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TORTURING THE ROME STATUTE: THE ATTEMPT TO BRING GUANTANAMO'S DETAINEES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

Eric Bales

I. INTRODUCTION*

On the campaign trail, Barack Obama promised to transfer detainees at Guantanamo Bay into the United States and around the world\(^1\) as an alternative to prosecution by military commission.\(^2\) As President-elect, Barack Obama cautioned the American public against a rushed and haphazard resolution,\(^3\) but anticipation mounted that he would begin dismantling the detention facilities within his first week.\(^4\) By his third day in office President Obama instituted the imminent closure of the detention facilities.\(^5\) This move was motivated in part

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5. Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST, Jan. 21, 2009, at A2; see also Ed Henry & Barbara Starr, *Obama Plans Executive Order to Close*
by reports from an outgoing official of the Bush administration that at least one detainee had been tortured. Once it was confirmed that some of the detainees would be brought to the United States and that a number of former detainees were returning to the jihad, public enthusiasm waned. So much so, President Obama has opted to revise the Bush-era military commission system for prosecuting detainees rather than reject the commissions.

Some suggest the United States ("U.S.") can divest itself of the politically troublesome issue by transferring the detainees to the International Criminal Court ("ICC") for prosecution. That suggestion is a tortured reading of the Rome Statute and a legal impossibility for several reasons. First, the ICC does not have subject matter jurisdiction over terrorism. Second, the ICC precludes expanding its subject matter jurisdiction by analogy. Third, only qualifying crimes occurring after July 1, 2002 can be brought before the ICC, prohibiting many of the detainees from appearing before the ICC. Fourth, the U.S. is not a state party to the Rome Statute that established the ICC. Fifth, domestic law in

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11. Press Release, U.N. Dept. of Pub. Information, International Criminal Court Fact Sheet (Dec. 2002), available at http://www.un.org/News/facts/iccfact.htm (noting “In Rome, there was significant interest in including terrorism . . . but it was decided not to do so. . . . At a future review conference, if the States Parties so decide, the crime of terrorism could be added to the Court’s jurisdiction.”); see also Mira Banchik, The International Criminal Court and Terrorism, 3 J. OF PEACE, CONFLICT & DEV. 18 (2003).


the U.S. expressly forbids cooperation with the ICC. Finally, the U.S. entered into over 100 bilateral non-cooperation agreements with members of the international community to curtail any exercise of jurisdiction by the ICC.16

Even if the Review Conference of the Rome Statute revisits the issue of terrorism and makes it an ICC core crime, this cannot overcome the fact that the U.S. has yet to ratify the Rome Statute and U.S. domestic law expressly bars participation in, or cooperation with, the ICC. Likewise, even if the United States repeals its codified non-cooperation with the ICC, under the principal of complementarity in the Rome Statute the ICC will not exercise jurisdiction unless the United States cannot or will not prosecute a core crime under its own national law.18 At the heart of this institutionalized non-cooperation with the ICC, at least in the context of the global war on terrorism, is the fundamental disagreement on what is “terrorism.”

Part II of this Article surveys the oft-failed quest for a definition of “terrorism.” Measuring past attempts, a synthesized definition is proposed that draws on the common ground of these otherwise divergent views. The formation of the ICC is discussed in Part III while Part IV takes up the non-inclusion of terrorism as a “core crime” of the ICC.19 Also discussed in Part IV is the attempt by some to shoe-horn terrorism into the ICC’s subject matter jurisdiction as a crime against humanity; while creative, the argument is not sustainable. Part V closes out the Article with a brief review of the American Service-members’ Protection Act of 2002 (“ASPA”) and the “Article 98 agreements” that diminish the capacity of the ICC to fulfill its mandate. The Article concludes that unless and until the Review Conference amends the

18. Rome Statute, supra note 12, art. 1.
20. INT’L CRIM. CT., supra note 17.
Rome Statute to include terrorism as an ICC core crime\textsuperscript{21} and the U.S. removes the obstacles it laid in the path of the ICC, there is no super-national body with jurisdiction to which the United States can pass off its legal burdens.

II. THE PROBLEM WITH DEFINITIONS

A continuing obstacle to international cooperation in the prosecution of terrorism is the fundamental disagreement on what is "terrorism."\textsuperscript{22} The United Nations ("U.N."\textsuperscript{23}) has yet to reach a consensus, which is often attributed to the "politically charged nature of terrorist activity" and disagreement on whether there should be an exemption for "national liberation movements."\textsuperscript{23} As it stands, the U.N. has yet to proffer an official definition of terrorism and has been equally unwilling to designate the systematic attacks of groups like Al Qaida as "acts of war" or part of an "international armed conflict."\textsuperscript{24}

A. The United Nations Draft Definition

In all fairness, in 2001, negotiations within the U.N. over the draft Comprehensive Convention on Terrorism produced a tentative definition for terrorism.\textsuperscript{25} An improvement over past stalemates, the draft definition nevertheless rings hollow because it clings to the continued disagreement over whether terrorism includes violence against civilians and whether or not to exempt "freedom fighters."\textsuperscript{26} Given the divergent perspectives of U.N. member states, it is unlikely these disagreements will soon be resolved.\textsuperscript{27} Still, the aspects upon which U.N. measures agree provide a starting point. Thankfully, most member states have a strong understanding of what constitutes terrorism.


\textsuperscript{24} Jackson N. Maogoto, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror 184 (2005) (noting adherence by some U.N. members to use of terrorism; see also Handbook of Humanitarian Law in Armed Conflicts 49 (Dieter Fleck ed., 1995) (defining act of war).


\textsuperscript{26} Id. at 130.

\textsuperscript{27} After the murder of Israeli athletes at the 1972 Olympics, the Secretary General of the U.N. added prevention of terrorism to the General Assembly's agenda; a firestorm of debate followed, making it clear that many states regard terrorism as a legitimate option. Maogoto, supra note 24, at 184–85.
and have formed a strong consensus, aligning against specific manifestations of terrorism.\textsuperscript{28}

\textbf{B. Emerging Trend in International Perspectives}

There are three barometers for measuring contemporary international perspectives on a terrorism definition. Two of them, ironically, rest with the U.N. nomenclature. Those barometers are: treaty law (promulgated primarily through the U.N.), Security Council resolutions, and scholarly commentaries on international law.\textsuperscript{29}

1. Treaty Law

Treaties among the international community tend to illuminate prevailing opinions on any given subject. The League of Nations, the precursor to the U.N., put forth one of the first concerted efforts to define “terrorism” in treaty law, opining it to be those “criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”\textsuperscript{30} Though the League of Nations failed to achieve ratification of this definition, the U.N. has fielded several on-point treaties that largely incorporate the League of Nations template.\textsuperscript{31} For all these initiatives, however, the U.N. has never officially and unequivocally defined terrorism.\textsuperscript{32} Instead, the U.N. response has been reactive, adopting measures that encourage member states to prohibit specific acts in their own municipal laws.\textsuperscript{33}

The closest a U.N. treaty has come to defining terrorism was the General Assembly’s adoption of the International Convention for the Suppression of the Financing of Terrorism.\textsuperscript{34} The Convention identifies a covered offense as “act[s] intend[ing] to cause death or serious bodily injury to a civilian . . . when the purpose of such act, by its nature or context, is to intimidate a population, or
to compel a Government or an international organization to do or abstain from doing any act."\(^{35}\) This is excellent progress, but the Convention does not create an international crime of terrorism, let alone an international tribunal with appropriate jurisdiction. The General Assembly has, at least, rejected the "political acts" defense of terrorism.\(^{36}\) However terrorism is defined in the eyes of the General Assembly, we now have a sense of what it is not.

2. United Nations Security Council Resolutions

Another indicator of international sentiment is the abundance of Security Council resolutions. The Security Council has adopted numerous resolutions condemning specific manifestations of terrorism—but has not defined terrorism. Examples include Resolutions 635, 731, 1368 and 1373.\(^{37}\) Resolution 635 calls for international cooperation in preventing terrorist use of plastic explosives.\(^{38}\) Resolution 731 describes the downing of Pan Am Flight No. 103 over Lockerbie, Scotland as a "terrorist attack."\(^{39}\) Resolutions 1368 and 1373 describe the events of September 11 as "terrorism."\(^{40}\) The attacks in Mumbai, though not rating a resolution, were condemned by way of a press release.\(^{41}\) Though the Security Council has not provided the world with a working definition, its resolutions at least provide a sense of what terrorism looks like in the eyes of the U.N.

3. Scholastic Commentaries

There are many views in academia that populate the field with potential definitions of terrorism. These legal commentaries are no less diverse than the makeup of the international community itself. Representative examples of the divergence found among legal commentators include:

Lyal S. Sunga, Senior Lecturer, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden—

[A]cts of terror frequently involve the premeditated use or threat of violence calculated to create a climate of fear with a view to provoking the [g]overnment


\(^{37}\) Martinez, supra note 29, at 7–8.


into overreaction, or to intimidate the [g]overnment or a section of the population into changing a particular policy or course of action.  

Alex P. Schmid, Chair of International Relations, St. Andrews University, Scotland—

Terrorism is a method of combat in which random or symbolic victims serve as an instrumental target of violence .... Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear (terror) .... The victimization ... is considered extranormal by most observers ... on the basis of its atrocity, the time (e.g. peacetime) or place (not a battlefield) of victimization, or the disregard for rules of combat accepted in conventional warfare. ...  

Michael J. Kelly, Assistant Professor of Law, Creighton University, United States of America—

"Terrorism" may be defined as the commission of various violent illegal "acts, which physically or mentally harm the well being of an individual or group of people with the aims of promoting of a political or religious ideology."  

Though these efforts at a definition among academia are as varied as the state-sponsored attempts, common elements can nevertheless be discerned.

C. Synthesized Definition of Terrorism

The consistent stumbling block for a common definition of terrorism is summed up best by the hackneyed adage, "one man's terrorist is another man's freedom fighter." This is underscored by two items that often ensnare any attempt to define terrorism: "the targeting of civilians and the existence of an ideological or political purpose" to the violence. The former evokes significant debate on the distinction between lawful and unlawful combatants. That is, whether protections should be granted to those who violate the Geneva Conventions' definition of a lawful combatant. The latter element, motive,

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42. Sunga, supra note 23, at 191.
45. Thomas H. Mitchell, Defining the Problem, in Democratic Responses to International Terrorism 9 (David A. Charters ed., 1991); see also M. Cherif Bassiouni, Legal Control of International Terrorism: A Policy-Oriented Assessment, 43 Harv. Int'l L.J. 83, 101 (2002) (noting the phrase to be, "What is terrorism to some is heroism to others . . . .")
46. Proulx, supra note 22, at 1034.
moves beyond the *mens rea* normally focused upon in criminal prosecutions by trying to understand the purpose of the act.  

Still, a synthesized definition drawing on the parallel threads of each is possible. As introduced by Susan Tiefenbrun, five common elements can be drawn from the emerging consensus against terrorism. The first element is the use or threat of violence. Second, the violence (proposed or actual) is indiscriminate in that the targets are not the chief end. Third, the targeting of civilians is intentional. Fourth, the purpose of the violence is coercion. Fifth, the coercion is aimed to compel or dissuade a particular act. Adopting these five elements to inform our discussion, this Article now turns to international attempts to respond to terrorism as a criminal act.

### III. INTERNATIONAL CRIMINAL COURT: A WORK IN PROGRESS SINCE 1919

Established on July 1, 2002, the ICC realized the long-standing goal of the international community to form a standing court that built upon the momentum of the tribunals of Nuremberg, Yugoslavia and Rwanda by establishing a permanent forum to prosecute genocide, crimes against humanity and war crimes. While the ICC enjoys broad jurisdiction, it does not possess universal jurisdiction. Its jurisdiction is limited to the most serious offenses ("core crimes") occurring within the territory of a state party, committed by a

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
citizen of a state party or where a state is not party to the Rome Statute but grants ad hoc jurisdiction to the ICC.  

A. Historical Background

For perhaps the first time, prosecution of individuals for war crimes was proposed following World War I at the Paris Peace Conference of 1919. This was rejected because the prevailing view was that compliance with the laws of war was the responsibility of the State, not individuals. The U.S. rejected any attempt to prosecute Kaiser Wilhelm because it viewed prosecutions of a head of state as an attack against that nation’s sovereignty. Ultimately, no trials were held but so began a charge that picked up momentum under the League of Nations and later the U.N., dulling resistance to the notion of individual responsibility.

The outrages of the First World War paled in comparison to the atrocities discovered after World War II. In response, France and the United States zealously advocated for tribunals to prosecute war crimes that could serve as a deterrent to any future transgressor. The Nuremberg Charter and the result of that advocacy articulated the emerging concept of individual criminal liability for the conduct of war.

However, the Nuremberg tribunal was not a complete innovation. The Nuremberg Charter drew extensively on the Preamble of the Hague Convention IV, which refers to “the interests of humanity and the ever-progressive needs of civilization.” Paragraph eight of the Preamble went further, stating that “the inhabitants and the belligerents remain under the protection and [governance] of the principles of the law of nations [, derived] from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.” The legacy of Nuremberg is the establishment of fairness and due process in international tribunals and the definitive idea that individual

59. Rome Statute, supra note 12, art. 12.
63. Horton, supra note 60, at 1044.
64. Id. at 1045.
65. Id.
66. Id. (citing RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 76 (2000)).
68. Id. ¶ 8 (alteration to original).
criminal liability exists for the commission of war crimes—an "act of state" cannot serve as a defense.69

The Nuremberg Charter did not speak of terrorism. Instead, "crimes against peace" and "war crimes" were the backdrop upon which crimes against humanity might occur.70 And for this reason terrorism has no organic basis within the legacy of the Nuremberg Charter to become part of the ICC's core crime jurisdiction as a crime against humanity.71

B. Shifting Attitudes: From Nuremberg to the Rome Statutes

The League of Nations advocated a standing international criminal court at the same time it proposed its definition of terrorism in 1937, but this too failed.72 The U.N. picked up where the League of Nations left off,73 but the ICC was not immediately accepted. Then came the events of Yugoslavia and Rwanda, impressing upon the world the need for a standing international court.74

Just as September 11 was a catalyst for rapid reform of municipal laws in the U.S., the horrors of Yugoslavia and Rwanda motivated the international community to no longer sit idly by. The Statute adopted for the International Criminal Tribunal for the Former Yugoslavia ("ICTY")75 established ad hoc jurisdiction over individuals who had committed specific acts amid the armed conflict (international or not) and directed against the civilian population.76 The Statute for the International Criminal Tribunal for Rwanda ("ICTR")77 incorporates the same enumerations as the ICTY, but diverges in two significant ways. First, it abandons the requirement of the violations occurring during an armed conflict.78 Second, it adds the element of discriminatory intent.79

70. Egon Schwelb, Crimes Against Humanity, 23 BRIT. YBK. INT’L L. 178, 206 (1946).
71. Id. at 180.
73. Horton, supra note 60, at 1046.
76. Id. art. 5.
78. KRIANGSAK KITICHAI SAREE, INTERNATIONAL CRIMINAL LAW 89 (2001); See generally ICTR Statute, supra note 77.
Specifically, civilian victims were targeted on the basis of national, racial, ethnic or religious identity.\textsuperscript{80}

Before the ICTY and ICTR tribunals were erected, hearings by individual states in their national courts advanced the cause of universal jurisdiction over the most heinous crimes.\textsuperscript{81} Borrowing from the universal jurisdiction principle of Nuremberg, the \textit{Eichmann} (1961), \textit{Barbie} (1985) and \textit{Touvier} (1994) cases against Nazi war crimes solidified the foundation upon which the ICTY and ICTR jurisdiction would later be built. In turn, the facts confronted by the ICTY and the ICTR tribunals became the catalyst that ushered the ICC into existence.\textsuperscript{82}

\textbf{C. The Rome Statute: Negotiating the Scope of the International Criminal Court}

The Rome Statute brought with it broad jurisdiction, but not the universal jurisdiction of its predecessors.\textsuperscript{83} Nevertheless, teeth were finally put into the international law maxim "\textit{aut dedere aut judicare}" (extradite or prosecute). However, some view the ICC as an entity that could become dangerous from its lack of moral and political checks.\textsuperscript{84}

For its part, the U.S. used its role at the Rome Conference to increase safeguards and curtail the scope of jurisdiction to be exercised by the ICC.\textsuperscript{85} The view of the U.S. under President Clinton was that the draft statute overreached as an international treaty and improperly sought to bind non-party states, contrary to the norms of international law.\textsuperscript{86} That is, treaties may neither impose obligations upon, nor modify the legal rights of, non-signatories.\textsuperscript{87}

\begin{thebibliography}{99}
\bibitem{Proulx} Proulx, \textit{supra} note 22, at 1056.
\bibitem{ICTR Statute} ICTR Statute, \textit{supra} note 77, art. 3.
\bibitem{Eichmann} See, e.g., Att’y Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Isr. Jer. 1961) (Israeli prosecution of a former Nazi officer for his role in committing atrocities against Jews); Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, 78 I.L.R. 125 (Fr. 1985) (French prosecution of a former Gestapo superior for the deportation and execution of Jews); Touvier Judgment of 20 April 1994, Cour d’Assises of Versailles (prosecution by France of a senior member of Lyons’ militia, part of the Vichy forces, fifty years after-the-fact for complicity in crimes against humanity).
\bibitem{Rome Statute} See \textit{generally} Rome Statute, \textit{supra} note 12, art. 12.
\bibitem{Czarnetzky & Rychlak} Czarnetzky & Rychlak, \textit{supra} note 69, at 59.
\bibitem{Chibueze} Chibueze, \textit{supra} note 56, at 31. The United States demanded numerous safe guards during the Rome Conference but ultimately voted against the Rome Statute. \textit{Id}. at 21. President Clinton nevertheless signed it in his last days in office, but the Senate never ratified it and President Bush subsequently withdrew the U.S. as a signatory. \textit{Id}. at 21–22.
\bibitem{Scheffer} See David J. Scheffer, \textit{The United States and the International Criminal Court}, 93 \textit{Am. J. Int’l L.} 12, 18 (1999).
\end{thebibliography}
While it is true obligations cannot be imposed upon a state without its consent, it is a different matter entirely that criminal liability can attach over a non-party's citizens whose conduct occurs within the territory of a contracting party. This is not the creation of obligations for non-party states and it cannot be argued that an exercise of jurisdiction within the territory of a contracting state party is an "overreach." Nevertheless, the U.S. delegation actively resisted universal jurisdiction, pressing for personal jurisdiction only by consent or by Security Council referral. Universal jurisdiction failed, but so did the measures proposed by the U.S. The conference literally came down to a take-it-or-leave-it package presented on the evening of the last day. Last minute maneuvers by the U.S. and India to derail the conference were unsuccessful; the final vote was taken with only two hours to spare: 120 yeas, 7 nays and 21 abstentions.

Quickly reaching its minimum sixty ratifications, the ICC became operative July 1, 2002. Efforts to carve exceptions for "official acts" (for example, military personnel on U.N. peace keeping missions) were rebuffed. In the end, the ICC achieved broad personal jurisdiction: whenever the location of an incident or the nationality of an accused was a signatory to the Rome Statute or when a non-party state ceded jurisdiction on an ad hoc basis.

Though President Bill Clinton inexplicably signed the Rome Statute after steadfastly resisting it, Congress never ratified the Rome Statute. Leaving nothing to chance, President George W. Bush "unsigned" the Rome Statute and Congress enacted the American Service-member Protection Act of 2002. It has been suggested that President Barack Obama may revisit the U.S.' position on the Rome Statute. Even if that proves to be the case, Congress still must repeal the ASPA and resolve the multitude of Article 98 agreements the U.S. put in place to eviscerate ICC jurisdiction before any effective change could be realized.

88. Chibueze, supra note 56, at 34 (citing Rome Statute, art. 12).
89. GLASIUS, supra note 74, at 134–35.
90. Id. at 14.
91. Id.
92. Rome Statute, supra note 12, art. 126(1) (granting effectiveness sixty days after the sixtieth ratification by a Contracting State).
93. Simons, supra note 55 and accompanying text.
94. Id. at 73.
95. Id. at 16–17.
96. Scheffer & Cox, supra note 14, at 990.
97. Id. at 991.
98. See id. at 984–85.
99. See generally id. at 997–1004 (an "Article 98 agreement" is a bilateral agreement with another nation to purposefully not cooperate with the ICC.).
IV. AN INTERNATIONAL CRIME OF TERRORISM?

The ICC does not possess subject matter jurisdiction over terrorism. The two recurring disputes that plague negotiations of a common definition of terrorism—use of force against civilians and whether to exempt "freedom fighters"—proved just as fatal to inclusion of terrorism as a core crime in the Rome Statutes. Some commentators nevertheless argue the express foreclosure does not absolutely bar prosecution of terrorist acts by the ICC. That is, a demonstrable campaign of terrorism is argued to fall within the ICC's "crimes against humanity" jurisdiction. Though persuasively argued, there are numerous obstacles to such an exercise of ICC jurisdiction.

100. Much, supra note 25, at 130.
103. Martinez, supra note 29, at 1–2; Goldstone & Simpson, supra note 10.
104. Martinez, supra note 29, at 2.
A. Terrorism as a Crime Against Humanity?

It is an erroneous argument that terrorism can be prosecuted before the ICC as a crime against humanity. True, the elements of the synthesized definition proposed in Part I match up to those in Article 7 of the Rome Statute. And yes, there are a number of instances where recourse to the ICC would be helpful. But in the end, the Rome Statute itself precludes expansive interpretations of the ICC’s subject matter jurisdiction.

1. Rome Statute, Art. 7: Crimes Against Humanity

One of four “core crimes” established under the Rome Statute, “crimes against humanity” was first expressly recognized in international law by the St. Petersburg Declaration in 1868. Accordingly, the acceptance of ICC jurisdiction over crimes against humanity has never been seriously contested, but the list of enumerated crimes coming under the designation is another matter. Article 7 of the Rome Statute identifies crimes against humanity as: “[A]cts . . . committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Specifically, Article 7 lists eleven underlying criminal acts: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; sexual violence of comparable gravity; persecution; enforced disappearances; apartheid; and other inhumane acts of a similar character. What is most distinguishing about the Rome Statute’s formulation from the traditional understanding of crimes against humanity is the removal of the requirement that an offense occur during an armed conflict. The delegates of the Rome Conference recognized that the illegality is every bit as real during times of “peace” as it is during times of war.

106. Compare Tiefenbrun, supra note 49, at 361 (outlining the synthesized definition of terrorism) with Rome Statute, supra note 12, art. 7(1) (noting that the five elements of crimes against humanity in Article 7(1) are: an attack; nexus between crimes and attack; committed against a civilian population; on a widespread or systematic basis; pursuant to a plan or policy).
107. Rome Statute, supra note 12, art. 22(2).
108. Id. art. 5(b).
110. BOOT, supra note 109, at 101.
111. Rome Statute, supra note 12, art. 7(1)(a)–(k).
112. Martinez, supra note 29, at 27.
113. BOOT, supra note 109, at 123, 125.
2. Repackaging Terrorism as a Crime Against Humanity

Not unpersuasively, a creative argument has been advanced that suggests acts of terrorism are prosecutable before the ICC as a crime against humanity. In fact, five of the eleven enumerated acts qualifying as a crime against humanity are especially applicable to the terrorism context: murder, torture, persecution, forced disappearances and "other inhumane acts." Murder, the illegal killing of another person, is most often the short-term aim of contemporary terrorist attacks. Torture is the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person within the care, custody, or control of the perpetrator." Persecution is "the intentional and severe deprivation of fundamental rights [of an identifiable group (political, racial, cultural, ethnic, religious or sex)] contrary to international law by reason of the identity of the group." Enforced disappearances are those occurring "with the authorization, support or acquiescence of, a State... followed by a refusal to acknowledge [the activity in order that the person can be removed] from protection of the law." "Other inhumane acts [is a catch-all that speaks to acts] causing great suffering, or serious [bodily] injury [short of death]."

Advocates of shoe-horning terrorism into the ICC's subject matter jurisdiction are absolutely correct that international condemnation lends itself to the use of the ICC in this fashion. And these advocates correctly point to the general agreement among the nations on the essential elements and universal jurisdiction for crimes against humanity, as evidenced by the holdings of the High Court of Australia and other national courts. The Rome Statute, however, does not permit itself to be twisted by analogy to read in such a fashion. Even if this were not so, under the principle of complementarity the

114. See generally Proulx, supra note 22, at 1010.
117. Rome Statute, supra note 12, art. 7(2)(e).
118. Id. art. 7(2)(g).
119. Id. art. 7(2)(i).
121. Trial of Hans Albin Rauter, 14 L.R.T.W.C. 89, 109 (1949) (stating trials of war crimes fulfilled a duty not only to national justice but also to all the nations).
122. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (holding revocation of naturalization of defendant as U.S. citizen was valid and that Israel could extradite and prosecute defendant on principle of universal jurisdiction). There is also the matter of the attempted prosecution of Pinochet by Spain. See Czarnetzsky & Rychlak, supra note 69, at 73–77.
123. Rome Statute, supra note 12, art. 22(2).
ICC is a court of last resort—a fact reluctantly acknowledged by the advocates of interpretational elasticity.\textsuperscript{124}

**B. Why Terrorism Is Not a Crime Against Humanity**

The attempt to make an end run around the ICC’s limited jurisdiction falls flat for a number of reasons, not the least of which is Article 22 of the Rome Statute. Article 22 expressly forecloses manipulations: “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”\textsuperscript{125} Thus, application of this “core crime” cannot include resort to the ICC for terrorism prosecutions, even though the acts to be prohibited are “non-derogable norms of the major human rights treaties” and “norms of customary international law.”\textsuperscript{126}

The non-inclusion of terrorism is more than a silent omission. The “legislative history” of the Rome Statute expressly forecloses terrorism as a core crime\textsuperscript{127} and has been reiterated on record by the U.N.\textsuperscript{128} There are eight overlapping factors that led to refusing to include terrorism as a core crime:

- the “core crimes” ultimately included were those of the greatest concern to the international community;
- the core crimes enjoyed clear status under customary international law;
- inclusion of other crimes would impede acceptance of the Rome Statute;
- prevailing view that effective systems of international cooperation were already in place for “treaty crimes”;
- a desire to avoid overburdening the ICC;
- the lack of a generally accepted definition of “terrorism”;
- concern that a “crime of terrorism” might politicize the ICC; and
- hope that limiting the ICC’s jurisdiction would facilitate a coherent and unified approach to its exercise of jurisdiction and the required state cooperation.\textsuperscript{129}

Professor Christian Much offers a more focused take, keying on factors one, six and seven: the offense is not well defined; the ICC mission is to try the most serious crimes of concern to the international community; and the politicizing effect on the court.\textsuperscript{130} Whatever the cause for non-inclusion, terrorism is not a core crime and cannot creatively be dressed up as a crime

\textsuperscript{124} Proulx, supra note 22, at 1013; see also Kirsch, supra note 13, at 543.
\textsuperscript{125} Rome Statute, supra note 12, art. 22(2).
\textsuperscript{126} Schabas, supra note 101, at 916, 925.
\textsuperscript{127} See GLASIUS, supra note 74, at 1–18.
\textsuperscript{128} U.N. Dep’t of Pub. Information, supra note 11.
\textsuperscript{129} BOOT, supra note 109, at 98–99.
\textsuperscript{130} See generally, Much, supra note 25.
against humanity, however appealing the ICC is as a forum for trying terrorist detainees.

C. Advantages of International Criminal Court Jurisdiction

Though the attempt to shoe-horn terrorism into the ICC's subject matter jurisdiction is doomed to fail, there are at least five distinct advantages to granting jurisdiction. The first advantage would be defusing judicial impasses between two governments that begin to threaten economic reprisals. The second advantage is to provide an alternative to a detaining state that hesitates to extradite out of concern for human rights violations that might occur against the detainees in the receiving country. A third advantage of resort to the ICC is the elimination of the "need" of extraordinary renditions to bring suspects within the reach of municipal law for prosecution in a nation's domestic courts. The fourth advantage of ICC jurisdiction is to maintain the possibility of prosecuting rebel groups that illegitimately come to power through means constituting terrorism, in that it is improbable the national judiciary, if it remains, would be inclined to entertain a prosecution. Finally, where the U.N. Security Council proves to be a politically-hostile environment, referral to the ICC could constitute a relief valve for an impartial finding of facts and disposition.

For purposes of the Obama administration, the inclusion of terrorism within the ICC's subject matter jurisdiction would afford not only the aforementioned advantages, its inclusion would create a politically expedient solution to the dilemma inherited from the Bush administration. Despite these advantages, the Rome Statute as it is currently drafted does not allow for an exercise of jurisdiction over terrorism. As discussed, however, the Rome Statute Review Conference could change that.

131. Proulx, supra note 22, at 1014–15 (referencing Libya’s refusal to extradite the Lockerbie bombing suspects).

132. Id. at 1016. As a signatory to the Convention Against Torture, the U.S. is obligated to refuse extraditions and deportations where there is a credible threat of torture or other human right violations of the person to be removed form the territorial jurisdiction of the U.S. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 39/46 U.N. Doc. A/RES/39/46 (Dec. 10 1984) [hereinafter C.A.T.] Of course, C.A.T. arguably precludes most extraordinary renditions, but that is beyond the scope of this article.

133. Proulx, supra note 22, at 1017. This was the case in United States v. Tunis, 924 F.2d 1086 (D.C. Cir. 1991) where the defendant was lured onto a yacht by the Federal Bureau of Investigations and arrested upon entering international waters.

134. Id. This scenario would trigger jurisdiction under the principle of complementarity because of the inability of a nation to prosecute; Rome Statute, supra note 12, art. 17.

135. Proulx, supra note 22, at 1017 (citing Antonio Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law, 12 EURO. J. INT’L L. 993, 994 (2001)).
V. UNITED STATES AVERSION TO THE INTERNATIONAL CRIMINAL COURT

Even after opting out of the Rome Statute, concern over the perceived dangers of politicized prosecutions lingered. In response, Congress enacted to the American Service-members' Protection Act of 2002. The ASPA prohibits, \textit{inter alia}, U.S. membership in the ICC, extradition of any U.S. citizen to the ICC, transfer of classified intelligence to the ICC, or military assistance to countries who are signatories to the ICC. The ASPA also authorizes the President of the United States to utilize "all means necessary and appropriate" to liberate U.S. and allied personnel detained by, on behalf of, or at the request of the ICC. With article 98 of the Rome Statute in mind, the U.S. has aggressively pursued bilateral agreements with other nations to memorialize formal non-cooperation with the ICC. Acting under the ASPA, the U.S. began withdrawing foreign aid and military assistance in 2003 from countries refusing to enter into Article 98 agreements. To date, the United States has negotiated over 100 Article 98 non-surrender agreements with other nations.

Thus, even if the ICC enjoyed subject matter jurisdiction over terrorism—by amendment or creative interpretation—the U.S. is not party to the Rome Statute and remains statutorily precluded from cooperation with the ICC by its own municipal law. Whether President Obama re-signs the Rome Statute, nullifies all Article 98 agreements and Congress fully repeals the ASPA remains to be seen. If the U.S. moves beyond its aversion to the ICC, the Review Conference must still declare terrorism a core crime within its jurisdiction before President Obama begins booking rooms at The Hague for the Guantanamo detainees.

\begin{itemize}
\item \textbf{139.} 22 U.S.C. § 7426 (repealed 2008).
\item \textbf{140.} 22 U.S.C. § 7427 (2002); \textit{see also} Chibueze, \textit{supra} note 56, at 22 (noting the ASPA has been coined as the "Hague Invasion Act" by the international community because it authorizes the use of force against the ICC and/or its agents in order to liberate detained U.S. personnel).
\item \textbf{141.} GLASIUS, \textit{supra} note 74, at 20. \textit{See also} Rome Statute, \textit{supra} note 12, art. 98 (allowing a country to refuse to extradite an accused person to the ICC when doing so would violate its own treaties).
\item \textbf{142.} GLASIUS, \textit{supra} note 74, at 20; 22 U.S.C. § 7426 (repealed 2008) (withdrawing of military assistance is required by the ASPA).
\end{itemize}
VI. CONCLUSION

Whatever the cause for not including terrorism as a core crime, legal gymnastics cannot bring a terrorism charge before the ICC. Until and unless the Review Conference amends the Rome Statute the question is foreclosed. For that matter, until the U.S. Congress repeals the ASPA the U.S. cannot cooperate in any way, shape or form with the ICC. But even if these obstacles are overcome, Philippe Kirsch, President of the ICC, reminds us that only those core crimes committed after July 1, 2002 are eligible. Thus, come what amendments may to the ICC’s subject matter jurisdiction, the next stop for most detainees at Guantanamo Bay is not The Hague.


146. Kirsch, supra note 13, at 543.

147. The most likely outcome will be the use of Article III Courts within the United States rather than the military commissions, something U.S. Attorney General Eric Holder emphatically endorsed during his confirmation hearings. Eric Lichtblau, Holder Wants Some Detainees Tried in the U.S., N.Y. TIMES (Jan. 15, 2009). Of course, one alternative that could be taken up is the use of admiralty law to prosecute at least a portion of the terrorist menace. E.g. Douglas R. Burgess, Jr., The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates Can Help Win the War on Terror, LEGAL AFF. (July-Aug. 2005).