

# Terrorism as an international crime

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## Introduction

Although terrorism has become the subject of sustained levels of discussion and scholarship in international law in recent years, these discussions and writings have generally focused on whether acts of terrorism can trigger the right to use force and how counter-terrorist operations and the law of human rights interact with one another in situations of actual or perceived terrorist risk.<sup>1</sup> This chapter, however, is focused more on whether, and if so, how, international criminal law can be employed in the courtroom-level attempts to counter terroristic activity. Following an overview of the long-standing difficulties in international discourses with coming to a general, binding, treaty-based definition of 'terrorism', the chapter proceeds to consider the ways in which existing international criminal law can be said to include within it prohibitions of terrorist activity; whether terrorism *per se* is a crime in international law; and the ways in which international treaty-based prohibitions on certain types of terrorist activity are developing a transnational criminal law relating to terrorism. Finally, the chapter considers the prospects for an international crime of terrorism in the future.

## Definitional conundrums

Before considering the extent to which international criminal law encompasses and prohibits what is known or classified as terrorist activity, the definitional difficulties raised by the treatment of terrorism in international law generally must be addressed. It is, by now, almost clichéd to begin considerations of legal treatments of terrorism with an acknowledgement that the international legal system has found itself to be incapable of coming to a binding, general international legal definition of 'terrorism' in treaty law.<sup>2</sup> Clichés notwithstanding, the definitional conundrums posed by terrorism cannot be ignored, particularly in relation to international criminal law in which the principles of certainty and clarity of prohibited activities must be borne in mind just as they must be in domestic law.

The absence of a general definition of terrorism in international law means that attempts to criminalise terrorism *per se* as a crime are prone to run into serious difficulties of clarity and certainty. These same difficulties do not necessarily arise in relation to situations in which

terroristic activity is prosecuted within the ambit of recognised international crimes because, in such cases, the activities are being considered as crimes against humanity, genocide, war crimes or grave breaches when the actions grounding the indictments happen to have been terroristic in character. In essence, the fact that these activities might be labelled as 'terrorism' does not necessarily have any impact on the exercise of proving the elements of the crime as defined within international criminal law generally. That said, such labelling may be relevant in the context of sentencing and certainly has a rhetorical impact that ought not to be underestimated.<sup>3</sup>

Tracing the historical difficulties faced by the international community in defining terrorism is beyond the scope of this chapter;<sup>4</sup> however, the process can be characterised by the two primary stumbling blocks that have been encountered in the process of definition: actor and purpose. There has historically been a considerable amount of resistance to the notion that a state could be deemed to engage in terroristic activity. Even where a state acts unlawfully, including by attacking civilians and/or creating and spreading terror among the civilian population, such unlawful acts are generally considered to be breaches of international humanitarian law but *not* acts that ought to attract the label of 'terrorist' within the international legal discourse.

Precisely the same acts carried out by a non-state actor might be deemed terroristic. This suggests that the identity of the actor has a bearing on the legitimacy of the act. Legitimacy here must be understood as something other than lawfulness, for a state can act in an unlawful manner in international law but not, it seems, in a terroristic manner. When a state acts, even if its actions are prohibited by international law, there is some kind of assumed and implicit legitimacy within those acts that flows from the state identity of the actor. Laura Donohue has been particularly effective in arguing against this conflation of legitimacy and statehood and has questioned the assumptive nature of that conflation within international legal discourses around terrorism (and, indeed, the inverse assumption that acts by non-state actors are necessarily *illegitimate*).<sup>5</sup> Notwithstanding those objections, it does not appear to be the case that states and state actors can be said to be terrorists within international legal parlance.

The second point of contestation within the attempts to arrive at a general international legal definition of terrorism centres on the matter of purpose. In general, an act that is unlawful in all circumstances will be terroristic only in circumstances when it is said to have been directed at a particular purpose or, in other words, to have a particular motive. Terrorism is generally conceived of as an activity that is motivated by a desire to spread feelings of terror and lack of security among the civilian population in order to try to influence the actions of a state or an institution. Indeed, it is the targeting of civilians towards a particular purpose or with a particular motivation that is generally said to distinguish terroristic activity from 'simple' criminal activity; it is the distinction between mass murder and a terrorist attack that brings about multiple fatalities. At their core, both of these examples involve the same action and result: causing the death of multiple persons by means of unlawful activity. Rhetorically, politically and legally, however, the latter example is seen as a different and, generally, more challenging and dangerous activity than the former. It is often said that the purpose or motivation of terrorist activity is one of the factors that makes effective counter-terrorism so difficult. If one has a political, ideological or religious motivation, it is thought that the deterrent effect generally associated with the criminal law is less likely to have an impact on prospective offenders. Although political science has developed a body of literature that calls into question whether individual actors within terrorist campaigns can truly be said to have terroristic motivations closely tethered to political, ideological or religious beliefs,<sup>6</sup> the international community has generally approached terrorism in a manner that presupposes the importance of purpose and motive not only as a definitional matter but also as a design matter in counter-terrorism.

Notwithstanding these definitional conundrums, there are numerous international treaties that deal with and prohibit terrorist activities in particular circumstances:

- 1 UN Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963);
- 2 UN Convention on the Suppression of Unlawful Seizure of Aircraft (1970);
- 3 UN Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);
- 4 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973);
- 5 UN International Convention on the Physical Protection of Nuclear Material (1980);
- 6 UN Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988);
- 7 UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988);
- 8 UN Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988);
- 9 UN Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991);
- 10 International Convention for the Suppression of Terrorist Bombings (1997);
- 11 International Convention for the Suppression of the Financing of Terrorism (1999);
- 12 International Convention for the Suppression of Acts of Nuclear Terrorism (2005).

The conclusion and ratification of these treaties reflect the fact that the difficulty in international law is not with the principle that terrorism ought to be prohibited as a matter of law, but rather with the task of coming to an agreement on what terrorism is as a general matter. Thus, while we have prohibited terrorism in discrete circumstances and of particular types as a matter of positive law, we have not managed to formulate a treaty-based crime of terrorism *per se*.

### Elements of terrorism and international crimes

Terrorist activity might well involve the commission of acts that are themselves violations of international criminal law and particularly of the Statute of the International Criminal Court. That Statute provides jurisdiction to the ICC over four types of international crime: crimes against humanity, genocide, war crimes and the crime of aggression. The crime of aggression has not yet been defined and can therefore be left to one side in the current consideration of the Statute's relevance to terrorism. The capacity of international criminal law to 'capture' terrorist activities within its established international crimes is significant in three ways.

Firstly it recognises that 'new' crimes need not always be created in response to terrorist activity, as such activity is, in almost all cases, constituted of unlawful actions that can be prosecuted under existing legal frameworks. This refutes often-made claims that the international legal system is compelled to amend itself to 'radical' or 'new' challenges posed by terrorism and rather reiterates the fact that international law is sufficiently broad in range to capture the majority of such activities within its pre-existing doctrinal structures.

Secondly, inasmuch as international crimes can be said to be subject to universal jurisdiction, the categorisation of terroristic activity within pre-existing frameworks of international criminal law both enables and compels states to apprehend, prosecute and aid in the apprehension and prosecution of individuals who are indicted in relation to such offences.

Thirdly, and following *a priori* from the second point of significance, as all of these crimes fall within the Rome Statute of the International Criminal Court, it is conceivable that when nation states are unwilling or unable to undergo domestic prosecutions or to facilitate prosecutions elsewhere relating to such activities, the International Criminal Court may be in a position to 'step in' and act in a complementary manner in order to bring such offences within recognised rubrics of criminal justice.

### *Crimes against humanity*

Article 7 of the Rome Statute of the International Criminal Court defines crimes against humanity over which the Court has jurisdiction thus:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

The crime therefore requires the commission of one or more of the specified acts against a civilian population as part of a widespread or systematic attack of which the perpetrator had knowledge. The difficulty with placing acts of terrorism within this framework is most likely to lie in the requirement of a 'widespread or systematic attack' as, in many cases, terrorist acts are relatively isolated incidents or, when they are part of a wave of incidents (for example, a wave of suicide bombings), it is frequently the case that such acts are not necessarily centrally directed or organised. In addition, even when there is a case of a wave of attacks over a relatively concentrated period of time, for example, there are difficulties with identifying the threshold for a 'widespread or systematic attack' from a definitional perspective – At what point does such a campaign become widespread or systematic? Article 7(2) of the Statute provides that an attack against the civilian population is to be understood as 'a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. Regrettably, this does not offer any further clarity in relation to the 'widespread or systematic' requirement.

That notwithstanding, it is conceivable that a terrorist attack or series of attacks could constitute crimes against humanity under Article 7.

Although the Statute suggests that what is required is *either* a widespread or a systematic attack, the definition of an attack on the civilian population considered above suggests that the distinction between these two classifications may be one of degree rather than one of nature, as both will have to have taken place 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.<sup>7</sup> This arguably blurs the distinction between widespread and systematic attacks that had previously been set down by the Trial Chamber of the ICTR in *Prosecutor v Kayishema and Ruzindana*:<sup>8</sup> thus, 'a widespread attack is one that is directed towards a multiplicity of victims. A systematic attack means an attack carried out pursuant to a preconceived policy or plan'.<sup>9</sup>

Although Article 7 causes a question mark to fall over the extent to which the two types of attack are to be doctrinally distinguished, the distinction from *Kayishema and Ruzindana* is still useful in terms of clarifying that it is possible for a single terrorist attack or a wave of attacks to constitute a crime against humanity provided they are reasonably coordinated and involve an element of organisation and orchestration. Thus, one might argue that the attacks of 11 September 2001 involving, as it appears they did, the multiple commission of acts, including murder against a civilian population in a manner that was both widespread and systematic, constituted a crime against humanity. It may, therefore, have been possible to apply the pre-existing international criminal law framework to that attack.

### Genocide

The International Criminal Court has jurisdiction over the crime of genocide, which is defined in Article 6 as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Whereas acts of terrorism are likely to involve the commission of the *actus reus* of genocide (particularly, perhaps, killing or causing serious harm to individuals), it seems unlikely that many terrorist acts are in fact commissioned with the required *dolus specialis* of genocide, i.e. 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. This does not mean that terrorist acts or campaigns could never fall within the definition of genocide and be prosecuted as such, but rather that it is extremely unlikely that genocidal terrorism would arise or that the offence of genocide would be used in an indictment against individuals suspected of commissioning or carrying out terrorist attacks.

### War crimes

War crimes become relevant in international law only when it can be said that there is an armed conflict of either an international or a non-international character. 'Armed conflict' is a

deceptively complex concept. It is clear that it is not confined to 'war' – indeed, the inclusion of the term 'armed conflict' rather than 'war' in the Geneva Conventions was intended to ensure that these Conventions' applicability would not be limited to wars in their traditional sense. Rather, it seems that a consensus view exists that an armed conflict has two core characteristics: (1) the existence of organised armed groups and (2) engagement in fighting of some intensity.<sup>10</sup> This corresponds well with the definition of armed conflict used by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Tadic*<sup>11</sup> – the first prosecution brought before the Tribunal. In that case, the Appeals Chamber defined armed conflict thus: '[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.<sup>12</sup>

Proceeding on the basis that both identified elements are required in order for an armed conflict to exist, it is clear that terrorist activities might be considered war crimes in some, although not all, contexts. It is true that there have been some scenarios in which terrorist activity was widespread, there were organised armed groups, and there was fighting of some intensity that have *not* been considered to be situations of 'armed conflict'. The Northern Ireland conflict, for example, was never considered to be an armed conflict by the United Kingdom government, which prosecuted individuals within a criminal justice model of counter-terrorism, albeit with some variations on 'normal' criminal procedures, such as the use of non-jury 'Diplock courts'. In contrast, the United States' counter-terrorist operations against Al Qaeda and associated organisations have been undertaken within what was, at least rhetorically, an armed conflict paradigm. While forests have been felled on whether or not the 'war on terrorism' ought properly to be considered an armed conflict, the United States Supreme Court held in *Hamdan v Rumsfeld* that in fact the 'war' against Al Qaeda and associated forces constituted a non-international armed conflict.<sup>13</sup> Where such a classification is undertaken, it is conceivable that terrorist activities falling within that armed conflict might be considered war crimes.

Article 8(2)(b) of the Rome Statute of the International Criminal Court includes the following within its definition of war crimes:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

In addition, Article 15 of Additional Protocol One and Article 13 of Additional Protocol Two to the Geneva Conventions provide that:

- 1 The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

- 2 The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Where the 'armed conflict' requirement is met, it seems clear that terrorist activities could fall within the offence of war crimes. Indeed, war crimes jurisdiction has been used to prosecute and to convict individuals who are accused of having engaged in terroristic activity within the context of an armed conflict. In *Prosecutor v Galic*,<sup>14</sup> for example, General Galic was convicted of Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia in respect of the conduct of a campaign of sniping and shelling the civilian population of Sarajevo with the primary purpose of spreading terror among this population. In that case, the Tribunal termed the offence 'the crime of terror against the civilian population' but were explicit in the holding that the consideration of whether the Tribunal had jurisdiction *ratione materiae* was undertaken 'only to the extent relevant to the charge in this case' (i.e. a war crimes charge).<sup>15</sup> In this respect the Tribunal applied the requirements of a crime in international law as laid down in *Tadic* to find that it had jurisdiction. Thus, the Tribunal held that the crime of terror against the civilian population could be rooted in Article 51 of Optional Protocol 1 to the Geneva Conventions;<sup>16</sup> that this is a treaty-based rule (and therefore a consideration of customary international law was not required in this respect);<sup>17</sup> that the alleged violation constituted a serious breach of international humanitarian law;<sup>18</sup> and that an individual could be fixed with criminal liability in international law for such a breach.<sup>19</sup> The offence itself, the Tribunal heard, could be said to occur only where there are acts of violence directed against civilians not taking an active part in hostilities and who suffered death or serious injury as a result thereof, when the accused 'wilfully' made such persons the object of the attack in question; the primary purpose of these acts was to spread terror among the civilian population;<sup>20</sup> and the acts of violence were unlawful attacks on civilians rather than legitimate attacks against combatants.<sup>21</sup> In the view of the Tribunal, all of these elements were proved in relation to Galic, who was convicted of war crimes with respect to the infliction of terror on the civilian population.

### Terrorism per se as an international crime

The Rome Statute of the International Criminal Court does not include terrorism *per se* as a crime; neither does any other international treaty, although, as considered above, there are numerous treaties that deal with particular types of terroristic crimes, and breach thereof can constitute a treaty crime in itself. The possibility of including a stand-alone offence of terrorism *per se* featured prominently in the negotiation of the Rome Statute; however it was ultimately decided that no crime of terrorism *per se* ought to be included in the Statute, not least because of the difficulties of definition such as those already considered above. This notwithstanding, there was a commitment to the reconsideration of whether terrorism as a crime ought to be included in the International Criminal Court's jurisdiction at the first review conference of the Rome Statute, to take place during the summer of 2010. The possibility of future developments toward inclusion of terrorism *stricto sensu* within the Statute is considered further below.

The absence of a crime of terrorism within the Rome Statute does not mean, however, that no argument can be made that terrorism *per se* is in fact an international crime as a matter of customary international law. Antonio Cassese argues that 'the contention can be made ... that indeed a *customary rule* on the objective and subjective elements of a crime of terrorism in time of peace has evolved'.<sup>22</sup> Cassese argues that parameters of a generally agreed upon definition of

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terrorism in a time of peace can be extrapolated from the various regional and international treaties that exist dealing with terrorism: namely, (1) conduct that is criminal;<sup>23</sup> (2) conduct that is transnational in nature;<sup>24</sup> (3) conduct that impacts upon both civilian victims and state officials;<sup>25</sup> (4) conduct that is directed towards the purpose of spreading terror among civilian populations or compelling a government or international organisation to behave in a particular way;<sup>26</sup> (5) conduct that spreads fear or anxiety among civilian populations or targets leading buildings or personalities;<sup>27</sup> (6) conduct that has a political, ideological or religious motivation.<sup>28</sup> For Cassese, the recognition of these six general elements of terrorism and the acceptance thereof by the ratification and development of treaties featuring these elements by states and international institutions point towards the recognition of a crime of terrorism *per se* in times of peace.

It might be argued that the *Galic* judgment noted above is, in fact, more properly to be read as a case in which the Tribunal considered a crime of terrorism *per se*. It might also be argued that, although the Tribunal was careful to limit itself to a consideration of the crime of inflicting terror on the civilian population within the framework of war crimes, the elements of the offence identified can be applied in the recognition of a customary international crime of terrorism. Indeed, there is a clear parallel between the elements of the offence identified by the Tribunal and those elements of the definition of terrorism that Cassese alleges point towards the crime of terrorism *per se* as a matter of customary international law. While such an argument can certainly be made, it must be borne in mind in *Galic* the International Criminal Tribunal for the former Yugoslavia did not purport to make any pronouncements whatsoever in relation to customary international law.

### 'Treaty crimes'

Terrorist activity is prohibited by numerous treaties in the international legal order. There are, as considered above, numerous treaties that prohibit terrorist activity within discrete areas such as financing, hijacking and so on. In the main, these treaties compel states to ensure that the proscribed activities are criminalised within their domestic legal orders. These acts, then, straddle the international and domestic legal areas and are not, strictly speaking, easily definable as 'international crimes'. Rather, these activities are crimes within the domestic legal order, but the contents of those domestic criminal laws are dictated to at least some degree by international instruments. In some cases, as with the extended terrorist asset-freezing regime that has been developed in the light of the attacks of 11 September 2001, those international provisions will be legally entrenched in regional as well as in domestic laws. In such a case, these crimes arguably have more of an 'international' character, although that categorisation is dependent on the nature of the regional organisation that has acted to implement these international obligations within the context of their own regional legal orders. Geographically, for example, the EU's implementation of the terrorist asset-freezing regime<sup>29</sup> designed by the UN Security Council<sup>30</sup> might be said to be international, but in reality the autonomous nature of the European legal order means that these crimes are more supra-national or transnational than they are *international*. Indeed, a concerted body of scholarship is evolving that argues that so-called 'treaty crimes' should in fact be considered part of 'transnational criminal law' rather than part of 'international criminal law'.

Transnational law is primarily traced back to Philip Jessup's influential lecture series delivered in the Yale Law School in the 1950s and later developed into *Transnational Law*, published in 1956.<sup>31</sup> For Jessup, transnational law encompasses 'all law which regulates actions or events that transcend national frontiers'.<sup>32</sup> Since then, the idea of transnational law has greatly developed, although whether it constitutes a 'field' or a 'methodology' is increasingly becoming a matter of



dispute among transnational scholars themselves. Although transnational law, whether as a field or as a methodology, is now well established, it has only recently (and indeed relatively slowly) begun to be deployed in the area of criminal law and in particular in the international legal developments that have non-international legal and extra-legal effects.<sup>33</sup> Neil Boister, however, has given particular attention to the transnational criminal law character of what he terms 'suppression conventions', i.e. 'crime control treaties concluded with the purpose of suppressing harmful behaviour by non-state actors'.<sup>34</sup> Certainly, numerous international treaties dealing with terrorist activity fall into this category, and, while the offences created thereunder are not *international* in strict terms, they nevertheless reflect at their core the elements of terroristic activity that are to be deemed 'criminal' or deserving of criminal sanctions within the international *milieu* from which they emerged. These crimes are problematic in numerous ways: there can, for example, be inconsistencies in the ways in which these international standards are translated in and between different domestic and regional jurisdictions. Recent litigation concerning the European implementation of asset-freezing measures relating to terrorist activity has also exposed the capacity of transnational criminal law to result in violations of individual rights by the implementing bodies (whether states or regional institutions). In *Kadi and Al Barakaat*<sup>35</sup> the European Court of Justice held that the implementation by the European Union of mechanisms emanating from the UN Security Council for the freezing of the assets of those deemed to be involved or associated in terrorist activity were invalid as they violated the fundamental rights guarantees that lie at the heart of the European Union's autonomous legal system. This recent case illustrates the difficulties that arise for states and organisations in effectively fulfilling all of their international legal obligations in relation to transnational criminal law: the obligation to criminalise certain activity, on the one hand, and the obligation to respect fundamental rights on the other.<sup>36</sup>

### Future developments

The first review conference of the Rome Statute of the International Criminal Court takes place during the summer of 2010. In advance of that conference, one of the matters that has received some consideration by participating states is whether or not the omission of a crime of terrorism *per se* within the Statute ought to be rethought. As mentioned above, at the time of the drafting of the Statute it was decided that terrorism itself ought not to be included as a crime within the Statute, not least because of the persistence of the definitional conundrums considered in the first part of this chapter, but also because, at the time, it was not thought that terrorism was one of the most serious crimes of concern to the international community. Developments since that time, however, point towards the fact that, despite these earlier barriers to inclusion of terrorism *per se* as a crime within the jurisdiction of the International Criminal Court, it might now be a more probable prospect than it was in the late 1990s. Not only have the attacks of 11 September 2001 given rise to an internationalised and widespread counter-terrorist movement epitomised by the 'War on Terrorism' led by the United States, but the emergence of organised and widespread piracy on the high seas is also sometimes linked to organised terror organisations and may well motivate some state action.

In advance of the review convention, the Netherlands submitted a proposal for the inclusion of a crime of terrorism *per se* in the Rome Statute of the International Criminal Court, building on Resolution E, adopted at the Rome Conference in 1998. Resolution E provided:

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

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Having adopted the Statute of the International Criminal Court,

- *Recognizing* that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community,
- *Recognizing* that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,
- *Deeply alarmed* at the persistence of these scourges, which pose serious threats to international peace and security,
- *Regretting* that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,
- *Affirming* that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,
- *Recommends* that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.<sup>37</sup>

While the Dutch proposal does not include the elements of a prospective crime of terrorism as it might appear within a revised Rome Statute, it does recommend that the crime of terrorism ought to be included in the Statute in a manner analogous to the way in which the crime of aggression was included in the Statute. In other words, the Dutch proposal is that terrorism ought to be listed as a crime under the Statute, but that a working group ought to be established within which the elements and definition of the crime would be worked out in the future. The inclusion of a crime of terrorism *per se* within the Statute on this basis would send a clear message of the international criminality of terrorist activity, but would not enable prosecutions under the Statute until the Offence is more clearly defined. Given that terrorist activity can already be prosecuted within the established international criminal law offences and that there is at least arguably a customary international crime of terrorism, inclusion of this nature is likely to be primarily symbolic but may, in the future, result in a clearly expressed crime of terrorism *per se* within the Statute.

## Conclusion

In spite of all of the definitional difficulties that exist in relation to terrorism as a crime within international criminal law, this chapter has outlined the fact that, as it stands, there is a jurisdiction within international law under which terroristic activity could be prosecuted, albeit without the label of 'terrorism' being attached thereto. In addition, there is a raft of international treaties prohibiting terrorism in particular situations as a result of which domestic and regional legal systems have developed criminal prohibitions on terroristic activity. However, until a generally agreed upon the definition of 'terrorism' can be arrived at, it seems unlikely that terrorism as a crime *per se* – either as a matter of customary international law or within a revised Rome Statute of the International Criminal Court – will be recognised with sufficient certainty and clarity within international criminal law for it to be operationalised in discrete cases.

## Notes

- 1 On the legality of the use of force as a counter-terrorist measure see, for example, M. Schmitt, 'Counter-Terrorism and the Use of Force in International Law', *Israeli Yearbook on Human Rights* 32, 2002, 53–116.

- On the relationship between human rights and counter-terrorism see, for example, R. Wilson (ed.), *Human Rights in the 'War on Terror'*, Cambridge: Cambridge University Press, 2005.
- 2 As considered further below, Cassese argues that the basic elements of terrorism are in fact agreed as a matter of states' practice and customary international law notwithstanding the fact that there is no generally agreed, binding, all-encompassing treaty definition of terrorism as a general phenomenon. A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice* 4, 2006, 933; A. Cassese, 'Terrorism as an International Crime', in A. Bianchi and Y. Naqvi (eds), *Enforcing International Law Norms against Terrorism*, Oxford and Portland: Hart Publishing, 2004, p. 213.
  - 3 On the rhetorical power of the 'terrorist' label see, for example, J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism', *Leiden Journal of International Law* 19, 2006, 69 and G. Andr ani, 'The "War on Terror": Good Cause, Wrong Concept' *Survival* 46, 2004–05, 31.
  - 4 An excellent survey is provided by B. Saul, *Defining Terrorism in International Law* Oxford; Oxford University Press, 2007 and R. Higgins, 'The General International Law of Terrorism' in R. Higgins & M. Flory (eds), *Terrorism and International Law*, London: Routledge, 1997, 14.
  - 5 L. Donohue, 'Terrorism and the Counter-Terrorist Discourse' in V. Ramraj, M. Hor and K. Roach (eds), *Global Anti-Terrorism Law and Policy*, Cambridge: Cambridge University Press, 2005, p. 13
  - 6 See esp. M. Crenshaw, 'The Causes of Terrorism', *Comparative Politics* 13, 1981, 379.
  - 7 See esp. K. Kittichaisaree, *International Criminal Law*, Oxford: Oxford University Press, 2001, pp. 96–7.
  - 8 Prosecutor v Kayishema and Ruzindana (ICTR-95-1-T), Trial Chamber, 21 May 1999.
  - 9 *Ibid.*, para. 123.
  - 10 These are the characteristics as identified by the ILA Use of Force Committee in its 'Initial Report on the Meaning of Armed Conflict in International Law' (2008). Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (accessed 14 October 2009).
  - 11 (IT-94-1-A), Appeals Chamber, 15 June 1999.
  - 12 *Ibid.*, para. 70.
  - 13 548 U.S. 557, 629–630 (2006).
  - 14 (IT-98-29-T), Trial Chamber, 5 December 2003.
  - 15 *Ibid.*, para. 87.
  - 16 *Ibid.*, para. 96.
  - 17 *Ibid.*, para. 97.
  - 18 *Ibid.*, para. 109.
  - 19 *Ibid.*, paras 127 and 129.
  - 20 *Ibid.*, para 133.
  - 21 *Ibid.*, para 135.
  - 22 A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice* 4, 2006, 933, 935. Cassese has also argued that terrorist activity can be prosecuted under existing international criminal law when it can be said to have a nexus to an international or internal armed conflict (i.e. as a crime against humanity, a war crime or a grave breach as considered above). See A. Cassese, 'Terrorism as an International Crime' in A. Bianchi and Y. Naqvi (eds), *Enforcing International Law Norms against Terrorism*, Oxford and Portland: Hart Publications, 2006, p. 213.
  - 23 A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' *Journal of International Criminal Justice* 4, 2006, 933, 938.
  - 24 *Ibid.*
  - 25 *Ibid.*
  - 26 *Ibid.* Cassese also notes that in more limited cases these treaties require conduct that is intended to destabilise a country's structures.
  - 27 *Ibid.*, 939.
  - 28 *Ibid.*
  - 29 Common Position 2003/140/CFSP OJ 2003 L 53/62; Regulation 561/2003 OJ 2003 L 82/1.
  - 30 SC Resolution 1267 (1999); SC Resolution 1333 (2000); SC Resolution 1390 (2002); SC Resolution 1455 (2003); SC Resolution 1526 (2004); SC Resolution 1617 (2005); SC Resolution 1735 (2006); SC Resolution 1822 (2008).
  - 31 P. Jessup, *Transnational Law*, New Haven: Yale University Press, 1956.
  - 32 *Ibid.*, p. 2

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- 33 See for example A. Eser and O. Lagondy (eds), *Principles and Procedures for a New Transnational Criminal Law*, Freiburg: Max Planck Institute, 1992.
- 34 N. Boister, 'Transnational Criminal Law?', *European Journal of International Law* 14, 2003, 953, 955.
- 35 Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, Judgment of the Court (Grand Chamber), 3 September 2008.
- 36 For a more complete commentary on these competing obligations and how they might be resolved see F de Londras and S. Kingston, 'Rights, Security and Conflicting International Obligations: Reading the ECJ's Decision in *Kadi & Al Barakaat* as Communicating External and Internal Constitutionalist Commitment to Fundamental Rights' *American Journal of Comparative Law*, 2010 (forthcoming)
- 37 Netherlands Proposal, Resolution E, <http://iccnow.org/?mod=resolutione>, Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (accessed 18 March 2010).