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RETHINKING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT IN THE POST-SEPTEMBER 11TH ERA: SHOULD ACTS OF TERRORISM QUALIFY AS CRIMES AGAINST HUMANITY?

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ABSTRACT

Following the events surrounding September 11th, many categories of international law are being revisited. The jurisdiction of the International Criminal Court ("ICC") should be no exception. This article argues that acts of international terrorism, such as those perpetrated on September 11th, qualify as crimes against humanity under the Rome Statute. Mindful of the concept of complementarity found under the statute, this article identifies several situations where it would be desirable to grant the ICC jurisdiction over acts of terrorism. The article first examines the jurisdiction of the ICC as it currently stands, along with the reasons why state parties did not feel

the need to include terrorism under ICC jurisdiction. Conversely, it presents the view, held by various states and legal scholars, that crimes of terrorism could be adjudicated on the international level. The article then moves toward the concrete process of rethinking the jurisdiction of the ICC so as to adapt to the modern war on terrorism. Before engaging in legal analysis, this article references the ongoing debate regarding adoption of an internationally-accepted definition for terrorism. Taking into consideration the fact that a majority of states share a common understanding of the minimal contents of such a definition, the author provides a solution to that polemic. In addition, this article briefly reviews the notion of crimes against humanity so as to demonstrate a *prima facie* proximity or compatibility between that infraction and acts analogous to those perpetrated by members of Al Qaeda. Finally, the article culminates with an analysis of Article 7 of the Rome Statute. Before dissecting every element found in that provision, the author surveys jurisprudential elements of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) that delineate the legal boundaries of crimes against humanity. This project ultimately leads to a detailed analysis of the requirements found under Article 7, and applies these requirements to the acts perpetrated on September 11th. In sum, the position taken in this article is that the Rome Statute does not have to be modified in order to characterize acts of terrorism as crimes against humanity. Most importantly, it follows from this proposition that where genuine national prosecutions prove illusory, the ICC could assert jurisdiction over acts of international terrorism.

INTRODUCTION

With the emergence of neo-terrorism and the multiplication of international crimes, the international community will have to rethink some of the key elements found under the Rome Statute.¹ Following the events of September 11th, it would be useful for legal scholars and practitioners to reconsider the jurisdiction of the ICC, especially with regard to crimes against humanity.² In doing so, those scholars and practitioners should identify alternate avenues and adjudicative bodies to national jurisdictions in order to thwart efficiently the increasing threat of international terrorism.³ This article compares the scope of Article 7 of the Rome Statute with the concept of international terrorism, as most states understand it.⁴ This article will ultimately gravitate towards a straightforward conclusion: that the international community is not required to amend the Rome Statute, as the crime of international terrorism undoubtedly falls under ICC jurisdiction already. This interpretation is feasible because Article 7, which deals with crimes against humanity, clearly encompasses the concept of international terrorism. Thus, for reasons I will detail in the following pages, it is necessary in some cases to grant jurisdiction to the ICC over acts of international terrorism.

An obvious and inherent limitation to my proposal lies in the principle of complementarity. In this regard, the general rule is that the state exercising custody over an accused may initiate domestic criminal proceedings against the individual.⁵ Under the aegis of the Rome Conference, state parties to the Rome Statute clearly intended

1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, (1998) [hereinafter Rome Statute].

2. See YOUNG SOK KIM, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY OF THE ROME STATUTE* 76 (2003) (noting that all states participating in the drafting of the Rome Statute agreed that crimes against humanity should fall under ICC jurisdiction).

3. See *id.* at 20 (commenting that, due to disagreements encountered when drafting the Rome Statute, international terrorism does not fall under ICC jurisdiction).

4. See *id.* at 83 (noting that no state opposed murder being defined as a crime against humanity).

5. See *id.* (noting that a prosecutor before the ICC is encouraged to be attentive to the interests of a broad international audience).

to subordinate the jurisdiction of the ICC to the national prosecution of criminal acts.⁶ In other words, the ICC will not adjudicate a crime enumerated in its Statute unless the “national authorities are ‘unwilling or unable’ to carry out a genuine investigation and, if appropriate, prosecution.”⁷ Cognizant of this spirit of complementarity, I recognize that the ICC should only act as an adjudicative body of “last resort,” where genuine national proceedings prove illusory.⁸ However, it is still necessary to acknowledge the jurisdiction of the ICC over international terrorism, as several specific situations warrant the involvement of an international tribunal like the ICC, such as state passiveness, inaction, or impunity.⁹

6. *See id.* at 219 (“[T]he Statute now requires the acceptance of *either* the state of nationality of the accused *or* the state in whose territory the crime was committed before the Court can exercise jurisdiction.”).

7. Kenneth Roth, *The Court the US Doesn't Want*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1195, 1195 (Henry J. Steiner and Philip Alston eds., 2000).

In favor of the [International Criminal] court were most of America's closest allies, including Britain, Canada, and Germany. But the United States was isolated in opposition, along with such dictatorships and enemies of human rights as Iran, Iraq, China, Libya, Algeria, and Sudan . . . The Clinton administration's opposition to the ICC stemmed in part from its fear, a plausible one, that hostile states like Cuba, Libya, or Iraq might try to convince the court to launch a frivolous or politically motivated prosecution of US soldiers or commanding officers. The Rome delegates adopted several safeguards against this possibility, most importantly the so-called principle of complementarity . . . the complementarity principle also reflects the widely shared view that systems of national justice should remain the front-line defense against serious human rights abuses, with the ICC serving only as a backstop . . . if an American soldier were to commit a serious war crime—say, by deliberately massacring civilians—he could be brought before the ICC only if the US government failed to pursue his case. Indeed, even a national decision not to prosecute must be respected so long as it is not a bad faith effort to shield a criminal from justice. Because of the strength of the US judicial system, an ICC prosecutor would have a hard time dismissing a US investigation or prosecution as a sham.

Id.

8. *Cf. id.* (commenting that the Yugoslav and Rwanda tribunals have the right to supercede national courts).

9. *See id.* (explaining that a primary purpose of the ICC is to prosecute criminals that have only faced sham or illusory prosecutions before national courts).

The inclusion of terrorism under ICC jurisdiction is well-founded for several reasons. More generally, it would undoubtedly serve a stabilizing purpose between two competing interests. On the one hand, given the current efforts being deployed in the field of counter-terrorism, many states wish to prosecute foreigners for terrorist acts perpetrated on their soil.¹⁰ On the other hand, states also want to protect and shelter their own nationals from terrorist attacks. In the latter scenario, those states often express the view that they themselves should exercise jurisdiction over crimes committed against their own civilians, regardless of the location of the perpetration.¹¹ In order to resolve this tension, referring such matters to the ICC would definitely constitute a reasonable compromise.¹² This solution is far from ideal, but when addressing politically sensitive issues like the prosecution of international terrorists, mitigation of jurisdictional conflicts is a noble objective.

Moving from general considerations to a concrete implementation of my proposed model, I have identified at least five situations where the ICC could exercise jurisdiction over acts of international terrorism. First, I invoke the *Lockerbie* situation.¹³ In the famous *Lockerbie* decision, two Libyan nationals were accused of participating in the bombing of Pan Am flight 103, in which a number of American nationals were killed.¹⁴ Following a United States Grand Jury indictment, the Libyan government categorically refused to extradite its nationals, as it argued that the United States was trying to curtail its obligations under the Convention for the

10. See KIM, *supra* note 2, at 54 (noting that the crime of terrorism was listed as a treaty crime; other treaty crimes include drug trafficking and crimes against U.N. personnel).

11. See Roth, *supra* note 7 (highlighting that the United States is particularly unwilling to allow an international tribunal to try its citizens).

12. See *id.* (emphasizing that the ICC is meant to be a court of last resort).

13. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1992 I.C.J. 3 (April 14, 1992) [hereinafter *Lockerbie*] (detailing the events surrounding the bombing of a commercial airline flight over Scotland).

14. See *id.* at 4 (explaining that the primary issue of in the case was application of the Montreal Convention).

Suppression of Unlawful Acts Against the Safety of Civil Aviation.¹⁵ According to Libya, the United States seemed more interested in recovering the culprits and preventing Libya from establishing jurisdiction than in fulfilling their treaty obligations.¹⁶ Once again, this case raised an interesting tension between two crucial concepts: trust and impunity. From the Libyan perspective, it was uncertain what treatment the United States would afford to the suspected terrorists.¹⁷ Consequently, Libyan leader Muammar Ghaddafi did not trust the United States to prosecute nationals from his country.¹⁸ From the American perspective, impunity remained the dominant concern.¹⁹ Should the suspected terrorists dodge extradition to the United States, there would be a significant risk that those individuals would face national sanctions disproportionate to the crimes committed or, worse yet, no punishment at all.²⁰ Such situations usually result in a jurisdictional impasse and threats of economic reprisals from the economically more powerful state, as was the case in *Lockerbie*.

Thus, referral of the matter to an independent international tribunal like the ICC might have been the proper response to the *Lockerbie* dilemma. This sort of ad hoc arrangement may also prove useful in other *Lockerbie*-like situations, namely where two

15. See *id.* at 5 (listing some of the provisions of the Montreal Convention, which includes mechanisms allowing states to prosecute their own nationals for crimes committed against civil aviation).

16. See *id.* at 11 (noting that the United States joined with the United Kingdom in strongly deploring the Libyan government for not taking effective measures to prevent terrorism).

17. See *id.* at 13 (commenting on the U.N. Security Council resolution calling for Libya to cease participation with all forms of terrorist activity).

18. See *Lockerbie*, 1992 I.C.J. at 5 (noting that there is no extradition treaty between the United Kingdom and Libya, and that Libyan law prohibits the extradition of Libyan nationals).

19. See *id.* at 10 (detailing that the United States joined the United Kingdom in a joint declaration demanding Libya hand over the men suspected of bombing Pan Am Flight 103).

20. See Eric Zubel, *The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council*, 5 ANN. SURV. INT'L & COMP. L. 259, 260 (1999) (commenting on the outcry from the Western press calling for the accused to be brought before U.S. and Scottish courts).

governments are deadlocked over the surrender of suspected terrorists.²¹

Second, a human rights/due process perspective warrants consideration. This approach is analogous to the analysis presented in the first scenario, as it also pertains to the level of trust a state exercising custody might have vis-à-vis the state requesting extradition.²² In the *Lockerbie* case, Libyan leader Ghaddafi clearly did not trust that the judiciary of the United States or the United Kingdom could afford the suspected terrorists an impartial hearing.²³ In addition to red-flagging significant due process concerns, Libya was of the view that the accused were actually considered guilty until proven innocent, contrary to the usual presumption in criminal law.²⁴ As a result, Libya harbored doubts that the United States would afford a fair trial to these individuals.²⁵

It is no secret that governments have been under public scrutiny for curtailing fundamental rights in their efforts to suppress terrorism.²⁶ Once again, in a situation where a government does not believe that its nationals will receive the full benefit of procedural and human rights guarantees, referring the matter to the ICC would be a reasonable middle ground. However, the direct effect of such a model is clear: it reduces the powers of national police and security forces to interrogate and detain suspected terrorists.

21. *See id.* at 265 (emphasizing that the Lockerbie incident was not the only time that Libya and the United States have been deadlocked over an extradition matter involving suspected terrorists).

22. *See id.* (highlighting Libya's distrust of the United States in seeking a settlement of their dispute due to the Berlin nightclub bombing incident).

23. *See id.* at 261 (noting the huge outcry against this particular bombing, and suggesting that it is not surprising that impartiality might come into question).

24. *See id.* (quoting George J. Church in Time magazine, who posed the question, "how can [Ghaddafi] and his regime be punished?" which implies that they were presumed guilty).

25. *See Zubei, supra* note 20 at 265 (reiterating Libya's reservations in dealing with the United States after it bombed Libya's capital city, military installations, and airports following the Berlin nightclub bombing).

26. *See Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (stating that some detainees in Guantanamo Bay are not entitled to due process).

Third, it is imperative to mention the *Yunis* situation.²⁷ In some cases, governments resort to “forcible abduction” of suspected terrorists as the only means to bring them to trial, where other avenues have failed.²⁸ In the *Yunis* case, the appellant was accused of spearheading a complex airplane hijacking and hostage-taking.²⁹ As the facts of the case reveal, in order to secure custody of the suspect, FBI agents concocted an elaborate scheme labeled “Operation Goldenrod:” “[u]ndercover FBI agents lured Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal, and arrested him once the vessel entered international waters.”³⁰ These types of “buy/bust” operations are becoming commonplace in the fight against terrorism.³¹

From the perspective of international law, or law and order more generally, the prospect of deploying bounty hunters or trying to track down terrorists by any means necessary—irrespective of the legal repercussions involved—is clearly not a desirable situation.³² Finding a basis for alternate jurisdiction before the ICC would regularize these types of situations.³³ It is important to reiterate that a recalcitrant state, such as Libya in the *Lockerbie* situation, may be

27. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

28. *See id.* at 1089 (detailing how undercover FBI agents lured Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal and arrested him once the vessel entered international waters, then transferred him to a Navy munitions ship for interrogation); *see also* *North Media Jersey Group, Inc. v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002) (explaining that the Court confirms its inability “to conclude that openness plays a positive role in special interest deportation hearings at a time when my nation is faced with threats of such profound and unknown dimension”).

29. *See Yunis*, 924 F.2d at 1089 (detailing the circumstances surrounding the hijacking of Royal Jordanian Airlines Flight 402).

30. *Id.*

31. *See id.* at 1093 (admitting that while these practices are not “a model for law enforcement behavior,” they are legally-acceptable practices).

32. *See id.* (holding that the U.S. military is usually prohibited from participation in domestic law enforcement but may participate in law enforcement abroad).

33. *See Yunis*, 924 F.2d at 1093 (stating that the fact that a suspect has been brought in to the court’s jurisdiction by forcible abduction does not impair the power to try a person).

expected to feel more confident handing over its nationals to the ICC than to the United States or the United Kingdom.³⁴

Fourth, and to a lesser degree, this framework should address the problem of guerilla and rebel groups. There may be circumstances where such groups illegitimately overthrow democratic governments.³⁵ In the aftermath of terrorist acts leading up to their rise to power, it is likely that these rebel groups would not agree to stand trial for their actions.³⁶ Once again, this situation raises the question of impunity and reaffirms the validity of ICC jurisdiction as a well-tailored mechanism by which to condemn unpunished acts of terrorism.³⁷ This proposition would inevitably entail the involvement of the United Nations ("U.N.") Security Council, and becomes relevant to my last consideration.³⁸

Fifth, the role of the U.N. Security Council in establishing ICC jurisdiction is pertinent.³⁹ In some instances, the international community may call upon the Security Council to decide the fate of

34. See *Lockerbie*, 1992 I.C.J. 3, 5 (April 14, 1992) (commenting on the extreme reluctance of the Libyan government to have their nationals tried in the United Kingdom).

35. See *Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes*, G.A. Res. 3103, U.N. GAOR, 28th Sess., U.N. Doc. A/9120, para. 1 (1973) [hereinafter *UN Resolution on Colonial Domination*] ("The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right of self-determination and independence is legitimate and in full accordance with the principles of international law."), available at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/75/IMG/NR028175.pdf?OpenElement> (last visited Apr. 30, 2004).

36. See *id.* at 142 (stating that an attempt to suppress the struggle against alien domination is against the Charter of the United Nations).

37. See *id.* at 142 (noting that states should afford rebels fighting against racist regimes the status of prisoners of war if captured).

38. See *id.* at 143 (stating that the violation of the legal status of combatants fighting against colonial powers implicates full responsibility under international law).

39. See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EURO. J. OF INT'L L. 993, 994 (2001) (noting that some commentators have defined the terrorist attacks of September 11th as crimes against humanity), available at <http://www.ejil.org/journal/Vol12/No5/120993.pdf> (last visited Apr. 30, 2004).

a suspected terrorist.⁴⁰ In making such a determination amidst a politically-hostile climate, referring the matter to the ICC could constitute an effective and expeditious solution.⁴¹ In other words, as a response to those difficult cases, I propose making the decision of the Security Council one of the bases for establishing jurisdiction under the ICC.⁴²

I now venture into the article's main analysis, which sets out to determine whether acts of international terrorism qualify as crimes against humanity. In doing so, I shall first review the jurisdiction of the ICC as it currently stands. Secondly, after briefly reviewing the concepts of international terrorism and crimes against humanity, I shall engage in a detailed analysis of this issue under Article 7 of the Rome Statute.⁴³

I. CURRENT JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

A. THE ROME STATUTE AND CRIMES AGAINST HUMANITY

Following the Rome Conference, those crimes that fall under the jurisdiction of the ICC have been clearly identified as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁴⁴ In fact, the negotiations between Member States led to the integration of Articles 6, 7, and 8 in the Rome Statute: which include express provisions outlining the aforementioned crimes, along with details regarding the requisite elements of each crime. This article concentrates on crimes against humanity and retains the specific statutory definitions and requirements tailored to this crime.

40. *See id.* at 995 (commenting that, although the Security Council does not have an armed force at its disposal, it may authorize the use of force).

41. *See id.* at 994 (noting that whether the ICC can adjudicate terrorism cases depends partially on the legal definition of terrorism).

42. *See id.* at 997 (explaining that the Security Council issued an ambiguous and contradictory resolution following the September 11th terrorist attacks).

43. *See id.* at 994 (commenting that the United Nations may not consider some acts of terrorism serious enough to try before an international tribunal).

44. *See Rome Statute, supra* note 1, art. 5(1) (stating that the jurisdiction of the ICC is limited to only the most serious crimes).

Article 7(1) is the essential guideline for identifying ICC jurisdiction with regard to crimes against humanity and reads as follows:

ARTICLE 7

CRIMES AGAINST HUMANITY

1. 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.⁴⁵

Therefore, the standards contained in Article 7(1), along with the additional elements found in Article 7(2)(3), are applicable to all crimes against humanity, and consecrate ICC jurisdiction over such acts. In fact, the Rome Statute is the first multilateral treaty to address and incorporate the concept of crimes against humanity as a whole. It is worth noting that, in itself, the Rome Statute does not

45. *Id.* art.7.

purport to modify or amend existing principles of international law.⁴⁶ However, Article 7(2)(a) is noteworthy, and serves as the primary limitation to this portion of the Rome Statute.⁴⁷

In sum, while maintaining its role as a mechanism complementary to national jurisdictions, the ICC will investigate and prosecute crimes that the international community considers the most serious;⁴⁸ crimes against humanity are no exception. The ICC will investigate and prosecute only when national jurisdictions are incapable of initiating genuine and effective proceedings for a given crime.⁴⁹

National courts, namely the High Court of Australia,⁵⁰ have affirmed that crimes against humanity should warrant universal jurisdiction.⁵¹ Other domestic courts have followed suit, emphasizing

46. *See id.* art. 10 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”).

47. *See id.* art 7 (placing limitations on some of the crimes against humanity listed in the Rome Statute).

48. *See Rome Statute, supra* note 1, pmbl. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”).

49. *See Jennifer Llewellyn and Sandra Raponi, The Protection of Human Rights Through International Criminal Law: A Conversation With Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 57(1) U.T. FAC. L. REV. 83, 96 (1999) (emphasizing the importance of an international body like the ICC in compensating for flawed or corrupt national prosecutions and failure to prosecute international crimes).

50. *See Trial of Hans Albin Rauter*, 14 L.R.T.W.C. 89, 109 (1949) (stating that, when trying war crimes or analogous crimes, the duty of the Court did not only pertain solely to national justice, but also purported to “giv[e] expression to the sense of justice to the community of Nations, which sense had been most deeply shocked by such crimes”); *see also Polyukhovich v. Commonwealth of Australia and Another*, (1991) 101 A.L.R. 545, 651 (declaring that crimes against humanity should fall under universal jurisdiction).

51. *See United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (revoking the U.S. certificate of naturalization of a former Nazi concentration camp guard); *Re Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985) (stating that the State of Israel sought and obtained extradition for crimes against the Jewish people, war crimes, and crimes against humanity); *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582 (6th Cir. 1985) (holding that Israel could prosecute on the basis of the principle of universality). The Court stated that crimes similar

that the principle of universality supersedes territoriality in prosecuting such crimes at the national level.⁵² Hence, there is international consensus for the proposition that any state exercising control over perpetrators of crimes against humanity can prosecute them while upholding the moral interests of humanity.⁵³

Nevertheless, in the spirit of complementarity, a framework like the Rome Statute remains effective only when national prosecution is unlikely or devoid of a genuine effort to pursue the matter seriously.⁵⁴ Whether attributable to impunity vis-à-vis the alleged criminals or the unwillingness of a state to extradite such individuals, the lack of a serious prosecution should trigger the jurisdiction of the ICC.⁵⁵

B. THE EXCLUSION OF INTERNATIONAL TERRORISM AS A CRIME AGAINST HUMANITY

It is interesting to note that, as the Rome Conference unfolded, several states expressed the wish to include acts of international

to the ones before it warranted prosecution by any state exercising custody over the perpetrators. *Id.* It was the opinion of the Court that these offenses attract universal condemnation. *Id.*

52. See *Regina v. Finta*, 1 S.C.R. 701, 811 (1994) (“The only reason Canadian courts can prosecute individuals such as Imre Finta is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity”). A former captain in the Royal Hungarian Gendarmerie, Imre Finta, was accused of crimes against humanity and war crimes. *Id.* Justice Cory, writing for the majority of the Supreme Court of Canada, held that Canadian courts are bound by the principle of territoriality. *Id.* Hence, they can only prosecute offenses committed on Canadian soil. *Id.* However, the learned judge added that the principle of universality constitutes an exception to the principle of territoriality, and set out several criteria that must be satisfied in order for the jurisdiction of Canadian courts to be extended. *Id.*

53. See *Finta*, 1 S.C.R. at 806 (“Jurisdiction is based upon the accused’s attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy”).

54. See *id.* at 807 (holding that the ability to try non-national criminals in Canada for crimes committed abroad is carefully-circumscribed and quite limited).

55. See *id.* at 813 (noting that there is no current definition for the mental element of crimes against humanity).

terrorism under ICC jurisdiction.⁵⁶ Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey all voiced the opinion that the treaty should address such crimes.⁵⁷ Most important to the ideas presented in this article is the fact that four states, namely Algeria, India, Sri Lanka, and Turkey, supported the argument that international terrorism should fall within ICC jurisdiction under the heading of crimes against humanity.⁵⁸ This position approximates the central approach of this article, which is two-fold in character: on one hand, studying and analyzing the legal concepts of international terrorism and crimes against humanity and, on the other hand, gravitating towards a point of convergence or intersection between both crimes on the theory that combating terrorism has become a priority for the international community.

At the time of the Rome Conference, the proposal to include international terrorism under ICC jurisdiction as a crime against humanity met with emphatic disapproval. Fears that the politicization of the ICC could result from this proposal were influential: jurisdiction over international terrorism was never explicitly granted to the ICC. The American delegation firmly opposed the inclusion of terrorism in the treaty, and remained a persistent objector.⁵⁹

56. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 227 (Oxford University Press 2001) (noting that Algeria thought that international terrorism was a threat against the foundation of a state).

57. See *id.* (commenting that the non-inclusion of terrorism as a crime against humanity was one reason that Syria and Turkey abstained from voting to adopt the Rome Statute).

58. Cassese, *supra* note 39, at 994.

59. See *id.* (pointing out that the American delegation rejected the proposal that terrorism be included in the Rome Statute). The American delegates provided four grounds to justify their decision to reject the proposed inclusion of terrorism:

- (i) the offence was not well defined; (ii) in their view the inclusion of this crime would politicize the Court; (iii) some acts of terrorism were not sufficiently serious to warrant prosecution by an international tribunal; (iv) generally speaking, prosecution and punishment by national courts were considered more efficient than by international tribunals.

Id.; see also *UN Resolution on Colonial Domination*, *supra* note 35, at 142 (“The struggles of peoples under colonial and alien domination and racist regimes for the implementation of their right of self-determination and independence is legitimate

Many of the states that endorsed the inclusion of terrorism within the scope of the ICC are, in fact, plagued with constant, if not daily, acts of terrorism.⁶⁰ However, the position taken by the recalcitrant states is not wholly incongruent with jurisprudence dealing with terrorism.⁶¹ In fact, in a 1984 decision, the Court of Appeals of the District of Columbia took the same line as the majority of states at the Rome Conference, rejecting the idea of universal jurisdiction over terrorism.⁶² The court focused the judgement around the premise that international consensus on the definition of international terrorism as a crime under customary law was lacking.⁶³ Other

and in full accordance with the principles of international law.”). See generally Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASKATCHEWAN L. REV. 275 (2001) (commenting on the broader issues of the United States’ opposition to the Rome Statute).

60. See KITTICHAISAREE, *supra* note 56, at 227 (pointing out that “[a]ccording to Algeria, international terrorism is a threat against the foundation of a State and a denial of democratic values. For Israel, there needs to be a correct balance between recognizing terrorism as an international crime and focusing on the most practical and effective means of cooperation in bringing international terrorists to justice . . . The eventual non-inclusion of this crime within the ICC’s jurisdiction compelled Sri Lanka and Turkey to abstain from voting to adopt the Rome Statute.”). On the same topic, see P. Kirsch, *Terrorisme, crimes contre l’humanité et Cour Pénale Internationale* (2001) Coalition pour la Cour Pénale Internationale, available at <http://www.iccnw.org/francais/opinion/articles/kirsch.pdf> (last visited on May 12, 2004), at 2.

61. See Kirsch, *supra* note 60, at 2 (detailing those reasons given by states to justify excluding terrorism from the ICC’s jurisdiction).

62. See *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 798 (D.C. Cir. 1984) (upholding the dismissal of an action for lack of subject matter jurisdiction). Survivors and representatives of people murdered in an attack on a bus in Israel brought this case against the Libyan Arab Republic. *Id.* at 775.

63. *Id.* at 795.

I turn next to consider whether terrorism is itself a law of nations violation. While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.

Id.

common law and civil law jurisdictions have reached similar conclusions.⁶⁴

C. POSSIBLE INCLUSION OF INTERNATIONAL TERRORISM AS A CRIME AGAINST HUMANITY

With all due deference, this author hereby submits that the status of international criminal law has evolved, and now adopts a more modern approach, blending the traditional elements of the crime against humanity with the reality of a post-September 11th world.⁶⁵ Consequently, it is my opinion that ICC member states must give careful consideration to the issue of terrorism in order to achieve significant corresponding changes in the area of international criminal law. For instance, former ICTY Judge Antonio Cassese is adamant that the events of September 11th should necessarily influence the international community to revisit the Rome Statute with regard to crimes against humanity.⁶⁶ I fully endorse this view,

64. See Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cmy de Cassation*, 12 EUR. J. INT'L L. 595, 607-11 (2001) (discussing the Ghaddafi case, which raised the issue whether terrorism constituted an international crime). In this case, decided on March 13, 2001, the French Court of Cassation confronted a serious case of terrorism involving Libyan leader Muammar Ghaddafi, in which it had to determine whether terrorism constituted an international crime warranting the Court to deny protective immunity to heads of state. *Id.* The Court ended up quashing the proceedings against the leader, holding that terrorism did not equate to an international crime. *Id.*

65. See *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, 554 (proclaiming that international law is anything but static and that, consequently, courts must recognize its ability to evolve).

It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move.' International law does change: and the courts have applied the changes without the aid of any act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn the slaver, the English courts were justified in applying the modern rules of international law.

Id.

66. See Cassese, *supra* note 39, at 993-95 (commenting on the effects of the terrorist attacks of September 11th).

The terrorist attack of 11 September has had atrocious effects not only at the human, psychological and political level. It is also having shattering

and so join many public figures , many of whom occupy the legal profession.⁶⁷

The idea of including terrorism under the jurisdiction of an international criminal court is not a novel concept. In fact, it emanates from ideas over half a century old, some of which have their origin in the vestiges of the First World War. Following that conflict, the League of Nations, on November 16, 1937, adopted the Convention for the Prevention and Punishment of Terrorism in order to counteract terrorist activity that had taken place after the war.⁶⁸ The treaty provided for the creation of an international criminal court. The Convention never entered into force, and the court was never implemented.⁶⁹

consequences for international law. It is subverting some important legal categories, thereby imposing the need to rethink them, on the one hand, and to lay emphasis on general principles, on the other . . . that atrocious action exhibits all the hallmarks of crimes against humanity: the magnitude and extreme gravity of the attack as well as the fact that it has targeted civilians, is an affront to all humanity, and part of a widespread or systematic practice.

Id.

67. See UN News Centre, *Terror Attacks on US Were Crimes Against Humanity, UN Rights Official Says* (Sept. 25, 2001)(noting that the United Nations High Commissioner for Human Rights, Mary Robinson, has also adopted this view that the terrorist attacks against the United States were “crimes against humanity”), at <http://www.un.org/apps/news/storyAr.asp?NewsID=1613&Cr=terror&Cr1=attack> (last visited Mar. 22, 2004). Distinguished international lawyers have also expressed this position. See Cassese, *supra* note 39, at n.7 (specifically naming Alain Pellet and British lawyer Geoffrey Robertson as lawyers who have written on the subject); see also Geoffrey Robertson, *American Could Settle This Score Without Spilling the Blood Across Afghanistan*, THE TIMES (LONDON), Sept. 18, 2001 (declaring that the terrorist attacks of September 11th, 2001 should be declared a “crime against humanity”).

68. See United Nations Assoc. of Great Britain and Northern Ireland, *The Fight Against Terrorism: Terrorism and Human Rights* (noting that the first attempt to deal with terrorism was the Convention for the Prevention and Punishment of Terrorism), at <http://www.una-uk.org/terrorism/terrorismhr.html> (last visited Apr. 30, 2004).

69. See Commission on Human Rights, Specific Human Rights Issues: New Priorities, In Particular Terrorism, E/CN.4/Sub.2/2003/WP.1 (Aug. 8, 2003) (pointing out that the Convention for the Prevention and Punishment of Terrorism never got off the ground), available at [www.unhchr.ch/huridocda/huridoca.nsf/0/BDA86CA424D4E9E1C1256D830028E78B/\\$File/G0315792.pdf?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/0/BDA86CA424D4E9E1C1256D830028E78B/$File/G0315792.pdf?OpenElement) (last visited Mar. 26, 2004).

In 1994, the International Law Commission (“ILC”) contemplated a similar initiative in its project concerning the Statute of the International Criminal Court.⁷⁰ The notion of international jurisdiction over terrorism would emerge once again in 1998, in the preliminary dialogue to the Rome Conference.⁷¹ In addition to a list of major crimes eventually incorporated into the Rome Statute as “most serious crimes of international concern,”⁷² the ILC suggested including crimes under ICC jurisdiction, such as terrorism and drug trafficking.⁷³ However, the ensuing negotiations produced an overall sentiment that the Rome Statute should limit jurisdiction to serious crimes already enumerated.⁷⁴ Some authors still defend the inclusion of terrorism under ICC jurisdiction, and their argument is growing stronger, particularly as global consensus denouncing the acts of September 11th and seeking to prevent the recurrence of such a tragedy has grown.⁷⁵

70. See *Report of the International Law Commission on the work of its forty-sixth session*, at 70, Supplement No. 10 (A/49/10), (1994) (listing genocide, aggression, and crimes against humanity as crimes to which the Court’s jurisdiction extends).

71. See International Criminal Court, Historical Background (noting that the Rome Statute of 1998 established the International Criminal Court, whose purpose was to make sure the gravest international crimes would not go unpunished), at www.icc-cpi.int/php/show.php?id=history (last visited Mar. 26, 2004).

72. Rome Statute *supra* note 1, art. 1 (introducing the purpose of the International Criminal Court).

73. *But see id.*, art. 5 (failing to include the crimes of terrorism and drug trafficking in the Statute’s final version).

74. See *id.*, art. 5-8 (enumerating and describing the crime of genocide, crimes against humanity, war crimes, and the crime of aggression).

75. See, e.g., Kirsch, *supra* note 60, at 1 (highlighting that Kirsch, the author and the Chairman of the Preparatory Commission for the International Criminal Court, felt that the events of September 11th revealed international mechanisms’ inability to adequately deal with acts of terrorism). Kirsch also adds that, although international terrorism does not fall under ICC jurisdiction, it could qualify as a crime against humanity, and thus be subject to international punishment, notwithstanding applicable domestic or national sanctions. *Id.*; see also International Criminal Court: Questions and Answers, Question 11 (noting that this section does not refute the possibility that international terrorism could fall under the heading of crimes against humanity), at <http://www.icc-cpi.int/php/show.php?id=faq> (last visited Mar. 24, 2004).

Similarly, during the eighth session of the Preparatory Commission for the International Criminal Court ("PCICC"), Turkey submitted a document in which it asserted that acts of terrorism constituted some of the most significant threats to peace.⁷⁶ Moreover, it opined that the global community should not have to wait the prescribed time period⁷⁷ to amend the Rome Statute and to recognize terrorism as a particularly repugnant infraction.⁷⁸ Turkey suggested a pragmatic approach to tackling the issue of terrorism and to broadening the jurisdiction of the court,⁷⁹ arguing that law must adapt to reality and underlining two possible avenues by which to enact effective and proactive changes that would place terrorism in a specific category of crimes. Corresponding amendments could be initiated either through the vehicle of the PCICC or via an international conference.⁸⁰ In its view, Turkey's objective was to create a category⁸¹ of crimes separate from those already explicitly enumerated in the Rome Statute.

Could the International Criminal Court deal with terrorist acts within its existing jurisdiction? The International Criminal Court will have jurisdiction over genocide, crimes against humanity and war crimes. The ICC may be able to prosecute terrorist acts when they amount to these crimes. All countries have a duty to take all necessary steps to prevent the commission of terrorist acts and bring alleged terrorists to justice.

Id.

76. See Comments by Turkey with regard to the terrorist crimes, PCNICC/2001/DP.1 of 2 October 2001 [hereinafter Comments by Turkey] (listing terrorism as a significant threat to peace).

77. See Rome Statute, *supra* note 1, Article 121(1) (noting that only state parties can propose amendments to the Rome Statute after the expiry of seven years from the Statute's entry into force).

78. See Comments by Turkey, *supra* note 76 (describing further Turkey's suggestions and comments regarding Article 121(1) and the prescribed waiting period for the amendment of the Rome Statute).

79. See *id.* (illustrating Turkey's personal take on the issues of terrorism vis-à-vis jurisdiction).

80. See *id.* (attempting to take a realistic and practical approach to amending the Rome Statute).

81. See Kirsch, *supra* note 60, at 5 (explaining that many war crimes described in the Rome Statute could also amount to acts of terrorism when they are part of an intentional attack aiming to instigate terror, thereby constituting an affront to fundamental principles of international law). Kirsch provides the following examples within the Rome Statute: Articles 8(2)(a)(i), (iii), (iv), 8(2)(b)(i), (ii), (v), (xiii), 8(2)(c)(i), (ii), (iii), 8(2)(e)(i), (ii), (xii). *Id.*

I commend this Turkish initiative. However, I respectfully advance a divergent strategy vis-à-vis the inclusion of terrorism within ICC jurisdiction. The contemplated solution would be deployed through the policies and interpretation of the soon-to-be fully-operational ICC, relying on well-established legal guidelines delineated by other major international tribunals such as the ICTY and ICTR. I submit, on the contrary, that many acts of international terrorism already qualify as crimes against humanity, as they fulfill the requisite elements established under the Rome Statute. In other words, the text of the Rome Statute should stand as it is presently formulated, for it allows the international community to include crimes of terrorism under Article 7. Furthermore, I recommend that the international community should include crimes of terrorism under Article 7, bearing in mind the fundamental underpinnings of the ICC: deterrence, punishment of international crimes, and justice for victims.⁸²

As I have previously outlined, many leading international jurists support this conclusion and, in my opinion, rightly so.⁸³ Nevertheless, it is useful to conduct a serious analysis to determine whether acts of international terrorism could converge so as to fall under the heading of “crimes against humanity.” Firstly, I will briefly review the concept of international terrorism. Secondly, I will examine the concept of crimes against humanity, predominantly by surveying the jurisprudence of the ICTY and ICTR.

82. See Rome Statute, *supra* note 1, pmbl. (laying out the purpose of the ICC).

83. See generally Coleen Enache-Brown and Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613, 624 (1998) (asserting that the definition of “universal crimes” should be expanded in light of new offenses, such as hijacking); see also Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788, 815 (noting that since World War II, universal jurisdiction has expanded and now covers terrorist activities). Some scholars also suggest that the concept of universality serves as an effective vehicle by which to promote international condemnation of terrorist acts. *Id.*; see, e.g., Rudiger Wolfram, *The Decentralized Prosecution of International Offenses Through National Courts*, in WAR CRIMES IN INTERNATIONAL LAW 233, 235 (Yoram Dinstein and Mala Tabory, eds., Kluwer Law International 1996) (suggesting that universal jurisdiction protects the interests of all people).

II. RETHINKING THE JURISDICTION OF THE COURT: RECOGNIZING TERRORISM AS A CRIME AGAINST HUMANITY

A. DEFINING TERRORISM

Many new buzzwords emanate from September 11th. Whether states were referred to as “evildoers” or described as part of “the axis of evil,” it was clear that a new vocabulary emerged from the rubble and debris.⁸⁴ Most importantly, a new international priority was proclaimed: combating international terrorism.⁸⁵ However, it seems that the most important buzzword in this global campaign, “terrorism,” is still poorly-defined among the international community.⁸⁶ States have yet to agree upon a universal definition for terrorism.⁸⁷ One of the obvious obstacles to reaching an agreement on the definition of terrorism derives simply from the fear of politicization.⁸⁸ This lack of consensus can be substantiated by reviewing the United Nations’ historical treatment of terrorism.⁸⁹ I

84. See President George W. Bush, State of the Union Address at the United States Capital, Washington D.C. (Jan. 29, 2002) (introducing both of these terms into the American vocabulary when referencing proponents of terrorism and anti-American sentiment), *at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited 3/23/2004).

85. See *id.* (referencing Bush’s first enumerated goal in which he states, “My hope is that all nations will heed my call, and eliminate the terrorist parasites who threaten their countries and my own.”)

86. See *Extract from the Report of the Secretary-General on Measures to Eliminate International Terrorism* U.N. Doc. A/58/116 (2003) (noting that, as of December 2003, there were twenty-one global or regional agreements relating to international terrorism).

87. See A.C. AREND & R.J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 141 (Routledge 1993) (commenting that while there are multiple definitions for the term “terrorism,” there are some common elements to each varying definition).

88. See Aaron Noteboom, *Terrorism: I Know it When I See It*, 91 OR. L. REV. 553, 565 (stating that different countries have varying purposes for subscribing to different definitions that cater to their own interests).

89. See *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie*

do not purport to engage in an extensive review of the history of efforts to define the crime of terrorism.⁹⁰ However, it is useful to briefly highlight some of the more recent efforts and some of the milestones along the road to a definition.⁹¹

in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes, U.N. GAOR 6th Comm., 27th Sess., U.N. G.A. Res. 3034 (XXVII) (1972) (highlighting the international community's reaction to the assassination of Israeli athletes at the 1972 Munich Olympics and the creation of a U.N. Committee on Terrorism).

90. See *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res.40/61, U.N. GAOR, 40th Sess., U.N. Doc. A/Res/40/61 (1985) (providing a brief history of the treatment of terrorism by the United Nations).

91. For a detailed history of General Assembly Resolutions on the topic of terrorism preceding and following the 1985 landmark document, see *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 3034, U.N.GAOR., 27th Sess., (1972); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 31/102, U.N.GAOR, 31st Sess., (1976); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 32/147, U.N.GAOR, 32d Sess. (1977); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 34/145, U.N.GAOR, 34th Sess. (1979); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an*

Following the Cold War, the United Nations was undeterred in its efforts to combat (and define) terrorism. In fact, in General

Attempt to Effect Radical Changes, G.A. Res. 36/106, U.N.GAOR, 36th Sess., U.N. Doc. A/RES/36/109 (1981); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 38/130, U.N.GAOR, 38th Sess., U.N. Doc A/RES/38/130 (1983); *Inadmissibility of the Policy of State Terrorism and Any Actions by States Aimed at Undermining the Sociopolitical System in other Sovereign States*, G.A. Res. 39/159, U.N. GAOR, 39th Sess., U.N. Doc. A/RES/39/159 (1984); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 42/159, U.N.GAOR, 42d Sess., U.N. Doc. A/RES/42/159 (1987); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, G.A. Res. 44/29, U.N.GAOR, 44th Sess., U.N. Doc. A/RES/44/29 (1989); *Measures to Eliminate International Terrorism*, G.A. Res. 46/51, GAOR, 46th Sess., U.N. Doc. A/RES/46/51 (1991); *Human Rights and Terrorism*, G.A. Res. 48/122, GAOR, 48th Sess., U.N. Doc. A/RES/48/122 (1993); *Measures to Eliminate International Terrorism*, G.A. Res. 49/60, GAOR, 49th Sess., U.N. Doc A/RES/49/60 (1994); *Human Rights and Terrorism*, G.A. Res., 49/185, GAOR, 49th Sess., U.N. Doc. A/RES/49/185 (1994); *Measures to Eliminate International Terrorism*, G.A. Res. 50/53, GAOR, 50th Sess., U.N. Doc A/RES/50/53 (1995) [hereinafter Resolution 53]; *Human Rights and Terrorism*, G.A. Res. 50/186, GAOR, 50th Sess., U.N. Doc. A/RES/50/186 (1995); *Measures to Eliminate International Terrorism*, GAOR, 51st Sess., G.A. Res. 51/210, U.N. Doc. A/RES/51/210 (1996); *Human Rights and Terrorism*, GAOR, 52d Sess., G.A. Res. 52/133, U.N. Doc. A/RES/52/133 (1998); *Measures to Eliminate International Terrorism*, GAOR, 52d Sess., G.A. Res. 52/165, U.N. Doc. A/RES/52/165 (1998); *Measures to Eliminate International Terrorism*, G.A. Res. 53/108, GAOR, 53d Sess., U.N. Doc. A/RES/53/108 (1999); *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, GAOR, 54th Sess., U.N. Doc. A/RES/54/109 (2000); *Measures to Eliminate International Terrorism*, G.A. Res. 54/110, GAOR, 54th Sess., U.N. Doc. A/RES/54/110 (2000); *Human Rights and Terrorism*, G.A. Res. 54/164, GAOR, 54th Sess., U.N. Doc. A/RES/54/164 (2000); *Measures to Eliminate International Terrorism*, G.A. Res. 55/158, GAOR, 55th Sess., U.N. Doc. A/RES/55/158 (2001); *Condemnation of Terrorist Attacks in the United States of America*, G.A. Res. 56/1, GAOR, 56th Sess., U.N. Doc. A/RES/56/1 (2001) [hereinafter Res. on Condemnation of Attacks in USA].

Assembly Resolution 53 on “Measures to Eliminate International Terrorism,” adopted on December 11, 1995, the United Nations integrated a substantial portion of a definition that was submitted in a 1993 study:

criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.⁹²

Although seemingly extensive, the above definition did not withstand international scrutiny or achieve acceptance.⁹³

The main obstacle to a universally-accepted definition of terrorism is easy to identify: states disagree on what constitutes terrorism.⁹⁴ The United Nations has been particularly evasive on the subject of defining terrorism. A salient example lies in U.N. Security Council Resolution 1373 on international cooperation to combat threats to international peace and security caused by terrorist acts, a recent

92. Resolution 53, *supra* note 91, para.2; *see also* AREND, *supra* note 87, at 141 (identifying three essential elements to the definition of terrorism: “violence, actual or threatened, a political objective, however conceived, and an intended audience, typically though not exclusively a wide one”).

93. *See, e.g.,* Suresh v. Canada, [2002] 1 S.C.R. 3 (exemplifying the difficulty that national jurisdictions have faced in applying a universal definition for terrorism), http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html (last visited Apr. 30, 2004). In *Suresh*, the Supreme Court of Canada was faced with a difficult task: balancing Canada’s interest in combating terrorism against a refugee’s interest in not being deported to a country where he would likely be subject to torture. *Id.* Of particular importance to the current discussion is the Court’s finding that there is no universally-accepted definition of terrorism, but that the crime is sufficiently settled in law to guide a judgment on the matter. *Id.* Ultimately, the Court opted for a definition found in a multilateral treaty, under the aegis of the International Convention for the Suppression of the Financing of Terrorism. *Id.* This example tends to demonstrate that national courts are making progress in this field, and perhaps leading the way in clarifying the concept of terrorism. *Id.* Similarly, the Canadian Anti-Terrorism Act now provides a definition of terrorism, and includes reference to several multilateral treaties on terrorism. Anti-Terrorism Act, S.C. 2001, c. 41.

94. *See* Noteboom, *supra* note 88 at 563-65 (outlining the international debate regarding the definition of terrorism).

landmark in the fight against terrorism.⁹⁵ The document clearly deploras acts of international terrorism and specifies that any act of terrorism constitutes a threat to international peace and security, but fails to provide a definition of terrorism.⁹⁶

It is fair to say that most states have a common vision of what elements should be present.⁹⁷ Based on most national definitions of terrorism, or on the understanding most states have of the concept, I submit that two elements are essential: the targeting of civilians and the existence of an ideological or political purpose.⁹⁸ The former entails a serious debate on the distinction between combatants and non-combatants; as well as a series of considerations relevant to the Geneva Convention. The second element ties into the motivations behind terrorism, and moves toward a standard that defies the “usual criminal behavior” model and looks to deeply-rooted or inherent

95. See U.N. SCOR, 56th Sess., 438th mtg., U.N. Doc S/RES/1373 (2001) (discussing states' obligations to combat terrorism while never effectively determining a set definition for the term).

96. See *id.* (“Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. . .”).

97. See, e.g., Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768 (discussing the safety of aviation); see also Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (commenting on aircraft hijackings); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1971, 24 U.S.T. 565 T.I.A.S. No. 7570 (addressing acts of aviation sabotage, such as bombings aboard aircraft in flight); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 1035 U.N.T.S. 167 (outlawing attacks on senior government officials and diplomats); International Convention Against the Taking of Hostages Dec. 18, 1979 1316 U.N.T.S. 205 (decrying the taking of hostages); Convention on the Physical Protection of Nuclear Material Mar. 3, 1980 (combating unlawful taking and use of nuclear material).

98. See, e.g., 22 U.S.C. § 2656f(d)(1)-(d)(2) (2000) (indicating that, “international terrorism” is generally understood as “terrorism involving citizens or the territory of more than 1 country” and defining the term “as premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”).

dimensions of the terrorists' belief system, religious motivations, or political agenda.⁹⁹

Endeavoring to define the term "terrorism" would clearly extend beyond the scope of this project. Moreover, unlike buzzwords that may be coined almost instantaneously, a universal definition of terrorism might send the international community back to the drawing board for some time. However, most states have delineated the term so as to include the two aforementioned elements.¹⁰⁰ Of particular importance to my discussion is the first element, namely the targeting of civilians, as it is mirrored in the Rome Statute.¹⁰¹ In fact, its language is evocative of a *sine qua non* of crimes against humanity: that an attack be directed against a civilian population.¹⁰² At the outset, one can immediately appreciate the degree of proximity and compatibility between notions of terrorism and crimes against humanity.¹⁰³ The legal status of the acts perpetrated on September 11th remains undisputed: such crimes undoubtedly amount to international terrorism.¹⁰⁴ I now refer to these events in order to analyze whether terrorist acts qualify as crimes against humanity. In my view, the current definition of terrorism does not, in any way, preclude the ICC from adjudicating acts of terrorism under the heading of crimes against humanity. On the contrary, the definition of terrorism as understood by a majority of states fits neatly under Article 7 of the Rome Statute.¹⁰⁵ Consequently, I

99. See Noteboom, *supra* note 88, at 565 (noting that countries often struggle with the distinction between terrorism and the "legitimate struggle of an occupied people for liberation").

100. See *id.* (providing an overview of multiple definitions of terrorism).

101. See Rome Statute, *supra* note 1, art. 7 (defining crimes against humanity to mean systematic attacks against a civilian population).

102. *Id.*

103. Compare 22 U.S.C. § 2656(f)(d) (defining terrorism as politically-motivated violence against civilians) with Rome Statute, *supra* note 1, art. 7 (describing crimes against humanity as attacks against civilians).

104. See U.N. SCOR, 56th Sess., 4370 mtg., U.N. Doc. S/RES/1368 (2001) (stating that the international community recognized that the acts perpetrated by members of Al Qaeda amount to terrorism, and recognizing the right of the United States and its allies to use force in self-defense vis-à-vis the attacks).

105. See *supra* note 103 (comparing the text of the United States Code with the Rome Statute and finding that the two are compatible).

contend that it is unnecessary to amend the Statute to encompass acts of terrorism.

B. SPECIFIC ACTS OF INTERNATIONAL TERRORISM

1. *Al Qaeda Network and September 11, 2001*

Ample reference has been made in legal scholarship to the events surrounding September 11th, 2001. It has now become universal knowledge that four distinct attacks were perpetrated against citizens of the United States on that date: two of which consisted of hijacking two planes full of civilians and crashing them into the Twin Towers of the World Trade Center (“WTC”) in New York City; one of which consisted of hijacking a plane full of civilians and crashing it into the Pentagon in Washington, D.C., and one of which consisted of hijacking a plane full of civilians, presumably to strike another landmark in Washington, D.C..¹⁰⁶ The final attack was apparently aborted; the plane plummeted to the ground, never reaching its destination.¹⁰⁷ The results were devastating: over 3,000 confirmed deaths associated with the WTC explosions, confirmed deaths of all crew and passengers onboard the four hijacked planes, missing persons, several wounded by the explosions, mass destruction to property, including the collapse of both WTC towers, the implementation of parallel crisis management initiatives leading to more deaths of involved on field personnel, etc. These facts have been reiterated endlessly by media organizations across the globe and virtually no controversy exists on the factual background of these events or on their immediate aftermath, except for some adjustment of the final death toll.

Nor is there any disagreement as to the identity of the terrorists responsible for perpetrating the aforementioned crimes.¹⁰⁸ Al Qaeda,

106. See, e.g., David Von Drehle, *World War, Cold War Won, Now the Gray War*, WASH. POST, Sept. 12, 2001, at A09 (detailing the September 11th attacks).

107. See, e.g., *September 11: Chronology of Fear* (noting the crash of flight 93 in Pennsylvania at 10:10 A.M), at <http://www.cnn.com/2001/US/09/11/chronology.attack> (last visited Apr. 30, 2004).

108. See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (noting the role of Al Qaeda in the

an Afghanistan-based network with terrorist cells across the globe, claimed responsibility for the attacks of September 11th.¹⁰⁹ With the support of the local Taliban government, Al Qaeda's leader, wanted terrorist Osama bin Laden, orchestrated these attacks,¹¹⁰ and also claimed responsibility for other terrorist activities.¹¹¹

The response has been a strong consensus among the international community, led by the United States, on the primacy of policies directed at combating and suppressing international terrorism.¹¹² In

September 11th attacks), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Apr. 30, 2004).

109. See *id.* (declaring that "Americans have many questions tonight. Americans are asking: Who attacked my country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda.").

110. See *id.* (identifying Osama bin Laden as the leader of Al Qaeda and noting his links to many other terrorist organizations in over sixty countries).

111. See, e.g., *Embassy Bombers Sentenced to Life without Parole*, PBS News (outlining the sentences four Al-Qaeda terrorists, all associates of bin Laden, received for the bombing of two U.S. embassies in Africa in 1998), http://www.pbs.org/newshour/updates/october01/embassy_10-18.html (last visited Apr. 30, 2004).

112. See *News and Notes—Terrorist Attacks on the World Trade Center and the Pentagon – Balancing the Interests*, HUM. RTS. & U.K. PRACTICE 2.5(2), (Dec. 3, 2001) (commenting on the international effects of September 11th, and how many countries reviewed their legislation in order to provide greater security to their citizens), LEXIS, Legal (excluding U.S.), United Kingdom, Journals. Reference is made to such changes in the United Kingdom as well as to obligations under the European Court of Human Rights. *Id.*

One of the results of the horrendous events on 11 September 2001 in the USA is that all countries are taking a long and hard look at what legislative steps might be taken, in addition to the other practical measures, to protect their respective citizens. In the United Kingdom there is talk of identity cards, changing the rules on extradition, and seeking derogation from Article 5 of the ECHR to allow the detention of suspected terrorists. There has not been the usual storm of protests about identity cards and, as one who probably has an original end-of-war identity card lurking somewhere in the house, I have never understood what all the fuss is about. There have been derogations before for dealing with terrorism in Northern Ireland, and what critics seem to be stressing is that any powers should be temporary and clearly for emergency use. In addition to the ECHR we also have responsibilities under the European Convention on Terrorism, and on extradition there are always sensitive issues to be considered. The scales have to be evenly balanced between preserving the interests of suspects and protecting the public, and in

fact, the U.N. General Assembly, on September 18, 2001, set the tone for what was to translate into a priority on the international agenda: namely, eliminating terrorist threats.¹¹³ As early as a week after the attacks, one could clearly detect a common wish to forestall terrorism and bring these types of actors to justice.¹¹⁴

I firmly believe that such acts could be prosecuted effectively in international fora such as the ICC, while striking a balance between two fundamental objectives: on one hand, reflecting the ideals of the Charter of the United Nations and commonly-accepted principles of international law while, on the other hand, achieving justice against the perpetrators on behalf of the victims and those who mourn them.¹¹⁵

The legal status of the acts surrounding September 11th is uncontested; the international community did not hesitate to characterize the actions of Al Qaeda as terrorism.¹¹⁶ However, from a strictly legal perspective, these acts also meet the generally-accepted legal requirements for the definition(s) of terrorism.¹¹⁷ Firstly, these

the present climate of opinion it is unlikely that there will be too many challenges to the government's proposals. Nevertheless, important issues are being raised, and one of my regular contributors, Dr Brown, will consider these options in the next issue.

Id.

113. See Res. on Condemnation of Attacks in USA, *supra* note 91 (condemning the attacks carried out by Al Qaeda on September 11th).

114. See U.N. Doc. S/RES/1368 (2001), *supra* note 104 (stating the international community's outrage at the September 11th attacks and extending condolences).

115. Cassese, *supra* note 39, at 1001.

The response to the appalling tragedy of 11 September may lead to acceptable legal change in the international community only if reasonable measures are taken, as much as possible on a collective basis, which do not collide with the generally accepted principles of this community. Otherwise, the road would be open to the setting in of that *anarchy* in the international community so eagerly pursued by terrorists.

Id. (emphasis in original).

116. See, e.g., Res. on Condemnation of Attacks in USA, *supra* note 91 (condemning the September 11th attacks as unabashed acts of terrorism); see also Kirsch, *supra* note 60 (agreeing that the September 11th attacks were unlawful acts of terrorism); Cassese, *supra* note 39 (concurring with this legal characterization).

117. See *supra* Part II.A (laying out the generally-accepted elements of the definition of the word "terrorism").

acts were intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons.¹¹⁸ It is also widely known that, following the Persian Gulf Conflict, Al Qaeda waged war, or *jihad*, against the Western World, especially against Americans, commonly labeled “infidels” by Muslim fundamentalist terrorist groups. The admitted goal of the September 11th attacks was to terrorize the American population, particularly the citizens of New York City and Washington, D.C. In doing so, it catapulted Americans into a state of chaos and panic that was eventually replaced by sorrow and grief.¹¹⁹ A deep collective feeling of paranoia and anxiety marked the months following the attacks, all attributable to the terror instigated by members of Al Qaeda. Secondly, there is no debate on the criminal nature of the perpetrated offenses; the direct consequences of hijacking four planes were the deaths of thousands of innocent citizens.¹²⁰ Finally, the bases upon which Al Qaeda carried out these acts of terrorism arguably correspond: there was obviously a strong religious element to these actions, but also a political dimension with regard, amongst other things, to the United States’ policy of support for Israel. One could also argue that there are other deeply-rooted ideological and philosophical motives that drove Al Qaeda to orchestrate the attacks.¹²¹

118. See generally Noteboom, *supra* note 88, at 569 (commenting on the political aspirations of terrorists and terrorist acts).

119. See President George W. Bush, Address to a Joint Session of Congress and the American People, *supra* note 108 (commenting on the sorrows and strength of the United States following the September 11th attacks).

120. See *id.* (noting the deaths of not only Americans but also Pakistani, Indian, Israeli, El Salvadorian, Iranian, Mexican, Japanese, and British citizens).

121. See William Carley & Timothy O’Brien, ‘New Kind of Terrorist, Amateur and Ad Hoc, Worries Authorities’, 3(3) FORENSICS, POLICING AND THE LAW, paras. 4, 5, 10, 13, 14 (1995) (exploring the context of Muslim extremism and its motives for making Westerners the target of terrorist acts). The article was prompted by a previous terrorist bombing on the WTC in 1995, which left six people dead and approximately a thousand people injured. *Id.* In addition, the authors explored further reasons behind terrorist actions and, in the following excerpt, eerily foreshadowed the events that would transpire over the six years that followed the publication of their article:

[t]errorist attacks around the world by Muslim extremists may grow for several reasons, analysts say. Mr. AbuKhalil cites widespread poverty, as

It is apparent that there is a logistical difficulty in prosecuting the culprits behind the September 11th attacks.¹²² Although the responsibility of Al Qaeda's superiors, such as Osama bin Laden, may be established, all those terrorists on board the four planes (and thus all those directly responsible) perished in the explosions. Therefore, it is impossible to prosecute these criminals in international or national fora.¹²³ However, as I have mentioned previously, the acts of September 11th are invoked here as an example—a standard against which to measure subsequent acts of terrorism. I merely suggest the usefulness of analyzing how the specific facts surrounding those events fit into existing legal guidelines associated with crimes against humanity.

2. Application to Other Recent Acts of International Terrorism

In addition, I submit that this application of international criminal law to facts should be transposed to other acts of terrorism where applicable, pursuant to the premise that the acts surrounding

well as fundamentalists' frustration because, in many nations, they can't change things by legitimate means. The fundamentalist electoral victory last year in Algeria, he notes, has been thwarted by a brutal crackdown by the secular government in power. Robert Hunter, former directory of Middle Eastern affairs for the National Security Council, says the fundamentalist extremists also may gain adherents partly because of the fading appeal of the older terrorist groups, which failed to win major political and economic payoffs for the masses of people. He adds that a new cycle of violence may be spurred by recent events, such as Israel's move to expel 400 Palestinians and the plight of Muslims in Bosnia. "I think we'll see more terrorism coming out of radical Islam," Mr. Hunter concludes . . . Whether that means more terrorism in the U.S. - in the manner of the World Trade Center attack - is another question. Mr. Whipple predicts that there will be more attempts, but that most of them will be thwarted by U.S. intelligence and law-enforcement agencies. "These plots will be nipped in the bud, and we won't even hear of most of them," he says. But because these new extremist groups are so hard to keep track of, Mr. Whipple adds, "a few may slip through."

Id. paras. 27-29 & 31-32.

122. Rowan Scarborough, *U.S. Search for bin Laden intensifies*, THE WASH. TIMES, Feb. 23, 2004 (evidencing the difficulty the U.S. has had in capturing, much less prosecuting, the mastermind behind the attacks of September 11th), <http://washingtontimes.com/national/20040223-012312-3087r.htm> (last visited Apr. 30, 2004).

123. *Cf.* Rome Statute, *supra* note 1, art. 11(1) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").

September 11th qualify as crimes against humanity. In fact, several acts of international terrorism would, *prima facie*, seem to amount to crimes against humanity, based on the considerations I have outlined above.¹²⁴ In any event, it is useful to analyze thoroughly how the acts of September 11th meet the legal requirements contained in the Rome Statute. Once it is universally recognized that these events are crimes against humanity, and correspondingly, that they fall under ICC jurisdiction, they will translate into a groundbreaking precedent for the international legal treatment of terrorism.

C. CRIMES AGAINST HUMANITY: GENERAL OVERVIEW

Of importance to ICC jurisdiction is the universal condemnation of crimes against humanity. Deplored as “inhumane” in character, these acts violate the very core elements of human decency.¹²⁵ Although this section does not purport to deliver an exhaustive historical and legal background on the concept of crimes against humanity, it is useful to canvass some of the leading cases and documents on the matter, in order to give the reader a grasp on the proximity between such crimes and international terrorism.

The notion and legal application of crimes against humanity emerged following World War II in the context of the Nuremberg and Tokyo trials.¹²⁶ The Nuremberg Charter provided an enumeration

124. See *infra* Part II.F.4. (addressing the concept that alleged terrorists would have to be linked to other incidents targeting civilians in order to be accountable for crimes against humanity). One could invoke the recent terrorist bombing in Bali, Indonesia, where over 180 people, including tourists, perished. Other recent attacks include the incidents in Kuwait, Yemen, and the hostage-taking by Chechen rebels in Moscow, Russia. *Id.*

125. See KITTICHAISAREE, *supra* note 56, at 85, citing Egon Schwelb, *Crimes Against Humanity* 23 BYBIL 178, 195-7 (1946) (“A crime against humanity is a crime against ‘humaneness’ that offends certain general principles of law and which becomes the concern of the international community. It has repercussions beyond international frontiers or exceeds in magnitude or savagery any limits tolerated by modern civilization.”).

126. Roger S. Clark, *Nuremberg and Tokyo in Contemporary Perspective*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 171, 176-77 (Timothy H. McCormack & Gerry J. Simpson eds.) (stating that crimes against humanity had occurred before the war, but that the Nuremberg and Tokyo Tribunals tried to respect questions of jurisdiction and what had been previously considered offenses against humanity and aggressive war).

of crimes against humanity.¹²⁷ Although the Nuremberg Charter incorporated a technical use of the term “crimes against humanity,”¹²⁸ and although these crimes were grouped under a separate category than war crimes,¹²⁹ the Nuremberg Tribunal did not seem to acknowledge the novelty of their character. Hence, in that context, the frontier between war crimes and crimes against humanity was, for all purposes, blurred.¹³⁰ In addition, under the Nuremberg Charter, it was imperative that a crime against humanity be committed in connection with a crime against peace or a war crime.¹³¹ Although the definition contained in the Nuremberg Charter applied directly to crimes committed during World War II, it is

127. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288 [hereinafter Nuremberg Charter] (defining “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated [emphasis added]”).

128. See Schwelb, *supra* note 125, at 183-84 (expressing that the term “crimes against humanity” was included with the specific objective of comprehensively covering those crimes that narrower interpretations of traditionally-used phrases would not have covered).

129. See *id.* at 186-87 (highlighting the perception that there were different categories of crimes: the crime of a German Nazi murdering a German, a Nazi murdering a Jew, carrying out Nazi enterprise “resulting in atrocities or war crimes;” and Nazi enterprises involving atrocities as distinguished from war crimes).

130. See KITTICHAISAREE, *supra* note 56, at 87 (outlining how the Nuremberg Tribunal treated crimes against humanity and war crimes as overlapping and interchangeable, the only major discernible difference being that crimes against humanity were those committed in Germany or in Austria and Czechoslovakia annexed as part of Germany, whereas war crimes were committed in territories occupied by Germany).

131. See *id.* (“[C]rimes against humanity under the Nuremberg Charter aimed to ensure that inhumane acts in violation of general principles of the laws of all civilized nations committed in connection with war should be punished; therefore, a crime against humanity was treated as an ‘accompanying’ or ‘accessory’ crime to either crimes against peace or war crimes.”); see also Schwelb, *supra* note 125, at 206 (explaining that the term was to encompass cases not covered by norms traditionally covering “laws and customs of war”).

interesting to note that the Nuremberg Tribunal considered its Charter to be “a reflection of current international law.”¹³²

Control Council Law No. 10, at Article II, dated 20 December 1945, also contained an enumeration of crimes against humanity.¹³³ This law effectively implemented the concept of crimes against humanity. Its practical ramifications were two-fold: on one hand, it expanded the list of specific crimes embodied under the Nuremberg Charter,¹³⁴ while, on the other hand, it suppressed the requirement that there exist a nexus between a crime against humanity and a crime against peace.¹³⁵

Of equal importance to the implementation of this legal concept is the fact that crimes against humanity do not require special intent;¹³⁶ indeed, “crimes against humanity differ from genocide in that no *dolus specialis* to destroy members of a particular group is required in case of crimes against humanity.”¹³⁷ In that respect, the *Akayesu* case clearly demonstrates the abandonment of *dolus specialis* as a

132. See V.M. Jacquart, *La Notion de Crime Contre L'Humanité en Droit International Contemporain et en Droit Canadien* 21 RGD 607, 623 (1990).

133. See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 2(1)(c) (Dec. 20, 1945), 3 Official Gazette Control Council for Germany 50-55 (1946) (“Atrocities and Offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.”), at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> (last visited Mar. 28, 2004).

134. See KITTICHAISAREE, *supra* note 56, at 87 (describing the fact that Control Council Law No. 10 augmented the Nuremberg Charter by adding imprisonment, torture, and rape to the list of crimes against humanity).

135. See *id.* at 88 (clarifying that Law No. 10’s omission of the words “in execution of or in connection with any crime within the jurisdiction of the Tribunal” eliminated the requirement that a crime against humanity must be committed in connection with a crime against peace or a war crime).

136. See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, paras. 565-68 (Sept. 2, 1998) (differentiating between genocide and crimes against humanity, and stating that crimes against humanity include murder, extermination, enslavement, starvation, or deportation of a civilian population, and persecution on national, racial, religious or political grounds).

137. KITTICHAISAREE, *supra* note 56, at 85.

requirement for the commission of a crime against humanity: “crimes against humanity are aimed *at any* civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”¹³⁸

It is interesting to note that the concept of crimes against humanity did not exclusively originate from the context of the Nuremberg trials. In fact, the Paragraph 2 of the Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land introduced the notion when it referred to “the interests of humanity and the ever-progressive needs of civilization.”¹³⁹ Most importantly, Paragraph 8 of the Preamble, commonly referred to as the Martens Clause, represents the earliest allusion to such a concept; although the term “crime against humanity” was not expressly mentioned, the document stated that “the inhabitants and belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.”¹⁴⁰ Apparently, there was no intention at that time to differentiate crimes against humanity from war crimes.¹⁴¹

The *Akayesu* decision refers to the Martens clause.¹⁴² In addition, the ICTR pointed out that such terminology was used subsequently

138. *Akayesu*, Case No. ICTR-96-4-T, para. 565 (emphasis added).

139. 36 Stat. 2277, T.S. No. 539, para. 2.

140. *Id.* para. 8.

141. See Schwelb, *supra* note 125, at 180 (describing how the term in the Charter was a technical term and noting that, in previous international documents, the term was considered non-technical).

142. See *Akayesu*, Case No. ICTR-96-4-T, para. 566 (noting that early notions such as the phrases “crimes against mankind” and “crimes against the human family” also appear); see also Francisco Forrest Martin, *Delineating a Hierarchical Outline of International Law Sources and Norms*, 65 SASK. L. REV. 333, 338-39 (2002) (offering the Martens clause as an example of how international instruments influence other international principles); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(2) 1125 U.N.T.S. 3,7, 16 I.L.M. 1391, 1296-97 (restating the Martens clause as reading “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience”).

in the post-World War I context to denounce the massacre of Armenian peoples in Turkey.¹⁴³ It is thus apparent that the conceptual roots of crimes against humanity reach back to international documents predating the Nuremberg era, although the concept gained strength following World War II. In this respect, it is useful to analyze briefly how courts have contributed to the evolution of the definition of this international crime.

In the renowned *Eichmann* case,¹⁴⁴ Otto Adolf Eichmann was accused of crimes he committed in his capacity as a Nazi superior.¹⁴⁵ The Court prosecuted Eichmann under Section I(b) of an Israeli law which stated that “[c]rime against humanity means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.”¹⁴⁶ Common elements of the modern definition of crimes against humanity, as seen in the Rome Statute, for instance, are easily identifiable in this definition.¹⁴⁷ As mentioned previously, the Court also declared that a crime against humanity did not require the special intent (*dolus specialis*) to target a specific group.¹⁴⁸ Eichmann

143. See *id.*, para. 565 (acknowledging that the concept of crimes against humanity were recognized before Nuremberg by explaining that on 28 May 1915, the Governments of France, Great Britain and Russia denounced the massacres of the Armenian population in Turkey as “crimes against humanity and civilization for which all the members of the Turkish government will be held responsible together with its agents implicated in the massacres”); see also Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, Report Presented to the preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (1919), reprinted in 14 AM. J. INT’L. L. 95 (1920) [hereinafter 1919 Commission Report] (referencing the violations against the laws of humanity in the course of describing those whom the tribunal shall adjudicate).

144. Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 (Dec. 11, 1961).

145. See *Akayesu*, ICTR-96-4-T para. 568 (explaining that Eichmann was charged under Nazi and Nazi Collaborators Law “for his participation in the implementation of the plan know as the Final Solution of the Jewish problem.”).

146. *Eichmann*, 36 I.L.R. at 30.

147. Compare *id.*, with Rome Statute, *supra* note 1 (finding that both have comparable and compatible definitions of crimes against humanity).

148. See *Eichmann*, 36 I.L.R. at 41 (explaining the irrelevance of the fact that Eichmann’s crime was against the Jewish people).

was eventually sentenced to death, after his appeal was declined by the Supreme Court of Israel.¹⁴⁹

The relationship between crimes against humanity and intent was further developed in the *Barbie* case,¹⁵⁰ in which a former superior of the Gestapo was tried for deporting and executing civilians.¹⁵¹ The French Court of Cassation proposed a definition of crimes against humanity which effectively broadened the intent element¹⁵² and

149. See *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 277, 341-2 (May 29, 1962) (concluding that when the Israeli Legislature allowed the death sentence to stand, they could not have imagined a criminal more deserving of it than Eichmann).

150. *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125 (1985).

151. See *Prosecutor v. Dusko Tadic a/k/a "Dule,"* Case No. IT-94-I-T, ICTY T. Ch. II, para. 641 (May 7, 1997).

In this case the *Chambre d'accusation* of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons during the Second World War, but only for 'persecutions against innocent Jews,' and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity. The order of the examining magistrate along the same lines was confirmed by the *Cour d'Assises* and an appeal was lodged. On appeal the *Cour de Cassation* quashed and annulled the judgment in part, holding that members of the Resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present. As the court stated, '[n]either the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity.' Thus, according to the *Cour de Cassation*, not only was the general population considered to be one of a civilian character despite the presence of Resistance members in its midst but members of the Resistance themselves could be considered victims of crimes against humanity if the other requisite elements are met.

Id.

152. *Barbie*, 78 I.L.R. at 137 (explaining that even war crimes could be considered crimes against humanity if they were inhumane acts and if the persecution was committed in a systematic manner in the name of a state practicing a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition).

subsequently affirmed it.¹⁵³ *Eichmann* stated that such a crime did not require special intent.¹⁵⁴ The *Barbie* case widened the notion of intent by suggesting a broad interpretation of the term “civilian population,”¹⁵⁵ as elaborated in the *Eichmann* decision and other international documents previously cited.¹⁵⁶ In *Tadic Tr. Chamber II*, the ICTY explained how the French Court proceeded to broaden this notion of intent, namely by counting members of the French Resistance as within the “civilian population.”¹⁵⁷ From these decisions, one observes a common wish to create a “catch-all” definition of crimes against humanity. This impetus would be further expanded in subsequent cases and, finally, in the Rome Statute.

For instance, the *Touvier* case involved a high-ranking officer in the Militia of Lyons.¹⁵⁸ In that decision, the French Court of Appeal

153. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 570 (Sept. 2, 1998) (“The fact that the accused, who had been found guilty of one of the crimes enumerated in Article 6(c) of the Charter of the Nuremberg Tribunal, in perpetrating that crime took part in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, constituted not a distinct offence or an aggravating circumstance but rather an essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.”).

154. See *supra* note 148 and accompanying text (finding that the intent that motivated *Eichmann* to choose a specific race was irrelevant in *Eichmann*’s prosecution).

155. See generally *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125, 136-41 (1985) (overruling the lower court’s conclusion that *Barbie* could only be held accountable for crimes against humanity vis-à-vis those Jews who were non-combatants in the Resistance).

156. See *infra* notes 248-256 and accompanying text (explaining the meaning and evolution of the term “civilian population”).

157. See *Prosecutor v. Dusko Tadic a/k/a “Dule,”* Case No. IT-94-I-T, ICTY T. Ch. II, para. 643 (May 7, 1997) (concluding that “a wide definition of civilian population, as supported by these sources, is justified. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”). The Court also highlighted the inherent limitation of a case like *Barbie*: it is a decision emanating from a national court. *Id.* para. 642.

158. See *Akayesu*, ICTR 96-4-T, para. 571 (enumerating the relevant facts in the *Touvier* case).

referred to the definition of crimes against humanity elaborated in *Barbie*.¹⁵⁹ It also further defined the policy or plan element, which would eventually be incorporated in the Rome Statute: “[t]he specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a state practicing a policy of ideological supremacy.”¹⁶⁰ The Court held that since Touvier was not acting on behalf of a state that practiced a policy of ideological supremacy, but in the name of the “Vichy” State, he was not responsible for crimes against humanity.¹⁶¹ With all due deference, I submit that this argument is unsound because, as the ICTR noted, the “Vichy” State clearly collaborated with Nazi Germany, the implementer of precisely such a policy.¹⁶² In fact, a court eventually recognized that Touvier had indeed committed crimes against humanity.¹⁶³

The definition of crimes against humanity developed in *Barbie* was further developed in the *Touvier* case. In that case, the accused, Paul Touvier, had been a high-ranking officer in the Militia (*Milice*) of Lyons, which operated in ‘Vichy’ France during the German occupation. He was convicted of crimes against humanity for his role in the shooting of seven Jews at Rillieux on 29 June 1994 as a reprisal for the assassination by members of the Resistance, on the previous day, of the Minister for Propaganda of the ‘Vichy’ Government.

Id.

159. *See id.* para. 572 (specifically citing *Barbie* in the course of defining crimes against humanity).

160. *Id.*

161. *See id.* para. 573 (declaring that the “Vichy” state was not a state practicing a policy of ideological supremacy, although it collaborated with Nazi Germany, which clearly did practice such a policy).

162. *See id.* (noting that the Nazis represented a state government which practiced a policy of ideological supremacy).

163. *See id.* para. 574.

The Court of Cassation allowed appeal from the decision of the Court of Appeal, on the grounds that the crimes committed by the accused had been committed at the instigation of a Gestapo officer, and to that extent were linked to Nazi Germany, a State practicing a policy of ideological supremacy against persons by virtue of their membership of a racial or religious community. Therefore the crimes could be categorized as crimes against humanity. Touvier was eventually convicted of crimes against humanity by the *Cour d’Assises des Yvelines* on 20 April 1994.

Id.

Although the preceding review of relevant jurisprudence is by no means extensive, it clearly demonstrates the origins of a modern definition of crimes against humanity through leading national cases. For instance, the ITCY followed the *Barbie* case, one of several cases on World War II involvement,¹⁶⁴ with regard to the definition of crimes against humanity.¹⁶⁵ However, elucidation did not emanate solely from the above-mentioned decisions at Nuremberg trials or in Israeli and French courts. In reality, it took nearly a century to concretely define the notion of crimes against humanity.¹⁶⁶ The relevant sources associated with this legal concept, whether inspired by international law¹⁶⁷ or created by national jurisdictions,¹⁶⁸ are too numerous to list here.

164. See, e.g., *Notes and News*, HUM. RTS. & U.K. PRACTICE 3.4(2) (Oct. 24, 2002), LEXIS, Legal (excluding U.S.), United Kingdom, Journals.

Maurice Papon, a member of the Vichy administration and a senior civil servant during the war, was found guilty on 2 April 1998 of aiding and abetting the unlawful arrest and false imprisonment of Jews who were deported to Auschwitz in convoys in 1942 and 1944. Such offenses were crimes against humanity and he was sentenced to ten years' imprisonment and stripped of his civil, civic and family rights. He appealed and argued he was exempt from the obligation to surrender to custody but the court said that he had forfeited this. He then fled to Switzerland but the authorities there ordered him to leave. The Criminal Division of the Cour de Cassation then declared that he had forfeited his right of appeal.

Id.

165. See *Prosecutor v. Mile Mrksic et al.*, Case No. IT-95-13-R6, 528-529 (April 3, 1996).

Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council resolution 780, noted, 'it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose.

Id.

166. See *supra* notes 139-143 and accompanying text (tracing the roots of the concept of "crime against humanity").

167. See, e.g., *Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess.,

However, one conclusion emerges: the various elements of the legal concept of crimes against humanity, whether related to intent, the policy element, etc., eventually culminated in what is now Article 7 of the Rome Statute.¹⁶⁹ In fact, rules of customary international law now fully recognize that crimes against humanity constitute international offenses.¹⁷⁰ Moreover, perpetrators of such crimes incur individual criminal responsibility.¹⁷¹ Some authors argue that the prohibition of crimes against humanity represents an “extant or emerging global jus cogens obligation.”¹⁷² This writer fully endorses that proposition.¹⁷³ Given their morally reprehensible and serious character, such crimes should receive particular attention and should be prosecuted internationally.¹⁷⁴ This premise does not seem to generate any controversy and should not, as the international

U.N. Doc. A/236 (1946) (calling on the Committee on the codification of international law to incorporate the principles of the Charter of the Nuremberg Tribunal in the process of forming an International Criminal Code); *see also Formulation of the Nürnberg Principles*, [1950] 2 Y.B. Int'l L. Comm'n 374, 374-377, U.N. Doc. A/CN.4/SER.A/1950 (describing the process by which the principles were formulated and stating the final principles agreed upon).

168. *See infra* notes 227-231 and accompanying text (describing the impact the Supreme Court of Canada has had on the development of the *mens rea* requirement for crimes against humanity).

169. *See* Rome Statute, *supra* note 1, art. 7 (detailing what is included under the definition of crimes against humanity).

170. *See supra* notes 50-52 and accompanying text (highlighting the growing consensus among nations that universality supercedes territoriality when it comes to prosecuting crimes against humanity).

171. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141 (Oct. 2, 1995) (noting that the ICTY had jurisdiction to hear the case against the defendant, in part, because there exists no requirement that a crime against humanity must be committed in the course of an armed internal or international conflict).

172. Martin, *supra* note 142, at 346.

173. *See* M.C. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 60-61 (2d ed. 1999) (emphasizing the growing importance of “crimes against humanity” in the global sphere, and tracing the origin of the term to the Hague Convention, where the words were intended to “provide an overarching concept to protect against unspecified violations whose identification in positive international law was left to future normative development”).

174. *See generally* Micaela Frulli, *Are Crimes Against Humanity More Serious Than War Crimes?* 12 EUR. J. INT'L LAW 329 (2001) (opining that crimes against humanity are often considered more serious than war crimes), *available at* <http://www.ejil.org/journal/Vol12/No2/120329.pdf> (last visited Apr. 30, 2004).

community established the ICC in an effort to suppress such deplorable conduct.¹⁷⁵ As I have already argued, the separate category of crimes against humanity is not necessarily exclusive of certain terrorist acts.¹⁷⁶ In addition, I also previously underlined that many international jurists support my argument. I now focus on the crimes committed by members of Al Qaeda as they pertain to the Rome Statute. In this regard, I intend to demonstrate how the acts of September 11th qualify as crimes against humanity, in that they meet all of the requisite elements under Article 7.¹⁷⁷

Before initiating an analysis of the aforementioned provision, I propose to look briefly at the notion of crimes against humanity as elaborated by the ICTR and ICTY. Although this paper sets out to analyze the legal requirements under Article 7 of the Rome Statute, it is essential to review the statutory provisions governing these international tribunals with regard to crimes against humanity. Furthermore, in light of the glaring fact that the ICC has yet to produce a single decision, I will invoke ICTY and ICTR jurisprudence in analyzing different elements under the Rome Statute. However, one caveat is mandatory: the doctrine of binding precedent, or *stare decisis*, is inapplicable in this international context.¹⁷⁸ Hence, one must avoid the temptation to read the legal

175. See German Embassy, *Purpose of the ICC* (quoting Chancellor Gerhard Schröder as having said that “[t]he International Court nourishes my hope that in the future the worst violations of international law such as genocide, crimes against humanity and war crimes will not go unpunished.”), at <http://www.germany-info.org/relaunch/info/publications/infocus/ICC/purpose.html> (last visited Mar. 28, 2004).

176. See, e.g., Debbie Berman, *Amnesty International: Palestinian Terror is Crime Against Humanity*, ISRAELINSIDER, July 11, 2002 (describing Amnesty International’s classification of Palestinian terrorist attacks on Israeli citizens as a crime against humanity), <http://english.pravda.ru/hotspots/2002/07/11/32325.html> (last visited Mar. 28, 2004).

177. See Rome Statute, *supra* note 1, art. 7 (listing acts which, when committed as part of a widespread or systematic attack directed against a civilian population, would constitute crimes against humanity).

178. See KITTICHAISAREE, *supra* note 56, at 50 (stating that “[i]n any case, international tribunals are not bound by past doctrines; they must apply customary international law as it stands at the time of the commission of offences.”); see also *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 654 (Oct. 2, 1995) (demonstrating that

principles I extract from these tribunals or any other international body as directly binding on the ICC.¹⁷⁹ This jurisprudence nevertheless remains instrumental to the following analysis of the Rome Statute.

D. THE INTERPRETATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Following a report by the Secretary General of the United Nations, the Security Council adopted the Statute for the International

there is no binding precedent between these judicial bodies). The Trial Chamber II of the ICTY rejected the notion of crimes against humanity as conceived at the time of World War II, insisting on the interpretation applicable at the time the offenses were perpetrated.

An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy 'because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nürnberg Charter]. *Id.*; see also *Trendtex Trading Corporation v. Central Bank*, [1977] Q.B. 529 (Jan. 13, 1997) (asserting the notion that *stare decisis* does not apply to international law). In doing so, the Court effectively reversed the decision rendered by the British Court of Appeals in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*. In that regard, Judge Shaw eloquently stated:

[t]his *reductio ad absurdum* carries the suggestion that there must be a flaw in the argument which leads to the incidence of *stare decisis*. May it not be that the true principle as to the application of international law is that the English courts must at any given time discover what the prevailing international rule is and apply that rule? This is not the same process as applying foreign law in my courts for that only comes into question when for a particular reason the proper law relating to the matter before the court is that foreign law. In the case of international law it is always part of the law to be applied irrespective of any intention or agreement of the parties in suit. This, so it seems to me, is the true distinction and not that the one is immutable as a rule of law while the other is always subject to investigation as a question of fact.

Id.

179. See MARK JENNINGS, THE PROCEDURAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 5 (explaining that the Rome Statute does not obligate the Court to adhere to its prior decisions, but rather permits the judges, in their discretion, to accord precedential value to principles and rules of law identified in prior decisions), available at <http://www.isrcl.org/Papers/Jennings.pdf> (last visited Mar. 28, 2004).

Criminal Tribunal for the Former Yugoslavia.¹⁸⁰ The relevant provision is contained in Article 5 and reiterates some elements I reviewed previously, such as the requirement that the crime be “directed against any civilian population;” it reads as follows:

ARTICLE 5

CRIMES AGAINST HUMANITY

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

murder;

extermination;

enslavement;

deportation;

imprisonment;

torture;

rape;

persecutions on political, racial and religious grounds;

other inhumane acts.¹⁸¹

From the statute itself, it is apparent that the moving party must prove a nexus between the alleged crime against humanity and an “armed conflict” before the ICTY. In other words, there must be a geographical and temporal link between the acts of the accused and an armed conflict. In light of the factual and historical background of the conflict in former Yugoslavia, this threshold seems easy to surmount.¹⁸² In addition, the type and nature of such an armed

180. See *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Year, Supp. No. 2, U.N. Doc. S/25704 (1993) (reporting on all aspects of the establishment of an international tribunal in the former Yugoslavia).

181. Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended by UN Security Council Resolution 1411 (2002) of 17 May 2002 (U.N. Doc. S/RES/1411) (2002) [hereinafter ICTY Statute].

182. *Roots of the Balkan Troubles: A History of Ethnic Skirmishes*, CNN (providing a short history of the conflict in the Balkans), at <http://www.cnn.com/WORLD/Bosnia/history> (last visited Mar. 28, 2004).

conflict is irrelevant¹⁸³ and the alleged crime does not even have to fit into an official policy or practice.¹⁸⁴ However, as will be demonstrated,¹⁸⁵ this jurisdictional limitation does not reflect the state of customary international law.¹⁸⁶ The ITCY has recognized

183. See *Prosecutor v. Zoran Kupreskic et al.*, Case No. IT-95-16-T, para. 545 (Jan. 14, 2000) (“By requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council, in establishing the International Tribunal, may have defined the crime in Article 5 more narrowly than is necessary under customary international law. It is nevertheless sufficient for the purposes of Article 5 that the act occurred in the course or duration of any armed conflict. The type and nature of such conflict – whether international or internal – is therefore immaterial. An armed conflict can be said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. The nature of the nexus required under Article 5 of the Statute is merely that the act be linked geographically as well as temporally with the armed conflict.”); see also *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, para. 71, (Mar. 3, 2000) (taking the same position).

184. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 573 (Oct. 2, 1995) (“It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law. The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.”); see also *Prosecutor v. Delalic, Mucic, Delic, Landzo*, Case No. IT-96-21-T, para. 195 (November 16, 1998) [hereinafter *Celibici* case] (asserting the same position).

185. See *infra* note 186 and accompanying text (addressing this issue extensively, and citing relevant jurisprudence and doctrine).

186. It would be interesting to contrast this idea with the notion that, under customary international law, crimes against humanity do not require to be linked with any conflict at all, as expressed in *Tadic Jurisdiction Decision*. However, on this very opinion expressed in the *Tadic Jurisdiction Decision*, Penny warns that “[i]t must be cautioned, however, that this ICTFY argument is also obiter dicta.” C.K. Penny, ‘No Justice, No Peace?’: A Political and Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia, 30 OTTAWA L. REV. 259, 311-12 n.275 (1999); see also KITTICHAISAREE, *supra* note 56, at 89 (citing *Tadic Jurisdiction Decision*, but not providing the same caveat, stating instead that “crimes against humanity under customary international law need not be linked to international armed conflict, as required in the Nuremberg and Tokyo Charters, or

this,¹⁸⁷ and many authors accordingly support the abandonment of the “armed conflict” element.¹⁸⁸ The “armed conflict” requirement serves the purpose of defining the *ratione materiae* of the ICTY, and does not constitute an additional element of the *mens rea*.¹⁸⁹ This

any conflict at all”); see also Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, para. 251 (July 15, 1999) (recognizing that customary international law does not require the nexus between the alleged acts and an armed conflict: “[t]hus the “attack on the civilian population” is here equated to “the armed conflict”). The two concepts cannot, however, be identical because crimes against humanity would, by definition, always take place in armed conflict, whereas under customary international law these crimes may also be committed in times of peace. So the two—the “attack on the civilian population” and “the armed conflict”—must be separate notions, although of course under Article 5 of the Statute, the attack on “any civilian population” may be part of an “armed conflict.” A nexus with the accused’s acts is required, however, *only* for the attack on “any civilian population. A nexus between the accused’s acts and the armed conflict is *not* required, as is instead suggested by the Judgment. The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.” *Id.*; see also Kupreskic, Case No. IT-95-16, para. 573-77 (taking the same position).

187. See, e.g., Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A, ICTY App. Ch., para. 81 (June 12 2002) (outlining the respondent’s argument that the alleged perpetrator of a crime against humanity need not approve of a plan to target the civilian population or personally desire its outcome, but that it is sufficient for the acts to be intentionally carried out within the context of a widespread or systematic attack against a civilian population, with knowledge of the context in which these crimes fit, and full awareness that their actions would contribute to the attack); see also *supra* note 171 and accompanying text (explaining the holding of the court in *Tadic*, which stated that it is not necessary to show that armed conflict was occurring at the exact time and place of the alleged acts, only that the offenses were closely related to the armed conflict as a whole).

188. See, e.g., Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 242 (1996) (“The Tribunal’s affirmation that crimes against humanity can be committed in peacetime is of major importance.”).

189. See *Dusko Tadic*, Case No. IT-94-1-A, para. 249.

[t]he Appeals Chamber would also agree with the Prosecution that the words ‘committed in armed conflict’ in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not “a substantive element of the *mens rea* of crimes against humanity” (i.e., not a legal ingredient of the subjective element of the crime.

Id.

distinction has the practical effect of doing away with the requirement that parties prove a nexus between the alleged acts and an armed conflict.¹⁹⁰ Therefore, the current state of customary international law does not require a nexus between crimes against humanity and an armed conflict.

E. THE INTERPRETATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The Statute for the International Criminal Tribunal for Rwanda ("ICTR Statute") incorporates an enumeration of the same crimes against humanity found under the ICTY Statute.¹⁹¹ However, it diverges from the latter in two fundamental aspects: first, it "does away with the requirement in the ICTY Statute that such crimes be committed in armed conflict,"¹⁹² and second, it adds a discriminatory element to ICTR jurisdiction over crimes against humanity. This second element is of primary importance, as it limits the geographical jurisdiction of the ICTR. Article 3 of the ICTR Statute is the essential provision in this regard, and reads as follows:

ARTICLE 3

CRIMES AGAINST HUMANITY

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

190. *See id.* para. 272 (holding that the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not constitute one of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute); *see also* Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, paras. 66-68 (Mar. 3, 2000) (maintaining that, in order to show that a link exists between an alleged crime and an armed conflict as a whole, it is sufficient that "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict").

191. *See* Sec. Council Res. 955, U.N. SCOR, art. 3, U.N. Doc. S/RES/955 (1994) (establishing the tribunal's power to prosecute persons responsible for certain enumerated crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds).

192. KITTICHAISAREE, *supra* note 56, at 89.

Murder;
Extermination;
Enslavement;
Deportation;
Imprisonment;
Torture;
Rape;
Persecutions on political, racial and religious grounds;
Other inhumane acts.¹⁹³

Hence, the ICTR Statute introduces the notion of “discriminatory intent,”¹⁹⁴ which requires that a crime against humanity must be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds” in order to fall within ICTR jurisdiction. In other words, the prosecution must establish that the alleged crime was perpetrated on the basis of a policy of persecution, a threshold easily surpassed in the factual context of the Rwandan conflict.

In the *Kayishema* case, the ICTR cited the additional discriminatory element.¹⁹⁵ Like the required nexus between a crime against humanity and an “armed conflict” under the ICTY Statute,

193. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., art. 3, U.N. Doc. S/RES/955 (1994).

194. See KITTICHAISAREE, *supra* note 56, at 89 (“Thus, the ICTR Statute contains a requirement of discriminatory intent in each of the enumerated crimes against humanity additional to the other requirements in the Nuremberg Charter, the Tokyo Charter, and the ICTY Statute.”).

195. Prosecutor v. Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, para. 130 (May, 21 1999).

The Statute contains a requirement additional to both the Nuremberg Charter and the ICTY Statute; that the attack be committed on national, political, ethnic, racial or religious grounds. The Prosecution submits that the discrimination at issue was based on ethnic or, alternatively, political grounds. The Prosecution asserted that the discrimination was on ethnic grounds because the victims were Tutsis and political grounds because the Tutsis were accomplices or supporters of the RPF. The Defence did not contest that the Tutsis were considered an ethnic group. Political grounds include party political beliefs and political ideology.

Id.

this additional “discriminatory intent element” under ICTR jurisdiction does not reflect the state of customary international law.¹⁹⁶ This additional “discriminatory intent element” is essential in that it was integrally transposed into the Rome Statute, along with the policy or plan element. In fact, under Article 7(1)(h) of the Rome Statute, a crime against humanity must be “committed as part of a widespread or systematic attack against any civilian population” and can translate into “persecution against any identifiable group or collectivity on *political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds.*”¹⁹⁷

F. REQUISITE ELEMENTS UNDER THE INTERNATIONAL CRIMINAL COURT’S JURISDICTION

As I have already indicated, Article 7 of the Rome Statute is the provision that concerns crimes against humanity.¹⁹⁸ In addition to

196. *See id.* para. 138 (confirming, with regard to both the ICTY and ICTR Statutes that “the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute”).

197. *See, e.g., id.* para. 130 (indicating that someone’s political beliefs or ideology could be the object of persecution and thereby meet the “discriminatory intent” requirement under Article 3); *see also* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, paras. 583-84 (Sept. 2, 1998) (pointing out that certain acts falling outside the scope of persecution could be qualified as crimes against humanity if perpetrated with the purpose of furthering other crimes against humanity).

Inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator’s intention was to further his attacks on the group discriminated against on one of the grounds mentioned in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity.

Id.

198. For a legislative history of the crimes under Article 7, *see* H. von Hebel & D. Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 79, 90-103 (R.S. Lee ed. 1999) (providing the background for Article 7 and the three negotiating pressures that influenced the definition of crimes against humanity). Those negotiating pressures were: 1) the state’s concerns that other states could potentially use the law on crimes against humanity to infringe upon

listing a series of actual crimes such as murder and extermination, Article 7 also states that the alleged crime must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” in order to fall under ICC jurisdiction.¹⁹⁹ Article 7 integrates various developments of international law since World War II.²⁰⁰ Moreover, the Rome Statute imports the “discriminatory intent element” found under the ICTR Statute.²⁰¹ I next review the requisite elements under Article 7 and study the aspects of the crime of murder as they apply to acts perpetrated by members of Al Qaeda.²⁰²

1. *Actus Reus*

Under the Rome Statute, the *actus reus* requirement of any crime against humanity is fairly straightforward. It may be summarized as amounting to the “commission of an attack that is inhumane in nature and character, causing great suffering, or serious injury to

national sovereignty; 2) state commitments to an expansive and feasible definition; and 3) pressure for a high level of accuracy. *Id.*

199. Rome Statute, *supra* note 1, art. 7.

200. See Darryl Robinson, *Defining “crimes against humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 44 (1999) (explaining that the brutalities of World War II challenged the drafters of the Nuremberg Charter in 1945 to criminalize the “policy of atrocities and persecutions against civilian populations” who were not of enemy states, and thus which did not always fit the technical definition of war crimes). The drafters designated such atrocities as “crimes against humanity.” *Id.*

201. See discussion *infra* Part II.E (describing how the ICTR Statute supplies an additional requirement, absent from the Nuremberg Charter and the ICTY Statute, that a perpetrator must have committed an attack on national, political, ethnic, racial or religious grounds).

202. See *Akayesu*, Case No. ICTR-96-4-T, para. 578 (citing that before the Rome Statute, the ICTR broke crimes against humanity down into four common elements). These elements follow:

- (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the act must be committed as part of a wide spread or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

Id.

body or mental or physical health.”²⁰³ Furthermore, the “inhumane act must be committed as part of a widespread or systematic attack against members of a civilian population.”²⁰⁴ These principal ingredients²⁰⁵ make up the general *actus reus* required for ICC jurisdiction. Four distinct elements must be present: i) an attack; ii) a nexus between the specific crimes and the attack; iii) the attack must be committed against any civilian population; and iv) the attack must be committed on a widespread or systematic basis.²⁰⁶ These specific *actus reus* elements will be discussed in greater detail in following sections.²⁰⁷ *Prima facie*, the attacks carried out by members of Al Qaeda on September 11th satisfy the threshold physical action requirement.²⁰⁸

203. See KITTICHAISAREE, *supra* note 56, at 90-91 (explaining that the Rome Statute reveals developments in international humanitarian law that followed World War II with the addition of 1) “forcible transfer of population” as a substitute for deportation; 2) “severe deprivation of physical liberty” as included within imprisonment; 3) sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization as incorporated in sexual offenses; 4) the requirement that persecution is aimed on discriminatory grounds “against any identifiable group collectivity; 5) disappearance of persons; and 6) apartheid).

204. *Id.*

205. See Prosecutor v. George Rutaganda, ICTR, Case No. ICTR-96-3-T, para. 67 (1999) (specifying that the *actus reus* must be more than a random inhumane act). Customary international law requires that the *actus reus* must be committed either in a widespread or systematic nature, but does not necessarily require both conditions to be present. *Id.* para. 68; see also Prosecutor v. Alfred Musema, ICTR, Case No. ICTR-96-13-T, para. 204 (2000) (characterizing “widespread” as a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims” and “systematic” as “organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources”).

206. See Musema, Case No. ICTR-96-13-T, para. 205 (stipulating that an attack may also be non-violent). Imposing a system of apartheid is an example of a non-violent attack that the Rome Statute considers a crime against humanity. *Id.*

207. See discussion *infra* Part II.F.4 (analyzing each element individually to determine whether the attacks carried out by Al Qaeda, once dissected into separate composite elements of the *actus reus*, did fulfill the requirements under the Rome Statute).

208. See *id.* (illustrating how the acts that Al Qaeda perpetrated on September 11th meet the requirements of *actus reus* for crimes against humanity).

2. *Mens Rea*

In addition to the *mens rea* required for an ordinary crime,²⁰⁹ the Rome Statute contains a specific requirement with regard to the mental element of any crime against humanity: the perpetrator of the crime must have knowledge that attack that is being carried out on a widespread or systematic basis.²¹⁰ Both the ICTR and the ICTY have indicated that either “actual” or “constructive” knowledge that the alleged attack is being perpetrated on such a basis and pursuant to such a policy or plan is sufficient to meet this requirement.²¹¹ In other

209. BLACK’S LAW DICTIONARY 712, 999 (7th ed. 1999). Black’s defines *mens rea* as

[t]he state of mind that the prosecution, to secure a conviction, must prove that the defendant had when committing a crime; criminal intent or recklessness . . . *Mens rea* is the second of two essential elements of every crime at common law, the other being the *actus reus*. – Also termed mental element; criminal intent; guilty mind.

Id.

210. See KITTICHAISAREE, *supra* note 56, at 91 (expounding that without knowledge, the perpetrator would not have the *mens rea* for a crime against humanity, but merely would possess the *mens rea* for an ordinary crime).

211. See, e.g., Prosecutor v. Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, para. 133 (May, 21, 1999) (confirming the requirement that the accused must have acted with knowledge of the broader context of the attack with the wording of Article 7 in the Rome Statute); see also Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 656-57 (Oct. 2, 1995) (citing to the judgment in the Canadian case, *Regina v. Finta*, and stating that “[t]he mental element required to be proved to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his or her acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his actions were inhumane.”); Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, para. 271 (July 15, 1999) (establishing that crimes against humanity are of a special nature, involve a higher degree of moral depravity than ordinary crimes, and thus require express elements); Prosecutor v. George Rutaganda, ICTR, Case No. ICTR-96-3-T, para. 69 (1999) (reinforcing the notion that the accused must have acted with a preconceived policy, which the state of the accused need not have adopted formally); Prosecutor v. Zoran Kupreskic et al., Case No. IT-95-16-T, paras. 56-57 (Jan. 14, 2000) (reiterating the elements of *mens rea* for crimes against humanity); *Musema*, Case No. ICTR-96-13-T, para. 206 (concurring with the Kayishema and Ruzindana judgments that a perpetrator must have actual or constructive knowledge of the expansive setting of the attack); Prosecutor v. Georges Ruggiu, ICTR, Case No. ICTR-97-32-I, para.20 (2000) (assenting with the Tadic and Kayishema tribunals that proving *mens rea* for crimes against

words, the accused must have a sense of the broader overall context in which the crime is being committed,²¹² and that such an offense fits into a context of mass crimes or within a pattern of similar offenses targeting civilian populations.²¹³ In sum,

[t]he perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act . . . to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.²¹⁴

Much jurisprudence has been written about the notion of criminal state of mind, and more precisely, about a perpetrator's "knowledge of a given attack."²¹⁵ Generally, the ITCR has established that a tribunal will examine a perpetrator's knowledge of an attack on an objective level, that is, based upon what can be implied from the circumstances of the alleged crime.²¹⁶ Hence, a tribunal will find an accused responsible for crimes against humanity based solely on their understanding of his or her knowledge of the attack and of the broader context in which the specific attack occurred; the

humanity is arduous and controversial); KITTICHAISAREE, *supra* note 56, at 91 (expressing that tribunals will judge knowledge on an objective level, applying the factual circumstances of the case). In judging the prerequisite knowledge for a crime against humanity, the accused need not know what will happen to the victims and the tribunal need not prove that the accused knew of the plan, merely that the accused took a risk that the crime could be committed. *Id.*

212. See *Dusko Tadic*, Case No. IT-94-1, para. 656 ("[T]herefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs."); see also KITTICHAISAREE, *supra* note 56, at 93 (justifying the proposition that the act must be committed "with knowledge of the attack" in order to differentiate unrelated events that have no connection with the crime at issue and would not be a crime against humanity).

213. See *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, paras. 244-50 (Mar. 3, 2000) (relying on the *Kayishema* and *Ruzindana* cases to demonstrate that the perpetrator must know that his act is part of the attack on a civilian population).

214. *Kayishema*, Case No. ICTR-95-1-T, para. 133.

215. See KITTICHAISAREE, *supra* note 56, at 92 (illuminating that the tribunal need not prove the motive of the accused, besides at the sentencing stage). In addition, having committed a crime with personal motives will not acquit the accused if his act fits the pattern of a crime against humanity. *Id.*

216. See *id.* (citing historical and political circumstances, the perpetrator's responsibilities in the political or military hierarchy, the breadth and seriousness of the acts, and the nature of the crimes as objective facts with which the tribunal may examine a perpetrator's knowledge).

perpetrator's knowledge with regard to the fate of the civilian population that is being targeted is immaterial to the analysis.²¹⁷ Similarly, the accused's motives are irrelevant to the tribunal's assessment of his or her knowledge of the attack.²¹⁸ Consequently, the prosecution does not have to establish that the accused actually knew of the criminal policy or plan behind the alleged criminal acts.²¹⁹ In reality, "it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context."²²⁰ The fact that the accused took a deliberate risk that the crime might follow, even if he harbored a hope that no damage or harm would ensue from the attack, would fulfill the "actual" or "constructive" knowledge element.²²¹

217. See *Dusko Tadic*, IT-94-1, para. 659.

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

Id.

218. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, para. 252 (July 15, 1999) (explaining that, although an act related to armed conflict is not committed for purely personal motives, nor is an act unrelated to armed conflict necessarily committed for purely personal reasons). A perpetrator may commit a crime against humanity for purely personal reasons, as long as he knew of and committed the crime in the context of widespread or systematic crimes directed against a civilian population. *Id.* para. 255. Although motives are initially irrelevant in criminal law, they can become relevant in mitigating or aggravating a convicted perpetrator's sentence. *Id.* paras. 267, 269.

219. See KITTICHAISAREE, *supra* note 56, at 91 (specifying that the accused must possess knowledge that his acts contributed to a broader context of mass crimes).

220. See *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, para. 251 (Mar. 3, 2000) (qualifying the knowledge required for a perpetrator to be found to have met the *mens rea* element of a crime against humanity). The ICTY feels that an accused who participated in the charge of a mass crime in a leadership capacity should have questioned the malicious intent of the crimes. *Id.* para. 253.

221. See *id.* para. 254 (rejecting the notion that the ICTY should require proof that the accused intended to support the regime that orchestrated the atrocious acts). Although it is unnecessary for the Tribunal to prove intent, indirect malicious intent or recklessness may still be present. *Id.*; see also KITTICHAISAREE,

In the *Blaskic* case, the ICTY Trial Chamber analyzed the scenario in which a person voluntarily assumes political or military functions in collaboration with the author of the plan, policy, or organization under scrutiny.²²² Many factors warranted consideration in establishing whether that person had effectively participated in the plan, even if that person had collaborated only periodically with the author of the policy.²²³ In order to demonstrate that this person had knowledge that he or she carried out his or her functions, collaboration, and participation as part of a greater context or plan leading to the commission of crimes against humanity, the ICTY suggested an analytical framework based on a multi-factor, fact-driven approach.²²⁴ The facts that bear consideration in such an inquiry go towards the historical and political circumstances in which the acts of violence occurred, the functions the accused was carrying out when the crimes were committed, his or her responsibilities within the political or military hierarchy, the direct and indirect relationship between the political and military hierarchy, the scope and gravity of the acts perpetrated, the nature of the crimes committed, and the degree to which they perpetration of the crimes was common knowledge.²²⁵ These factors act as guidelines for courts addressing the political or military collaboration element, such as the ITCY Trial Chamber in the *Blaskic* case.²²⁶

supra note 56, at 91 (referring to the proper extent of the perpetrator's awareness for the transformation of a crime into a crime against humanity).

222. See *Blaskic*, Case No. IT-95-14-T, para. 660 (finding that when General Blaskic agreed to be the Kiseljak region military commander and the Central Bosnia Operative Zone commander, he subscribed to the policy of the Croatian military and political authorities in persecuting Muslim populations).

223. See *id.* para. 661 (establishing that General Blaskic ordered attacks in April and June of 1993 in the Kiseljak region against Muslim villages and had to have known that violent crimes would unavoidably occur as a result of such orders).

224. See *id.* paras. 258-59 (noting that a tribunal can deduce the *mens rea* for a crime against humanity by framing the knowledge of the political context using a set of material facts).

225. See *id.* (proffering examples of concrete facts that judges seek as evidence in determining the circumstances of the case). There is no explicit requirement that perpetrators of an attack must have committed acts with racial, national, religious, or political animus. *Id.* para. 260.

226. See KITTICHAISAREE, *supra* note 56, at 92 (citing the summary of the judgment in *Blaskic* that the President of the Trial Chamber I of the ICTY read).

Finally, the *Finta* decision is of crucial importance to an understanding of the *mens rea* requirement under Article 7 of the Rome Statute.²²⁷ International tribunals have followed the decision in dealing with the component referred to as “knowledge of the attack.”²²⁸ Writing on behalf of the majority of the Supreme Court of Canada, Justice Cory indicated that there must be an element of subjective knowledge on the part of the accused, a groundbreaking approach to analyzing the knowledge element.²²⁹ The *Finta* Court went on to reject willful blindness as a defense where particular actions should evidently constitute crimes against humanity.²³⁰ In sum, the accused must have some sense that his or her actions are

Thus, the accused in *Blaskic* was found to be part of a design whose purpose was the persecution of the Muslim population because of his political will to get involved with the Croat defence council known as the HVO which had military and civilian structures. The HVO took decisions on the organization of life in the town, and, as such, the accused, who was a general, was deemed to be perfectly aware that the scope of his activities was not and could not be a strictly military one, and to be aware of the policy of discrimination against Muslims to systematically exclude them from the organs of political life.

Id.

227. See Rome Statute, *supra* note 1, art. 5 (specifying crimes within the jurisdiction of the ICC such as murder, extermination, enslavement, etc., all of which require a “knowledge of the attack”).

228. See, e.g., Prosecutor v. Dusko Tadic, Case No. IT-94-1-A (July 15, 1999) (providing an example of how the ICTY has followed Canada’s ruling).

229. See *Regina v. Finta*, 1 S.C.R. 701, 819 (1994) (emphasizing that the *mens rea* requirement does not require the perpetrator to know that such actions were inhumane).

230. See *id.*

These cases make it clear that in order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. Thus, for all of the reasons set out earlier, I am in agreement with the majority of the Court of Appeal’s assessment that the mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity. However, I emphasize it is *not* necessary to establish that the accused knew that his or her actions were inhumane . . . Similarly, for war crimes, the Crown would have to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime.

Id.

objectively shocking to generally-accepted principles of humanity, or that they constitute an affront to universal moral conscience.²³¹

This analysis is easily transferable to the acts perpetrated by members of Al Qaeda on September 11th.²³² The admitted purpose of the attacks was to strike at symbols of the Western world, such as the WTC and the Pentagon, while murdering civilians in the process.²³³ Those responsible hoped to use these acts as a vehicle for their message, and were objectively aware that such acts would induce a climate of terror, as well as causing the destruction of human life.²³⁴ Using the media to show the world that it was a force to be reckoned with, Al Qaeda obviously intended these murders as proof of its reach and presence.²³⁵

3. *Nexus with an Armed Conflict*

There is no requirement to prove a nexus between a crime against humanity and an armed conflict under Article 7 of the Rome Statute.²³⁶

231. *See id.* (noting that in order to establish *mens rea*, the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking individuals; alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was willfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offenses).

232. *See Kirsch, supra* note 60, at 7 (asserting that the events surrounding September 11th undoubtedly satisfy the “knowledge of the attack” element). The article also compares genocide and war crimes to crimes against humanity in the context of international law. *Id.* at 5.

233. *See* ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 89 (Columbia University Press 2002) (explaining that Al Qaeda’s long-term strategy was to build an alliance of Islamic states to wage war against the United States).

234. *See id.* at 91 (noting that Osama bin Laden “makes no pretence about his strategy of using terror as an instrument”). The author also states that terror is only one of Al Qaeda’s tactics—other strategies include the politicization and radicalization of Muslims. *Id.* at 92.

235. *See id.* at 91 (referring to an anti-United States poster, which read, “the non-Muslim world should know it well that a Muslim is always ready to die in the name of God”).

236. *See generally* Meron, *supra* note 188 (asserting that crimes against humanity do not require a connection to an international armed conflict).

4. *Specific Requirements under the Rome Statute*

a. Attack

Article 7 of the Rome Statute requires that a physical attack be perpetrated.²³⁷ In addition, Article 7(2)(a) defines the term “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.”²³⁸ Hence, the attacks of September 11th were a physical event involving the commission of enumerated crimes against humanity under Article 7.²³⁹

b. Application to Specific Acts of Terrorism

Because the Al Qaeda network claimed responsibility for hijacking four planes and crashing three of them into the WTC and the Pentagon, the “attack” element of Article 7 is easily met.²⁴⁰ I submit that the events of September 11th did not form part of an isolated account or episode. In fact, Al Qaeda is widely known to have perpetrated other acts of terrorism.²⁴¹ With regard to the

237. See Rome Statute, *supra* note 1, art. 7 (specifying examples of attacks, including murder, extermination, enslavement, deportation, torture, and rape).

238. See von Hebel and Robinson, *supra* note 198, at 95 (noting that “multiple commission of acts” does not require more than one enumerated crime against humanity).

239. See Prosecutor v. Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, para. 122 (May, 21 1999); Prosecutor v. George Rutaganda, ICTR, Case No. ICTR-96-3-T, para. 68 (1999) (finding that, in both of these cases, the ICTR has stated that the attack cannot be perpetrated for purely personal motives). *But see* Regina v. Finta, 1 S.C.R. 701, 819 (1994) (holding that the accused’s motives are now irrelevant to the analysis).

240. See Rome Statute, *supra* note 1, art. 7 (requiring attacks to be “widespread and systematic”).

241. See *supra* note 111 and accompanying text (referring to the 1998 bombing of U.S. embassies in Africa).

application of Article 7(2), this author is of the view that the hijackers committed over 3000 individual acts of murder.²⁴²

c. Nexus Between Specific Crimes and Attack

This portion of Article 7 sets forth another requirement that does not generate much controversy.²⁴³ Essentially, the alleged crimes must be perpetrated in relation to widespread or systematic attacks on a civilian population.²⁴⁴

d. Application to Specific Acts of Terrorism

The acts perpetrated by members of Al Qaeda were part of a systematic campaign against U.S. civilian populations.²⁴⁵ There is also a direct link between the September 11th hijackings and the

242. See T.M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 66 (New York: Cambridge University Press 2002), (asserting that, although the final death toll following the attacks of September 11th is not accurate, some sources suggest that more than 5,000 civilians were killed).

243. See Rome Statute, *supra* note 1, art. 7 (requiring that the attacks be perpetrated against a civilian population).

244. See Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, para. 271 (July 15, 1999).

Crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population and that the accused *knew* that his crimes were so related.

Id.

245. See Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23., para. 100 (June 12, 2002) (specifying a relatively low threshold for what is deemed a “systematic attack”). The *Kunarac* court held that: [t]he acts of the accused must be part of the “attack” against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime must not, however, be an isolated act. A crime would be regarded as an “isolated act” when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.

Id.

overall campaigns that Al Qaeda directed against Israel and U.S. troops in Saudi Arabia.²⁴⁶ Above all, these specific crimes converge into a greater objective, an ongoing, global *jihad* aimed, among other things, at expelling infidels from Saudi soil.²⁴⁷

e. Committed Against Any Civilian Population

This element is relatively straightforward: there must be a nexus between the acts of the accused and the attack on the civilian population.²⁴⁸ It is accepted law that the term “civilian” must be given a broad definition to cover the general population but also members of the armed forces or resistance forces who are *hors de combat* at the time of the attack.²⁴⁹ The key factor in determining a

246. See GUNARATNA, *supra* note 233, at 86-88 (explaining that Middle Eastern ideologues used the concept of *jihad* primarily against Israel and the Jews). Al Qaeda also believes that until U.S. troops are ejected from Saudi Arabia, Muslim society will be “living a life of sin.” *Id.* To appeal to the Muslim masses, Osama bin Laden is likely to use the same argument regarding U.S. troops in Afghanistan and Pakistan. *Id.*

247. See *id.* at 84 (discussing Al Qaeda’s ideology). The author makes several important observations, which are interesting here:

[t]o understand the mind-set of Al Qaeda’s volunteers one must appreciate their belief system and the group’s ideology, which is founded on Islamism and the pursuit of *jihad*. Various Islamists, including Al Qaeda, have misinterpreted—or at times reinterpreted—*jihad* as ‘holy war.’ Lexically *jihad* is the exertion of one’s utmost effort in order to attain a goal or to repel something detestable. . . . The principal aims of *jihad* are to remove oppression and injustice; to establish justice, well-being and prosperity; and to eliminate barriers to the spread of truth. . . . Osama never interpreted Islam to assist a given political goal. Islam is his political goal, his rhetoric, philanthropy toward the Muslim poor and military support for oppressed Muslims having great resonance among young Muslims the world over, including those living in the West who found it difficult adapting to, and integrating with, their new environment.

Id.; see also NOAH FELDMAN, *AFTER JIHAD* 7-8 (New York: Farrar, Straus and Giroux 2003) (providing a brief history of Islamic *jihad* from the late 1970s to the present).

248. See *Dusko Tadic*, IT-94-1-A, para. 251 (holding that one must view an “attack on any civilian population” and “armed conflict” as separate notions, and that a nexus for the crime is required only for an attack on a civilian population).

249. See KITTICHAISAREE, *supra* note 56, at 95 (emphasizing that the situation faced by the victim at the time of the crime must be evaluated when determining “civilian status”); see also *Dusko Tadic*, Case No. IT-94-1-A, paras. 626 & 641-

victim's "civilian status" lies in an assessment of his or her status at the time the crimes were perpetrated.²⁵⁰ Although the majority of the targeted "population" must be civilian, courts have found "civilian" status by a victim's exact situation, rather than military status. A definition of "terrorism" articulates the following general principle: "the individual victim is victimized because of his membership of a civilian population targeted by the accused."²⁵¹

f. Application to Specific Acts of Terrorism

It is obvious that the attacks directed at the WTC and the Pentagon targeted a "civilian population," more precisely, the population of New York City and Washington, D.C.²⁵² As a result, over 3000 citizens perished, mostly civilians.²⁵³ Hence, the targeted population included civilian and non-civilian members but was predominantly civilian in nature.²⁵⁴ Furthermore, given the sufficient number of individuals targeted in the attack, the attacks were clearly aimed at a

43, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, paras. 574-76 & 582 (Sept. 2, 1998); *Prosecutor v. George Rutaganda*, ICTR, Case No. ICTR-96-3-T, para. 70 (1999); *Prosecutor v. Goran Jelusic*, Case No. IT-95-10, para. 54 (Dec. 14 1999); *Prosecutor v. Alfred Musema*, ICTR, Case No. ICTR-96-13-T, para. 207 (2000); *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, paras. 208-10 & 214 (Mar. 3, 2000) (reiterating the same principle in relation to determining civilian status).

250. *See Blaskic*, IT-95-14-T, para. 214 (reasoning that crimes against humanity means not only crimes against civilians in the strict sense, but also against those who are members of a resistance movement or who are former combatants, whether they wear a uniform or not); *see also* KITTICHAISAREE, *supra* note 56, at 95 (noting that, when a family member is compelled to use arms to protect the family, he or she does not lose civilian status).

251. *See* KITTICHAISAREE, *supra* note 56, at 95 (highlighting the victim's point of view in determining civilian status).

252. *See Kayishema*, ICTR-95-1-T, para. 127 (finding that traditionally, the legal definitions of "civilian" or "civilian population" have been discussed within the context of armed conflict).

253. *See id.* (reasoning that the term civilian must be understood within the context of war as well as relative peace).

254. *See id.* (considering that a wide definition of civilian is applicable even where there is no armed conflict, and that this broad definition includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force). Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale. *Id.*

population.²⁵⁵ The admitted purpose of the terrorists in striking at the Pentagon and the WTC was to kill as many civilians as possible. These attacks were clearly “directed against” a civilian population, and the international community specifically denounced the attacks on that basis.²⁵⁶

g. On a Widespread or Systematic Basis

Under the Rome Statute, the crimes perpetrated must be related to “widespread or systematic attacks” against a civilian population.²⁵⁷ However, the act of the accused does not necessarily have to be part of both a “widespread” and a “systematic” attack; one type of attack is sufficient.²⁵⁸ The *Akayesu* decision defined the concept of

255. See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, para. 90 (June 12 2002) (holding that it is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to show that the attack was in fact directed against a civilian “population,” rather than against a limited and randomly-selected number of individuals).

256. See *id.* para. 91 (establishing that the use of the word “population” does not denote that the entire population of the geographical entity in which the attack takes place must have been subjected to that attack). Moreover, the criteria of “directed against,” seems to be fully satisfied in this case. *Id.*

257. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, para. 271 (July 15, 1999) (rejecting the possibility that a random act of violence could qualify as a crime against humanity). *But see* *Prosecutor v. Mile Mrksic et al.*, Case No. IT-95-13-R61, para. 30 (Apr. 3, 1996) (explaining that the ICTY does not exclude the possibility that a single act against one victim or a limited number of victims could qualify as a Crime against humanity, and noting that the key factor is that there be a nexus between the widespread or systematic attack against a civilian population); *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 649 (Oct. 2, 1995) (noting the possibility that a single act can constitute a crime against humanity). If the effect of the single attack is widespread in scope, the threshold would also be met. *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, para. 206 (Mar. 3, 2000). In this single event theory, “the act of denouncing a Jewish neighbour to the Nazi authorities committed against the background of widespread persecution against the Jews has been held to be a crime against humanity.” KITTICHAISAREE, *supra* note 56, at 97.

258. See *Dusko Tadic*, IT-94-1, paras. 646-47 (supporting the contention that the use of either “widespread” or “systematic” will serve to exclude isolated or random acts). It is relevant to point out that the ICTR was confronted with a controversy over the French term “et,” placed between the words “widespread”

“widespread” as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”²⁵⁹ In contrast, it held that the “concept of systematic may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”²⁶⁰ Finally, it concluded that “there is no requirement that this policy must be adopted formally as the policy of a state,” but that “[t]here must however be some kind of preconceived plan or policy.”²⁶¹ In sum, established international jurisprudence equates the term “widespread attack” to an attack directed against a multiplicity of victims, while the term “systematic attack” amounts to an attack orchestrated by virtue of a preconceived plan or policy.²⁶²

and “systematic.” As a result, the Tribunal was faced with a disjunctive over-inclusive test in one language and a conjunctive under-inclusive test in another language. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, paras. 144 (Sept. 2, 1998). *Akayesu* overruled the French version of the ICTR Statute by stating that “[t]he Chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both.” *Id.* para. 579. The Court also followed this line of reasoning in the cases of *Rutaganda* and *Musema*. *Prosecutor v. George Rutaganda*, ICTR, Case No. ICTR-96-3-T, para. 66 (1999); *Prosecutor v. Alfred Musema*, ICTR, Case No. ICTR-96-13-T, paras. 202-03 (2000). However, the ICTY pointed out: that “[t]he fact still remains however that, in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation.” *Blaskic*, IT-95-14-T, para. 207.

259. *Akayesu*, ICTR-96-4-T, para. 580; *see also Rutaganda*, Case No. ICTR-96-3, para. 67 (determining that, in order to find a widespread or systematic attack, the *actus reus* must be shown); *Musema*, ICTR-96-13, para. 204 (holding that a showing of “widespread” is a required element in a crime against humanity case).

260. *Akayesu*, ICTR-96-4-T, para. 580.

261. *Id.*

262. *See Prosecutor v. Dusko Tadic*, IT-94-1-T, para. 648 (July 14, 1997) (explaining that the International Law Commission Draft Code intended the use of the language “systematic” to exclude random acts, and the use of “large scale” to exclude isolated acts at single victims); *see also Blaskic*, IT-95-14-T, para. 206 (noting that the term “widespread” may be shown through the cumulative effect of a series of acts); *Kayishema*, Case No. ICTR-95-1-T, para. 123 (setting forth the authority of the International Tribunal for Rwanda to prosecute “widespread or systematic attacks against any civilian population”).

The Rome Statute's primary shortcoming lies in its failure to define the concept of "widespread or systematic attack."²⁶³ Article 7(2), which defines the word "attack," blurs the distinction between both terms as defined by the international jurisprudence that came before.²⁶⁴ In rectifying this anomaly, the distinction between "widespread" and "systematic" will inevitably turn on the degree of organization used in mounting an attack.²⁶⁵ A determination of "systematic" will necessarily involve a higher threshold, since organization, coordination, and orchestration all pertain directly to the concept of "systematicity" and constitute language closely associated with an attack carried out on a "systematic" basis.²⁶⁶ Such related concepts also inherently indicate a more thought-out, well-regimented, and well-structured operation than does "widespread."²⁶⁷ This interpretation applies to the current discussion, as the crimes

263. See KITTICHAISAREE, *supra* note 56, at 96 (explaining that the Rome Statute's only stipulation is that the attack be directed against civilians).

264. See *id.* at 96-97 (mentioning that, despite the awkward drafting, as long as a single attack affects the civilian population, it may qualify under this definition).

265. *Id.* at 97

Article 7 of the Rome Statute requires that both a widespread attack and a systematic attack be carried out pursuant to or in furtherance of a State or organizational policy to commit such attack. To reconcile the provision under Article 7 of the Rome Statute with established international jurisprudence, it is hereby submitted that the difference between the two types of attack is one of degree or organization of the attack. A widespread attack is proved when it is directed against a multiplicity of victims as part of a course of conduct involving multiple commission of acts in pursuant to or in furtherance of a State or organizational policy to commit such attack, as in the case of the policy of persecution of Jews under Nazi Germany. A systematic attack shares the same elements as a widespread attack just mentioned, with the exception that a systematic attack is orchestrated, coordinated, or organized by a group of people so that the attack is carried out in a systematic manner. In other words, systematicity is a higher threshold test than widespreadness because the latter involves unorganized, uncoordinated, and unorchestrated multiple commission of acts that somehow serve a policy to commit a crime against humanity.

Id.

266. See *Akayesu*, ICTR-96-4-T, para. 580 (describing the concept of widespread simply as an attack that is very serious).

267. See KITTICHAISAREE, *supra* note 56, at 96 (noting that any kind of widespread attack will undoubtedly involve a large amount of planning and organization).

perpetrated by members of Al Qaeda, certainly meet the more onerous requirement of a “systematic attack.”²⁶⁸

h. Application to Specific Acts of Terrorism

As mentioned previously, the admitted purpose of the attacks of September 11th was to transmit various messages, ranging from opposition to the United States' policy of support for Israel to the triumph of religious fanaticism.²⁶⁹ Fortunately for this analysis, earlier jurisprudence has identified a series of factors by which to determine whether a given attack is “systematic” in character, including

the existence of an acknowledged policy²⁷⁰ targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population.²⁷¹

268. *See id.* (determining that a systematic attack will involve an organized plan).

269. *See generally* Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343 (Aug. 2003) (providing useful insight into how the cadres of an organization like Al Qaeda exert cautious and strategic directing in orchestrating terrorist attacks), available at <http://danieldrezner.com/research/guest/Pape1.pdf> (last visited May 2, 2004).

270. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 653 (Oct. 2, 1995) (explaining that no formalized policy is required and may even be inferred from the circumstances in which the acts occur); *see also* Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, paras. 204-05 (Mar. 3, 2000) (noting that the policy does not have to be declared, clearly stated, or developed by the state).

271. Prosecutor v. Goran Jelusic, Case No. IT-95-10, para. 53 (Dec. 14 1999). The ICTY provides four guiding factors by which to determine the systematic character of an attack:

the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; the preparation and use of significant public or private resources, whether military or other; the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

These factors suggest that the crimes committed by members of the Al Qaeda network formed part of a “systematic attack.”²⁷² This terrorist group waged war against the United States and sustained a notorious policy of targeting non-Muslim Westerners, labeled “infidels,” in a variety of attacks.²⁷³ Recalling the 1998 bombing of U.S. embassies in Africa, orchestrated by Osama bin Laden,²⁷⁴ the attacks of September 11th fit the broader, systematic context of Al Qaeda’s struggle against the West. Moreover, the Al Qaeda network is a tightly-regimented organization with cells across the globe.²⁷⁵ The organization also implemented military-like training camps where young soldiers were subjected to drills and exercises in preparation of their participation in the *jihad*.²⁷⁶ This organization received significant logistical and financial support in perpetrating the attacks of September 11th.²⁷⁷ Nineteen terrorists conducted the

Blaskic, IT-95-14-T, para. 203.

272. See Kirsch, *supra* note 60, at 6-7 (supporting the opinion that Al Qaeda carried out a systematic attack).

273. See Prosecutor v. Zoran Kupreskic et al., Case No. IT-95-16-T, paras. 551-55 (Jan. 14, 2000) (explaining that the policy or plan does not have to be express and will often be actively denied by the perpetrators); see also *Blaskic*, IT-95-14-T, para. 204 (setting forth a series of factors that the ICTY considers relevant in evaluating the presence of a plan). Among other factors, the Tribunal has said that media propaganda was important and probative. *Id.*

274. See *Blaskic*, IT-95-14-T, para. 204 (noting that the ICTY uses a multitude of factors, including historical circumstances and the scale of the violence).

275. See GUNARATNA, *supra* note 233, at 76 (offering an interesting depiction of the cellular structure of Al Qaeda).

Al Qaeda’s global terrorist network strictly adheres to the cellular (also known as the cluster) model, “composed of many cells whose members do not know one another, so that if a cell member is caught the other cells would not be affected and work would proceed normally.” Cell members never meet in one place together; nor do they in fact know each other; nor are they familiar with the means of communication used between the cell leader and each of its members.

Id.

276. See *id.* at 70-71 (discussing Al Qaeda’s training methods, which include the distribution of a 7,000-page manual highlighting tactics of guerilla warfare and terrorism).

277. See William F. Wechsler, *Strangling the Hydra: Targeting Al-Qaeda’s Finances*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 129, 129 (James F. Hoge, Jr. & Gideon Rose eds., 2001) (describing one of Al Qaeda’s

actual hijackings, and many more took part in the operation or directed it from afar.²⁷⁸ Al Qaeda committed this attack on a vast scale, causing approximately 3,000 deaths, many injuries, and massive destruction of property.²⁷⁹ There were “multiple commissions” of inhumane acts, pursuant to Article 7 in that the four hijackings and approximately 3000 individual acts of murder were all part of the same single, systematic attack.²⁸⁰ The organizations planning and committing these crimes ensured the deployment of significant human and financial resources.²⁸¹ In addition, the issue of

major strengths as its sophisticated financial network and its ability to raise funds, and noting that Al Qaeda relies on its assets, coupled with its sophisticated fundraising system, in carrying out terrorist attacks).

Osama bin Laden is unusual for a terrorist. He did not become famous by leading an army into battle, through personal acts of valor in combat, or by running a local terrorist cell. Instead, bin Laden’s claim to fame was his ability to raise, manage, and move money for the Afghan armies that fought the invading Soviet troops in the 1980s. This fact is central to understanding the Al Qaeda organization today, for its Saudi leader still derives much of his authority and influence from the cash he controls . . . Al Qaeda raises money in four basic ways. First are its legal businesses and investments . . . The second way Al Qaeda makes money is through criminal schemes, both petty and grand. Afghanistan is the world’s leading producer of opium, and virtually all of it comes from Taliban-controlled territory, despite the fact that the Taliban claim to oppose drug production on religious grounds. . . Al Qaeda also solicits donations from rich Muslims who share its goals . . . The fourth and perhaps most important source of Al Qaeda’s budget is the mass fundraising it conducts through charitable and nongovernmental organizations.

Id. at 130-32. For a general discussion on the topic of Al Qaeda’s financial network see GUNARATNA, *supra* note 233, at 60-62.

278. See Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR, *supra* note 277, at 1, 2, 8 (noting that there were a total of nineteen hijackers involved in the September 11th attacks, all of whom were part of Osama bin Laden’s network and all of whom are believed to have been under his direction).

279. See HARRY HENDERSON, TERRORIST CHALLENGE TO AMERICA 77 (2003) (explaining that, in addition to the destruction of the both WTC towers and a portion of the Pentagon, the actual death toll was actually closer to 2,790).

280. See KITTICHAISAREE, *supra* note 56, at 96 (noting that Article 7 of the ICC requires crimes against humanity to be widespread or systematic attacks against civilians, not simply random acts of violence).

281. See Wechsler, *supra* note 277, at 130-33 (discussing Al Qaeda’s fund raising methods).

high-level funding or involvement is two-fold.²⁸² On one hand, the Al Qaeda network, heavily involved with the Taliban government and several other high-level Muslim officials, orchestrated the attacks.²⁸³ On the other hand, even to this day, there is still controversy as to those organizations or individuals responsible for funding the operation.²⁸⁴ Some theories assert that Al Qaeda obtained funding from wealthy Muslims in several countries, including Saudi Arabia.²⁸⁵

Many other factors would tend to corroborate the fact that these actions fit the description of crimes against humanity.²⁸⁶ For example, the *Blaskic* case indicated that courts should consider media propaganda as probative of the “systematic” character of an attack.²⁸⁷ Osama bin Laden, with the support of both the Taliban government and Al Qaeda, released several videotapes to the media in which he claimed responsibility for the attacks, advanced his

282. See *id.* (explaining the various sources of funding for Al Qaeda’s terrorist operations).

283. See Franck, *supra* note 242, at 66 (explaining that one of the factors in the U.S. military’s decision to intervene in Afghanistan was the fact that the Taliban harboured and provided training facilities for terrorists).

284. See Wechsler, *supra* note 277, at 132 (discussing the fact that Al Qaeda solicits donations from rich Muslims who support its ideology).

Such donations were vital to the *mujahideen* in their war against the Soviets and remain an important source of income for Islamist extremists today. And the donors are surprisingly numerous. Conventional wisdom dictates that terrorists or their supporters are very poor and have no real options in life. But a significant percentage of terrorists and their backers in fact come from middle-class and wealthy families. Such is the case with bin Laden himself and many of the September 11th hijackers. Unfortunately, the identities of most of the wealthy donors remain a matter of mere speculation; this area requires further investigation.

Id.

285. See *id.* at 132, 141 (urging President Bush to seek the assistance of Muslim countries in determining the source of Al Qaeda finances).

286. See Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, para. 204 (Mar. 3, 2000) (discussing various additional factors to use in the course of determining whether or not crimes against humanity have been perpetrated).

287. See *id.* (mentioning that courts should also consider the overall content of the perpetrators’ political program as shown through the writings and speeches of its authors).

views, and further threatened to terrorize the target population.²⁸⁸ Various additional factors bear consideration as part of this evaluation, such as the number of victims, the geographical area covered by the attacks,²⁸⁹ and the organization's ability to gather intelligence and infiltrate political establishments.²⁹⁰ Based on the factors mentioned above, the acts perpetrated by members of Al Qaeda would seem to fully satisfy the threshold set out under the Rome Statute and international jurisprudence.

i. The Policy or Plan Element

As mentioned previously, Article 7 of the Rome Statute requires the presence of a policy or plan in the commission of crimes against humanity.²⁹¹ The relevant factors were examined in the previous section.²⁹² However, as established earlier, terrorist groups or organizations such as Al Qaeda can be the perpetrators of crimes against humanity.²⁹³ In this regard, the application of international

288. See Howard Schneider & Walter Pincus, *Bin Laden Video Includes Sept. 11 Praise; 'Will' of Hijacker Mixed With Newer Footage; Al Qaeda Leader is Silent*, WASH. POST, April 16, 2002, at A12 (explaining the content of the many Al Qaeda videotapes that have aired since the September 11th attacks), 2002 WL 19154179. This video shows Osama bin Laden and Ayman Zawahiri praising the September 11th terrorist attacks. *Id.*

289. See *Blaskic*, IT-95-14-T, para. 204 (noting that "temporally and geographically repeated" offensives can factor into the determination whether the Court will classify an attack as a crime against humanity, and therefore within its jurisdiction).

290. See GUNARATNA, *supra* note 233 at 76.

Contemporary terrorist groups have perfected the art of agent handling to generate high grade or high quality intelligence. Unlike the ragtag terrorist groups of the Cold War period, sophisticated terrorist groups of the post-Cold War period have developed intelligence wings comparable with government intelligence agencies. By running agents into the political establishment, security forces or security and intelligence apparatus, Al Qaeda and Islamist terrorist groups have infiltrated both Middle Eastern, and other governments. *Id.*

291. Rome Statute, *supra* note 1, art. 7.

292. See *supra* Part II.F.4.h (discussing those factors established by the courts as probative of whether an attack qualifies as systematic); see also KITTICHAISAREE, *supra* note 56, at 97-102 (giving a complete history of the policy or plan element).

293. See *Prosecutor v. Zoran Kupreskic et al.*, Case No. IT-95-16-T, para. 1 (Jan. 14, 2000) (charging the six with the crimes against humanity of murder,

law has evolved beyond a state-based policies model, thereby extending to criminal or terrorist groups.²⁹⁴ Therefore, it is now plausible and acceptable that a terrorist organization like Al Qaeda, through targeted killing of civilians, can be held responsible for crimes against humanity.

j. Application to Specific Acts of Terrorism

The hierarchical structure and level of organization possessed by Al Qaeda would seem to fulfill the policy or plan element almost effortlessly, particularly in light of the considerations outlined throughout this article.²⁹⁵

Assuming that the general requirements set forth in Article 7 of the Rome Statute are met,²⁹⁶ it becomes necessary to briefly review the requirements for the specific crime against humanity of murder.

inhumane acts, and persecution); *see also Blaskic*, ICTY 95-14-T, para. 7 (stating that, aside from breaches of the Geneva Conventions and eleven violations of the laws or customs of war, the accused was also charged with three crimes against humanity); Nora V. Demleitner, *How Many Terrorists are there? The Escalation in so called Terrorism Prosecutions*, 16 FED. SENTENCING REP. 1, 3 (2003) (examining the definition of terrorism and explaining that certain acts of terrorism may amount to crimes against humanity, giving the ICC jurisdiction to prosecute such crimes); Mark A. Drumbl, *Victimhood in My Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 60-62 (considering the possibility that the acts of September 11th be prosecuted as a crime against humanity).

294. KITTICHAISAREE, *supra* note 56, at 98.

That a crime against humanity may be committed in pursuance of a policy of either a State or a non-State actor is not disputed. The law regarding crimes against humanity has developed to the extent that crimes against humanity can be committed on behalf of entities with *de facto* control over a particular territory although those entities have no international recognition or formal status of a *de jure* State; it can be also committed by a terrorist group or organization. Private individuals with the aforesaid *de facto* power or organized in criminal gangs or groups might also be in the position to commit crimes against humanity.

Id.

295. *See supra* Part II.F.4.i. (discussing the requirements of the policy or plan element).

296. *See supra* Part II.F.4 (delineating the requirements as an attack, a nexus between specific crimes and attack, committed against a civilian population, on a

5. Specific Crime Against Humanity of Murder

a. Rome Statute Requirements

The specific crime against humanity of murder is identified in Article 7(1)(a) of the Rome Statute.²⁹⁷ It is important to note that there is controversy over the use of the word *meurtre* in the French version of the Rome Statute, as opposed to Article 3(a) of the French version of the ICTR Statute and Article 5(a) of the French version of the ICTY Statute which both use the term *assassinat*.²⁹⁸ The confusion is relatively simple to resolve: *assassinat* contains a higher degree of *mens rea* or premeditation, while the term *meurtre* does not contain so high a standard of premeditation.²⁹⁹ In *Akayesu*, the ICTR Trial Chamber I stated that there was an error in translation in the ICTR Statute, and offered a definition of murder.³⁰⁰ This finding has been rejected in other case law, leading tribunals to adopt the higher standard of *mens rea* embodied in the term *assassinat*.³⁰¹ It is

widespread or systemic basis, and involving a policy or plan element, and applying them to the events of September 11th).

297. Rome Statute, *supra* note 1, art. 7(1)(a).

298. See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, para. 588 (Sept. 2, 1998) (examining the difference between the words “murder” and “*assassinat*”).

299. See Prosecutor v. Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, para. 137 (May, 21 1999) (explaining that the difference between the words murder and *assassinat* derives from the fact that the English definition of “murder” includes, but does not require, premeditation, while the French word *assassinat* absolutely requires premeditation).

300. See *Akayesu*, *supra* note 298, para. 589 (discussing that customary international law dictates that murder, and not *assassinat*, is considered to be a crime against humanity). The court then defines murder and gives the elements of murder, which are:

the victim is dead, the death resulted from an unlawful act or omission of the accused or the subordinate, and at the time of the killing, the accused or subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

Id.

301. See *Kayishema*, ICTR 95-1-T, para. 137 (rejecting the *Akayesu* interpretation and holding that the Court's interpretation has to be bound by the actual wording of the ICTR statute, which dictates that the crime against humanity is *assassinat* and not *meurtre*).

useful to note that, under the ICC, the generally-accepted standard corresponds to the term *meurtre*, which does not require premeditation.³⁰² In fact, it seems that the ICC will be applying the standard established in *Blaskic*³⁰³ and other similar cases, which upheld the reasoning of the ICTR in *Akayesu*.³⁰⁴

In sum, the specific crime against humanity of murder under the Rome Statute can be defined as “the unlawful killing of a human being as part of a widespread or systematic attack against a civilian population of which the victim is a member.”³⁰⁵ The requisite elements of this crime of murder are as follows:

the victim is dead as a result of an unlawful act or omission of the accused or his subordinate who, at the time of the killing intended to kill or cause grievous bodily harm to the deceased with the knowledge that such bodily harm was likely to cause the victim’s death, and was reckless whether death ensued or not.³⁰⁶

302. See KITTICHAISAREE, *supra* note 56, at 102-4 (reviewing the *assassinat/meurtre* dichotomy).

303. See Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, para. 216 (Mar. 3, 2000) (distinguishing between premeditated murder and non-premeditated murder).

It is appropriate to point out first that the French version of the Statute uses the term *assassinat*³⁰⁷ – a crime with a very precise meaning in French national law whilst the English version adopts the word “murder” which translates in French as *meurtre*. Relying on Article 7(1)(a) of the Statute of the International Criminal Court, Article 18 of the ILC Code of Crimes Against the Peace and Security of Mankind and the assertions of Trial Chamber I of the ICTR in the *Akayesu* case which all refer to murder, the Trial Chamber is of the view that it is murder and not premeditated murder which must be the underlying offence of a crime against humanity.

Id.

304. See Prosecutor v. Goran Jelusic, Case No. IT-95-10, para. 51 (Dec. 14 1999) (holding that the tribunal will accept that murder is the appropriate crime against humanity, and that this interpretation is consistent with international custom); see also Prosecutor v. George Rutaganda, ICTR, Case No. ICTR-96-3-T, para. 79 (1999) (following the *Akayesu* definition of murder and defining murder as the unlawful, intentional killing of a human being).

305. KITTICHAISAREE, *supra* note 56, at 104.

306. *Id.*

From the cited passages, it is apparent that the Rome Statute does away with the premeditation element found under the French term *assassinat*.³⁰⁷

b. Application to Specific Acts of Terrorism

As previously demonstrated, the crimes perpetrated on September 11th were part of a “systematic attack.”³⁰⁸ The threshold for the crime of murder under the Rome Statute does not pose much of a challenge in the case of Al Qaeda.³⁰⁹ The terrorists were well aware that their conduct would result in human deaths, and certainly intended to kill or cause grievous bodily harm at the time of the attack.³¹⁰ In fact, they used these deaths as a means of broadcasting messages and threats worldwide.³¹¹ Moreover, the terrorists likely harbored the necessary premeditation even to fulfill the test under a more onerous legal standard embodying the meaning of the French

307. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, paras. 589-90 (Sept. 2, 1998) (interpreting the crime against humanity as not requiring *mens rea*); see also *Rutaganda*, ICTR 96-3-T, para. 78-9 (explaining that customary international law dictates that murder, and not *assassinat*, is a crime against humanity).

308. See *supra* Part II.F.4.g (concluding that Al Qaeda’s attacks were part of a “systematic” as opposed to a widespread attack); see also Christopher L. Blakesley, *Ruminations on Terrorism and Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1047 (2003) (explaining that the attacks of September 11th were part of a systematic attack in the course of examining whether the participants in the attack enjoy any protections under international law).

309. See Blakesley, *supra* note 308, at 1047 (holding that the events of September 11th met the requisite elements of murder in examining what course of action the United States could take in responding to such acts under current principles of international law); see also David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 100 n.6 (2002) (“[t]he terrorist attacks of September 11, 2001, would appear to meet the criteria for crimes against humanity, in that they constituted murder that appears to have been committed as part of a widespread or systematic attack directed against a civilian population, and presumably with knowledge of the attack by the perpetrators and their presumed conspirators.”).

310. See Blakesley, *supra* note 308, at 1047 (explaining that at least some of the perpetrators and their leaders knew they were, or at the very least intended to be, part of a systematic attack on civilians, and noting that over three thousand civilians were, in fact, killed).

311. See *id.* (discussing the political or religious messages that underlie acts of terrorism).

word *assassinat*.³¹² However, that question remains purely academic, as the ICC does not require premeditation for this specific crime.³¹³ Nevertheless, it is apparent from widely-known facts that members of Al Qaeda had been planning these attacks thoroughly and carried them out in carefully-orchestrated fashion.³¹⁴ These acts are reminiscent of past terrorist activities, such as the bombing of U.S. embassies in Africa, with two essential differences: the scale on which they were perpetrated and the unparalleled death toll that ensued.³¹⁵

CONCLUSION

Regardless of the political or logistical ramifications that could result from broadening the jurisdiction of the ICC, there are several arguments that support such an initiative. In fact, events like those perpetrated on September 11th would, in my view, qualify as crimes against humanity, pursuant to Article 7 of the Rome Statute.³¹⁶ Even should the ICC wish to apply a stringent standard in adjudicating cases of terrorism, there is no doubt that events of this magnitude would easily meet all of the requisite elements. In sum, such acts of

312. See *id.* at 1058-9 (stating that the perpetrators of the attacks of September 11th had the requisite *mens rea* for murder).

313. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 588 (Sept. 2, 1998) (holding that the appropriate standard is the murder standard and not the “*assassinat*” standard); see also *Prosecutor v. Goran Jelusic*, Case No. IT-95-10, para. 51 (Dec. 14 1999) (deciding to follow *Akayesu* and reject the premeditation requirement); *Prosecutor v. George Rutaganda*, ICTR, Case No. ICTR-96-3-T, para. 79 (1999) (holding that premeditation is not a necessary element of murder).

314. See Laura Taylor Swain, *Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity*, 37 SUFFOLK U. L. REV. 51, 51 (2004) (stating that the September 11th attacks were the result of long-term and sophisticated planning).

315. See *Ceremony Honors U.S. Embassy Bombing Victims*, CNN, Sept. 11, 1998 (“[t]he U.S. embassies in Kenya and Tanzania were targets of twin car bombs August 7 that killed 257 people and wounded 5,500 others, mostly Kenyans.”), <http://www.cnn.com/US/9809/11/embassy.bomb.memorial> (last visited Mar. 28, 2004).

316. See *supra* Part II (suggesting that terrorism should be recognized as a crime against humanity); see also Drumbl, *supra* note 293, at 60-62 (explaining that the events of September 11th may qualify as crimes against humanity).

terrorism are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. They ultimately lead to multiple acts of murder against innocent civilians.

Some authors argue that acts of terrorism could amount to other crimes against humanity, such as persecution.³¹⁷ In addition, there is a strong belief shared by many prominent jurists that these events qualify as crimes against humanity, and that other international acts of terrorism should not be exempted from the same legal characterization.³¹⁸ Consequently, the next step for the international community could be to amend the Rome Statute pursuant to Article 121.³¹⁹ However, these changes would not enter into force immediately. Most importantly, there would be obvious obstacles to an amendment for reasons previously outlined, such as persistent fears regarding the politicization of the Court.³²⁰ This article concludes by suggesting that the ICC should take these factors into consideration, and adapt Article 7 to this reality.

In this author's view, the text of the Rome Statute does not need to be amended in order to encompass acts of terrorism. As discussed above, most states view the crime of terrorism as containing two key

317. See Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357, 383 (2003) (“[t]errorists can be convicted of committing war crimes, crimes against humanity, genocide, torture, and even piracy (i.e. the Achille Lauro incident), if they committed these crimes by using terrorist methods.”); see also *Mary Robinson Says Establishment of International Criminal Court Key to Fighting Terror*, UN WEEKLY NEWSLETTER, Mar. 9, 2002 (calling the events of September 11th a war crime, which is a crime against humanity, in discussing the importance of ratifying the ICC Statute after the terror attacks), <http://www.unic.org.in/news/2002/nl/nl9mar2002.htm#17> (last visited Mar. 26, 2004).

318. See Blakesley, *supra* note 308, at 1055 (“[t]errorism is a crime. Some terror tactics in war rise to the level of crimes against humanity or war crimes. The same conduct committed against innocent civilians in peacetime would be terrorism.”).

319. See Rome Statute, *supra* note 1, art. 121 (setting out the conditions under which the Rome Statute may be amended).

320. See Cassese, *supra* note 39, at 994 (expressing the reasons why states never granted jurisdiction over international terrorism to the ICC); see also Scheffer, *supra* note 309, at 100 n.7 (explaining that another reason for opposing the inclusion of terrorism in the ICC was that such inclusion would require the ICC to investigate complex terrorist crimes as well as suspect states, and that this would lead to an investigative overload in the ICC).

elements, namely the targeting of civilians and the advancement of some ideological or political purpose. On that basis, it is clear that acts of international terrorism fit under the Article 7 framework.³²¹ In fact, both terrorism and certain Article 7 crimes share tangible similarities: they are viewed as some of the most repugnant crimes to humanity; they employ similar language and philosophy, i.e. prohibiting the targeting of civilians; they depart from the classic criminal standard of *mens rea* and impose a different degree of preparation and structure; in their most irreducible form, they constitute crimes which strike at the very core of human decency, claim innocent lives, and devastate populations; etc.³²²

Hence, other acts of international terrorism, which do not compare in magnitude to the events of September 11th, yet still constitute an affront to the principles of humanity, should be prosecuted under this mechanism.³²³ The acceptance of such a proposition could encourage certain countries to revisit extradition treaties and rethink their policies on combating terrorism. It would also make it so that corrupt governments and vitiated judicial systems' handling of terrorism

321. See Scheffer, *supra* note 309, at 49 (stating that the events of September 11th were crimes against humanity, specifically murder, and that they would probably have fallen under the jurisdiction of the ICC had it existed on that date).

322. See Blakesley, *supra* note 308, at 1110.

Crimes against humanity and terrorism are crimes of the first order. They represent, along with genocide, the worst we mortals do to each other; that is to say, as I will explain more fully below, to ourselves. They are crimes of political violence without restraint of international law or morality. One question for this article is whether international criminal law and prosecution can even provide a remedy. The perpetrator's motive is important: violence against innocents to achieve a political, military, religious, or philosophical end or to be rid of individuals or groups seen as enemies (or as at least as folks deemed to interfere with "the good life"). Sometimes the offenses are bred of simple racial, religious, gender, or ethnic hatred, created and manipulated by evil leadership. The leadership usually does this to gain or maintain power. Finally, the people against whom the crimes are committed actually are part of the essence of the crime.

Id.

323. See Scheffer, *supra* note 309, at 49-50 (asserting that the ICC is a very useful tool in prosecuting future acts of international terrorism that may constitute crimes under the ICC, and suggesting that the United States explore the utility of the ICC because an effort to dismantle the ICC would be incompatible with the United States' war on terrorism, given its value in prosecuting acts of terrorism).

cases is not the last instance.³²⁴ Regardless of the direction or measures the international community wishes to take, I believe that Lord Denning's advice should be followed: international law must evolve. The global reality is fairly simple: terrorism involves the international community as a whole.³²⁵ I contend that the interpretation of international treaties should adapt accordingly, and that multilateral cooperation on terrorism should be increased. Oftentimes, the financing structure and network of a given terrorist organization reaches well above and beyond national borders.³²⁶ The world is faced with a wave of neo-terrorism that expands on new technologies, cyberspace, access to new weaponry, increased networking, significant financial support, solid and efficient

324. See *id.* at 52 (stating that one of the reasons for a permanent international criminal system is to eliminate the injustice and corruption that results when national leaders participate in trials for international crimes such as terrorism, often enjoying "virtual impunity" because their governments fail to investigate and prosecute them). The author goes on to explain that changes in international law which militate against this type of corruption are already visible, and that unqualified arguments in favor of immunity via the act of state doctrine, the head of state immunity doctrine, and the diplomatic immunity doctrine are becoming less acceptable where leaders have participated in an international crime. *Id.*

325. See Scheffer, *supra* note 309, at 51 (arguing that the world has changed, that the international community no longer tolerates international crimes, and suggesting that the ICC be adopted in order to eliminate past problems in dealing with such crimes, such as the inability of certain national governments to properly prosecute them).

326. See *Suresh v. Canada*, [2002] 1 S.C.R. 3, para. 87-88 (expressing similar thoughts in evaluating the repercussions of financing and support for terrorism in the national security context).

[W]e believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security . . . International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid. First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a world-wide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism

Id.

command and financing structures, etc. I contend that the national courts are not always suited to adjudicating such offenses, and that an international tribunal would be an adequate forum for assessing all of the extrinsic and intrinsic legal elements in terrorism cases.³²⁷ At this time, this question is somewhat academic, as the United States, a significant international presence, refuses to ratify the Rome Statute.³²⁸ My proposal might attract approval among states faced with daily acts of terrorism, but might fail to convince major participants in the war on terror, such as the United States, the United Kingdom, and Australia to embrace the Court. The American and British governments have been detaining suspected terrorists indefinitely³²⁹ in their efforts to combat international terrorism.³³⁰

327. See Scheffer, *supra* note 309, at 49 (suggesting that the ICC would be a formidable venue in which to prosecute future acts of terrorism that may qualify as crimes against humanity).

328. See *id.* at 98-100 (examining the U.S. position towards the ICC, and suggesting several steps the United States could take to alleviate its concerns, such as remaining engaged in the U.N. Preparatory Commission in order to ensure U.S. interests remain protected, amending the Federal Criminal Code and the Uniform Code of Military Justice in order to ensure such crimes can be prosecuted domestically, and signing Article 98(2) agreements with governments in order to protect U.S. personnel from having to surrender to the ICC).

As Ambassador Scheffer's remarks reflect, the U.S. government's principal criticism of the Rome Statute is that nationals of non-State Parties can theoretically be prosecuted before the ICC. By virtue of Article 12 of the Statute, when an investigation has been triggered by either the Prosecutor or a State Party, the ICC can exercise jurisdiction only if at least one of the following States is a Party to the Rome Statute or has accepted the Court's jurisdiction with respect to the crime in question: 1) the State in whose territory the crime occurred, and 2) the State of which the accused is a national. Theoretically, then, a national of a non-State Party alleged to have committed a crime within the territorial jurisdiction of a State Party could be prosecuted before the Court.

Diane F. Orentlicher, *Politics by Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489, 490 (1999).

329. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 706 (4th Cir. 2002) (dealing with the restriction of access to deportation hearings in special interest cases, but addressing the restriction of certain liberties in the fight against terror). The government argued that the restriction of certain liberties in the fight against terror is "akin to the construction of a mosaic," each individual piece of information being important. *Id.* The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, and the

Given the tactical and strategic advantages of such a practice, it is unlikely that the United States or the United Kingdom would concede jurisdiction over terrorism to the ICC and, consequently, relinquish custody over suspected terrorists.³³¹

Nevertheless, ICC jurisdiction over terrorism undoubtedly constitutes a feasible solution to the five jurisdictional problems I identified at the beginning of this account. In light of ongoing criticism of government action, my proposal offers an alternate framework to national systems of checks and balances on executive decision-making, while appreciating the context of a war that is novel and indeterminate in character. It logically follows that having an international mechanism like the ICC is ideal for upholding the principles of international law, as long as it does not lead to the politicization of the Court.³³² It must adjudicate infractions while

disruption visits from family members and lawyers might cause have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain); *see also* A, X and Y and Others v. Secretary of State for the Home Department, [2002] EWCA Civ 1502 (deciding to detain alleged terrorists based on the logic of immigration, and for practical reasons). Although the suspects were subject to deportation, the state withheld their expulsion; the government rendered the authority to detain subordinate to the authority to expel aliens from the country. *Id.* Furthermore, the most important reason for the existence of such a policy is easily identified: indefinite and incommunicado detention is an effective tool with which to break cases and gather intelligence. *Id.*; *see also* Padilla v. Rumsfeld, 256 F. Supp. 2d 218, 220 (S.D.N.Y. 2003) (evaluating the detention of an individual with alleged terrorist ties, and examining the U.S. government's argument that mandatory detention without access to counsel or outside contact amounts to an effective means of interrogation).

330. *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 414 (noting that the U.S. Department of Homeland Security has orders to subject asylum seekers from all nations where Al Qaeda, Al Qaeda sympathizers, or other terrorist groups are known to have operated in, to mandatory detention as part of "Operation Liberty Shield").

331. *See* Scheffer, *supra* note 309, at 100 n.7 (explaining that the United States has expressed strong objections against including terrorism as a crime against humanity under the ICC because, among other things, the United States believes that granting jurisdiction to the ICC over acts of terrorism would hamper and undermine national and transnational efforts in fighting terror).

332. *See supra* Part I.B (noting that fear of politicization was one of the reasons why terrorism was excluded from the category of crimes against humanity under the ICC).

keeping in mind its practical underpinnings: deterrence, punishment of international crimes, and justice for the victims.³³³

333. See Scheffer, *supra* note 309, at 50 (explaining that the purpose behind the ICC is to provide enforcement and deterrence against the commission of further heinous crimes).