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Reviewing Developments in the Prosecution of Terrorism at the International Criminal Court

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Abstract

Today, the spread of terrorist crimes around the world requires a comprehensive definition, and international and regional documents can be used to help in this regard. After the terrorist attacks of September 11, 2001, global efforts against terrorism increased. Hence, the recognition of some terrorist acts as crimes against humanity and war crimes in international criminal law, the adoption of the Financing of Terrorism Convention, and the emergence of terrorism as a distinct international customary crime are promising developments for international prosecution of individuals who represent groups. Therefore, for the international prosecution of individuals who commit the crime of terrorism, it should be transformed into the ratification of an international treaty or the inclusion of terrorism as the fifth international crime in the Rome

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Statute and the expansion of the jurisdiction of the International Criminal Court (ICC). Despite the fact that the ICC does not have jurisdiction to prosecute terrorism crimes, the terrorist events of September 11, 2001 emphasized the need to include terrorist crimes as a crime within the jurisdiction of the International Criminal Court.

***Keywords*:** Prosecution of Terrorism, Rome Statute, International Criminal Court, September 11, 2001.

Introduction

The international community, which was faced with the phenomenon of terrorism in the second half of the twentieth century, reacted by adopting a series of international and even regional conventions on specific types of terrorist crimes and the obligations of states.[1] Despite the lack of legal standards for this phenomenon in today's world and the international community's facing security challenges, the international community has not been able to reach a consensus on it for ideological and political reasons, and this issue has always been raised as a problem. Today, terrorist threats in various forms and levels have put all countries and political systems of the world at risk, and no country is safe from these threats.

However, nowadays, in order to spread terrorist crimes all over the world, it is necessary to provide a comprehensive definition of terrorism easily, and in this regard, international and regional documents can be used for help. Therefore, according to the plurality of the aforementioned documents in the field of dealing with terrorist crimes, these documents follow common goals; these goals are to respond to the Trans nationalization of terrorist crimes by

[1] Namamian, Peyman. "Judicial Investigation of Terrorist Crimes within the Jurisdiction of National and International Criminal Courts." *Journal of Political Strategy* 6, no. 4 (2023): 247.

internationalizing the fight against it. However, due to the lack of any definition of terrorist crimes, governments do not have enough confidence in international courts to try terrorists. Of course, the expansion of the definitions of terrorism in international law and across domestic jurisdictions significantly weakens collective action in international law while strengthening the unilateral prosecution of terrorism.[2]

Although terrorism is still seen in its traditional forms, due to the changes and developments in the contemporary world, it has become a global phenomenon; no country is therefore immune to terrorism's effects and consequences in today's world. In the first five years after the 9/11 attacks, the US unilaterally opted for counter-terrorism strategies based on the use of military force, repression, and crime control policy. In addition to the US, in many other countries, the limited counter-terrorism strategy has gradually moved towards a broader approach to combating violent extremism, even though greater emphasis and priority are on prevention and expression. Furthermore, counter-terrorism measures are taken to repress and eradicate the extremists.[3] Terrorism is a phenomenon that links to crime and abuse of power because it violates the human rights of those who suffer harm as a result of crime and abuse of power. Crime and abuse of power could be described as the breach of fundamental rights and the denial or prejudice of these rights.

Many of these criminal acts may be war crimes, crimes against humanity, or genocide, collectively known as core international

[2] Baumer-Schuppli, Fabian. "The Proliferation of Definitions of Terrorism in International Law: A Story of Failed Symbolism and Premature Universal Jurisdiction." *Contemporary Challenges: The Global Crime, Justice and Security Journal* 1 (2020): 29.

[3] See, for example, at the regional level: European Commission 2019; see also Tajbakhsh 2010; and at the global level: United Nations Office of Counter-Terrorism.

crimes. Articles 6, 7, and 8 of the Rome Statute of the ICC list core criminal acts related to these crimes, such as torture, enslavement, murder, sexual slavery, attacks on civilians, and persecution. They are relevant in the context of the conflicts in Syria and Iraq.[4] When committed in the course of armed conflict, some of these acts can be war crimes, and when committed as part of a widespread or systematic attack directed against a civilian population, they can be crimes against humanity. Such acts may also constitute genocide if they are committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.[5]

Over the past 30 years, one of the key issues in the fight against international terrorism has been the development of a comprehensive legal definition in a global international treaty. Today, the international legal basis for the system of international counter-terrorism cooperation encompasses a wide range of instruments.[6]

Terrorist crimes, including sixteen international conventions under the supervision of the United Nations and their protocols related to terrorist acts, are undoubtedly a part of international criminal law in its broadest sense. Because these crimes have a political dimension, they are similar to very important international crimes, i.e., the main crimes. In all these crimes, like terrorist crimes, the identity of the victim is not taken into account, but the victim is targeted because he is a member of a moral, political, national, or religious group. In

[4] Stuart Casey-Maslen, "Prosecution of Terrorism as an International Crime," in *International Counterterrorism Law* (Cambridge: Cambridge University Press, 2024), 211.
[5] Kelisiana Thynne, "Better a War Criminal or a Terrorist? A Comparative Study of War Crimes and Counterterrorism Legislation," *International Review of the Red Cross* 103 (2021): 916–17.
[6] Vera Alizade, "Criminalization of International Terrorism in International Law" (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3763673; Suwita Hani Randhawa, "International Criminalization and the Historical Emergence of International Crimes," *International Theory* 14, no. 3 (2022): 476.

terrorist crimes, the victim is the second target and may even be chosen randomly, and the main target is the government or an organization that the victim is often associated with by being in a public place.[7]

However, to gather the topics and issues raised in this article, the method of document collection and using library and internet resources has been used. Therefore, the study and research method is developmental in terms of purpose and descriptive in terms of data collection.

I. Developments and Legal Realm

Since the early 1960s, many physical acts identified as terrorist activities have been criminalized through the adoption of regional anti-terrorism treaties. According to these treaties, certain terrorist acts, like other international crimes, including war crimes, crimes against humanity, genocide, and torture, are recognized as international crimes provided they meet the characteristics of the underlying offense. This is the case, since the early 1970s, the international community has announced its dissatisfaction or disapproval of terrorist acts, providing some reasons.[8]

Therefore, the U.N. has issued numerous declarations, resolutions, and reports in order to forbid and suppress terrorism. As it is clear from several instruments prepared by different departments of the U.N., this organization has assumed a leading role in fighting

[7] Saeed Farhadnia and Seyyed Ali Hanjani, "Challenges of International Criminal Law in Fighting against Terrorism," *Journal of Legal Research* 18, no. 40 (2020): 7–29.
[8] Mariona Llobet Anglí, Manuel Cancio Meliá, and Clive Walker, "Introduction to Precursor Crimes of Terrorism," in *Precursor Crimes of Terrorism*, ed. Clive Walker, Mariona Llobet Anglí, and Manuel C. Meliá (Cheltenham: Edward Elgar Publishing, 2022), https://www.elgaronline.com/display/edcoll/9781788976312/9781788976312.00006.xml.

terrorism. In addition, regional and supra-regional organizations and meetings have taken some steps to encounter and suppress terrorism, leading to the preparation, formulation, ratification, and publication of various instruments.[9]

On September 8th, 2006, the General Assembly of the U.N. adopted the "world anti-terrorism strategy," one of the aims of which is to introduce various anti-terrorism activities of the U.N. as a common framework.[10] On the basis of the objectives of the current study of terrorism definition, one of the most important dimensions of U.N. activities is that of the General Assembly *ad hoc* committee on preparation and formulation of the Draft Comprehensive Convention on Countering International Terrorism[11].[12]

It seems that the topical approach of regional treaties had the best effects in the past. Regional anti-terrorism treaties and domestic laws are shaped by regional or internal needs. Their aim is to coordinate and strengthen cooperation among the involved nations. When defining terrorism, nations act based on their own perceptions of the term and do not have to pay attention to other values. This, apparently, facilitates enacting and approving laws. However, the topical approach seems to be really useful, as it ensures international collaboration and relative consensus among the international community on confronting terrorism.

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[9] Jaafar Koosha and Peyman Namamian, "Position of Terrorist Acts in the Light of International Criminal Law," *Private Law Studies Quarterly* 38, no. 3 (2008): 243–48.
[10] UN General Assembly. Resolution 60/288, "The United Nations Global Counter-Terrorism Strategy," A/RES/60/288 (2006), http://www.un.org/terrorism/strategy-counterterrorism.html.
[11] UN Ad Hoc Committee on Terrorism. "Draft International Comprehensive Convention on International Terrorism." In Annexes to the Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996. UN GAOR, 57th sess., Supp. no. 37, UN Doc. A/57/37 (2002).
[12] The Ad Hoc Committee was established by UN General Assembly Resolution 51/210 of 17 December 1996.

However, these two plans will not be so appropriate for future implications of enforcing international regulations for terrorist crimes.[13]

On the one hand, past experiences have shown that terrorism is an ever-changing subject. Terrorists find new targets and methods to carry out attacks. Therefore, a topical approach is too slow to account for such changes. Instead of reacting and encountering, the international community must be capable of acting on the basis of an existing plan. Defining terrorism must be put at the top of the agenda and be the first step toward reducing or eradicating terrorism successfully.

Although it is clear that governments have not agreed to define terrorism as an independent crime, it is notable that there is no penal reaction to terrorism as an independent crime under general international law.[14] Also, it seems that penal reaction to terrorism as a potentially independent crime contradicts two important components of the principle of legality of crime and its punishment, that is, "barred ex-post facto legislation" and "specification," which provide that laws imposing penal reaction should be specified as much as possible so that a potential offender is informed of the respective mens rea and actus reus.[15] Although the specification principle is not absolutely applicable to international criminal law, it seems that denying its applicability, or indeed applying barred ex-post facto legislation to the

[13] Marcello Di Filippo, "Terrorist Crimes and International Cooperation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes," *European Journal of International Law* 19, no. 3 (2008): 549.

[14] Henok Kebede Bekele, "Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem," *Beijing Law Review* 12, no. 2 (2021): 38–42.

[15] Article 22, *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90.

concept of terrorism as an independent crime, is not justified for two reasons:

1. There is no agreed definition of terrorism as a potentially independent crime since subjective and objective elements of the crime are ambiguous and not clarified by law science or by the ICC's statute.

2. There is no legitimate justification for the inapplicability of barred ex-post facto legislation and specification principles to terrorism as an independent crime because it is possible to ignore both principles in favor of defending society against such acts and to prosecute criminally individual perpetrators of terrorist acts for special manifestations of terrorism.

However, terrorism can't be criminalized as a potentially independent crime under international law today. So taking such a policy violates the principle of legality of crime and its punishment, especially barred ex-post facto legislation and specification ones.

II. Terrorist Groups and International Criminal Justice

War crimes, crimes against humanity and genocide are considered the most serious crimes under international law and are of concern to the international community as a whole. According to the report of the UN Commission on Human Rights[16], which was replaced by the UN Commission on Human Rights, serious crimes under international law include "grave breaches of the Geneva Conventions, Additional Protocol I and other violations of international humanitarian law (IHL), which are crimes under international law, genocide, [and]

[16] UN Commission on Human Rights. "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity." E/CN.4/2005/102/Add.1, February 8, 2005. https://ap.ohchr.org/documents/alldocs.aspx?doc_id=10818.

crimes against humanity. The jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, which include war crimes, crimes against humanity, genocide, and the crime of aggression.

In addition to the counter-terrorism conventions that include the obligation aut dedere aut judicare – also known as the obligation to extradite or prosecute – UN Security Council Resolution 1373 (2001) on counter-terrorism specifically calls on all States to deny safe haven to sponsors, financiers, and other persons associated with terrorism. According to the UN Counter-Terrorism Committee, this is considered an obligation to extradite or prosecute.

Other UN Security Council resolutions, such as UN Security Council Resolutions 2178 (2014) and 2396 (2017), also impose an obligation on States to bring those responsible for terrorist crimes to justice.[17] If all States adhered to the aut dedere aut judicare obligations, this would effectively mean that there would be no place to hide, no safe haven for any terrorist. But the lack of a definition of terrorism or being a terrorist creates political and practical problems.

The Kurdistan Workers' Party (PKK)[18] is designated as a terrorist group by the European Union, Turkey, and several other countries, including the United States (USA) and Canada, but not by the United

[17] UN Security Council. "Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001)." S/2004/70, January 26, 2004, 6. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/219/97/PDF/N0421997.pdf?OpenElement.

[18] See "Foreign Policy – PKK," Republic of Turkey Ministry of Foreign Affairs, https://www.mfa.gov.tr/pkk.en.mfa; Council Implementing Regulation (EU) 2022/147, Official Journal of the European Union L 25/1 (February 4, 2022), annex, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:025:FULL; US Department of State, "Designated Foreign Terrorist Organizations," Bureau of Counterterrorism, https://www.state.gov/foreign-terrorist-organizations/; and "Currently Listed Entities," Public Safety Canada, https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#43.

Nations. Sweden's recent refusal to extradite alleged PKK members, such as Turkish journalist Bulent Kenes, is what prompted Turkey to initially oppose Sweden's accession to NATO, alleging that Sweden harbors terrorists.[19] Therefore, requiring extradition or trial can be seen as laying the groundwork for an "effective system of criminalization and prosecution" and key to combating impunity for core international crimes and terrorism offences.

However, some countries, such as the United Kingdom (UK) and the Netherlands, have revoked the citizenship of their foreign fighters, which poses significant challenges to the obligation to extradite or prosecute under several counter-terrorism conventions, such as the 1997 International Convention for the Suppression of Terrorist Bombings, or the 1999 International Convention for the Suppression of the Financing of Terrorism. When a country revokes the citizenship of its citizens suspected of terrorist activities and expels them, it is in breach of its obligations under the terrorism-related conventions.

Only the Genocide Convention includes a political crime exception to extradition, meaning that states should not treat genocide as a political crime, such as terrorism, and therefore cannot use this as a pretext to refuse an extradition request.[20] To combat impunity, it is essential not only to strengthen a state's ability to investigate and prosecute core international crimes but also to improve extradition and MLA. In an initiative led by Slovenia, Argentina, Belgium, Mongolia, the Netherlands, and Senegal to address this cooperation gap, states have negotiated a draft Convention on International Cooperation in

[19] Sean Beeghly, "Sweden Supreme Court Rules Journalist May Not Be Extradited to Turkey," Jurist, December 20, 2022, https://www.jurist.org/news/2022/12/sweden-supreme-court-rules-journalist-may-not-be-extradited-to-turkey/.
[20] "Mutual Legal Assistance and Extradition Initiative," Republic of Slovenia Ministry of Foreign and European Affairs, https://www.gov.si/en/registries/projects/mla-initiative/.

the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes, etc. International Crimes After numerous consultations.

While the grounds for refusal were considerably broad and allowed States to refuse mutual legal assistance based on sovereignty, security, and public order (a set of fundamental values that constitute the essence of a society), these grounds were removed in the final version of the Convention. On 26 May 2023, the Ljubljana-Hague Convention was ratified by 80 countries, marking a significant milestone in achieving accountability for core international crimes.[21]

III. Global Jurisdiction and Prosecution Mode

Although at present ICCs do not enjoy jurisdiction to deal with terrorism, it does not mean it has no jurisdiction over perpetrators of terrorist crimes. If a terrorist act falls within the framework of the definition of crimes against humanity set forth in Article 7 of the ICC's Statute, and it is a crime over which the court indirectly has specific jurisdiction, it implies that the ICC enjoys jurisdiction over terrorism.[22]

The argument is that the framework for crimes against humanity differs from previous frameworks, with some aspects narrower and others broader. Article 7(1) of the court statute defines widespread or organized attacks on civilian populations with knowledge of the situation. Article 7(2)(a) further clarifies that such attacks involve multiple acts (e.g., murder, genocide, slavery, torture) against civilians, aimed at advancing a government or organization's policy.

[21] Republic of Slovenia. "The Ljubljana–Hague Convention Adopted." News Release, May 26, 2023. https://www.gov.si/en/news/2023-05-26-the-ljubljana-hague-convention-adopted/.
[22] Hojjat Salimi Turkamani, "Terrorism and Criminal Justice System: International Criminal Court or Mixed Tribunal?" *Criminal Law Research Journal* 9, no. 2 (2018): 183.

The perpetrator (a terrorist) must be aware that their actions constitute such an attack.[23]

This relationship between a single act and a widespread attack is the main element converting a simple delict into one of the gravest crimes. So the offender must be aware of this central and essential relationship. As stated earlier, Article 7 (2) (a) refers to the possibility for crimes against humanity to occur within an extensive and organized context.

The link between a single act and a widespread attack is key in transforming a simple crime into one of the gravest offenses. The offender must be aware of this connection. Article 7(2)(a) highlights that crimes against humanity can occur within an extensive, organized context, including non-governmental actors like terrorist organizations.[24] International law has evolved to encompass such groups, and the 9/11 attacks could theoretically be classified as crimes against humanity.[25] While al-Qaeda had attacked U.S. facilities before, there are multiple reasons to consider 9/11 within this broader context. However, Article 7 appears unsuitable for prosecuting terrorists.

a) Reasons for Non-Acceptance

Based on the analysis presented, it can be concluded that, if Article 7 of the Court Statute is interpreted literally, terrorism could be considered a crime against humanity, encompassing all its aspects, and those who commit such acts could be prosecuted. However, as

[23] Cian C. Murphy, "Terrorism and Transnational Law: Rules of Law under Conditions of Globalization," *Law Research Paper Series*, University of Bristol Law School (2019), https://www.bristol.ac.uk/law/research/legal-research-papers.
[24] Sam Mullins and James K. Wither, "Terrorism and Organized Crime," *The Quarterly Journal* 15, no. 2 (2016): 73.
[25] M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd rev. ed. (The Hague: Kluwer Law International, 1999), 69.

previously stated, there are well-documented reasons why terrorism is not included under the scope of Article 7. The following points are noteworthy in the context of evaluating the reasons for excluding terrorism from the provisions of Article 7 of the Court Statute:

1. The history of drafting the Court Statute reveals that prior to the 1998 Rome Diplomatic Conference, efforts to include terrorism within the jurisdiction of the International Criminal Court (ICC) were limited to treating terrorism as an independent crime (whether by defining particular manifestations of terrorism or by considering terrorism as a potential independent crime alongside specific forms), rather than incorporating it within crimes against humanity.

2. In 1997, the Rome Diplomatic Conference passed a resolution recommending that a Review Conference specifically address the crime of terrorism within the framework of the ICC's jurisdiction. This arguably indicated that terrorist acts should not be included in the Court Statute.[26]

3. The generally accepted approach to formulating the Court Statute was that it should incorporate the established principles of international common law. If terrorist acts were considered crimes against humanity under international common law, they could reasonably be included in Article 7 as a crime against humanity.

4. Should terrorism be included under Article 7, perpetrators of such acts might reasonably argue that such an inclusion would violate the principle of legality regarding crimes and punishments.

5. A distinctive feature of terrorism is its intent to spread terror and fear, or to intimidate a population, or force a government or organization to act (commission) or refrain from acting (omission). If

[26] William A. Schabas, "Theoretical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict," *Fordham International Law Journal* 26 (2003): 936-939.

terrorism were categorized under Article 7, there would be no specific provision addressing this unique characteristic. Furthermore, Article 7 does not distinguish between terrorism and acts of national liberation or self-determination.

b) Limitations of Proceedings

Even if it is assumed that terrorism is under the Court's jurisdiction, other obstacles would appear to be overcome prior to judgment.

Therefore, the Court considers certain jurisdictional obstacles in addressing terrorism: first, the Court has jurisdiction only over crimes committed after the statute became binding. For a nation becoming a member after the statute became binding, the Court is authorized to address the crimes committed on that nation after the Court statute became binding unless that nation has issued a declaration according to Article 12, clause 3 of the Court statute; and second, as stated earlier, a particular terrorist element needs to meet criteria a crime against humanity meets, indeed, it needs to be in the realm of one or more crime defined as crimes against humanity.[27]

The Court jurisdiction complements national criminal jurisdiction. So the Court would not address a terrorist act which can be investigated or tried by a state having jurisdiction over it. Having reasonable evidence to initiate an investigation, the prosecutor is required to inform all member states, as well as the states that are naturally qualified to address the crimes under investigation. However, existing complementary regulations raise this question: "Under which conditions would the Court exercise its jurisdiction over terrorism if the governments that tend to refer the case to the Court or that are members of it, in fact, are those governments willing

[27] Stella Margariti, "Defining International Terrorism to Protect Human Rights in the Context of Counter-Terrorism," *Security and Human Rights* 29 (2018), 29-31.

to try terrorists inside their own country?" A real scenario is the situation of a terrorist supporting state to which the terrorists' trial can't be relegated. An example is the Lockerby case related to the trial of two Libyan nationals for bombing Pan-American flight 103 on 21 December 1988, who were supported by the Libyan government. Libya did not extradite suspects to the United State or England to be prosecuted; on the contrary, it announced that it would try the accused in its own national courts.[28]

IV. The Territorial Capacity of the Rome Statute

In fact, there are several anti-terrorism treaties presently that should provide the bed to formulate an article relating to terrorist crimes. Some unique representatives of the preliminary committee on Review Conference Team Work disagreed with including crimes based on the treaty because of concerns about the extension of ICC's court's jurisdiction.[29] They claimed that

Universal adoption of the statute would possibly be endangered because the Court has limited financial and staff resources. But this concern seems irrelevant, since the Court would exercise its jurisdiction under the complementary jurisdiction principle only when a state would not do so genuinely and truly. Some governments, of course, claim that the existing treaties' performance would be disrupted in the case that jurisdiction over terrorist acts is given to the

[28] Inez Braber, "Terrorism as a New Generation Transnational Crime: Prosecuting Terrorism at the International Criminal Court," in *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach*, ed. Harmen van der Wilt and Christophe Paulussen (Cheltenham: Edward Elgar Publishing, 2017), 79-81.

[29] Molly McConville, "A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court," *American Criminal Law Review* 37 (2000): 92.

ICC. But this reasoning is not persuasive. ICCs would not withdraw their jurisdiction in situations where the states pass judgment, whether based on a treaty or otherwise, properly.[30]

However, it is possible to include many existing treaties in the Court statute. However, two conventions titled "Tokyo Convention" and "Convention on Marking Plastic Explosives for the Purpose of Later Detection" seem not to be suitable for being included in the statute. This is because the Tokyo Convention forbids acts threatening the safety of aircraft, or people and property on board, and/or endangering order and discipline within the organization. This convention was not merely adapted to encounter terrorist acts aimed at national aviation, rather it is regarded as a manifestation of common law.[31] In particular, items included in Article 11 clearly reflect this convention's unfitness in terms of judgment since it calls for states to take necessary and appropriate actions to restore control over hijacked planes; thus, Article 11 isn't a regulation but an advisory view in the form of an article related to cooperation and collaboration between states.

In addition, today, illegal aircraft seizure is covered by a separate convention adopted in order to fill broad gaps of the Tokyo Convention, which is not qualified to be included in the Rome Statute because of existing drawbacks and faults. Also, the Convention on the Marking of Plastic Explosives for the Purpose of Later Detection should not be included in ICC's statute since it addresses member states and contains only a series of assisting and advisory items. But the Convention on Physical Protection of Nuclear Material, entered

[30] Shubhra Sanyal, "International Laws to Control Terrorism: A Comparative Study," *Asian Journal on Terrorism and Internal Conflicts* (2015), https://ssrn.com/abstract=3232739.
[31] Ilias Bantekas et al., *International Criminal Court* (London: Cavendish Publishing Limited, 2001), 96.

into force on 8 February 1987, has a two-fold objective. This convention sets the level of physical protection for nuclear material in international transit (articles 3-6) and provides measures against illegal acts involving nuclear material with internal use, storage, or international/national transit (article 7).

Since Article 7 (1) explicitly states which crimes are punishable by domestic law, it seems that this convention should be included in the statute as an article related to terror crimes. Other conventions clearly specify illegal acts, so they have potential for being included in the statute.

However, the following anti-terrorism conventions are notable in terms of their objectives and subjects:

A. Aviation-related Conventions

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (14 September 1963)
2. Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970)
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (23 September 1971)
4. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (24 February 1988)
5. Beijing Convention on the Suppression of Unlawful Actions Against Civil Aviation (10 September 2010)
6. Protocol to the Beijing Convention on Unlawful Seizure of Aircraft (10 September 2010)
7. Protocol to the Convention on Crimes and Other Acts Committed in Aircraft (4 April 2014)

B. Maritime-related Conventions

1. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988)

2. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (10 March 1988)

C. Nuclear-related Conventions

1. Convention on the Physical Protection of Nuclear Material (3 March 1980)
2. International Convention for the Suppression of Acts of Nuclear Terrorism (13 April 2005)

D. Financing Terrorism

1. International Convention for the Suppression of Financing Terrorism (9 December 1999)

E. Hostage-taking and International Protection

1. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (14 December 1973)
2. International Convention Against Taking Hostages (17 December 1979)

F. General Terrorism-related Conventions

1. International Convention for the Suppression of Terrorist Bombings (15 December 1997)
2. Convention of Marking Plastic Explosives for the Purpose of Later Detection (1 March 1991)

G. Draft and Comprehensive Conventions

1. Draft Comprehensive Convention Against International Terrorism (2002)

The majority of these conventions were established earlier within the preliminary committee draft. Since the proposal of this bill in 1997, two new international anti-terrorism conventions titled "International Convention for Suppression of Terrorist Bombings"

and "International Convention for the Suppression of Financing Terrorism" took effect, and, in this direction, criminalized fundamental and widespread terrorist activities and played a major role in reducing terrorism. So it seems that both treaties should be included in the form of an article to address terrorist crimes.[32]

Since terrorism has been an ever-developing problem, it is likely that new treaties will be placed on the future agendas of governments and international organizations. In this sense, a treaty titled "International Convention for the Suppression of Acts of Nuclear Terrorism" was approved by the U.N. General Assembly in 2005 and became binding on 7 July 2007. This treaty is the 13th instrument that has already been approved to confront terrorism. Recent convention has taken into account the global approach used in many previous anti-terrorism treaties and has criminalized acts related to the convention subject. However, even if the international community has no success in achieving an agreed definition of terrorism prior to the Review Conference, it should at least include international anti-terrorism conventions that relate to terrorist crimes under a separate regulation in the statute.[33]

[32] A look at international documents related to the financing of terrorism shows that these documents set conditions and criteria for the exercise of criminal jurisdiction. The Convention on the Suppression of the Financing of Terrorism has specified the criteria for jurisdiction for the judicial institutions of the countries that are parties to the convention. Referring to the legislative policies of countries, it is observed that countries differ in the manner and scope of exercising criminal jurisdiction. Most countries base their criminal jurisdiction on territory and use the principle of territorial jurisdiction to protect national security. The principle of territorial jurisdiction is the oldest and most fundamental principle for the implementation of criminal laws that has existed since the formation of states. Of course, the above principle has gradually lost its former validity due to the trans nationalization of some crimes, and in recent decades, a fundamental change has occurred in the concept of criminal jurisdiction; Ahmad Mohammadi and Bagher Shamloo, "Jurisdiction to Investigate Terrorist Financing Crimes," *Journal of Criminal Law and Criminology* 11, no. 21 (2023): 27.

[33] Agata Kleczkowska, "Why There Is a Need for an International Organ to Try the Crime of Terrorism: Past Experiences and Future Opportunities," *Hungarian Journal of Legal Studies* 60, no. 1 (2019): 45–46.

Nevertheless, the prospect of adopting such an article seems favorable. States that approved these treaties act on the basis of "trial or extradition." The only difference in including these treaties in the Rome Statute is that, in cases where states are unwilling or unable to prosecute terrorists, the Court takes action, usually filling the existing gap easily.

In 2010, the Rome Statute Review Conference was held for 10 days, hosted by Kampala, Uganda.[34] During this period of time, the Conference dealt with issues challenging the international system not previously included in the Court's jurisdiction. As the basis for holding the Conference, issues under debate included such subjects as "definition of crime of aggression"[35], "Review of Article 124 of the Statute", and "Review of Article 8 of the Statute regarding the use of mass destruction weapons in non-international armed conflicts". This is the case while, unfortunately, the definition of terrorism was not accepted again due to disagreement among participating states over terrorism in terms of outlining the subject at the Review Conference.

As considered earlier, the Court has no jurisdiction over terrorist crimes. Moreover, the Court's jurisdiction is limited to the gravest crimes concerning the international community as a whole. So, even if a terrorist attack is regarded as a crime against humanity or is performed in conjunction with an armed conflict and regarded as a war crime, it does not necessarily mean that it falls into the Court statute.[36]

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[34] The Rome Statute Review Conference, *Impact of the Rome Statute and the International Criminal Court* (Kampala, 2010).

[35] Anja Seibert-Fohr, "The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC," *American Society of International Law* 12, no. 24 (2008): 101.

[36] Cassandra Christina Rausch, "Fundamentalism and Terrorism," *Journal of Terrorism Research* 6, no. 2 (2015), 78.

But a considerable point is that tens of international and regional acts have already been approved by the international community in determining crimes and punishments, among which the lack of a perfect and proper treaty is apparent, generally due to the unwillingness of international superpowers to implement them. In particular, this incompetence has been visible in executing decisions of tribunals like the ICC for the former Yugoslavia.[37]

Thus, considering the establishment of an international tribunal as well as the lack of encountering these problems, it can be stated that the Security Council can guarantee international regulations, especially the Court decisions, to be implemented perfectly. In this direction, the state's roles should not be ignored. So, the Rome Statute established some rules regarding cooperation between states and the Court, on the basis of which Articles 87 to 102 from chapter 9 state the government's obligations in this area.

V. Exercise of Jurisdiction and the Conditions Governing it

Courts may declare jurisdiction if there is no territorial or personal connection to the crime or the perpetrator and victims, but the crime is so heinous that it constitutes a crime against the international community. Universal jurisdiction is the mechanism by which a State can prosecute core international crimes. However, a distinction must be made between whether States have an obligation or a right to establish universal jurisdiction over core international crimes. States are obliged to establish universal jurisdiction over crimes that constitute grave breaches under the Geneva Conventions, while States

[37] "The International Legacy of the Yugoslav War Crimes Tribunal," *World Politics Review*, accessed May 12, 2026, https://www.worldpoliticsreview.com/the-international-legacy-of-the-yugoslav-war-crimes-tribunal/.

have the right under customary international law to establish universal jurisdiction over war crimes.

Grave breaches are a more limited subset of war crimes[38] and include intentional killing, torture, unlawful detention, or deportation.54 States also have the right, although without the obligation, due to the lack of treaty provisions, to establish universal jurisdiction over crimes against humanity and genocide. However, many states around the world have implemented universal jurisdiction for one or more core international crimes in their domestic law. In some countries, such as Sweden and Germany, the suspect need not be present in the country to initiate criminal proceedings under universal jurisdiction. However, prosecutors have the discretion not to initiate an investigation unless the likelihood of the suspect being apprehended is very remote.[39] In the Netherlands, the presence of the accused is a condition for initiating an investigation when the alleged core international crime was committed abroad, unless the perpetrator or victim is Dutch.[40] In addition to claiming jurisdiction based on the principle of active nationality, many countries have extended universal jurisdiction to terrorist crimes, in addition to core international crimes. This allows Dutch courts to declare jurisdiction over terrorist acts committed abroad in accordance with domestic law.

However, universal jurisdiction remains controversial and politicized. The fact that the application of universal jurisdiction has been under discussion for over a decade shows how controversial it is.

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[38] Justice for Victims of War Crimes Act (2022), S. 4240, accessed May 12, 2026, https://www.justsecurity.org/wp-content/uploads/2022/12/War-Crimes-Act-2022.pdf. uploads/2022/12/War-Crimes-Act-2022.pdf.

[39] Germany, Code of Criminal Procedure, sec. 153f, accessed May 12, 2026, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1367.

[40] Netherlands, International Crimes Act, art. 2, accessed May 12, 2026, https://wetten.overheid.nl/BWBR0015252/2020-01-01.

Hence, the scope and application of universal jurisdiction have also been debated and contested in various international fora such as the Global Counter-Terrorism Forum (GCTF) and the United Nations. For example, at the Sixth Committee of the United Nations in 2018, the representative of Kenya stated that "universal jurisdiction should not be allowed to become a wildfire, uncontrolled in its spread and destructive of orderly legal processes."[41] It is applied as a last resort, and the primary responsibility for prosecuting core international crimes lies with the States where the crimes were committed or with the State of nationality.

VI. The Prosecution of Terrorism in the International Criminal Court: Comparative Legal Assessment and Political Challenges

The prosecution of terrorism varies significantly across domestic jurisdictions, reflecting different legal traditions, political contexts, and historical experiences with terrorism. Analyzing the approaches of the United States, the United Kingdom, and France highlights divergent national counterterrorism laws and underscores the complexity of establishing a universal definition of terrorism. This divergence also illuminates the potential role of the ICC's in harmonizing global efforts against terrorism.

Meanwhile, the inclusion of terrorism within the jurisdiction of the International Criminal Court faces significant political challenges rooted in geopolitical dynamics and concerns about state sovereignty. While the legal imperative for a global framework is clear, the

[41] United Nations General Assembly Sixth Committee, "Without Clear Definition, Universal Jurisdiction Principle Risks Misuse, Abuse Sixth Committee Speakers Warn," GA/L/3571, October 10, 2018, accessed May 12, 2026, https://press.un.org/en/2018/gal3571.doc.htm.

political motivations of powerful states often hinder progress in this area.

a) Comparative Legal Assessment

In the United States, terrorism is prosecuted under a comprehensive legal framework, including the USA PATRIOT Act of 2001[42], which significantly expanded federal authority to investigate and prosecute terrorism-related crimes. The act is very complex and lengthy, with ten main parts and 1,016 subparts. Its stated purpose is to deter and punish acts of terrorism in the United States and around the world, to strengthen law enforcement investigative tools, and for other purposes.[43] It is worth noting that the act's major provisions are in Title I, Enhancing Homeland Security Against Terrorism. Title II, Strengthening Oversight Procedures, including expanding the Electronic Crimes Task Force initiative; Title III, "Regulating International Money Laundering for the Financing of Terrorism. and Title IV, U.S. Border Protection. Title V, "Removing Obstacles to Terrorism Investigation, including requiring DNA testing of all violent offenders, disclosure of educational (and library) records to the FBI, and payment of rewards to terrorism informants. Title VI provides assistance to victims of terrorism and the families of public safety officers. Title VII enhances information sharing among federal, state, and local law enforcement. Title VIII defines, strengthens, and increases penalties for terrorism. Title IX is designed to improve and coordinate federal intelligence collection, and Title X provides various definitions, including expanding electronic demonstrations. It also provides funding for bioterrorism preparedness/response. The U.S.

[42] U.S. Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty* accessed May 12, 2026, https://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf.
[43] Terrorism Prosecution Database, Center on National Security at Fordham Law, accessed May 12, 2026, https://www.centeronnationalsecurity.org/terrorism-database

legal approach emphasizes the concept of "material support for terrorism, which allows individuals who provide resources, training, or financial support to designated terrorist organizations to be prosecuted even if they are not directly involved in acts of violence. The United States also uses military commissions for specific cases involving foreign nationals, particularly in the context of Guantanamo Bay, reflecting a dual legal system that combines civilian and military jurisdictions.[44]

The UK uses a broad legal definition of terrorism under the Terrorism Act 2000[45], which includes acts designed to influence the state or intimidate the public for political, religious, or ideological purposes. The UK framework emphasizes preventive measures, including control orders, temporary restraining orders, and extensive surveillance powers under the Investigatory Powers Act 2016[46]. Prosecutions are often conducted in specialist courts with provisions to protect sensitive information and national security interests. It is also noted that the UK has introduced administrative measures to combat terrorist offenses. As part of the Anti-Terrorism, Crime and Security Act 2001[47], which was passed in response to the September 11 attacks, it established a system of indefinite administrative detention for foreign nationals suspected of committing terrorist offenses.[48] In 2015, the Counter Terrorism and Security Act amended some of the provisions of the Terrorism Prevention and Investigation

[44] Nicole Hallett, "The Use and Abuse of Domestic National Security Detention," *Seattle University Law Review* 45 (2022): 539–540.
[45] United Kingdom, Terrorism Act 2000, c. 11, https://www.legislation.gov.uk/ukpga/2000/11/contents.
[46] United Kingdom, *Investigatory Powers Act 2016*, c. 25, https://www.legislation.gov.uk/ukpga/2016/25/contents.
[47] United Kingdom, *Anti-terrorism, Crime and Security Act 2001*, c. 24, https://www.legislation.gov.uk/ukpga/2001/24/contents.
[48] Part 4, *Anti-Terrorism, Crime and Security Act* 2001, c. 24 (U.K.).

Measures Act and reintroduced the controversial involuntary relocation measure that had existed under the 2005 Control Order regime but was removed from the Terrorism Prevention and Investigation Measures Act due to civil liberties concerns (Section 16(3), Counter Terrorism and Security Act 2015)[49]. In practice, few Terrorism Prevention and Investigation Measures Act measures have been issued since their enactment, and as of October 2016, only six Terrorism Prevention and Investigation Measures Act measures were in force.[50] It should be noted that the Foreign Office and the Home Office of the United Kingdom initiated the preparation of a "Counter-Terrorism Strategy."[51] In July 2023, it was submitted to Parliament for review and approval.

In France, the legal system considers terrorism both as an individual act and as part of organized criminal activities. French anti-terrorism laws are integrated into the penal code, and specialized anti-terrorism judges and prosecutors handle cases. France has a centralized judicial system that allows for widespread pre-trial detention, extensive investigative powers, and the use of dedicated anti-terrorism courts. The French approach also emphasizes preventing radicalization through social programs and monitoring extremist networks. In addition, some of the measures available in France that can be applied to terrorist offenders have long existed, but

[49] United Kingdom, *Counter-Terrorism and Security Act 2015*, c. 6, https://www.legislation.gov.uk/ukpga/2015/6/contents.
[50] HM Government, *Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011*, Cm 9348 (London: The Stationery Office, October 2016), 14.
[51] HM Government, *The United Kingdom's Strategy for Countering Terrorism 2023*, accessed May 12, 2026, https://assets.publishing.service.gov.uk/media/650b1b8d52e73c000d54dc82/CONTEST_2023_English_updated.pdf.

not as part of policies to counter terrorist crimes.[52] In particular, the provisions of the Immigration Code allow administrative authorities to prohibit the entry of foreigners who are considered a threat to public order or to issue expulsion orders against foreigners who pose a serious threat to public order.[53] In response to the very serious threat posed in recent years, France has adopted several anti-terrorism laws, including several administrative measures. In 2014, it adopted the "Law on Strengthening the Fight Against Terrorism".[54] In 2022, France adopted the "Anti-Terrorism and Intelligence Law" to provide security agencies with tools to prevent terrorism. This law creates a new chapter in the internal security regulations that aims to regulate the surveillance programs of French intelligence agencies, in particular domestic and foreign intelligence programs.[55]

It is strategic to seek new tools to effectively address the threats posed by the conduct of terrorist offenders as part of a coherent strategy to counter terrorist crimes. Human security, as a fundamental human right, must be upheld by States as a legal obligation. However, the actions taken by States in response to terrorist crimes have themselves often posed serious challenges to human rights and the rule of law. In particular, as States increasingly rely on administrative mandates to combat terrorist crimes. Thus, the differing national approaches highlight the challenges in achieving a unified legal framework for the international prosecution of terrorism. The ICC can

[52] Sharon Weill, "French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France," *International Review of the Red Cross* 100, nos. 907–909 (2019): 211–212.
[53] France, *Code de l'entrée et du séjour des étrangers et du droit d'asile*, arts. L213-1–L213-9 and L521-1–L521-5.
[54] France, *Law No. 2014-1353 of 13 November 2014 Strengthening Provisions on the Fight Against Terrorism*.
[55] Félix Tréguer, "Overview of France's Intelligence Legal Framework," research report, Centre de Recherches Internationales (CERI), 2021, 7-8,

play a key role in standardizing definitions, legal procedures, and human rights protections, thereby fostering international cooperation and greater accountability.

b) Political Challenges

One of the primary obstacles is states' reluctance to cede judicial authority to an international body. Countries like the United States, Russia, and China have historically resisted expanding the ICC's mandate, fearing that it could be used for politically motivated prosecutions against their nationals or military personnel. This reluctance reflects broader concerns about the erosion of national sovereignty and the potential for international legal mechanisms to interfere with domestic political and security decisions.

As Western states and their networks of allies enter a new era of strategic competition, they face a diverse range of terrorist threats.[56] Geopolitical interests complicate efforts to bring terrorism within the jurisdiction of the International Criminal Court. For example, the designation of particular groups as "terrorist organizations" often varies based on strategic alliances and regional interests.

Additionally, regional organizations and blocs have expressed skepticism about the ICC's impartiality. The African Union, for example, has criticized the ICC for disproportionately targeting African leaders, raising concerns about selective justice and the court's susceptibility to political pressure.[57] This perception diminishes the

[56] Jacob Ware, "Geopolitics and Counterterrorism," in *the Palgrave Handbook of Contemporary Geopolitics*, ed. Zak Cope (Cham: Springer Nature, 2024), 1205-1206.

[57] Despite the adoption of numerous documents by the international community and the creation of a structure, including the Rome Statute establishing the International Criminal Court and the establishment of ad hoc and hybrid international criminal courts, the legal mechanisms of these courts were not effective in combating international crimes on the African continent through the application of the International Criminal Court's jurisdiction. The Court's position in dealing with crimes under its jurisdiction posed challenges for African governments, and in recent years and decades this has led to non-cooperation and threats to

ICC's legitimacy and complicates efforts to expand its jurisdiction to cover terrorism.[58] However, the growing insecurity in some parts of the world due to terrorist threats and attacks highlights two important issues: first, the importance of adopting a human rights-based approach to countering terrorism and the violent extremism that leads to terrorism. Second, international cooperation on human rights as a fundamental condition for preventing and countering terrorism.

Therefore, all counter-terrorism efforts must be consistent with international human rights standards. While human rights are often seen as an obstacle to counter-terrorism efforts, they have the potential to better identify the root causes and underlying drivers that fuel and lead to terrorist acts. A holistic approach to counter-terrorism that addresses gaps in the rule of law, democratic governance, and civil space, and reverses patterns of discrimination and marginalization of ethnic and minority groups, contributes to greater stability and security. Compliance with international human rights standards during security operations also brings significant benefits by reducing the risk of civilian harm. In this process, the international community must act in a coherent and united manner, through a renewed commitment to

withdraw from the Court, with claims that the immunity of high-ranking sovereign heads was not taken into account, as well as discriminatory proceedings within the Court's jurisdiction. Therefore, the lack of cooperation of African governments with the Court led to the establishment of the African Court and the accession of the Malabo Act to it in 2014, which, according to Article 28C of the Additional Act to the Statute of the African Court, brought the prosecution of terrorist crimes under the jurisdiction of the African Court; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; Ben Saul, "The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights: Article 28G of the AU's Malabo Protocol 2014," in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, ed. Charles C. Jalloh and Kamari M. Clarke (Cambridge: Cambridge University Press, 2019), 427-428.

[58] Chile Eboe-Osuji, "Administering International Criminal Justice through the African Court: Opportunities and Challenges in International Law," in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, ed. Charles C. Jalloh and Kamari M. Clarke (Cambridge: Cambridge University Press, 2019), 68.

multilateralism, to ensure that all measures taken to prevent and combat terrorism are consistent with international human rights law and the Charter of the United Nations.

Addressing these political challenges requires a multifaceted approach that includes legal reforms, diplomatic engagement, and efforts to build trust in the ICC's impartiality. Enhancing the representativeness of the ICC's leadership, promoting transparency in prosecutorial decisions, and fostering dialogue among states can help mitigate political resistance and strengthen the international legal framework for prosecuting terrorism.

Conclusion

The doctrine of sovereign immunity has undergone significant transformation, reflecting broader shifts in the landscape of international law. The historical foundation of absolute immunity, which conferred near-universal protection on states and their officials from foreign judicial processes, is increasingly seen as incompatible with contemporary legal principles that prioritize accountability, justice, and the rule of law. The shift toward restrictive immunity, particularly in the 20th century, was necessitated by the growing involvement of states in commercial activities and the corresponding recognition that sovereign immunity should not shield states from legal consequences arising from acts beyond purely governmental functions.

The restrictive approach, which differentiates between acts *jure imperii* (sovereign or public acts) and *jure gestionis* (private or commercial acts), has brought greater alignment with principles of fairness and equity in international law. However, the application of this distinction remains

problematic, as the boundaries between public and private acts are often blurred, leading to inconsistent judicial interpretations and uncertainty in state practice. Additionally, the evolving nature of international human rights law has further challenged the traditional scope of immunity, with increasing recognition that certain grave violations—such as torture and crimes against humanity—cannot

be shielded by sovereign immunity, even when committed by state officials acting in an official capacity.

The present legal framework, while evolving, lacks a coherent and universally accepted standard for delineating the limits of sovereign immunity, particularly in cases involving serious human rights violations. This inconsistency underscores the need for a more refined legal approach that can reconcile state sovereignty with the imperative for accountability in international law. Moving forward, there must be a concerted effort to develop clearer guidelines, possibly through international treaties or customary international law, that establish well-defined exceptions to immunity. Such efforts should aim to harmonize state practice, reduce legal fragmentation, and ensure that the principles of sovereign equality do not obstruct access to justice.

Ultimately, the international legal community must continue to engage in dialogue to strike an appropriate balance between respecting state sovereignty and advancing the protection of human rights. The progressive development of the law of sovereign immunity must be grounded in a commitment to upholding the rule of law and facilitating the pursuit of justice for victims of state misconduct, while also maintaining the stability and predictability essential for international relations.