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# Assessing the Jurisdiction of the International Criminal Court Statute in the Criminalization of Terrorism

***Peyman Namamian***

*Assistant Professor of Law Department Arak University, Iran*



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***ABSTRACT***

*International Criminal Court (ICC) has no jurisdiction over the crimes of Terrorism. Initially, combating Terrorism served as the motivation for creating an ICC. In 1937, under the auspices of the League of Nations, an international convention against Terrorism and an annexed statute of the ICC were drafted. Neither of these documents entered into force. Contemporary international criminal law, however, focuses on the prosecution and punishment of crimes committed in connection to large-scale armed conflicts. The only solution to eradicate Terrorism is the consensus of the governments in a comprehensive document on the definition, examples, exceptions and criminal mechanisms in the fight against Terrorism. Until then, we cannot expect international criminal law to fight Terrorism well, and we will witness an increase in the number of victims of this sinister phenomenon. However, Rome Statute has gone into action, and the court will begin its activity toward achieving the goals; there is no way to return.*

## Introduction

Over the last decade, Terrorism has changed and expanded into an international phenomenon, requiring stricter measures and greater international cooperation. Despite greater international cooperation, Terrorism and terrorist groups are still flourishing. Terrorism, as an expanding global phenomenon, needs an international response, but such a response can only be reached if clear measures are taken at the national level. At the same time, issues at the global level differ from those at the national level, rendering some national laws inapplicable. While international law cannot entirely resolve the problem, having a universal definition could set up a

framework to fight terrorists and avoid abuses (Defossez, 2021: 1-2).

Although Terrorism is still seen in its traditional forms, due to the changes and developments in the contemporary world, it has become a global phenomenon; no country is immune from Terrorism's effects and consequences in today's world. In the first five years after the 9/11 attacks, the US unilaterally opted for counter-terrorism strategies based on the use of military force, repression, and crime control policy. In addition to the US, in many other countries, the limited counter-terrorism strategy has gradually moved towards a broader approach to combating violent extremism, even though greater emphasis and priority are on prevention and expression. Furthermore, counter-terrorism measures are taken to repress and eradicate the extremists.[1] Terrorism is a phenomenon that links to crime and abuse of power because it violates the human rights of those who suffer harm as a result of crime and abuse of power. Crime and abuse of power could be described as the breach of fundamental rights and the denial or prejudice of these rights (Fotouhi, Rayejian Asli, Moazenzadegan, 2022: 168).

Terrorist crimes are one of the most heinous crimes, practically extremely ruthless. At the same time, enforcement of national law regulations, which exist through international cooperation to combat Terrorism, is not satisfactory in the current situation. At Rome Conference, some countries advocated the extension of court jurisdiction to this crime. Some countries like Algeria, India, Sri Lanka and Turkey were interested in Terrorism being provided for under the statute as one of the crimes against humanity. However, the fact that Terrorism eventually was not included in the statute led Turkey and Sri Lanka not to participate in voting for adopting the statute.

However, one of the major reasons why Terrorism was not included in the statute was the government's concern about the court activity being politicized. Although Arab League disagreed with including Terrorism in the statute on the basis of the fact that the international community failed to define Terrorism in a publically acceptable way, the Rome statute established no particular stratagem to encounter terrorist crimes despite the fact that all nations suffer it and, traditionally, to

[1] See, for example, at global level: The United Nations' Office of Counter Terrorism, n.d.; See also: Tajbakhsh (2010); and at regional level: European Commission (2019)

create a proper mechanism to encounter and suppress such crimes has been one of the right ideals of the international criminal court should not cooperate with domestic courts in relation to encountering such crimes. Considering the expansion of changes and challenges increasingly facing international order, it is felt that an extension of the court jurisdiction is necessary to cover terrorist crimes.

For the past 30 years, one of the key questions of combating international Terrorism has been formulating general legal definitions in the universal international treaty. Nowadays international legal basis for the system of international counterterrorism cooperation consists of wide range of international legal documents. Currently, there are 52 instruments pertaining to Terrorism. 19 of them are universal1 and 33 are regional2 (United Nations, General Assembly, 2018). Each of them deals with specific criminal conduct rather than a general notion of "terrorism". Most are penal in nature with a common format. Legal regulation was predetermined by eruption of terror in the middle of 20th century and new threats, that's why most counterterrorism international treaties were aimed at combating previously unknown types of Terrorism. For example, hijacking civil aircrafts as a crime appeared in the late 1960s. Treaties of late 20s and early 21st century contained references to be bound by earlier treaties, especially within the framework of the UN, along with the criminalization of new forms of Terrorism (Alizade, 2021: 1-2; See: Hani Randhawa, 2022).

Terrorist crimes, including sixteen international conventions under the supervision of the United Nations and their protocols related to terrorist acts, are undoubtedly a part of international criminal law in its broadest sense. Because these crimes have a political dimension, they are similar to very important international crimes, i.e. the main crimes. In all these crimes, like terrorist crimes, the identity of the victim is not taken into account, but the victim is made because he is a member of a moral, political, national or religious group. In terrorist crimes, the victim is the second target and may even be chosen randomly, and the main target is the government or an organization that the victim is often associated with by being in a public place (Farhadnia and Hanjani, 2020: 9).

**1. Terrorism**

Since the early 1960s, a major part of physical behaviors constituting terrorist acts

has been criminalized through approval of regional anti-terrorism treaties on the basis of which some terrorist acts are classified like other international crimes including war crimes, crimes against humanity, genocide and torment as long as *actus reus* exist. This is the case, since early of 1970s, international community has announced its dissatisfaction or disapproval of terrorist acts, providing some reasons (Llobet Anglí, Cancio Meliá and Walker, 2022: 16-17).

Therefore, U.N. has issued numerous declarations, resolutions and reports in order to forbid and suppress Terrorism. As it is clear from several instruments prepared by different departments of U.N., this organization has assumed leading role for fighting Terrorism. In addition, regional and supra regional organizations and meetings have taken some steps to encounter and suppress Terrorism, leading to preparation, formulation, ratification and publication of various instruments (Koosha and Namamian, 2008: 243-248).

In September 8th, 2006, General Assembly of U.N. adopted "world anti-terrorism strategy" among aims of which is to introduce various anti-terrorism activities of U.N. as a common framework.[2]

On the basis of objectives of current study of terrorism definition, one of the most important dimensions of U.N. activities is that of General Assembly ad hoc committee on preparation and formulation of Draft comprehensive convention on Encountering International[3] Terrorism.[4]

It seems that topical approach of regional treaties had the best effects in the past. Regional anti-terrorism treaties and domestic laws are shaped by regional or internal needs. Their aim is to coordinate and strengthen cooperation between the nations involved (Bantekaset, 2001: 23-24). To define Terrorism, nations act based on their own perception of this term and do not have to pay attention to other values. This, apparently, facilitates enacting and approving laws. However, the topical approach seems to be really useful in that it

[2] A/RES/60/288; 2006, available at http://www.un.org/terrorism/ strategy-counterterrorism.html.

[3] UN Ad Hoc Committee on Terrorism, *Draft International Comprehensive Convention on International Terrorism*, in Annexes to the Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, UN GAOR, 57th sess, Supp no 37, UN Doc A/57/37; 2002.

[4] The Ad Hoc Committee was established in 1996 by UN General Assembly Resolution 51/210 of 17 December 1996.

ensures international collaboration and relative consensus of international community on encountering Terrorism.

However, these two plans will not be so appropriate for future implications of enforcing international regulations for terrorist crimes (Di Filippo, 2008: 544).

On the one hand, past experiences have proved. Terrorism is an ever-changing subject. Terrorists find new targets and methods to put attacks into effect. Therefore, topical approach is so slow that it can't include such changes. Instead of reacting and encountering, the international community must be capable of acting on the basis of an existing plan. Defining Terrorism must be put on the top of the agenda and be the first step toward reducing or eradicating Terrorism successfully.

Although it is completely clear that governments have not reached an agreement on defining Terrorism as an independent crime, it is considered that there is no penal reaction to Terrorism as an independent crime according to general international law (Kebede Bekele, 2021: 44-45). Also, it seems that penal reaction to Terrorism as a potentially independent crime contradicts two important components of principle of legality of crime and its punishment, that is, "barred ex-post facto legislation" and "specification" which provide that laws imposing penal reaction should be specified as much as possible so that a potential offender be informed of respective *mens rea* and *actus reus* (Article 22 of International Criminal Court Statute). Although the specification principle is not absolutely applicable to international criminal law, it seems that denial of its applicability, or, indeed, application of barred ex-post facto legislation to terrorism concept as an independent crime, is not justified for two reasons:

1. There is no agreed definition of Terrorism as a potentially independent crime since subjective and objective elements of the crime are ambiguous and not clarified by law science or by international criminal court statute.

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

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

**2. International Criminal Court**

Although at present, international criminal court does not enjoy jurisdiction to deal with Terrorism, it does not mean it has no jurisdiction over perpetrators of terrorist crimes. If a terrorist act can fall into the framework of definition of crimes against humanity set forth in Article 7 of international criminal court statute, and it is a crime over which the court has specific jurisdiction indirectly, it implies that international criminal court enjoys jurisdiction over Terrorism. Thus, it is necessary to make efforts to determine the court jurisdiction in this sense in that no act is a crime and no punishment is imposed on it unless under the rule of law according to one of fundamental rules of international law known as the principle of legality of crimes and punishments.

But, in this connection, what has been attempted is the existence of well-documented reasons for rejecting framework of crimes against humanity is not similar to previous ones.

While some of its dimensions are interpreted more narrowly, its other aspects are more extensive. Article 7(1) of the court statute considers widespread or organized attacks which take place against civilian populations and with knowledge of that. Such an attack is described by Article 7 (2) (a) as follows: "an act involving committing several acts from those mentioned in 1st clause (like murder, genocide, slavery, torment, etc) against any civilian population which takes place to pursue or advance the policy of a government or an organization to put such an attack into effect. The criminal (a terrorist) must know that his act is a part of a widespread or organized attack (Murphy, 2019: 112-114).

This relationship between a single act and a widespread attack is the main element converting a simple delict into one of the gravest crimes (Robinson, 2002: 52). So the offender must be aware of this central and essential relationship. As stated earlier, Article 7 (2) (a) refers to the possibility for crimes against humanity to occur within an extensive and organized context (Mullins, 2016: 83). International common law developed with regard to this approach,

nowadays, including nongovernmental actors like terrorist organization (Bassiouni, 1999: 24). Presently, this group of offenders is expanding to cover terrorist organizations and, in this sense, 11 September attacks can be considered among crimes against humanity, theoretically. It was not the first time that al-Qaeda attacked the United States of America facilities; and there are many reasons and causes in order to place 11 September within previous context of al-Qaeda attacks. Nevertheless, it appears that Article 7 is not a suitable plan for bringing terrorist to justice.

**A. Reasons for rejecting Terrorism in Article 7**

Based on analyses provided, it can be concluded that by interpreting Article 7 of the court statute literally, Terrorism can be regarded among crimes against humanity attaining all aspects, and those who commit it can be prosecuted, but, as stated earlier, there are well-documented reasons why Terrorism is not accepted in the form of Article 7.

So following points are notable in the direction of evaluating the reasons for rejecting Terrorism in Article 7 of the court statute:

1. history of preparing and formulating the court draft statute shows that prior to the 1998 Rome Diplomats Conference, any efforts to include Terrorism within the jurisdiction of international criminal court was limited to the attribution of Terrorism as an independent crime (or by defining particular terrorism manifestations or by defining Terrorism as a potentially independent crime and particular terrorism manifestations simultaneously), distinct from any suggestions to put it within crimes against humanity.

2. In 1997, Rome Diplomats Conference recommended through a resolution that a Review Conference study crime of Terrorism specifically with respect to the list of crimes established within the framework of jurisdiction of international criminal court: this arguably showed that terrorist acts should not included in the Court statute (Schabas, 2003: 931-932).

3. In general, an acceptable approach to formulating the Court statute is that it should contain previous rules of international common law. If terrorist acts were included among crimes against humanity based on international common law, then it would be reasonably included in Article 7 as a crime against humanity strictly.

4. If it were determined that Terrorism be included in Article 7, perpetrators of such acts could arguably rely on this reasoning that the principle of legality of crimes and punishments would be violated.

5. One special feature of Terrorism is an intention to spread terror and fear or to, intimidate a population or to force a government and one or an organization to do an act (commission) or not to do (omission). If Terrorism were to be encountered under Article 7, no specific report on this feature could be obtained. Moreover, Article 7 does not separate Terrorism from fighting for national liberation and self-determination.

**B. Jugement obstacles**

***a. Juridiction obstacles***

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

Therefore, the Court considers some jurisdiction obstacles while addressing Terrorism: first, the Court only has jurisdiction over those crimes committed after the statute become binding. For a nation becoming a member after the statute became binding, the Court is authorized to address the crimes committed on that nation after the Court statute became binding unless that nation has issued a declaration according to Article 12, clause 3 of the Court statute; and second, as stated earlier, a particular terrorist element needs to meet criteria a crime against humanity meets, indeed, it needs to be in the realm of one or more crime defined as crimes against humanity (Margarita, 2018: 29-31).

***b. Complementarities obstacles***

The Court jurisdiction complements national criminal jurisdiction. So the Court would not address a terrorist act which can be investigated or tried by a state having jurisdiction over it. Having reasonable evidence to initiate investigation, prosecutor is required to inform all member states as well as the states that naturally are qualified to address the involved crimes of that investigation. However, existing complementary regulations raise this question “under which conditions would the Court exercise its jurisdiction over terrorism if the governments who tend to refer the case to the Court or who are member of it, in fact, are those governments willing to try terrorists inside their own country?” A real scenario is the situation of a terrorist-supporting state to which the terrorists' trial can’t be relegated. An example is the

Lockerby case related to the trial of two Libyan nationals for bombing Pan-American flight 103 on 21 December 1988 who, were supported by Libyan government. Libya did not extradite suspects to the United State or England to be prosecuted; on the contrary, it announced that it would try the accused in its own national courts (See: Braber, 2017: 79-83).

### 3. Terrorism and ICC Statute Recommendations for improvement

In fact, there are several anti-terrorism treaties presently which should provide the bed to formulate an article relating to terrorist crimes. Some unique representatives of the preliminary committee on Review Conference Team Work disagreed with including crimes based on the treaty because of concerns about extension of the international criminal court's jurisdiction (McConville, 2000: 234). They claimed that universal adoption of statute would be possibly endangered because the Court has limited financial and staff resources.

But this concern seems to be irrelevant since the Court would exercise its jurisdiction, based on complementary jurisdiction principle, only when a state would not do this genuinely and truly.

Some governments, of course, claim that existing treaties performance would be disrupted in the case that jurisdiction over terrorist acts is given to international criminal court. But this reasoning is not persuasive. The international criminal court would not withdraw its jurisdiction in situations where the states pass judgment, whether based on a treaty or otherwise, properly (Sanyal, 2015: 18).

However, it is possible to include many existing treaties in the Court statute. However, two conventions titled "Tokyo Convention" and "Convention on Marking Plastic Explosives for the Purpose of Later Detection" seems not to be suitable for being included in the statute.

This is because Tokyo Convention forbids acts threatening the safety of aircraft, or people and property on board and/or endangering order and discipline within the organization. This convention was not merely adapted to encounter terrorist acts aimed at national aviation, rather it is regarded a manifestation of common law (Bantekaset, 2001: 234). In particular, items included in Article 11 clearly reflect this convention unfitness in terms of judgment since it calls for states to take necessary and appropriate actions to restore control over

hijacked planes; thus, Article 11 isn't a regulation but an advisory view in the form of an article related to cooperation and collaboration between states.

In addition, today, illegal aircraft seizure is covered by a separate convention adopted in order to fill broad gaps of Tokyo convention, which is not qualified to be included in Rome Statute because of exiting drawbacks and faults.

Also, convention on Marking of Plastic Explosives for the Purpose of Later Detection should not be included in international criminal court statute since it addresses member states and contains only a series of assisting and advisory item. But convention on physical protection of Nuclear Material, entered into force on 8 February 1987, has a two-fold objective. This convention sets the level of physical protection for nuclear material in international transit (articles 3-6) and provides measures against illegal acts involving nuclear material with internal use, storage, or international / national transit (article 7).

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

However, the article related to terrorist crimes can cover international treaties presently being in effect such as convention on offences and certain other acts committed on Aircraft Board (14 September 1963); convention for the suppression of unlawful seizure of Aircraft (16 December 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971); Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation (24 February 1988); Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation (10 Mars 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental shelf (10 Mars 1988); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (14 December 1973); International Convention against Taking Hostages (17 December 1979); Convention on Physical Protection of

Nuclear Material (3 Mars 1980); Convention of Marking Plastic Explosives for the Purpose of Later Detection (1 Mars 1991); International Convention for the Suppression of Terrorist Bombings (15 December 1997); International Convention for the Suppression of Financing Terrorism (9 December 1999); International Convention for the Suppression of Acts of Nuclear Terrorism (13 April 2005); Draft comprehensive convention against international Terrorism (2002); Beijing Convention on the Suppression of Unlawful Actions against Civil Aviation Additional (10 September 2010); Protocol to the Beijing Convention on Unlawful Seizure of Aircraft Additional(10 September 2010); Protocol to the Convention on Crimes and Other Acts Committed in Aircraft (4 April 2014).

Majority of these conventions were established earlier within preliminary committee draft (Robinson, 2002: 24). Since the proposal of this bill in 1997, two new international anti-terrorism conventions titled "International Convention for Suppression of Terrorist Bombings" and "International Convention for the Suppression of Financing Terrorism" took effect and, in this direction, criminalized fundamental and wide spread terrorist activities and played a major role in reducing Terrorism. So it seems that both treaties should be included in the form of an article to encounter terrorist crimes.

Since Terrorism has been an ever-developing problem, it is likely new treaties to be placed on future agendas of governments and international organizations. In this sense, a treaty titled "International Convention for the Suppression of Acts of Nuclear Terrorism" was approved by General Assembly of U.N in 2005 and became binding on 7 July 2007. This treaty is the 13th instrument which has been already approved regarding confronting Terrorism.

Recent convention has taken the global approach taken in many previous anti-terrorism treaties into account and criminalized committing acts related to the convention subject. However even if international community has no success in achieving an agreed definition of Terrorism prior to Review Conference, it should at least include international anti-terrorism conventions, which relate to terrorist crimes, under a separate regulation in the statute. There exists no reason for not including existing treaties. These conventions reflect agreement among states and contain earlier

definitions of crimes so there is no need to make additional improvements (Kleczkowska, 2019: 37-39).

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

In 2010, Rome Statue Review Conference has been held for 10 days hosted by Kampala, Uganda.[5] During this period of time, the Conference dealt with issues challenging international system not included in the Court jurisdiction previously. As the basis for holding the Conference, issues under debate included such subjects as "definition of crime of aggression" (Seibert-Fohr, 2008: 93-94), "Review of Article 124 of the Statute", and "Review of Article 8 of the Statute regarding the use of mass destruction weapons in non-international armed conflicts". This is the case while, unfortunately, the definition of Terrorism was not accepted again due to disagreement among participating states over Terrorism in terms of outlining the subject at Review Conference.

As considered earlier, however, the Court has no jurisdiction over terrorist crimes. Moreover, the Court jurisdiction is limited to the gravest crimes concerning international community as a whole. So, even if a terrorist attack is regarded as a crime against humanity or is performed in conjunction with an armed conflict and regarded as a war crime, it does not necessarily mean that it falls into the Court statute (Rausch, 2015: 63-64).

But a considerable point is that tens of international and regional acts have been already approved by international community in determining crimes and punishments among which the lack of a perfect and proper treaty is apparent generally due to unwillingness of international superpowers to implement them. In particular, this incompetency has been visible in executing decisions of tribunals like international criminal court for former Yugoslavia.[6]

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

[6] https://www.worldpoliticsreview.com/the-international-legacy-of-the-yugoslav-war-crimes-tribunal/

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

**Conclusion**

Notwithstanding the emphasis placed on the need for concerted international action to confront the problem of Terrorism, positive international law is far from treating the issue of defining the criminal notion of Terrorism coherently.

Apparently, it is important to amend the Court Statute through an article related to terrorist crimes. So it can be claimed that the Court Statute suffers some drawbacks in terms of terrorist crimes criminalization. It must be kept in mind that Terrorism is a distinct subject, which is not qualified to have a separate trial by itself.

Therefore, the Court should not accuse terrorists of current crimes like crimes against humanity or war crimes (Thynne, 2021: 245). As stated earlier, not all terrorist acts enjoy threshold above crimes against humanity. As a result, certain terrorists can escape the Court jurisdiction despite graveness and horror of their acts pursued by international community.

In addition, any terrorist crimes, whether hijacking or bombing, is disgusting and repugnant regardless the number of its victims, of course, it is argued that financing terrorist acts and giving safe heavens to terrorists are as repugnant as terrorist crimes. Without financial support, terrorist attacks can't be performed from the beginning since all these activities have a very close relationship which must be understood. However, it is harmful for the Court to separate terrorist acts trials and to accuse terrorists of existing crimes. Therefore, the Court Statute should be amended to include an article related to terrorist acts.

At present, the court is the only international institution capable of filling the existing gap, which is considered a favorable instrument in fighting Terrorism through safeguarding justice and even preventing future terrorist

acts from being committed. International community sends a highly clear message to terrorist groups all over the world, saying their acts are forbidden internationally and lead to an international trial by one court which only prosecutes the gravest crimes pursued by international community. In fact, the Court has not proved its successful competency, not enjoying very essential support from nations. However, Rome Statute has gone into action and the court will begin its activity toward achieving the goals; and there is no way to return.

Terrorism as an international crime does not have been defined yet and states supported perspective dominated on it in the past. But with expansion of Terrorism, getting transnational aspect and more independence from states, international community seeks to fight against this phenomenon in the context of international criminal law. Some writers believe international community is somewhat unable to fight against it because of the lack of terrorism definition. Even though, there is this idea that international criminal law largely has fought against terror in the context of sixteen conventions against Terrorism and statute of international criminal court. But, actually, these criminalization are limited and there is no comprehensive solution for solving terrorism problem basically.

## CONFLICT OF INTEREST

The author (s) declares that there is no conflict of interest regarding the publication of this manuscript. In addition, the ethical issues, including plagiarism, informed consent, misconduct, data fabrication and/or falsification, double publication and/or submission, and redundancy, have been completely observed by the authors.

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