⁵ Also a first was the deliberate use of the passengers as hostages for demands made publicly against the Israeli government. The combination of these unique events, added to the international scope of the operation, gained significant media attention. Another aspect of this internationalization is “the cooperation between extremist organizations in conducting terrorist operations. Cooperative training between Palestinian groups and European radicals started as early as 1970, and joint operations between the PFLP and the Japanese Red Army (JRA) began in 1974. Since then, international terrorist cooperation in training, operations and support has continued to grow, and continues to this day.”³⁶

Regarding the current state of terrorism, the largest act of international terrorism occurred on September 11, 2001. “In a set of co-ordinated attacks on the United States of America, a group of Islamic terrorists hijacked civilian airliners and used them to attack the World Trade Center towers in New York City and the Pentagon in Washington, DC. Other major terrorist attacks have also occurred in New Delhi (Indian Parliament attacked); the Bali car bomb attack; the London subway bombings; the Madrid train bombings and the most recently the attacks in Mumbai (hotels, train station and a Jewish outreach center). The operational and strategic epicenter of Islamic terrorism is now mostly centered in Pakistan and Afghanistan.”³⁷

³⁴ Note 29 above.

³⁵ Note 29 above.

³⁶ Note 29 above.

³⁷ Note 29 above.

2.1.2. Definitions of terrorism

As Michael P. Scarf has noted: “The problem of defining ‘terrorism’ has vexed the international community for years”³⁸ Defining terrorism has become so polemical and subjective an undertaking as to resemble an art rather than a science. When exploring many international conventions and doctrines one notices that most authors have tried to define terrorism but they are not unanimous on what should be understood by terrorism. Therefore, before exploring what some authors and international treaties said about terrorism, attention must be first paid to the scholars’ definition of terrorism.

2.1.2.1. Academic definition

According to Eric David, terrorism act is considered in general as a grave act of violence committed by an individual or a group of individuals against guiltless victims for an ideological purpose.³⁹ In my view, this definition seems to be more formless and imprecise than the reality it tries to express. What exactly constitutes grave violence and guiltless victims? Are there no actions committed against guilty people that can be qualified as terrorism? Why should terrorism be limited only to a person’s acts? Can’t we see that the state also commits terrorism and even on a higher level than individuals? One can also say that it is not necessarily only a guiltless person that can be a victim of terrorist act. A guilty person can also suffer from actions that can be called terrorism. Furthermore, if one limits the terrorist acts only, this will be unjust and illogical because there are states that carry out terrorist acts, and this is even on a higher level.

According to Gerard Cornu, terrorism is a group of violent acts carried out by a political organization in order to overthrow the government.⁴⁰ By analysing the words of this statement, the definition seems to be right, but it is also restricted in the sense that terrorism has a various aims that are not only limited to overthrowing government authority. Therefore, not only a specific state or government, but the whole social system should be included. During the conference on ‘Democracy and terrorism’ held in Madrid from 8 to 10 March 2005, the former UN general secretary, Kofi Annan proposed a definition of terrorism.

³⁸ M Scarf ‘*Defining terrorism as the peace time equivalent of war crimes: A case of too much convergence between international humanitarian law and international criminal law*’ International Law Student Association Journal of International and Comparative Law (2001) 391.

³⁹ E David ‘*Elements de droit pénal international: La répression nationale et internationale des infractions internationales*’ Bruylant, Bruxelles, 4th ed (1994) 212.

⁴⁰ G Cornu *Vocabulaire Juridique* H. association, Capitant 7th ed, Paris (1995) 177.

However, this definition did not include the violation which can be considered as a terrorist target in order to compel the government's authorities to change. The definition states that terrorism means any act committed with intent to cause death or serious bodily injury to a civilian or people not taking part in hostilities in order to intimidate or compel a government or an international organisation to do or to abstain from doing any act.⁴¹

According to Salmon J. terrorism is defined as an illicit act of grave violence committed by an individual or a group of persons acting on their behalf or with the approval, encouragement, tolerance or support of a state, against persons or properties for an ideological purpose, which can breach international peace and security.⁴² The observation here in conclusion is that it will be very difficult to define a notion with several meanings without narrowing or hiding some aspects.

Professor Henri Donnedieu De Vabres, defined terrorism as collective organisation acting by means of terror.⁴³ The problem with this conception is that this definition subtracts individual from potentials actors of terrorism while there are cases of terrorism perpetrated by a single person. For instance, this state of affairs happened in Bali, Indonesia in 2002 where a car bomb attack was perpetrated by a person, and not an organization.

The Centre for Research on International Terrorism (CRIT) defined terrorism as an unlawful use of force against person or properties, intimidation or coercion of a government and population to promote a change or a political advancement.⁴⁴ This definition lacks of precision about the perpetrators of terrorism act. It is difficult to understand if the perpetrator is a person, a group or other organization.

According to Philip Wilcox, the former coordinator of anti-terrorism in the department of America defined terrorism as “politically motivated violence directed against people not taking part in hostilities.”⁴⁵ The definition framed a specific type of terrorist act with reference to the underlying political purpose or motivation of the perpetrator excluding other considerations such as social and economic factors.

⁴¹ Note 8 above.

⁴² J Salmon ‘*International public law dictionary*’ Bruyant, Bruxelles ed (2001) 1081.

⁴³ D Henri ‘*Répression du terrorisme*’ revue Internationale de droit compare Bayard ed Paris (1973) 23.

⁴⁴ CRIT ‘what is terrorism?’ <http://www.globalissues.org/article/432/south-african-anti-terror-bill-draconian> (accessed 29 March 2010).

⁴⁵ P WILCOX ‘*Le terrorisme reste une question mondiale*’

<http://www.amarc.org/documents/books/Medias_violence_terrorisme.pdf> (accessed 12 April 2010).

Laqueur and Ruby have defined terrorism by referring to act of violence. The former defines terrorism as “use of violence or threat of violence in order to sow panic in society, to weaken or overturn the establishing authorities and to create a political change.”⁴⁶ For the latter, terrorism is “any act involving the use of violence that affect people’s lives or their physical integrity in a case of a company which aim is to cause terror in order to achieve certain purposes.”⁴⁷ I do not agree with this when he states that, acts of violence committed in the context of terrorism is to affect only the live of persons or their physical integrity while these acts may affect their properties both public and private. This is the reason why these definitions of terrorism seem to be partial because they lack to give all component of terrorism. I shall then examine the South Africa law definition.

2.1.2.2. South African law definition

The South Africa government has introduced the 2003 Anti-Terrorism Bill into the National Assembly. This Bill purported to create a range of terrorism related offences, such as committing or threatening to commit a terrorist act⁴⁸ knowingly facilitating the commission of a terrorist act⁴⁹ and being a member of, or supporting, a terrorism organization.⁵⁰ Furthermore, the Bill gave extra investigative and arrest power to the South Africa police⁵¹ and made provisions for the suppression of the financing of terrorist organizations⁵². Clause 1 of the Bill states the definition of the “terrorism act”. According to it, “terrorism act means an unlawful act, committed in or outside the Republic which is:

- (a) a convention offence; or
- (b) Likely to intimidate the public or a segment of the public.”

The disjunctive use of the precise and common approaches in this definition made a usual offence against South Africa criminal law an act of terrorism provided that it was likely to

⁴⁶ LAqueur, W ‘*Definitions of Terrorism*’ Jewish Virtual Library, A Division of The American-Israeli Cooperative Enterprise. <<http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html>> (accessed 21 March 2010).

⁴⁷ Ruby Charles L. ‘*The Definition of Terrorism*’ <<http://cat.inist.fr/?aModele=afficheN&cpsidt=16381568>> (accessed 21 March 2010).

⁴⁸ Anti-terrorism Bill 2003(South Africa) clause 2(1) (a).

⁴⁹ Note 48 above cl 2(2).

⁵⁰ Note 48 above cl 2(3),(4).

⁵¹ Note 48 above cl 6,8,9.

⁵² Anti Note 48 above cl 4.

intimidate the public or a segment of the public. It automatically made a convention offence⁵³ an act of terrorism irrespective of its intimidatory nature or purpose. “Rights activists say this definition could include ordinary political actions, like protest marches and defiance campaigns and even some strikes by workers. These tactics are often used by South African political and community organizations to support demands for social rights.”⁵⁴

The Bill was heavily criticized by Human Rights Commission for, amongst others things; it’s extremely broad definition of terrorism. “The draft also puts such limits on access to bail for those who are arrested under the anti-terrorism legislation that they will effectively be subject to detention without trial.”⁵⁵ In its submission to Parliament, the Congress of South African Trade Unions (COSATU), said: “The word ‘terrorism’ is highly subjective, emotive and contested. Heads of the former apartheid government- Vervoerd, Vorster and Botha-all used the threat of ‘terrorism’ to justify their most brutal and repressive laws.”⁵⁶ The South Africa government response was to replace the Anti-Terrorism Bill with the 2003 Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA), 33 of 2004.

“In 2004, the South African Parliament enacted the POCDATARA to give effect to South Africa’s obligation in respect of the suppression of terrorism under United Nation convention, Security Council resolution and the OUA convention on the Prevention and combating of terrorism of 1999.”⁵⁷

Like its predecessor provided for terrorism-related criminal offences, this Act gave certain powers to investigating authorities and provided for financial counter-terrorism measures.

Section 1, which creates the offence of terrorism, does not define the term but defines terrorist activity and terrorist related activities and terrorism has expressed concern about the

⁵³ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Hague Convention of 1970 on Aerial Hijacking, Montreal Convention of 28 May 1999 on the Unification of Certain Rules for International Carriage by Air.

⁵⁴ A Soppard ‘Rights-south africa: anti-terror bill draconian’ Inter press Service, (2003), <http://ipsnews.net/interna.asp?idnews=18989> (accessed 29 March 2010).

⁵⁵ Note 54 above.

⁵⁶ Note 54 above.

⁵⁷ J Dugard SC ‘*Jurisdiction and International Crimes*’ International Law: A South African Perspective’, third edition (2005) 169.

overly broad list of crimes that may be treated as terrorist activity. Section 1 of POCDATARA contains the relevant definitions in relation to the law. Section 1, subsection 1 (xxv) (a) defines ‘terrorist activity’ through a fairly long list of crimes. Subsection (b) then defines terrorist specific intent, and subsection (c) the requirement of a political or analogous aim. These subsections are to be read together as a cumulative definition, so that an act constitutes terrorism only if all three conditions are met. It becomes hard to imagine which form of violence could not be qualified by one of those three requirements. However, subsection (a) of the definition, read in isolation, enumerates an overly broad scope of acts, covering several offences that do not necessarily include deadly or serious violence against members of the population generally or sectors of it. It provides: “Convention offence means an offence, created in fulfilment of the Republic’s international obligations in terms of instruments dealing with terrorist and related activities” - “Offences associated or connected with financing of specified offences; Offences relating to explosive or other lethal devices; Offences relating to hijacking, destroying or endangering safety of a fixed platform; Offences relating to taking a hostage; Offences relating to causing harm to internationally protected persons; Offences relating to hijacking an aircraft; Offences relating to hijacking a ship or endangering safety of maritime navigation.”⁵⁸

2.1.2.3. International treaties’ approach

In a general point of view by exploring international law, one can observe that few conventions have tried to give a definition of terrorism. After a tragic event in Marseille where the King Alexandre of Yugoslavia and the Minister of Foreign Affairs were assassinated, the Convention for the Prevention and Punishment of Terrorism adopted in 1937 in Geneva was only ratified by India. Article 3 of the Convention defined terrorism as follows: All criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.⁵⁹ This definition seems to be narrow on one hand, and on the other hand it seems to be a repetition because it defined terrorism as terror. To terrorize does not mean to terrify, to strike of terror, but it means to establish terrorism, the reign of terror.⁶⁰ In the light of our present- day

⁵⁸ Protection of Constitutional Democracy Against Terrorism and Related Activities Act , 33 of 2004, chap 2 Part 2 section 4-10.

⁵⁹ Article 3 of the Convention for the Prevention and Punishment of Terrorism.

⁶⁰ Note 25 above 73.

experience it can be doubted that this was an adequate definition, because it is not always clear whether what we usually call terrorism is directed against a state.⁶¹

“Unlikely the 1937 convention, the European Convention on the Suppression of Terrorism of January 27, 1977 lists the offences each of which, for the purposes of extradition, shall not be regarded as a political offence, or as an offence connected with a political offence, or as an offence inspired by political motives”⁶². This Convention states only rules which make easy the proceedings and the international repression of certain acts such as hijacking, taking of hostages, bomb attacks,⁶³ but the surprise here is that the Convention does not give an exact meaning of terrorism.

From the Arab Convention for the Suppression of terrorism (adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice in Cairo, Egypt in 1998), terrorism was defined in the Convention as: “Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.”⁶⁴

“The International Convention for the Suppression of the Financing of Terrorism adopted without a vote by the United Nations General Assembly in New York on 9 December 1999 (resolution 54/109), entered into force on 10 April 2002 and, as of 31 October 2008, 167 states were parties to thereto. This instrument aims to facilitate the prosecution of persons accused of involvement in the financing of terrorist activities.”⁶⁵ It defines terrorism as any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of

⁶¹ International Society for Military Law and the Law of War, The Netherlands National Group. *Terrorism and the Military International Legal Implications*’ edited by Wybo P. Heere, 119.

⁶² Article 1 of the European Convention on the Suppression of Terrorism of 27 January 1977.

⁶³ UNO, International instruments on Prevention and punishment of international Terrorism. (2005) 141.

⁶⁴ Article 2 of the Arab Convention For The Suppression Of Terrorism
<http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_27.html> (accessed 29 March 2010).

⁶⁵ P Klein ‘International Convention for the Suppression of the Financing of Terrorism’
<untreaty.un.org/cod/avl/pdf/ha/icsft/icsft_e.pdf> (accessed on march 2010).

such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁶⁶

Some authors have a lot of comments on these treaties. For instance, Andrew Byrness in his inaugural lecture, *Apocalyptic visions and the law: the legacy of September 11* presented at the Faculty of Law, Australian National University on May 30 2002 observed that: “These conventions – all of which are described by the United Nations as part of its panoply of anti-terrorist measures – share three principal characteristics:

(a) they all adopted an "operational definition" of a specific type of terrorist act that was defined without reference to the underlying political or ideological purpose or motivation of the perpetrator of the act – this reflected a consensus that there were some acts that were such a serious threat to the interests of all that they could not be justified by reference to such motives;

(b) they all focused on actions by non-State actors (individuals and organisations) and the State was seen as an active ally in the struggle against terrorism - the question of the State itself as terrorist actor was left largely to one side; and

(c) they all adopted a criminal law enforcement model to address the problem, under which States would cooperate in the apprehension and prosecution of those alleged to have committed these crimes.”

This act-specific approach to addressing problems of terrorism in binding international treaties has continued up until relatively recently.⁶⁷ Although political denunciation of terrorism in all its forms had continued apace, there had been no successful attempt to define “terrorism as such in a broad sense that was satisfactory for legal purposes. There was also some scepticism as to the necessity, desirability and feasibility of producing an agreed and workable general definition.”⁶⁸

From the above one can say that scholars and international treaties could not agree on the notion of terrorism, consequently terrorism is still controversial. After analysing all these definitions, my own definition of terrorism is the following: Terrorism is the unlawful use or

⁶⁶Article 2 (1) (b) of International Convention for the Suppression of the Financing of Terrorism, See also UNO, International instruments on Prevention and Punishment of international Terrorism. (2005)122-123.

⁶⁷ A Byrness: ‘*Apocalyptic visions and the law: the legacy of September 11*’ Federation Press (2003) 32.

<http://www.google.com/search?q=Apocalyptic+visions+and+the+law%3A+the+legacy+of+September+11&ie=utf-8&oe=utf-8&aq=t&rls=com.yahoo:fr:official&client=firefox-a> (accessed April 1 2010).

⁶⁸ Note 67 above.

threatened use of force or violence (attacks, taking of hostages... etc.) by an individual or group of individuals against persons, people, systems, countries or property with the intention to create a climate of fear, intimidation for reasons such as political, social, religious, strategic and ideological aspects. Academics, politicians and journalists, all use a variety of definitions of terrorism. Some definitions focus on the terrorist organisations' mode of operation, others emphasize the motivations and characteristics of terrorism. Finding a consensual definition of terrorism is of a particular importance. A lack of a common definition may be an obstacle for cooperation to fight against terrorism. It is thus not surprising that although my own definition includes a variety of actors and actions, it provides more positive connotations that are often used to describe and characterize the terrorist activities.

2.2. International Criminal Court

This section will deal with the following: historical background, crimes within the jurisdiction of the Court, ICC and other judicial institutions, evolution within the ICC's Statute under international law.

2.2.1. Historical background

In 1948, after the Nuremberg and Tokyo tribunals were established following the Second World War, the United Nation General Assembly for the first time decided to establish a permanent court to prosecute odious crimes such as genocide, and other horrendous war crime. However, "it was not until 1989 when at the demand of the UN General Assembly, the International Law Commission (ILC) was invited once again to prepare a draft statute for the setting up of such a court. Finally, in 1994, a draft statute was submitted to the General Assembly for deliberation. Consequently, the preparatory committee on establishment of an ICC created in 1995 to examine the draft statute, held a conference on the draft in Rome from 15 to 17 April 1998. The conference was attended by 160 states as well as human rights representatives from 14 specialised agencies, 17 intergovernmental and 124 non-governmental organisations."⁶⁹ At its conclusion the Rome Statute of the International Criminal Court was adopted in a non-recorded vote by 120 states, 7 against (include US,

⁶⁹ A William Schabas *'An Introduction to International Criminal Court'* Cambridge University Press (2007) 316.

China and India) and with 21 abstention (including Turkey, Sri Lanka and Mexico).⁷⁰ A minimum of 60 ratifications were required before the court could formally become fully operational (art 126(1) Rome Statute). Finally the required quota was reached in April 11, 2002 and the court being set up in July 1st of the same year.⁷¹

2.2.2. Crimes within the jurisdiction of the Court

The jurisdiction of the Court has to be understood in three contexts in accordance with general principle of criminal law. These are: Subject matter jurisdiction, answering the question of which crime can be tried before the Court? Territorial and personal jurisdiction, setting down the question of who can be tried? And temporal jurisdiction, solving the problem of when might the crime has been committed.

2.2.2.1. Subject matter jurisdiction.

The jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with the statute with respect to the following crimes (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.⁷²

2.2.2.1.1. Genocide

The Rome Statute defines ‘genocide’ as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.⁷³

⁷⁰ Press Release L/ROM/22 UN Diplomatic Conference concludes in Rome With Decision To Establish Permanent International Criminal Court, 17 July 1998.< <http://www.un.org/icc/pressrel/lrom22.htm> > (accessed Jan. 24, 2011).

⁷¹ Note 67 above.

⁷²The Rome Statute of the International Criminal Court. Part2 article 5(1).

⁷³ Note 72 above article 6.

2.2.2.1.2. Crimes against humanity

‘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 collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3,⁷⁴ 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.⁷⁵

2.2.2.1.3. War crimes

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. ‘War crimes’ also means: Grave breaches of the Geneva Conventions of 12 August 1949, other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.⁷⁶

2.2.2.1.4. Crime of aggression

“Discussions and negotiations on the crime of aggression first began over a decade ago, in Rome. At the 2010 Review Conference in Kampala-Uganda, discussions focused on one major outstanding issue still preventing agreement: the jurisdiction of the ICC and the role of the UN Security Council in this context.”⁷⁷ Crime of aggression, referred to as the ‘*supreme*

⁷⁴ Paragraph 3 of article 7 Rome Statute refer to gender which simply mean any man or human following the society, any other definition is not acceptable.

⁷⁵ Note 72 above article 7.

⁷⁶ Note 72 above article 8.

⁷⁷ Report on the first Review Conference on the Rome Statute ,31 May-11 June 2010 Kampala, Uganda <<http://www.kampala.icc-cpi.info>> (accessed on 12 Jan 2011).

international crime,⁷⁸ was the dominant topic of the Review Conference. Since Rome, the Court has already been competent to try “crimes against humanity, war crimes, and genocide”⁷⁹; but back then “political parameters had not allowed for an agreement on a definition of the crime of aggression and rules for its exercise of jurisdiction.”⁸⁰

“With the firm commitment of states parties and the leadership of the president of the ASP and the chair of the Working Group on the crime of aggression, states were able to reach consensus on the final day of the Conference. States agreed on a definition, the conditions under which the Court would exercise jurisdiction, and a roadmap for the future activation of that jurisdiction to commence after January 1, 2017.”⁸¹

“The definition of the crime of aggression proved to be rather uncontroversial. In two paragraphs, the newly added article 8bis defines the individual crime (paragraph 1) and the prerequisite state act of aggression (paragraph 2).”⁸² Pursuant to article 8bis (1), the crime of aggression means “*the planning, preparation, initiation or execution*” of an act of aggression.

“As had been expected, the regime for the exercise of jurisdiction over the crime of aggression was the most contentious issue.”⁸³ “Whilst the permanent members of the Security Council strongly argued that the Security Council must have the exclusive power to refer a situation of aggression to the ICC, many states favoured a trigger mechanism allowing the ICC Prosecutor to investigate upon authorisation by the Pre-Trial Chamber and thereby independently from the Security Council.”⁸⁴

“Exemptions from the jurisdiction of the Court were included in the final package. These exemptions will prohibit the Court from exercising jurisdiction over the crime of aggression

⁷⁸ International Military Tribunal, judgment of 1 October 1946, in “The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany”, Part 22 (22nd August to 1st October, 1946) 421.

⁷⁹ See article 5 of the Rome Statute of the International Criminal Court.

⁸⁰ The First Review Conference of the International Criminal Court By Laura Marschner, Berlin, and Isabelle Olma, The Hague.

⁸¹ Note 77 above.

⁸² Note 80 above.

⁸³ Trahan, “*The new agreement on the definition of the crime of aggression*,” (2010) 2

<http://blogs.ubc.ca/ligi/files/2010/06/aggression-Kampala-op-ed.trahan.pdf> (accessed on 12 Jan 2011).

⁸⁴ Note 83 above.

when committed by the nationals or on the territory of any non-state party. The same applies to certain states parties who wish to participate in the exemption.”⁸⁵

“Going forward, the Coalition will monitor the progress of state party ratification of the crime of aggression amendments and the ASP preparations for an eventual activation of the crime of aggression. The Coalition will also be joining with other organizations to oppose exemptions to the Court’s jurisdiction, as such exemptions may likely result in an impunity gap.”⁸⁶

2.2.2.2. Territorial and personal jurisdiction

The Court may exercise its jurisdiction if one or more of the following states are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.⁸⁷ In addition the Court shall have jurisdiction over natural persons pursuant to this Statute.⁸⁸ The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.⁸⁹

2.2.2.3. Temporal jurisdiction

The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute. If a state becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that state has made a declaration under article 12, paragraph 3.⁹⁰ This simply means that the jurisdiction of the court is not retroactive.

⁸⁵ Note 77 above.

⁸⁶ Note 77 above.

⁸⁷ Note 72 above article 12.

⁸⁸ Note 72 above article 25 paragraph 1.

⁸⁹ Note 72 above article 26.

⁹⁰ Note 72 above Part 2 article 11.

2.2.3. ICC and other judicial institutions

In this section, attention shall be paid firstly on ICC and International court of justice, secondly on ICC and *ad hoc* tribunals for Rwanda and Yugoslavia and thirdly on ICC and hybrid tribunals.

2.2.3.1. ICC and International Court of Justice

The International Court of Justice (ICJ) is the primary judicial organ of the United Nation. Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions submitted to it by duly authorized international organs, agencies, and the UN General Assembly. The international court of justice has jurisdiction over crimes that deal with individual criminal responsibility.⁹¹ This means that only states are liable before the International Court of Justice, so ICJ has jurisdiction only with respect to disputes between states instead of individuals who are liable before the ICC.

2.2.3.2. ICC and *ad hoc* tribunals for Rwanda and Yugoslavia

It was under chapter 7 of the UN Charter that the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY)⁹² and the International Criminal Tribunal for Rwanda (ICTR)⁹³ in order to adjudicate the atrocities committed in those countries. “The International Tribunals for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territories of the former Yugoslavia, and Rwanda were established by the United Nation Resolution 827 of 22/02/1993 (ICTY) and Resolution 955 of 8/11/1994 (ICTR) to prosecute those responsible for atrocities during times of war and genocide in these specific regions.”⁹⁴ They were not established to prosecute violations that occurred anywhere, or to prevent future breaches. Unlike the two *ad hoc* tribunals stated above, ICC is an institution without permanent geographical and temporal limitation. “It is competent to act more quickly than if *ad hoc* court should be established. As a permanent court, it is a real deterrent, sending a strong message to the potential criminals.”⁹⁵ It encourages states to investigate and prosecute the

⁹¹ Statute of International Court of Justice article 38

<<http://www.icjci.org/documents/index.php?p1=4&p2=2&p3=0>> (accessed 27 March 2010).

⁹² Security Council resolutions on the establishment of an international tribunal for the former Yugoslavia, S.C. Res 808,827, reprinted in Hum. RTS. L.J.197 (1993).

⁹³ Statute of the International Tribunal for Rwanda S.C. Res. 955, reprinted in 33 I>L>M>1590 (1994).

⁹⁴ Note 1 above.

⁹⁵ Note 1 above.

worst crimes committed on their territories or by their nationals. If they do not, the Court is there to exercise jurisdiction.⁹⁶

2.2.3.3. ICC and hybrid tribunals

The latest type of international crime court, inter alia dubbed ‘hybrid courts’, has been welcomed with great expectation.⁹⁷ Examples of hybrid courts are Panels in the Courts of Kosovo, Court for Sierra Leone, *Extraordinary Chambers in the Courts of Cambodia*, or (Khmer Rouge Tribunal). The term is used to indicate that a mix of national and international components is said to offer an approach that may address some of the concerns about purely international justice and local justice. Indeed their nature is mixed, incorporating at the same time international and national features. They all are composed of international and local staff. Their aim is to sanction grave violations of international law in particular, international humanitarian law, and human rights law committed by individuals and, as a consequence, dissuade future violations and help to restore the rule of law.

But unlike the ICC, they are ad hoc institutions, formed to deal with exact situations, for a limited amount of time, and are the consequence of remarkable political and historical circumstances.

2.2.4. Evolution within the ICC’s statute under international law

The first International Criminal Court has made a great evolution or innovations under the international order; these are automatic nature of the jurisdiction of the Court, the guarantees of a fair and just trial for the alleged victims and principles of victim’s reparation and protection.

2.2.4.1. The automatic nature of ICC’s jurisdiction

ICC has jurisdiction over nationals of states that have ratified the Rome Statute. This ICC’s power is a major evolution under international law because in the past, acceptance of jurisdiction was in most cases subject to an additional agreement of the state.⁹⁸

⁹⁶ Note 1 above.

⁹⁷ M H Sarah ‘Hybrid courts’ *The hybrid category of a new type of international crimes courts* <www.utrechtlawreview.org/publish/articles/000033/article.pdf> (accessed 27 march 2010).

⁹⁸ Note 72 above article 12.

2.2.4.2. The guarantees of a fair and just trial for alleged perpetrators

The ICC statute creates a genuine system of international justice. It guaranteed that individuals accused of crimes that fall under the jurisdiction of the court and it also guaranteed all the elements of a fair and just trial. The Statute recognizes a wide range of rights to the accused and even extends the standard recognize by most international instruments on human rights. The Statute recognizes several specific advantages. One can talk of mechanisms available to the investigating⁹⁹ body, or political motivated criminal prosecution. In addition people who are called upon to make decisions regarding the primary judicial investigation or trial must have the highest qualifications of competence, independence and impartiality. Moreover, the Statute also contains provisions based on general principle of criminal law, investigations, prosecutions, trial, cooperation and judicial assistance and enforcement. These provisions require harmonization of national systems of criminal procedure and of different criminal laws. I believe that having reached an agreement on these highly technical issues is a major success.

2.2.4.3. The principles of victim's reparation and protection

At the creation of the ad-hoc tribunals, the focus was particularly on the punishment for violations of human rights and violation of international humanitarian law. But with the advent of the ICC, victims have a right under international law to request damages and seek redress.¹⁰⁰ “Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations and the harm suffered.”¹⁰¹ The court shall establish principles relating to reparation for victims, such as restitution, compensation, satisfaction, rehabilitation and guarantee of non-repetition. The Court has jurisdiction to determine the extent of damage, loss or injury caused to the victims and order the convicted person the appropriate remedy to grant. The Court may order that the proceeds of fine or others property to be confiscated must be paid to the funds.¹⁰² It should be noted that the role of victims in the new international criminal court is crucial because the ICC in its jurisdiction no longer limited to law enforcement but also the restoration of

⁹⁹ Note 98 above.

¹⁰⁰ M Cheri Bassiouni ‘*International Criminal Law*’ Volume III International Enforcement. Martinus Nijhoff Publishers 699.

¹⁰¹ Note 100 above.

¹⁰² Note 98 above.

victim's rights. Restitution should, whenever possible, restore the victim to the original situation before the gross violation.¹⁰³

The Rome Statute provides for the victim's protection during the investigation and when discussing contradictory hearing.¹⁰⁴ The prosecutor takes measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the court.¹⁰⁵ This measure is relevant for the victims to be heard. During the course of the discussion room, Court may order the camera at any event. This is applying particularly in respect of a victim of sexual assault or child who is the victim.

The aim of this chapter is to learn more about theoretical consideration of International criminal court and terrorism. Despite the wide range of terrorism definition and the clarifications of International criminal court's competence, we are now able to analyse the issue of the issue of the subject matter jurisdiction. It is the main point of the next chapter.

¹⁰³ Note 93 above.

¹⁰⁴ Note 72 above article 54(1)(b)(c)(e).

¹⁰⁵ Note 72 above article 54(b).

CHAPTER 3: THE ISSUE OF THE SUBJECT MATTER JURISDICTION

In this chapter, before exploring the reasons of terrorism being excluded from the Rome Statute and its consequences, it will be relevant first of all to start by pointing out factors which led to this state of affairs.

3.1. Crimes of terrorism as a separate provision under the ICC's Statute

The creation of ICC opens a new judicial world; it is the first time humanity gets a permanent and universal Criminal Court for the prosecution of most serious crimes such as war crimes, genocide, crimes against humanity and the crime of aggression. However, the Preparatory Committee's Working Group proposed a provision concerning the prohibition of the crimes of terrorism. This provision was not adopted at the Rome Conference in 1998 mainly because there was and still is no generally accepted definition of terrorism.¹⁰⁶ Three main factors influenced the exclusion of terrorism act from the subject matter jurisdiction of ICC:

Firstly the matter of time: In Rome there was a great debate on including terrorism act within the mandate of ICC but the participants decided to decline.¹⁰⁷ In 1998, during the works of the adoption of ICC and its competences, there were controversies about terrorism. The issue of terrorism raised many debates and since its criteria were and are not still clear, the compromise on what should be understood as terrorism failed. It was very hard to reach at a consensus within this short period of time, in which many other questions were supposed to be answered. Obviously, nothing on the terrorism issue came out of the meeting because of lack of criterion, but especially because of a limited time to go on with consultations. On this account, Ilias Bantekas rightly observed that the question of including terrorism within the ICC's competence involves sensitive and long disputed issues which could not be resolved at the conference because it had to conclude its work within five weeks.¹⁰⁸ In the end, participants decided to drop the terrorism provision and proposed a Review Conference in 2009 to determine whether any amendments to the Rome Statute are appropriate.

On November 2009 the Assembly of State Parties (ASP) decided on issues such as terrorism to be considered at the Review Conference, both in terms of amendments and stocktaking. As

¹⁰⁶ P Robinson 'The Missing Crime in the Rome Statute of International Criminal Court: a commentary' 517.

¹⁰⁷ Note 3 above.

¹⁰⁸ Ilias Bantekas ET AL "International Criminal Law" Cavendish Publishing Limited ed. (2001) 125.

a result of discussions at the eighth ASP session, a number of proposals did not gather sufficient support for their consideration. Nevertheless, the ASP agreed to create an ASP Working Group on Amendments that will serve to continue discussions on the submitted proposals and any other future proposal starting at the ninth ASP session in December 2010.¹⁰⁹

Secondly, during the 1998 session on ICC and its competences, the Preparatory Committee's Working Group proposed a provision concerning the prohibition of the crimes of terrorism. But the crime of terrorism was and still faces the universal challenge of definition. The ICC is based on the idea that "the most serious crime affecting the entire community must not go unpunished and that their prosecution must be ensured by taking measures at national level and strengthening international cooperation."¹¹⁰ However, the idea of establishing a universal justice is still a daydream since some international crimes such as international terrorism that threatens the peace and international security are excluded from the substantive jurisdiction of the ICC.

According to Ghislaine Doucet, terrorism as undeniable international crime cannot be excluded from the jurisdiction of the Court. Its perpetrators could not remain unpunished based on an alleged international custom (*Nullum crimen nulla poena sine lege*) protecting them from prosecutions and convictions.¹¹¹ The issue of terrorism as now defined seems to be specific to certain regions. That could be why from 1998 until now there is still lack of compromise on the criteria of terrorism as a crime. Indeed, as stated Patrick Robinson, this provision was not adopted at the Rome Conference in 1998 mainly because there was and still is no generally accepted definition of it.¹¹²

Thirdly, the Rome statute of ICC expressly excluded crime of terrorism from its competence.¹¹³ According to the principle *Nullum crimen sine lege* established by article 22(1): "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

¹⁰⁹ Review Conference of the Rome Statute of ICC: From 22-25 March 2010, the eighth session of the Assembly of States Parties (ASP) to the Rome Statute resumed at UNHQ in New York to discuss preparations for the Review Conference. <<http://www.iccnw.org/?mod=review>> (accessed 24 April 2010).

¹¹⁰ Amnesty International: "The International Criminal Court" <<http://www.amnestyinternational.be>>(accessed 24 April 2010).

¹¹¹ G Doucet 'Terrorisme, victimes et responsabilité pénale internationale' Calmann-Levy (2003) 104.

¹¹² Note 106 above.

¹¹³ See article 5 of the Rome Statute of International Criminal Court. It only mentions war crime, crime against humanity and genocide. See also article 8bis for crime of aggression.

According to the fact that terrorism is not part of the ICC competence, the following conclusion imposes itself: Crime of terrorism cannot be pleaded before the court.

After this analysis of factors which influenced the exclusion of terrorism crime, it is important now to identify the reasons of the fundamental legal incompetence of the ICC in prosecuting crimes of international terrorism.

3.2. Legal reasons of excluding crimes of terrorism from the jurisdiction of the court

The only fundamental legal reason of the ICC's incompetence that still prevails now remains the problem of lack of a universal definition of international terrorism under international law, and that also raises the problem of the qualification of terrorism acts.

3.2.1. The challenge of universally defining terrorism

Although the international community had repeatedly condemned terrorism, there is no consensus internationally on what should be understood as terrorism. For many decades, countries, lawyers and the wider international community have tried unsuccessfully to provide a definition of crime of terrorism legally acceptable according to criminal law techniques. More than a hundred definitions have been developed. In this regard Andrew Byrnes states: "International responses to terrorism are nothing new, though it may be argued that the nature of modern international terrorism and the extent of the suffering and damage that may result from terrorist acts are now significantly different."¹¹⁴ In addition, "Although political denunciation of terrorism in all its forms had continued apace, there had been no successful attempt to define "terrorism" as such in a broad sense that was satisfactory for legal purposes."¹¹⁵ Despite the fact that terrorism is a reality such as all other crimes, the compromise on its definition and universal criterion remains an illusion for the international community. According to the website of internet association for the promotion of human rights for instance there exists 212 English definitions of which 72 used officially, but it is clear that none is unanimous.¹¹⁶ Finding a solution to the universal challenge of defining terrorism, Ariel Merari thought that a definition of terrorism that would achieve the consensus is not an important end in itself except for linguists. According to him the

¹¹⁴ Note 67 above.

¹¹⁵ Note 67 above.

¹¹⁶ É Campos 'Définitions du terrorisme: analyse et discussion' <<http://erta-tcrg.org/analyses/defanalyse1.htm>> (accessed 29 April 2010).

important thing is to have a definition that characterizes the specificity of terrorism, even if it is not unanimous and allowed the distinction from other forms of violence.¹¹⁷ Legally speaking it does not make sense and it will be illegal and unfair if one has to refer to a standard with no consensus at the international level.

3.2.1.1. The UN General Assembly

After September 11 2001, the international community could hardly continue to isolate terrorism from the traditional categories of international crimes and condemning it without actually defining it. For many years, the General Assembly and other UN bodies have condemned international terrorism without a qualification. It is clear that none of the resolutions of the United Nations General Assembly address the problem of an international terrorism definition in a manner acceptable to all.

The question of defining international terrorism remains the most difficult and unsatisfactorily solved for all engaged in the process of elaboration of anti-terrorist treaties, either universal or regional.¹¹⁸

In every major debate, the difficulty of defining international terrorism has been raised and it is often the result as in the case of preparatory negotiations of the adoption of the ICC's Statute.

3.2.1.2. The International Law Commission

The International Law Commission was created in 1947 by the General Assembly of United Nations.¹¹⁹ Its role consists to codify international law rules. "This mission was given to the ILC in order to set out a Draft Code of Offences against the Peace and Security of Mankind. At the time, the ILC had to consider in advance the four major international crimes, notably, 'crimes against peace,' 'war crimes,' 'crimes against humanity,' and 'genocide,' already included in a convention adopted by the General Assembly in 1948."¹²⁰ The mandate was extended to cover other category of international crimes. Then relating to the crime of terrorism the draft statute defined it in three paragraphs:

¹¹⁷ A Merari 'Du Terrorisme comme stratégie d'insurrection' Bayard ed Paris (2004) 23.

¹¹⁸ Z Galicki: 'International Law and Terrorism Institute of International Law' University of Warsaw, 743

¹¹⁹ General Assembly Resolution n°174 of November 17, 1947 on establishment of an International Law Commission. <<http://www.un.org/documents/ga/res/2/ares2.htm>> (accessed April 2010).

¹²⁰ Note 119 above.

“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; Offences under six listed conventions, such as the Convention for the Suppression of Unlawful Seizure of Aircraft and the International Convention against the Taking of Hostages;

An offence involving the use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.”¹²¹

However, “the ILC's work on the Draft Code of Offences completed in 1954 decided to include terrorism in the category of ‘war crimes’ committed in violation of international humanitarian law and in the context of armed conflict.”¹²² The proposition was not considered and as a result, ICC would not have jurisdiction over crime of terrorism. Moreover, “from 1978 to 1991 the ILC worked, obviously without great haste, at the development of a new Draft Code of Crimes, which by then contained twenty-six categories of crimes, as opposed to only four, namely, aggression, genocide, crimes against humanity, and war crimes.”¹²³ Thus in its 1990 version of the draft code of crimes against peace and security of mankind, the crime of international terrorism was criminalized.¹²⁴ In 1995, however, there was no consensus among members of the commission. Finally, the debate on terrorism crime led to an impasse up to now.

The International Law Commission, which spent years preparing the draft Code on Crimes against Peace and the Security of Humanity, was obliged to abandon the effort to include the crime of terrorism because it could not agree on a definition. “Several commission members have raised in particular the difficulties in developing a definition of crime of terrorism which would have the necessary precision required for criminal law.”¹²⁵ Others have noted that

¹²¹ ‘Crimes within the Court's Jurisdiction’ <<http://www.un.org/icc/crimes.htm>> (accessed 22 April 2010).

¹²² Report of the ad hoc committee work established by the General Assembly Resolution n° 51/210 of December 17, 1996, <<http://www.un.org/law/terrorism/index.html>> (accessed April 2010).

¹²³ Note 122 above.

¹²⁴ Note 106 above.

¹²⁵ D Thiam ‘Rapport sur le projet de code des crimes contre la paix et la sécurité de l’humanité.’ *Annuaire de la Commission du droit international volume III* (1998) 124.

terrorism is not a crime against peace and security of mankind, but that only certain acts of international terrorism were international crimes.¹²⁶

The difficulties that have been encountered in seeking agreement on a generic, universally valid definition of terrorism can be appreciated by comparing the definitions of terrorist acts contained in existing treaties.

3.2.1.3. The Rome Statute of International Criminal Court

According to Ghislaine Doucet, if international criminal law has evolved, it remains incomplete. In cases of genocide, war crimes and crimes against humanity, the ICC does not exempt the states leaders of their responsibility.¹²⁷ But “such terrorism was deliberately excluded from the jurisdiction of the Court, arguing that this crime, political in nature, cannot be defined.”¹²⁸ “The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee for the establishment of an International Criminal Court to discuss the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission in 1994.”¹²⁹ During the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy from June 15 to July 17 1998, the problem of terrorism was discussed. “The Preparatory Committee considered crime of terrorism without prejudice to a final decision on its inclusion in the Statute. The Commission proposed to include certain acts of terrorism already under investigation by treaties in the list of crimes within the jurisdiction of the Court through a reference to an annex.”¹³⁰ The proposal of the commission described these acts as crime of “international apprehension of an exceptional severity.”¹³¹

Although the fact that the Committee also discussed this crime only in a general manner and did not have time to examine it thoroughly as other crimes, there was significant interest in including terrorism in the Court's mandate, but it was decided not to do so. The committee proposed an article entitled ‘*crime of terrorism*’. It established two categories of crimes of

¹²⁶ Note 125 above.

¹²⁷ Note 72 above Article 27.

¹²⁸ Note 108 above, 392.

¹²⁹ Note 108 above, 125.

¹³⁰ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), volume II
<http://www.google.co.za/search?hl=en&q=document+des+Nations+Unies%2C+suppl%C3%A9ment+no+22+%28A%2F51%2F22%29+&btnG=Search&meta=&aq=f&aqi=&aql=&oq=&gs_rfai> (accessed 29 April 2010).

¹³¹ Note 130 above.

terrorism (act of violence likely to cause terror and use of certain weapons to commit random acts of violence), and made references to other conventions such as Hague and Montreal conventions regarding other terrorist acts already criminalized.¹³² “None of these propositions was adopted, because several states had issued the opinion saying that the crimes under the Hague and Montreal Conventions were possibly less serious than war crimes, genocide and crime against humanity, and it might play down the role of the ICC.”¹³³

In addition to various treaties prohibiting many specific acts of terrorism, and in the aftermath of September 11, 2001 the member states of the UN have undertaken the drafting of a comprehensive convention against terrorism.¹³⁴ At a future review conference, if the States Parties so decide, the crime of terrorism could be added to the Court's jurisdiction. However, there is no doubt that terrorism probably will never have the necessary conditions of setting a legal definition to a universal response for international terrorism.¹³⁵

3.2.1.4. The UN special Committees on international terrorism

At its sixtieth session, the General Assembly in resolution 60/43 "condemned all acts, methods and practices of terrorism in all its forms and manifestations as criminal and unjustifiable."¹³⁶

“In 1996 the General Assembly, in resolution 51/210 of December 17, decided to establish an *ad hoc* committee to prepare an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism.”¹³⁷ “The convention’s aim was to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.”¹³⁸ Under the terms of General Assembly resolution, the *ad hoc* committee shall, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism, and shall continue to

¹³² Note 130 above.

¹³³ Note 130 above.

¹³⁴ ‘*The International Criminal Court: What about terrorism and drug trafficking ?*’ Published by the United Nations Department of Public Information (December 2002) <<http://www.un.org/News/facts/iccfact.htm>> (accessed 23 April 2010).

¹³⁵ Note 125 above, 297.

¹³⁶ UN disarmament yearbook Document A/60/228 <<http://www.un.org/depts/dhl/resources/terrorism/>> (accessed 23 April 2010).

¹³⁷ Note 136 above.

¹³⁸ Note 136 above.

discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.¹³⁹ “This mandate continued to be renewed and revised on an annual basis by the General Assembly in its resolutions on the topic of measures to eliminate international terrorism.”¹⁴⁰ The *ad hoc* committee's mandate is further framed by the following two declarations adopted by the General Assembly: The Declaration on Measures to Eliminate International Terrorism¹⁴¹, the Declaration to supplement the 1994 Declaration on Measures to Eliminate International Terrorism.¹⁴² “During the sixtieth session, the following measures were taken in order to eliminate international terrorism: the General Assembly calls upon all States to cooperate to prevent and suppress terrorist acts; urges all states and the secretary general, in their efforts to prevent international terrorism, to make the best use of the existing institutions of the United Nations.”¹⁴³

Since its establishment, the *ad hoc* committee has negotiated several texts resulting in the adoption of three treaties: The International Convention for the Suppression of Terrorist Bombings adopted by the General Assembly in resolution 52/164 of 15 December 1997; the International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly in resolution 54/109 of 9 December 1999; the International Convention for the Suppression of Acts of Nuclear Terrorism adopted by the General Assembly in resolution 59/290 of April 13, 2005.

Since 2000 the *ad hoc* committee has focused on the drafting of a treaty against nuclear terrorism and a comprehensive convention against terrorism, and since 2005 it has focused exclusively on the latter.

As Rosand points out, the Security Council also adopted a number of Resolutions on terrorism.

¹³⁹ UN Resolution 64/118 adopted on December 16, 2009 (operative paragraph 22) <<http://www.un.org/law/terrorism/index.html>> (accessed 23 April 2010).

¹⁴⁰ Note 139 above.

¹⁴¹ Resolution 49/60 of December 9, 1994 adopted by the General Assembly on the report of the Sixth Committee (A/49/743) ‘Measures to eliminate international terrorism’ <<http://www.un.org/law/terrorism/index.html>> (accessed 23 April 2010).

¹⁴² Resolution 51/210 of December 17, 1996 by the General Assembly on the report of the Sixth Committee (A/51/631) ‘Measures to eliminate international terrorism’ <<http://www.un.org/law/terrorism/index.html>> (accessed 23 April 2010).

¹⁴³ Resolution adopted by the General Assembly on the report of the Sixth Committee (A/60/519) A/RES/60/43 ‘Measures to eliminate international terrorism’ <<http://www.un.org/law/terrorism/index.html>> (accessed 29 April 2010).

“Adopted on September 28, 2001, Resolution 1373 is the cornerstone of the United Nations' counterterrorism effort. Following September 11, 2001, the Security Council took a number of important steps in the fight against terrorism...The United Nations is uniquely placed to facilitate cooperation between Governments in the fight against terrorism. It declares international terrorism a threat to international peace and security and imposes binding obligations on all UN member states...Resolution 1373 does not attempt to define terrorism the principal reason being that it was drafted to avoid the divisive debate in the Security Council that has bogged down the Sixth Committee's work on the Comprehensive Convention. The sponsors of Resolution 1373 wanted a resolution that would pass quickly... Nor does it, like ‘Resolution 1390,¹⁴⁴ seek to identify specific terrorists. In fact, the goal of the Counter-terrorism Committee, and of Resolution 1373 as a whole, is perhaps more ambitious: to raise the average level of government performance against terrorism across the globe... Resolution 1373 requires all states to take steps to combat terrorism; it creates uniform obligations for all 191 member states to the United Nations, thus going beyond the existing international counterterrorism conventions and protocols binding only those that have become parties to them... More generally, it requires all member states to reconsider their domestic laws and practices to ensure that terrorists cannot finance themselves or find safe havens for their adherents or their operations on these states' territory.’¹⁴⁵ Agreement on a universally acceptable definition of the term however, remains problematic.

3.2.1.5. The UN Centre for the Prevention of International Criminality

UN Centre for the Prevention of International Criminality is one of the United Nations Research and Training Institutes. It assists the international community in formulating and implementing improved policies in the field of crime prevention and criminal justice.

The Institute carries out action-oriented research, training and technical cooperation programmes, with the aim of assisting governments and the international community at large in tackling the threats that crime poses to social peace, development and political stability and in fostering the development of just and efficient justice systems. It supports the formulation and implementation of improved policies in the field of crime prevention and justice, the

¹⁴⁴ Security Council Resolution 1390 (Jan. 28, 2002).

¹⁴⁵ E Rosand Security Council Resolution 1373, *The Counter-terrorism Committee, and the Fight against Terrorism* ‘The American Journal of International Law, Vol. 97, No 2 (Apr.2003) 333. <<http://www.jstor.org/stable/3100110>> (Accessed on 14 Jan 2011).

promotion of national self-reliance and the development of institutional capabilities. The Institute works to advance the understanding of crime-related problems, supporting the respect for international instruments and standards; it facilitates the exchange and dissemination of information, cooperation in international law enforcement and judicial assistance. It also structures its activities to meet the identified needs of member states. Its programme activities arise from priorities identified by the UN Annual Crime Prevention and Criminal Justice Commission. The Institute current priorities include, *inter alia*, activities related to organized crime, judicial reform, juvenile justice, security and counter-terrorism, major event security, international criminal law, corruption, human trafficking, victim protection, counterfeiting, cybercrime, crimes against the environment, and drug abuse. The Institute is a firm believer in the importance and benefits of close international and cross-regional cooperation. It encourages the sharing of information and experiences at all levels.

Reflecting the determination of the international community to eliminate this threat. “The organization and its agencies have developed a wide range of international legal agreements that enable the international community to take action to suppress terrorism and bring those responsible to justice.”¹⁴⁶ Currently there are 27 global or regional instruments pertaining to the subject of international terrorism, dating back to 1963. “The Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo in 1963, is considered to be the first international treaty against terrorism. Five more were adopted during the 1970s: the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 1979 International Convention against the Taking of Hostages and the 1979 Convention on the Physical Protection of Nuclear Material. Three treaties were adopted in 1988: the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, a Protocol to that Convention for the Suppression of Unlawful Acts.”¹⁴⁷

“These treaties define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of ‘bombs’ or nuclear

¹⁴⁶ Note 130 above.

¹⁴⁷ D O’Donnell ‘International treaties against terrorism and the use of terrorism during armed conflict and by armed force’ International review of the Red Cross, Volume 88 n°864 (2006).

materials, and two crimes concerning the financing of terrorism.”¹⁴⁸ According to Daniel O’Donnell there is a tendency to consider these treaties as establishing a sort of evolving code of terrorist offences. The most significant evidence of this trend is the 1999 Convention against the financing of terrorism, which establishes the crime of donating or collecting funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of international law and as defined in one of the treaties listed in the annex.”¹⁴⁹ “The duties of states parties to this Convention with respect to the crime of financing the activities defined in the treaties listed in the annex is independent of their ratification, although it does allow states that are not party to one or more of the listed treaties to make reservations limiting the scope of their obligations under the 1999 Convention with respect to the financing of the activities prohibited by any unratified treaty or treaties.”¹⁵⁰

Although some regional treaties contain a generic definition of terrorism, the UN bodies that have taken on this task have thus far failed to reach agreement on such a definition. The service of the UN Preventing Centre of International Criminality (PCIC), has noted that United Nations members’ states have not reached an agreement on a definition.

3.2.1.6. International Humanitarian Law

International Humanitarian Law is a branch of international law applicable when a situation of armed violence escalates into armed conflict, whether international or non-international. “Treaties of International Humanitarian Law are the best known as four Geneva Conventions of 1949 and its two Additional Protocols of 1977, but there are also other several humanitarian law treaties that’s purpose is to reduce human suffering in times of war.”¹⁵¹ According to Bruno Frey and Simon Luechinger, “there are virtually hundreds of definitions of terrorism, and there is no consensus of opinion as to which is the most relevant one.”¹⁵²

¹⁴⁸ Note 147 above.

¹⁴⁹ Note 106 above.

¹⁵⁰ Note 106 above.

¹⁵¹ International Humanitarian Law is broadly divided into Geneva Law (eg the Geneva Conventions of 1949 and the 1977 Additional Protocols) and Hague Law (dealing with methods and means of warfare, eg amongst other, the Hague Conventions 1899/1907, the 1980: UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons and the 1993 Paris Convention on the Prohibition of Chemical Weapons). See also M Veuthey ‘*International Humanitarian Law and the Restoration and Maintenance of Peace*’ Published in African Security Review (1998) <<http://www.iss.co.za/pubs/ASR/7No5/InternationalHumanitarian.html>> (accessed 29 April 2010).

¹⁵² S Bruno Frey and S Luechinger: ‘*Measuring Terrorism*’ (2003) <<http://docs.google.com/viewer?a=v&q=cache:VUxxIqZxxrkJ:www.iew.uzh.ch/wp/iewwp171.pdf+Bruno+S.+>

Article 33 of the Fourth Geneva Convention provides in part that: “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” A similar provision is found in the two Additional Protocols to the four 1949 Geneva Conventions: Article 51(2) of Protocol I on international armed conflict and 13(2) of Protocol II on non-international armed conflict provide in part that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 4(2) of Additional Protocol II provides that “acts of terrorism” against civilians and non-combatants “are and shall remain prohibited at any time and in any place what so ever.” The notice here is that these large ranges of measures derive from war and armed conflict, as provided by 1949 Geneva Conventions. Yet terrorism cannot be confused with war or armed conflict. In war times or situations of armed conflict, many acts acquired some validity while the same acts would be common crimes in time of peace. The consequence is that there is still lack of a clear definition of terrorism act in international humanitarian law. Michel Veuthey rightly observed that if terrorism acts refer to attacks against civilians, protected persons and civil properties, there is no definition of terrorism or terrorism acts in the Geneva Conventions and its Additional Protocols.¹⁵³ In the same vein, we can agree with Bouchet who affirmed that it is important to make a difference between terrorism activities and those undertaken in the context of internal armed conflict for a belligerent who is not necessary recognized by the national authorities (resistance movement).¹⁵⁴

3.2.1.7. National and regional legislation

Recognizing the importance of national legal and administrative instruments, the international obligations of states need to be translated into national laws in order to ensure their effective implementation, to assist states in ensuring that national legislation is in accordance with international standards.

With regard to Peru, the human rights Committee have held that the decree-law n°25475 of 5 May 1992 (crime of terrorism) contains a very broad definition of terrorism under which

[Frey+and+Simon+Luechinger:+Measuring+Terrorism,+October+2003&hl=fr&pid=bl&srcid=ADGEEShmISD SBcmDXioP-FbelvFCvHbm93OkkdBcooxm](#)

[59_EbgeF2mXFeQbsd4gob5nyJmzHIu8ZUWb0tRhRDj871_RaW05Lt2p1byxj-K0DBhfwPif2d9ES5KGgOAsqu94ofFKV4s&sig=AHIEtbSdWXRn3RA733FQYIX276vFjx5W4Q>](#) (accessed 29 April 2010).

¹⁵³ Note 152 above.

¹⁵⁴ S F Bouchet ‘*Dictionnaire pratique du droit humanitaire*’ 436.

innocent persons have been detained and remain in detention.¹⁵⁵ Moreover, this organ has held that the definition of terrorism crime in Peru, which was vague, violated the rights of individual.¹⁵⁶

Despite the lack of a clear definition of terrorism crime, numerous states are openly engaged in the fight against terrorism. “Austria, for instance, indicated that it had signed, ratified and implemented the 12 universal counter-terrorism instruments. It had also signed the Council of Europe Convention on the Prevention of Terrorism, in May 2005”.¹⁵⁷ Some states have chosen a new technique which consists to draw an official list of group classified as terrorists. Then the Islamist organization (*Al Qaeda*), the Palestinian group (*Hamas*), the Israeli organization (*Black Hand*) and the Algerian group (*Islamist Armed Group*) are some examples of groups belonging to terrorists groups. Among countries using this practice of listing are France, Germany, Italy, Portugal United Kingdom, and USA.¹⁵⁸ The main implication is that belonging to groups considered as terrorists automatically becomes a crime even if the individual does not commit any illegal act. As the term “terrorism” the term “terrorist group” is rarely defined or it is defined so vaguely that it can be interpreted as applying to political, religious, ethnic or peaceful groups.¹⁵⁹ In this context it is freedom of opinion and associations that are affected.

At the regional level talking about America, the Inter-American Commission on human rights has held that the rights applies arbitrarily, when the criminal offences are defined in vague terms or inaccurate making it impossible to determine certainly in advance what are perpetrated behaviour.¹⁶⁰ “In Europe, Austria along with Belgium, France, Germany, Luxembourg, the Netherlands, and Spain, had prepared the text of the agreement on strengthening cross-border cooperation, especially in countering terrorism, organized crime and illegal migration, referred to as Schengen III, which was signed on 27 May 2005”.¹⁶¹

¹⁵⁵ Concluding Observations of human rights committee, Peru (CCPR/C/79/Add.67.) of 25/7/1996 <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.8.Fr?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.8.Fr?Opendocument)>(accessed 29 April 2010)

¹⁵⁶ Note 108 above, 125.

¹⁵⁷ Report of the UN Secretary-General, Sixtieth session: “Measures to eliminate international terrorism,” A/60/228 12 August 2005 <<http://www.un.org/law/terrorism/index.html>> (accessed 23 April 2010).

¹⁵⁸ G Gomez del Prado ‘*List of terrorists group*’ <<http://erta-tcrg.org/groupes/groupe.htm>> (accessed 29 April 2010).

¹⁵⁹ Note 116 above.

¹⁶⁰ Note 108 above.

¹⁶¹ Note 158 above.

3.3. Consequences of the absence of a universal definition of terrorism

The main consequences are the non-admissibility of terrorism cases before the Court and the arbitrariness of national courts.

3.3.1. Non-admissibility of terrorism cases before the Court

Article 19(1) of the Rome Statute of ICC provides that: “The Court shall satisfy itself that it has jurisdiction in any case brought before it (...).” Indeed by referring to article 5 of the same Statute: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” Article 5 of the statute addresses the nature of crimes to be considered by the Court. There is wide agreement to include a number of “core crimes”, that is to say the most serious crimes of concern to the international community. The original draft statute proposed by the International Law Commission, included the following: aggression, war crimes, genocide and crimes against humanity.¹⁶² In this regard, it is surprising to realize how such an act as serious as international terrorism causing thousands of deaths in international community, is not included in these most serious crimes. As stated above, at the Preparatory Committee stage there was no agreement regarding the inclusion in the draft statute of crime such as terrorism. As far as the issue of terrorism is concerned, some delegations expressed the view that particularly terrorism offences which involve an international dimension should be included as they have serious consequences on the international peace. There was also no unified system for addressing this crime, because of divergences of opinion. The preparatory work of the Rome Statute indicated that terrorism acts may be less serious than war crimes, genocide and crime against humanity and the fact of their inclusion in the jurisdiction of the Court could be trivialized the role of the Court.¹⁶³

In brief, the principal reasons for non-admissibility of terrorism crime before the Court derived from intense controversies. Indeed, it was said that if the ICC were empowered to investigate and prosecute terrorism, or offenses against internationally protected persons, then it would be duplicating the jurisdiction of article III courts which have long prosecuted such actions as domestic crimes with international ramifications.¹⁶⁴ There were serious efforts

¹⁶² ‘Analysis of Issues in the draft statute of ICC’ < <http://www.un.org/icc/statute.htm> > (accessed 26 April 2010).

¹⁶³ Note 130 above.

¹⁶⁴ D Scheffer; C Ashley ‘The constitutionality of the Rome Statute of the International Criminal Court’ (Symposium on Redefining International Criminal Law). *Journal of Criminal Law and Criminology*.

prior to and during the Rome negotiations in 1998 to include terrorism in the ICC's jurisdiction, but enough governments, including the United States, opposed the proposals, which were defeated. The U.S. delegation argued that existing 'multilateral treaties'¹⁶⁵ on terrorism would be undermined if jurisdiction were granted to the ICC.¹⁶⁶ A bedrock principle of these treaties is the "prosecute or extradite" principle, which has long been applied to strengthen national prosecutions of transnational crimes. Nonetheless, the possibility remains that terrorism may be resurrected as candidates for inclusion in the ICC's subject matter jurisdiction.¹⁶⁷ Pursuant to article 121(5) of the Rome Statute, any State Party could refuse to be subject to ICC jurisdiction over any such crime that is added by amendment to the Rome Statute.

At this level it is obvious that the characteristic of terrorism has an international dimension with a plurality of perpetrators that becomes difficult to isolate even the instigators of the crime. Since the crime of terrorism is not incorporated within the reach of the substantive authority of the ICC, issues whose purpose is the crime of international terrorism will not be admissible before the ICC. The consequence is that this situation would encourage impunity of this crime at the international level and victims would never be restored in their rights because the ICC, once hearing that case would always declare its incompetence until proof to the contrary. There is no doubt that the subject-matter jurisdiction of the ICC is limited.

3.3.2. Arbitrariness of national judges

According to the principle of complementarity, the International Criminal Court is unable to supersede national courts. Its role in this case consists rather to complement them. In fact, article 15 of the statute stresses that a case is admissible to the Court when a State is "unwilling or unable genuinely" to carry out the investigation or prosecution and when a state has decided not to prosecute the accused and this decision resulted from the unwillingness or

<<http://www.accessmylibrary.com/article-1G1-189742043/constitutionality-rome-statute-international.html>> (accessed April 26, 2010).

¹⁶⁵ International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, International Convention against the Taking of Hostages, New York, 17 December 1979, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973etc...

¹⁶⁶ Note 164 above.

¹⁶⁷ Note 164 above.

inability of the state to prosecute. Then, in a case of international crime such as terrorism the principle of competence is recognized to national judges.

There might be a case of international crime such as terrorism where despite evidence, national judges could refuse to apply a fair and just trial. This may happen when the accused is one of the national citizens. For instance, in the aftermath of September 11 American authorities claimed the extradition of Bin Laden from the government of Afghanistan where Ben Laden sheltered. I question the fact that a country which has hardly suffered from terrorist attacks, could impartially judge the alleged perpetrators. For example, given the importance of psychological, material and institutional disorder caused by the September 11, 2001, it is difficult to believe that an American judge could completely ignore the pressure of public opinion as well as trauma caused by such acts in his verdict.

The issue is that, despite numerous agreements or international treaties against terrorism, none of states is willing to give up its sovereignty. Added to this, the lack of terrorism definition at international level does not make things easier. The fact is that international politic does not always coincide with national priorities. On this account the statement of Chief Justice John Richard of the Federal Court of Canada is relevant: “The challenge now confronting the judiciary, indeed the legal community as a whole, is to achieve a new equilibrium between the dictates of security and our cherished civil rights and liberties. While September 11 may have shifted the balance, the protection of those three cornerstones of our society -freedom, democracy and the rule of law - continue to be the priority of all judges.”¹⁶⁸ The role of the judiciary has not changed since September 11. In Canada for instance, in interpreting and applying the anti-terrorism Act, the judiciary will face questions which are new and unfamiliar and which are characterized by complex social and moral issues of considerable import to society.¹⁶⁹ Then it is obvious that facing international crimes such as terrorism, national judges do not have necessary tools to find adequate solutions. For that reason it is important to give more power to ICC in terrorism issues by including terrorism as crime in its subject matter jurisdiction. Indeed, there is no doubt that talking of terrorism, unreliable justice systems are not just an obstacle in the implementation of international legal frameworks, but they often play a role in the violation of human rights.

¹⁶⁸ J D Richard ‘*The role of the judiciary in times of crisis*’ Harvard Law Journal
<http://www.fcacaf.gc.ca/bulletins/speeches/times_of_crisis_e.shtml> (accessed 27 April 2010).

¹⁶⁹ Note 168 above.

If one needs a legal way to restore victim's rights and discourage all perpetrators of terrorism on international level, the international community should developed a universal legal definition of international terrorism and include it in the subject matter jurisdiction of the ICC. By acting in this way, it would be a good idea to sustain international justice by fighting against impunity of heinous crimes such as international terrorism that always threatens the international peace and security. Nowadays, there is an absolute necessity of a universal criminal response to the crimes of terrorism.

CHAPTER 4: ABSOLUTE NECESSITY OF A UNIVERSAL CRIMINAL RESPONSE TO THE CRIMES OF TERRORISM

Terrorism presents an enormous challenge to society and to the international community as a whole. If the pursuit of happiness and welfare of individuals is the reason why humankind came to form a society, it is accepted that society is entitled to protect itself from the violence of terrorism which attempts to destroy this *raison d'être* of our society. This chapter will focus firstly on the international legal regime regarding terrorism. Secondly, on the need for upholding the rule of law through containing terrorism and the need for abiding by the Rule of Law in countering terrorism. Thirdly, on steps in becoming a party to and implementing the existing conventions and protocols dealing with terrorism.

4.1. The international legal regime of terrorism crime

The essence of international legal order is to support the rule of law in international society as society of human beings. The purpose of this section is to point out the international treaties concerning terrorism, the jurisdiction over offences and the international cooperation in criminal matter.

4.1.1. The international treaties concerning terrorism

The first issue to emphasize refers to obligations established by the international treaties against terrorism. The international community's response to terrorism has been a gradual development of a legal infrastructure against terrorism, related conventions and protocols. Particularly within the European Union, the Member States were obliged to integrate the fight against terrorism in their legislation.

In 1937 the first international treaty against terrorism was adopted in Geneva, namely the Convention for the Prevention and Punishment of Terrorism. In 2003, another international legal instrument in this field was adopted, known as the European Convention on the Suppression of Terrorism of 1977, as amended by its Protocol of May 15, 2003. As affirmed by some authors, "these two conventions may be treated as the milestones on the road of long-lasting efforts of the international community of states to create an effective legal

response to one of the most disastrous and horrifying phenomena of our times: international terrorism.”¹⁷⁰

However, even if at the international level terrorism has become a priority, the international community face many obstacles for an impartial treatment of perpetrators. It is said that “the principal obligation set forth in the international treaties against terrorism is to incorporate the crimes defined in the treaty in question into the domestic criminal law, and to make them punishable by sentences that reflect the gravity of the offence.”¹⁷¹ These legal measures which aim to fight terrorism crimes are an opportunity to address serious crimes committed by terrorists using a wide array of criminal justice mechanisms. “It is based on the premise that perpetrators of terrorist crimes should be brought to trial by their national governments, or should be extradited to a country willing to bring them to trial.”¹⁷² Regarding the qualification of terrorist acts, there are two basic guidelines: first, committed in time of war terrorism is a serious breach of International Humanitarian Law (IHL). Perpetrators can be tried by any State Party to the Geneva Conventions.

The well-known principle of *aut dedere aut judicare* (extradite or prosecute) is instrumental in the fight against terrorism crime. As it is generally admitted: “The states parties to these treaties also agree to participate in the construction of ‘universal jurisdiction’ by taking necessary measures to give their courts very broad jurisdiction over the offences in question, including jurisdiction based on territoriality, jurisdiction based on the nationality of the offender and the victims and, according to most of these treaties, jurisdiction based on the mere presence of a suspect in the territory of the state.”¹⁷³ Moreover, there should be an obligation either to extradite any alleged offenders found in their country or to begin criminal procedures against them.

Second, committed in time of peace, experts agree that when the act of terrorism meets the criteria required qualifying as a crime against humanity nothing should interfere with the

¹⁷⁰ Z Galicki: ‘*International Law and Terrorism*’ Institute of International Law University of Warsaw, Poland 743.

¹⁷¹ Note 147 above, 864-856.

¹⁷² Legislative guide to the universal legal regime against terrorism, prepared by the United Nations Office on Drugs and Crime.

http://www.google.co.za/search?hl=en&source=hp&q=Consequences+of+absence+of+universal+legal+definition+of+international+terrorism&meta=&aq=f&aqi=&aql=&oq=&gs_rfai=> (accessed 29 April 2010).

¹⁷³ Note 147 above, 856.

jurisdiction of the ICC.¹⁷⁴ However, this is only complementary jurisdiction of the courts domestic criminal jurisdiction and provided that other conditions, mainly the fact that State concerned is party to the Statute of the ICC, were met.¹⁷⁵ I believe that this restriction, together with the fact that terrorism is not formally included in the jurisdiction of the ICC, the result is that the sanction of acts of terrorism is at the unilateral discretion of states. But most often, when states refuse to arrest, prosecute and convict the leaders still in office, alleged sponsors of terrorist act in defiance of the obligation *aut dedere aut judicare*.

In order to combat international terrorism the scope of the treaties is generally limited to acts that have an international character. The lexicon here refers to ‘aviation’, ‘navigation’, ‘international civil servant’, ‘head of state and government’ and so forth. Article 13 of the 1979 Convention against Hostage-taking provides that it [the convention] ‘shall not apply where the offence is committed within a single state and the hostage and alleged offender are nationals of that state and the alleged offender is found in the territory of that State.’ In the same vein, article 3 of the Convention against Terrorist Bombings and article 3 of the Convention against Financing Terrorism have almost the same prescription. But derogations with regard to the extradition of accused persons who have fled abroad are available. Indeed, article (2) (1) of the Convention on the Physical Protection of Nuclear Material and the Protocol on continental platforms provides that penal provisions are applicable to the acts committed within the territory of a state by a national, regardless of the nationality of the victim, if any.

The most recent Conventions, adopted in an attempt to finalize a draft general convention against terrorism, establish important progress in the combat against terrorism. Article 2(1) (b) of the 1999 Convention against the Financing of Terrorism criminalizes the donation or collection of funds to support any other act intended to cause death or serious bodily injury when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. “This represents a milestone in the development of international law on terrorism, because it is the first treaty provision to refer to the purpose of terrorism as recognized by international humanitarian law, namely, to terrorize the population.”¹⁷⁶

¹⁷⁴ Note 111 above, 534.

¹⁷⁵ Note 72 above, Article 1 and 4(2).

¹⁷⁶ Note 147 above, 862.

In addition, the annex to General Assembly resolution 51/210 of December 1996 established an Ad Hoc Committee open to all Member States to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention on the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.¹⁷⁷ One year later the Committee established the 1997 International Convention for the Suppression of Terrorist Bombings. It was given an additional mandate by the General Assembly to develop an agreement on terrorist financing, resulting in the International Convention for the Suppression of the Financing of Terrorism of 1999. The International Convention on the Suppression of Acts of Nuclear Terrorism was adopted in 2005 and came into force in July 2007. Negotiations on a comprehensive instrument dealing with terrorism continue as of 2008.¹⁷⁸ Finally, in its resolution 62/71 of 8 January 2008, the General Assembly repeated the call made in the Global Strategy for the Terrorism Prevention Branch of United Nations Office on Drugs and Crime (UNODC) to continue its work assisting States in becoming parties to and implementing the terrorism-related conventions and protocols, adding that this should include national capacity-building.

Furthermore, based upon binding resolutions of the Security Council concerning terrorism acts and terrorism funds, States become members of the United Nations by adopting its Charter, which is an international convention with legally binding obligations. Under Articles 24, 25 and 48 of the Charter, those obligations include the duty to carry out decisions taken by the Security Council when it is acting to preserve peace and security under Chapter VII of the Charter.¹⁷⁹ In October 1999, the Security Council adopted resolution 1267, demanding that the Taliban in Afghanistan turn over Osama bin Laden to a country where he would be brought to justice. Non-compliance with the resolution by the Taliban led to resolution 1333 in December 2000, expanding the freezing obligation to “funds and other financial assets of Osama Bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization.”¹⁸⁰

¹⁷⁷ Note 176 above.

¹⁷⁸ Note 176 above.

¹⁷⁹ Note 176 above.

¹⁸⁰ Note 176 above.

Resolution 1390 of January 2002 continued the freezing of funds and provided for regular updating by the Committee, which came to be known as the Al-Qaida individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization.”¹⁸¹ The resolution required the criminalization of the financing of terrorism, which lead to a number of law enforcement and international cooperation measures. It also called upon Member States to become parties, as soon as possible, to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism. This appeal to become parties to relevant agreements can also be understood to include regional agreements related to terrorism. Those instruments can play a valuable role complementing bilateral treaties and universal terrorism-related conventions and protocols, so long as those arrangements are “consistent with the purposes and principles of the United Nations” in accordance with Article 52 of the United Nations Charter.¹⁸²

4.1.2. Jurisdiction over offences

The most fundamental rule of international cooperation established by the terrorism-related conventions and protocols is the principle of “extradite or prosecute”. On this account the 1997 Terrorist Bombing Convention provides that a State Party that does not extradite a person to a Requesting State Party shall be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.¹⁸³ The phrase found in the “extradite or prosecute” articles of the Conventions and Protocols providing that the requested State Party is obliged to submit the case for the purpose of prosecution “without exception whatsoever” can be interpreted in differing ways.¹⁸⁴ As it has been correctly noted in the doctrine, states traditionally have based their jurisdiction to prosecute and punish criminal offenders on one or more of the following four principles: territoriality, nationality, protection security, and universality. Conventions against terrorism, international and regional in nature, base its jurisdictional obligations and rights of states

¹⁸¹ Note 176 above.

¹⁸² Note 176 above.

¹⁸³ Article 8 of the 1997 Terrorist Bombing Convention.

¹⁸⁴ Note 176 above.

parties on these principles. The 1970 convention deals entirely with the mandatory establishment of jurisdiction over offenders by states parties. As stated by some authors such as Zdzislaw Galicki, “anti- terrorist conventions concluded in past years have developed a variety of possibilities for optionally established jurisdiction. For instance, the International Convention for the Suppression of the Financing of Terrorism of 1999 provides for the mandatory establishment of jurisdiction in three cases and for an optional one in five cases.”¹⁸⁵ The provisions contained in the International Convention for the Suppression of Terrorist Bombings of 1997 are substantially the same.

The principle of universality which can be found in all the conventions fighting terrorism crime is without any doubt the most important of all. Indeed, “the principle of universality and its consequent application is one of the best guarantees for effective suppression of international terrorism through the punishment of terrorists whenever and wherever they may be found, without a possibility of any safe haven for them.”¹⁸⁶ The general principle *aut dedere aut punier* (either extradite or punish) or *aut dedere aut judicare* (either extradite or prosecute), is the keystone of conventions against terrorism which allows to states the choice to either extradite terrorists or establish over them their own jurisdiction. Terrorist crime shall be deemed to be included as extraditable offenses in all extradition treaties already concluded between states who are parties to anti- terrorist conventions. Anti-terrorist conventions may also be considered by states, at their option, as the legal basis for extradition in respect to given terrorist offenses.¹⁸⁷

Furthermore, these conventions provide for wide cooperation in the prevention of the offenses covered by the said conventions by taking all practicable measures, inter alia, adapting their domestic legislation, including coordination of administrative and other preventive measures, exchanging of information on preventive measures, and cooperating with regard to and transferring of technology, equipment, and related materials.¹⁸⁸

¹⁸⁵ Note 147 above, 749.

¹⁸⁶ Note 147 above, 864-856.

¹⁸⁷ Note 186 above.

¹⁸⁸ Note 186 above.

4.2. The need of international cooperation in prosecuting those accountable for terrorism

In the present setting, the remarkable normative development of international human rights law, international humanitarian law and international criminal law has led to the sentiment of condemning the culture of impunity for terrorist acts, whether these acts are committed by secessionist movement or by oppressive regimes. Against the background that terrorism is threatening not only the very basis of our domestic society, but also the prospect of sound development of the international community, it is legitimate for the international community to give serious attention to terrorism from the viewpoint of international legal order.

4.2.1. Legal basis for expanding the ICC jurisdiction and developing of norms containing terrorism

Efforts have been made to combat terrorism through the establishment of national, regional as well as international legal norms as mentioned above. Starting with the international standard, a number of bilateral and multilateral agreements and protocols have been concluded since the second half of the 20th century under the support of the United Nations. Several universal legal instruments concerning the prevention and suppression of terrorism have come into existence. In a broad sense, these universal conventions can be said to constitute the primary global legal regime against terrorism and serve as sources for international co operation in countering terrorism.¹⁸⁹ The increasing involvement of the Security Council provides one of the important aspects of international co operation in creating a legal framework through legislative acts for containing terrorist acts and enforcing the anti terrorist measures taken in the name of the international community.¹⁹⁰ Thus every state should be obliged to incorporate into its criminal law system the substantive and procedural requirements of existing international conventions and resolutions of Security Council. For this purpose the state should establish a legal connexion certain between the acts in question and its own criminal justice system, such as the principle of territoriality, or of nationality by which the State party to the legal instrument is to exercise jurisdiction in relation to the defined offence in accordance with *aut dedere aut judicare* principle.¹⁹¹ It is therefore important to introduce a universal jurisdiction on the basis of international agreements with regard to the acts of

¹⁸⁹ Hisashi Owada: '*International Terrorism and the Rule of Law*' <http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/international+terrorism/00040> (accessed 29April 2010).

¹⁹⁰ Note 189 above.

¹⁹¹ Note 189 above.

terrorism. There is a need for harmonization and integration of these principles in international law and in domestic law. It is only then that the legal regime against terrorism can be effectively enforced as part of international public order through co operation of the domestic legal system.¹⁹²

4.2.2. Incentives of non- state parties to ratify the Rome Statute

Terrorism is a challenge that requires coordinated, systematic and comprehensive international actions based on common standards, values, institutions and goals. Indeed, if anything has become clear since September 11, 2001, it is that there is no safe area in the world, and that any country that underestimates this reality would sooner or later suffer from the same consequences as New York, Washington, Madrid and London. A consensus and collaboration at international level are necessary to help prevent the commission of terrorism acts and to prosecute its perpetrators. Otherwise the terrorists would continue to make use of weaknesses of some countries to commit or prepare their offences. All states must work together for identification and arrest of terrorists, for disruption of their operations, for the protection and defence of population and society against terrorist's attacks and finally mitigating the consequences of such acts. Finally, the international community should now feel the force of combined hands in the fight against terrorism. Otherwise international terrorism will remain the greatest threat to the security of mankind. In the framework of international cooperation, especially in the fight against terrorism, the subject matter jurisdiction of the Court has to be extended. The international community has an obligation to encourage all states to ratify the Statute of the ICC and therefore include terrorist acts within the scope of the ICC. The apparent success of this Court cannot deny the fact that different regions, especially Asia, are still underrepresented among the states parties to the Rome Statute. "As of 24 March 2010, 111 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 30 are African states, 15 are Asian states, 17 are from Eastern Europe, 24 are from Latin American and Caribbean states, and 25 are from Western Europe and Others."¹⁹³ This ratification represents an important milestone in advancing towards universal ratification of the Rome Statute, but efforts still have to be improved.

¹⁹² Note 189 above.

¹⁹³ The States Parties to the Rome Statute available at <<http://www.icc-cpi.int/Menus/ASP/states+parties/>> (accessed June 2010).

If the political instability of some states and the existence of internal armed conflict may explain the reluctance of some governments to ratify the Rome Statute, these components are however neither prohibitive barriers to ratification of Rome Statute, nor the exclusive explanation of hostilities of some states in regard of ICC. Among the most serious reasons that are invoked by states to refuse ratification of the Rome Statute, One can understand their fear of allowing the ICC controlling the conduct of operations whether civilian or military. However, the drafters of the Rome Statute have provided many safeguards to prevent States from an unwarranted intervention of the ICC. One example could be the independence of the prosecutor, the only prospective jurisdiction of the ICC and the possibility for states that ratify the Rome Statute to exclude the jurisdiction of the ICC in respect of war crimes for a period of 7 years from the date of entry into force of the statute. It is however the mechanism of complementarities that protects states from excessive interference from the ICC.

Other arguments and obstacles have been developed by states to justify that they do not ratify the Rome Statute. Indeed, the absence of an effective judiciary or independent power led some states to oppose the ICC since the system set in place determines the non-interference of the ICC to the effective function of national judiciary system. Some states base their refusal to ratify the Rome Statute on the alleged shortcomings of the Statute. Thus, the fact that terrorism does not fall within the subject matter jurisdiction of the ICC (in the absence of an international definition of this concept) is regularly maintained.

To conclude this chapter, it should be repeated that terrorism has no border and it represents a serious threat to any democratic *society* and fundamental values that are its particular rights such as human rights. Therefore, at the next Review Conference, states parties should work without reservations and determine the possible inclusion of crimes of terrorism in the sphere of the international court.

CHAPTER 5: CONCLUSION

By analyzing the different definitions of terrorism such as express through various instruments, it is clear that it was difficult for the entire community to find an legal and acceptable definition that combine all aspect of terrorist crime according to the fact that terrorism has an multiple phenomenon. In fact, several international institutions as mentioned (such as the UN Centre for the Prevention of International Criminality, the International Law Commission and the UN General Assembly) have tried unsuccessfully to elaborate a legally acceptable definition according to principles of criminal law. UN Special Committees on international terrorism have been established, but no consensus has been made up. It should be mentioned that the lack of universal definition was the legal reason of the exclusion of terrorism within the subject matter jurisdiction of the ICC.

I believe that the international community should find a universal definition of terrorist crime through a development and adoption of a comprehensive convention on terrorism, because this is considered as a legal response to terrorism. All states not party to the Rome Statute of International Criminal Court should come together to ratify the Statute. “Internationalization of terrorism can no longer be adequately dealt with by the purely national responses based on the traditional nomenclature of terrorism as a crime within the purview of the domestic criminal justice system of a nation State; global terrorism calls for global response based on the consideration of international public order of the international community with its non derogable imperative of fundamental human rights of human individuals as part of the universal justice of this community.”¹⁹⁴ International law has to adapt itself to the reality. All states must agree on the fact that:

- 1) “All acts methods and practices of terrorism are criminal and unjustifiable, committed wherever, by whomever and for whatever reason.
- 2) Terrorism must be stopped not just through immediate improvements to law enforcement mechanisms, but it must also be strategically tackled through long-term preventative measures that would deny terrorists the ideological space to operate.

¹⁹⁴ Note 189 above.

- 3) Countering terrorist cannot and must not give an excuse to trample upon human rights and common values enshrined in the UN charter.”¹⁹⁵

Terrorism is no longer just a theoretical issue. It affects everyone in the world. The community needs to adapt its thinking and find a way to reach the correct balance between protecting human rights, protecting civilians, and allowing governments the freedom to deal with those terrorists, because people who are fighting without reference to the rules do not deserve any protection.

“Although trying acts of terrorism is not a part of the ICC’s current mandate, such acts can fall within the definition of one of the crimes already under the Court’s jurisdiction, namely crimes against humanity.”¹⁹⁶ “Mary Robinson, the then United Nations High Commissioner for Human Rights, speaking at the U.S. Institute of Peace in Washington, 2001, expressed the opinion that the attacks of September 11 constituted such a crime.”¹⁹⁷ A consideration of the definition of crimes against humanity in the ICC Statute, analysed in tandem with the elements of the crime contained in Appendix 3 to the Statute, indicates that the attacks of September 11 to qualify as “murder” and “inhumane acts” “committed as part of a widespread or systematic attack directed against [a] civilian population.”¹⁹⁸ The High Commissioner’s opinion was of course ex hypothesis insofar as the ICC could have no jurisdiction over crimes committed before its own inception,¹⁹⁹ which, as noted, did not take place until the entered into force of the Rome Statute of ICC. It hardly needs saying, however, that any similar acts committed in the future need not be so excluded.²⁰⁰

Definitely the issue of terrorism seems mostly to be a political issue depending of any state’s interest. Thomas Mitchell has observed quite rightly that terrorism is not a monolithic concept.²⁰¹ The definition is often used as a political tool in attempts to deny legitimacy to opponents.²⁰² Despite the fact that states would never be unanimous around the definition of

¹⁹⁵ Speech of Mr Jean Paul Laborde (18 April 2010) ‘A Fair and Effective Criminal Justice System: A Key Component of the Fight against Terrorism’ Salvador, Brazil.

¹⁹⁶ J Richard Goldstone & J Simpson (2003) ‘Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism’: Harvard Law Journals volume 16 14.

¹⁹⁷ Note 189 above.

¹⁹⁸ Note 72 above, article 7.

¹⁹⁹ Note 72 above, article 11(1).

²⁰⁰ Note 189 above.

²⁰¹ Thomas H Mitchell ‘Democratic Responses to International Terrorism’ (1991) David Charters (ed) 13.

²⁰² Tal Becker ‘Terrorism and the State: Rethinking the Rules of State Responsibility’ (2006) Oxford and Portland, Hart Publishing 85.

terrorism, the international community should dress a standard acceptable to all in order to place barriers that could prevent states to commit such acts. The states of the world should join together so that terrorists would have no opportunity to remain unpunished for their crimes and crime would not be justified as a means to any political end.

The legal solution would not be to eliminate terrorism, which by its nature bypasses the rules of international game, no matter how a successful universal counter-terrorist convention might be. However, at least at the legal level, a universal counter-terrorist convention could help the international community be rid of a team of negative conceptual controversies and no terrorist activity could remain unpunishable.

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