

# International Terrorism: What are the Current Legal Challenges in Bringing Terrorists to Justice?

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## Keywords

TERRORISM, COUNTER-TERRORISM, DEFINING TERRORISM, INTERNATIONAL CRIMINAL COURT, ROME STATUTE, STATE COOPERATION

## Abstract

International terrorism has faced a definitional deadlock. While various international conventions have emerged condemning acts of terrorism and states have enacted counter-terrorism legislation, a single universal definition on the crime of terrorism has yet to be agreed upon. The cause of a definitional deadlock can be boiled down to the famous idea that one man's terrorist is another man's freedom fighter thus; acts seen as justified by some are viewed as crimes by others. Few individuals labelled as terrorists would call themselves as such. However, both the International Criminal Court (ICC) as well as domestic courts are affected by the definitional deadlock. Despite extensive discussions on the inclusion of terrorism within the Rome Statute, the lack of a commonly agreeable definition on terrorism eventually made the inclusion impossible. Therefore, the ICC can only bring terrorists to justice when acts of genocide, crimes against humanity or war crimes have occurred. On the other hand, states rely on co-operation, mutual trust and the exchange of information when prosecuting international terrorists. Due to the lack of a common definition on terrorism, states have taken fragmented approaches and counter-terrorism strategies vary considerably between states. While in some states no counter-terrorism measures exist at all, other states have taken on considerably broad laws. This makes effective cross-border co-operation challenging or even impossible. Conclusively, reaching a common definition on a crime of international terrorism cannot be stressed enough. It will allow for a new discussion to take place with regards to the creation of a crime of terrorism in the Rome Statute. Furthermore, state authorities would be restricted in the use of overly broad legislation as national laws can be harmonised to a greater extend.

[F]inally last week, I determined that we had enough intelligence to take action, and authorized an operation to get Osama Bin Laden and bring him to justice. (...) [A]fter a firefight they killed Osama Bin Laden and took custody of his body. (...) [O]n nights like this one, we can say to those families who have lost loved ones to al Qaeda's terror: Justice has been done.<sup>1</sup>

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<sup>1</sup> The White House, *President Barack Obama: Osama Bin Laden Dead*, 2 May 2011, at <whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead> (accessed 17 May 2016); Paulussen, C, *Impunity for International Terrorists? Key legal questions and practical considerations*, 2012, International Center for Counter-Terrorism Research Paper, 1 at <icct.nl/download/file/ICCT-Paulussen-Impunity-April-2012.pdf> (accessed 17 May 2016).

## **I. Introduction**

In 2011, US President Obama made the preceding statement after an attack that killed Osama bin Laden, the mastermind behind the 9/11 attacks. President Obama claims that justice has been served; a sentiment that is shared by many world leaders such as the President of the United Nations (UN) General Assembly who stated shortly after the attack that ‘terrorists must know that there will be no impunity for their barbaric and cowardly deeds’.<sup>2</sup> Terrorism has been a growing threat within the global community. Groups such as the Islamic State of Iraq and Syria (‘Islamic State’, hereinafter ISIS) have grown in size and power while executing daily attacks with deadly consequences. In return, the global community must respond with measures to end such brutality. However, one may wonder how justice is served through killing such leading terrorist figures as Osama bin Laden or whether he has truly been held accountable for his actions.

This paper will assess the how the international legal framework can hold international terrorists accountable for their acts. The first part will look at the International Criminal Court (ICC) as the only permanent international court with the power to bring terrorists to justice. The second part will focus on national courts and the imperative role that states play in fighting and preventing combating terrorism.

The difficulty in holding the leading figures of terrorist groups accountable for their crimes creates a gap in the existing international criminal law. When inadequate tools are in place to hold the highest-ranking members of terrorist groups accountable, alternative measures will inevitably arise. As a consequence, States will take matters in their own hands and assassinating men like Osama bin Laden will become the norm of ‘serving justice’. Consequently, the current challenges and deficiencies of international criminal law in bringing terrorists to justice will be highlighted in addition to providing several proposals for enhancing tools to combat international terrorism.

## **II. The Difficulties of Establishing a Common Definition**

International terrorism has faced a definitional deadlock.<sup>3</sup> Despite serious attempts, an agreement has not been found as to what exactly a crime of terrorism entails. The problem can be boiled down to the famous idea that ‘one man’s terrorist is another man’s freedom fighter’ thus; acts seen as justified by some are viewed as crimes by others. Therefore, terrorism is a highly politically charged topic as acts of terror are typically committed due to ideological or political motives.

To attempt to define international terrorism, first it must be understood what ‘international’ entails. It is possible to identify two types of international terrorism.

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<sup>2</sup> United Nations Security Council, *Security Council Presidential Statement, Welcoming End of Osama bin Laden’s Ability to Perpetrate Terrorist Acts, Urges States to Remain Vigilant*, 2 May 2011, at <[un.org/News/Press/docs/2011/sc10239.doc.htm](http://un.org/News/Press/docs/2011/sc10239.doc.htm)> (accessed 17 May 2016).

<sup>3</sup> Maloney-Dunn, K, “Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC” 6 *Santa Clara Journal of International Law* (2010) 69, 70.

Firstly, it could refer to crimes containing a cross-border or a transnational element with regards to ‘the persons implicated, means employed and the violence involved’.<sup>4</sup> Such crimes would be, for example, suicide bombers conducting attacks on foreign soil hence, an act transcending national boundaries. Secondly, terrorism can also be viewed as international even when taking place in a purely domestic setting if the crimes are of such nature that they become a concern to the international community as a whole.<sup>5</sup> Therefore, the second type of international terrorism refers to the so called *effects doctrine* arguing that the effects of acts taking place within one country can be felt far beyond territorial borders.<sup>6</sup>

In 1937, the first attempt was made to define terrorism as an international crime as the League of Nations adopted the Convention on the Prevention and Punishment of Terrorism.<sup>7</sup> The convention never came into force but remains important, as it has served as a model for future Conventions regarding terrorism.<sup>8</sup> The 1937 Convention defined terrorism as ‘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’.<sup>9</sup> Ever since, varying definitions have arisen. The Appeals Chamber of the Special Tribunal of Lebanon has famously forwarded one definition in 2011. It was the first time an international tribunal has forwarded an authoritative definition of the crime of terrorism under international law.<sup>10</sup> The Chamber unanimously argues that a crime of terrorism has emerged. The customary rule of a crime of terrorism include:<sup>11</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.

The landmark ruling faced widespread criticism in literature making the jurisprudential value of the ruling doubtful.<sup>12</sup> Nevertheless, it goes to show how attempts

<sup>4</sup> Cassese, A, “Terrorism as an International Crime” in Bianchi, A and Naqvi, Y, eds, *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004), 223.

<sup>5</sup> Paulussen *supra* nt 1, 6-9.

<sup>6</sup> Bianchi, A, and Naqvi, Y, *International Humanitarian Law and Terrorism* (Hart Publishing, 2011), 274-275; Paulussen *supra* nt 1, 6-9.

<sup>7</sup> League of Nations (LoN), *Convention for the Prevention and Punishment of terrorism* (1937) (The 1937 Convention).

<sup>8</sup> Ragni, C, “The Contribution of the Special Tribunal for Lebanon to the Notion of Terrorism: Judicial Creativity of Progressive Development of International Law?” in Boschiero, N, *et al*, eds, *International Courts and the Development of International Law* (Asser Press, 2013), 671.

<sup>9</sup> Article 1, LoN, The 1937 Convention.

<sup>10</sup> Scharf, MP, “Special Tribunal for Lebanon issues landmark ruling on definition of terrorism and modes of participation” 15(6) *American Society of International Law* (2011) at <[asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and](http://asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and)> (accessed 17 May 2016).

<sup>11</sup> Special Tribunal for Lebanon, Case STL-11-01/I, *Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging* STL-11-01/I/AC/R176 bis/F0936/20130530/R144057-R144210/EN/nc, 16 February 2011, para 85.

<sup>12</sup> Paulussen *supra* nt 1, 8.

are continuously made in order to achieve a commonly accepted definition on the crime of terrorism.

While it has been clearly shown that a definition has not been established, there seems to be, nevertheless, a basic understanding as to what constitutes terrorism as the term itself is commonly referred to by states and the international community as a whole. Such a conclusion was reached at the Poelgeest Seminar. In its final report, it was suggested that an act of terrorism is an unjustifiable criminal act, intending to cause death or bodily or mental harm. Such an act would be committed with the intent to cause terror in the general public.<sup>13</sup> The consequences that a lack of definition has towards effectively combatting terrorism, has been the centre of (scholarly) attention.<sup>14</sup> It has been suggested that while an authoritative definition on terrorism does not yet exist, the term has nevertheless developed its own international legal personality. Some international tribunals as well as most national courts have in fact established a crime of terrorism. In addition, various international Conventions and UN Security Council (UNSC) Resolutions support such a finding as various treaties have emerged condemning terrorism. In fact, the Security Council declared terrorism as a threat to international peace and security in Resolution 1368 (2001)<sup>15</sup> effectively allowing for actions to be taken under chapter VII of the UN Charter.<sup>16</sup> Hence, by trying to combat terrorism, the international community has by default included terrorism in its international legal personality. As such, one could argue that terrorism as a concept has now become customary international law.<sup>17</sup> Nevertheless, 'defining "terrorism" and identifying a "terrorist" are perhaps the most complex and highly charged issues of modern times'.<sup>18</sup> As the Final report of the Poelgeest Seminar concluded: 'given the lack of a generally accepted international definition of terrorism, states are in a position to use their own national characterisations and this opens the door to a fragmented approach and abuse'.<sup>19</sup> When consensus cannot be reached on an international level, states are free to approach terrorism in a way they see fit, hence creating opportunities of possible neglect or abuse and justice is not always being served fairly and efficiently. While commonly accepted elements of what constitutes terrorism have slowly emerged, states are not bound by any particular definition. In addition to states, the ICC is also affected by the current definitional deadlock. Therefore, the next section will come to assess the functioning of the ICC and whether the Court has jurisdiction over acts of terrorism.

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<sup>13</sup> The Poelgeest Seminar organized by the Grotius Centre in Leiden, The Netherlands. The Seminar discussed the current challenges to international caused by transboundary terrorism: Final Report Poelgeest Seminar, "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges" 54 *Netherlands International Law Review* (2007) 571, 574.

<sup>14</sup> Paulussen *supra* nt 1, 7.

<sup>15</sup> UN Security Council, *Threats to international peace and security caused by terrorist acts*, 12 September 2001, (4370<sup>th</sup> plenary meeting) S/RES/1368.

<sup>16</sup> Chapter VII, United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter).

<sup>17</sup> Walter, C, "Defining Terrorism in National and International law" in Christian Walter *et al*, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2003), 33-40.

<sup>18</sup> Graham, K, "The Security Council and counterterrorism: global and regional approaches to an Elusive public good" 17(1-2) *Terrorism and Political Violence* (2005) 37, 40.

<sup>19</sup> Paulussen *supra* nt 1, 8; Poelgeest *supra* nt 13, 574.

### III. The Rome Statute and Terrorism

The Rome Statute of the ICC came into force on 1 July 2002 as 60 states ratified the treaty.<sup>20</sup> ICC marks a fundamental shift in international criminal law, as it is the first permanent, treaty based international criminal court. The duty of the ICC is to bring to justice ‘perpetrators of the most serious crimes of concern to the international community’. Such core crimes are Genocide, Crimes against Humanity, War Crimes and Crime of Aggression.<sup>21</sup> However, ICC operates on the basis of the principle of complementarity. This essentially means that national courts are given the priority in establishing jurisdiction.<sup>22</sup> The exception to the principle of complementarity is when a state, according to Article 17 of the Rome Statute is ‘unwilling or unable to genuine carry out an investigation or prosecution’<sup>23</sup> therefore, only when a state has the capacity and will truly hold individuals accountable for their actions, will the ICC’s jurisdiction become complementary.

Preconditions for the exercise of jurisdiction are laid down in Article 12 of the Rome Statute.<sup>24</sup> The grounds for jurisdiction are threefold. First, a State Party may refer a situation to the Court. Second, the Prosecutor may initiate investigation *proprio motu* and finally the UN Security Council (UNSC) may refer a situation to the Court.<sup>25</sup> For the first and second options, a state not party to the Rome Statute may explicitly accept the jurisdiction of the Court by lodging a declaration to the Registrar. However, under the third possibility, a Security Council referral, a situation may be referred even when it takes place outside the territory of State Parties. Therefore, a Security Council referral can be a powerful tool in enabling investigation to take place. Unfortunately, Security Council referrals have been described as experiencing a ‘referral fatigue’ as the number of situations referred remains extremely low.

ICC’s role in holding terrorists accountable is not entirely straightforward. There is no crime of terrorism hence; acts of international terrorism should constitute one of the existing core crimes. Therefore, genocide, war crimes and crimes against humanity will be assessed to examine whether an act of terrorism could potentially amount the said crimes.

Firstly, a war crime is a crime consisting of a plan or a policy and a large –scale commission of the crime according to the plan. Crucially, war crimes require the existence of an armed conflict, a requirement that may be difficult to establish for terrorist acts. Nevertheless, terrorism may under certain circumstances amount to a war crime. Article 33 (1) of the Fourth Geneva Convention of 1949<sup>26</sup> outlines that ‘all measures of intimidation or of terrorism are prohibited’.<sup>27</sup> However, such acts must be against

<sup>20</sup> International Criminal Court, *About the Court, at (International Criminal Court)* <[icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx)> (accessed 17 May 2016).

<sup>21</sup> United Nations, *Rome Statute of the International Criminal Court* (1998) 2187 UNTS 90 (*Rome Statute*), Article 5.

<sup>22</sup> *Ibid.*

<sup>23</sup> Article 17 (1), *Rome Statute*.

<sup>24</sup> Article 12, *Rome Statute*.

<sup>25</sup> Article 13, *Rome Statute*.

<sup>26</sup> Article 33(1), International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949) 75 UNTS 287 (Fourth Geneva Convention).

<sup>27</sup> *Ibid.*

civilians with a 'protected status'.<sup>28</sup> In addition, the same prohibition has been established for acts taking place in internal armed conflicts.<sup>29</sup> Therefore, it is clear that terrorist acts can amount to war crimes as long the acts are directed *against civilians*,<sup>30</sup> as international humanitarian law clearly bans acts of terrorism. To establish that a war crime has occurred, in addition to the *actus reus* of attacking civilians, it is also necessary to establish the *mens rea* of conducting war crimes; the intent of causing violent acts or spreading fear and anguish among civilians.<sup>31</sup>

While terrorism may amount to a war crime, certain problems can be identified. Firstly, terrorism is a specific intent crime meaning that the perpetrator must intend to cause terror, such a type of intent is not mentioned in Article 8 of the Rome Statute. Secondly, terrorism is typically understood to hold underlying ideological and political motives, which are in fact not characteristic for war crimes. Thirdly, the root problem of considering terrorism as a war crime is that terrorism is not explicitly referred to in Article 8 of the Rome Statute. The underlying reasoning for the absence of terrorism as an included act of war crimes, can be explained by the fact that only armed conflicts amount to war crimes. Terrorist attacks are not commonly considered to be acts of war or armed conflicts. Only large-scale terrorist attacks amounting to armed conflicts can trigger Article 8 of the Rome Statute.<sup>32</sup> Conclusively, categorising acts of terrorism a war crime can be possible yet only a partial solution.

Besides war crimes, terrorism could theoretically amount to genocide. Genocide, according to Article 6 of the Rome Statute,<sup>33</sup> requires the *mens rea* of intending to 'destroy in whole or in part, a national, ethnic, racial or religious group, as such',<sup>34</sup> which consequently forms the *dolus specialis* of genocide. The *actus reus* of Genocide varies from for example killing, forcibly transferring children, preventing birth or causing serious bodily or mental harm.<sup>35</sup> Furthermore, genocide excludes the intent to destroy a group on the basis of political or ideological grounds, an element commonly associated with terrorism. Terrorist groups rarely act with the intention of entirely annihilating a specific group. Taking the example of Osama bin-Laden and the 11 September attacks once more, while it may be argued that the victims of the attacks form part of a specific group, as required to establish genocide, this group may be a general group of Westerners or perhaps the victims could be categorised as Americans.<sup>36</sup> However, to be considered as genocide, the attack should fulfil the *dolus specialis* of 'destroying in whole or in part'<sup>37</sup> the victimised group of the attack. Al-Qaeda did not limit its actions against one target group, as violent attacks by Al-Qaeda and Osama bin-Laden were committed against varying group across the world. Conclusively, considering terrorism as a form of

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<sup>28</sup> Cassese *supra* nt 4, 221.

<sup>29</sup> Article 4(2)(d), United Nations, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (1977) 1125 UNTS 609, Article 4(2)(d) (Protocol II).

<sup>30</sup> Bianchi and Naqvi *supra* nt 6, 221.

<sup>31</sup> *Ibid.*

<sup>32</sup> Article 8, *Rome Statute*.

<sup>33</sup> Article 6, *Rome Statute*.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Cohen, A, "Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism" 20 *Michigan State International Law Review* (2013) 219, 241.

<sup>37</sup> *Ibid.*

Genocide does not serve as a convincing or useful solution to holding terrorists accountable.

Thirdly, crimes against humanity currently require the least legal juggling in order to fit terrorism.<sup>38</sup> Article 7 of the Rome Statute<sup>39</sup> defines crimes against humanity as being acts committed in the context of a widespread or systematic attack ‘directed against any civilian population, with knowledge of the attack’.<sup>40</sup> The underlying crimes, the *actus reus*, of crimes against humanity vary, ranging from murder, enslavement, forcible transfer of population, forced pregnancy among others. The significant factor in allowing great space for crimes against humanity to lend itself to terrorism is that Article 7 of the Rome Statute<sup>41</sup> does not require the crimes to be committed in a context of a war. Therefore, the crime can take place in peace time, as is often the case for acts of terrorism.<sup>42</sup> While it may seem that crimes against humanity will provide the ICC with the necessary grounds to establish jurisdiction over acts of terrorism, problems nevertheless pertain. The requirement of a general policy in terms of a widespread or a systematic attack is a difficult threshold to reach with regards to acts of terrorism. To establish a crime against humanity, it must be established that a group is acting in the furtherance of a general organisational policy. Isolated attacks or randomly selected targets without clear structure or a greater plan will not amount to crimes against humanity. The fulfilment of such a requirement must be tested on a case by case basis even though it will in all instances be difficult to establish the exact linkage between a single attack and the greater organisational plan of the terrorist group.<sup>43</sup> Furthermore, terrorism has intentionally not been included in Article 7 as an underlying crime therefore acts of terrorism must fit within the context of one of the existing underlying crimes of crimes against humanity, such as enforced disappearances or torture. While Article 7 (k) acknowledges ‘other inhumane acts of similar character’<sup>44</sup> it does not seem plausible that the drafters of the Rome Statute intended to include terrorism under such additional inhumane acts. This lends towards a strict reading of the Rome Statute. Since terrorism was a well-established term during the time of the drafting of the Rome Statute, it can be argued that leaving terrorism out has been well intended. All in all, crimes against humanity provide the most plausible option under the current Rome Statute for the Court to establish jurisdiction over acts of terrorism.

To sum up, war crimes, genocide and crimes against humanity are three well-established core crimes within the Rome Statute. They are crimes of the gravest concern to the international community. To fill the existing legal vacuum, namely the difficulty in holding terrorists accountable for their actions before an international court, has not been fully corrected by relying on the existing core crimes of the Rome Statute. Furthermore, acts of nationals of a non-State Party that does not consent to the ICC’s jurisdiction on the soil of a non-consenting State party will fall outside the Court’s jurisdiction. Practically this would mean that had the terrorists committing the 11 September attacks on US soil survived, ICC would not have had the power to investigate or prosecute the terrorists. This essentially creates a gap in the existing criminal law and the jurisdiction of

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<sup>38</sup> Cohen *supra* nt 36, 242.

<sup>39</sup> Article 7, *Rome Statute*.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Cohen *supra* nt 36, 242-243.

<sup>43</sup> *Id.*, 243.

<sup>44</sup> Article 7(k), *Rome Statute*.

the Court.<sup>45</sup> In light of the current weaknesses of the ICC, the role of domestic courts in combatting terrorism becomes increasingly important.

#### IV. Role of National Courts in Holding Terrorists Accountable

Most crimes are prosecuted at a national level as various conducts are domestically criminalised. In the case of cross-border crimes, co-operation among states is required and for this purpose various bilateral as well as multilateral agreements have been established to ensure the exchange of information, extradition possibilities as well as to guarantee other forms of legal assistance. Such co-operation will allow domestic courts to effectively establish jurisdiction and bring persons to justice, even when the conduct is not purely of domestic concern.<sup>46</sup> This is also the case for terrorism. Since the devastating 9/11 attacks by Al-Qaeda, it has become increasingly common to see national legislation taking account of the threat of terrorism. Additionally, ICC operates on basis of principle of complementarity, therefore the vast majority of cases are dealt with by national courts.

The UN, in addition to regional organisations such as the European Union (EU) have enacted various legal acts at the international level in order to ensure that all states take part in preventing terrorism and bringing perpetrators to justice. Various UNSC Resolutions have been drafted. First Convention dealing with terrorism was already seen in 1963; The Aircraft Convention,<sup>47</sup> condemning terrorist acts on board of an aircraft. Ever since, a number of Conventions and Resolutions have emerged condemning specific acts of terrorism, ranging from seizing aircrafts, acts against internationally protected persons, taking hostages, illegal use of nuclear material as well as protecting safe maritime navigations. Most recently, Resolution UNSC S/RES/2255 (2015) on ‘Threats to international peace and security caused by terrorist acts’.<sup>48</sup> In addition, EU has developed its own Counter Terrorism Strategy.<sup>49</sup> Particularly after the Paris and Brussels attacks, EU has taken a more prominent role in preventing terrorism. All in all, the international legal framework has extensively covered acts of terrorism and states have, in general, implemented the said laws on a national level.

Several cases have arisen worldwide where domestic courts have successfully prosecuted individuals for acts of terrorism or for planning terrorist acts. In the United Kingdom, in case *Regina vs Tarik Hassane et al*, Mr. Hassane, the son of a Saudi Arabian ambassador, pleaded guilty to charges of conspiracy to murder and preparation of terrorism.<sup>50</sup> He was sentenced to prison for planning to kill policemen, soldiers and even

<sup>45</sup> Morris, M, “Terrorism: The Politics of Prosecution”, 5(2) *Chicago Journal of International Law* (2005) *Law* 405, 412-413.

<sup>46</sup> *Id*, 405.

<sup>47</sup> United Nations, *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963) 704 UNTS 220 (Tokyo Convention).

<sup>48</sup> UN Security Council, Resolution 2255, *Threats to International Peace and Security caused by Terrorist Acts*, 21 December 2015, (7590<sup>th</sup> meeting) S/RES/2255.

<sup>49</sup> Commission, *The EU Counter-Terrorism Policy: main achievements and future challenges*, COM (2010) 386 final.

<sup>50</sup> *Regina vs Tarik Hassane et al* cited in Pantucci, R, “The Islamic State Threat to Britain: Evidence from Recent Terror Trials”, 9(3) *CTC Sentinel* (2016) 19, p. 20 at <ctc.usma.edu/posts/the-islamic-state-threat-to-britain-evidence-from-recent-terror-trials> (accessed 24 May 2016).

civilians. Tarik Hassane, together with three other young men, obtained weapons but were captured and sentenced before the plan could be realised.<sup>51</sup> A second example is found in case *Lodhi v. The Queen*<sup>52</sup>, where the Court of Criminal Appeal of Australia held Faheem Lodhi guilty of possessing an item connected with a terrorist act, collecting or making documents connected to terrorist acts, as well as acting in preparation or planning a terrorist act. He was handed down a 20-year sentence. The third example is the recently ongoing case of Salah Abdeslam<sup>53</sup>, the mastermind behind the recent Paris attacks; he was captured in Brussels as a suspect for planning and taking part in terrorist acts. Capturing alleged terrorists or those planning terrorist acts and establishing prosecution for their actions is therefore common. Similar cases are frequently reported worldwide. Interesting to note, is that prosecution is not only limited over terrorist acts that have been already committed, instead national legislations have taken an active role in criminalising preparatory acts, including incitement to terrorism, as well.

So far it has been demonstrated how national courts play a decisive and important role in holding terrorists accountable for their actions. While this is certainly true, several issues may, nevertheless, be identified. First, since terrorism is a politically motivated crime, it is not unusual to see states being targets of terrorist acts or even sponsoring terrorism, as has notably been the case with for example, Iran.<sup>54</sup> The involvement of a State in an act of terrorism complicates the establishment of jurisdiction over the same acts as a state itself is involved. It seems unlikely that a state who sponsors terrorism, would, in fact, establish jurisdiction and bring to justice those responsible for the said acts. Therefore, an impetus exists to transfer the jurisdiction for State sponsored terrorism to an outside authority, a supranational institution, such as the ICC. This way the perpetrators of acts of terrorism will be shielded from justice by the state that sponsors their activities.<sup>55</sup> In the famous *Lockerbie* –case,<sup>56</sup> United States of America and the United Kingdom resorted to the UN Security Council as a supranational authority in order to gain custody of the defendant for criminal prosecution in domestic courts of UK and USA.<sup>57</sup> The suspects were Libyan nationals and Libya had announced it would prosecute the suspects in a Libyan national court. Since evidence had arisen of Libya sponsoring the bombing, national jurisdiction posed a problem.<sup>58</sup> Eventually, a compromise was reached as the suspects were tried in the Netherlands by Scottish judges. A second issue, related to prosecuting terrorists on a national level, is the weak national sentencing policies. It is not uncommon to see a person charged with a terrorism related crime but later be involved in a serious terrorist attack. In January 2015, the office of the Charlie Hebdo satire magazine was attacked by brothers Chérif and Saïd Kouachi. Chérif Kouachi had in fact, been earlier charged with conspiracy to commit acts of terrorism.

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<sup>51</sup> *Ibid.*

<sup>52</sup> Supreme Court of New South Wales, *R v Lodhi* [2006] NSWSC 691.

<sup>53</sup> The Guardian, *Paris attacks suspect Salah Abdeslam charged with murder, at* <[theguardian.com/world/2016/apr/27/paris-attacks-suspect-salah-abdeslam-appears-before-french-judges](http://theguardian.com/world/2016/apr/27/paris-attacks-suspect-salah-abdeslam-appears-before-french-judges)> (accessed 24 May 2016).

<sup>54</sup> Morris, *supra* nt 45, 405.

<sup>55</sup> *Id.*, 407.

<sup>56</sup> ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* ICJ Reports 1992, 3 March 1992.; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)* ICJ Reports 1992, 3 March 1992.

<sup>57</sup> Morris, *supra* nt 45, 408.

<sup>58</sup> *Id.*, 406-407.

Furthermore, one of the men suspected of helping to carry out the 13 November Paris attacks was Samy Amimour. Prior to the November 2015 attacks, Amimour had already been captured and charged with terrorist conspiracy in 2012. Therefore, questions have arisen regarding national sentencing policies and how effective they are in preventing the threat of terrorism.<sup>59</sup> The third issue is the difficulty in establishing jurisdiction over acts of terrorism. While a state may be able to identify and detain suspected terrorists, it has often been problematic to gather the sufficient evidence of terrorist acts or plans to commit acts of terrorism in order to make prosecution possible. In March 2016, a top German prosecutor expressed his concerns over prosecuting those suspected of fighting for Islamic State of Iraq and Syria (ISIS): '[w]e often have the impression that these people were not just in Syria as sentries or to be trained in the use of weapons, but that they took part in maimings, killings and bomb attacks (...) We assume that these perpetrators have blood on their hands, but we often can't prove it'.<sup>60</sup> Therefore, national courts rely on cooperation by other states in order to share information and data to be able to build a case against suspected terrorists. While national laws may be in place, they are not fully enforceable as investigative problems related to gathering necessary evidence pertain. The fourth major problem is the lack of uniformity among states with regards to methods of investigation and prosecution of acts of terrorism as well as overly broad terrorism laws. When no harmonised application to investigating acts of terrorism exists, states are free to approach the matter in any way they deem best which as a consequence can complicate cooperation among states. Due to a lack of a common definition on the crime of terrorism 'states are in a position to use their own national definitions and this opens the door to a fragmented approach and abuse'.<sup>61</sup> Varying standards, with regards to dealing with acts of terrorism, are a consequence of extremely broad terrorism laws. When laws are broad the risk of facing arbitrary arrests, human rights violations, long detention periods as well as other issues becomes commonplace.<sup>62</sup> Examples of broadly defined terrorism laws can be found in the UK and China. The UK has one of the most extensive anti-terrorism laws in the Western world. The UK anti-terrorism laws of 2000 and 2006 have been widely criticised as it catches those that the law was never intended for such as, journalists who are trying to influence the Government without any intentions to coerce or intimidate.<sup>63</sup> David Anderson, the independent reviewer of the UK Terrorism Acts called for a review of the terrorist act in his 2015 report.<sup>64</sup> On the other hand, China adopted a comprehensive counter terrorism bill in 2016, which has been equally criticised as overly broad and vague.<sup>65</sup> Media is now restricted on its ability to report on terrorist attacks or government responses. Wide discretionary powers to government agents and broad definitions of 'extremism' have caused concerns as to possible prejudice caused to dissidents and religious minorities.<sup>66</sup> What is therefore

<sup>59</sup> Journalist's Source, *Terrorism Sentencing: Challenges for criminal Prosecutors in U.S. and abroad*, 8 December 2015, <[journalistsresource.org/studies/government/criminal-justice/terrorism-sentencing-prison-crime](http://journalistsresource.org/studies/government/criminal-justice/terrorism-sentencing-prison-crime)> (accessed 25 May 2016).

<sup>60</sup> RT, *German Government struggling to build Cases against suspected ISIS Terrorists – Prosecutor*, 30 March 2016, <[rt.com/news/337762-germany-prosecution-isis-terrorists/](http://rt.com/news/337762-germany-prosecution-isis-terrorists/)> (accessed 25 May 2016).

<sup>61</sup> Paulussen, *supra* nt 1, 8; Poelgeest final report, *supra* nt 13, 574.

<sup>62</sup> Paulussen, *supra* nt 1, 21-23.

<sup>63</sup> Terrorism Act 2000, Chapter 11; Terrorism Act 2006, Chapter 11.

<sup>64</sup> Anderson, D, *Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, Print ISBN 9781474109277, Web ISBN 9781474109284, London, July 2014, at <[terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf](http://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf)> (accessed 25 May 2016).

<sup>65</sup> Counter-Terrorism Law of the People's Republic of China (2015) as in force on 1 January 2016.

<sup>66</sup> Roach, K, *Comparative Counter-Terrorism Law* (Cambridge University Press, New York, 2015), 42-43.

gradually seen is, that as states aim to combat the threat of terrorism, legislation is created to enable wide discretionary powers to investigate, gain confidential information and to detain individuals whenever suspicion of terrorist activity arises. However, what such activity entails has become difficult to clearly identify.

Gross human rights violations and lack of access to a judiciary are not uncommon elements of national counter terrorism strategies and this has led to a situation where finding the truth and serving justice may not take place and co-operation among states with different counter terrorism strategies will become increasingly difficult. As a consequence, combatting terrorism may not be fully effective. Varying national standards and different investigative methods as well as the involvement of states in terrorism have shown the urgent need of greater uniformity and enhanced cooperation among state authorities. While national jurisdiction can often be established, it may however not always be possible to exercise jurisdiction.<sup>67</sup> Consequently, for such a grave crime as international terrorism, increased action on the international level is needed.

## V. A Critical Analysis

Combating terrorism requires a multi-level approach. Domestic courts as well as the international community, including the ICC, all work towards more effective prevention of acts of terrorism. Nevertheless, majority of terrorism related cases will be dealt with by national courts. In addition, ICC plays an imperative role as the only permanent international court with the power to hold terrorists accountable. In reality, only a few cases would reach the ICC but the role of the court should nevertheless not be underestimated. ICC complements national courts, filling the gap left by unwilling, inefficient or unable states.<sup>68</sup>

The time for increased action and coherence in combatting terrorism could not be more imperative today.<sup>69</sup> Nevertheless, a genuine movement towards the birth of a crime of terrorism in the Rome Statute seems, for the time being, far from fruition. While a crime of terrorism under the Rome Statute would arguably have had added value, due to its distinct nature separate from the existing core crimes, it does however not suggest that a new crime of terrorism should be enacted under the current state of international criminal law. This is due to the lack of a common definition on an international crime of terrorism, making the creation of a new crime of terrorism difficult to properly justify. As long as State Parties cannot agree on what acts of terrorism would trigger criminal jurisdiction, the Rome Statute cannot realistically be extended. The ICC cannot afford being therefore, its jurisdiction should not be artificially stretched. Doing so would cause tension instead of providing solutions. It is nevertheless, for the time being, tempting yet short-sighted to push for a crime of terrorism. Instead, combatting terrorism requires a more refined and multi-layered method of bringing perpetrators to justice. Therefore, for now the role of the ICC should remain more modest. Instead of extending the Court's jurisdiction, the ICC can rather take on a more coordinating role, assisting domestic courts in bringing terrorists to justice.

<sup>67</sup> Betti, S, "The Duty to Bring terrorists to Justice and Discretionary Prosecution", 4(5) *Journal of International Criminal Law* (2006) 1104.

<sup>68</sup> Steigen, J, *The Relationship Between the International Criminal Court and national Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, Leiden, 2008), 189.

<sup>69</sup> Ragni, *supra* nt 8, 671-673.

## **VI. Conclusion**

Since combating terrorism is a complex multi-layered process, it must be concluded that domestic courts, international institutions as well as the ICC all have a role to play. A coordinative and supportive role of the ICC will greatly improve the current methods of preventing terrorism. In addition, more importance needs to be given to enhance cooperation, such as joint investigative teams, to improve national prosecution. Mutual trust among states must be in place to enable effective cooperation to be realised. Instead of simply trying to bring as many terrorists to justice on the basis of mere suspicions of terrorist activity, greater emphasis needs to be given to serving justice while also respecting human rights, rule of law as well as criminal law procedures in general.<sup>70</sup> Therefore, reaching a common definition on the crime of international terrorism cannot be stressed enough. A crime of international terrorism would ensure for more harmonised national laws, improved possibilities of extradition and criminality requirements. Most importantly, prosecutors would benefit from more defined and narrow terrorism laws.<sup>71</sup>

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<sup>70</sup> Paulussen, *supra* nt 1, 21-24.

<sup>71</sup> *Ibid.*