Should "Grave Crimes of International Terrorism" be included in the Jurisdiction of the International Criminal Court?

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Abstract

Genocide, crimes against humanity and war crimes are among the most serious categories of crimes known to international law. For decades lawyers and others debated whether a standing international court should be established to prosecute and punish such crimes. In 1998 the debate ended with the adoption of the Rome Statute for the establishment of an International Criminal Court (ICC). The Statute defines the elements of each of these crimes and includes them in the ICC's jurisdiction. The idea of including "grave crimes of international terrorism" as an additional category in the ICC's jurisdiction was considered, but abandoned as too difficult. Firstly, there is at present no universally agreed definition of terrorism and the whole subject is politically sensitive. Secondly, democratic and other States have long recognised that certain acts that would ordinarily be considered criminal should be treated differently if they can be characterised as "political offences". This paper argues that both these difficulties can be overcome. A solution to the problem of definition is to confine "terrorism" to those acts that are outlawed by existing anti-terrorist multilateral conventions, as listed by the UN, at least to the extent that those conventions are declaratory of customary international law. It is also argued that the "political offence" issue has been rendered obsolete by the creation of the ICC, with its numerous safeguards to ensure the Court's impartiality. In 2009 the Rome Statute will be reviewed and there will be an opportunity to expand the ICC's jurisdiction to include grave crimes of international terrorism. For the international rule of law to be supported and strengthened, that opportunity should not be missed.

1. Introduction

On 17 July 1998, representatives of 160 States meeting in Rome at the United Nations (UN) Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) adopted the multilateral convention known as the Rome Statute of the International Criminal Court[1] (the Statute). The Statute entered into force on 1 July 2002 in accordance with Article 126, and therefore does not apply to crimes committed prior to that date. As at 18 November 2003, 139 States were signatories of which 92 were parties.[2] The establishment of the ICC is the culmination of decades of discussion by governments and academic commentators concerning

the need for a permanent judicial body representing the principal legal systems of the world to conduct trials of individuals who are accused of the most serious crimes of concern to the international community as a whole.

A key issue throughout the negotiations leading to the adoption of the Statute, beginning during the deliberations of the UN Preparatory Committee on the Establishment of an International Criminal Court (the Preparatory Committee), was the question of which crimes should fall within the jurisdiction of the ICC. Virtually all States agreed that the crime of genocide should be included and an overwhelming majority supported the inclusion of war crimes and crimes against humanity.[3] These three categories of crime are defined in the Statute. There was support also for including the crime of aggression in the ICC's jurisdiction, although the elaboration of a definition of this crime, and the exercise of the Court's jurisdiction over it, was postponed (see Lee 1999, 81-85).

There, however, the broad consensus ended. Other crimes that were considered for inclusion within the *ratione materiae* jurisdiction of the ICC were drug trafficking, terrorism and crimes against UN and associated personnel (see Arsanjani 1999, 29: and the sources cited therein).[4] When it became clear that some States were unalterably opposed to the broadening of the Court's jurisdiction to include drug trafficking and terrorism, the Rome Conference decided to omit them so as to eliminate a potential area of major disagreement and ensure that the Statute would be adopted within the time available.[5] Thus, although both the UN General Assembly (UNGA)[6] and Security Council (UNSC)[7] have repeatedly condemned international terrorism and more recently have characterized this phenomenon as "one of the most serious threats to international peace and security",[8] international terrorism does not appear as one of the categories of crimes described in Article 5 of the Statute as "the most serious crimes of concern to the international community as a whole".

This paper argues that the exclusion of terrorism as a crime falling within the jurisdiction of the ICC ought not to become a permanent feature of the Statute. Between the adoption of the Statute on 17 July 1998 and its entry into force on 1 July 2002, the world was shaken by the events of 11 September 2001, the *sequelae* of which are placing under strain some long-held principles of international law about the

regulation of the use of force (Cassese 2001, 993-1001). There is growing recognition of the need for a concerted international response to terrorism, including an integrated global system for investigating, apprehending, trying and punishing accused terrorists, that will overcome attempts to excuse or overlook their crimes on political grounds. This paper argues that those objectives can be met if such crimes are included within the jurisdiction of the Court when the ICC Statute is reviewed pursuant to Article 123 in July 2009. The possibility of a future Review Conference deciding to include the crime of terrorism within the jurisdiction of the Court was envisaged by a resolution adopted by the Rome Conference itself.[9]

2. The Problem of Definition

At the present time there is no universally accepted definition of "terrorism". Dozens of definitions have been attempted over the last thirty years but a consensus about an appropriate definition remains elusive (Wexler et al. 1995, 72-73). Several States participating in the Preparatory Committee "were of the view that international terrorism should not be included [within the jurisdiction of the ICC] because there was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the Court".[10] However, this does not explain why the crime of terrorism was not dealt with in the same manner as the crime of aggression. It could have been included in Article 5 of the Statute with the proviso that the ICC's jurisdiction with respect to that crime would commence operation at a future time, once the elements of the crime had been defined.

But the difficulties involved in arriving at a universally agreed definition of terrorism should not be underestimated. One academic writer has gone so far as to say that defining terrorism is "an impossible task" (Gilbert 1985, 705). Even attempts to reduce the concept of terrorism to certain core elements short of a formal definition (see, for example, Greenwood 1989, 189) have thus far failed to attract an international consensus.

Nevertheless, if terrorist crimes are to be included as a separate category within the jurisdiction of the ICC, such crimes will have to be defined in the Statute in order to satisfy the principles of *nullum*

crimen sine lege, nulla poena sine lege. In 1998, the Preparatory Committee proposed a definition of terrorism in the Draft Statute and Draft Final Act presented to the Rome Conference. This is reproduced as Appendix 1. Although paragraphs (2) and (3) of the draft need to be replaced with an up-dated list of international anti-terrorist conventions, it is submitted that this definition has much to recommend it, as it encompasses virtually all of the different manifestations of terrorism that have been condemned repeatedly by the international community.[11] Nevertheless some States are anxious to exclude from any definition of terrorism acts of violence by or on behalf of national liberation and self-determination movements and other organizations they support.[12] The Preparatory Committee definition does not exclude acts that purportedly fall into that category and it is therefore unlikely to attract broad support from the international community, at least for the time being.

Another possible definition is presently being developed by a working group of the United Nations Sixth (Legal) Committee that was established pursuant to UNGA Resolution 51/210 for the purpose of preparing a draft Convention to outlaw terrorism. Article 2, paragraph 1 of the draft, reproduced as Appendix 2, defines terrorism in terms that draw heavily on the definition used in the International Convention on the Suppression of Terrorist Bombings.[13] This formulation merely serves to highlight rather than resolve the many issues and difficulties that have emerged in the numerous attempts to define terrorism. The draft acknowledges that the working group was unable to reach a consensus on whether, and if so to what extent, the acts of national liberation and self-determination movements should be excluded from the operation of the Convention. Another difficulty is that the word "unlawfully" in the *chapeau* of Article 2, paragraph 1 makes the provision circular. The purpose of the definition is to declare certain behaviour unlawful, and yet it is a precondition of the application of the paragraph that the behaviour to which it applies is unlawful. It is also not clear whether the unlawfulness must be according to international law or domestic law, or either (Beres 1995, 241).

A less ambitious way of defining terrorism for inclusion in the jurisdiction of the ICC, but one that might be more widely accepted by States, would be to limit "terrorism" to grave instances of the specific offences that are defined by existing international anti-terrorist

conventions. The ICC itself would decide whether any such matter that is brought before it meets the requirement of "gravity". This solution, which this paper advocates, has been made feasible by the steady growth in the number of anti-terrorist conventions over the last 30 years and the large number of States that are parties thereto. A table of international anti-terrorist conventions appears as Appendix 3.

All of the conventions listed in the table define particular types of behaviour which States are required to prohibit and prevent. Any person, whether a private individual or a government official, who offends against any of these conventions is required to be made criminally liable by States Parties. In the case of a government official, if the commission of the offence can be imputed to the relevant State, the State itself will be internationally responsible, but not criminally liable. The ICC's jurisdiction is limited to "natural persons"[14] and the concept of State criminality *per se* is therefore excluded.

In the Preparatory Committee, the idea of giving the ICC jurisdiction over "terrorism", defined restrictively as grave instances of the offences elaborated in existing international conventions, was met with arguments that:

> the jurisdiction of the Court should be limited to the core crimes under general international law [i.e. the four categories of crimes now covered in Article 5] to avoid any question of individual criminal responsibility resulting from a State not being a party to the relevant legal instrument, to facilitate the acceptance of the jurisdiction of the Court by States that were not parties to particular treaties, to facilitate the functioning of the Court by obviating the need for complex State consent requirements or jurisdictional mechanisms for different categories of crimes [and] to avoid overburdening the limited financial and personnel resources of the Court by trivializing its role and functions…[15]

Each of the arguments in this passage is flawed. Firstly, the terrorist offences defined by the international conventions in Appendix 3 are all arguably violations of customary international law. The UN Security Council has "unequivocally condemned" the commission of these offences as "criminal and unjustifiable, regardless of their motivation"[16] and has called upon all States "to become a party, as a matter of urgency, to all relevant international conventions and protocols relating to terrorism",[17] which the UN web-site lists as those in Appendix 3. The UNSC declaration and other UN resolutions[18] and the large number of States that have elected to become parties to each

of the existing conventions, all attest to the abundance of State practice and *opinio juris* that support the proposition that these offences are not only treaty-based but also prohibited by customary international law. For the avoidance of doubt, it would be open to the UN General Assembly or Security Council to refer the matter to the International Court of Justice pursuant to Article 96(1) of the UN Charter for an Advisory Opinion as to the customary law status of each of these offences. Although an Advisory Opinion is not binding, it would be highly persuasive.

Secondly, the argument that terrorism is a qualitatively less serious crime than the "core crimes" presently included in the Statute has, it is submitted, been superseded by events, particularly the horrific mass-killings in New York and Washington DC on 11 September 2001, in Bali on 12 October 2002 and in many other parts of the world both before and after those events. It is the growing incidence of violent acts deliberately aimed at killing or maiming civilians that has elicited the more frequent and severe condemnations by the United Nations referred to earlier. Few people would argue that such incidents, and not just the four "core crimes" presently covered by the Statute, shock the conscience of humanity because of the magnitude of innocent human suffering and property damage that they intentionally inflict.

Thirdly, the argument that the inclusion of treaty-based crimes within the jurisdiction of the ICC would place too great a call on the resources of the Court is counterbalanced by the fact that many developing States that are particularly vulnerable to terrorist assaults do not have the resources to engage in large-scale intelligence gathering and lengthy prosecutions of accused terrorists.[19] These States have more hope of responding effectively to terrorism if the burden of investigating, prosecuting and punishing terrorists is shared with other States Parties to the Statute. This would also serve the interests of the developed States, who dare not allow terrorists to flourish with impunity in States that lack the resources to deal with them effectively. It would, of course, still be open to any State Party to elect to utilise its own domestic law enforcement and judicial processes to deal with any terrorist incident. The inclusion of terrorist offences, as defined in existing international conventions, within the jurisdiction of the ICC would be without prejudice to the principle of complementarity and national jurisdiction enshrined in the Statute.[20]

Fourthly, there is no reason that the jurisdictional pre-conditions and trigger mechanisms now enshrined in the Statute could not also apply in respect of terrorist offences. Even if it became necessary to devise separate requirements specific to the crime of terrorism for crossing the ICC's jurisdictional thresh-hold, these could hardly be more complex and problematical than the technical legal requirements that presently determine the jurisdictional reach and extradition obligations of individual States under international law.[21]

Two further arguments have been made against including a definition of terrorism in the Statute that is restricted to grave violations of the conventions listed in Appendix 3:

(i) Such an approach is a piecemeal treatment of the phenomenon of international terrorism and does not tackle the issue comprehensively (Gilbert 1985, 712). The definition would not necessarily cover, for example, acts of terrorism in which lethal chemical or biological agents, nuclear weapons and/or missile technology are employed (Bassiouni 2001, 90-91; Dalton 1997, 17). However, this argument loses its force when one accepts that such acts would fall under the rubric of other crimes already defined in the Statute, such as crimes against humanity. The deliberate use of such devastating means to kill or harm civilians necessarily constitutes "a widespread or systematic attack against a civilian population" within the meaning of Article 7 of the Statute (Bassiouni 2001, 101) and may also constitute war crimes under Article 8(2)(c) and (e) (Ibid., 97-101). Moreover, it is highly probable that the international community will respond to the continuing proliferation of terrorist incidents with further international conventions that define additional specific types of behaviour as terrorist offences.[22] These conventions could be incorporated into the Statute as they come to be recognized as giving expression to customary international law.

(ii) The inclusion within the jurisdiction of the ICC of the offences defined by the international conventions listed in Appendix 3 begs the question of how the Court will treat defences based on the traditional "political offence"

exceptions to the prosecution of terrorist crimes. This issue is analysed in section 3 below.

3. The "Political Offence" Issue

An issue that bedevils every aspect of the international legal treatment of terrorism is the insistence by some States that acts that ordinarily would fall under the rubric of terrorism are excusable if they have been committed in furtherance of a war of national liberation or a self-determination movement (see Starke, J. G. 1987, 312-313). An early illustration of the division in international opinion about whether certain politically-motivated acts should be characterised as "terrorism" is the UNGA Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[23] On the one hand, the Declaration proclaims that "[e]very State has the duty to refrain from ... assisting or participating in...terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to…involve a threat or use of force".[24] Elsewhere in the Declaration, however, it is stated that peoples pursuing the right of self-determination "are entitled to seek and to receive support in accordance with the purposes and principles of the Charter".[25]

The apparent contradiction between these two principles emerges in even starker language in the UNGA Resolution on the Definition of Aggression.[26] Article 3 of this Resolution contains a non-exhaustive list of acts constituting aggression. These include[27] "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out [grave] acts of armed force against another State…". Article 7 of the same Declaration, however, provides that:

> Nothing in this Definition, and in particular Article 3 could in any way prejudice the right to self-determination, freedom and independence…of peoples forcibly deprived of that right… particularly peoples under colonial and racist regimes or other forms of alien domination…to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the abovementioned Declaration on Principles of International Law.[28]

Both of these Declarations are marred by circularity. They declare that **the principles of the Charter and international law** prohibit

attempts by one State to subvert another by the use or threat of force through armed proxies. But they also declare that such behaviour is permissible when it is in support of a self-determination struggle, provided that such behaviour is in conformity with **the principles of the Charter and international law** (emphases added).

Underlying the circularity is the political reality that many States oppose criminalizing acts of terrorist violence. During the proceedings of the Preparatory Committee, "[s]ome delegations also emphasized the importance of distinguishing between international terrorism and the right to self-determination, freedom and independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other forms of alien domination".[29] The attempt to exclude such acts from the definition of terrorism seems to be designed to support the proposition that such acts are outside the operation of the various multi-lateral anti-terrorist conventions and the various anti-terrorist resolutions of the UNGA and UNSC. This consequence is said to flow from the peremptory character of the principle of self-determination .[30]

This kind of reasoning confuses the concepts of "just ends" (*jus ad bellum*) and "just means" (*jus in bello*) (Beres 1995, 241-243). It may be accepted that the principle of self-determination is a peremptory norm or rule of *jus cogens*.[31] It does not follow, however, that every act that is claimed to be in pursuit of that principle is in fact so, or that any means may be used if self-determination is the objective.

> The Geneva Conventions and Additional Protocols are based on the unarticulated premise that even legitimate ends do not justify certain means. Insurgents and revolutionaries, though not without right to resort to armed conflict, must nonetheless abide by the rules of armed conflict applicable to combatants and non-combatants in the context of non-international armed conflicts. The same applies to state forces fighting against such groups. Violations by one side do not justify reprisals by the other. Thus, symmetry in legal obligations is established (Bassouni 2001, 98: and the authorities cited in that passage).

However, the political offence issue has been most problematical as an obstacle to extradition, rather than as a substantive defence. Under the principle of State sovereignty, a State's right to control all persons within its territory "is susceptible of no limitation not imposed by itself".[32] Accordingly, it is only by treaty that one State in whose

territory a person is present (the asylum State), who has allegedly committed a crime elsewhere, can be required to secure the return (i.e. extradite) that person to the custody of another State that seeks to prosecute that person for the alleged crime (the requesting State). Most of the international conventions listed in Appendix 3 contain a provision obligating an asylum State that is faced with an extradition request in connection with an alleged offence under the convention either to prosecute the alleged offender itself or to comply with the request. However, this obligation to "prosecute or extradite" (*aut dedere aut judicare*) is not unqualified. Over the last 200 years it has become a rule of customary international law that the asylum State must not allow extradition for crimes which are of a political character (Lauterpacht 1944, 88; and the authorities cited therein). As it is a (non-peremptory) customary rule, it will apply unless expressly ousted by the provisions of the treaty.

The rationale behind the rule is that with political offences there is a danger that alleged offenders who are extradited will be punished for their political convictions or affiliations and not (or not only) for their alleged behaviour (Phillips 1997, 340). Implicit is the concern that the alleged offender will not receive a fair trial in the requesting State's courts and, therefore, that its judicial system will be less than impartial. The rule attempts to balance the need to bring international criminals to justice to preserve international public order with the human rights of an accused person to an impartial trial and to be protected from persecution (van den Wijngaert 1980, 197). These principles were developed in the nineteenth century to protect persons engaged in liberal-democratic and nationalist movements from arbitrary retribution by the autocratic regimes they opposed. The political offence exception was never intended to protect contemporary terrorists who seek the violent overthrow of liberal-democratic, representative governments.[33]

There has always been much controversy over what constitutes a political offence. A "pure" political offence is directed solely against a State, does not involve civilians and is not accompanied by the commission of a common crime, such as murder. Treason, sedition, conspiracy to overthrow a government and espionage, by themselves, are "pure" political offences that clearly qualify for the political offence exception (Philips 1997, 341-342). Complexities arise in relation to

"relative" political offences. "These are crimes which have a hybrid nature, that is, they involve either a combination of a common crime with a pure political offence, or more often, a common crime which is perpetrated pursuant to a political agenda".[34]

No universally approved test has been devised to determine in what circumstances relative political offences should be characterised as "political" for extradition purposes. In the UK, for such an offence to be exempt from extradition it must meet the test formulated in *In re Castioni*.[35] It must be "incidental to and form part of a political disturbance", that is, it must have been committed "in the course of" and "in furtherance of" a political disturbance.[36] In that case the Court of Queens Bench refused to extradite the accused to Switzerland where he was sought for the killing of a government official that had occurred when a mob, dissatisfied with their local authorities, had stormed the municipal palace. The decisions in this and subsequent cases make it clear that the political disturbance in question must have been part of an attempt to change the government or its policies.[37] Most importantly the alleged offence must be proximate to the final goal of the dissenting party. The mere political or ideological motive of the fugitive is insufficient in itself to attract the exemption.[38]

Even though the American courts purport to follow the English cases, in practice they have refused extradition merely if the alleged offence occurred during the course of a political disturbance, no matter how remote from the ultimate goal of the political unrest the alleged offence may have been.[39] Accordingly, American courts have consistently held that the existence of a political disturbance in Northern Ireland means that crimes committed by the Provisional Irish Republican Army (IRA) incidental to the disturbance are political offences and thus non-extraditable.[40] On the other hand, a member of the Palestine Liberation Organisation (PLO), who allegedly bombed civilians indiscriminately in an Israeli city, was extradited to Israel by a US court. The court held that there needed to be a direct political effect from the alleged offence for it to fall within the exemption from extradition.[41]

In the civil law countries of Europe there has been a move away from the original French approach which was, in effect, to confine the political offence exception to pure political offences.[42] The civil law countries now follow the approach developed by the Swiss courts in

which a relative political offender will be exempted from extradition if:

a) the offence is in direct relation to the end sought i.e. it is a really efficacious method of achieving the end, or constitutes an integral part of acts leading thereto, or represents an incident in a general political movement in which the parties to have recourse to such methods;[43] and
b) the type of methods used in the commission of the offence are the "sole means" of achieving the political end.[44]

In most cases, the Swiss courts have construed these requirements as excluding terrorist acts from the political offence exception (Phillips 1997, 346-348; and the authorities cited therein). Terrorist acts have been held to be "repugnant to any civilised conscience" (Ibid., 347) and therefore incapable of being rationalised as a last resort for achieving a political agenda.

None of these approaches has been consistently applied. The British House of Lords has extradited a wanted person in circumstances in which the *Castioni* requirements have been satisfied.[45] In the US, where there is a large Irish constituency, the courts, as already noted, have treated alleged IRA and PLO offenders in diametrically opposite ways. The Swiss courts also, despite their general view that terrorist acts can never be justified as a last resort for achieving political goals, have found to the contrary in at least one case (Phillips 1997, 347-348; and the authorities cited therein).

These inconsistencies invite the conclusion that public opinion and other political factors in the asylum State, and not the dispassionate application of rules of law, determine whether or not a person whose extradition is sought by another State will be given the benefit of the political offence exception. In one notorious case, the French courts refused to extradite to West Germany or Israel Abu Daoud, the alleged mastermind of the Munich Olympics massacre of 11 Israeli athletes in 1972. It is widely accepted that the French government brought pressure to bear on its courts in order to avoid terrorist reprisals and the loss of contracts in the Arab world (Heymann 1990, 22-23).

A further difficulty is that even when extradition is granted it may not be possible for *any* trial in the requesting State to be impartial because of the influence of public opinion and other political factors

in that State. The possibility of an extradited person being persecuted in the requesting State, either through judicial partiality or otherwise, cannot be excluded. Even the very concepts of "due process" and "non-persecution", to the extent that they apply to the political offence exception, have been criticised as culturally biased in favour of Western, liberal-democratic values (Gilbert 1985, 711).

The political offence issue cannot be avoided simply by confining the definition of terrorism to the specific offences elaborated in the relevant international conventions. Indeed, the Convention against the Taking of Hostages specifically exempts self-determination-inspired acts from its scope.[46] Also, like some of the other conventions, it achieves the same result indirectly by providing that extradition requests are to be decided according to the law of the asylum State, which at present universally includes the political offence exception (Green 1988, 349-356).

The Conventions against Terrorist Bombings and the Financing of Terrorism each provide specifically that extradition pursuant to the convention is not to be refused on the basis of the political offence exception.[47] However, this is negatived to some extent by further provisions in each convention that preclude extradition where the asylum State has "substantial grounds" for believing that the extradition request has been made for the purpose of prosecuting or punishing the offender on account of "race, religion, nationality or **political opinion**" or that the alleged offender's position may be prejudiced for any of those reasons.[48] The most serious acts of terrorism have invariably been claimed by their perpetrators to be motivated by political or religio-political purposes. It is almost certain that an alleged offender would try to avoid extradition by relying on the "political opinion" exception. One must therefore conclude that all of the international conventions that define terrorist offences preserve in one form or another the political offence exception to extradition, although none of these conventions provide that it may be pleaded as a substantive defence.

It follows that if the offences defined by these conventions were to be included within the jurisdiction of the ICC, an asylum State that was unwilling itself to prosecute an alleged violator of any of these conventions would have to decide whether, and if so to what extent, the delivery of the alleged offender to the ICC is precluded by the political offence exception. Even if one accepts that political rather

than legal considerations will motivate such decisions by the asylum State, its refusal to deliver up an alleged offender to the ICC would be much harder to justify than a decision not to extradite that person to another State. The ICC Statute ensures that its judges are broadly representative of the world's legal systems and that individual judges may be challenged by the accused in cases of actual or perceived bias.[49] The legal principles upon which the ICC operates are clearly spelt out in the Statute including extensive protections for accused persons.[50]. It would defy credulity for an asylum State to argue that an accused person who was delivered up to the ICC would be in danger of not receiving an impartial trial or of being persecuted for his or her political convictions. Nor could it plausibly be suggested that the ICC is inherently flawed with a pro-Western cultural bias. International trials would give significant resonance to the prosecution and punishment of the most serious terrorist offences (Cassese 2001, section 4, 3) and may eventually render obsolete the political offence exception as a bar to prosecution.

4. Conclusion

In addition to the ICC's advantages in overcoming "political offence" issues as obstacles to prosecuting international terrorism, further benefits would be derived from including grave terrorist crimes, as defined by existing international conventions, within its jurisdiction. Firstly, it might well help to harmonize the substantive law with regard to ideologically or politically motivated offences so as to eliminate the disparity in reasoning that now exists between different municipal courts, particularly as regards the appropriate test to define a "political offence".

Secondly, the sentencing practices of the ICC with regard to international terrorism would eventually set a standard that would strongly discourage the wild inconsistencies that currently exist from state to state in sentencing for closely similar offences. For example, sentences for aerial hijacking in the US, Cuba and Iran, whose political and legal systems differ fundamentally from one another, have ranged from death by hanging to complete amnesty (Silverman 1997, 1).

Thirdly, the ICC would be in a position to develop coherent databases concerning terrorist offences for investigative and case

reporting purposes. These could be augmented by data made available by individual States and be accessible to all States Parties to the Statute.

Ultimately, the trend for terrorism to become globalized and more sophisticated and devastating in its scale and effects will compel nation states, in the interests of self-preservation, to respond to this phenomenon with at least equal sophistication and a significantly higher level of co-operation than has occurred in the past. The alternative is increasing unilateralism and an eventual breakdown in the Charter system. If the collective international community is to respond effectively to grave international terrorist crimes, it will need to take a broad range of measures, including the empowerment of a permanent, central body like the ICC to investigate, prosecute and punish what all States agree is a growing and deadly threat to international peace and security.

Notes

1. U.N. Doc. A/CONF. 183/9. According to Note 1 appended to the Statute, the USA disputes that this document reflects in all respects the final document that was voted upon at the Conference.
2. Searchable at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part 1/chapterXV111/treaty10.asp.
3. Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume 1*, *(Proceedings of the Preparatory Committee During March-April and August 1996)* UN General Assembly, 51st Session., Supplement No.22, A/51/22,1996,at 26, para. 103.
4. Crimes against UN and associated personnel were ultimately included as a war crime in Article 8(2)(b)(iii) and (e)(iii) of the Statute.
5. See above note 3.
6. E.g. UNGA Resolutions 40/61, 49/60 and 56/1.
7. E.g. UNSC Resolutions 731 (1992), 1070 (1996), 1269 (1999), 1368 (2001) and 1456 (2003).
8. E.g. UNSC Resolution 1456 (2003).
9. Final Act of the Rome Conference, Resolution E, UN Doc. A/CONF.183/10*, at 7.
10. See above note 3, para. 107.
11. For a useful exposition of the different dichotomies manifested by terrorism see Dinstein 1989, 57-58.
12. See analysis in section 3 below.
13. Cited in Appendix 3.
14. Statute Article 25(1), and see Konstantinov 1995, 293-294.
15. See above note 3.
16. E.g. UNSC Resolution 1456 (2003), second pre-ambular paragraph.
17. *Ibid*, operative clause 2(a).

18. See above notes 6 and 7.
19. Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN General Assembly, 50th Session, Supplement No.22, A/50/22, 1995, 18, para. 82.
20. *Ibid*, para. 83.
21. Some of these difficulties are examined in section 3 of this paper.
22. E.g. Draft Convention on the Suppression of Acts of Nuclear Terrorism, Jan. 28, 1997, UN Doc. A/AC.252/L.3.
23. UNGA Resolution 2625(XXV), 24.10.1970.
24. First Principle, 9th para.
25. Fifth Principle, 5th para.
26. UNGA Resolution 3314 (XXIX), 14.12.1974
27. Article 3, paragraph (g)
28. Article 1(4) of Additional Protocol I (1125 *United Nations Treaty Series* 3) to the four Geneva Conventions of 12 August 1949 (75 *United Nations Treaty Series* 31, 85, 135 and 287 respectively) similarly seems to lend legitimacy to 'wars of national liberation' by including them within the definition of 'international armed conflict' so as to make international humanitarian law applicable to them.
29. See above note 3, para. 106
30. See for example Pakistan's 'Declaration' on becoming a party to the UN Convention for the Suppression of Terrorist Bombings reproduced at http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty9.asp.
31. *East Timor Case (Portugal v Australia)* [1995] *International Court of Justice Reports* 90, 102 (para. 29).
32. *The Schooner Exchange v McFaddon* (1812) 7 *Cranch Reports* 116 (US Supreme Court, *per* Marshall C.J.).
33. *Cheng v Governor of Pentonville Prison* [1973] *Appeal Cases* (UK) 931, 961-963 (*per* Lord Salmon).
34. *Ibid*, 342-343.
35. [1891] 1 *Queens Bench Reports* 149.
36. *Ibid*, 156 and 165-166.
37. *Schtraks v Government of Israel* [1964] *Appeal Cases* (UK) 556, 582-584 (*per* Lord Reid)
38. *Cheng*, above note 33, 945 (*per* Lord Diplock).
39. *In re Ezeta* (1894) 62 *Federal Reporter* (USA) 972.
40. *Extradition of McMullen* (1980) 74 *American Journal of International Law* 434-435.
41. *Ziad Abu Eain v Wilkes* (1981) 641 *Federal Reporter, 2nd Series* (USA) 504.
42. *Re Giovanni Gatti* [1947] *Annual Digest* 145-146. (Case No. 70)
43. *In re Nappi* (1952) 19 *International Law Reports* 375-376. These requirements are virtually identical to the tests adopted by the UK courts.
44. *Ktir v Ministère Public Fédéral* (1961) 34 *International Law Reports* 143, 144.
45. *Cheng*, above note 33, 956 (*per* Lord Simon dissenting).
46. Article 12.
47. Articles 11 and 14 respectively.
48. Articles 12 and 15 respectively.
49. Statute Article 41(2)(b).
50. E.g. Statute Articles 55 and 67.

Appendix 1

Preparatory Committee's Definition of Terrorism*

Crimes of Terrorism

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

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

(2) An offence under the following Conventions:

- *(a) Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation;*
- *(b) Convention for the Suppression of Unlawful Seizure of Aircraft;*
- *(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;*
- *(d) International Convention against the Taking of Hostages;*
- *(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;*
- *(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;*

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

* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (UN Document A/Conf.183/2/Add.1, 1998 at 33).

Appendix 2

UN Sixth Committee Working Group's Definition of Terrorism – Article 2, paragraph 1 of draft Convention*

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

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

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment, where such damage results in or is likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

* UN Document A/C.6/56/WG.1/CRP.5/Add.5

Appendix 3
UN's List of International Anti-Terrorist Conventions*

Abbreviations

UNTS - United Nations Treaty Series.
ILM - International Legal Materials

* The information in this table was compiled from the sources noted and from the material at http://untreaty.un.org/English/Terrorism.asp where seven regional anti-terrorist conventions are also listed.

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19. UN Document A/C.6/56/WG.1/CRP.5/Add.5 (Definition of Terrorism).
20. UNGA Resolutions 40/61, 49/60 and 56/1. (Terrorism)
21. UNGA Resolution 2625(XXV), 24.10.1970 (Friendly Relations).
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