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**‘INCLUDING TERRORISM AS A CRIME UNDER THE ROME  
STATUTE: TAKING THE FIGHT AGAINST TERROR TO THE  
ICC’.**

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S.F Baumann

13194748

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**Study Supervisor: Professor Dire Tladi**

**Department of Public law**

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# Chapter One

## Introduction

### 1. Background

September 11, 2001 is a day the world will never forget. At 08:46 am United Airline flight 11 crashed into the north tower of the World Trade Centre in New York, just an hour and seventeen minutes later three more planes have been hijacked and crash. One into the South tower of the World Trade Centre, another into the Pentagon and one more into a field in Pennsylvania.<sup>1</sup> In the span of two hours, 19 men caused the death of almost three thousand people in the deadliest terrorist attacks the world has seen.<sup>2</sup>

Terrorism is a word that most people around the world know and most people would be able to name, off the top of their heads, a terror attack or terrorist group, whether it is one that has affected the state they live in or merely an incident that was so horrific it has been imprinted on their minds. In fact, between 2001 and 2016 there was an increase of 11 581 terror related incidents whereas over the 31 years between 1970 and 2001 there was an increase of only 1 256 incidents.<sup>3</sup> This radical increase shows how terrorism has become a more frequent and more prevailing threat and it is only growing worse.<sup>4</sup>

Terrorism is not isolated to one state either. States all around the world have been affected, the United Kingdom has had the London underground bombing as well as the Manchester arena attacks. In France we saw the attacks on Charlie Hebdo as well as the November 15<sup>th</sup> Paris attack. In Nigeria there was the Chibok school girl kidnapping and in Spain there was the Madrid bombings. These acts, to name a few, have all been carried out by foreign nationals and in some instances by nationals that have been radicalised by foreign terror cells.

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<sup>1</sup> Peter L. Bergen "September 11 attacks" *Encyclopaedia Britannica* 2018, page 4-7.

<sup>2</sup> Id. at 5.

<sup>3</sup> Max Roser, Mohamed Nagdy and Hannah Ritchie "Terrorism" (2018) available at OurWorldInData.org. <https://ourworldindata.org/terrorism/#modern-terrorism-after-the-second-world-war>.

<sup>4</sup> N Boister, *An Introduction to Transnational Criminal Law* (2012) page 62.

The scope of terrorism widens every day and the international response has been to create separate conventions and protocols that deal with that specific element separately, resulting in more than nineteen different treaties dealing with terrorism, ranging from prohibiting financing terrorism<sup>5</sup> to regulations regarding aviation<sup>6</sup> and maritime<sup>7</sup> transport.

With the increase in technological advancements, ease of global communication as well propaganda platforms, the ability to recruit globally and to perform terrorist attacks has become increasingly easier.<sup>8</sup> We now not only face threat of suicide bombs or gun men but also the threat of nuclear, chemical and biological terrorism.<sup>9</sup>

Although states around the world have increased their anti-terror strategies, it often falls short due to the cross-border nature of terrorism. This requires a high level of cooperation between states which often becomes a problem due to state secrecy and the likelihood of states protecting their citizens or wanting to prosecute on their own as a form of revenge.<sup>10</sup>

States have adopted rules and approaches to combat terrorism in their domestic law. For example, South Africa adopted the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004<sup>11</sup> and the United Kingdom's incorporation of the Terrorist Act 2006.<sup>12</sup> Even if a State has not adopted laws regarding terrorism into their domestic law there exists a number of treaties and conventions regarding terrorism on an international level, for example the International Convention for the Suppression of the Financing of Terrorism 1999<sup>13</sup> which has 188

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<sup>5</sup> UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517; UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349

<sup>6</sup> International Civil Aviation Organization (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

<sup>7</sup> UN General Assembly, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, No. 29004

<sup>8</sup> A Cordesman and A Burke *The Role of the United Nations in Fighting Terrorism* 2002, page 15-21.

<sup>9</sup> Street CT, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology* (2011) page 418.

<sup>10</sup> Cordesman AH and Burke A 2002: 6-8.

<sup>11</sup> Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

<sup>12</sup> United Kingdom: Terrorism Act 2006 [United Kingdom of Great Britain and Northern Ireland], 2006 Chapter 11, 30 March 2006. See further the Australians have the Anti-Terrorism Act (No. 2) of 2005, in India there is the Prevention of Terrorism Act No.15 of 2002 and in Canada there is the Anti-Terrorism Act 2015.

<sup>13</sup> See above Fn 5.

signatories<sup>14</sup>. From domestic law to international law we see regulations that exist to prevent and punish crimes of terrorism and yet terrorism is not included within the jurisdiction of the International Criminal Court (hereinafter referred to as the 'ICC').

The ICC was founded in 2002 with the purpose of exercising jurisdiction over persons for the most serious crimes of international concern and finds its powers in terms of the Rome Statute.<sup>15</sup> The ICC's jurisdiction<sup>16</sup> is limited to the crime of genocide,<sup>17</sup> crimes against humanity,<sup>18</sup> war crimes<sup>19</sup> and the crime of aggression.<sup>20</sup> Yet terrorism, a crime known for its inhumanity, mass killing aspect and unrelenting attacks on humankind all around the world, has not found its place among the above list, and not for a lack of trying.

There have been two attempts to include terrorism in the Rome Statute. The first attempt was at the initial discussions regarding the creation of the ICC in 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>21</sup> The second attempt was at the eighth session of the Assembly of States Parties<sup>22</sup> where the Netherlands tendered a proposal that was subsequently rejected.<sup>23</sup>

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<sup>14</sup> XVIII 11. Penal Matters.

<sup>15</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6. The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This version of the Statute incorporates changes made to it by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>16</sup> The jurisdiction of the ICC is found in article 5 of the Rome Statute. And is limited to the most serious crimes of concern to the international community as a whole.

<sup>17</sup> Article 5(a) of the Rome Statute.

<sup>18</sup> Article 5(b) of the Rome Statute.

<sup>19</sup> Article 5(c) of the Rome Statute.

<sup>20</sup> Article 5(d) of the Rome Statute.

<sup>21</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Held at Rome, Italy 15 June-17 July 1998. See further United Nations document A/CONF.183/13(Vol. III) and A/CONF.183/10.

<sup>22</sup> Held at the Hague 18-26 November 2009. The purpose of these discussions was to decide if the proposed amendments would be tabled at the 2010 Review Conference. See further the Report of the Bureau on the Review Conference: ICC-ASP/8/43.

<sup>23</sup> See in detail discussion in Chapter 2.

## **2. Thesis Statement**

Terrorism has become a prominent crime around the world. The past, current and future nature of terrorism requires more attention from the ICC, it requires a place in the Rome Statute. The far-reaching effect of the Rome Statute and ensured international cooperation required by the ICC will ensure a more effective way of Combatting Terrorism. By including terrorism into the Rome Statute, it will also show states the importance placed on combating terrorism.

The purpose of this mini-dissertation is to indicate whether or not terrorism should be included as a crime under the Rome Statute. I hope to do this by showing how the ICC differs from current counter terrorism methods, why terrorism was not included initially and why it deserves to be in the Rome Statute now. I will also be determining if it is possible to prosecute terrorism under the ICC's unique jurisdiction and look at how terrorism compares to the crimes listed within the court's jurisdiction.

Chapter two will form the bulk of the dissertation and I will be looking at the ICC's jurisdiction and why terrorism has not been included in the Rome Statute yet by discussing the previous attempts to include terrorism in the Rome Statute. I will also discuss the difficulty surrounding a definition of terrorism and compare the crimes currently within the jurisdiction of the ICC and terrorism. In chapter three I will discuss the current methods used to combat terrorism as well as the pros and cons of including terrorism in the Rome Statute. I will also discuss an alternative to inserting terrorism as a core crime but rather as part of existing core crimes. My final chapter, chapter four, will be the conclusion which will provide observation on whether terrorism should be included in the Rome Statute or not.

## **3. Research Questions**

3.1. Should Terrorism be included as a crime under the Rome Statute?

3.1.1 Can terrorism be prosecuted under the current Rome Statute regime?

3.1.2 Why wasn't terrorism initially included in the Rome Statute?

3.1.3 What are the common characteristics of the crimes currently on the Rome Statute?

## Chapter Two

### Terrorism and the ICC

#### 1. Introduction

Very few achievements in international law rival that of the establishment of the International Criminal Court. It was a huge step in terms of international human rights and combating violations of human rights.

Prior to the establishment of the ICC, the prosecution of grave breaches in international human rights vested in international criminal tribunals established in specific territories to prosecute the atrocities of specific events.<sup>1</sup> Post World War II the allied powers formed the Nuremburg Tribunal<sup>2</sup> and Tokyo Tribunal<sup>3</sup> to prosecute the axis powers for committing grave breaches of international human rights law. Following this, the United Nations created the International Criminal Tribunal for the Former Yugoslavia in 1993 to punish the serious violations of international law that occurred in the territory of the former Yugoslavia<sup>4</sup> and the International Criminal Tribunal for Rwanda was established in 1994 to prosecuting those responsible for genocide and other serious violations of international law in Rwanda and its neighbouring states.<sup>5</sup>

The ICC was created with a much wider scope than the above tribunals and this scope is found in the Rome Statute. The Rome Statute (the Statute) governs all aspects of the ICC, from composition of the ICC, to rules of evidence and protection of witnesses.

To determine if terrorism should be included as a separate crime under the Statute we must look at what the ICC's unique jurisdiction entails, how terrorism compares to the

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<sup>1</sup> Dugard, J, *International law a South African Perspective* (2012) page 170-173.

<sup>2</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.

<sup>3</sup> International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946.

<sup>4</sup> UNSC Resolution 827 (1993).

<sup>5</sup> UNSC Resolution 955 (1994).

current crimes under the Statute and what, if any, previous attempts that have been made to include terrorism in the Rome Statute.

## 2. Jurisdiction of the ICC

Jurisdiction of states becomes complicated when the criminal acts involve a transnational element. A transnational element is when an act is committed in one state by an actor who is a citizen of another state; or when it involves nationals of more than one state and non-state actors; or where it is planned in one state and then carried out in another state.<sup>6</sup> Acts of terrorism are often planned in more than one state, with weapons and equipment obtained from multiple states and carried out in more than one state with the intention of affecting multiple states.<sup>7</sup>

The norm regarding crimes that transcend boundaries is for states to use the principle *aut dedere aut iudicare*, which means to try or extradite.<sup>8</sup> Thus one state must prosecute the person or hand them over to another state that will prosecute them. With this principle states must cooperate on a very high level.

Dugard describes jurisdiction as “the authority that a state has to exercise its governmental functions by legislation, executive and enforcement action, and judicial decrees over persons and property”.<sup>9</sup> Further, Dugard refers to six grounds where a state can exercise jurisdiction over criminal acts.<sup>10</sup>

Firstly, a state may exercise jurisdiction when a crime is carried out in that state’s territory.<sup>11</sup> The state can either arrest the person within their boundaries or, if the person has fled to another state, the affected state can request the other state to extradite the accused.

Secondly a state will also have jurisdiction if a criminal act starts in a states territory but is completed in another or where a crime starts in another state and is completed

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<sup>6</sup> Boister 2012: 4.

<sup>7</sup> Id. at 63.

<sup>8</sup> Much C, The International Criminal Court (ICC) and Terrorism as an International Crime, *Michigan State Journal of International Law* 2006 Vol 14:121 page 124.

<sup>9</sup> Dugard J, *International law a South African Perspective* (2012) page 146.

<sup>10</sup> Id. at Chapter 9.

<sup>11</sup> Id. at 148-149.



in its own territory.<sup>12</sup> Here the effects principle comes into play, both states are affected by the act and thus the state who is impacted the most may exercise jurisdiction.<sup>13</sup>

The third category is when a state claims jurisdiction over a person who is linked to the state in some way, such as citizenship, and has committed a criminal act in another state that jeopardises the security of the state concerned.<sup>14</sup>

A fourth category concerns states exercising jurisdiction over their nationals that have committed criminal acts in another state.<sup>15</sup>

The fifth category is when a state exercises jurisdiction over persons who commit a crime in another state that has resulted in the harm of citizens of the state exercising jurisdiction, the use of this jurisdiction has been favoured in cases of terrorism.<sup>16</sup>

The last category deviates from the rest. All the above situations involve a link to the state exercising jurisdiction, the crime is committed on the territory or involves the persons nationality, either the accused or the affected. The sixth category is known as universal jurisdiction, here a state may exercise jurisdiction because it is in the interest of the international community to do so and usually involves international crimes.<sup>17</sup> This has serious practical and political obstacles as a state can merely refuse to extradite or try the accused and so treaty obligations need to be in place to counter the issue.<sup>18</sup>

The only entity to resemble a form of universal jurisdiction is the ICC.<sup>19</sup> However the ICC's jurisdiction only encompasses states party to the ICC and only for the four core crimes within the Statute. The ICC does possess an, almost, universal jurisdiction in that it may exercise jurisdiction over any state party to the Rome Statute, being 123

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<sup>12</sup> Id. at 149-152.

<sup>13</sup> Id. at 150.

<sup>14</sup> Id. at 152.

<sup>15</sup> Id. at 152-153.

<sup>16</sup> Id. at 153-154.

<sup>17</sup> Id. at 154.

<sup>18</sup> Id. at 156. Treaty obligations still don't ensure interstate cooperation as it can happen that a state disregards the treaty obligation (Cohen A, Prosecuting Terrorist at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism, *Michigan State International Law Review* 2012 Vol 20:2 page 253).

<sup>19</sup> Id. at 155.

states out of 197 world-wide.<sup>20</sup> This ‘universal’ jurisdiction is subject to limitations, these being set out in articles 5 to 21 of the Rome Statute.

Article 5 sets out that jurisdiction can only be applied over the specific core crimes that the ICC may prosecute, limited to only four crimes.<sup>21</sup> Articles 6 to 8*bis* individually define and give the scope for each crime listed in article 5.<sup>22</sup> Article 11 sets out the temporal jurisdiction of the ICC, which only applies to crimes committed after the entry into force of the statute or in relation to a specific state, after that state has become party to the statute.<sup>23</sup> Article 12 sets preconditions to the ICC exercising jurisdiction, a crime referred to in article 5 must have occurred in the territory of a state party,<sup>24</sup> must have been committed by a national of a state party<sup>25</sup> or, if the crime involves a non-state party territory or citizen, that non-state party may lodge a declaration with court noting its acceptance of the ICC’s jurisdiction.<sup>26</sup> Article 13 states that the ICC can only act on cases which come to the knowledge of the ICC in one of three ways, (I) the occurrence of a crime is referred to the prosecutor by a state party,<sup>27</sup> (II) the occurrence of a crime is referred to the prosecutor by the United Nations Security Council<sup>28</sup> or (III) the prosecutor acting on his own in accordance with article 15 of the Rome Statute.<sup>29</sup> Article 17 deals with the principle of complementarity and sets out the four instances where the ICC will step in to prosecute, after all the ICC is a court of last resort.<sup>30</sup> The four situations where a matter will be admissible to the court is when (a) a state is unwilling or unable to investigate and prosecute the matter,<sup>31</sup> (b) where

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<sup>20</sup> Accessible on [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx) Accessed on 20/10/2018, see further *Joining the International Criminal Court Why Does It Matter?* downloadable at [https://www.icc-cpi.int/news/seminarBooks/2018%2001%20Universality\\_Eng\\_pages.pdf](https://www.icc-cpi.int/news/seminarBooks/2018%2001%20Universality_Eng_pages.pdf) Accessed on 20/10/2018. See also <<https://www.countries-of-the-world.com/all-countries.html>> Accessed on 23/08/2018.

<sup>21</sup> Rome Statute Article 5 “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 this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression”.

<sup>22</sup> Article 6-8*bis* of the Rome Statute. Article 6 deals with Genocide, article 7 deals with Crimes Against Humanity, article 8 deals with War Crimes and article 8*bis* deals with the Crime of Aggression.

<sup>23</sup> Article 9 of the Rome Statute.

<sup>24</sup> Article 12(2)(a) of the Rome Statute. Territory includes crimes committed on a party state registered aircraft or vessel.

<sup>25</sup> Article 12(2)(b) of the Rome Statute.

<sup>26</sup> Article 12(3) of the Rome Statute.

<sup>27</sup> Article 13(a) of the Rome Statute.

<sup>28</sup> Article 13(b) of the Rome Statute.

<sup>29</sup> Article 13(c) of the Rome Statute.

<sup>30</sup> Schabas 2017: 170-171.

<sup>31</sup> Article 17(1)(a) of the Rome Statute.

a state has refused to prosecute because of its inability or unwillingness to prosecute,<sup>32</sup> (c) the person has already been tried for the matter<sup>33</sup> and (d) the case is not of sufficient gravity to warrant the courts attention.<sup>34</sup> Article 20 then further sets out when a person will not be tried at the ICC, this in accordance with the rule *ne bis in idem* (a person cannot be tried for the same thing twice).<sup>35</sup> Lastly Article 21 provides the applicable law the Court shall apply.<sup>36</sup>

The above merely provide an overview of the strict rules that the ICC applies with regards to exercising its jurisdiction. For this mini-dissertation I will only be discussing the Core Crimes in detail.

## 2.1 The Core Crimes, Article 5

Up until the creation of the ICC the difference between a transnational crime and an international crime was not significant, they could be used almost interchangeably.<sup>37</sup> After the inclusion of the core crimes under the Statute the difference became substantial, international crimes are now synonymous with those core crimes referred to under the Statute and the other treaty crimes, not included in the Statute, are known as transnational crimes or treaty crimes.<sup>38</sup> What is interesting is that It was the prosecution of these treaty crimes, not included in the Statute, that sparked the resurgence of the debates on creating an international criminal court.

In 1989 it was Trinidad and Tobago that reignited discussions about the creation of an international criminal court.<sup>39</sup> Trinidad and Tobago requested that the International Law Commission address the question of establishing an international criminal court and that the court have jurisdiction over persons who have committed certain crimes,

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<sup>32</sup> Article 17(1)(b) of the Rome Statute.

<sup>33</sup> Article 17(1)(c) of the Rome Statute.

<sup>34</sup> Article 17(1)(d) of the Rome Statute.

<sup>35</sup> Article 20 of the Rome Statute.

<sup>36</sup> Article 21 of the Rome Statute.

<sup>37</sup> Boister N, *Transnational Criminal Law, European Journal of International Law* 2003, Vol 14(5) page 961.

<sup>38</sup> *Id.* at 962.

<sup>39</sup> Shabas WA, *An Introduction to the International Criminal Court* (2017) page 75.

one of which was to prosecute “persons engaged in illicit trafficking in narcotic drugs across national frontiers”.<sup>40</sup>

This request to include transnational crimes was adhered to and during the drafting of the Rome Statute the drafters included certain transnational crimes within the jurisdiction of the court. Draft article 20 initially set out the court’s jurisdiction as follows:<sup>41</sup>

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) The crime of aggression;
- (c) Serious violations of the laws and customs applicable in armed conflict;
- (d) Crimes against humanity;
- (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Within the list of treaty crimes annexed to the draft were several treaties regarding counter-terrorism,<sup>42</sup> however this sub article was excluded in the final draft and therefore so were any provision regarding terrorism.<sup>43</sup>

Article 20 was changed to Article 5 and in the final statute, the only crimes punishable by the ICC were limited to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. These crimes were given an additional element in the final statute, they were described as “the most serious crimes of concern to the international community as a whole”.<sup>44</sup>

Although these crimes can be committed within a single state and can lack any international element, they are on the list non the less as it is not where the crimes are committed but the fact that these crimes are of the utmost concern of the international

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<sup>40</sup> UN Resolution 44/39 (1989).

<sup>41</sup> Yearbook of the International Law Commission 1994 A/CN.4/SER.A/1994/Add. L (Part 2) page 38.

<sup>42</sup> The following treaties relating to terrorism were included in the annexure: 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; The 1979 International Convention against the Taking of Hostages; The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

<sup>43</sup> Schabas WA, *The International Criminal Court A Commentary on the Rome Statute* 2016 page 115-116.

<sup>44</sup> Article 5(1) of the Rome Statute.

community, they are grave breaches of human rights and require prosecution as it is humanity as a whole that is affected by these crimes.<sup>45</sup>

### 3. Terrorism and the Core Crimes

There are only four crimes in the Statute and they all have their place for a specific reason, they are regarded as crimes that the international community considers the most serious out of all the other international crimes in the world. At the initial inception of the statute, terrorism was considered for inclusion in the statute, but it was ultimately left out. This was no luck of the draw, it was a decision made after many hours of research, treaty and custom interpretation. Thus, what makes these crimes different or less important than terrorism?

#### I. Crime of Genocide

The first crime listed within the jurisdiction of the ICC is the crime of genocide. The term genocide can be traced back to as early as 1944,<sup>46</sup> it was not long afterwards that genocide was declared an international crime by the United Nations General Assembly.<sup>47</sup> Soon after this the crime of genocide was punishable in terms of one of the first United Nations human rights treaties,<sup>48</sup> the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>49</sup> The crime of genocide is also considered to be a customary international law crime.<sup>50</sup>

Genocide is defined in article 6 as the killing, causing serious bodily or mental harm, deliberately inflicting destructive conditions of life, preventing births or the transfer of children from one group to another, all with the intent to destroy, in whole or a part of

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<sup>45</sup> Schabas 2017: 75-76.

<sup>46</sup> Schabas 2016: 124.

<sup>47</sup> Schabas 2017: 87.

<sup>48</sup> Schabas 2016: 124.

<sup>49</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

<sup>50</sup> Pikis GM *The Rome Statute for the International Criminal Court* (2010) page 59 and 60.

a national, ethnical or religious group.<sup>51</sup> An aspect that is important regarding genocide is the special intent needed surrounding an act of genocide.<sup>52</sup> This special intent is the fact that the person accused of genocide must have had the intent to destroy a certain category of persons.

## II. Crimes Against Humanity

The second crime listed is crimes against humanity. The first prosecution of crimes against humanity was at the Nuremberg Tribunal in 1945.<sup>53</sup> There have been attempts to create a convention whose sole purpose was to deal with crimes against humanity but ultimately crimes against humanity remained a customary international law crime substituted by treaty until its insertion in the Statute.<sup>54</sup>

Article 7 of the Statute defines crimes against humanity as committing any of the acts listed under article 7(1)(a) to (k) as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>55</sup> Prosecution of crimes against humanity was originally for crimes committed during war, this is no longer the case as the ICC has jurisdiction over crimes against humanity both during times of war and peace.<sup>56</sup>

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<sup>51</sup> Article 6 of the Rome Statute.

<sup>52</sup> Schabas 2017: 90.

<sup>53</sup> Schabas 2017:94; *see further* Schabas 2016: 147.

<sup>54</sup> Many of the crimes considered to be crimes against humanity can be found in treaties. For example; the UNGA International Convention on the Suppression and Punishment of the Crime of Apartheid 1973; UNGA Slavery Convention 1926 as amended by the Protocol 1953; UNGA Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; <http://www.un.org/en/genocideprevention/crimes-against-humanity.html> >. Accessed on 13/09/2018; *See further* Schabas 2017: 91 and Pikis 2010: 60-62.

<sup>55</sup> Article 7 of the Rome Statute; Article 7(1)(a) to (k) of the Rome Statute states: “(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, 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”.

<sup>56</sup> Dugard 2012: 178.

### III. War Crimes

War crimes is the oldest of the crimes in the Statute and was one of the first to be prosecuted, this was done as early as the 1920's.<sup>57</sup> Although the foundation of war crimes can be found in the Hague Convention of 1907,<sup>58</sup> war crimes would go on to be punishable in terms of more than one convention.<sup>59</sup> It was included in many conventions, with the most important being the four Geneva Conventions of 1949.<sup>60</sup> War crimes is another core crime that finds its place in international customary law.<sup>61</sup>

War crimes can be found in article 8 of the Statute and is defined comprehensively, with the longest definition of the four crimes in the Statute.<sup>62</sup> The definition is extensive and can be divided into war crimes during international armed conflict and war crimes during non-international armed conflict.<sup>63</sup>

Articles 8(2)(a) and (b) deal with war crimes during international armed conflict, these crimes are defined as committing any act mentioned in article 8(2)(a)(i) to (viii) which constitute grave breaches of the Geneva Convention of 12 August 1949 and any act mentioned in article 8(2)(b)(i) to (xxvi) which are serious violations of laws and customs that are applicable to international armed conflict.<sup>64</sup>

Article 8(2)(c),(d),(e) and (f) deals with war crimes committed during non-international armed conflict, here war crimes are defined as committing any acts mentioned in article 8(2)(c)(i) to (iv) during non-international armed conflict that is aimed at non-combatants, armed forces that have surrendered or people who have become *hors*

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<sup>57</sup> Schabas 2017: 110.

<sup>58</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>59</sup> Schabas 2017: 110.

<sup>60</sup> Id. at 117; see further (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; (II) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; (III) Geneva Convention to the Treatment of Prisoners of War 12 August 1949 and (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

<sup>61</sup> Schabas 2017:115.

<sup>62</sup> Schabas 2017: 110.

<sup>63</sup> Dugard 2012: 180-185.

<sup>64</sup> Article 8(2)(a)(i)-(viii) and article 8(2)(b)(i)-(xxvi) of the Rome Statute.

*de combat*.<sup>65</sup> Article 8(2)(c) does not apply to internal disturbances, riots or isolated acts of violence.<sup>66</sup> The last definition of war crimes also relates to non-international armed conflict and is defined as carrying out any of the acts in article 8(2)(e)(i) to (xv) during non-international armed conflict, however this article does not apply to internal disturbances, riots or isolated violence but applies to conflict between governmental authorities and organized armed groups.<sup>67</sup>

#### IV. Crime of Aggression

The Last crime on the Statute is found in article *8bis* read with articles *15bis* and *15ter*, these articles relate to the crime of aggression.<sup>68</sup>

Before it was called a crime of aggression it was known as crimes against peace and was regarded as the “supreme international crime” when it was prosecuted at the Nuremburg and Tokyo trials.<sup>69</sup> Like crimes against humanity, the crime of aggression did not have a convention of its own but was rather considered to be a part of international customary law due to its successful prosecution at the Nuremburg trials.<sup>70</sup>

There was much difficulty surrounding a definition of the crime of aggression during the drafting of the Statute and even threats of removing it from the Statute if a definition could not be agreed on.<sup>71</sup> Ultimately the crime of aggression was included in the original inception of the Statute without a definition but was subject to article 5(2) which stated that the court will have jurisdiction over the crime once an agreed upon definition is formulated.<sup>72</sup>

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<sup>65</sup> Article 8(2)(c)(i)-(iv) of the Rome Statute.

<sup>66</sup> Article 8(2)(d) of the Rome Statute.

<sup>67</sup> Article 8(2)(e)(i)-(xv) and article 8(2)(f) of the Rome Statute.

<sup>68</sup> Article *8bis*, *15bis* and *15ter* of the Rome Statute.

<sup>69</sup> Schabas 2016: 302; Schabas 2017: 133.

<sup>70</sup> Schabas 2016: 302.

<sup>71</sup> Doc A/CONF.183/C.1/L.53, see A/CONF.183/13 page 212.

<sup>72</sup> UN General Assembly, *Rome Statute of the International Criminal Court* 17 July 1998, prior to 2010 amendments. Art 5(2) was deleted at the 2010 Review Conference.



It was not until the 2010 ICC Review Conference that a definition of aggression was inserted.<sup>73</sup> Article 8*bis*(1) makes it a crime for any person who is in charge of the political and military function of a state, to plan or initiate act of aggression.<sup>74</sup>

Article 8*bis*(2) then defines an act of aggression as the use of armed force by a state against the territorial integrity, sovereignty and independence of another state and that committing any of the acts listed under article 8*bis*(2)(a) to (g) against another state is considered an act of war.<sup>75</sup>

## V. Terrorism

If we look at the four core crimes referred to above, a pattern arises. Firstly, we see that all these crimes have a significant place in history, tracing back to the 1900's and being the main concerns after WWII.

Secondly, these crimes are all part of customary international law, this is important as it places importance on interstate cooperation on prosecuting these crimes.

A third aspect is that these crimes can be found in convention. Although crimes against humanity and the crime of aggression do not have their own treaty, the many acts considered to be crimes against humanity can be found in treaties and before it was known as crime of aggression, crimes against peace could be found in treaty.<sup>76</sup>

Another aspect is the fact that these crimes all contain definitions accepted by the international community. There might have been many attempts and disagreement amongst states, but over the years definitions have arisen and were inserted in the Statute. Even the crime of aggression, that had no agreeable definition at its insertion in the Statute, obtained a definition over the years and was inserted in the statute in 2010. Lastly these crimes are all considered to be the most serious concern of the international community.

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<sup>73</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Held at Rome, Italy 15 June-17 July 1998; See further United Nations document A/CONF.183/13(Vol. III) and A/CONF.183/10.

<sup>74</sup> Article 8*bis*(1) of the Rome Statute.

<sup>75</sup> Article 8*bis*(2)(a)-(g) of the Rome Statute.

<sup>76</sup> Kellogg-Briand Pact 1928.

Terrorism, like the crimes above has roots throughout history. In fact, the first use of the phrase terrorism was during the French Revolution to describe the acts committed by the French government in coercing the citizens to comply with its rule.<sup>77</sup> In 1914 terrorism evolved from state action against civilians to actions of non-state actors against civilians, private entities and the state when Archduke Ferdinand was assassinated.<sup>78</sup> In 1972, during the Munich Attack, we saw terrorism become what is known today.<sup>79</sup>

It is also suggested that terrorism finds its place among customary international law.<sup>80</sup> In the interlocutory decision of the Appeals Chamber for the Special Tribunal for Lebanon (STL) in 2011 it was stated that over the years terrorism has become part of a customary international law and a customary law definition of terrorism has been created.<sup>81</sup> This decision of the STL was adopted in the decision of the Court of Appeal of England in 2012, stating that in international law there does exist an international crime of terrorism, however limited this to acts of terrorism where there is no armed conflict.<sup>82</sup> Another important decision was that of the French Court of Cassation in 2011, where the court stated that the prohibition of international terrorism was a *jus cogens* norm.<sup>83</sup>

Terrorism can also be found in nineteen conventions, each convention proscribing different acts of terrorism such as acts regarding civil aviation, safety of internationally protected persons, prohibiting the taking of hostages, protection of nuclear material, protecting maritime navigation, control of explosive material, prohibiting terrorist bombing, prohibiting the financing terrorism and prohibiting nuclear terrorism.<sup>84</sup>

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<sup>77</sup> Roberts A, *The Changing Faces of Terrorism*, BBC. Page 1; <[http://www.bbc.co.uk/history/recent/sept\\_11/changing\\_faces\\_print.html](http://www.bbc.co.uk/history/recent/sept_11/changing_faces_print.html)>. Accessed on 22/05/2018

<sup>78</sup> Id. at 2.

<sup>79</sup> Ibid.

<sup>80</sup> Dugard 2012: 165.

<sup>81</sup> Prosecutor V Ayyash 2011 STL-11-01/1: Interlocutory Decision of the Appeals Chamber for the Special Tribunal for Lebanon; see further Boister 2012: 73; *The Pursuit of a Brave New World in International Law, Essays in Honour of John Dugard*, Edited by Maluwa T, Du Plessis M and Tladi D, 2017 page 371.

<sup>82</sup> Regina V Mohammed Gul, Case No: 2011/01697/C5, [2012] EWCA Crim 280 paras 32-36; see Weatherall T, The Status of the Prohibition of Terrorism in International Law: Recent Developments, *Georgetown Journal of International Law* 2015 Vol.46 page 600-601 and 605-609.

<sup>83</sup> Weatherall 2015: 609-611.

<sup>84</sup> Boister 2012: 64-69; see <http://www.un.org/en/counterterrorism/legal-instruments.shtml> Accessed on 27/10/2018. See further : International Civil Aviation Organization (ICAO), *Convention on Offences and Certain Acts Committed on Board Aircraft*, 14 September 1963; United Nations, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, UN Treaty Series 1973; international Civil Aviation

The only problem with comparing the crimes above with terrorism lies in the fact that there is still no universally accepted definition of the crime of terrorism. There are a few common definitional elements that exist that could aid the ICC in creating a universally accepted definition.<sup>85</sup> In fact, at the eighth session of the Assembly of States Parties it was held that that terrorism was already covered in sixteen multilateral conventions and stated that there was no problem with finding a definition.<sup>86</sup>

Lastly when we look at terrorism being of serious concern to the international community, in the final act<sup>87</sup> it was stated that “Recognizing that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community, Deeply alarmed at the persistence of these scourges, which pose serious threats to international peace and security”.<sup>88</sup>

#### **4. Previous Attempts to Include Terrorism in the Rome Statute**

There have been two attempts to include terrorism in the Rome Statute. The first attempt was in the initial proposal in 1998 at the United Nations Diplomatic Conference

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Organization (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177; United Nations, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, UN Treaty Series 1990; UN General Assembly, *International Convention against the Taking of Hostages*, 17 November 1979, No. 21931; UN General Assembly, *Convention on the Physical Protection of Nuclear Material*, 26 October 1979, No. 24631; UN General Assembly, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, No. 29004; international Maritime Organization (IMO), *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005; UN General Assembly, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, UNTS 1678, I-29004; international Maritime Organization (IMO), *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 14 October 2005; UN General Assembly, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991; UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517; UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349; UN General Assembly, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, A/59/766.

<sup>85</sup> See below section 4. Defining Terrorism.

<sup>86</sup> Eighth session, The Hague 18-26 November 2009, Report of the Bureau on the Review Conference ICC ASP/8/43.

<sup>87</sup> A/CONF.183/10 17 July 1998.

<sup>88</sup> A/CONF.183/10 page 7 and 8. See A/CONF.183/13 page 142.

of Plenipotentiaries on the Establishment of an International Criminal Court<sup>89</sup> and the second attempt was at the Eighth Session of the Assembly of States Parties<sup>90</sup> held before the review conference of the ICC.<sup>91</sup>

#### I. 1998 United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court

In 1998 at the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Court there were many proposals and multiple drafts put forward by states and other parties to the conference. Included in some drafts and found in a few proposals was the inclusion of terrorism.

In the Report of the Preparatory Committee on the Establishment of an International Criminal Court the preparatory committee included the crime of terrorism and even attached a definition.<sup>92</sup> However, in the footnote of the document it was stated that the preparatory committee had discussed terrorism and two other crimes but only in a “general manner and did not have time to examine them as thoroughly as the other crimes”.<sup>93</sup> This is understandable as terrorism did not carry the weight of importance as the other crimes at the time. Especially since these discussions were carried out right after the events in Rwanda and former Yugoslavia.

Another proposal was made in a discussion paper submitted by the Bureau.<sup>94</sup> Here it was submitted that one of the options for article 5 was to include certain treaty crimes

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<sup>89</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Held at Rome, Italy 15 June-17 July 1998. See further United Nations document A/CONF.183/13(Vol. III) and A/CONF.183/10.

<sup>90</sup> Eighth session, The Hague 18-26 November 2009, Report of the Bureau on the Review Conference ICC ASP/8/43.

<sup>91</sup> Held at the Hague 18-26 November 2009. The purpose of these discussions was to decide if the proposed amendments would be tabled at the 2010 Review Conference. See further the Report of the Bureau on the Review Conference: ICC-ASP/8/43.

<sup>92</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court 14 April 1988. Doc A/CONF.183/2. See further United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998, Official Records, Volume III, Reports and other documents. Doc A/CONF.183/13 page 21.

<sup>93</sup> The other two crimes were crimes against United Nations and associated personnel and crimes involving illicit trafficking in narcotic drugs and psychotropic substances. See footnote 25 of A/CONF.183/2. Also see Footnote 25 A/CONF.183/13 page 21.

<sup>94</sup> Doc A/CONF.183/C.1/L53. See A/CONF.183/13 page 204.

within the jurisdiction of the court, with terrorism being one of those treaties alongside drug crimes and crimes against UN personnel.<sup>95</sup>

A recommendation made by the coordinator was for terrorism to be included as a crime within crimes against humanity.<sup>96</sup> This recommendation was rejected as only some delegations supported the idea and there was no consensus on the matter.<sup>97</sup>

It was further submitted by Barbados, Dominica Republic, India, Jamaica, Trinidad and Tobago and Turkey to include terrorism and drug crimes as article 5(d) and (e) with a sub article requesting that “the definition and element of the crimes of terrorism and drug crimes shall be elaborated by the preparatory commission”.<sup>98</sup> Thus one of the mandates of the preparatory commission was to include their finding in the final act.<sup>99</sup>

The work of the commission was unfortunately not enough. In annexure I of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court<sup>100</sup> it stated that terrorism would not be included in the Rome statute and was set out as follows:<sup>101</sup>

*Regretting* that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,

*Affirming* that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

*Recommends* that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.

## II. 2009 Eighth Session of the Assembly of States Parties

In line with article 123 of the Rome Statute, 7 years after the entry into force of the statute the Secretary General of the United Nations must establish a review

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<sup>95</sup> A/CONF.183/13 page 204 and 208.

<sup>96</sup> Doc A/CONF.183/C.1/L.60/REV.1. *see* A/CONF.183/13 page 221.

<sup>97</sup> Footnote 18 A/CONF.183/13 page 221. The few delegations that supported this idea were India, Sri Lanka and Turkey, *see* A/CONF.183/C.1/L.27/REV.1 and A/CONF.183/13 page 242.

<sup>98</sup> A/CONF.183/C.1/L.71. *see* A/CONF.183/13 page 248.

<sup>99</sup> Footnote 40 A/CONF.183/13 page 248.

<sup>100</sup> A/CONF.183/10. *See* A/CONF.183/13 page 139-147.

<sup>101</sup> A/CONF.183/10 page 7 and 8. *See* A/CONF.183/13 page 142.

conference to discuss amendments to the Rome Statute.<sup>102</sup> This conference was held in 2010.<sup>103</sup> One of the many proposals made, was by the Netherlands to include terrorism as a crime under the Rome Statute.<sup>104</sup> Prior to the conference the Assembly of States Parties held an eighth session to determine what proposals would be considered at the actual review conference, considering scope, financial and legal implications as well as practical and organisational issues.<sup>105</sup>

In the proposal by the Netherlands, the Netherlands stated its concern that terrorism has become “one of the biggest and most challenging threats the world is facing in the twenty-first century”.<sup>106</sup> The Netherlands proposed that it was time for terrorism to be included in the Rome Statute.

The proposal submitted by the Netherlands was to amend the Rome Statute to include terrorism as a core crime under article 5 but to have the same suspensive provision as aggression did when it was initially included in the Rome Statute in 1998, thus to include it with a suspensive provision stating that the article will only come into force once a definition is agreed on.<sup>107</sup>

At the eighth session some states indicated that the inclusion of terrorism in the statute would overburden the courts limited financial and human resources.<sup>108</sup> They also suggested that terrorism was a politically sensitive matter and would lead to difficult negotiations at the review conference.<sup>109</sup>

In its report, the Bureau stated that discussing terrorism would be prolonged and lead to difficult discussions at the review conference that would reduce the possibility of successful negotiations regarding amendments.<sup>110</sup> Several delegations agreed that combatting terrorism is important but that it was wrong for the Netherlands to propose

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<sup>102</sup> Article 123 of the Rome Statute.

<sup>103</sup> Review Conference of the Rome Statute of the International Criminal Court held at Kampala, 31 May – 11 June 2010, Official Record RC/9/11, International Criminal Court publication ISBN No. 92-9227-198-9.

<sup>104</sup> ICC ASP/8/43 page 9.

<sup>105</sup> Id. at 3.

<sup>106</sup> Netherlands Proposal C.N.723.2009. TREATIES-5 XVIII.10, page 2.

<sup>107</sup> C.N.723.2009 page 3. “3. The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.

<sup>108</sup> ICC ASP/8/43 page 5.

<sup>109</sup> Id. at 6.

<sup>110</sup> Ibid.

terrorism to be included the same way as the crime of aggression and that it would not be appropriate or feasible to do so.<sup>111</sup>

The objections and concerns put forward by the Bureau outweighed the proposal put forward by the Netherlands and so terrorism was not included in the topics to be discussed at the review conference, instead it was suggested that terrorism be considered at further review conferences in the future.<sup>112</sup>

## 5. Defining Terrorism

The largest problem surrounding terrorism is the difficulty in creating a universally accepted definition of international terrorism and this is not due to a lack of trying. There have been many attempts at defining terrorism, but none have had any form of universal acceptance. Since 2001 there has been a new urgency for a definition and 17 years later the urgency has only grown.<sup>113</sup>

As stated above, nineteen different conventions have been created in the fight against terror with each convention only defining a particular form of terrorism that the particular convention was created to suppress or combat at the time.<sup>114</sup> This sectoral approach came about because of the failure to create a general definition of terrorism and as states could not stand by and simply wait for a definition, this approach of adopting specific conventions at the time was the solution.<sup>115</sup>

In 1997 acting on a report of the United Nations General Assembly Sixth Legal Committee, the United Nations General Assembly (UNGA) adopted resolution 51/210.<sup>116</sup> In this resolution the UNGA decided that the UNGA Sixth legal Committee was to conduct work on certain anti-terror conventions<sup>117</sup>, one of which being a comprehensive convention dealing with international terrorism.<sup>118</sup> From 1997 to 2000

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<sup>111</sup> ICC ASP/8/43 page 9.

<sup>112</sup> Id. at 6.

<sup>113</sup> Saul B, *Defining Terrorism in International Law* 2006 page 5.

<sup>114</sup> Maluwa T, Du Plessis M and Tladi D 2017: 371.

<sup>115</sup> Id. at 373.

<sup>116</sup> UNGA resolution 51/210 (1997).

<sup>117</sup> Id. at paras 9-14. The other conventions the UNGA Sixth Legal Committee was tasked to create an international convention for the suppression of terrorist bombings, an international convention for the suppression of acts of nuclear terrorism and to supplement related existing conventions.

<sup>118</sup> Ibid; see Boister 2012: 71.

the UNGA Sixth Legal Committee successfully drafted the 1997 Terrorist Bombing Convention and the 1999 Terrorist Financing Convention.<sup>119</sup> During this time terrorism was being discussed with regards to its insertion into the Rome Statute but it was ultimately left out.<sup>120</sup> In 2000, following the unsuccessful attempt at including terrorism in the Rome Statute, the UNGA adopted resolution 54/110 which decided that the UNGA Sixth Legal Committee continue its work on creating a comprehensive convention of international terrorism.<sup>121</sup> Also in 2000 the UNGA Sixth Legal Committee started work on a draft convention on international terrorism with help of a working document submitted by India.<sup>122</sup> In 2005 the UNGA Sixth Legal Committee created the Nuclear Terrorism Convention and thus all that was left in accordance with the resolutions referred to above was to finish the draft comprehensive convention on terrorism.<sup>123</sup> Unfortunately from 2005 up until now this draft comprehensive convention on international terrorism has not been completed or entered into force, this is due to the fact there is no universal acceptance on the definition of terrorism.<sup>124</sup>

The problem with defining terrorism is not due to acceptance of those acts that constitute terrorism but rather due to disagreement as to those acts that should be excluded from terrorism.<sup>125</sup>

With regards to those elements that constitute terrorism there are many definitions of that are all foundationally similar and only differ with regards to emphasis on certain clauses, such as different types of force or who the act is directed at.<sup>126</sup>

The closest to a universal definition can be found in the International Convention for the Suppression of the Financing of Terrorism (Financing Convention) with 188 states signatory to this treaty.<sup>127</sup> The Financing Convention creates an offence if any person

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<sup>119</sup> UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517; UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349. See Saul 2006: 184.

<sup>120</sup> Saul 2006: 180-183.

<sup>121</sup> UNGA Resolution 54/110 (2000).

<sup>122</sup> UN General Assembly, *Draft Comprehensive Convention on International Terrorism*, 28 August 2000, A/C.6/55/1.

<sup>123</sup> UN General Assembly, *International Convention for the Suppression of Acts of Nuclear Terrorism*, 13 April 2005, A/59/766; see Saul 2006: 184-185.

<sup>124</sup> Boister 2012: 71.

<sup>125</sup> Ibid. see further Maluwa T, Du Plessis M and Tladi D 2017: 372.

<sup>126</sup> Saul 2006: 57.

<sup>127</sup> UNGA, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349; see further XVIII 11. Penal Matters; Cohen 2012: 233-234.



provides funds to carry out a terrorist act, it then states that a terrorist act is any act in terms of the conventions annexed to the financing convention or

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>128</sup>

The Financing Convention is an important step towards creating a universally accepted definition of terrorism. The definition provided for in the Financing Convention deals with the specific *mens rea* (intention) needed for acts of terrorism, this being the intention of the attack is to bring about a certain change or compel and intimidate a population.<sup>129</sup> The wide acceptance of the definition provided for in the financing convention provides a great foundation for a universally accepted definition.<sup>130</sup>

Another breakthrough occurred in the Special Tribunal for Lebanon,<sup>131</sup> where it was suggested that terrorism has become an international customary law crime and that over the years a customary law definition has been created.<sup>132</sup> The elements of a definition concluded by the tribunal are:<sup>133</sup>

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.

Aviv Cohen lists elements to a definition similar to that of the one proposed by the tribunal, the elements being (i) threat of and use of violence, (ii) the act does not discriminate on victims and the victims are not the intended audience, (iii) the victims of the attack are civilians and not military combatants and (iv) the purpose of the act

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<sup>128</sup> Article 2(1)(a) and (b) of the UNGA *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349.

<sup>129</sup> Cohen A, Prosecuting Terrorist at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism, *Michigan State International Law Review* 2012 Vol 20:2 page 233-234. See further Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism 1999.

<sup>130</sup> Ibid.

<sup>131</sup> Prosecutor V Ayyash 2011 STL-11-01/1: Interlocutory Decision of the Appeals Chamber for the Special Tribunal for Lebanon.

<sup>132</sup> Id. at 49 and 50; See further Boister 2012: 72 and 73.

<sup>133</sup> Ibid.

is to force a government authority or organisation to do, or refrain from doing something.<sup>134</sup>

Ben Saul also point out similar elements to a definition as the ones above, here the elements are (i) serious violent criminal act intended to cause injury, death or damage to life and property, (ii) committed outside of armed conflict, (iii) for a political, religious or ideological purpose, (iv) in order to create fear in the people and in doing so intimidate the population or force a government or international organisation to do or refrain from doing something and (v) that rebellious or protesting action not intended to cause harm to public does not constitute terrorism.<sup>135</sup>

As stated earlier the problem surrounding universal acceptance involves those acts that should be excluded from the definition of terrorism. This always involves two distinct problems.<sup>136</sup>

The first is whether use of armed force by states against its civilians, state terrorism, falls within the definition of terrorism and whether an exception exist regarding liberation movements committing acts of terrorism against oppressive governments or foreign occupation.<sup>137</sup>

Regarding both liberation movements and use of armed force by states against civilians, there needs to be a distinction made between acts occurring during armed conflict and peace time.<sup>138</sup> On the one hand it is argued that International Humanitarian Law and other obligations in terms of international law are the appropriate routes to follow when these acts occur during times of armed conflict.<sup>139</sup> Where-as it's also argued that these exceptions are vital in maintaining the right to self-determination against oppressive or colonialist regimes and a states right to state sovereignty.<sup>140</sup>

However with regards to these acts carried out in times if peace, it is suggested that violent acts aimed at innocent civilians should never be justifiable as this would be contrary to international human rights, which the ICC is tasked with protecting, if the

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<sup>134</sup> Cohen 2012: 229-230

<sup>135</sup> Id. at 229-230 and Saul 2006: 65-66.

<sup>136</sup> Cohen 2012: 231-232; Much 2006: 130. See also Saul 2006: 63, for detailed discussion see Chapter 2; Boister 2012: 71 and Maluwa T, Du Plessis M and Tladi D 2017: 372.

<sup>137</sup> Ibid.

<sup>138</sup> Saul 2006: 63 and Maluwa T, Du Plessis M and Tladi D 2017: 376.

<sup>139</sup> Saul 2006: 63.

<sup>140</sup> Cohen 2012: 232.

international community wants to be serious about combatting terrorism there should be no exceptions to the rule.<sup>141</sup> The Intentional targeting and attack on innocent civilians should be illegal no matter the reason, it is contradictory to allow the violation of human rights in order to protect human rights.<sup>142</sup>

Despite the possible human rights violations, some states are still of the opinion that these exceptions are needed. This can be seen in article 19 of the Terrorist Bombing Convention<sup>143</sup> which has an exclusionary article that is a template for further conventions. The Organisation of African Unity Convention on the Prevention and Combatting of Terrorism also contains an exclusionary clause found in article 3.<sup>144</sup>

Lastly, we can find many states have their own national implementation of anti-terror legislation that contain definitions and provisions dealing with terrorism.<sup>145</sup>

The four definitions provided above all have very similar elements as to what constitutes terrorism, as for those exclusionary principles, it is up to states to come to a conclusion on this matter, one that will depend on the seriousness of those states in bringing an end terrorism.

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<sup>141</sup> Cohen 2012: 233; Saul 2006: 64-65

<sup>142</sup> Ibid. see further Addicott JF, *Terrorism Law, Materials, Cases, Comments* 2007 page 4; Oehmichen A, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France* 2009 page 6.

<sup>143</sup> Article 19 of UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997 No. 37517: "1. Nothing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law. 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention". See further *The Pursuit of a Brave New World in International Law, Essays in Honour of John Dugard* 2017: 375.

<sup>144</sup> OAU Convention on the Prevention and Combatting of Terrorism 1999.

<sup>145</sup> See above page 2 Fn 12.

## Chapter Three

### Including Terrorism in the Rome Statute

#### 1. Current Methods Used to Combat Terrorism

Prosecuting international terrorism is split into national and international measures. Prosecution vests in the national courts of states, in terms of the national law of that state, as there is no international criminal court established that currently prosecutes terrorism. The national law of those states is influenced by international law, and with regards to international terrorism, mainly by the work of the United Nations.

Currently there are nineteen International conventions and protocols dealing with international terrorism, these conventions each deal with a specific form of terrorism, this is due to the inability of the international community to arrive at a universally accepted general definition of international terrorism.<sup>1</sup> These individual conventions and protocols concern acts regarding civil aviation, protection of international staff, taking of hostages, nuclear material, maritime navigation, explosive materials, terrorist bombings, financing of terrorism and nuclear terrorism.<sup>2</sup>

These conventions all compel and request states to enact national laws that enable those states to prosecute acts of terrorism.

In 2001, after the attacks of 9/11 the United Nations Security Council (UNSC) adopted resolution 1373.<sup>3</sup> This resolution prompted a new wave of counter terrorism measures,<sup>4</sup> on the one hand the resolution prompted the creation of the Counter Terrorism Committee (CTC) and on the other hand it requested the United Nations General Assembly (UNGA) Sixth Legal Committee to continue its work on creating counter terrorism conventions and to formulate a general definition of terrorism.<sup>5</sup>

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<sup>1</sup> *The Pursuit of a Brave New World in International Law, Essays in Honour of John Dugard*, Edited by Maluwa T, Du Plessis M and Tladi D, 2017 page 371 and 373.

<sup>2</sup> <<http://www.un.org/en/counterterrorism/legal-instruments.shtml>> Accessed on 28/10/2018.

<sup>3</sup> UNSC Resolution 1373 (2001).

<sup>4</sup> Ruperez J, *The United Nations in the Fight Against Terrorism*, Counter-Terrorism Committee Executive Directorate page 13.

<sup>5</sup> Maluwa T, Du Plessis M and Tladi D, 2017: 363-364.

Resolution 1373 in way, unified the relationship of the UNGA and the UNSC on combatting terrorism, drawing on each of these UN bodies strengths to combat terrorism.<sup>6</sup>

The UNSC adopted resolution 1373 under chapter VII of the Charter of the United Nations.<sup>7</sup> Chapter VII allows the UNSC to determine the existence of any threat to international peace and security and to decide what measure are to be taken to restore this peace and security.<sup>8</sup> Thus resolution 1373 was binding on all member states and set out twelve obligations which all states shall do and a further 9 non-binding obligation calling on states to perform certain functions.<sup>9</sup> These obligations and functions included, among others, the prohibiting of financing of terrorism, implementing national counter terrorism strategies and domestic legislation and compelling states to become party to the current counter terrorism conventions.<sup>10</sup>

Resolution 1373 further created the CTC, a subsidiary organ of the UNSC, with the function of monitoring states compliance with resolution 1373.<sup>11</sup> The CTC also has the duty of monitoring states implementation of national counter terrorism measures as well as receiving reports from states listing those peoples or entities suspected of terrorism.<sup>12</sup> Once a person is listed, that person or entity becomes sanctionable in terms of the relevant terrorism convention.<sup>13</sup>

In 2003 the CTC had become overrun and needed additional resources and so in 2004 the Counter Terrorism Executive Directorate (CTED) was created.<sup>14</sup> CTED's duty is to cooperate and coordinate with states on creating and implementing effective practices and guidelines on fighting terrorism.<sup>15</sup> CTED further monitors states compliance with resolution 1373 and reports this to the CTC.<sup>16</sup>

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<sup>6</sup> Id. at 380.

<sup>7</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>8</sup> Article 39 of The Charter of the United Nations.

<sup>9</sup> Maluwa T, Du Plessis M and Tladi D, 2017: 384.

<sup>10</sup> Dugard, J, *International law a South African Perspective* (2012) page 165.

<sup>11</sup> Ruperez J, *The United Nations in the Fight Against Terrorism*, Counter-Terrorism Committee Executive Directorate page 11.

<sup>12</sup> Maluwa T, Du Plessis M and Tladi D, 2017: 401.

<sup>13</sup> Ibid.

<sup>14</sup> UNSC Resolution 1535(2004); Ruperez J, *The United Nations in the Fight Against Terrorism*, Counter-Terrorism Committee Executive Directorate page 15.

<sup>15</sup> Id. at 16.

<sup>16</sup> Maluwa T, Du Plessis M and Tladi D, 2017: 404.

In 2006 the General Assembly adopted resolution 60/288, The United Nations Global Counter Terrorism Strategy.<sup>17</sup> This set out a four-pillar strategy to combat terrorism, (i) measures addressing the conditions conducive to the spread of terrorism,<sup>18</sup> (ii) measures preventing and combatting terrorism,<sup>19</sup> (iii) measures building states capacity and strengthening the role of the UN<sup>20</sup> and (iv) measure ensuring protection of human rights and the rule of law.<sup>21</sup>

A problem that arose with the CTC and CTED over the years was the fact that it was difficult for people or entities that were listed to become delisted.<sup>22</sup> Thus in 2009 we saw the creation of the Ombudsperson.<sup>23</sup> The duty of the Ombudsperson is to evaluate de-listing request and to perform any necessary function with regards to the delisting of persons or entities.<sup>24</sup>

Another important resolution is 1566, which sets out a general definition of terrorism, incorporating the various counter terrorism conventions as well as obliging states to cooperate fully with other states in the fight against terror.<sup>25</sup>

Thus, the current method of countering international terrorism involves the use of different international organs, committees and conventions that states must comply with and cooperate with to effectively combat and prosecute terrorism.

## 2. Advantages of Including Terrorism in the Rome Statute

The inclusion of terrorism in the ICC is not really a question of whether terrorism can in fact be prosecuted at the ICC. From the above it is clear that from a practical point of view, terrorism can be prosecuted at the ICC. The real problem is of a more political

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<sup>17</sup> UNGA Resolution 60/288 (2006).

<sup>18</sup> Id. at 4.

<sup>19</sup> Id. at 5.

<sup>20</sup> Id. at 7.

<sup>21</sup> Id. at 9.

<sup>22</sup> Id. at 405.

<sup>23</sup> UNSC Resolution 1904 (2009); Ibid.

<sup>24</sup> Maluwa T, Du Plessis M and Tladi D, 2017: 405.

<sup>25</sup> UNSC Resolution 1566 (2004); Dugard 2012: 165; N Boister, *An Introduction to Transnational Criminal Law* (2012) page 70.

nature. Is it more beneficial for states to include terrorism in the Rome Statute? Here I believe there are numerous advantages.

Aviv Cohen breaks these advantages into four categories, procedural advantages, advantages to states, advantages from a counter-terrorism position and a general view.<sup>26</sup>

Firstly, including terrorism in the Rome Statute (the Statute) will benefit states from a procedural standpoint.<sup>27</sup> The court has clear and strict guidelines regarding the legal proceedings of the court, every aspect from rules of evidence to procedure is clearly set out in the Statute. Instead of states having to compare jurisdictions, determine which of the nineteen conventions to comply with decide who's rules to apply they could look at the Statute instead, this allows a more efficient manner of prosecuting terrorism.

From a state view point the Court is impartial and neutral and when a situation affects more than one state the ICC is a perfect middle ground.<sup>28</sup> Article 45 of the Statute requires the prosecutor, deputy prosecutors, judges, the registrar and deputy registrar to take a solemn undertaking to perform all duties with impartiality.<sup>29</sup> Often when terrorism is prosecuted in national courts, the courts might find it difficult to be impartial and neutral. Unlike murder or rape, where the presiding officers will likely not have any connection to the case and therefore more likely to be impartial, terrorism involves the presiding officers' fellow countrymen that have been killed and maimed all to compel a certain authority (mostly their own nation) to do something. The ICC in these situations will more likely be impartial.

Terrorism very often affects more than one state and can result in competing claims by the states as to who gets to prosecute the matter, the ICC will be able to settle this. As mentioned above, the transnational element of terrorism becomes a problem when determining which state will have jurisdiction. These competing jurisdictional claims can lead to one state overriding or overpowering another state to crucify the accused.

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<sup>26</sup> Cohen A, Prosecuting Terrorist at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism, *Michigan State International Law Review* 2012 Vol 20:2 page 251-253.

<sup>27</sup> Id. at 251.

<sup>28</sup> Cohen 2012: 251-252; Much C, The International Criminal Court (ICC) and Terrorism as an International Crime, *Michigan State Journal of International Law* 2006 Vol 14:121 page 135.

<sup>29</sup> Art 45 of the Rome Statute.

the ICC can be a court that is neutral and operates on behalf of both states or even be an impartial decider on the competing claims of states.

From a counter-terrorism view point there are many benefits. Firstly, including terrorism in the Statute will help prosecute those part of terrorist groups, that hold positions of influence in governments.<sup>30</sup> The core crimes that are in the Statute needed an impartial court capable of prosecuting perpetrators of these crimes because the state itself cannot properly prosecute those accused, as it is often the state or its officials that are the accused.<sup>31</sup> This is the same when we look at state sponsored terrorism or even state officials that are part of terrorist groups. This immunity is not true immunity as article 98 of the Statute creates a loophole. Article 98 allows a state to refuse cooperation with the ICC in that a state may not be asked to act contrary to any obligation regarding immunities in international law<sup>32</sup> or to act in contradiction to any obligation that has been created in terms of international law, unless that state has consented to it.<sup>33</sup> Despite this loophole, article 27 still allows the ICC to prosecute heads of states or high ranking official as can be seen in certain cases before the ICC.<sup>34</sup> Even if the ICC cannot ensure judicial proceedings against the accused, the warrants of arrest do deter the accused from international travel.<sup>35</sup> This end to impunity will allow the ICC to prosecute state officials for sponsoring terrorism or to prosecute state officials who are part of terrorist groups or play a role in aiding terrorist in any way, this is something that states will less likely take up under their national law.<sup>36</sup>

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<sup>30</sup> Cohen 2012: 252. See further Article 27 of the Rome Statute.

<sup>31</sup> William A. Schabas, *An Introduction to the International Criminal Court* 2017 page 75.

<sup>32</sup> Article 98(1) of the Rome Statute.

<sup>33</sup> Article 98(2) of the Rome Statute.

<sup>34</sup> Currently the ICC has issued warrants of arrest, arrested and put on trial persons who held or possess a certain official capacity. The ICC currently has in their custody, awaiting trial for crimes against humanity committed in Cote d'Ivoire, Laurent Gbagbo the Former President of Cote d'Ivoire and Charles Ble Goude an Ivorian political leader (see ICC-02/11-01/15). In addition the ICC has issued arrest warrants for the arrest of Omar Hassan Ahmed Al Bashir who is the President of Sudan and suspected of committing crimes against humanity, war crimes and the crime of genocide in Darfur, Sudan (see ICC-02/05-01/09); For the arrest of Saif Al-Islam Gaddafi who is the Libyan *de facto* Prime Minister for suspected crimes against humanity in Libya (see ICC-01/11-01/11); For the arrest of Abdel Raheem Muhammed Hussain who was the former Minister of national Defence for suspected crimes against humanity and war crimes committed in Darfur, Sudan (see ICC-02/05-01/12); for more information regarding cases before the ICC see <<https://www.icc-cpi.int/cases>>. Accessed on 01/10/2018.

<sup>35</sup> Dugard 2012: 156-157.

<sup>36</sup> The same could be said for cases before the ICC as was seen when South Africa failed to successfully arrest Omar Hassan Ahmed Al Bashir, however it will still limit the likeliness of these officials to travel as other states might not be as lenient as South Africa was with Bashir, a risk that is not worth taking.



Another benefit is that acts of terrorism are often committed by more than one perpetrator. Here article 25 of the Rome Statute allows for the prosecution of accomplices and co-perpetrators.<sup>37</sup> The ability to prosecute co-perpetrators and accomplices is not something that is limited to the ICC, however, like competing jurisdictions, states must compete or cooperate to bring the accused to justice and this requires serious interstate cooperation which can be simplified by the ICC.<sup>38</sup>

The ICC will also reinforce national anti-terror measures thanks to complementarity.<sup>39</sup> Although not strictly stated, article 17(1)(a) and (b) deal with the principle of complementarity.<sup>40</sup> The court does not act as a court of first instance, it in fact offers the state that has jurisdiction over the matter opportunity to investigate and prosecute first and only if the state is unwilling or unable to prosecute, will the ICC step in.<sup>41</sup> Article 17(2) and (3) of the Statute set out what the court means by unwilling and unable. To determine unwillingness the court will look at instances where the proceedings in national courts are taken to shield an accused from the ICC,<sup>42</sup> if there is an irregular delay in proceedings that show no intent to bring the accused to justice<sup>43</sup> and if the proceedings are not impartial or independent and indicate no intention to bring the accused to justice.<sup>44</sup> When looking at inability of a state to prosecute, the court looks at whether a state cannot prosecute due to a total collapse of its judicial system as well as the states inability to secure the accused, evidence and testimonies to carry out proceedings.<sup>45</sup> In order to avoid the ICC from stepping in and risk looking like that state is unwilling or unable, states will more likely strengthen their own measures.<sup>46</sup>

The ICC will also set standards for prosecuting acts of terrorism and in turn create legal certainty and predictability.<sup>47</sup> Furthermore states are more likely to cooperate with the ICC than with other states.<sup>48</sup> The Statute is a multilateral statute and acting

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<sup>37</sup> Article 25 of the Rome Statute.

<sup>38</sup> Cohen 2012: 252.

<sup>39</sup> Ibid.

<sup>40</sup> Schabas 2017: 170-171.

<sup>41</sup> Ibid.

<sup>42</sup> Article 17(2)(a) of the Rome Statute.

<sup>43</sup> Article 17(2)(b) of the Rome Statute.

<sup>44</sup> Article 17(2)(c) of the Rome Statute.

<sup>45</sup> Article 17(3) of the Rome Statute.

<sup>46</sup> Cohen 2012: 253.

<sup>47</sup> Ibid. see Much 2006: 136.

<sup>48</sup> Ibid.

contradictory to it will bring the attention of more than one state and can lead to more serious repercussions, where as if a state had to be in breach of a bi-lateral treaty the repercussions would be serious but more easy to handle or avoid.<sup>49</sup> Including terrorism in the Statute will also lead to a more effective way of sharing intelligence and information on terrorist groups and attacks.

Also, with regards to states, including terrorism in the Statute will help states that cannot prosecute themselves or lack the resources to effectively combat terrorism.<sup>50</sup> Those states that lack technological infrastructure or who's judicial systems are overburdened or full may find ease in knowing that the ICC will be there to assist with the prosecution of terrorism. In terms of Article 17, the ICC will have jurisdiction when a state cannot prosecute the accused.<sup>51</sup> With acts of terrorism often occurring in states with weak or failing judicial systems or even within failed states ,and so the states can be seen as unwilling and unable, it would be consoling to know the ICC can step in and assess the situation.<sup>52</sup> The ICC will also be able to assist in anti-terror methods and techniques that will allow such a state to effectively combat terrorism. One of the arguments put forward is that terrorism is already effectively prosecuted under national law, but only 'if' the suspects can be caught.<sup>53</sup> As is often the case the suspect has killed himself in the attack, which only leaves his accomplices or terror group behind, and they could be from or in a vast number of states.<sup>54</sup> Having the ICC set out rules for arrest and surrender can assist in apprehending terror suspects.

From a more general view, including terrorism in the Statute will send a clear message that the international community condemns acts of terrorism.<sup>55</sup> It would also reduce alternative combatting of terrorism such as the literal war on terror by the USA, who is currently under investigation by the ICC for alleged war crimes committed in Afghanistan while fighting the fight on terror.<sup>56</sup>

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<sup>49</sup> Ibid.

<sup>50</sup> Much 2006: 134-135.

<sup>51</sup> Art 17(1)(b).

<sup>52</sup> See above Fn 123. See further Much 2006: 134-135.

<sup>53</sup> Schabas 2017: 76.

<sup>54</sup> Cohen 2012: 253.

<sup>55</sup> Much 2006: 135.

<sup>56</sup> Bowcott O, ICC will continue 'undeterred' after US threats, *The Guardian* 11/09/2018.

<<https://www.theguardian.com/law/2018/sep/11/icc-will-continue-undeterred-after-us-threats-john-bolton>>. Accessed on 25/09/2018.

Including terrorism in the Statute will also reduce the cost and time used by states in creating and implementing counter terrorism strategies as well as counter-terrorism legislation, as states will be able to use the Statute as a framework.

Another benefit will be that including terrorism in the Statute will motivate states to join the ICC. Certain states did not join the ICC for the exact reason that treaty crimes such as terrorism were not included in the original and updated text. Including terrorism in the Statute may prompt certain states to rethink its membership to the ICC.<sup>57</sup>

One of the biggest advantages of including terrorism in the Statute would be the clarification on a definition of terrorism. This would solve an international problem and prevent further proliferation of anti-terror legislation that already poses difficulty in international law regarding terrorism.<sup>58</sup> A definition would unify states national legislation and assist with the political problems faced, such as refugees and granting of asylum.<sup>59</sup>

Including terrorism will also prevent states from pursuing excessive counter terrorism measures which have become the norm since 2001.<sup>60</sup> These methods have become increasingly contradictory to human rights, with torture of suspects, illegal detentions and harmful treatment of detainees.<sup>61</sup> Terrorism is a crime that deeply affects human rights, firstly because the actual attack leaves thousands injured, maimed or dead and secondly because the fight against terror has resulted in human rights violations by state authorities in their attempts to prosecute terrorist suspects.<sup>62</sup>

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<sup>57</sup> Cohen 2012: 238-239 "For states like India, which is currently not a State Party to the ICC but is to the Financing Convention and was one of the more adamant participants in the Rome Conference favouring the inclusion of terrorism within the jurisdiction of the ICC, this may provide an incentive to consider joining the ICC."

<sup>58</sup> Saul B, *Defining Terrorism in International Law* 2006 page 24.

<sup>59</sup> Id. at 67.

<sup>60</sup> Id. at 10.

<sup>61</sup> Saul 2006: 23-24 see further page 316; Boister 2012: 71-72; Maluwa T, Du Plessis M and Tladi D, 2017: 390-392.

<sup>62</sup> Oehmichen A, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France* 2009 page 21-23. See Much 2006: 135.

### 3. Disadvantages of Including Terrorism in the Rome Statute

Despite the many advantages of including terrorism in the Statute there are also disadvantages to including terrorism that must also be looked at to see if it will truly benefit states to include terrorism in the Statute.

There are mostly practical disadvantages to including terrorism in the Statute. The ICC has no police and is dependent on states to cooperate, gather evidence, share intelligence and apprehend terrorist.<sup>63</sup> States already struggle and refuse to cooperate with one another in accordance with existing law and so it may be the case that states will continue to do the same even with the ICC.

A more political disadvantage is the fact that the USA, one of the leading states on combating terrorism, is not a party to the Rome Statute.<sup>64</sup> The USA is one of the leading authorities on combatting terrorism as well as creating and implementing counter-terrorism strategies and so the ICC would most likely create a second competing route to counter terrorism.<sup>65</sup> This will cause confusion among states as to who to cooperate with.<sup>66</sup> Would states extradite accused to the USA or the ICC, who's arrest warrants do they execute and who's rules will they follow?

Another International authority that can pose a threat is the United Nations Security Council as they too provide routes and methods to combatting terrorism. Also, the USA is a permanent member of the UNSC which can be problematic if they chose to exercise their veto. Article 16 of the Statute already requires a twelve-month period where no investigation or prosecution may commence if the United Nations Security Council request as such.<sup>67</sup> Thus even if the ICC does end up in the Statute, the USA could just veto decisions to investigate if the USA would prefer to prosecute themselves.

A disadvantage from the ICC own point of view is that it might not be in the best interest of the ICC to combat terrorism.<sup>68</sup> The ICC is still young and has limited resources that

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<sup>63</sup> Cohen 2012: 254.

<sup>64</sup> Signatories to the Rome Statute XVIII 10. PENAL MATTERS.

<sup>65</sup> Cohen 2012: 254. See Much 2006: 135.

<sup>66</sup> Ibid.

<sup>67</sup> Article 16 of the Rome Statute.

<sup>68</sup> Ibid.

it already uses on combatting the current crimes. It is argued that including terrorism within its scope will not strengthen the courts reputation and status that is already being questioned by African States.<sup>69</sup>

Another disadvantage to including terrorism in the Statute is that it might cause over prosecution in national courts.<sup>70</sup> The police and investigative authorities could violate the very human rights the ICC is sworn to uphold, by torturing or violating the accused, all done under orders of the ICC which could shield states from repercussions.<sup>71</sup> It is worth noting that although this is a disadvantage, it could trigger the ICC article 17 of the Rome Statute.

Lastly from the view point of deterring terrorism, it may be optimistic to think that including terrorism in the Statute would deter people who are willing to, and do, die for their cause.<sup>72</sup> But here the same could be said for national courts and terrorism.

#### **4. Including Terrorism in the Rome Statute as Part of Existing Crime**

An Alternative to including terrorism as a core crime is to incorporate terrorism into one of the existing crimes currently on the Rome Statute. These crimes being genocide, crimes against humanity, war crimes and the crime of aggression.<sup>73</sup>

The first option would be to include terrorism under the crime of genocide would be prove difficult. Genocide requires a special intent, which is to destroy a certain group of people,<sup>74</sup> although acts of terrorism can result in a certain group of people being attacked, for example westerners, the intention is not to destroy that group but rather to scare their government into doing something.<sup>75</sup>

The second option would be to Include terrorism under crimes against humanity would be the best option of the four crimes.<sup>76</sup> This is because the some of the acts carried

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<sup>69</sup> Ibid, see further Dugard 2012: 199-200.

<sup>70</sup> Cohen 2012: 255.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Article 5 of the Rome Statute.

<sup>74</sup> Article 6 of the Rome Statute.

<sup>75</sup> Cohen 2012: 241,242 and 250.

<sup>76</sup> Cohen 2012: 250.

out n terrorist attack already fall under crimes against humanity, for example murder,<sup>77</sup> torture<sup>78</sup> and more specifically acts that's cause great suffering or serious physical or mental injury.<sup>79</sup> Further acts of terrorism conform with all the requirements of crimes against humanity, however crimes against humanity need to be wide spread and systematic and this raises problems for those acts of terror that are more isolated.<sup>80</sup>Already in 1998, during the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court it was suggested that terrorism be included as a crime under crimes against humanity however this never happened.<sup>81</sup>

The third option is including terrorism under war crimes. Once again this proves difficult since war crimes can only be committed in armed conflict,<sup>82</sup> this will exclude those acts of terrorism that occur in times of peace, which is often the case.<sup>83</sup>

The Last option would be under the crime of aggression, however once again the requirements do not match in any way. Crime of aggression can only be committed by one state against another state and once it is established that a crime of aggression has been committed,<sup>84</sup> the person who is control of the state or its military forces is held liable.<sup>85</sup> Thus this would only cover state terrorism against other states and not those acts of terrorism carried out by non-state actors.<sup>86</sup>

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<sup>77</sup> Article 7(1)(a) of the Rome Statute.

<sup>78</sup> Article 7(1)(f) of the Rome Statute.

<sup>79</sup> Article 7(1)(k) of the Rome Statute.

<sup>80</sup> Cohen 2012: 242-246 and 250.

<sup>81</sup> Doc A/CONF.183/C.1/L.60/REV.1. *see* A/CONF.183/13 page 221.

<sup>82</sup> Article 8 of the Rome Statute.

<sup>83</sup> Cohen 2012: 246-249 and 250; Article 8 of the Rome Statute.

<sup>84</sup> Article 8*bis*(2) of the Rome Statute

<sup>85</sup> Article 8*bis*(1) of the Rome Statute

<sup>86</sup> Cohen 2012: 249-250.

## Chapter Four

### Conclusion

The ICC is a marvel from an international law perspective. Despite some of its drawbacks, it is evolving every day and contributing more every day to the development of international criminal law, from providing universal rules to improving cooperation between states and promoting the protection of international human rights. The ICC is still young and has many years ahead of it with many changes to come and terrorism is one of them. The ICC was created to bring an end to the most heinous international crimes and has been trying to do this since its inception.

But at the same time terrorism has become an ever-growing international threat since 2001. Terrorism is a crime that has become more prevalent since the creation of the ICC. One of the largest terrorist attacks occurred in 2001 and since then terrorism attacks have become more frequent. As stated above, the increase in terrorism attacks since 2001 is substantial to say the least. In 2001 there was 1907 terror related incidents, with 7 743 fatalities compared to 2016 which had 13 488 incidents resulting in 34 676 deaths.<sup>1</sup>

Terrorism affects the entire world and unfortunately terrorist more than often get away with their plots and attacks.<sup>2</sup> Terrorism is a unique crime to say the least. Consensus can't be reached by states on a single definition and yet the same elements exist in all definitions and the phrase terrorist and terrorism has become a commonly used term world-wide. Terrorism affect people of every race, gender, age, religion and nationality, it has no discretion or bias and is a crime that people all around the world have come to fear. William A. Schabas stated that the four core crimes on the Rome Statute "dictate prosecution because humanity as a whole is the victim".<sup>3</sup> Humanity suffers every day because of terrorism and I believe it is time for its inclusion in the Rome Statute.

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<sup>1</sup> See above page 1 Fn 3.

<sup>2</sup> Cohen A, Prosecuting Terrorist at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism, *Michigan State International Law Review* 2012 Vol 20:2 page 256.

<sup>3</sup> William A. Schabas, *An Introduction to the International Criminal Court* 2017 page 75.

In Chapter two sub section four I discuss the previous attempts at including terrorism in the Statute. The concern that arose in both attempts was regarding a definition of terrorism. In Chapter two sub section five I discuss the problems surrounding the definition of terrorism, here it is clear that a definition of terrorism is not necessarily the problem but rather it is disagreement on those exclusion to a definition. If the international community is serious about combatting terrorism, then this should not pose the problem that it does. As indicated, international humanitarian law already deals with those problems faced during armed conflict and as for acts during peace, it should never be allowed to attack innocent civilians. These sections deal with the question of why terrorism was not initially included.

In Chapter two sub-section 2 and 3 I discuss the core crimes and compare terrorism and the core crimes using five criteria. Terrorism meets four of these without complication. The only real stepping stone once again is regarding a definition of terrorism. But as suggested by the Netherlands in their proposal the crimes of aggression had the same issue and it was dealt with, the same could be done for terrorism if a definition cannot be agreed on. These sections deal with the question of how terrorism compares to the core crimes.

In Chapter three I discuss the current methods used to combat terrorism in subsection one, the advantages and disadvantages of including terrorism in the Statute in subsection two and three and alternatives to including terrorism as a core crime in sub-section 4. With regards to the last section the unique requirements for terrorism do not overlap sufficiently with those of the other four crimes, besides maybe crimes against humanity, but even then, including it under crimes against humanity would limit the scope of terrorist attacks. As for subsection one to three we see that the international community already has in place measure to combat terrorism, and that most of these measures are identical to the advantages that the ICC would pose. However, the ICC would do one thing that the current measures cannot, this would be consolidating all the proliferated measure into one convention and one international organ. This would make combatting terrorism more efficient and effective than the current methods, it would also greatly enhance international human rights observance in the fight against terror, which currently poses a significant problem. These sections answer the question of whether terrorism can be prosecuted under the current ICC regime.



My main question posed for this dissertation is should terrorism be included in the Rome Statute? The political agenda of states is what is holding back the ICC.<sup>4</sup> International criminal law is a powerful tool that has allowed the prosecution of the most heinous crimes the world has seen.<sup>5</sup> So why can't the largest international criminal authority be a part of the fight against one of the most heinous crimes the world is facing now? I believe that if the international community wants to be serious about combatting terrorism then no excuse can be justified.

Even from the point of amending the Rome Statute, the procedure is simple and can be found in articles 121 to 123 of the Rome Statute.

The ICC was created to try crimes that shook the world, that violated human rights to such an extent that it required the intervention of the world. Currently the crimes that the ICC has power over, are crimes that have resulted in the deaths of thousands if not hundreds of thousands of people and terrorism is no different. Terrorism has become a prominent crime around the world and needs the intervention of the ICC. The current methods of combatting terrorism are not sufficient, I believe that the ICC can fill the gaps. I do not believe that taking the fight against terror to the ICC will end terrorism altogether, but I do believe that it would reduce the effects that terrorism has in today's society. It would also revolutionise the fight against terror in a way that no other convention, protocol or international governing body has been able to do so far. This new era of terrorism requires a new era of international prosecution, one that the ICC can provide. Terrorism requires a place on the Rome Statute, it is time we take the fight against terror to the ICC.

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<sup>4</sup> Cohen 2012: 257.

<sup>5</sup> Ibid. For example the prosecution of those involved in World War II, the Rwandan genocide and the crimes committed in the Former Yugoslavia.

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