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Including the Crime of Terrorism Within the Rome Statute: Likelihood and Prospects

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ABSTRACT: One of the lessons from September 11, and the more recent wave of terror in Europe, is how latent international terrorism is today, in a world that is increasingly interconnected. This paper analyzes the way that international terrorism is handled from a legal perspective and the reach that the International Criminal Court (ICC) has in terms of jurisdiction on acts of terrorism. The Rome Statute, which gave life to the ICC, excluded the crime of terrorism from its jurisdiction. Two reasons for this exclusion were the opposition from the United States by claiming that this could jeopardize its country's security when it comes to sharing intelligence with an international court, and the fear of highly politicizing the new permanent international court. However, the official position given to the world as to why the ICC did not exercise jurisdiction over international terrorism was the lack of a definition of the concept of terrorism. This paper argues that since the end of the Cold War, a Post-Westphalian order that gives power not only to States but also to International Governmental Organizations and Non-Governmental Organizations, has created a space and precedent to consider the crime of terrorism as *jus cogens*. I argue that with the current pressing situation in Europe and the Middle East on terrorist attacks, having the crime of terrorism within the jurisdiction of the court would cover some existing loopholes, not necessarily because the ICC will prosecute every terrorist, but instead because the crime itself will have universal jurisdiction.

Keywords: *International terrorism, International Criminal Court, international law, post-Westphalian order, crime of terrorism, Rome Statute.*

Introduction

One of the lessons from September 11 and the more recently wave of terror in Europe, is how latent international terrorism is in a world that is every day more interconnected. This paper will focus on analyzing the way that international terrorism is being handled from a legal perspective and the reach that the International Criminal Court (ICC) has in terms of jurisdiction on acts of terrorism. Furthermore, this paper will assess if and what the international community can get by including the crime of terrorism into the Rome Statute of the ICC. Followed by the literature review, Part III will outline the previous attempts that have been made to create a permanent international court, as well as exploring the characteristics of the Rome Statute. As early as 1937, the Convention for the Prevention and Punishment of Terrorism created an international criminal court which had jurisdiction over terrorism. Nevertheless, the Convention never

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entered into force.[1] Just after the end of World War II, a second attempt, this time by the International Law Commission (ILC) was made to create an International Criminal Code. The political situation at the time stalled any progress made by the ILC.[2] It was not until 1989 that a new attempt to have a court with jurisdiction over the most pertaining international threats came into the conversation again. The end of the Cold War, added with the phenomenon of globalization, opened a space for a shift in global governance, giving a more important role to non-state actors.

Part IV will look at the attempts made by the international community in defining terrorism. Analyzing diverse perspectives as to the meaning of terrorism, such as treaty law, United Nations General Assembly (UNGA) Resolutions and Declarations, and the United Nations Security Council (UNSC) action,[3] will give the study the necessary tools to investigate the main question addressed in Part V: can terrorism be categorized as *jus cogens?* Recent precedents do exist to think that international terrorism is becoming a peremptory norm. Terrorists are *"hostis humani generic,* an enemy of all mankind"[4] which is considered a phenomenon that creates legal responses to the needs of the international society to prohibit conducts that shock the conscience of humanity.[5] Part VI will focus on the concerns that the world community has on including terrorism into the ICC jurisdiction. Are there some conditions that need to be satisfied in order to get a consensus on a definition? What role can the existing network of conventions dealing with terrorism play on finding the definition? Finally, Part VII will provide some alternatives as to how the crime of terrorism can be included into the Rome Statute. Two options will be addressed, first, the Statute can be amended in order to extend the jurisdiction of the court and include a specific Article that specifies the conditions under the crime of terrorism. The second option would be to interpret terrorism under the crimes which the Court has jurisdiction on. By coding this crime within the Rome Statute, the international community will be adding universal jurisdiction to the crime. By providing an additional alternative to the traditional bases of jurisdiction (territory, nationality, protection, and passive personality), the performance of obligations *erga omnes* will constitute an obligation for states to either prosecute or extradite individuals involved in acts of terrorism.[6]

1 Ridarson Galingging, "Prosecuting Acts of Terrorism as Crimes against Humanity under the Icc Treaty," *Indonsesian Journal of International Law* 7, no. 4 (2010): 746.
2 Andrew Novak, *The International Criminal Court: An Introduction* (Fairfax: Springer, 2015), 3.
3 Lucy Martinez, "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems," *Rutgers Law Journal* 34, no. 1 (2002): 4.
4 Ibid., 41.
5 Thomas Weatherall, "The Status of the Prohibition of Terrorism in International Law: Recent Development," *Georgetown Journal of International Law* 46, no. 2 (2015): 590.
6 Ibid., 621.

Literature Review and Methodology

Previous literature has primarily focused on analyzing the different options that the ICC has when prosecuting acts of terrorism.[7] While this approach has enriched the literature on the field, no work has been focused on investigating the implications of having the crime of terrorism as part of the Rome Statute. Thomas Weatherall has been the closest one, when in 2015 he analyzed recent developments that had "crystalized" the international crime of terrorism in customary international law.[8] While the study of terrorism in international law boomed after the September 11 events, a reduction of the studies on the topic can be seen. Nevertheless, with the wave of terrorism that peaked in the latter part of 2015, the question on how and if acts of terrorism should be codified are again playing an important role. This paper adds to the current literature by providing a rationale on the possible tools that the international community may have with an ICC that can prosecute crimes on terrorism. By holding accountable individuals responsible of terrorism in the ICC, problems such as the Lockerbie case will have a potential neutral court, no state immunity will be granted when the attack is state-sponsored, and universal jurisdiction on the crime will further facilitate the prosecution of terrorists. This study will be using mostly academic sources found in databases, but is also supported by books on international law and the International Criminal Court. Furthermore, the official ICC website, UNGA resolutions and UNSC resolutions have been examined to better understand and strengthen the discussion at hand.

Origins of the International Criminal Court and the Rome Statute

Since the League of Nations, the international community intended to create a permanent international court. However, World War II and the Cold War prevented international organizations from implementing such a court. It was only until the end of the Cold War in 1989, that Trinidad and Tobago campaigned again for the idea of having a permanent international criminal court. In addition, the creation of the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively, evidenced a shift in global governance trends. Until the end of the Cold War the sovereign state was the only relevant player in international relations, but these international criminal tribunals were proof of a shift towards a more interconnected world where the sovereign state was no longer the only actor.[9] As a result, in 1994, the ILC prepared a Draft Statute for an International Criminal Court. This draft did not define

7 Martinez, "Prosecuting Terrorists at the International Criminal Court"; Galingging, "Prosecuting Acts of Terrorism as Crimes against Humanity under the Icc Treaty"; Antonio Cassese, "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law* 12, no. 5 (2001): 993-1001.

8 Weatherall, "The Status of the Prohibition of Terrorism in International Law."

9 Eric K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Hampshire: Ashgate, 2005), 190.

the crimes to be prosecuted by the Court, instead, drafters thought that the jurisdiction of the Court should be on crimes defined in international treaties, along with crimes part of the Draft Code of Crimes Against the Peace and Security of Mankind, and those crimes considered part of customary international law.[10]

Recognizing that Trinidad and Tobago raised the issue of bringing in an international court that could prosecute drug trafficking and other transnational criminal activities, the United States approached the first session of the Ad Hoc Committee on a Permanent International Criminal Court with the unique mission of excluding these matters from the jurisdiction of the Court.[11] Washington was concerned that the statute could jeopardize its national security, especially on the prosecution of international terrorists and narcotic traffickers. After extensive deliberation and discussions, on July 17, 1998, the conference adopted the Statute for a permanent international criminal court by a vote of 120 in favor, seven against (including the United States) and twenty-one abstentions.[12] In the end, drug trafficking and other transnational criminal activities, which were the crimes that brought the ICC conversation in the first place, were left out of the jurisdiction of the Court. However, the Rome Conference adopted a Resolution that recommended a Review Conference that would "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."[13]

The Rome Statute entered into force on July 1, 2002 after 60 states had ratified, accepted, and approved it, pursuant to Article 126. The Statute provides for an International Criminal Court to be based in The Hague, and has detailed provisions on: establishment of the Court; jurisdiction, admissibility and applicable law; general principles of criminal law; composition and administration of the Court; investigation and prosecution; trial; penalties; appeal and revision; international cooperation and judicial assistance; enforcement; assembly of states parties; and financing.[14] In order for the court to prosecute an individual, this individual must meet the following characteristics: (i) the defendant must be either a national of a state signatory of the Rome Statute (*ratione personae)*, have committed the crime in a state part of the ICC (*ratione loci)*, or, the UNSC refers the case to the ICC in the interests of international peace and security; (ii) domestic courts must be inactive, unwilling, or unable to investigate and prosecute the alleged crimes; (iii) the alleged crimes must be of sufficient gravity and must fall within the Court's subject matter jurisdiction (*ratione materiae)*, and; (iv) the crimes must have occurred after July 1, 2002 (*ratione temporis)* or the day that the state party accepted the Court's jurisdiction (a new

10 Johan D. van der Vyver, "Prosecuting Terrorism in International Tribunals," *Emory International Law Review* 24, no. 2 (2010): 534-35.
11 Ibid., 535.
12 Martinez, "Prosecuting Terrorists at the International Criminal Court," 15.
13 Vyver, "Prosecuting Terrorism in International Tribunals," 539-40.
14 Martinez, "Prosecuting Terrorists at the International Criminal Court," 15.

state is permitted to backdate its acceptance of jurisdiction).[15] The Court focuses on three crimes with universal jurisdiction which are Genocide, Crimes Against Humanity, and War Crimes. Even if the Statute also includes Crimes of Aggression as part of the Court's jurisdiction, a provision with the definition of this crime is still missing.

In order for the Court to claim jurisdiction it has to either have a State or the UNSC refer the case to the Court, and in the case of the UNSC, it refers cases on the basis of threats against international peace and security. A third option which makes the Court more independent but at the same time more controversial is the *proprio motu* power. The Prosecutor, as provided in Article 15, may begin investigations on its own initiative on the basis of information on crimes within the jurisdiction of the Court. However, its power is not total, the Prosecutor must submit to the Pre-Trial Chamber a request for authorization of an investigation. After the Court learns that it has jurisdiction over a case by either one of the three cases explained above, the issue of admissibility enters into play. There are two components to consider: complementarity and gravity. The first component is one of the most essential aspects of the ICC jurisdiction, permitting Court prosecutions only where a country is unwilling or unable to handle a case.[16] Emphasizing how important this component of admissibility is for the court, both the preamble and Article 1 of the Statute declare that the Court shall be complementary to national criminal courts. The second component, gravity, has the main task of limiting the number of individuals that it can prosecute, due to its resource restraints. This component hence, makes the Court focus its efforts to prosecute senior leaders or those most responsible, rather than foot soldiers or low-level perpetrators. Usually, however, these senior leaders are the ones more likely to avoid accountability for their crimes.[17]

Terrorism through the International Community Lens

The term terrorism first emerged during the French Revolution. At the time, terrorism was linked with the notion of state-instigated terror "unleashed on a state's own population as a mechanism of control."[18] This concept has been evolving over time and currently three categories of terrorism can be identified: (i) state instigated policies of terror applied domestically; (ii) domestic or internal terrorism carried out by private individuals or groups; and (iii) international terrorism, including state-sponsored acts of transnational violence.[19] The main reason for terrorists to carry out their actions is because these are "low-cost, relatively low-risk, and yet afford the possibilities of high yield in terms of weakening, penetrating or even gaining control through covert means. Moreover, such

15 Novak, *The International Criminal Court*, 43.
16 Ibid., 54.
17 Ibid., 57.
18 Tim Stephens, "International Criminal Law and the Response to International Terrorism," *University of New South Wales Law Journal* 27, no. 2 (2004): 457.
19 Ibid., 457.

methods carry far less cost and less risk of escalation than conventional war."[20] As such, terrorist groups can carry out attacks that are intended to coerce decisions or policies that their enemy (states or international organizations) is intending to implement. Given that terrorism is such a politicized activity, the international community has not been able to find consensus on a clear definition. Until the end of the Cold War, the main issue was whether to include or not national liberation movements as terrorist acts or not. Since then, the reaction of the international community has drastically changed to condemn any act regardless of its motives as terrorism. Nevertheless, being a highly political issue has prevented an agreement on what exactly terrorism is. Hence, one of the reasons for not wanting to include the crime of terrorism within the Rome Statute has been this exact fear of having a highly politicized court, which would threaten its primary objective of being independent and being a court of last resort.

While the phenomenon of terrorism is not new and many treaties exist to address specific acts of terrorism, the international community has no consensus on a holistic definition of the term. While the intent of this paper is not to define terrorism, the paper will investigate the different sources that underline the current international views on the meaning of terrorism. The three sources that will be explored are: treaty law, United Nations General Assembly Resolutions and Declarations, and United Nations Security Council action.[21] Afterwards, an examination on how previous *Ad Hoc* international courts have dealt with acts of terrorism will be made.

Treaty Law

In the first intent that the International Community made to have an international court back in 1937, terrorism was defined as "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."[22] While the Statute was never ratified and the Court never entered into existence, this first attempt at creating a definition is an important precedent and clear evidence that it was of interest to many states to have a permanent international tribunal that would claim jurisdiction over the crime of terrorism. Starting from the 1960s, the international community began creating conventions that condemned several types of terrorism. To date, some two-thirds of UN Member States have either ratified or acceded to at least 10 of the 16 existing instruments, and there is no longer any country that has neither signed nor become a party to at least one of them.[23] These conventions can be divided into four categories: (i) international civil aviation conventions; (ii) internationally protected persons and hostage-taking conventions; (iii)

20 Martinez, "Prosecuting Terrorists at the International Criminal Court," 3.
21 Ibid., 4.
22 Ibid.
23 "Counter-Terrorism Commission," United Nations Security Council, accessed May 31, 2017, https://www.un.org/sc/ctc/.

maritime navigation; and (iv) the 'new generation' of counter-terrorism conventions (which include the Terrorist Bombings Convention, Terrorism Finance Convention, and the Nuclear Terrorism Convention).[24]

Even if these instruments are in place, which are currently among the most widely ratified international agreements,[25] there is still not a unified definition of the crime which is allowing for loopholes weakening the existing framework. One example of the existing gaps can be seen in the Lockerbie case in which two Libyan officials were investigated for the bombing of an airplane over Lockerbie, Scotland. While the aircraft was registered in the United States and it was flying over the United Kingdom, the nationals accused were Libyan. This crime then had three different states that could claim jurisdiction in the case. Both the United States and the United Kingdom wanted Libya to extradite the two officials, convinced that they would not get an appropriate punishment if tried in a Libyan court. Whereas Libya insisted that through Article 7 of the Montreal Convention it had the obligation to prosecute or extradite *(aut dedere aut punier)*, stating then that these two officials were going to be prosecuted in Libya. The main lesson of this specific case is that even though the existing counter-terrorism conventions network does give more instruments to the international community to address acts of terrorism, there are still situations in which officials and senior leaders can escape the appropriate punishment. Without the crime of terrorism having universal jurisdiction, some specific events can become extremely hard to deal with.

United Nations General Assembly Resolutions and Declarations

The UNGA adopted unanimously on December 1994 and again in 1996 and 1999,[26] the Declaration on Measures to Eliminate International Terrorism. The General Assembly declared that "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[27] The latter part, describing 'whatever the considerations…' in this declaration, refers to the Cold War, when the General Assembly did not condemn all acts of terrorism, but categorizing them between those committed by national liberation armies and the rest. The shift that the UNGA had since 1989 in its declarations and resolutions that address acts of terrorism, is what the global governance perspective calls the post-Westphalian order. In this new order, there is an increased interdependence and an increased importance of a more pluralistic group of international actors.[28] Not only is the sovereign

24 Stephens, "International Criminal Law" 467-70.
25 Ibid., 473.
26 Martinez, "Prosecuting Terrorists at the International Criminal Court," 7.
27 UN General Assembly, Resolution 49/60, "Measures to Eliminate International Terrorism," Dec. 9, 1994, http://www.un.org/documents/ga/res/49/a49r060.htm.
28 Leonard, *The Onset of Global Governance*, 183.

state the one imposing policies and negotiating in the international sphere anymore, but also International Governmental Organizations, Non-Governmental Organizations, and Transnational Corporations have a louder voice on the shaping of international norms. This shift in the UNGA's declarations and resolutions is adding to the body of law relevant when trying to define terrorism.

United Nations Security Council Action

The Security Council has adopted resolutions both prohibiting terrorist acts as such and resolutions related to specific terrorist incidents.[29] Drawing again on the Lockerbie case explained above, the Security Council adopted resolution 1192 on August 1998 in which, recalling the three previous resolutions on the case, resolutions 731, 748, and 883, it demanded the Libyan Government to comply with those resolutions.[30] The Council, acting under Chapter VII of the UN Charter, considered this terrorist act as threatening international peace and security. Also, a stronger action was taken by the Council after the September 11 attacks. Resolution 1373 calls on all the Members of the United Nations under Chapter VII, which makes the resolution legally binding, for states to "prevent and suppress the financing of terrorist acts."[31] Furthermore, it created the Counter Terrorism Committee, which had the mission to monitor the domestic implementation of this resolution within the UN Members. These events have also led to think that the intent of having legally binding resolutions on acts of terrorism further strengthens these crimes into becoming peremptory norms. Even without a clear definition, these acts have been recognized all around the world and are continuously coming into focus in international criminal law, and the discussion on whether these acts are indeed *jus cogens* is also becoming more relevant.

Ad Hoc International Tribunals

For the purpose of the investigation, the Nuremberg and Tokyo criminal tribunals will not be discussed (giving the focus to the post-Cold War tribunals). Instead, some general comments on the criminal tribunals in Yugoslavia, Rwanda, and Sierra Leone will be made with respect to their way of addressing terrorist acts. These three international criminal tribunals had the mission to bring to justice those responsible of committing different types of crimes during the cruel wars and genocides taking place during a specific time period and in a specific location. While the ICTY did not explicitly include terrorism under its subject matter jurisdiction, both the Statute of the ICTR and the Statute of the Special Court for Sierra Leone (SCSL) included acts of terrorism. Article 3 of the SCSL and Article 4 of the ICTR called "Violations of Article 3 Common to the Geneva

29 Martinez, "Prosecuting Terrorists at the International Criminal Court," 7-8.

30 United Nations Security Council (SC), Resolution 1192, Aug. 27, 1998, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20SRES1192.pdf.

31 SC, Resolution 1373, Sept. 28, 2001, https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

Conventions and of Additional Protocol II,"[32] made reference to acts of terrorism as one of the components of the jurisdiction of the tribunals. The inclusion of acts of terrorism under these Statutes is yet another precedent that raises the question on whether the crime of terrorism does in fact has universal jurisdiction under international customary law.

The Crime of Terrorism as *Jus Cogens*

Terrorism has been categorized as *hosti humani generis* – an enemy of all mankind and has been considered to be on the same level as slavery, genocide, and piracy. Almost all the states around the world have adopted domestic legislation criminalizing international terrorism.[33] The elements that generally constitute the crime within domestic law are: "(i) an illegal violent act; (ii) intended to terrorize or coerce; and (iii) of an international nature."[34] In addition, one of the most recent conventions, the International Convention for the Suppression of the Financing of Terrorism of 1999, which is ratified by 173 parties has stated a definition of terrorism. The Convention expresses under Article 2 that "[a]ny 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."[35] In addition to both domestic law and conventions, in 2007 Judge Antonio Cassese as President of the Special Tribunal for Lebanon (STL), established a clear legal foundation for the international crime of terrorism under international customary law.[36]

In 2005, sitting Prime Minister Hariri of Lebanon was killed along with 22 others. In a negotiation between the United Nations and the Lebanese government, a tribunal was established on May 2007, under a Security Council Resolution acting under Chapter VII of the UN Charter to prosecute those responsible for the killings.[37] The Special Tribunal of Lebanon was mandated to judge according to the Lebanese Criminal Law, but it could apply international customary law and treaty law when considered necessary. Thus, based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber of the court declared that there actually existed a definition of terrorism in customary international law, consisting of:

> The following three key elements: (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

32 See United Nations, "Statute of the International Criminal Tribunal for Rwanda," (1994), and United Nations, "Statute of the Special Court for Sierra Leone," (2002).
33 Weatherall, "The Status of the Prohibition of Terrorism in International Law," 590.
34 Ibid., 592.
35 United Nations, "International Convention for the Suppression of the Financing of Terrorism," 1999, http://www.un.org/en/sc/ctc/docs/conventions/Conv12.pdf.
36 Weatherall, "The Status of the Prohibition of Terrorism in International Law," 600-01.
37 SC, Resolution 1757, May 30, 2007, http://www.un.org/press/en/2007/sc9029.doc.htm.

> 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.[38]

With this definition, the old slogan "one man's terrorist is another man's freedom fighter" has been rejected by the post-Westphalian order. The claim that national liberation fighters could justify their acts of terrorism seems to no longer stand in global governance.

Just few weeks after the STL issued the definition on terrorism, the French Court of Cassation released a decision assuming the *jus cogens* status of the prohibition of terrorism in international law.[39] In a 2013 Appeal Decision in the England Court against *Gul,* the judgment clearly declared a prohibition of terrorism in international customary law. The *Gul* case is the judgment of a United Kingdom national born in Libya, which divulgated terrorist videos on the internet, including websites such as YouTube. The Court underlined that such a violation constituted an international crime imputing individual responsibility.[40] The three recent precedents listed should be taken into consideration when thinking whether the crime of terrorism has universal jurisdiction today. Having confirmation of the existence of a peremptory norm through international judicial organs provides the most authoritative indication of its emergence.[41] The STL already considered it to be part of customary international law and became the first international tribunal to claim jurisdiction through this means. Shortly after both French and English courts considered that the crime of terrorism was indeed a peremptory norm.

Finding Consensus on the Definition of Terrorism

A lack of consensus on the definition of the crime of terrorism is not an obstacle for the ICC to exercise jurisdiction over terrorists. Nevertheless, the lack of consensus does leave loopholes as have been outlined. Even if the discussion of having a permanent international criminal instrument was brought by Trinidad and Tobago's concern on drug trafficking and other transnational criminal activities, these crimes were left out of the Rome Statute. The biggest advocate against including these crimes, the United States, is not even a party to the Statute. The problem with this kind of crimes, as has been the case with the inclusion of Crime of Aggression, is the fear of having a highly politicized Court. The ILC Draft Statute that was presented to the delegates in Rome originally included terrorism within the jurisdiction of the Court. Furthermore, countries like Algeria, India, Sri Lanka, and Turkey, when they understood that having terrorism as part of the Court's jurisdiction was not possible, proposed to include terrorism expressly within the definition

38 Michael P. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation," *American Society of International Law* 15, no. 6 (2011).
39 Weatherall, "The Status of the Prohibition of Terrorism in International Law," 600-01.
40 Ibid., 605-09.
41 Ibid., 591.

of "Crimes Against Humanity."[42] There are three characteristics that would make any act of terrorism fall into "Crimes Against Humanity," these are: (i) no need to find a nexus with a war; (ii) there has to be a widespread or systematic attack against a civilian population; and (iii) there needs to be knowledge of the attack (from the perpetrator).[43] Therefore, regardless of whether an individual can be labeled as a terrorist, anyone who commits a crime falling within the jurisdiction of the Court, falls within the jurisdiction of the Court.[44]

Given the fact that almost every state recognizes and punishes acts of terrorism, in addition to the intents made to have a definition of the term, it would be plausible for the international community to look at the conglomerate of counter-terrorism conventions if it intends to find a consensus on the definition. In addition, as this paper has been investigating, different events and instruments that have made terrorism an issue concerning every state, should also be taken into consideration. With the redistribution of power in international relations in the past 25 years, more pressure is being put on states to become more responsible actors. The political nature of terrorism, personified in the slogan "one man's terrorist is another man's freedom fighter" is no longer accepted throughout the civilized nations of the world. While it is true that currently the ICC must focus on other pressuring issues such as recent statements made by South Africa in which it intends to withdraw from the Court, as well as a plan inside of the African Union in which African States signatories to the Rome Statute are intending to withdraw in masse, the conversation on giving the Court jurisdiction over the crime of terrorism should not be left aside.

Including the Crime of Terrorism on the Rome Statute

This paper has limited its reach to exposing the existing records that can give the crime of terrorism universal jurisdiction, thus it is not the intent here to propose a holistic solution as to how to overcome the existing loopholes. Nevertheless, I will expose two ways in which the crime of terrorism can be included within the Rome Statute. The first option would be to amend the Statute in order to create a new Article that would focus on the specific crime of terrorism, specifying the conditions to be met. This would then become a fifth crime in which the ICC could exercise jurisdiction on. Nevertheless, if an amendment is made to the Statute, it will only be binding to those State Parties that accept it.[45] Article 121 states that after seven years from the entry into force of the Statute "any State Party may propose amendments."[46] The first review conference took place in Kampala, Uganda in

42 Martinez, "Prosecuting Terrorists at the International Criminal Court," 18-19.
43 Galingging, "Prosecuting Acts of Terrorism" 757.
44 Ibid., 761.
45 Ibid., 750.
46 United Nations, "Rome Statute of the International Criminal Court," (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. 79.

2010. There was a recommendation since the Rome Conference to review the possibility of including drug crimes and the crime of terrorism within the Statute, however, the recommendation was not taken into consideration during the conference. The second way to include terrorism within the Court's jurisdiction would not need to amend the Statute, but by interpreting acts of terrorism as crimes that fall under the definition of one of the crimes already within the ICC competence.[47] Contextualizing this, there are little possibilities for the Court to interpret acts of terrorism under Genocide, but there is a possibility, however, for these acts to be categorized under War Crimes or, even more feasible, under Crimes Against Humanity.

Conclusion

Acts of terrorism are not a new phenomenon, but the term has been continuously evolving since the times of the French Revolution. The international community has been trying to fight these crimes mostly by creating counter-terrorism conventions that are intended to tackle specific aspects of terrorism such as aircraft security, maritime security, protected persons and financing. In addition to treaty law, there has been a shift in the way that both the United Nations General Assembly and Security Council deal with terrorism. Prior to the end of the Cold War, these organs attempted to differentiate between acts of terrorism and similar acts made on behalf of national liberation movements, but since 1989, tolerance for any act of terrorism no longer exists. The post-Westphalian order has been treating acts of terrorism as a crime at the same level as slavery, genocide, and piracy, which indicates that is becoming part of customary international law. Therefore, further research should focus their efforts on assessing if the different sources of law presented here, in addition with the current global governance context have converted the crime of terrorism into a peremptory norm.

Additionally, almost every nation state today has domestic law codifying and criminalizing international terrorism. Two examples of how local courts (French and English) had recently considered international terrorism as *jus cogens* under customary international law have underlined how close this crime is to being considered a peremptory norm. Although it is not impossible to prosecute terrorists under the ICC, the lack of a definition of the term creates loopholes that protect terrorists. To address this issue, the ICC has two options, it can amend its Statute in order to exercise jurisdiction over the crime of terrorism, or, it can interpret terrorism as part of War Crimes or Crimes Against Humanity. While giving the Court jurisdiction over this crime will not bring every terrorist to justice, this option would more adequately address the issue and provide the international community with universal jurisdiction, which as a result could unify the broad network of counter-terrorism conventions and eliminate the existing gaps in the prosecution of terrorists.

47 Galingging, "Prosecuting Acts of Terrorism," 746.

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