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The case for inclusion of terrorism in the jurisdiction of the International Criminal Court

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1) Introduction

Large parts of Africa are currently plagued by endemic violence. These conflicts differ in intensity and causes, but have some features in common. While the official government is involved in most cases, the contenders include a motley crowd of militias, armed rebel groups and protagonists of organized crime, vying for power and resources. Moreover, the parties do not only fight each other, but often terrorize the civilian population. These dire situations epitomize the growing problem of failed states.

A number of these situations are investigated or prosecuted by the International Criminal Court (ICC). Some of them have even been referred by the states themselves, which suggests that they deem themselves insufficiently equipped to rigorously enforce the criminal law within their sovereign realm.1 Until now, the ICC’s efforts to administer justice in the African continent have not been a stroll in the park. Initially triggered by the Court’s decision to issue an arrest warrant against Sudan’s incumbent president Al Bashir, the ICC and African states have embarked on a course of increasing animosity.2 The African Union has exercised harsh criticism on the Court, accusing it of ‘neo-colonialism’ and bias and urging member states not to cooperate with the Court.3 African states, like Chad and Malawi, have indeed followed suit by witholding the Court their assistance. Scholars have censured the Prosecutor’s selection of accused, pointing in particular at the practice of ‘self-referrals’ which would serve as a convenient tool for governments to draw attention to the

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1 Currently, 8 ‘situations’ are under scrutiny of the ICC. Sudan and Libya have been referred to the ICC by a Resolution of the Security Council, in the cases of Kenya and Ivory Coast the prosecution has made use of its authority to start an investigation proprio motu (Article 15, s. 1 of the Rome Statute) and in the cases of the Congo, Uganda, Central African Republic and Mali the state itself has referred the situation to the ICC. In its letter of referral the Democratic Republic of Congo candidly avowed that ‘les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d’engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale’; Lettre de M. Joseph Kabila, dated 3 March 2004 – Reclassified as public pursuant to Decision ICC-01/04-01/06, ICC-01/04-01/06-39-AnxB1.


3 In a resolution, adopted in July 2009, the AU Assembly of the African States Parties to the Rome Statute ‘decided that in view of the fact that the request of the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan’ Assembly/AU/Dec.245(XIII) Rev.1, para 10.
misdeeds of their adversaries, while keeping out of reach themselves.\(^4\) The result has been controversial international criminal justice, developing at a slow pace, with only a small number of accused in the docks.\(^5\)

This article argues that, even if the relations and ensuing cooperation with African states would significantly improve, the ICC would be structurally hampered to prosecute non-state actors, at least if they operate outside the context of an armed conflict. After all, the subject matter jurisdiction of the ICC includes – apart from genocide – war crimes and crimes against humanity which requires either the existence of an armed conflict or a powerful organization with state-like features. Although the authors realize that the extension of the Court’s jurisdiction with a separate crime of terrorism is not a panacea that solves all problems, we will move to defend that position, basically for two reasons. First of all, intermittent terrorist attacks on civilians in a context of virtual anarchy breeds similar human suffering and social disruption as analogous attacks in an armed conflict and it would therefore be rather arbitrary to make jurisdiction dependent on the crossing of that line. Secondly, the impotence of the state to protect its own citizens has always been advanced as one of the strongest justifications of legal intervention by the international community - next to the State’s oppression of its citizens – and the former is precisely the situation which we are facing in large parts of Africa. In short, we think it is time that terrorism enters the realm of international crimes \textit{stricto sensu}.

This article is structured as follows. Section 2 discusses terror as a war crime. Section 3 investigates the question where international humanitarian law draws the line between erratic outbursts of violence and armed conflict. Section 4 explores the issue whether terrorism might be qualified as a crime against humanity. In section 5 we discuss the question why terrorism in peacetime has been excluded from the jurisdiction of the International Criminal Court and touch upon the vexing task of rendering a satisfactory definition of terrorism. In section 6 we will briefly dwell upon the similarities between terrorism and war crimes/ crimes against humanity. And section 7 rounds off with some final reflections.

2) Terrorism as a war crime\(^6\)

It is a fallacy to argue that terrorism can legally only be considered as a criminal offence in time of peace. Article 4, sub d of the Statute of the International Criminal Tribunal for Rwanda explicitly qualifies ‘acts of terrorism’ as a serious violation of article 3 common to


\[\text{\textsuperscript{5}}\] At the moment of writing, the ICC has rendered only one judgment in the case against Thomas Lubanga (Judgment, 14 March 2012, Case No. ICC-01/04-01/06; \textit{Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo}).

\[\text{\textsuperscript{6}}\] This section partially draws on Harmen van der Wilt ‘Self-referrals as an indication of the inability of states to cope with non-state actors’, to be published in: Carsten Stahn and Mohammed El Zeidy, \textit{The Practice of the International Criminal Court}, OUP 2014 (forthcoming).
the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 1977 over which the ICTR has criminal jurisdiction. And as the ICTR only has jurisdiction over offences committed in a non-international armed conflict, the Statute qualifies terrorism as a war crime in a non-international armed conflict.\(^7\) Whereas terrorism is not explicitly mentioned in the Statute of the International Criminal Tribunal for the former Yugoslavia, the Appeals Chamber of the ICTY has concluded in \textit{Galić} that terrorization of the civilian population, committed during an armed conflict, has crystallized into a war crime under customary international law.\(^8\) The Appeals Chamber confirmed the ruling of the Trial Chamber that terrorization of the civilian population constituted a serious infringement of a rule of international humanitarian law, to wit Article 51(2) of the First Additional Protocol that prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population.’\(^9\) The Trial Chamber had already clarified that the relevant provisions in the Additional Protocols purported to extend the protection of civilians from terror, as Article 33 of Geneva Convention IV had only a limited scope, protecting a subset of civilians in the hands of the Occupied Power.\(^10\) Consequently, Articles 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II are addressing all persons – belligerents, civilians and organized groups alike – imploring them to renounce from acts of terrorism in the territory of the parties to an armed conflict.\(^11\) That the violation of these essential rules of international humanitarian law entailed individual criminal responsibility could, in the opinion of the Appeals Chamber, be inferred from ‘state practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.’\(^12\) After a comprehensive scrutiny of these instruments and decisions, the Appeals Chamber concluded that customary international law indeed imposes individual criminal liability for violations of the prohibition of terror against the civilian population.

Article 8 of the Rome Statute does not mention terror as a war crime. However, both state officials and non-state actors could be exposed to the ICC’s jurisdiction if they have been involved in ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’ which is qualified as a war crime both in international armed conflicts (Article 8 (2), b, i) Rome Statute) and in non-international armed conflicts (Article 8 (2), e, i) Rome Statute). The \textit{actus reus} corresponds with

\(^{7}\) in Article 3, sub d of the Statute of the Special Court for Sierra Leone acts of terrorism features as a war crime (in a non-international armed conflict) as well.

\(^{8}\) \textit{Prosecutor v. Galić}, Judgment of the Appeals Chamber, IT-98-29-A, 30 November 2006, par. 91-98. The Trial Chamber, while recognizing that the ICTY had jurisdiction over terror as a war crime under Article 3 of its Statute, had still left the question of the customary international law nature of the crime of terror in abeyance, \textit{Prosecutor v. Galić}, Judgment and Opinion, IT-98-29-T, 5 December 2003, par. 138.

\(^{9}\) Article 13(2) of the Second Additional Protocol reads exactly the same.

\(^{10}\) \textit{Prosecutor v. Galić}, Trial Chamber, par. 120.

\(^{11}\) See also Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 4 \textit{Journal of International Criminal Justice} (2006), 944.

\(^{12}\) \textit{Prosecutor v. Galić}, Appeals Chamber, par. 92.
mainstream definitions of terrorism, but the special intent to ignite fear in or intimidate the civilian population is absent. Another war crime that closely resembles an act of terrorism in peace time is hostage-taking which requires an intention ‘to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.’\(^{13}\) Although terrorism does not feature as a separate offence in the Rome Statute, there are equivalent war crimes that cover materially the same unlawful conduct. One could even wonder whether the comprehensive regulation of war crimes which is predicated on the rich normative framework of International Humanitarian Law does not obviate the need for identifying terrorism as a distinct war crime.\(^{14}\) However, if the jurisdiction in respect of terrorism of the International Criminal Court – and arguably other international criminal tribunals as well – is dependent on the existence of an armed conflict it is obviously of paramount importance to inquire when the threshold of armed conflict is reached. It is to this question that we will now turn.

3) Armed conflict as a legal category under IHL and ICL

The necessity of defining and delineating the concept of armed conflict emerged when the states parties negotiating the terms of the Geneva Conventions of 1949 decided to include a ‘codex’ on minimum provisions that the parties to a non-international armed conflict had to observe in view of the protection of non-combatants. While section 2 of this well-known Common Article 3 expressly stipulated that it’s application would not affect the legal status of the Parties, some states expressed concern, arguing that these proposals would bestow criminal groups with moral legitimacy and hamper Governments in their measures of legitimate repression. It was feared that the arrangement would ‘cover all forms of insurrections, rebellion and the break-up of states and even plain brigandage’.\(^{15}\) In an effort to allay the apprehensions of the opponents, a Special Committee of the Diplomatic Conference assured that Common Article 3 would not include ‘terrorism’ and incidental riots or insurrections, but would only apply ‘to conflicts which, though internal in character, exhibited the features of real war.’\(^{16}\) In respect of the actors, the Committee alluded to well organized insurgents who wield control over (part of the) territory and population and have the power to contend the state’s monopoly of violence.

In their attempt to enhance the protection of civilians and other vulnerable categories during hostilities, the international criminal tribunals have considerably widened the scope

\(^{13}\) Elements of Crimes – International Criminal Court, New York, 30 June 2000, Article 8 (2) c) (iii).

\(^{14}\) Compare Claudia Martin, who quotes approvingly the International Committee of the Red Cross, stating that ‘once the threshold of an armed conflict has been reached, there is little added value in designating acts of violence against civilians or civilian objects as “terrorists”’. Claudia Martin, ‘Terrorism as a crime in international and domestic law: open issues’, in: Larissa van den Herik & Nico Schrijver (eds.), Counter-Terrorism Strategies in a Fragmented International Legal Order, Cambridge 2013, 649.


\(^{16}\) Pictet, footnote 15, 33.
of the concept ‘armed conflict’. While an exhaustive analysis of this intriguing topic is beyond the ambit of this article, we will briefly refer to some decisions that highlight the difference with the prior approach.\textsuperscript{17}

In Tadić the Appeals Chamber pioneered uncharted waters and propounded a definition that would serve as an authoritative point of departure for later judgments. According to the Appeals Chamber, an armed conflict exists ‘whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.\textsuperscript{18} In relation to non-international armed conflicts the definition clarified two aspects. First of all, armed conflicts can occur without any involvement of the official government and can therefore be fought between insurgent groups inter se. This extension of the scope of Additional Protocol II which only applies if the central government is one of the warring parties, reflects the sensitivity for the problem of failed states.\textsuperscript{19} Secondly, in order to qualify as an armed conflict, two cumulative conditions have to be satisfied: a) the armed forces should display a certain level of organization and b) the fighting should have a certain degree of intensity. As these criteria are obviously still rather vague, they require further elaboration and interpretation in practice.\textsuperscript{20}

In Limaj, the Trial Chamber had the opportunity to flesh out these standards, as it had to determine whether an armed conflict had existed between the Kosovo Liberation Army (KLA) and Serbian armed forces.\textsuperscript{21} The organizational strength of the KLA was measured in terms of its capacity to wield internal control over its people, to formulate and execute concerted military action and to operate as a unity in external relations.\textsuperscript{22} The Trial Chamber also shed light on the requirements in the realm of intensity of the conflict, mentioning, among others, the frequency and seriousness of armed clashes, the mobilization of elite military groups and the effects on the civilian population.\textsuperscript{23}

In helpfully summarizing the factors that should be taken into account in the assessment of the intensity of the hostilities, the Trial Chamber in Boskoski & Tarkulovski frequently referred to the Limaj judgment:

\textsuperscript{17} For a comprehensive and seminal discussion of the topic, see Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, Cambridge 2010. For a concise survey, see Fleck, D., The Handbook of International Humanitarian Law, 2nd ed. Oxford 2010, Chapter 2.
\textsuperscript{18} Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No.: IT-94-1-AR72, par. 72.
\textsuperscript{19} On this topic, see also Cullen, footnote 17, 146-148.
\textsuperscript{20} Compare Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment, 6 December 1999, par. 93: ‘The definition of an armed conflict per se is termed in the abstract, and whether or not a situation can be described as an “armed conflict”, meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis.’
\textsuperscript{22} Prosecutor v. Limaj, par. 46 and 125.
\textsuperscript{23} Prosecutor v. Limaj, par. 146, 150 and 166..
‘the number of civilians forced to flee from the combat zones; the types of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by the shelling or fighting; the quantity of troops and units deployed; existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of governments forces to the crisis area; closure of roads; cease fire orders and agreements, and the attempts of representatives from international organizations (such as the SC) to broker and enforce cease-fire agreements.’

The requirements in respect of organization have gradually crystallized in 5 groups of factors that would be indicative of sufficient organization:

‘i) the presence of a command structure, ii) the capability of the group to carry out operations in an organized manner, iii) the level of logistics, iv) the level of discipline and the ability to implement the basic obligations of Common Article 3, v) the ability to speak with one voice’. 25

While the level of organization and the intensity of the conflict are both indispensable conditions, the requirements as to the geographical and temporal scope of the conflict have been watered down in recent case law. The application of international humanitarian law does not depend on the actual occurrence of hostilities in a particular place. The regime of IHL would govern acts and relations related to the conflict, whenever the existence of an armed conflict in a wider geographical area had been established: ‘(...) in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given locality forms part.’ 26 As to the temporal aspect, the Inter-American Commission on Human Rights was quite willing to expand the application of international humanitarian law to a short-lived insurrection at the La Tablada military base. 27

Although the concept of (non-international) armed conflict has expanded over time, clear-cut requirements as to the level of organization and intensity still prevail. Moreover, there is an obvious correlation between these parameters. Only if armed groups possess sufficient military strength to defy governmental forces or other groups of similar prowess, they can engage in prolonged armed struggles. The concept of armed conflict is thus predicated on a certain equality of arms between adversaries. It follows that no armed conflict exists when

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24 Prosecutor v. Boskovski & Tarculovski, Judgment, Case No. IT-04-82-T, 10 July 2008, par. 177. The authors are obliged to Miss Annemarie van Zeeland, LLM, who has drawn our attention to this case.
the rebellious armed group is no match for official power, or reversely, when the victims of its violence are unable to defend themselves, like in the case of unprotected civilians.

These considerations put the relationship between terrorism and armed conflict into proper perspective. Most terrorist groups will not have the capacity to engage in protracted fights against government forces, because they lack the organizational strength to do so. This was also acknowledged by the Trial Chamber in Tadić, when it held that ‘in an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.’

The situation in the Central African Republic provides a case in point. Referring to the clashes between Muslims and Christians, the Crisis-group has recently observed that ‘the Seleka, a loose coalition of armed groups that took power in a March 2013 coup, has broken up into multiple armed factions, whose thuggery has triggered violent reactions amongst the population.

The conclusion is clear: if intermittent attacks by militia’s do not reach the threshold of an armed conflict, either because they do not meet the required level of intensity or because of the group’s poor organization, these attacks would not qualify as war crimes and the ICC would lack jurisdiction.

4) Terrorism as crime against humanity?

An alternative option would be to classify terrorist acts as crimes against humanity. In Blagojević a Trial Chamber of the ICTY indeed included terrorization of the civilian population under the heading of ‘persecution’ as a crime against humanity, provided it was carried out with discriminatory intent. Referring to the judgment in Galić and citing the relevant provisions of the Additional Protocols of the Geneva Conventions, the Trial Chamber defined the elements of ‘terrorizing the civilian population’ as follows:

‘a) Acts or threats of violence;

b) The offender willfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats; and

c) The acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.’

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28 Prosecutor v. Tadić, Opinion and Judgment, Case No. IT094-1-T, 7 May 1997, par. 562. (our italics)
29 African Briefing No. 96, 2 December: Central African Republic: Better Late than Never.
The idea that terrorism could be qualified as a crime against humanity has received broader support in legal literature. In the wake of 9/11, several distinguished lawyers and politicians have defended this position, pointing at the magnitude and extreme gravity of the attack.\(^{32}\) However, ‘9/11’ was obviously a singular event, of huge scope and impact. Whether terrorism could more generally and inherently be classified as a crime against humanity is much more controversial.\(^{33}\) Probably, a sweeping answer to the issue is impossible; it all depends on the question whether the terrorist assault meets the contextual elements of crimes against humanity. Article 7 of the Rome Statute defines a crime against humanity as an act which is part of a widespread or systematic attack, directed against a civilian population, with knowledge of the attack. Moreover, for the International Criminal Court to have jurisdiction, the attack must be ‘pursuant to or in furtherance of a State or organizational policy’. That requirement is arguably the largest obstacle. The disjunctive phrasing – State or organizational policy – already suggests that perpetrators of crimes against humanity might include private organizations.\(^{34}\) The pertinent question, however, is what level of organizational proficiency those non-state actors should have achieved in order to come within the reach of Article 7. In the \textit{Bemba} confirmation decision the Pre-Trial Chamber addressed the concept of ‘policy’, indirectly shedding some light on the nature of ‘organization’:

‘the requirement of a “State or organizational policy” implies that the attack follows a regular pattern. Such a policy may be made by groups or persons who govern a specific territory or by an organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalized. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.’\(^{35}\)


\(^{34}\) This was corroborated by the International Law Commission which has determined that ‘the article (on crimes against humanity, addition HvdW/IB) does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the Draft Code’. Yearbook of the International Law Commission 1991, Volume 2, Part 2, A/CN.4/Ser. A/1991/Add.1 (part 2), p. 103.

\(^{35}\) \textit{Prosecutor v. Bemba}, Decision Pursuant to Article 61(7), (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, 15 June 2009, par. 81.
In the Kenya-decision the issue of the necessary features of organizations that would potentially be covered by Article 7 of the Rome Statute was confronted head-on and kept the Pre-Trial Chamber divided. The bone of contention was whether such organizations should display state-like qualities. The majority of the Pre Trial Chamber confirmed the Bemba decision that the litmus test for an ‘organization’ in the sense of Article 7 Rome Statute is whether the group ‘has the capability to perform acts which infringe on basic human values.’ The PTC specified this finding by identifying a non-exhaustive list of factors:

(i) whether the group is under a responsible command, or has an established hierarchy; ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against the civilian population; iii) whether the group exercises control over part of the territory of a State; iv) whether the group has criminal activities against the civilian population as a primary purpose; v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; vi) whether the group is part of a larger group, which fulfills some or all of the aforementioned criteria.

Obviously, this definition suffers from a degree of circular reasoning: ‘who qualifies as a (potential) perpetrator of crimes against humanity? Those who have the capacity to commit such crimes’. Consequently, the circle of perpetrators is dependent on the interpretation of the category itself, in particular on the question what constitutes a ‘widespread or systematic attack’. However, it would be rather unfair to dispose of the Kenya-decision with such a sophism. After all, the elliptic definition contains a number of useful indicia which serve as guidelines for the identification of organized groups that would have sufficient capacities to attack civilians on a large scale. Moreover, for Judge Hans-Peter Kaul, the approach of the majority was even too liberal. He suggested a more rigorous standard and argued that the organization should partake some of the characteristics of a state. As Judge Kaul’s opinion has received support in legal literature, the discussion on the proper limits of organizations that might engage in crimes against humanity has probably not ended.

For our discussion it is important to notice that the organizational requirements for the assessment of crimes against humanity - responsible command, control over part of territory - are strongly reminiscent of the corresponding conditions for belligerent groups in

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37 Kenya Decision, par. 93.
38 Kenya Decision, Dissenting Opinion of Judge Hans-Peter Kaul, par. 51.
armed conflicts. It follows that a non-state group which lacks the organizational proficiency to trigger an ‘armed conflict’ – and is therefore technically unable to commit war crimes – would equally fail to qualify as a perpetrator of crimes against humanity in ‘peace time’. As such non-state armed groups remain beyond the jurisdictional reach of the ICC, it should be investigated whether there are good reasons to expand the jurisdiction of the ICC with a separate crime of terrorism.

5) Terrorism as a separate offence in ‘time of peace’: in search of a definition

As we already mentioned in the introduction, the International Criminal Court does not possess jurisdiction over the discrete crime of terrorism. In practice, the Court is structurally hampered to prosecute non-State actors if these operate outside the context of an armed conflict.

How the exclusion of terrorism from the Rome Statute came to be the case is neatly set out by Van der Vyver, who remarks that terrorism was deliberately omitted from the subject matter jurisdiction of the ICC, partly because the United States approached the very first sessions of the Ad Hoc Committee on a Permanent International Criminal Court with the express mission of excluding the crime of terrorism from the proposed subject matter jurisdiction. The main reason for the United States to request this particular omission was its deep concern that inclusion of the crime in this international tribunal could undermine its own extensive investigative efforts undertaken in its national prosecutions of international terrorists. However, during the Rome Conference several States later to become party to the ICC –i.e. Spain, Algeria, India, Sri Lanka, Barbados, Dominica, Jamaica, Trinidad and Tobago, and Turkey- submitted proposals to indeed include terrorism in the jurisdiction provisions of the ICC, but eventually, due to the fact that these proponents for the inclusion of terrorism could in the end not convince a sufficient number of delegates to support the idea, and due to widespread disagreement about the exact definition and required elements of the crime, terrorism was left outside the Rome Statute.

This is illustrative for a long-standing state of affairs in the global sphere: it can hardly be deemed a secret that for decades, the international community is extremely divided in its quest for a broadly acceptable definition of terrorism in international law and upon the ambit of application of a Convention based on a shared definition. That is hardly

40 See also Kress, footnote 49, p. 826 who correctly observes that ‘(...) [Kaul’s] definition mirrors that of a party to a non-international armed conflict, as contained in Article 1(1) of the Second Additional Protocol to the Geneva Conventions, with one (significant) exception that territorial control is not needed.’ Remarkably, the requirement of territorial control is indeed absent in Judge Kaul’s definition, while it features as one of the indicia in the circumscription of the Majority.

41 Even those who favour a broad interpretation of crimes against humanity candidly admit this, see Di Filippo, footnote 33, p. 568: ‘(...) it must be conceded that a certain tension arises between the traditional conception of crimes against humanity and the emerging notion of core terrorism as far as the issue of possible perpetrators is concerned.’


44 Van der Vyver (footnote 42), 539.

surprising, since also on the domestic level there exists a broad range of slightly different legal definitions of terrorism,\(^{46}\) regional organizations such as the European Union and the Organization of American States do not address the issue in exactly the same terms, and there is no lack of divergent documents on terrorism in the international legal sphere either.\(^{47}\) This makes only too much sense. The opinion on certain ‘punishable’ behaviour is largely dependent on the position a State has in the web of international relations. Especially relating to terrorism, elements of international power conflicts and political issues are attached to the concept. Diversity is inherent to the international legal system and fragmentation between countries on what is illegitimate behaviour is unavoidable. But still it remains paramount, especially with regard to the quarrelling on a universal definition on terrorism, to agree on a common denominator. Since terrorism is predominantly an international phenomenon, consensus is essential to adequately counter this transnational crime. Notwithstanding the dissidence on the operational definition, the phenomenon of terrorism undeniably exists and with that likewise a general philosophical concept of it. As said, within academic discourse, however, there are contrasting perspectives on whether a general definition exists in international law at all.\(^{48}\)

Terrorism remains a diffuse concept, especially since the conduct in a more general sense hovers on the crossroad between political expression and crime. It is however one of the more serious contemporary challenges currently facing the international community of States. These States thus far have tried to postulate a response to the terrorist threat by devising a patchwork of (sectoral and regional) treaties,\(^{49}\) a so-called piecemeal approach. The global normative framework surrounding terrorism is therefore rather fragmented and suffers from a lack of coherence. Some academics attribute the failure of States to arrive upon an adequate terrorism definition to the constantly evolving nature, diversity, and ability to take many forms of the phenomenon itself, which renders it doubtful that a checklist definition will completely and effectively capture its essential components forever.\(^{50}\) But terrorism is of course by far not unique in this respect; perhaps it is a fundamental problem inherent in all questions of law demarcation.

However, to a certain extent terrorism can indeed be considered as an international crime and a myriad of legal academics emphasize the growing need to define the phenomenon. Drawing the matter of terrorism into the realm of international criminal law is arguably the best way to do so, since the law of self-defence as enshrined in Article 51 of the Charter of


\(^{47}\) Inter alia the sectoral international treaties, which can be consulted at http://untreaty.un.org/English/Terrorism.asp

\(^{48}\) With regard to the mentioned ‘numerous’ international (sectoral) treaties that deal with and prohibit terrorism in particular circumstances, de Londras notes that ‘The conclusion and ratification of these treaties reflect the fact that the difficulty in international law is not with the principle that terrorism ought to be prohibited as a matter of law, but rather with the task of coming to an agreement on what terrorism is as a general matter. Thus, while we have prohibited terrorism in discrete circumstances and of particular types as a matter of positive law, we have not managed to formulate a treaty-based crime of terrorism per se.’ Fiona de Londras, ‘Terrorism as an International Crime’ in William A Schabas & Nadia Bernaz (eds), Routledge Handbook on International Criminal Law (Routledge 2010) 169.

\(^{49}\) See footnote 47.

\(^{50}\) Orlova Moore, footnote 46, 284.
the United Nations cannot be invoked vis-à-vis non-State actors. Even though such a conclusion is inevitable when one sees the normative order of the world only or mostly in terms of the rights and duties of the States, the price for the too strict conservative doctrinarism on these matters is the incapacity of international law to adequately address some of the most pressing developments in the world, such as terrorism.  

This need is deemed even more pressing by the unfortunate situation that acts of terrorism occurring outside situations of armed conflict are, as demonstrated here, nearly impossible to adequately counter. As long as the terrorist activity bears no relation to a war situation, the perpetrators of the act cannot be brought to justice through existing institutions of international criminal law.

Nevertheless, international criminal jurisdiction over acts of terrorism just falling short of the threshold for a situation of armed conflict currently does not exist, since a fundamental condition to eventually adorn the ICC with jurisdiction over terrorism is first and foremost reaching international consensus over the exact definition of terrorist crimes, which has, as said, proven to be a highly demanding task.

Most of the initially well-intentioned international negotiations tend to run stalemate on a handful of clashing suppositions: firstly, whether there exists such a thing as acts of terrorism committed by the State; second, whether the global community should make an exception for legitimate ‘freedom fighters’, and less frequent, but still thorny, what the relation should be between the envisioned legally binding instrument of international criminal law, such as a tribunal of international criminal law, and the already existing sectoral treaties dealing with terrorism. As long as States do not reach at least a minimal consensus on this, no universal treaty rules laying down a comprehensive definition can evolve either. But not only are these aforementioned most contentious issues surrounding an international definition of terrorism most problematic. For example, academics also disagree over the exact elements of the crime, such as the issue whether a transnational dimension is required in order for acts to qualify as international terrorism.  


52 Most Islamic states feel compelled to argue that ‘freedom fighters’, when availing themselves of traditional ‘terrorist’ activity, can indeed be excused from the condemnation of terrorism. Curiously enough however, the UN General Assembly in its 1994 Resolution repeated its ‘unequivocal condemnation of all acts, methods and practices of terrorism’ and this declaration did not feature, for the very first time, any reference to peoples’ ‘legitimate struggle for freedom and independence’. Art. 1(3) UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60. Likewise, the 2004 Security Council Resolution 1566, which calls upon all states to combat terrorism regardless of its cause or motivation, reiterates the broad definition from the 2002 United Nations Convention for the Suppression of the Financing of Terrorism and makes no exception for ‘freedom fighters’ of any kind. Of the Security Council resolutions calling for action against terrorism this one is the most fierce, and includes three cumulative conditions. UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, first paragraphs.

53 According to Di Filippo, it is not, since he claims that a particularly serious violation of human rights, such as happens when innocent civilians are harmed due to acts of terrorism, even when these acts are solely ‘internal’, is of common concern for the international community of states, similar to the present international approach to perceived crimes against humanity. This strikes us however as a possibly highly controversial approach. Di Filippo, footnote 33, 545. Cassese, footnote 11, 938 argues that the transnational nature is a necessary component of acts of international terrorism, and refers to Article 3 of the Convention for the Suppression of the Financing of Terrorism (‘This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis . . . to exercise jurisdiction . . . ’).
Nevertheless, even though indisputably at least a part of terrorist conduct transcends national borders, when one directs one’s attention to the current poignant developments in the Central African Republic, it seems to be obvious that dismissing this transnational requirement is the only means to address and hold accountable the perpetrators. The impotence of a State to protect its own citizens has always been advanced as one of the strongest justifications of legal intervention by the international community—next to the State’s oppression of its citizens—and the former is precisely the situation which one is facing in large parts of Africa. This issue is further complicated by the often promulgated, parallel belief that another distinctive feature of terrorism should lie in the presence of an organization actually carrying out acts of serious violence, because where people perceive the presence of a group behind acts of violence and the probability of the repetition of similar acts, the spread of terror is more evident, if compared with the action of an isolated agent.\(^{54}\) However, this supposedly mandatory element of the crime reflects again the threshold needed for a war crime to qualify as actually occurring during a situation of armed conflict, to wit a certain degree of intensity and a basic degree of organization, respectively. When taking the contemporary situation in the Central African Republic into account again, a strong degree of organization between the insurgent individual groups would be difficult to prove, which again implies that the perpetrators of these serious acts of violence enjoy impunity.

Returning to possible future consensus on a definition of international terrorism, Di Filippo offers a quite interesting approach. He attempts to counter the perceived incoherent treatment by the international community of the issue of defining the criminal notion of terrorism and the abuse of the term ‘terrorism’ in the course of the debate,\(^{55}\) and to this end puts forward a proposed definition which does not recognize as materially relevant the perpetrator’s motivations, but instead as overwhelmingly important the value infringed. This approach renders him able to minimize the relevance of some historically heavily propagated arguments such as the existence and inclusion of State terrorism and the treatment of freedom fighters.\(^{56}\) To this end, the propagated definition consists not of an all-encompassing description of possible terrorist offences, but rather a core notion; the ‘lowest common denominator approach’. Regarding the exact substance of this ‘core’ definition, Di Filippo emphasizes the harm done to innocent civilians as the fundamental essence of terrorist acts and accordingly the most pressing reason to criminalize this behaviour. Also, since in criminal law a certain precision is required, due to the principle of *nullum crimen sine lege* and the strict constitution of penal statutes, the search for a unitary or all-encompassing notion of terrorism in criminal law terms risks being incomplete or too advanced because of different underlying policy choices: Higgins and Baxter for example came to the conclusion that in general international law terrorism as such has no specific legal meaning.\(^{57}\) A less ambitious approach could therefore be useful, with a core definition

\(^{54}\) Di Filippo, footnote 33, 545.

\(^{55}\) Di Filippo, footnote 33, 533.

\(^{56}\) Ibid.

that still leaves the option open to add more elaborate notions to it by (restricted groups of) States for the benefit of their own regional or domestic prosecutorial mechanisms.

It is interesting to note that the fundamental notion of Di Filippo’s approach does hardly share characteristics with the only stronghold currently existing with regard to the actual existence of terrorism as a discrete international crime, namely the landmark decision by the Special Tribunal for Lebanon – with Cassese as its intellectual father. Echoing the arguments of its presiding judge, Cassese, the STL’s Appeals Chamber held in a 2011 interlocutory decision \(^{58}\) that, indeed, terrorism had crystallized to form a distinct international crime under rules of customary international law.\(^{59}\) In this ruling the STL dared to venture into hitherto judicially avoided legal territory and dived straight into the exact definition of terrorism as a discrete crime.

The Special Tribunal for Lebanon offers in Article 2 of its Statute an authoritative definition of terrorist acts in peace time under customary international law, although this Article utilizes domestic Lebanese law as a basis for this definition, indeed exclusively alludes to relevant provisions of the Lebanese Criminal Code (more specifically, Article 314), instead of the applicable international law. The three constitutive elements of the crime of terrorism as provided for in Article 314 of this Lebanese Criminal Code are ‘(i) an act, whether constituting an offence under other provisions of the [Lebanese] Criminal Code or not, which is (ii) intended to ‘cause a state of terror’; and (iii) the use of a means ‘liable to create a public danger’.\(^{60}\)

Because the STL Statute does not provide for an elaborate definition of terrorism, the judges were left with the task of deciding upon that. However, the Appeals Chamber stated that both international conventions and customary law would guide the Tribunal’s interpretation of the domestic Lebanese criminal law \(^{61}\), astonishingly implying that there has indeed emerged a terrorism definition under customary international law. In its own words, it elaborates this decision as follows: ‘...a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of IL regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or

\(^{58}\) UN Special Tribunal for Lebanon (Interlocutory Decision on the Applicable Law, Case No. STL-11-01/I (STL Appeals Chamber 16 February 2011)


\(^{60}\) STL AC Decision, footnote 58, § 49. Lebanese case law shows a narrow interpretation of this third, means, element: the means employed must be similar to those included in Article 314 of the Lebanese Criminal Code.

\(^{61}\) ‘It is not a question of untethering Tribunal’s law from Lebanese provisions. It is rather that as domestic law those Lebanese provisions may be construed in the light of and on basis of relevant international rules. Thus when applying the law of terrorism, the Tribunal may ‘take into account relevant applicable law’, but only as an aid to interpreting relevant provisions of the Lebanese Criminal Code’. STL AC Decision (supra) at § 45
indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. 62

The Appeals Chamber thus glossed over all the global bones of contention relating to definitional issues of terrorism and proposed, by pointing to the Nicaragua case,63 that discrepancies are not fatal to formation of customary rules because general practice consistent with the relevant custom is quite sufficient. Most interesting, the essence of its conclusion was the removal of the political motive requirement, which it sees as a ‘discrepancy covered by the Nicaragua principle’. 64

Based on this, one could indeed make a case for the existence of a customary international legal rule on the prohibition of the crime of terrorism. However, several legal scholars argue that the STL definition is problematic because it is both under- and overinclusive. 65 Also, no emphasis is placed on what intuitively strikes one as the most horrendous element of terrorist behaviour: the direct harm done to innocent, defenceless civilians.

6) Terrorism within the taxonomy of international crimes

Having outlined these complicated circumstances around a terrorism definition, when observing the position of terrorism within the taxonomy of international crimes, a cynosure of the discussion on whether terrorism should be delineated as an international crime is the prevalent nature of the traditional ‘international crimes’ and subsequently, what the actual legal consequences are of such an ‘international crime’ qualification. Nagle predicates that international ‘core’ crimes are ‘broadly defined as encompassing criminal acts that threaten the international community as a whole or acts that threaten its most fundamental values’,66 As demonstrated in this article, a significant parallel between the legal elements and intricacies of crimes against humanity, war crimes, and terrorism respectively is undeniable. Gradually, we are seeing an erosion of the legal distinction between ‘standard’ transnational crimes and the traditional international core crimes, which paves the way to gradually start considering the inclusion of terrorism with these already codified core crimes too.

62 STL AC Decision, footnote 58, § 83, 85, 86. Some national courts have also recognized that there exists a crime of terrorism under customary international law, including the Supreme Court of Canada in Suresh v. Canada (Judgment, Suresh v. Canada (Minister of Citizenship and Immigration) 2002 1 S.C.R. 3 (11 January 2002) at §§ 96, 98. This is a flagrant turn away from the earlier jurisprudence of Tel Oren v Libyan Arab Republic, where a U.S. Federal Court of Appeal denied in 1984 the existence of a customary rule. Tel-Oren v Libyan Arab Republic United States Court of Appeals for the District of Columbia Circuit (Judgment, Tel-Oren v Libyan Arab Republic, 726 F.2d 774 (3 February 1984)) at §§ 806-807.

63 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 §§ 183-6. At 98, § 186: ‘The Court does not consider that, for a rule to be established as customary, the correlative practice must be in absolutely rigorous conformity with the rule.’

64 STL AC Decision, footnote 58, §100.


66 This is on the grounds that ‘the values and interests transcend individual goals, national borders, and sovereignty limitations because they are common to and affect all nations equally. Even if international crimes only occur in a few nations, their immediate and direct effect endangers the well being of the world as a whole and threatens the international peace and security of mankind. In such events, the international community, through the authority of the United Nations Security Council, acquires a legitimate right to intrude in the sacrosanct sovereignty of a nation and may take punitive measures, such as (...) establishing an ad hoc tribunal, or authorizing a national or international force to arrest an indicted suspect.’ Luz E Nagle, ‘Terrorism and Universal Jurisdiction: Opening a Pandora’s Box?’ (2011) 27 Georgia State University Law Review 341.
The essential question - at which points terrorism deviates from the traditional core crimes -, is therefore difficult to answer. Even though less broad consensus exists on what exactly is a terrorist offence, compared with the international community’s stance on crimes against humanity and genocide, views are divided upon the abhorring nature of this latter conduct as well.

Notwithstanding, a proper definition of terrorism per se in the criminal law framework is not merely a semantic, symbolic or superfluous exercise. Firstly, the perception that everybody already agrees upon these ‘core cases’ cannot withstand careful scrutiny. In addition, the alarming label ‘terrorist’ adds an extra incentive to award such violent conduct substantial attention. The task of solicitously defining the offence is critical, both from the standpoint of the legal regulation of the phenomena and of lawful responses to them, since without this, ambiguities and consequently shortcomings are created that allow terrorists to slip through cracks in the law, as we see currently in large parts of Africa. A downside of domestically-prosecuting terrorists through the existing sectoral treaties is their fragmental nature and their general, vague terms which only add to uncertainty about the confines of criminal behaviour. Especially in international criminal law, with its underlying principle of nullum crimen sine lege, clarity and certainty about prohibited conduct is essential. The current prevarication leads to legal grey areas which can be exploited by both the terrorist culprit and the victim State. An example is the enforcement mechanism in counterterrorism treaties which consists of the duty of States to either prosecute or extradite international terrorists - but there is no consensus on whether this aut dedere, aut iudicare maxim is an actual norm under customary international law.

Be that as it may, fundamentally, a prohibition on terrorist activity in international law already exists, and because international law imparts the obligation on all States to adhere to and enforce rules of international law, it automatically follows that States cannot sit back impassively but have to actively adhere to their legal duty. A generally accepted definition painting terrorists as criminals is the most effective way to enforce these obligations. In the current state of affairs, the obfuscation around a clear definition of terrorism precludes any legal institution from taking effective measures to combat it, which in turn leads to a complete inability of the international community to punish perpetrators and prevent terrorist attacks, whereas the creation of a comprehensive international terrorist regime, including judicial institutions, can only assist in the fight against terrorism and cannot be said to either be harmful or an impediment to said cause. The current lack of an accurate, effective agreed-upon definition of terrorism in international law merely provides an excuse.

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67 An interesting analogy can be drawn with the contention surrounding ‘peremptory norms’ of ‘ius cogens’. Morgan describes the ‘perplexing state of affairs’ around ius cogens norms, the uncertainty about their nature and the tendency among international lawyers to slowly but steadily expand the category, new legal norms ‘joining a rarefied—if growing—club of abuses that are universally condemned as beyond the pale of legally acceptable conduct in a world with notoriously few universal rules’ with the resulting devaluation of the ‘fundamentality’ of such norms. Ed Morgan, ‘Fear and Loathing in Ius Cogens: A Journey to the Heart of International Law’ [2007] Canadian International Journal 101, 103. See also Anthony d’Amato ‘It’s a Bird, It’s a Plane, It’s Ius Cogens!’ (1990) 6 Connecticut Journal of International Law 1

68 ‘Aut dedere, aut iudicare’ (the duty to ‘either extradite or prosecute’ in international law) is primarily inspired by the aim of preventing trials in absentia. Harmen van der Wilt, ‘Universal Jurisdiction Under Attack, An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States’ (2009) 9 Journal of International Criminal Justice 1050


70 Ibid., at 149
for States not to meet their international legal obligations\textsuperscript{71}; regardless of the general will of States to bring terrorists to justice, due to the lack of an international consensus on how to exactly do this, efforts to reach this objective are currently not very useful.\textsuperscript{72}

7) Terrorism within the spectrum of international crimes: some final reflections

The impetus to include terrorism as a separate crime under the jurisdiction of the International Criminal Court has a dual source. For one thing, the Special Tribunal for Lebanon has propounded an authoritative definition of terrorism in peace time under customary international law. Secondly, most terrorist attacks can probably not be qualified as an armed conflict, either because they lack the required intensity, or because the perpetrators do not meet the level of organization that the law of war attaches to belligerents.\textsuperscript{73} For this very reason, most acts of terrorism could not be assimilated to crimes against humanity either. As terrorism engenders similar levels of pain and suffering amongst the (civilian) population, there are good reasons for plugging this jurisdictional loophole.

The similarities between terrorism and war crimes have frequently been observed.\textsuperscript{74} The analogy may serve as a useful point of departure for the demarcation of terrorism as a separate crime under the jurisdiction of the ICC \textit{de lege ferenda}. The gist of war crimes is that violence is employed against vulnerable people who are \textit{hors de combat} or that cruel and barbaric means are applied during combat. In case of terrorism these prohibited methods and means of warfare and the targeting of non-combatants coincide, as terrorism implies by definition the attack on civilians with the intent to create widespread fear. The \textit{dolus specialis} – intimidation or terrorization of the general public – is sometimes considered to be problematic from a criminal law perspective, in view of its emphasis on subjective intentions.\textsuperscript{75} But if we accept that this special intent can be deduced in retrospect from the objective situation, rather than that it should serve as a tool to widen the net of

\textsuperscript{71} Ibid., at 155: ‘The lack of an accepted common definition of terrorism that could become the basis to create a comprehensive international legal regime to combat terrorism is more an excuse than a legitimate impediment’

\textsuperscript{72} Ibid., at 142

\textsuperscript{73} In this context it is interesting to refer to the reservation of the United Kingdom to Article 1(4) and Article 96(3) of Additional Protocol I: ‘It is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.’

\textsuperscript{74} One of the pioneers is R. David, ‘Le terrorisme en droit international (definition, incrimination, repression)’, in: P. Mertens (ed.) \textit{Réflexions sur la définition et la répression du terrorisme}, Brussel 1974, 125. See also M. Sassoli, Terrorism and War, \textit{4 Journal of International Criminal Justice} (2006), 979 who correctly points out that the strict separation between the \textit{ius ad bellum} and the \textit{ius in bello} serves as an adequate rebuttal of those who always advance the just cause of ‘freedom fighters’ as an alibi to engage in terrorism.

criminal law repression by prematurely imputing bad intentions to would-be terrorists, these objections can partially be obviated. 76

According to the Special Tribunal for Lebanon, the political motive is not a necessary element of terrorism under customary international law. Slightly inconsistent with this view, the STL still acknowledged that the purpose of terrorist acts could either be spreading terror among the population or compelling a government or an international organization to perform or abstain from performing an act. After all, while blackmailing a government with the threat of a terrorist attack for purely financial gains is certainly feasible, pressure on public officials is mainly exercised in order that they change their policy. We would be in favour of deleting the second prong of the terrorist’s presumed objective – compelling a government to perform or abstain from performing an act – in the definition of terrorism as a separate crime under the jurisdiction of the ICC. In our opinion, the protection of civilians and other vulnerable groups from heinous crimes is the main object and purpose of the ICC, in view of the Preamble to the Rome Statute. Moreover, such a lean definition of terrorism would immunize the ICC from taking sides in internal political strife. The fact that the Statute’s definition would deviate from the one under customary international law would not constitute an impediment, as Article 10 of the Rome Statute explicitly allows the ICC to stray from international law. 77

A similar line of reasoning could be followed in the assessment of the question whether terrorist acts must have a transnational element in order to qualify as an international crime under the jurisdiction of the ICC. As indicated earlier, the Appeals Chamber of the Special Tribunal for Lebanon considered the transnational nature of a terrorist act to be a prerequisite for its entering the realm of customary international law. The analogy with war crimes committed in the context of a non-international armed conflict militates, however, against such a restriction. It would make no sense to acknowledge the suffering of civilians from war crimes in civil war and the concomitant interest of the international community in their repression, while denying such commitment in the case of ‘domestic terrorism’. 78

Perhaps the most difficult issue is whether and if so, to what extent, the ICC should only have jurisdiction over terrorist acts if they are committed by an organization. Di Filippo defends this position, holding that ‘where people perceive the presence of a group behind

76 In a similar vein, Di Filippo, footnote 33, 544: ‘The intention of spreading terror should mainly be inferred from the material features of the conduct: experience shows that, when civilians are hit in the normal course of their everyday affairs in an indiscriminate and possibly massive way, we can speak of terrorist activities, due to the fact that individuals feel insecure about their lives and basic rights.’
77 Article 10 Rome Statute provides that ‘nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for other purposes than this Statute.’
78 For a similar point of view, see Di Filippo, footnote 33, 548: ‘Moreover, the emphasis put on the safeguarding of individuals’ essential rights indicates that the adherence of the international community to this notion is not subject to aspects such as the transnational nature of the conduct.: a particularly serious violation of human rights is of common concern for the international community even though it occurs in a context which is ‘purely’ internal to a single state.’
acts of violence and the probability of the repetition of similar acts, the spread of terror is more evident, if compared with the action of an isolated agent’. While this reasoning has some merit in view of the psychology of terrorism, its factual correctness cannot be easily ascertained. A stronger argument in favour of some organizational requirement would in our view be that national jurisdictions would generally find more difficulty in repressing terrorist organizations by means of criminal law than single perpetrators. Obviously, we would defeat our previous position that terrorism cannot be equated with crimes against humanity, if we were to attach exaggerated requirements to the level of organization. An adequate standard might be the definition of ‘organized criminal group’ in the United Nations Convention against Transnational Crime.

The presentation of the ICC as a default option in case of failing national jurisdictions comports with our general perception that terrorism not only in a phenomenological sense but also from a criminal law enforcement point of view bears strong resemblance to the classic ‘core crimes’. It is too easily assumed that national states are usually both willing and able to prosecute and try the suspects of terrorism. In our view, that opinion has to be qualified and nuanced.

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79 Di Filippo, footnote 33, 545.
80 Palermo, 15 November 2000. Article 2, sub a of that Convention defines “Organized criminal group” as a ‘structured group of three or more persons. Existing for a period of time and acting with the aim of committing one or more serious crimes or offences established in accordance with this Convention (…)’