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## A Permanent Hybrid Court for Terrorism

Erin Creegan

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# A PERMANENT HYBRID COURT FOR TERRORISM

ERIN CREEGAN\*

INTRODUCTION .....	239
I. BACKGROUND.....	240
A. WHAT IS TERRORISM? .....	240
B. IS TERRORISM A CRIME AGAINST THE LAW OF NATIONS? .....	243
C. TRANSNATIONAL VERSUS INTERNATIONAL CRIME .....	246
1. Who Commits the Crime? .....	246
2. Scale.....	248
3. Reprehensibility.....	250
D. THE NETHERLANDS’ PROPOSAL.....	252
E. THE WORKING GROUP ON THE CRIME OF AGGRESSION .....	253
II. ANALYSIS.....	257
A. ARGUMENTS IN FAVOR OF AN INTERNATIONAL COURT	
EXERCISING CRIMINAL JURISDICTION OVER TERRORISM .....	257
1. States that are Unable to Bring Terrorists to Justice .....	257
2. States that are Unwilling to Bring Terrorists to Justice...	259
3. Other Arguments .....	261
B. ARGUMENTS AGAINST AN INTERNATIONAL COURT	
EXERCISING CRIMINAL JURISDICTION OVER TERRORISM .....	262
1. States are Generally Effective at Criminally Trying Terrorists.....	262
2. States Do Not Wish to Lose Control over National Prosecution .....	264
3. Most Transnational Crimes are more Domestic than International in Nature.....	265

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4. Terrorism Crimes Could Overload an International Court of General Jurisdiction .....	266
C. DESIGNING AN INTERNATIONAL COURT TO ADDRESS THE ARGUMENTS ABOVE.....	267
1. Features of a Permanent Hybrid Court Exercising Jurisdiction over Terrorism: The Special Court for Counterterrorism.....	268
a. Judges.....	271
b. Prosecutor .....	271
c. Defense Office .....	271
d. Substantive Law .....	272
e. Jurisdiction.....	272
f. Multiple States Implicated by a Single Event .....	276
g. Location .....	276
h. Comparison to Existing Courts.....	276
2. Broadening the Scope: The Special Court for Transnational Crime .....	278
D. CAN THE CRIME OF TERRORISM BE INTEGRATED INTO THE INTERNATIONAL CRIMINAL COURT? .....	280
1. Arguments in Favor of Adding the Crime of Terrorism to the Jurisdiction of the ICC.....	280
2. Arguments Against Adding the Crime of Terrorism to the Jurisdiction of the ICC.....	281
a. Political Considerations .....	281
b. Practical Considerations .....	284
3. Can the Crime of Terrorism Be Integrated Effectively into the ICC with Special Procedures? .....	284
CONCLUSION .....	286
APPENDIX .....	287
DRAFT STATUTE OF THE SPECIAL COURT FOR COUNTERTERRORISM .....	287
SECTION I: ESTABLISHMENT OF THE SPECIAL COURT.....	287
SECTION II: JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW .....	288
SECTION III: ORGANIZATION OF THE SPECIAL COURT.....	298
SECTION IV: RIGHTS OF VICTIMS, SUSPECTS AND DEFENDANTS .....	302

SECTION V: CONDUCT OF PROCEEDINGS .....	304
SECTION VI: AMENDMENT, REVIEW AND WITHDRAWAL .....	311

## INTRODUCTION

In the summer of 2010, the Review Conference of the Rome Statute of the International Criminal Court (“ICC”) met in Kampala, Uganda.<sup>1</sup> The Review Conference covered, among other topics, the ongoing work of the Working Group for the Crime of Aggression, an advisory body tasked with outlining the definition and procedures of the crime of aggression, which until then existed only as a placeholder in the Rome Statute.<sup>2</sup> The Review Conference was also the place for states parties to propose amendments to the Rome Statute.<sup>3</sup>

The Netherlands made such a proposal—submitting documents in advance of the conference recommending that the “crime of terrorism” be added to the jurisdiction of the court.<sup>4</sup> This suggestion is not new. Terrorism, along with other crimes, particularly drug-related crimes, was considered, but rejected, when the Rome Statute was drafted in 1998.<sup>5</sup> At that time, the crime of terrorism was determined to be inappropriate for the jurisdiction of the

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1. See Rome Statute of the International Criminal Court art. 123, July 17, 1998-Dec. 31, 2000, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (providing for a review conference seven years after the Statute’s entry into force). For information on the proposals before the Review Conference, see *Review Conference of the Rome Statute*, INT’L CRIM. CT., [http://www.icc-cpi.int/Menus/ ASP/ReviewConference/\(last updated Dec. 23, 2010\)](http://www.icc-cpi.int/Menus/ASP/ReviewConference/(last%20updated%20Dec.%2023,%202010)).

2. Rome Statute, *supra* note 1, art. 5.2 (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”).

3. *Id.* art. 123.1.

4. Assembly of State Parties to the Rome Statute of the International Criminal Court, 8th Sess. at Annex II, ¶¶ 40-51, I.C.C. Doc. ICC-ASP/8/20 (Nov. 18-26, 2009) [hereinafter Assembly of Parties to the Rome Statute]; *id.* app. III.

5. See generally ROBERTA ARNOLD, THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM 53-57 (2004).

International Criminal Court.<sup>6</sup> However, shortly before the statute of the International Criminal Court entered into force, the world confronted the specter of international terrorism with the events of September 11, 2001, followed by the Madrid train bombings, and the London bus bombings.<sup>7</sup> Is the crime of terrorism still, if it was ever, inappropriate for the world's highest criminal court? Or is there another way for the international community to combat terrorism?

## I. BACKGROUND

### A. WHAT IS TERRORISM?

No paper on the crime of terrorism would be complete without the introductory observation that its definition is not generally agreed upon. The most common reason cited for this lack of consensus is that an individual's political ideology and national origins dictate who he or she considers to be a terrorist, and thus any definition is too subjective because "one man's terrorist is another man's freedom fighter."<sup>8</sup> Of course, properly considered, that is not a definitional problem, but a problem of application. The definition of terrorism, in order to encompass all offenders that are abhorrent to the international system as they innovate new tactics and embrace new causes, could include some groups who certain states deem to be using so-called "violence for good," such as in a struggle to throw off an oppressor or to conduct a just war.<sup>9</sup>

Terrorism is commonly understood as "a violent and intimidating act—usually directed against innocent targets—and aimed at coercing a government or a community to comply with the

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6. *See id.* at 55 (noting that the main argument against the inclusion of terrorism and other similar crimes was the lack of universal acceptance of the treaties defining those crimes).

7. *Timeline: Al-Qaeda*, BBC NEWS (Aug. 7, 2008), <http://news.bbc.co.uk/2/hi/7546355.stm>.

8. ARNOLD, *supra* note 5, at 3-4; *see also* Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213, 214 (Andrea Bianchi ed., 2004) (arguing that excluding "freedom fighters" from the definition of terrorism is a function of the international community's inability to agree on exceptions to the definition—not the inability to define what terrorism is).

9. Cassese, *supra* note 8, at 217 (stating that the First Additional Protocol of 1977 to the Geneva Conventions avoided the problem by labeling "freedom fighters" as "combatants" instead of "terrorists").

perpetrators' political requests."<sup>10</sup> This definition is not easily translated into legal terminology,<sup>11</sup> yet many countries have enacted criminal terrorism proscriptions. The United States defines international terrorism as:

“activities that . . . involve violent acts . . . [that] appear to be intended, (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping [in a way that] transcend[s] national boundaries . . . .”<sup>12</sup>

In fact, the U.S. Code contains over a dozen different, and not necessarily synonymous, definitions of terrorism.<sup>13</sup> The international community has defined specific acts of terrorism in no less than thirteen sectoral conventions, banning the specific acts of, inter alia, aircraft hijacking, aircraft bombing, hostage taking, and the financing of terrorist groups.<sup>14</sup> The sectoral conventions are backward-looking

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10. ARNOLD, *supra* note 5, at 4.

11. *See id.* at 5 (suggesting international humanitarian law as a basis for a legal definition of terrorism).

12. 18 U.S.C. § 2331(1) (2006).

13. *See* ELIZABETH MARTIN, CONG. RESEARCH SERV., RS 21021, “TERRORISM” AND RELATED TERMS IN STATUTE AND REGULATION: SELECTED LANGUAGE (2006) (excerpting samples of a few statutory definitions of “terrorism” in the United States Code); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249-50 (2004) (characterizing nineteen distinct definitions of terrorism present in the U.S. Code as either “deductive”—covering a wide variety of criminal conduct but only under narrow circumstances where the perpetrator has a politically oriented intent—or “inductive”—using a rather precise list of conduct but omitting the political intent requirement).

14. Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564; Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 124; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201; Protocol for the Suppression of Unlawful Acts against

for the most part; they condemn acts of terrorism which have already been perpetrated, rather than looking ahead with more encompassing definitions.<sup>15</sup> In the 1970s, the U.N. General Assembly attempted, without success, to come up with a definition of terrorism that would not apply to freedom fighters and combatants in anti-colonial movements.<sup>16</sup> Until 2005, there was great support for a Comprehensive Convention on International Terrorism,<sup>17</sup> but negotiations stalled over the definition of terrorism.<sup>18</sup> Negotiating states differed over the definition's inclusion or exclusion of collateral civilian losses during warfare, resistance to occupation, and national liberation movements.<sup>19</sup> There was an attempt to build consensus by completing the remainder of the convention and returning to the definition at a later stage, but this effort failed to yield a definition as well.<sup>20</sup> One of the last drafts of the convention circulated in 2005 gave the following proscription for terrorism:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation

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the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 201; Convention on the Marking of Plastic Explosives for the Purpose of Detection, *opened for signature* Mar. 1, 1991, 2122 U.N.T.S. 359; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89.

15. Cf. ARNOLD, *supra* note 5, at 9-27 (discussing the passage of conventions in response to air hijacking, hostage taking, piracy and maritime terrorism, and bombings).

16. STEPHEN DYCUS, WILLIAM C. BANKS & PETER RAVEN-HANSEN, COUNTERTERRORISM LAW 6 (2007).

17. *Id.*

18. *See id.* (referencing an agenda-setting document which, to avoid the controversy, deleted the definitional language).

19. *Id.*

20. *See id.* (noting that the ensuing General Assembly resolution "condemn[ed] terrorism in all its forms and manifestations," but did not define such "forms and manifestations").

system, an infrastructure facility or to the environment; or

(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.<sup>21</sup>

From this and other definitions, there is a discernable pattern: the generally-agreed elements are serious violence, a political motive, an international element, and the creation of extreme fear.<sup>22</sup> Two controversial subjects in the definition of terrorism are “freedom fighters,” and whether states actors can commit terrorism—a question which often translates to whether collateral damage in armed conflict can be labeled terrorism.<sup>23</sup>

#### B. IS TERRORISM A CRIME AGAINST THE LAW OF NATIONS?

One of the liveliest debates in international criminal law today is whether the crime of terrorism has emerged as a true international crime. Learned international criminal scholars Antonio Cassese and the late Thomas M. Franck conclude that it is,<sup>24</sup> though many others say that it is not.<sup>25</sup> The reality seems to be that, despite disagreement, the crime of terrorism has not developed a complete pedigree as an

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21. Chairman of the Sixth Comm. of the General Assembly, Letter dated Aug. 3, 2005 from the Chairman of the Sixth Comm. Addressed to the President of the General Assembly, app. II, U.N. Doc. A/59/894 (Aug. 12, 2005).

22. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 59-63 (2006).

23. *See id.* at 63 (arguing, however, that when an alleged act of terrorism occurs during an armed conflict, international humanitarian law is the most appropriate legal framework).

24. Cassese, *supra* note 8, at 214; *see* Thomas M. Franck & Deborah Niedermeyer, *Accommodating Terrorism: An Offense Against the Law of Nations*, 19 ISRAEL YEARBOOK HUM. RTS. 75, 100 (1989) (internationalizing the crime by tying it to a state’s accommodation of those “who use force to inflict harm [on other states]”).

25. Cassese, *supra* note 8, at 213 n.4.

international crime (perhaps leading to its ultimate non-inclusion in the Rome Statute), but it could very well crystallize as one at some point in the future.<sup>26</sup>

The ICC's predecessors—the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”)—proscribed only the crime of genocide, violations of the law of war (war crimes), and crimes against humanity.<sup>27</sup> At the time of the drafting of the Rome Statute, terrorism was still considered a “treaty crime”—a crime proscribed in international law by virtue of agreement between states, rather than because it is an inherent violation of a norm of the international community.<sup>28</sup> The negotiating parties' decision to limit the Statute to four core crimes and to drop the “treaty crimes” provision was based on the conclusions that only the core crimes enjoyed clear status as *jus cogens* under customary international law, that the inclusion of crimes such as international drug trafficking and terrorism would prevent final agreement and ratification of the Rome Statute, and that there was no generally accepted definition of the crime of terrorism.<sup>29</sup>

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26. See Robert Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 8, at 227, 272 (presenting competing lines of scholarly thought on the question of whether universal jurisdiction exists for terrorist crimes); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 101-02 (2006) (“Rather than continue to attempt to establish a universal jurisdiction with respect to terrorism, the international community . . . opted for a system whereby states exercise domestic criminal jurisdiction over acts of terrorism.”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (noting the potential for universal jurisdiction over certain acts of terrorism as a matter of customary law); PRINCETON UNIV. PROGRAM IN LAW AND PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (Stephen Macedo ed., 2001) (excluding terrorism from the list of “serious crimes under international law,” which would carry with them universal jurisdiction, notwithstanding its otherwise progressive interpretation of international criminal law).

27. Rome Statute, *supra* note 1, arts. 5-8; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2-5, *amended* July 7, 2009, *available at* <http://www.icty.org/sid/135>; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 995, arts. 2-4, U.N. Doc. S/RES/995 (Nov. 8, 1994) (including “acts of terrorism” under art. 4—“Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”).

28. ARNOLD, *supra* note 5, at 59.

29. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN

The above led the negotiators to conclude, fatally, that the crime of terrorism and other treaty crimes have yet to find universal acceptance as violations of the law of nations.<sup>30</sup> In other words, unlike the other international crimes, it is not agreed that universal jurisdiction exists for crimes of terrorism.<sup>31</sup>

Implicit in that argument, and stated explicitly by some of those who negotiated the Rome Statute, is the notion that crimes that do not carry universal jurisdiction are fundamentally different than those that do.<sup>32</sup> Most countries agree that terrorism, drug trafficking, attacks on U.N. personnel, human trafficking, and other similarly abhorrent treaty crimes are worthy of near universal proscription; however, genocide, war crimes, crimes against humanity, and aggression have a special and lofty place in the hierarchy of inherently criminal acts.<sup>33</sup> These acts constitute a violation of the law of nations because they are committed against the international order.<sup>34</sup>

To explain this concept further, international criminal law luminary M. Cherif Bassiouni noted that international criminal law is the convergence of two kinds of law: criminal aspects of international law (e.g., crimes against the international order, such as genocide or aggression) and international aspects of national criminal law (e.g., crimes proscribed by national laws and with an international dimension, but not directed at the international order, such as drug trafficking, and—this article suggests—terrorism).<sup>35</sup>

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RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 212 (2d ed. 2001); *see* Rep. of the Ad hoc Comm. on the Establishment of an Int'l Criminal Court, ¶ 81, U.N. Doc. A/50/22; GAOR, 50th Sess., Supp. No. 22 (1995) (arguing for the exclusion of treaty-based crimes because effective mechanisms are already in place and their inclusion would overburden the ICC); ARNOLD, *supra* note 5, at 56 (referencing the fear that the inclusion of terrorism would have polarized the ICC).

30. ARNOLD, *supra* note 5, at 55.

31. *Id.* at 56.

32. *Id.* at 58-59.

33. *See id.* at 58 (distinguishing these crimes as part of general international law because they are not simply derivations of national crimes applied in an international setting, but are crimes of particular international concern); *see also* Lyal S. Sunga, *The Crimes within the Jurisdiction of the International Court (Part II, Articles 5-10)*, 6 EUR. J. CRIME, CRIM. L., & CRIM. JUST. 61, 66 (1998).

34. ARNOLD, *supra*, note 5, at 58.

35. M. Cherif Bassiouni, *Characteristics of International Criminal Law*

The first kind of crime is truly international crime, while the second is more accurately understood as transnational crime. Transnational crime is geographically international but offends the international order only in the sense that nearly all states are concerned with the crime and must work together to suppress it.

### C. TRANSNATIONAL VERSUS INTERNATIONAL CRIME

#### 1. *Who Commits the Crime?*

Truly international crime involves the participation of the officials of the state itself at the highest levels. The decision to participate in aggression, for example, can only be made by the authority of a state.<sup>36</sup> Likewise, war crimes, either in an international or a civil war, involve the meeting of two large fighting forces and often the participation of multiple state leaderships.<sup>37</sup> Crimes against humanity and genocide need not be specifically ordered or carried out by the apparatus of a state,<sup>38</sup> but they must necessarily involve a failure of the state to suppress these acts, and the acts must be occurring to such a degree that they are widespread or systematic, or on a scale great enough that they could destroy a defined group in whole or in part.<sup>39</sup> Both crimes against humanity and genocide are likely to occur in times of interstate conflict.

Transnational crime is, by contrast, generally conducted by private parties that states are working to suppress. Terrorists, though they may at times receive illicit support from sympathetic states, are usually private persons who engage in violence that is directed at making their government or a neighboring government act or not act

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*Conventions*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 1, 1 (M. Cherif Bassiouni ed., 1986).

36. See Rev. Conf. of the Rome Statute, 13th plenary meeting, June 11, 2010, I.C.C. Doc. RC/Res.6, Annex I, art. 8(1) [hereinafter RC/Res.6] (“[C]rime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”).

37. See Rome Statute, *supra* note 1, art. 8.

38. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 166 (Feb. 26) (reasoning that because genocide is a crime under international law, states parties have an obligation to prevent it).

39. *Id.*; Rome Statute, *supra* note 1, arts. 6-7.

in a certain way.<sup>40</sup> Drug trafficking flouts the authority of a state by moving illicit substances without state permission, subverting the state's legal controls.<sup>41</sup> Piracy, though it has developed a pedigree as an international crime,<sup>42</sup> functions as transnational crime.<sup>43</sup> Piracy is an act by private persons directed against private ships in contravention of state authority or outside of the normal enforcement abilities of states.<sup>44</sup> Drug trafficking and piracy are driven by profit rather than political motives.

The difference in who commits international versus transnational crimes shows the greater danger that international crime poses to the international system at large. For an international crime, often

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40. See SAUL, *supra* note 22, at 63-64 (suggesting that because terrorist acts are committed during peacetime, a definition of terrorism should encompass the "acts of both State officials and non-State actors" in order to "maintain moral symmetry" and reinforce the definition's legitimacy).

41. Compare Johan David Michels, *Keeping Dealers off the Docket: The Perils of Prosecuting Serious Drug-Related Offences at the International Criminal Court*, 21 FLA. J. INT'L L. 449, 452 (2009), with Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 76 (2000).

42. Leticia M. Diaz & Barry Hart Dubner, *On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 BARRY L. REV. 175 (2009). See generally BARRY HART DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* (1980).

43. Despite being a crime against nations and, thus, generally subject to universal jurisdiction, piracy is not within the jurisdiction of the ICC. Again, this suggests that the ICC is not the appropriate forum for crime with the features of transnational crime, whether categorized as a crime against nations or not.

44. See U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

*Id.*

someone with state authority is perpetrating a wrong, and so the only higher authority that can suppress the action is the international community of states. With transnational crime, the wrong is conducted below the state level. States may fail to effectively suppress the crime, but states also fail to achieve perfect results with the suppression of any kind of domestic, ordinary crime. While a few states may refuse to suppress terrorism or even abet terrorists, those situations are the only ones in which international terrorism is similar to other kinds of truly international crime.

## 2. Scale

The definition of terrorism poses a problem for ICC jurisdiction because a single event can qualify as an act of terrorism. Unlike genocide or crimes against humanity, which are necessarily massive in scale, there can be such a thing as “a little terrorism.” While the classic model of terrorism, such as that seen in the Irish Republican Army in Ireland or the National Liberation Front in Algeria, involved hierarchical structures coordinating a paramilitary strategy, the model of al-Qaeda and other modern terrorist organizations lacks any real hierarchy at all.<sup>45</sup> Osama bin Laden and his immediate supporters broadcast a message that gives general guidance on planning acts of terrorism,<sup>46</sup> but individual people or small groups with no connection to al-Qaeda can then decide for themselves whether and how they will stage attacks to support the al-Qaeda cause.<sup>47</sup> As such, some acts of terrorism have as few as a single person involved, relatively small numbers of casualties, and may be planned and carried out in a small domestic locality. The issue of the scale of terrorism introduces another unique challenge: when the

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45. The international community's increased efforts to fight hierarchical terrorism have reduced terrorist capacity and placed more emphasis on small, independent groups, which are bolstered by modern communications technology. Terrorism has also changed from the earlier hierarchical model of the 1970s and 1980s by becoming more violent, less discriminate, and less proportional in the 1990s. The movements have also become less directly political in their demands; instead of seeking control of specific territory, terrorism can now have a more amorphous message, such as general Anti-Americanism. *See* DYCUS, BANKS & RAVEN-HANSEN, *supra* note 16, at 4-5.

46. *See generally* BEN VENZKE & AIMEE IBRAHIM, *THE AL-QAEDA THREAT: AN ANALYTICAL GUIDE TO AL-QAEDA'S TACTICS AND TARGETS* (2003) (considering a number of interviews and broadcasts made by al-Qaeda members).

47. *Id.*

crime is more domestic than international, can it still be called international terrorism?<sup>48</sup>

Furthermore, international and transnational crimes differ in scale. While there is no doubt a significant amount of drug trafficking and other kinds of transnational crime ongoing, the volume of transnational crime is best understood as an aggregation of a number of independently committed criminal acts. Some crimes are large-scale, some are exceedingly small operations. International crimes, on the other hand, involve either the invasion of another country or the aggregation of a great number of small acts into a single plan to commit genocide, perpetrate war crimes, or commit crimes against humanity (which must also be widespread or systematic in order to qualify for the Rome Statute and other criminal tribunal definitions<sup>49</sup>).

Finally, even terrorist crimes that are relatively small in terms of number of casualties can have large political intimidation effects. For example, the assassination of the Lebanese Prime Minister Rafik Hariri was sufficiently politically important that it led to the establishment of the Special Tribunal for Lebanon, a hybrid international court with jurisdiction over what was technically an act of terrorism.<sup>50</sup> It is not clear how to draft a definition for terrorism that would separate “big” international terrorism from “small” terrorism, and would allow an international court to adjudicate such cases without docket-flooding on the one hand, or jurisdictional unavailability on the other.

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48. While many scholars distinguish international and domestic terrorism, claiming that only international terrorism is of concern to the international community and perhaps only international terrorism is an international crime, this article disagrees with strict delineation between the two. Even if a terrorist movement is directly against a state by nationals, there are exceedingly few cases in which international movements or policies are not implicated. Additionally, wide-scale terrorist violence in a single country is still a threat to the peace and security of the international community. For this reason, domestic and international terrorism should be viewed as one phenomenon. *But see SAUL, supra* note 22, at 47 (suggesting that even some acts of international terrorism may not be significant enough to affect “international peace and security” under the U.N. Charter).

49. *E.g.*, Rome Statute, *supra* note 1, art. 7 (“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 . . .”).

50. S.C. Res. 1757, Annex, art. 1, U.N. Doc. S/Res/1757 (May 30, 2007).

### 3. Reprehensibility

Widespread or systematic attacks on civilian populations, attacks on civilians during wartime, attempts to destroy an ethnic group in whole or in part, and unjustified aggression toward another country are all actions that tend to arouse disgust and hatred in the international community. Indeed, the consensus of the international community is that these actions are never permissible for any reason.<sup>51</sup> Politically motivated attacks on civilians, while still detested, have not crystallized as totally impermissible acts.<sup>52</sup> Countries with colonial histories often owe their independence to national liberation groups who were willing to use such tactics to fight the superior military power of their oppressors.<sup>53</sup> In short, while actors in the international system are completely forbidden from committing genocide for any reason, they are forbidden from attacking civilians for political purposes only most of the time. Furthermore, leaders of attributed national liberation organizations, whom some deem terrorists, have not been excluded from participation in the international community—for example, Gerry Adams of the Irish Republican Army in Northern Ireland and Nelson Mandela of the African National Congress in South Africa.<sup>54</sup>

Much of the scholarship that suggests adding terrorism or other crimes to the jurisdiction of the ICC focuses on the belief that terrorism is one of the world's most reprehensible crimes.<sup>55</sup> It may

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51. The prohibitions on actions such as genocide may well be considered peremptory norms or *jus cogens* in the international system. For a detailed discussion of peremptory norms, see generally LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988).

52. See Cassese, *supra* note 8, at 213-14 (outlining the debate to except “freedom fighters” from the definition of terrorism).

53. See SAUL, *supra* note 22, at 116-20 (advancing arguments that justify certain terrorist acts when part of a rebellion against an oppressive regime).

54. *Id.* at 121.

55. This suggestion is often achieved by illustrating how acts of terrorism can be categorized under the statutory definition of crimes against humanity. *E.g.*, Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 15 (2003); Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 2 (2002); Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. J. INT'L L. 121, 127 (2006).

very well be that, at the time the Rome Statute was adopted, the international community wished to distinguish the aforementioned four crimes by identifying them, and them alone, as the most reprehensible. Indeed, the definition of a “crime against nations” depends on the consensus on the international community to view the actions in that way, not on the threat level or inherent moral reprehensibility of the action.<sup>56</sup>

We need not accept the view that simply because a crime is not included in the Rome Statute it does not deserve the greatest moral condemnation, or great attention from the community of states. There are great differences between transnational crimes, like terrorism, and international crimes, such as genocide, which might impact the decision on how acts of terrorism should be tried. This decision should perhaps be based on practical considerations rather than the need for moral clarity. Likewise, by acknowledging that transnational crime threatens international peace and security, we need not accept that terrorism or narcotrafficking affects the international community in the same way that genocide or aggression does.

Many scholars have argued that terrorism is technically already included in the jurisdiction of the International Criminal Court; certain acts of terrorism may be considered war crimes, crimes against humanity, or genocide.<sup>57</sup> These arguments are clever, and have some analogical support in the opinions of the international criminal tribunals,<sup>58</sup> but it might require some of the worst legalese to begin trying those whom we know to be terrorists as war criminals. Terrorism is a distinct and discrete phenomenon in the international system. Reading terrorism into another crime’s definition would involve exactly the kind of twisting of legal definitions and statutory overreaching that first made states uneasy about the existence of an

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56. EDWARD M. WISE ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 43-44, 58-62 (2d ed. 2004).

57. See, e.g., *supra* note 55.

58. E.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 158, 172 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 496 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). In both cases, though rape was not listed under the relevant article of the ICTY Statute, the court permitted prosecution of it as torture or inhumane treatment.

International Criminal Court.<sup>59</sup> This move would constitute a direct contravention of the will of the negotiating parties who chose to exclude terrorism from the Rome Statute. If we wish to make terrorism a crime under the ICC, then let us explicitly add the crime to the court's jurisdiction. If not, then let us find another way.

#### D. THE NETHERLANDS' PROPOSAL

The Netherlands' Proposal to include the crime of terrorism in the Rome Statute is a short one. The Netherlands states that terrorism is a threat to international peace and security, and that international accountability is imperative when states with jurisdiction are unable or unwilling to prosecute alleged terrorists.<sup>60</sup> The proposal acknowledges that there are definitional problems with terrorism, and suggests adding the crime of terrorism to the Rome Statute as a placeholder while a new working group discusses how to integrate the crime into the court, both by definition and in terms of any special procedures.<sup>61</sup> As noted above, the ICC has already had one such placeholder and working group, for the crime of aggression.<sup>62</sup> To discuss whether this proposal is a good one, this article turns to an evaluation of the efforts of the Working Group for the Crime of Aggression in the next section.

The Netherlands' proposal also acknowledges that terrorism may already be a crime in the ICC's jurisdiction; per the above discussion of legalese and statutory overreaching, this article discounts that as a viable possibility.

Notably, the proposal that the Netherlands advanced for the 2010 meeting is one that they have advanced before, without success, when the Rome Statute was under negotiation.<sup>63</sup> Despite the many interceding years and the manner in which the events of September 11, 2001 have refocused global security concerns on the threat of terrorism, the Netherlands' proposal failed again to achieve any significant support, and was shelved for consideration at a later date.

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59. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 14 (1999) (emphasizing the need for precise definitions which codify only existing customary international law).

60. Assembly of Parties to the Rome Statute, *supra* note 4, Annex I, ¶ 41.

61. *Id.* ¶¶ 41-42.

62. Rome Statute, *supra* note 1, art. 5, ¶ 2.

63. See Kolb, *supra* note 26, at 279-80.

## E. THE WORKING GROUP ON THE CRIME OF AGGRESSION

The international community has been working on a definition for the crime of aggression since the Nuremberg Trials after World War II, and even earlier.<sup>64</sup> The fact that an uneasy consensus took twelve years to reach even after the drafting of the Rome Statute forebodingly suggests a similar fate for the hypothetical crime of terrorism. Negotiations over the definition of the crime of aggression occurred in several phases, including a failed attempt by the International Law Commission in the years after World War II, three decades of General Assembly debates from the 1950s to 1970s, and preparations for the negotiation of the Rome Statute in the 1990s.<sup>65</sup> In 1998, the international community decided to kick the can down the road once more by leaving a placeholder in the Rome Statute.<sup>66</sup>

In the twelve interceding years, the Working Group for the Crime of Aggression was tasked to come up with a universally agreed upon definition.<sup>67</sup> Ultimately a compromise was reached and a definition accepted, with the following elements:

## Article 8 bis: Crime of Aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United

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64. See generally OSCAR SOLERA, *DEFINING THE CRIME OF AGGRESSION* (2007).

65. E.g., *id.* at 12.

66. *Id.* at 356.

67. See Chairman of the Working Group on the Crime of Non-Aggression, *Non-paper by the Chairman on the Elements of Crimes*, ¶ 1 (May 28, 2009), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/SWGCA/Non-paper-Elements-of-the-CoA-28May2009-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Non-paper-Elements-of-the-CoA-28May2009-ENG.pdf) (intending to facilitate discussion on the draft elements of the crime of aggression, first proposed and circulated in 2002).

Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>68</sup>

Whether this definition solves the many issues that prolonged the codification of the crime of aggression remains to be seen.

The crime of aggression poses a unique problem in the community of states. Unlike other crimes, it can absolutely only apply to the highest political authorities of a state and to their political decisions.<sup>69</sup> Many states are concerned that the chosen definition of

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68. RC/Res.6, *supra* note 36, Annex I.

69. *Compare id.* Annex I, element 2 (requiring the perpetrator's ability to exercise control over or to direct the political or military action of a state), *with* Rome Statute, *supra* note 1, arts. 6-8 (excluding an official capacity requirement

aggression could outlaw the benign decisions of states, particularly a decision of one state to enter another for humanitarian reasons, anticipatory self-defense, self-determination, peacekeeping and global law enforcement, or a small-scale territorial incursion.<sup>70</sup>

The crime of aggression suffers from definitional and application issues similar to those that plague the crime of terrorism. States are concerned that actions which they consider to be benign or legal may fall within an all-encompassing technical definition.<sup>71</sup> As noted above, some states consider humanitarian intervention or anticipatory self-defense, *inter alia*, to be an improper interference with territorial sovereignty under the U.N. Charter that should trigger liability for the crime of aggression, whereas other states do not.<sup>72</sup>

One of the ways that states could have protected allegedly benign behavior from falling under the technical definition of aggression is by constricting the conditions under which the ICC could exercise its jurisdiction. Under Article 13 of the Rome Statute, jurisdiction can be exercised through referral by a state party, referral by the U.N. Security Council (“Security Council”), or upon an independent investigation of the ICC Prosecutor.<sup>73</sup> The Working Group on the Crime of Aggression considered two special mechanisms to protect benign state action: requiring the consent of the alleged aggressor state before exercising jurisdiction (unless the case is referred by the Security Council under its U.N. Charter Chapter VII power), or

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from the definitions of genocide, crimes against humanity, and war crimes).

70. See SOLERA, *supra* note 64, at 409-435 (considering a definition of the crime of aggression by evaluating possible defenses to such a charge); Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT’L L. 341, 346-48 (2009) (referencing historical opposition to any form of unauthorized aggression, but noting arguments for the emergence of a “legal norm in favor of unilateral humanitarian intervention”).

71. See SOLERA, *supra* note 64, at 347-50 (reviewing delegations’ proposals for the crime of aggression and raising concerns about several trends therein, such as the tendency for states parties to conflate “aggression” with the broader notion of “breaching the peace” under the U.N. Charter). Solera also discusses the ongoing debate of whether the threat of aggression can be equated with the actual act—ultimately concluding that the most sensible approach is to view threats as evidence of intent to commit aggression, but alone insufficient to constitute the crime of aggression. *Id.*

72. *E.g.*, Murphy, *supra* note 70, at 346-48.

73. Rome Statute, *supra* note 1, art. 13.

imposing an advance jurisdictional filter.<sup>74</sup> Proposals for advance jurisdictional filters suggested the requirement that other international bodies—the Security Council, the Pre-Trial Chamber of the ICC, the General Assembly, or the International Court of Justice—refer a case of aggression or determine that there has been aggression before the case is given to the ICC Prosecutor.<sup>75</sup>

Some scholars and government officials, having reflected on the work of the Working Group, came to oppose adding the crime of aggression to the statute at all—with or without any such special procedural protections.<sup>76</sup> There is a strong possibility that the recent addition of the crime of aggression to the Rome Statute will result in a number of states exercising their right not to be bound by the new article,<sup>77</sup> choosing to leave the Rome Statute altogether,<sup>78</sup> or, in the case of current non-parties, being further dissuaded from acceding to the court.<sup>79</sup> Countries such as the United States (current non-party), the United Kingdom (party), and Belgium (party) are concerned about an inability to exercise humanitarian intervention,<sup>80</sup> and the United States may be concerned about its active worldwide military—particularly its low-level military operations against terrorists, narcotraffickers, and paramilitaries—and its pseudo-law enforcement activities undertaken in foreign territory (including

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74. Chairman of the Working Group on the Crime of Aggression, *Non-paper by the Chairman on the Conditions for the Exercise of Jurisdiction*, ¶ 6 (May 28, 2009), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/SWGCA/Non-paper-conditions-jurisdiction-28May2009-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Non-paper-conditions-jurisdiction-28May2009-ENG.pdf).

75. *Id.* at ¶¶ 13-19.

76. See, e.g., Sean D. Murphy, *Aggression, Legitimacy, and the International Criminal Court*, 20 EUR. J. INT'L L. 1147, 1147 (2009) (perceiving problems with the proposed draft amendment on the crime of aggression, particularly with regard to “long-term prospects for the legitimacy of the definition of the crime and of the institutional structures charged with administering it”).

77. Rome Statute, *supra* note 1, art. 121, ¶ 5 (prohibiting the ICC from exercising jurisdiction over new crimes or new definitions of existing crimes when the state party whose nationals are implicated or upon whose territory the crime occurred has yet to accept the amendment).

78. See *id.* art. 127 (allowing for voluntary withdrawal); *id.* art. 121, ¶ 6 (allowing for immediate withdrawal from the statute during a one year period following the adoption of an amendment).

79. The Statute strongly suggests that only current states parties have the option to reject the addition or amendment of crimes, though the instrument is not wholly unambiguous on this point. See *id.* art. 121, ¶ 5.

80. Murphy, *supra* note 70, at 348.

internationally-unpopular extraordinary renditions).<sup>81</sup> Some states may argue that these actions should be condemned or punished, but those arguments will drive the world's most powerful states away from building international consensus on either the definition of aggression or the value of the ICC. Thus, the efforts of the Working Group for the Crime of Aggression give reason for great pause and skepticism before advocating for a working group to resolve longstanding definitional and application issues with the crime of terrorism.

## II. ANALYSIS

### A. ARGUMENTS IN FAVOR OF AN INTERNATIONAL COURT EXERCISING CRIMINAL JURISDICTION OVER TERRORISM

The Netherlands' proposal draws attention to two situations in which an international court with criminal jurisdiction over terrorism would be particularly helpful to suppressing terrorist acts. Both situations involve a failure of a state to exercise its basic criminal police powers: (a) the state is simply unable to do so by virtue of collapsed infrastructure or failure to control its territory, or (b) the state is unwilling to assist in the prosecution of terrorists, perhaps because the state empathizes with the particular terrorist cause.<sup>82</sup> This article evaluates both situations and also considers other ancillary reasons for referring terrorists to an international court.

#### *1. States that are Unable to Bring Terrorists to Justice*

Some states simply lack the ability to bring terrorists in their territorial jurisdiction (or any other form of jurisdiction) to justice. The list of "unable" states may include not only failed states, like

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81. Cf. Silvia A. Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589, 597-98 (2002) (acknowledging discussion regarding the magnitude or gravity of the use of force under the definition of aggression).

82. A historical example would be the Lockerbie bombing case, in which Libyan nationals were accused of setting bombs that killed hundreds, including a number of Scottish nationals. Libya, at first, refused to turn over the suspects and claimed that Libya could try the bombers itself. The international community took the belief that Libya has no intention to earnestly try the suspects. See JOHN P. GRANT, *THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY* xvii-lxiii (2004).

Somalia,<sup>83</sup> but those that have lost a monopoly over the legitimate use of force in a portion of their territory but are otherwise functional, such as Colombia or Pakistan.<sup>84</sup> In both cases, the state simply cannot capture and prosecute terrorists effectively. Stronger states typically provide military support to these governments, which is needed to reach territory the central state cannot control and give logistical support to weak criminal justice systems.<sup>85</sup> In some cases, “unable” states even find unconventional means of bringing terrorists to justice—the United States sometimes acquires terrorists in these states by extraordinary rendition, a practice which is roundly unpopular in the rest of the world,<sup>86</sup> or, for example, uses unmanned drones to fly over uncontrolled Pakistan and strike terrorist leaders.<sup>87</sup>

Notwithstanding these mechanisms used by the community of nations to combat terrorists hiding out in weak states, there does seem to be an advantage to creating a neutral, international court with jurisdiction to try such terrorists. The obvious problem with referring prosecution of these elusive terrorists to an international court is, however, a reiteration of the state’s inability to try them in the first place: any international court may issue an arrest warrant, but there may be no competent military or law enforcement body to

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83. See Walter S. Clarke & Robert Gosende, *Somalia: Can a Collapsed State Reconstitute Itself?*, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 129, 129-30 (Robert I. Rotberg ed., 2003) (“Somalia is considered by some to be a likely refuge for terrorists in the post 11 September world.”).

84. See C. CHRISTINE FAIR & PETER CHALK, FORTIFYING PAKISTAN: THE ROLE OF U.S. INTERNAL SECURITY ASSISTANCE 9 (2006) (noting the array of challenges confronting law enforcement and intelligence personnel in Pakistan, including jihadist terrorism, sectarian extremism, and drug trafficking); Harvey F. Kline, *Colombia: Lawlessness, Drug Trafficking, and Carving Up the State*, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR *supra* note 83, at 161, 161 (chronicling the historically weak Columbian government—particularly its inability to govern rural areas of the country).

85. FAIR & CHALK, *supra* note 84, at 50-52 (describing the U.S. Dept. of Justice security assistance to Pakistan, including police officer training and assistance with investigative capacities).

86. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1333 (2007) (urging that extraordinary rendition, though “a practice purportedly developed to uphold the rule of law against lawless terrorists,” has itself become “a lawless practice which perverts the rule of law”).

87. E.g., Bobby Gosh & Mark Thompson, *The CIA's Silent War in Pakistan*, TIME (Jun. 1, 2009), <http://www.time.com/time/magazine/article/0,9171,1900248,00.html>.

undertake the dangerous task of finding and apprehending these suspects in lawless areas.<sup>88</sup> Insofar as U.N.-blessed military forces from other states may attempt to perform this function, remember that the United States and other countries with strong militaries already attempt to render this kind of assistance. Nonetheless, the approval of the international system could assist in such missions.

Additionally, states that can control their territory but have weak investigative or criminal adjudication systems would seem to benefit the most from referring to an international court the complex and expensive task of investigating and prosecuting a massive terrorist attack. Weaker states could be infused with trained judges and other legal staff as well as financial support to build a more legitimate infrastructure. There would of course be drawbacks, such as a loss of local involvement and local justice in these cases, but there may be a way to ameliorate such concerns—explored later in this article.

## 2. *States that are Unwilling to Bring Terrorists to Justice*

There exist competent and organized states that simply do not wish to surrender terrorists in their territory to another state which has a grievance against them. For example, in the famous Lockerbie bombing case, the government of Libya had custody over the two persons accused of planting a bomb on a plane that killed 270 people when it exploded over Lockerbie, Scotland.<sup>89</sup> Libya insisted that it would try the suspects, who were both Libyan citizens.<sup>90</sup> The international community suspected that the pending Libyan prosecution would surely be a sham.<sup>91</sup> After lengthy negotiation and litigation before the International Court of Justice, the two suspects in the bombing were surrendered to a special court in the Netherlands to be tried under Scottish national law.<sup>92</sup>

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88. Compare Rome Statute, *supra* note 1, art. 58 (“At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person . . .”), with Associated Press, *Sudan leader re-elected despite war crimes charges*, USA TODAY, Apr. 26, 2010, [http://www.usatoday.com/news/world/2010-04-26-Sudan\\_N.htm](http://www.usatoday.com/news/world/2010-04-26-Sudan_N.htm).

89. See GRANT, *supra* note 82, at xvii-xviii.

90. *Id.* at xix.

91. *Id.* at xvii.

92. *Id.* at xix-xx, xxii-xxiii, 135-43 (doc. 2.11) (reproducing the Libyan Position paper accepting the special court); *id.* at 149-62 (doc. 2.14) (setting an agreement for the special court between Scotland and the Netherlands).

It is not just rogue states like late 20<sup>th</sup> century Libya that are unwilling to surrender suspected terrorists to nations seeking to try them. Many bilateral extradition treaties contain “political offense” exceptions that do not allow those suspected of political crimes to be extradited.<sup>93</sup> While extradition treaties have been adapted in the modern era to facilitate the transfer of terrorists,<sup>94</sup> there is still a great deal of disagreement between states about who should be considered a terrorist and who a political offender. Freedom fighters and those who have advocated but not actually participated in violence pose particular problems. In general, states may fear that counterterrorism extradition requests are mere facades for the persecution of political rivals. By the same token, political sympathy can be a culprit when states refuse to allow extradition. For example, judges in the United States—where there is a large and sympathetic Irish American community—were often unwilling to extradite members of the Irish Republican Army, even to the United Kingdom, the United States’ closest ally and a state where the guarantees of a fair trial are as sure

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93. See Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 777 (1992) (lamenting the devaluing effect of political offender exceptions on extradition treaties); see also *In re Mackin*, 668 F.2d 122, 125 (2d Cir. 1981) (agreeing with the Magistrate Judge that an Irish Republican Army member charged with murdering a British soldier was properly granted political offender status).

94. See, e.g., Supplementary Treaty Concerning the Extradition Treaty with the United Kingdom, U.S.-U.K., June 25, 1985, S. EXEC. DOC. 99-17 (1986) (modifying the Extradition Treaty between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 8, 1972, 28 U.S.T. 227). Article 1 of the Supplementary Treaty reads:

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

- (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
- (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
- (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
- (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;
- (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

*Id.* app. 1, art. 1. New extradition treaties are now written with language similar to the Supplementary Treaty, denying political offense protection to international terrorists.

as anywhere.<sup>95</sup>

If a request for extradition of a suspected terrorist were to come from an international court rather than another country, the request might have more persuasive appeal over the state with custody of the suspect. Of course, for this to be true, the international court would have to be careful to maintain legitimacy and not involve itself in politically-motivated prosecutions.<sup>96</sup> Arguably, an international court would still run into some of the same issues as a bilateral extradition regime: like the Lockerbie case, a country that is reticent to give up its nationals could institute a sham prosecution to keep them, since any international criminal court would most likely not be ratified unless it had a complementarity regime like that of the ICC.<sup>97</sup> However, the moral authority of an international court has an undeniable appeal because of its perceived unbiased nature and ability to assign universal moral condemnation to perpetrators. Such a court would likely have more success pressuring reticent countries to surrender accused terrorists, at least compared to states acting on their own.

### 3. Other Arguments

The Netherlands' proposal suggests that the chief practical reason for expanding the ICC's jurisdiction to include terrorism is the problem of states that are unable or unwilling to prosecute suspected terrorists. There are, however, a few other considerations that might weigh in favor of trying terrorist crimes before an international body.

The first argument is a moral one, as noted previously. Trying terrorism at an international level would show that the international community stands united against terrorism, and would add credibility to worldwide condemnation of terrorist acts. In this way,

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95. *E.g.*, *In re Mackin*, 668 F.2d 122; *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); *see* U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2007: UNITED KINGDOM 1760 (2008) ("The Government generally respected the human rights of its citizens.").

96. *See, e.g.*, Marc Grossman, U.S. State Department Under Secretary for Political Affairs, Remarks to Center for Strategic and International Studies (May 6, 2002), *available at* <http://www.amicc.org/docs/Grossman.pdf> (highlighting the United States' opposition to the ICC and specifically identifying the fear of politically-motivated prosecutions as a reason for that opposition).

97. For the terms of the ICC's complementarity regime, *see* Rome Statute, *supra* note 1, arts. 17-20.

international trials for terrorists also further the goal of norm creation; international involvement in criminal suppression of terrorism creates fewer ideological refuges for terrorists and disrupts their ability to appeal to moderate and other non-radical constituencies.<sup>98</sup> Additionally, any increase in effective enforcement of existing bans on terrorism can also serve a deterrent purpose, though it is unclear how effective the ICC has been at deterring those leaders who are bold enough to commit international crimes in the first place.<sup>99</sup>

National-international cooperative courts may have added benefits because they allow international actors, working side-by-side with officials in weaker states, to instill notions of human rights, justice and fair process, governmental accountability, strong institutionalization of criminal justice processes, and international cooperation.<sup>100</sup> This cooperation builds capacity in weaker states instead of simply taking over the role of law enforcement from them.

#### B. ARGUMENTS AGAINST AN INTERNATIONAL COURT EXERCISING CRIMINAL JURISDICTION OVER TERRORISM

The main arguments against referring criminal trial of terrorists to an international body revolve around the sovereignty of states.

##### *1. States are Generally Effective at Criminally Trying Terrorists*

As noted above, transnational crime is different than international crime in that international crime often cannot be judicially suppressed by states. Terrorism, on the other hand, is routinely and

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98. See Vigay M. Padmanabhan, *Norm Internalization Through Trials For Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 429-31 (2009) (arguing that trials for the violation of international laws can internalize those laws within communities which otherwise lack respect for them).

99. See James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 1-2 (2009) (quoting recent Under Secretary of State John Bolton—"a weak and distant [International Criminal] Court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity . . ."—and noting further that measuring the deterrent effect of any criminal policy "can be extraordinarily difficult").

100. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306-08 (2003).

effectively dealt with by state criminal justice systems.<sup>101</sup> Although some states possess meager law enforcement capabilities buttressed by frail court systems, their lack of efficacy is typically overcome by mutual legal assistance rather than through the loss of local control over prosecution.<sup>102</sup> While some states have struggled to adapt to the threat of terrorism, we are seeing national jurisdictions adopt new and innovative procedures to meet this challenge, including—inter alia—criminal courts of special jurisdiction,<sup>103</sup> procedures for handling classified evidence or new police tactics to further the effective investigation of crimes,<sup>104</sup> and special terrorism laws for trial and appeal.<sup>105</sup> Many states simply have no need to refer terrorist prosecutions to an international court.

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101. See, e.g., JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* 51, 89, 113, 125, 137, 145 (2007) (identifying the United Kingdom, Germany, Spain, Russia, Japan, and Israel as examples of states who have had ongoing terrorist activity and have effectively dealt with the offenders through trials or legislation).

102. See LORNA HARRIS & CHRISTOPHER MURRAY, *MUTUAL ASSISTANCE IN CRIMINAL MATTERS: INTERNATIONAL CO-OPERATION IN THE INVESTIGATION AND PROSECUTION OF CRIME 2-4* (2000) (commenting on recent increases in reciprocal criminal legal assistance between states, concomitant with the rise of international trade and travel and the growing threat of transnational crime). *But cf.* ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 4-7* (1993) (referencing the U.S.'s tendency to compensate for weak criminal justice systems in other states by internationalizing its own law enforcement).

103. See, e.g., AUDENCIA NACIONAL, <http://www.audiencianacional.es> (last visited Jan. 1, 2011) (sitting in Madrid with jurisdiction over international crimes, including terrorism); *Schools: About the Courts*, IRELAND CTS. SERVICE, <http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/10646F81427562D480256DA9004139B7?opendocument> (last visited Jan. 1, 2011) (“The Special Criminal Court [of Ireland] consists of three judges sitting without a jury and mostly deals with criminal charges involving terrorist organisations, and more recently, charges relating to organised drug activities.”).

104. See generally BECKMAN, *supra* note 101, at 43, 71, 110, 116, 140 (providing numerous examples of unique approaches taken by different states for the investigation of terrorist crimes); U.N. LEGISLATIVE SERIES, *NATIONAL LAWS AND REGULATIONS ON THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM*, at 171-76, 263-65, 372-73, 494-500, U.N. Doc. ST/LEG/SER.B/22, U.N. Sales No. E/F.02.V.7 (2002) (surveying airport security laws of Fiji and New Zealand).

105. See THE FEDERAL COURT OF JUSTICE 9-10 (2008), available at <http://www.bundesgerichtshof.de/cae/servlet/contentblob/758306/publicationFile/91260/brochure.pdf> (explaining the German Court's jurisdiction over appeals in terrorism cases).

## 2. States Do Not Wish to Lose Control over National Prosecution

Not only do many states have no need to refer terrorists to an international body, many have no desire to do so either. States often do not want to lose the ability to directly punish the terrorists who have targeted them, and accordingly, have given careful thought to their national counterterrorism laws and wish to see them applied. Community justice for a harm done to that community is a valuable process—states who effectively prosecute “their” terrorists do not wish to see them disappear to The Hague when the suspects could be tried publically at home, victims’ families could be present in the courtroom during the hearing, and communities could see the perpetrators incarcerated in a local prison.<sup>106</sup>

Additionally, states are wary of the definition and application of the label of terrorism and do not wish to see those that they do not consider terrorists the subject of foreign extradition requests. For example, many states consider terrorist-supporting speech to be an act of terrorism,<sup>107</sup> but a country such as the United States would be hesitant to extradite someone to face trial for political speech.<sup>108</sup> Countries with large militaries, intelligence forces, or militias may be concerned that their armed forces or government officials would be accused of terrorism.<sup>109</sup> Indeed, the United States has promulgated the American Servicemembers’ Protection Act<sup>110</sup> to emphatically declare that members of the American armed forces are never to be sent before the ICC and tried for any crime, even if they fall within the court’s territorial jurisdiction.<sup>111</sup> This policy highlights state

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106. See Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1661 (2000) (emphasizing the importance of community participation in criminal trials).

107. See, e.g., BECKMAN, *supra* note 101, at 147 (citing Israel’s Prevention of Terrorism Ordinance, which prohibits “terrorist speech”).

108. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

109. See SOLERA, *supra* note 64, at 351 (reproducing one proposal for the definition of the crime of aggression where liability could be broadly assigned to commanders and even politicians who direct their subordinates to use armed violence to violate the “sovereignty, territorial integrity or political independence of [another] State”).

110. American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2006).

111. *Id.* § 7426(c) (repealed 2008) (“ARTICLE 98 WAIVER- The President may, without prior notice to Congress, waive the prohibition of [the subsection

concerns about the definition of the crime of aggression, namely the potential for legitimate state actions such as self-determination, anticipatory self-defense, or humanitarian intervention to violate its technical definition.<sup>112</sup> States do not want their nationals to be punished for a technical violation when their actions nonetheless comport with what the state considers to be the spirit of the international criminal law. This fear of misapplication was a recurring one for states while negotiating the definition of the crime of aggression.

There is often even more concern related to national control of internal matters. For example, the United States and India maintain the right to hold suspected terrorists in preventative detention without trial.<sup>113</sup> If the ICC were to issue arrest warrants for such persons, the complementarity regime would not protect the state's ability to hold them without charge.<sup>114</sup>

### *3. Most Transnational Crimes are more Domestic than International in Nature*

International crimes tend to be directed against the international system itself. If a state engages in an act of aggression against another, or if the leadership of a state instigates, encourages, or fails to suppress a massive genocide in a neighboring state, these crimes tend to be not only geographically international, but directed against the community of nations itself; they, thus, have the effect of undermining the stability of that community.<sup>115</sup> Terrorist actions, by

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allowing no military assistance to a party to the Rome Statute] with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.”).

112. SOLERA, *supra* note 64, at 415-16 ; *see* Murphy, *supra* note 70, at 345 (stating that unauthorized humanitarian intervention is generally viewed as unlawful).

113. Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J. INT'L L. & POL'Y 285, 318, 334 (2005).

114. *See* Rome Statute, *supra* note 1, art. 17, ¶ 1(a) (providing complementarity protection for investigation or prosecution, not preventative detention).

115. *See* André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT'L L. 313, 315-22 (2010) (providing examples of “system criminality,” including the dirty war in Argentina

contrast, while they are certainly a threat to peace and security, are often directed against a single state's policies (e.g., protest over United States presence in the Middle East).<sup>116</sup> A terrorist act can be committed by nationals, lawful residents, dual nationals, or lawfully visiting foreign nationals and it can occur within the territory of the state, against the state's nationals, with the goal of influencing the government of that state, or based on an international movement or ideology.<sup>117</sup> Terrorist acts can also be committed by a single, private individual. These transnational criminal characteristics pragmatically separate terrorism from international crimes.

For these reasons—and unlike genocide or aggression or crimes against humanity, which are necessarily broad in scale, or war crimes, which require an extraordinary scale of interstate or intrastate violence as a prerequisite—most of the world's terrorism crimes can, and often must, be tried nationally. There will be only a few cases of the scale and international nature for which it may be helpful to refer investigation and trial to an international court.<sup>118</sup>

#### *4. Terrorism Crimes Could Overload an International Court of General Jurisdiction*

Unlike those crimes over which the ICC currently has jurisdiction, terrorism crimes often target or harm only a small number of people.

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in the 1970s and 1980s and the crimes committed during the armed conflicts in Sudan, where states and organized armed groups actively encourage the commission of international crimes by even “unexceptional” people).

116. See John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903, 915 (2006) (suggesting that one possible justification for terrorist actions is to “thwart perceived inequity, tyranny, or injustice” caused by the West).

117. While many scholars differentiate between international and domestic terrorism, this article recommends against strict delineation between the two. Even if a terrorist action is directed against a state by its own nationals, there are exceedingly few cases in which international movements or policies are not implicated. Additionally, wide-scale terrorist violence in a single country is still a threat to the peace and security of the international community. See SAUL, *supra* note 22, at 47 (showing that the U.N. Security Council condemns “all forms” of terrorism, domestic or international).

118. Cf., Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1220-21 (2002) (providing examples of truly international terrorism, such as the 1998 embassy bombings in Nairobi, Kenya and Dar es Salaam, Tanzania, and the September 11, 2001 terrorist attack in the United States).

Using the ICC as an example, the court could become completely overwhelmed by the volume of small terrorist crimes occurring throughout the world. A surge in caseload might distract ICC staff from other crimes, and the court might struggle institutionally to continue to deter and suppress grave international crimes occurring at the interstate level.

### C. DESIGNING AN INTERNATIONAL COURT TO ADDRESS THE ARGUMENTS ABOVE

If judicial economy were no object, and we could start with a blank slate to design an international court tailored to the adjudication of terrorist crimes—incorporating the positives noted above and minimizing the negatives—what would that court look like?

This article posits that states have a greater role in suppressing terrorism and other transnational crimes than they do in deterring and punishing acts in violation of traditional international criminal law, where the mechanisms of state suppression have typically failed. National courts are normally effective at investigating and trying most terrorists within their jurisdiction. In fact, because most acts of terrorism are perpetrated domestically, the number of smaller acts of terrorism to be tried in an international forum would be limited. Finally, the fact that the international community cannot reach a consensus on a definition of terrorism also supports the role of states in suppressing terrorism.

However, in those cases where the state or states with jurisdiction are genuinely unable or unwilling to prosecute suspected terrorists, there may well be a role for an international court that will uphold national participation in the proceedings and take account of the concerns of states. Such a court could assist in norm creation, effective enforcement, legitimizing counterterrorism operations, and possibly deterrence. Thus, this article suggests the creation of a permanent international hybrid court—one that would apply national law but use international criminal justice norms and administrators. Such a court could provide weaker states with international support and build capacity while giving them a role in achieving communal justice. Furthermore, it could help morally undermine unwilling states that express sympathy for the terrorists they harbor, while

avoiding conflicts with the sovereign and effective criminal justice operations of other states.

*1. Features of a Permanent Hybrid Court Exercising Jurisdiction over Terrorism: The Special Court for Counterterrorism*

The international system is familiar with the work of hybrid courts; hybrid courts have existed in Sierra Leone to try grave violations of humanitarian law (the Special Court for Sierra Leone)<sup>119</sup> and in Cambodia to try offenses of the Khmer Rouge (Extraordinary Chambers in the Courts of Cambodia).<sup>120</sup> Similar smaller courts have existed in Kosovo, East Timor, Nigeria, Peru, and other states.<sup>121</sup> There is even the recently established Special Tribunal for Lebanon, a hybrid court applying Lebanese national law, charged with investigating and trying all those connected with the assassination of Lebanese Prime Minister Rafik Hariri, a criminal act which was technically—under the definitions discussed above—an act of terrorism.<sup>122</sup>

While the ICC has struggled in its short year history to effectively prosecute or build a strong institutional reputation, contemporaneous hybrid tribunals have been fairly successful.<sup>123</sup> Hybrid tribunals

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119. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter Statute of the Special Court for Sierra Leone] (establishing a court “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”).

120. See Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea art. 1, June 6, 2003, 2329 U.N.T.S. 117 (setting forth the purpose of the court, which is “bringing to trial the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia . . .”).

121. See Dickinson, *supra* note 100, at 295 (focusing in particular on the international tribunals in Kosovo and East Timor, each of which worked to bolster local judiciary infrastructure and personnel).

122. See S.C. Res. 1757, *supra* note 50, Annex (characterizing the attack on Prime Minister Hariri as a “terrorist crime”).

123. See, e.g., Dickenson, *supra* note 100, at 297-300 (citing three examples where hybrid courts were established because neither domestic courts nor

provide an effective means of conveying much needed international assistance in extraordinary situations while still allowing for the application of national law.<sup>124</sup> National prosecutors and personnel play a role in the trials, and, to a certain extent, the country controls whom the court indicts.<sup>125</sup> Just as the Lebanese government struck a balance between international and domestic involvement when it sought to create the Special Tribunal for Lebanon,<sup>126</sup> this model for cooperative enterprise could be applied to a number of other acts of extraordinary terrorism.

If individual hybrid courts are so effective, the question becomes: why does the international system need a permanent one? The answer is that a permanent court would mitigate time and money expenditures involved in perpetually establishing new courts with similar features. While the international community will likely continue to establish new temporary hybrid courts because ICC prosecution of transnational crime is ineffective and—as this article posits—inappropriate, a single court would have economy, legitimacy, more deterrent value, consistent personnel, resources, and guiding law. Generally speaking, a permanent court would prevent the international community from needing to reinvent the wheel each time a qualifying transnational crime is committed. The international system originally created the ICC to avoid the “tribunal fatigue” it faced when establishing new courts for international criminal law violations.<sup>127</sup> The repetitive creation of new hybrid tribunals for the prosecution of transnational crime could also lead to

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international tribunals could effectively handle their case backlog).

124. *See id.* at 297, 300 (noting that the Hybrid Courts in Kosovo, East Timor, and Sierra Leone allowed both foreign and domestic lawyers to participate in the proceedings).

125. *See id.* at 297-300.

126. *See* THE ESTABLISHMENT OF THE HARIRI TRIBUNAL 50-51 (C. Tofan ed., 2008) (reprinting relevant U.N. documents, including a report from U.N. Commission recommending a “sustained effort on the part of the international community to establish an assistance and cooperation platform together with the Lebanese authorities”).

127. *See* John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals*, 18 EUR. J. INT’L L. 277, 290 (2007) (citing David J. Scheffer, Address at New England School of Law: Challenges Confronting International Justice Issues (Jan. 14, 1998)). Cerone points out that the United States, a current non-party to the Rome Statute, was actually a major impetus behind its creation. *Id.*

such fatigue.

Some may claim that a permanent hybrid court, such as the one outlined below, would be a new treaty court and, thus, require the arduous process of building consensus and attracting signatures. It is true that this institutional cost is unavoidable. Nonetheless, establishing a permanent hybrid court would preempt the future need to establish multiple courts, which each require a similarly difficult approval process. Detractors may also argue that it will be difficult to attract states that are unwilling to turn over alleged terrorists. But, it is worth noting that these same “unwilling states” can just as easily opt out of the crime of terrorism if it is added to the ICC’s jurisdiction, as long as they are parties to the Rome Statute at the time of its addition.<sup>128</sup>

It would be a novel undertaking for the international system to create a permanent hybrid tribunal. The ICC was created to take over the kind of work done by international tribunals in the former Yugoslavia and Rwanda—non-hybrid courts prosecuting only international crimes. Along the same lines, a permanent hybrid could be established to parallel the work of the ICC, addressing transnational crime rather than international crime. This court could have jurisdiction over numerous kinds of transnational crime (an argument addressed in the next subsection), or, the court could be limited to terrorism crimes alone. Henceforth this article will use the working moniker the “Special Court for Counterterrorism” (“SCC”).

The challenge for the SCC would be that hybrid tribunals typically apply national law alongside international law. Both the ICTY and ICTR, and the ICC that followed, applied roughly the same formulation of international law.<sup>129</sup> A hybrid tribunal that hears cases from more than one national jurisdiction would have to apply different bodies of law in different cases. This challenge is not as daunting as it first appears. An addendum to this paper includes a Draft Statute for the Special Court for Counterterrorism, which provides a list of procedures for handling this and other issues. The

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128. Rome Statute, *supra* note 1, art. 121, ¶ 5; *see supra* note 77.

129. *See, e.g.,* Dr. Göran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOY. L.A. INT'L & COMP. L. REV. 605, 611-12 (2003) (explaining the hierarchical relationship between states and the ICC, ICTY, and ICTR).

following subsections summarize and explain of a few basic features for the proposed SCC.

*a. Judges*<sup>130</sup>

There shall be a permanent cadre of international judges serving a term of years decided by the states parties. The appended draft statute proposes five-year terms. National judges, comprising a minority of the number of judges in the Pre-Trial, Trial, and Appeals Chambers, shall be appointed ad hoc when cases are referred from their nation and shall be appointed by their states of nationality. There should be one Pre-Trial Chamber, Trial Chamber, and Appeals Chamber for each state with current cases before the court.

*b. Prosecutor*<sup>131</sup>

The SCC will have one Prosecutor appointed for a term of years by the Secretary-General of the United Nations. In hybrid tribunals, there is typically a deputy prosecutor of the nationality of the state that the United Nations is assisting. In the SCC, there will be multiple deputy prosecutors, one for each state which is currently pursuing cases before the court. They will each carry a title of nationality: Deputy Prosecutor for Somalia, Deputy Prosecutor for Spain, etc. Such deputy prosecutors will be appointed by their states of nationality.

*c. Defense Office*<sup>132</sup>

While not all hybrid tribunals employ permanent defense staff, this article recommends the establishment of a Defense Office because of the political unpopularity and varying economic status of terrorist suspects. This Office would assure apt representation and procedural fairness that will ultimately bolster rule of law norms.

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130. See Draft Statute of the Special Court for Counterterrorism [hereinafter Draft Statute], *infra* app., arts. 18-20.

131. See Draft Statute, *infra* app., arts. 18, 22.

132. See Draft Statute, *infra* app., arts. 18, 24.

*d. Substantive Law*<sup>133</sup>

The substantive law of the SCC will consist of both international and national criminal proscriptions on terrorism. If at some point in the future a single unifying definition of terrorism is adopted, whether it establishes its pedigree as an international crime or not, the statute can be amended to include it. Until that time, this article recommends that international legal proscriptions on terrorism be imported from the thirteen sectoral treaties that decry specific terrorist acts, such as aircraft hijacking and hostage-taking.<sup>134</sup> National legal proscriptions shall be included by agreement between the government of the prosecuting state and the United Nations.<sup>135</sup> This process appears complex, but will streamline access to hybrid prosecution compared to the repetitive creation of new tribunals.<sup>136</sup>

*e. Jurisdiction*

The procedure by which the SCC will come to exercise its

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133. See Draft Statute, *infra* app., arts. 5-7.

134. See Draft Statute, *infra* app., art. 6; see also Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564; Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. 11080; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 201; Convention on the Marking of Plastic Explosives for the Purpose of Detection, *opened for signature* Mar. 1, 1991, 2122 U.N.T.S. 359; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. 13075; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89.

135. See Draft Statute, *infra* app., arts. 7-8.

136. See, e.g., GRANT, *supra* note 82, at xxix (explaining the lengthy process undertaken to establish a national Scottish tribunal sitting in the Netherlands to try the two suspected Lockerbie bombers).

jurisdiction is the most delicate feature of the new court. Such a court brings the specter of politically motivated referrals, and there must be a careful mechanism for selecting which referrals to pursue. For example, special procedures for granting jurisdiction were considered for the crime of aggression within the ICC because states are concerned that they may be referred to the court even when they consider themselves to have acted legally.<sup>137</sup>

Referrals will be pursued in one of two ways. First, a state—particularly a weaker state with territorial, national, or passive personality jurisdiction over the offenders—can institute a request for assistance.<sup>138</sup> The alleged terrorism crimes must fit one or more of the offenses described in the thirteen sectoral treaties, national law proscriptions on terrorism, or both.<sup>139</sup> The state will reach agreement with the President of the Special Court about which national laws should be applied, and will appoint a Deputy Prosecutor and ad hoc judges to its own newly constituted national chamber.<sup>140</sup>

State referral by an affected state, rather than independent indictment by the Prosecutor, would preserve state sovereignty in a number of important ways. First, any definitions of terrorism adopted by the SCC will not result in automatic prosecution; a state must first pursue referral. States will not have to be concerned, as they are with aggression under the ICC, that benign or marginally criminal acts will come within one of the technical definitions and therefore trigger indictment by an ambitious prosecutor.<sup>141</sup> Second, states will have the opportunity to evaluate for themselves whether it is preferable to prosecute a particular crime with international

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137. See Report of the Working Group on the Crime of Aggression, Annex II, ¶¶ 5-6, RC/20 (June 2010), available at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Crime+of+Aggression.htm> (noting disagreement over whether jurisdiction should be asserted where the alleged aggressor state has not accepted jurisdiction over the crime of aggression, and referencing different opinions as to how the court should proceed when the Security Council has yet to determine that an act of aggression has occurred).

138. See Draft Statute, *infra* app., art. 10.

139. See Draft Statute, *infra* app., arts. 5, 9.

140. See Draft Statute, *infra* app., art. 7.

141. See Robert A. Alter, *International Criminal Law: A Bittersweet Year for Supporters and Critics of the International Criminal Court*, 37 INT'L LAW. 541, 544 (2003) (summarizing U.S. fears, applicable even to established ICC crimes, that extensive prosecutorial discretion “opens the door to politically motivated prosecutions”).

cooperation rather than through an entirely domestic proceeding. The SCC would also guard against politically motivated referrals. If a state party chooses to refer a politically motivated case to the SCC, they have now imposed a neutral body which is free to acquit the defendants—or even drop the charges.

The second way that a referral could be received is through the Security Council.<sup>142</sup> This is the basis for the international community's authority to establish the ICTY and ICTR,<sup>143</sup> and it can also be the means for compelling states—that do not voluntarily prosecute or refer cases—to turn terrorism suspects over to the SCC. For a case in which an unwilling state with custody or bases of jurisdiction refuses to prosecute a terrorist act, the Security Council can declare that this failure to prosecute constitutes a threat to international peace and security and refer the case to the Prosecutor of the SCC for compulsory investigation. The prosecutor can then initiate an investigation and determine whether there are chargeable crimes.

Security Council referral could have been used to resolve the Lockerbie bomber case. Though the Libyan government in the Lockerbie case actually held out in the face of numerous U.N. resolutions pressuring them to turn over the suspects, Libya eventually agreed to a trial by a special panel in the Netherlands.<sup>144</sup> Turning suspects over to an international panel presents a certain added appeal by way of legitimacy, and creates political pressure that the international community can bring to bear to resolve such cases.

For state referrals, the statute relies on passive personality jurisdiction along with the two more traditional bases of jurisdiction included in Rome Statute—nationality of the offender and territory in which the crime was committed.<sup>145</sup> The crime of terrorism is one

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142. See Draft Statute, *infra* app., art. 11, ¶ 1.

143. E.g., VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 37 (1995).

144. See Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 AM. U. INT'L L. REV. 163, 167-68 (2002) (stating that this was the first time the U.N. Security Council had "pressured a state, through economic sanctions, to surrender its nationals for trial abroad").

145. Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (granting a state jurisdiction over certain conduct and

which lends itself to passive personality jurisdiction.<sup>146</sup> In order to ensure prosecution when the states qualifying for jurisdiction under the more traditional bases are unwilling or unable to accomplish it, states whose nationals are targeted should have the ability to assert SCC jurisdiction over the offenders. The appended Draft Statute limits passive personality jurisdiction to situations where it can be shown, *prima facie*, that alleged offenders intended and actually succeeded in harming nationals of the state asserting such jurisdiction.

Even though states will be able to assert passive personality jurisdiction over nationals of other states parties, the structure of the permanent hybrid court does not allow for infringement on the independence of other states. The proposed complementarity regime protects states that diligently prosecute their nationals for committing a terrorist offense against nationals of another state.<sup>147</sup> Furthermore, there is an additional conflict procedure for states who do not avail themselves of the complementarity regime or whose prosecutions are not found to be genuine by the SCC—these states may request additional ad hoc judges of their nationality be appointed to the Trial and Appeals Chambers to protect the interests of their nation.<sup>148</sup> These mechanisms and others, by encouraging states to ratify the statute and accede to this possible loss of jurisdiction over their nationals, put significant normative pressure on states that may be “holdouts” in their opposition to anti-terrorism norms. Hopefully, by encouraging participation, holdout states can be brought into the fold of states cooperating to suppress international terrorism.

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persons in its territory, conduct intended to have substantial effect within its territory, its own nationals, and certain other conduct by foreign nationals outside its territory that is directed against its national security or a limited class of other state interests), *with* Draft Statute, *infra* app., art. 8 (extending jurisdiction of the court to cases where a State Party is either: the State in which the conduct in question occurred, the State of which the accused is a national, or the State in which the victims or intended victims are nationals).

146. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987) (applying the passive personality principle to terrorists).

147. See Draft Statute, *infra* app., art. 16, ¶ 3; see also Rome Statute, *supra* note 1, art. 17, ¶ 1. A complementarity regime means that cases are inadmissible at the supranational level as long as the case is being diligently investigated or prosecuted at the national level.

148. See Draft Statute, *infra* app., art. 10(3).

*f. Multiple States Implicated by a Single Event*

In the event that a terrorism crime targets and successfully harms nationals or national interests of multiple states, the appended statute provides that the President of the SCC shall first request that the interested states consider which state is the most affected by the terrorist event, and that they defer prosecutorial authority to that party, or otherwise negotiate a division of responsibilities.<sup>149</sup> In the event that an agreement cannot be reached, the President of the Special Court will have equitable powers to divide prosecution responsibilities, to decide on the allotment of judges and Deputy Prosecutors, and to append multiple national laws (keeping in mind the general principles of international law and any double jeopardy considerations that might thereby arise), as he or she deems appropriate.<sup>150</sup>

*g. Location*

The appended Draft Statute provides that the SCC be headquartered in The Hague, but also allows the court to sit elsewhere if desirable.<sup>151</sup> While The Hague would be the best location to ensure the involvement of international lawyers, one can imagine that for the most significant terrorist events, local chambers can be convened to work side-by-side with national prosecutors. The statute also proposes flexibility on working languages to meet the demands of operating among so many nations.<sup>152</sup>

*h. Comparison to Existing Courts*

The Draft Statute derives its provisions from a variety of existing statutes, including the Rome Statute, the Statute for the Special Court for Sierra Leone, and the Statute for the Special Tribunal for Lebanon.<sup>153</sup> Of course, the draft puts forth only one version of many possible versions that could be created. This article purposefully included a shorter statute more common to the hybrid courts, as

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149. Draft Statute, *infra* app., art. 11, ¶ 5.

150. Draft Statute, *infra* app., art. 11, ¶ 5.

151. Draft Statute, *infra* app., art. 3, ¶¶ 1, 3.

152. See Draft Statute, *infra* app., art. 25.

153. See generally Rome Statute, *supra* note 1; Statute of the Special Court for Sierra Leone, *supra* note 119; S.C. Res. 1757, *supra* note 50.

opposed to the longer Rome Statute. Where the Rome Statute might have multiple articles on command responsibility and the irrelevance of official capacity, these provisions were consolidated into the shorter formulation of “individual criminal responsibility” that one would find in most hybrid tribunals’ statutes.<sup>154</sup> This shorter version makes it easier to understand the recommended procedures; however, in creating a permanent court, the international community may prefer to give it less flexibility and state procedures more clearly. The proposed SCC statute also imports typical features of a “treaty-made” court—like the ICC, including provisions for amendment and withdrawal.<sup>155</sup> Provisions regarding the complementarity regime,<sup>156</sup> the rights of victims and the accused,<sup>157</sup> the conduct of the proceedings,<sup>158</sup> the grounds for appeal,<sup>159</sup> and so on, are relatively standard.

Of course, this drafting of the SCC statute required a number of policy decisions with which the international community may generally disagree. Where multiple international criminal tribunals provide different rights for victims, suspects, or defendants, the

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154. Compare Draft Statute, *infra* app., art. 12 (presenting a simple, five-paragraph article that sets forth whom the court may prosecute), with Statute of the Special Court for Sierra Leone, *supra* note 119, art. 6 (mirroring the wording and structure of the attached Draft Statute, *infra* app., art. 12).

155. Compare Draft Statute, *infra* app., arts. 42-46, with Rome Statute, *supra* note 1, arts. 121-27 (providing similar mechanisms for amendment, review, accession, entry into force, and withdrawal).

156. Compare Draft Statute, *infra* app., arts. 16-17, with Rome Statute, *supra* note 1, art. 17 (containing almost identical language governing issues of admissibility and concurrent jurisdiction).

157. Compare Draft Statute, *infra* app., arts. 27-29, with S.C. Res. 1757, *supra* note 50, arts. 15-17 (adopting the rules governing the rights of suspects during investigation and the rights of the accused).

158. Compare Draft Statute, *infra* app., arts. 30-32, 34-41, with Rome Statute, *supra* note 1, art. 59 (using similar language to govern arrest proceedings), and Statute of the Special Court for Sierra Leone, *supra* note 119, art. 19 (adopting language governing penalties), and S.C. Res. 1757, *supra* note 50, arts. 18, 20-21, 23-27, 29-30 (establishing rules that govern pretrial and trial proceedings, powers of chambers, judgment, penalties, compensation to victims, appellate proceeding, enforcement of sentences, and pardon or communication of sentences).

159. Compare Draft Statute, *infra* app., art. 38 (allowing for appeals to the Appeals Chamber on procedural grounds, or when there is a question of law or fact), with Statute of the Special Court for Sierra Leone, *supra* note 119, art. 20 (settling disputes through negotiation or any other type of mutually agreed upon procedure).

appended draft generally adopts the most inclusive formulations.<sup>160</sup> For example, unlike the Rome Statute, it does not limit jurisdiction to actions committed only after the creation of the court<sup>161</sup> because those national and international laws that will be enforced by the SCC are already in force. In addition, unlike the Special Court for Sierra Leone, it does not create liability or special procedures for juvenile offenders.<sup>162</sup> Although the Draft Statute's provisions are more truncated than the Rome Statute for many topics, it does include the Rome Statute's rather elaborate national security information protection regime—and actually strengthens it to make it concordant with this article's preference that the court should take on a state-empowering structure.<sup>163</sup>

There are many possible alternative scenarios that could be addressed. For example, if the international prosecutor is a national of the victim or alleged offender's state, there may be a need for recusal and perhaps deferral of lead prosecution to the most senior Deputy Prosecutor or another professional international prosecutor. This article and appended Draft Statute leave such issues to be addressed by the court's yet-unwritten rules of procedure and evidence.<sup>164</sup> The Draft Statute is provided merely as a framework to begin contemplating how a permanent hybrid court might function.

## 2. Broadening the Scope: The Special Court for Transnational Crime

This article noted above that terrorism shares many of the attributes and characteristics of other transnational or "treaty" crimes (which are two distinct, but related, categories of crime). The drafters of the Rome Statute debated adding both kinds of crime to the jurisdiction of the ICC, but found the marriage of international and transnational crimes to be an awkward one.<sup>165</sup> This marriage is

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160. See Draft Statute, *infra* app., arts. 27-29.

161. Compare Draft Statute, *infra* app., arts. 5-7 (remaining silent on the issue of prosecuting crimes committed before the enactment of the statute), with Rome Statute, *supra* note 1, art. 11 (authorizing jurisdiction for crimes committed only after the statute entered into force).

162. See Statute of the Special Court for Sierra Leone, *supra* note 119, arts. 7(2), 15(4) & (5), 19(1).

163. See Draft Statute, *infra* app., art. 33.

164. See Draft Statute, *infra* app., art. 21.

165. See Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1270 (2007)

imperfect because there are a number of existential differences between the categories, including: whether the crime requires a gravity, or magnitude, threshold; whether the perpetrator is likely to be a private person or state-affiliated; whether a crime is conducted more against the international community or more against an individual state; and whether the motivation for the allegedly criminal conduct can—in some circumstances—justify the action.

However, simply because international crime and transnational crime do not mesh well in the context of a single court does not mean that the international community cannot cooperate in the suppression of transnational crime. The proposed Special Court for Counterterrorism is one way to accomplish such cooperation, and it could even be expanded to include narcotrafficking and piracy. Piracy, though it is perhaps the oldest crime against the law of nations and technically not a treaty crime, contains characteristics that render it more practical to prosecute using methods similar to those used for transnational crimes<sup>166</sup> such as human trafficking, attacks on U.N. personnel, organized crime, and so on. A working group could be convened to examine the practical possibilities of developing a wider subject matter jurisdiction for the appended permanent hybrid court for terrorism. Transnational crimes tend to share many features that have rendered them all similarly inappropriate for addition to the Rome Statute, but their similarities mean that a permanent hybrid court for terrorism could include other transnational crimes without any damage to the court's design or function.

Courts with subject matter of this kind already exist in some national criminal justice systems. For example, the Spanish *Audencia Nacional* hears only criminal cases involving terrorism, organized crime, drug trafficking, and counterfeiting;<sup>167</sup> in Ireland, the Special

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(expressing a view that states refused to criminalize transnational crimes in the ICC, such as drug trafficking, because they were already adequately addressed by other international means).

166. See DUBNER, *supra* note 42, at 42 (commenting that piracy, as an offense under municipal law that is capable of occurring in international zones, should first be prosecuted at the municipal level, particularly because the characteristics of the crime can vary from state to state); Diaz & Dubner, *supra* note 42, at 200-03 (noting an historical disagreement over the definition of piracy and “the traditional assertion that piracy is an offence or a crime against the law of nations”).

167. AUDENCIA NACIONAL, *supra* note 103.

Criminal Court hears terrorism and organized crime cases,<sup>168</sup> and India has developed special terrorism courts as well.<sup>169</sup> Thus, national courts have already recognized that transnational or complex crimes pose unique challenges as compared to domestic crime, but that due to their commonalities, these challenges can be approached through a single, unified court.

A court of more general jurisdiction also has the advantage of reinventing itself or adjusting its jurisdiction to the kinds of transnational crime that emerge. For example, human trafficking and piracy are either emerging or reemerging as concerns when they were not so prominent only a few years ago.<sup>170</sup> A general court, unlike a terrorism court, would be able to adjust its jurisdiction to include new transnational crimes. However, expanding the court may forgo the special condemnation that an exclusive counterterrorism court would bring.

#### D. CAN THE CRIME OF TERRORISM BE INTEGRATED INTO THE INTERNATIONAL CRIMINAL COURT?

This article next considers whether the crime of terrorism can be integrated into the jurisdiction of the ICC. Below is an in tandem discussion of the arguments supporting and opposing this addition. This section concludes by looking into whether the prosecution of crimes of terrorism would function more effectively if it had special procedures not shared by the other crimes.

##### *1. Arguments in Favor of Adding the Crime of Terrorism to the Jurisdiction of the ICC*

The arguments for adding the crime of terrorism to the ICC, rather than to a separate court, are of two kinds. First, there is judicial economy. If terrorism is successfully defined as an international crime, incorporated into the Rome Statute, and written carefully to involve only the most serious circumstances, a marginal increase in

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168. *Schools: About the Courts*, supra note 103.

169. Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 342 (2004).

170. See Leticia M. Diaz & Barry Hart Dubner, *An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake*, 34 N.C. J. INT'L L. & COM. REG. 521, 566 (2009) (implying the need for an expansion of UNCLOS, or some other international means, to combat human trafficking).

litigation will not require the extra costs of establishing a new court with new personnel, procedures, and so on. The guiding body of law, the procedures of the court, and other procedural issues will all be settled without the need for substantial renegotiation. Creating a new permanent court would undoubtedly be a long and difficult process.<sup>171</sup>

The second argument in favor of ICC jurisdiction is normative. Adding terrorism to the ICC rather than to a hybrid court means that it will almost certainly have to first be defined as an international crime. Incorporation into the Rome Statute could settle, once and for all, terrorism's pedigree as a violation of the law of nations. This would unequivocally show that terrorism is among the most egregious forms of crime and that it is as deserving of the condemnation of nations as any other international crime. Perhaps this condemnation would have a deterrent effect greater than that achieved by a special hybrid court, although it bears repeating that the deterrent value of international criminal courts is hotly debated.<sup>172</sup>

Stemming from terrorism's codification as a crime against the law of nations, universal jurisdiction could flow from whatever definition of terrorism was enshrined in the Rome Statute. This could lower hurdles for acquiring jurisdiction over terrorists, but may also impinge state sovereignty in unwanted, and perhaps unanticipated, ways.

## *2. Arguments Against Adding the Crime of Terrorism to the Jurisdiction of the ICC*

In addition to those points discussed in Section II(B) above, which oppose the addition of terrorism to any "international" court's jurisdiction, there are political and practical considerations that particularly disfavor terrorism's addition to the Rome Statute.

### *a. Political Considerations*

As noted above, the international community has struggled to

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171. See David Harris, *Progress and Problems in Establishing an International Criminal Court*, 3 J. ARMED CONFLICT L. 1, 2-5 (1998) (identifying numerous substantial political and practical hurdles that delayed the creation of an International Criminal Court).

172. E.g., Alexander, *supra* note 99, at 4-5.

define terrorism and has struggled with the question of whether terrorism is an offense against the law of nations. It is simply unimaginable how such questions can be resolved in the near future so that the states parties to the Rome Statute might agree to incorporate terrorism into the jurisdiction of the ICC. Politically, states are concerned about losing control of national matters, the indictment of those they do not consider to be terrorists, and politically motivated prosecutions.<sup>173</sup> Those fears are not allayed by the ICC's structure, which gives an independent prosecutor a lot of power to choose who to charge. This wide discretion is evidenced by Prosecutor Luis Moreno-Ocampo's institutionally risky decision to indict a sitting head of state.<sup>174</sup> Integrating terrorism will necessarily lead to an even greater number of legitimacy challenges for the court.

The United States, as a global leader in the war against terrorism, has a number of concerns about the structure of the court that many states, powerful or not, may share. The United States may be concerned that the ICC is a "European" style body, controlled by many European nationals, which looks to what the United States considers to be expansive human rights law and imposes undeservedly low criminal sentences.<sup>175</sup> In addition, the United States may well be concerned about interference from the international community in the global war on terrorism, including indictments of U.S. military servicemembers based on creative interpretations of any definition of terrorism, or interference with preventative detention of suspected terrorists.<sup>176</sup> Other nations may be concerned about prosecution of whom they see as legitimate freedom fighters.<sup>177</sup>

The United States has disfavored the incorporation of terrorism or drug crimes from the outset because of its view that they are

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173. See, e.g., Alter, *supra* note 141, at 544 (addressing U.S. concerns that the powers granted to the ICC prosecutor could lead to politically charged prosecutions).

174. Press Release, International Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad AL BASHIR, for Genocide, Crimes Against Humanity and War Crimes in Darfur, I.C.C. Doc. ICC-OTP-20080714-PR341 (July 14, 2008).

175. Cerone, *supra* note 127, at 294.

176. See *id.* at 293 (listing high-ranking officials in the Bush administration that expressed anti-ICC sentiments).

177. Cassese, *supra* note 8, at 213-14.

incompatible with an international court.<sup>178</sup> It has maintained the view that the creation of an international criminal court was intended to solve the problem of establishing new tribunals for each event in which the Security Council exercised its Chapter VII powers, and would have preferred referral mechanisms that relied on a determination by the Security Council, rather than independent initiation by the ICC Prosecutor.<sup>179</sup> The United States has also been concerned about its own vulnerability, given its major, and often disproportionate, role in maintaining international peace and security. It would require strong complementarity regime protections to ensure national prosecutions are respected and sensitive security information is protected.<sup>180</sup> The United States, despite its negative evaluation of the Rome Statute, has, by contrast, been very supportive of hybrid tribunals, due to the U.S. government's faith in the value of national prosecutions and its confidence that U.S. nationals are not open to politically-motivated indictments.<sup>181</sup>

Defining the crime of aggression has been on the agenda of the international community since the acts of the Nazi regime in the 1930s and 1940s, but could not be flushed out until 2010, and even now its future is uncertain.<sup>182</sup> Similarly, while modern international terrorism has been on the radar as an international security threat for decades, the crime of terrorism is also yet to be defined in a manner satisfactory to the international community at large. There is no convincing indication that the crime of terrorism can avoid the crime of aggression's fate—that is, convening a working group to create an official definition that instead seems to prolong a slow collapse of consensus, until ultimately either no resolution or a problematic resolution is reached.

Finally, political concerns over the inclusion of the crime of terrorism also suggest that adding it to the Rome Statute could cause states to refuse jurisdiction for the new crime, using their reservation power under Article 121, paragraph 5.<sup>183</sup> Because new parties to the

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178. Scheffer, *supra* note 59, at 12, 13.

179. *Id.* at 14-15.

180. *Id.* at 15.

181. Cerone, *supra* note 127, at 305-06.

182. Michael J. Glennon, *The Blank-Page Crime of Aggression*, 35 YALE J. INT'L L. 71, 73-82 (2010).

183. See e.g., de Gurmendi, *supra* note 81, at 604 (supporting the conclusion

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statute do not have the choice to accept jurisdictional articles in a piecemeal fashion, adding the crime of terrorism to the Rome Statute could provide a disincentive for states who consider joining it. For example, new states may fear the ICC Prosecutor initiating ambitious prosecutions against their nationals or other interference with their national management of counterterrorism.

*b. Practical Considerations*

The crime of terrorism does not fit neatly into the ICC. Because even terrorist acts with a low number of casualties can have great political import, or be good candidates for international cooperation, it is possible that numerous terrorism cases would flood the ICC and distract from its original mandate of addressing much more widespread crimes. The ICC's jurisdiction could be generally expanded or a separate "terrorism chamber" could be added, but both options degrade the judicial economy argument that otherwise supports integrating terrorism into the jurisdiction of the ICC.

Additionally, states are in the best position to determine which cases should be referred, though there is room for the Security Council to be part of the process. Unlike the crimes which the ICC typically polices, the failure of state officials to fulfill their obligations to protect international peace and security are rarely at issue in international terrorism crimes.<sup>184</sup> The ICC Prosecutor is not well-positioned to independently determine which cases to indict, nor would states be comfortable with him or her doing so.

*3. Can the Crime of Terrorism Be Integrated Effectively into the ICC with Special Procedures?*

Many of the concerns with including the crime of terrorism in the ICC are procedural and relate to purposeless interference with state sovereignty. To address this issue, the most obvious solution is to remove independent initiation of cases by the Prosecutor from the

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that the wording of paragraph 5 suggests that only current parties can refuse new amendments).

184. See Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 90-91 (2002) (noting further that states are not open to criminal punishment in the same manner as natural persons, or even corporations—which could be subject to dissolution).

Rome Statute.<sup>185</sup> This alteration would remove the most serious threat to state sovereignty and effective state handling of terrorism because cases could then only reach the ICC through state referral or a Security Council Chapter VII resolution.<sup>186</sup>

Certain advantages of the hybrid court system would be lost if the ICC remains the only international court. The most obvious is the ability to enforce national proscriptions against terrorism alongside international ones. Recall that terrorism is often a crime directed against the community or government by private persons, and that states have an interest in achieving justice for their communities. Hybrid courts empower weaker legal systems with an infusion of international legal talent, particularly if the hybrid court can sit anywhere—as the ICC can—and takes full advantage of this feature. A hybrid court can also function without an international consensus on the definition of terrorism, and without relying solely on the thirteen backward-looking sectoral treaties.<sup>187</sup> Furthermore, a hybrid court can compel unwilling states to accede to its jurisdiction, but without threatening state sovereignty.

While small changes to the ICC's procedure might address the unique legal and practical problems posed by terrorism trials—with the removal of independent initiation of proceedings being perhaps the most important alteration—the best results for international trials of terrorists cannot be achieved without serious alteration to the procedures that exist for other crimes. This is true much more so for terrorism than it is for the crime of aggression, which already faces uneasy integration into ICC procedures due to its unique features. At some point, the international community must ask itself whether it is institutionally worthwhile to create so many special procedures in the ICC, or whether it makes more sense to establish a new court with new procedures that are calibrated to the threats posed by transnational, rather than international crime.

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185. See Rome Statute, *supra* note 1, art. 15 (allowing the Prosecutor to initiate investigations of crimes within the court's jurisdiction).

186. *Id.* art. 13(a)-(b).

187. See Draft Statute, *infra* app., art. 6 (adopting the definitions described in these sectoral treaties, but providing a means by which other definitions can be added to the jurisdiction of the court).

## CONCLUSION

Our commitment to fighting terrorism is not diminished because the crime of terrorism is qualitatively different than the crimes proscribed by the Rome Statute. There is a role for the international community to bolster prosecution in weaker states, to deter noncompliance by holdout states, and to morally eviscerate any legitimacy that terrorist acts may enjoy in their audiences. But the need for states to remain active in suppressing transnational crimes that affect their nationals is strong. For this reason, this article suggests that if terrorism is to be tried by any international court, it should be a hybrid tribunal that applies national and international proscriptions on terrorism, encourages the involvement of national prosecutors, leaves jurisdiction with states that diligently suppress terrorism, and protects national security information.

Appended to this article is a "Draft Statute of the Special Tribunal for Counterterrorism," intended to begin a conversation about whether and how such a hybrid tribunal should be formed, and to raise issues that should be considered in designing any new court. It is hoped that the wisdom of different states and scholars, after reflecting on these ideas, will develop upon these initial sketches.

## APPENDIX

DRAFT STATUTE OF THE SPECIAL COURT FOR  
COUNTERTERRORISM

*The States Parties to this Statute,*

*Mindful* that thousands of children, women and men have been victims of terrorist crimes that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that terrorist crimes must not go unpunished and that their effective prosecution can be ensured by taking measures at the national level and by enhancing international cooperation,

*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for terrorist crimes,

*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

*Determined* to these ends and to establish an independent permanent Special Court for Counterterrorism in relationship with the United Nations system, with jurisdiction over internationally and nationally proscribed terrorist crime,

*Emphasizing* that the Special Court for Counterterrorism established under this Statute shall be complementary to national criminal jurisdictions,

*Resolved* to deter and combat terrorism in States that are unable or unwilling to prosecute such offenders,

*Have agreed as follows*

## SECTION I: ESTABLISHMENT OF THE SPECIAL COURT

*Article 1**The Special Court*

A Special Court for Counterterrorism (“Special Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons responsible for the

most serious terrorist crimes, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Special Court shall be governed by the provisions of this Statute.

*Article 2*

*Relationship of the Special Court with the United Nations*

The Special Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Special Court on its behalf.

*Article 3*

*Seat of the Special Court*

1. The seat of the Special Court shall be established at The Hague in the Netherlands ("the host State").

2. The Special Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Special Court on its behalf.

3. The Special Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

*Article 4*

*Legal status and powers of the Special Court*

1. The Special Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

2. The Special Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

SECTION II: JURISDICTION, ADMISSIBILITY AND  
APPLICABLE LAW

*Article 5*

*Crimes within the jurisdiction of the Special Court*

The Special Court shall have the power to prosecute persons who bear the greatest responsibility for serious violations of international

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legal proscriptions on the crime of terrorism, listed in article 6, and appended national law proscriptions on terrorism, adopted by the procedures given in article 7.

*Article 6*

*Crimes of terrorism in international agreements*

The Special Court shall have the power to prosecute persons who committed the following crimes:

(a) an offense described in the Convention on Offences and Certain Other Acts Committed On Board Aircraft of 14 September 1963;

(b) an offense described in the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970;

(c) an offense described in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(d) an offense described in the Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973;

(e) an offense described in the International Convention against the Taking of Hostages of 17 December 1979;

(f) an offense described in the Convention on the Physical Protection of Nuclear Material of 3 March 1980;

(g) an offense described in the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 24 February 1988;

(h) an offense described in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and its Protocol;

(i) an offense described in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 and its Protocol;

(j) an offense described in the Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1 March 1991;

(k) an offense described in the International Convention for the Suppression of Terrorist Bombings of 15 December 1997;

(l) an offense described in the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(m) an offense described in the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005; and

(n) Other acts such as may be added to this statute by the amendment procedure given in article 42.

*Article 7*

*Crimes of terrorism under national law*

1. The Special Court shall have the power to prosecute persons who committed violations of national proscriptions on terrorism in the relevant jurisdiction.

2. A State Party and the President of the Special Court may agree to append any national law proscriptions on crimes of terrorism that were characterized as terrorist crimes by national law and pre-existing at the time of the alleged conduct.

3. In order for the Pre-Trial Chamber to approve an indictment based on national law, appended by the procedure given in paragraph 2, the relevant national law must have already been passed and publicized at the time of the commission of the alleged crime. The relevant national law must specify that it proscribes a terrorist crime and not be categorized as an ordinary crime.

4. A State Party may refer a case to the Prosecutor in accordance with article 10 solely on alleged crimes of terrorism under international law, as in article 6, solely on alleged crimes of terrorism under national law, as in paragraph 2 of this article, or both.

*Article 8*

*Preconditions to the exercise of jurisdiction*

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Special Court with respect to the crimes referred to in article 6 and may also consent to append additional crimes under the procedure given in article 7.

2. In the case of the next article, paragraph (a), the Special Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the

Special Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national; or

(c) The State of which the intended and actual victim or victims of the alleged crime are nationals.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Special Court with respect to the crime in question. The accepting State shall cooperate with the Special Court without any delay or exception.

#### *Article 9*

##### *Exercise of jurisdiction*

The Special Court may exercise its jurisdiction with respect to a crime referred to in article 6 and 7 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by an affected State Party in accordance with the next article; or

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations in accordance with article 11.

#### *Article 10*

##### *Referral of a situation by a State Party*

1. An affected State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Special Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

3. In the case described in article 8, paragraph 1(c), in which the intended and actual victims of a State Party are targeted by a national or committed within the territory of a State that is not a Party to this statute, the State of nationality of the alleged offender may request the right to appoint an additional two ad hoc judges to the Trial Chamber and two ad hoc judges to the Appeals Chamber with jurisdiction over the case of its national. Such a request will be considered by the President of the Special Court, taking into consideration fairness to the defendant, transparency and participation concerns of the State of nationality of the alleged offender and a commitment by the State of nationality of the alleged offender to assist the Special Court in gaining custody over the alleged offender. The ad hoc judges will be appointed by the State of nationality of the alleged offender, subject to approval by the Secretary-General of the United Nations (hereinafter “the Secretary-General”).

4. If multiple States Parties request the appointment of Deputy Prosecutors, national judges and appended national law for the same case, the President of the Court shall instruct the Parties to negotiate a division of responsibilities between themselves and to defer to the interests of the State with the greatest number of intended and actual victims in the case. In the event that no agreement can be reached, the President of the Special Court may decide, turning to equitable considerations, whether to award joint prosecution responsibilities to a single state, or whether to divide national prosecution responsibilities between multiple states and whether to append the national laws of multiple States. The President of the Special Court shall not consider requests for involvement from States Parties that do not submit a request for involvement within ten days of the first referral of the case to the Special Court by a State Party.

#### *Article 11*

##### *Referral of a situation by the Security Council*

1. The Security Council, acting under Chapter VII of the Charter of the United Nations, may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Special Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of

such crimes.

2. The Security Council may refer a case in which a crime has been committed under article 6, or it may refer a case in which a crime has been committed under article 7, in accordance with the national law of the State or States of nationality of the intended and actual victim or victims of a terrorism offense.

3. If the State or States of nationality of the intended and actual victim or victims are Parties to the Statute, they may request the appointment of a Deputy Prosecutor, national judges and appended national law within ten days of referral by the Security Council.

4. If the State or States of nationality of the intended and actual victim or victims are not Parties to the Statute, they may accede to the Statute and proceed to initiate the requests in paragraph 3 of this article.

5. If multiple States Parties request the appointment of Deputy Prosecutors, national judges and appended national law for the same referred case, the President of the Court shall instruct the Parties to negotiate a division of responsibilities between themselves and to defer to the interests of the State with the greatest number of intended and actual victims in the case. In the event that no agreement can be reached, the President of the Special Court may decide, turning to equitable considerations, whether to award joint prosecution responsibilities to a single state, or whether to divide national prosecution responsibilities between multiple states and whether to append the national laws of multiple states. The President of the Special Court shall not consider requests for involvement from States Parties that do not submit a request for involvement within ten days of the first referral of the case to the Special Court by the Security Council.

#### *Article 12*

##### *Individual criminal responsibility*

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 6 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall

not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 6 and 7 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 7 shall be determined in accordance with the respective laws of the national legal jurisdiction.

#### *Article 13*

##### *Jurisdiction over persons under eighteen years of age*

The Special Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime.

#### *Article 14*

##### *Mental element*

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Special Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed

accordingly.

*Article 15*

*Grounds for excluding criminal responsibility*

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Special Court;

(c) The person acts reasonably to defend himself or herself or another person or, in extreme cases, property which is essential for the survival of the person or another person, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Special Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Special Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Special Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable international or national law. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

*Article 16*

*Concurrent jurisdiction*

1. The Special Court and the national courts of the States possessing criminal jurisdiction shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

3. The Special Court shall not exercise jurisdiction where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint.

4. In order to determine unwillingness in a particular case, the Special Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Special Court;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted

in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

5. In order to determine inability in a particular case, the Special Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

6. Challenges to the jurisdiction of the Special Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.

*Article 17*

*Ne bis in idem*

1. No person shall be tried before a national court of any State Party for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 6 and 7 of the present Statute may be subsequently tried by the Special Court if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

## SECTION III: ORGANIZATION OF THE SPECIAL COURT

*Article 18**Organs of the Special Court*

The Special Court shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Chamber, one or more Trial Chambers and an Appeals Chamber for each State Party whose national law is or will be applied in a case before the Special Court;

(b) The Prosecutor;

(c) The Registry, and

(d) The Defense Office.

*Article 19**Composition of the Chambers*

1. There shall be as many Chambers as there are States Parties with current cases before the Special Court. For each State Party, the associated Chambers shall be composed of at least [fifteen (15)] independent judges, who shall serve as follows:

(a) [Three] judges shall serve in the Pre-Trial Chamber, of whom [one] shall be an ad hoc judge appointed by the State Party referring the case to the Special Court, and [two] judges appointed by the Secretary-General.

(b) [Five] judges shall serve in the Trial Chamber, of whom [two] shall be a judge appointed by the State Party referring the case to the Special Court, and [three] judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").

(c) [Seven] judges shall serve in the Appeals Chamber, of whom [three] shall be judges appointed by the State Party referring the case to the Special Court, and [four] judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of each Chamber shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an

alternate judge or judges have been appointed by the referring State Party or the Secretary-General, the presiding judge of that Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

*Article 20*

*Qualification and appointment of judges*

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in criminal law and procedure and international law.

3. The international judges shall be appointed for a [five]-year period and shall be eligible for reappointment. The national judges shall be appointed ad hoc for each situation which is referred by or relegated to the joint prosecution of their associated State Party.

*Article 21*

*Rules of Procedure and Evidence, Regulations of the Special Court*

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation

before the Special Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

6. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Special Court necessary for its routine functioning.

7. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

8. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

#### *Article 22*

##### *The Prosecutor*

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Court. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

2. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor shall be appointed by the Secretary-General for a [five]-year term and shall be eligible for re-appointment. He or she

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shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by Deputy Prosecutors, one for each Party referring at least one active case to the Special Court, in the cases referred by or associated with that State Party, and by such other national and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. The Deputy Prosecutors shall be referred to as the Deputy Prosecutor of their State of nationality.

5. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the national authorities concerned.

#### *Article 23*

##### *The Registry*

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General and shall be a staff member of the United Nations. He or she shall serve for a [five]-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Special Court and others who are at risk on account of testimony given by such witnesses.

#### *Article 24*

##### *The Defense Office*

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint an independent Head of the Defense Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defense Council.

2. The Defense Office, which may also include one or more public defenders, shall protect the rights of the defense, provide support and assistance to defense Council and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Chamber or a Chamber in respect of specific issues.

*Article 25*

*Official and working languages*

The official languages of the Special Court shall be French and English. In any given case proceedings, a Chamber may decide that one of these, alone or in combination with any other language, may be used as a working languages or working languages, as appropriate.

*Article 26*

*Annual Report*

The President of the Special Court shall submit an annual report on the operation and activities of the Special Court to the Secretary-General and to the Government of any State Party which has referred a case to the Special Court, or any State Party which has lodged a request for the report that has been granted by the Secretary-General.

SECTION IV: RIGHTS OF VICTIMS, SUSPECTS AND DEFENDANTS

*Article 27*

*Rights of victims*

Where the personal interests of the victims are affected, the Special Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Chamber considers it appropriate.

*Article 28*

*Rights of suspects during investigation*

A suspect who is to be questioned by the Prosecutor shall not be

compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Court;

(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

(c) The right not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(d) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defense Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;

(e) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;

(f) The right to be questioned in the presence of Council unless the person has voluntarily waived his or her right to Council;

(g) The right not be subjected to arbitrary arrest or detention.

#### *Article 29*

##### *Rights of the accused*

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond a reasonable doubt.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following

minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defense and to communicate with Council of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To examine all evidence used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Court;

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(h) Not to be compelled to testify against himself or herself or to confess guilt.

## SECTION V: CONDUCT OF PROCEEDINGS

### *Article 30*

#### *Pre-Trial proceedings*

1. The Pre-Trial Chamber shall review the indictment. If a majority of the Chamber is satisfied that a prima facie case has been established by the Prosecutor, the Chamber shall confirm the indictment. If the Pre-Trial Chamber is not so satisfied, the indictment shall be dismissed.

2. The Pre-Trial Chamber may, at the request of the Prosecutor,

issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial, if the Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Special Court.

*Article 31*

*Arrest proceedings in the custodial State*

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and in compliance with the procedures outlined in the request.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfill its duty to surrender the person to the Special Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with the laws and procedures of the Special Court.

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to

prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Special Court as soon as possible.

#### *Article 32*

##### *Commencement and conduct of trial proceedings*

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.

2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defense.

3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.

4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

#### *Article 33*

##### *Protection of national security information*

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order

to obtain resolution of the issue in accordance with this article.

4. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defense or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Special Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

5. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Special Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

6. Thereafter, if the Special Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Special Court may undertake the following actions:

(a) The Special Court may request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;

(b) The Special Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(c) If the Prosecutor determines that he or she cannot proceed without the information, that the absence of the requested information does a material injustice to the accused, or has reason to believe that the State's refusal to disclose the information is not in good faith, the Prosecutor may submit a request for dismissal with his or her grounds for doing so to the Pre-Trial Chamber, and the Pre-Trial Chamber may order the dismissal of the case.

*Article 34*

*Powers of the Chambers*

1. The Special Court shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.

2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

*Article 35*

*Judgment*

The judgment shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

*Article 36*

*Penalties*

1. The Trial Chamber shall impose upon a convicted person imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the other international criminal tribunals, as well as relevant national courts for

crimes under article 7.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of nationality of the victim or victims.

*Article 37*

*Compensation to victims*

1. The Special Court may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Special Court.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgment finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Court and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Special Court under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgment of the Special Court shall be final and binding as to the criminal responsibility of the convicted person.

*Article 38*

*Appellate proceedings*

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

- (a) A procedural error;
- (b) An error on a question of law invalidating the decision;
- (c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

*Article 39**Review proceedings*

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgment.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the Trial Chamber;
- (b) Retain jurisdiction over the matter.

*Article 40**Enforcement of sentences*

1. Imprisonment shall be served in a State designated by the President of the Special Court from a list of States that have indicated their willingness to accept persons convicted by the Special Court, giving due consideration and priority to the requests of a State of nationality of the victim or victims.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to the next article of this Statute.

*Article 41**Pardon or commutation of sentences*

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

## SECTION VI: AMENDMENT, REVIEW AND WITHDRAWAL

*Article 42**Amendments*

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 6 and 7 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Special Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 46, paragraph 1, but subject to article 46, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

*Article 43**Review of the Statute*

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 42, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

*Article 44**Signature, ratification, acceptance, approval or accession*

1. This Statute shall be open for signature by all States in [city], at [location], on [date]. Thereafter, it shall remain open for signature in [location] until [date].

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 45**Entry into force*

1. This Statute shall enter into force on the first day of the month after the 30th day following the date of the deposit of the 30th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or

accession.

*Article 46*

*Withdrawal*

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Special Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Special Court prior to the date on which the withdrawal became effective.

*Article 47*

*Authentic texts*

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at [city], this [date].