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Terrorism and International Criminal Justice: Dim Prospects for a Future Together

Naomi Norberg*

Introduction

What is the relationship between terrorism and international criminal law? More precisely, should terrorism join genocide, crimes against humanity, war crimes, and aggression as crimes within the jurisdiction of the International Criminal Court (ICC)? This inclusion was proposed when the Rome Statute establishing the International Criminal Court (ICC Statute) was drafted, and an international terrorism court was proposed in 1937 by the League of Nations. But new calls for this inclusion may be a symptom of the general “over-investment in criminal law”

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1. An international terrorism court was also suggested as the appropriate jurisdiction for terrorism at the Santa Clara University School of Law Third Annual International Humanitarian Law Workshop, January 6-9, 2009.


that has plagued both states and the international community (even though globalization affects less than ten percent of crime)\(^6\) since the "war on crime" began in the 1980s. As a result, instead of remaining the last resort (*ultima ratio*), criminal law seems to have become the first. And when the domestic last resort proves insufficient, the solution is to internationalize, which increases stigmatization while globalizing repression.\(^7\)

The phenomenon of "governing through crime"\(^8\) has taken hold in the United States as elsewhere, bringing with it a slew of new offenses and harsher penalties. Even the European Union (EU), which has no officially delegated criminal law powers, has developed quite an extensive program of police and judicial cooperation in criminal matters since the 1970s, slowly harmonizing national systems around more repressive norms.\(^9\) In the immediate aftermath of the September 11 terrorist attacks in the United States, many states—and the EU—were able to obtain acceptance of previously rejected measures both broadening police powers in terrorism cases and restricting access to immigration and asylum. Since the adoption of Security Council resolutions 1373\(^10\) and 1624,\(^11\) in particular, a further hail of harsh legislation has been passed, producing an international state

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7. Frédéric Mégret notes that internationalizing the struggle of terrorism aimed not only at obtaining better results, but also at preventing states from "extending 'protective' jurisdiction, kidnapping terrorists or striking safe havens militarily. All along, the international legal order may have had more to lose from terrorist attacks than just the attacks: a subversion of the international legal order by the states themselves . . . ." Frédéric Mégret, *Justice in Times of Violence*, 14 *Eur. J. Int’l L.* 327, 328-29 (2003). Seen in this light, calls for international jurisdiction over terrorists, particularly those responsible for 9/11, may be considered an acknowledgement that internationalization has failed to accomplish this goal, and an indictment of national tribunals as unable, if not unwilling, to provide fair trials. See *id.* at 333.


of emergency\textsuperscript{12} bearing no resemblance to responses to genocide, crimes against humanity or war crimes. Still, the terrorist threat looms. The reasons for not elevating terrorism to the rank of "international crime" remain valid: there is insufficient consensus as to a precise definition or possible exceptions; and prosecuting terrorism before the ICC risks politicizing that court.

The stated goal of the ICC is to "put an end to impunity for the perpetrators" of the "most serious crimes of concern to the international community as a whole."\textsuperscript{13} In so doing, it will contribute to the prevention of such crimes and, one hopes, provide justice to the victims. As UN mechanisms for peace and justice, the ICC and other international and hybrid criminal tribunals constitute instruments for the protection of human rights, which are frequently violated on a massive scale when the "most serious crimes of concern to the international community as a whole" are committed. There is no doubt that terrorism is a serious crime that affects the international community, in the same way that other gross violations of human rights do.\textsuperscript{14} But the focus since 2001 on international "hyperterrorism,"\textsuperscript{15} such as the destruction of the World Trade Center, tends to eclipse other forms of terrorism that are for the most part "set deep within national borders."\textsuperscript{16} The internationalization of the struggle against this crime, therefore, leads to a certain paradox: to combat certain acts of terrorism that transcend borders, a law that transcends borders has emerged that consists of fairly similar measures applicable everywhere and that obliges states to cooperate in preventing and punishing acts of terrorism. But except for police and judicial cooperation, the primary tools used to combat terrorism since 2001 have reinforced psychological as well as physical borders as states have taken advantage of the inconsistencies between the antiterrorism and human rights regimes and the less-than-clear hierarchy of norms.

These inconsistencies, as well as loose use of the word terrorism, lead to politically expedient results. For example, in 1985, Luis Posada Carriles stood accused of the 1976 bombing of a Cuban airliner that resulted in the deaths of all 73 people aboard and was also implicated in a terrorist bombing that occurred in

\textsuperscript{12}Kim Lane Scheppele, Memorandum from Kim Lane Scheppele to Syracuse Participants, Apr. 1, 2007, http://www.maxwell.syr.edu/campbell/programs/sawyer/papers/SLAPP%2006-07/ScheppelleMemo.pdf [hereinafter Scheppele, Memorandum to Syracuse Participants].
\textsuperscript{13}ICC Statute, supra note 2, pmbl.
\textsuperscript{14}See Karima Bennoune, Terror/Torture, 26 BERKELEY J. INT'L L. 1, 41-6 (2008).
\textsuperscript{15}Mégret, supra note 7, at 328.
\textsuperscript{16}DELMAS-MARTY, LE RELATIF ET L'UNIVERSEL, supra note 4, at 285.
Washington, DC in 1976. While awaiting trial in Venezuela for the airliner bombing, Posada escaped from jail. In 2002, he was allegedly involved in an attempt to assassinate Fidel Castro, and in May 2005, he was found in the United States and arrested. Venezuela requested his extradition; Posada requested asylum. Members of Congress called for the Bush administration to comply with the extradition request, but the administration refused, and today, Posada is a free man—despite the Patriot Act requirement that all aliens suspected of terrorism be detained.17

With respect to terrorism, international criminal law would be hard pressed to fulfill its goals of deterrence and justice for victims. It would, however, be likely to contribute to erecting more barriers—virtual or real—and to state suppression of fundamental rights in the name of combating what seems to have become the “crime of crimes” of the 21st century.

To illustrate, I will briefly review the difference between “international” and “transnational” crimes (Part I) and key elements of the “definitional crisis” that set terrorism apart from the crimes within the ICC’s jurisdiction (Part II). I will then show that the United States’ response to 9/11 and Security Council emphasis on combating terrorism effectively lifted certain taboos and emboldened states to renege on their human rights obligations in the name of fighting terrorism (Part III). I conclude that elevating terrorism to the status of international crime might exacerbate this problem without fulfilling the functions of international criminal law.

I. International or transnational? Fundamental differences between terrorism and the “most serious crimes of concern to the international community as a whole”

The question of “terrorism under international criminal law” invites reflection as to the scope and purposes of international criminal law and the extent to which terrorism may be considered an international crime and, as such, be a candidate for the International Criminal Court’s jurisdiction. Among criminal law’s most important functions is the expressive function: the designation of an act as a crime

indirectly reflects a given society's essential values. In this way, criminal law serves as a barometer of values at a given time. This is no less true for international criminal law than domestic criminal law, the manifestation par excellence of sovereignty. The crimes within the jurisdiction of the ICC (genocide, war crimes, crimes against humanity and aggression) may therefore be deemed to reflect instances when the disparate states of the world became a society cohesive enough to express a consensus as to the values protected by those prohibitions.

In the aftermath of World War II, pressure was high to respond to the state-committed or condoned atrocities that were deemed to affect all of humanity and to go beyond any one state's power to adequately punish and redress. The barometer thus read "fair weather" for the creation of international (or supranational) crimes expressing international society's consensus as to the values protected by the prohibitions of genocide, crimes against humanity and war crimes and subject to either supranational jurisdiction before international tribunals or universal jurisdiction before domestic courts. Due to that consensus—and precise, globally accepted definitions—those crimes are today subject to the jurisdiction of the ICC, as well as other international criminal tribunals.

The ICC thus constitutes an addition to the numerous human rights institutions established since 1945. Its statute explicitly declines to limit the category of the "most serious crimes of concern to the international community as a whole" to the four categories mentioned above (and listed in article 5), but there are few clues to be found indicating what other crimes might fit therein. The ICC statute itself is silent on the issue; neither the ad hoc international criminal tribunals (ICTs) nor the International Law Commission have offered any real clarification; and legal scholars have avoided tackling the issue head on. Isabelle Fouchard's recent dissertation on crime in international law thus offers important insight not only into the incorporation of criminal law, the sine qua non of the state, into international

22. ICC Statute, supra note 2, art. 5.
24. Id. at 17.
law, but also into the distinction between the "international" or "supranational" crimes of genocide, crimes against humanity, war crimes and aggression, and "transnational" or "internationalized" crimes, such as terrorism, drug trafficking and corruption.

Without wishing to minimize the debates as to the differences in nature between the two types of crimes or to oversimplify them, it seems safe to assert that international crimes originate in and are defined by international law, and individual liability for them lies in international law.\(^{25}\) For example, the ICC statute codifies, in a sense, international customary law with respect to crimes against humanity and war crimes,\(^ {26}\) while genocide was established by international convention.\(^ {27}\) Other crimes satisfy these criteria yet are not included in the ICC's jurisdiction, which appears to be limited by the further criteria of "extreme gravity" and "touching the international community as a whole."\(^ {28}\) In accordance with the principle of legality (no crime or punishment without a prior law), the material and intellectual elements of these three crimes, as well as the penalties, are set out in precise terms in the ICC statute.

Transnational crimes, however, are essentially domestic crimes that may comprise an extranational element. For example, the bombing of the federal building in Oklahoma City by Timothy McVeigh, an American citizen, is an example of domestic terrorism.\(^ {29}\) But when the crime crosses borders, occurs where no state has territorial jurisdiction (such as on the high seas), or involves persons of differing nationalities, it contains an extranational element and exceeds

\(^{25}\) See id. at 33-5.
\(^{26}\) Id. at 40.
\(^{28}\) Fouchard, Crime international, supra note 19, at 44 (citing Prosecutor v. Anto Furundzija, IT-95-17/1-T, Judgment, § 141, (Dec. 10, 1998)) (omission of torture is a clear indication that there are different categories of international crime; thus, exclusion from ICC jurisdiction does not mean a particular crime is not extremely grave or does not touch the international community as a whole).
\(^{29}\) Widely considered one of the worst terrorist attacks in the United States, the bombing provides an example of the problems inherent in defining and proving terrorism. McVeigh was charged with and convicted of explosives violations. His act, however, does not qualify as terrorism under definitions requiring a motive of intimidation: it was perpetrated not to compel the government to do or refrain from doing anything, but in retaliation for what it had done. See, e.g., Kevin Flynn, "One of Ours' Analysis Bombs Out, ROCKY MOUNTAIN NEWS, May 24, 1998, at 3E; Gaylord Shaw, In McVeigh's Behalf: Defense Lawyers Ask for Mercy, NEWSDAY, June 7, 1997, at A04.
an individual state’s ability to respond alone. But in such cases, international law merely promotes interstate police and judicial cooperation and universal jurisdiction, not supranational jurisdiction. The extranational element is in many cases acknowledged through the label “international terrorism,” but the crime continues to be prosecuted according to domestic law: not all states ratify international conventions and when they do, they incorporate (at times modifying) the international definitions into domestic law. This “nationalization” is reflected in the fact that not all states distinguish between domestic and international terrorism. For example, the French Penal Code includes airplane hijacking in its long list of acts constituting terrorism, without any domestic or international qualifiers. Moreover, international law imposes few restrictions on states as they


31. See id. at 45. The Special Tribunal for Lebanon makes this clear: established to prosecute a political assassination such as the one that sparked the drafting of the 1937 League of Nations Convention, the Tribunal will apply Lebanese law. See S.C. Res. 1757, U.N. Doc. S/Res/1757 (May 30, 2007) (establishing the Special Tribunal). The Tribunal’s statute, annexed to the Resolution, provides:

Article 2 Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle.

Id. Attachment, Statute of the Special Tribunal for Lebanon, art. 2.

32. See C. PÉN., art. 421-1(1).
struggle with transnational crimes. The effect has been to extend sovereign reach rather than limit it, as in the case of international crimes.

While a similar “nationalization” of definitions may occur with respect to the crimes within the ICC’s jurisdiction, the struggle against such crimes was initiated at the international level. State action thus has a common reference point. Such is not the case with respect to terrorism, where sovereign prerogative is clear. States have been combating “terrorism” under various names since well before the international community addressed the issue. And since the internationalized struggle under the contemporary regime began in the 1960s, the lack of agreement on an exception for “freedom fighters” has meant that each state has fought terrorism according to its own definition. Despite greater harmonization of definitions since the 1990s, there are still unresolved issues that make agreement on a comprehensive definition unlikely in the near future and that point to fundamental differences between terrorism and international crimes.

II. Definitional elements that distinguish terrorism from international crimes

A. Terrorism as a crime of transferred intent

The classic approach to defining terrorism constitutes an attempt to put the magic slipper on the wrong foot. The term “terrorism” has its roots in the Reign of Terror that followed the French Revolution: considered “dreadful but necessary,” this purge of enemies of the Revolution and other persons suspected of being corrupt saw 16,000 people guillotined in nine months. The only way to escape definitively was to flee the country, as those who maneuvered to gain the pleasure of the rulers might just as easily fall from grace onto the executioner’s block. In this sense, “terrorizing the civilian population,” a form or subset of war crimes prosecuted at the International Criminal Tribunal for the former

33. See Fouchard, Crime international, supra note 19, at 156-57.
34. See id. at 135-36.
35. See generally Norberg, A Harmonized Approach, supra note 18.
36. See, e.g., id. at 204; DELMAS-MARTY, LE RELATIF ET L’UNIVERSEL, supra note 4, at 285.
Yugoslavia,\textsuperscript{38} seems accurate: against the backdrop of ongoing armed conflict, acts designed specifically to intimidate persons with minimal chances of escape may indeed produce terror and consequent compliance with demands. Such may be the case today in Pakistan's Swat valley, where a Taliban reign of terror currently has residents scurrying to listen to their radios, as "failure to listen and learn might lead to a lashing—or a beheading."\textsuperscript{39} Similarly, Afghan girls have been victims of acid attacks designed to scare them away from school.\textsuperscript{40} Fear may also linger in communities such as these where terrorism has taken an extensive toll.\textsuperscript{41} As Karima Bennoune points out, however, the human rights violations may be a more important consequence than fear.\textsuperscript{42}

Outside this context, definitions based on the notion that "terrorism" intimidates or terrorizes the population seem counterproductive.\textsuperscript{43} The November 2008 bombing of two luxury hotels in Mumbai sparked the immediate politicization of citizens who realized their apathy had left them with a government unable to protect them,\textsuperscript{44} and one of the targeted hotels proudly reopened just three weeks after the attacks.\textsuperscript{45} The July 2005 bombings in London produced archetypical "stiff upper lip" reactions; commuters in Paris (including this author) and elsewhere


\textsuperscript{40} Dexter Filkins, \textit{Afghan Girls, Scarred by Acid, Defy Terror, Embracing School}, N.Y. TIMES, Jan 14, 2009, at A1.

\textsuperscript{41} See Bennoune, \textit{supra} note 14, at 45.

\textsuperscript{42} See \textit{id.} at 41.

\textsuperscript{43} See, e.g., C. \textit{PÉN.}, art. 421-1 (acts of terrorism are those committed, inter alia, with the "goal of seriously disturbing public order by intimidation or terror"). Here, subjective intimidation would seem to be required. \textit{Cf.} Measures to Eliminate International Terrorism, U.N. Doc. A/Res 49/60 (Dec. 9, 1994) ("Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes"); Terrorist Financing Convention, \textit{supra} note 30 ("... when the purpose of such act, by its nature or context, is to intimidate a population"). In the latter two definitions, there is merely an objective intent to intimidate. While such an intent is clearly present in the Afghan or Pakistani situations, it is less clear in other situations.

\textsuperscript{44} See Anand Giridharadas, \textit{Mumbai's Elite See Price of Indifference}, HERALD TRIBUNE, Dec. 4, 2008, 1.

continue to take their daily trains in the wake of station bombings; and Israelis continue to frequent outdoor markets, common sites of suicide attacks. Indeed, we all continue to travel by plane. The alternative or additional element of a motive, such as seeking to "compel a government or an international organization to do or to abstain from doing any act," is perhaps even more counterproductive. As Bennoune's list of "endogenous and exogenous causes" of "fundamentalist movements in the Muslim world" indicates, many such acts are more akin to McVeigh's act of retaliation than an attempt to terrorize.

In this regard, many acts of terrorism resemble other random acts of violence subject to domestic criminal law. What sets them, and particularly "hyperterrorism," apart from other transnational crimes such as corruption and trafficking is its warlike character, its capacity for mass destruction (though, as Professor Paust rightly points out, this is not a requirement). Putting the slipper on the other foot thus looks appropriate at first glance: recent history has shown that mass crimes can be committed by non-state actors, and international humanitarian law and practice before ICTs reflect the increased liability of non-state actors for international crimes. But the crimes prosecuted before these tribunals have been committed in the context of a conflict reaching critical mass:

46. Terrorist Financing Convention, supra note 30, art. 2(b).
47. See Bennoune, supra note 14, at 54. Exogenous factors include the now-infamous training, supported by the U.S. (with significant British, Pakistani and Saudi involvement), of anyone willing to fight the Soviet Union in Afghanistan—no matter how extreme their ideology. Many of those founding or leading terror cells from the Philippines to Morocco fought in Afghanistan, where they built a sophisticated and dangerous network, and then took their training home with them. The other major contributing factor from outside the Muslim world, particularly to recruitment and sympathy for Muslim fundamentalist armed groups, and the apologetics on their behalf from various quarters, is that of disastrous Western policies toward Muslim countries. Examples include 2003's illegal invasion of Iraq and failure to equitably resolve the Palestinian-Israeli conflict.

Id. at 54-5.

48. In this regard, the Madrid bombing of 2004 constitutes an exception. Occurring just three days before a national election as Spain prepared, under the incumbent government, to join coalition forces in Iraq, the attack may well have influenced the outcome—in favor of the opposition party—of the election. The bombers' intent may thus have been to compel the people, rather than the government, to take or refrain from taking a particular action. The response to this attack also constitutes an exception. See the Conclusion, infra.

49. See Jordan J. Paust, Terrorism's Proscription and Core Elements of an Objective Definition, 8 SANTA CLARA J. INT'L L. 51, 61.
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without the forces, structure or organization generally associated with the state but now within the grasp of some rebel groups, mass—or “widespread and systematic”—atrocities such as those prosecuted first at Nuremberg and today at the ICC, the ICTs and various hybrid tribunals depend on massive firepower. Though al Qaeda strikes may fit this image,\(^5\) it is a vision that excludes the daily intimidation occurring in some tribal and religious communities\(^5\) and ignores the fact that, as independent terrorist cells and individuals like McVeigh illustrate, terrorism in and of itself requires no such state-like attributes. Therefore, while the fight against impunity’s shift in focus from state to non-state actors clearly tracks reality with respect to genocide, war crimes and crimes against humanity, this same shift with respect to terrorism in fact blurs the focus of the crimes themselves.

The motive behind genocide is to “destroy . . . a national, ethnical, racial or religious group, as such,”\(^5\) while crimes against humanity comprise acts “committed as part of a widespread or systematic attack directed against any civilian population . . . .”\(^5\) In both cases, victims are members of an identified group, and are targeted as such. Though exceptions are possible when a conflict extends beyond the territories occupied by the warring parties, war crimes seem to be similarly conceived as crimes directed at specific populations or installations: members of the opposing camp, neutral installations or personnel (such as the UN or Red Cross), and even members of one’s own camp, such as when children are conscripted.\(^5\)

Terrorism, particularly transnational, politically or ideologically motivated terrorism, however, often has a more indirect quality. Targets may of course be

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51. See Delmas-Mart\, Global Crime, supra note 38, at 286 (suggesting that the September 11 strikes meet the definition of crimes against humanity).
52. For an insightful examination of how the separation between law and religion leads to laws ignoring women’s efforts for change in such societies and, therefore, enables continued discrimination, see Madhavi Sunder, Piercing the Veil, 112 Yale L.J. 1399 (2003). Such acts may, however, be treated as gender-based persecution. See, e.g., Carolyn Patty Blum & Nancy Kelly, The Protection of Women Refugees, in 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 197 (Kelly D. Askin & Dorean M. Koenig eds., 2001); DROIT D’ASILE ET FEMMES. GUIDE PRATIQUE (Groupe asile femmes (GRAF) 2007). See also U.N. High Comm’r for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01 (May 7, 2002), available at http://www.unhcr.org/refworld/docid/3d36f1c64.html (last visited Oct. 30, 2009).
53. ICC Statute, supra note 2, art. 6.
54. Id. art. 7.
55. Id. art. 8.
chosen on the basis of nationality (the American embassies simultaneously bombed in Kenya and Tanzania, the tourists asked if they were British or American during the 2008 Mumbai hotel attacks), or presumed nationality (the World Trade Center or a London bus). But among the victims may be persons of other nationalities, and the purpose of the attack may in fact not be to destroy the group, but to express political or other ideological disagreement with a particular state. In such cases, victims are merely symbols. In fact, the first definition of terrorism contained in an international convention reflects this anti-state character.\footnote{Spurred by the assassination of King Alexander of Yugoslavia, the 1937 League of Nations convention defined terrorism as “[a]ll 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.”\footnote{Convention for the Prevention and Punishment of Terrorism art. 1(2), League of Nations Doc. C.547M.384 1937 V (1937).} This convention was not ratified, and the next attempt to address terrorism in an international convention would not come until 1963, when the first of three conventions dealing with airplane hijackings and bombings was adopted under the auspices of the International Civil Aviation Organization (ICAO).}

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\textbf{B. Internationalization of the struggle: combating terrorism without defining it leads to disparate, domestic responses}

The three ICAO conventions\footnote{Convention for the Prevention and Punishment of Terrorism art. 1(2), League of Nations Doc. C.547M.384 1937 V (1937).} defining offenses against plane and passenger safety are considered to be the first anti-terrorism conventions. Widely ratified (approximately 180 State Parties), they do not employ the word “terrorism,” as no agreement on a definition was then possible.\footnote{See Norberg, \textit{A Harmonized Approach}, supra note 18, at 205.} The Hague Convention of 1970

\footnote{This is certainly not the only kind of terrorism. Bennoune rightly encourages thinking in terms other than state/anti-state, noting that “[w]omen are frequent targets of terrorist activity, either as part of the civilian population generally, or when particularly targeted as women. Gender-based terrorism, such as attacks on women’s health clinics that perform abortions or killings of women based on their refusal to conform to ‘dress codes,’ . . . are often downplayed or neglected altogether within the security paradigm of terrorism. Governments and the media rarely label such acts as terrorism.” Bennoune, \textit{supra} note 14, at 48.

\footnote{Convention for the Prevention and Punishment of Terrorism art. 1(2), League of Nations Doc. C.547M.384 1937 V (1937).}

(Hijacking Convention) constitutes the model subsequently used for all terrorism conventions, including the regional conventions adopted between 1971 and 2002. In addition to omitting a definition of terrorism per se, the ICAO and subsequent conventions make it abundantly clear that they apply only to those acts over which either no state or more than one state has jurisdiction, but for such exceptional acts, terrorism is a domestic crime.

In fact, until the 1980s, terrorist attacks tended to track national affairs, even when they comprised an extranational element: the German Red Army Faction attacked American military personnel and the Israeli-Palestinian conflict spilled over its borders as not only the Palestine Liberation Organization (PLO), but also the Japanese Red Army, carried out attacks related to this conflict. But the 1979 kidnapping of American embassy personnel in Teheran ushered in an era of terrorism more appropriately labeled transnational, as between 1982 and 1985 various Islamic groups, often with state support, drastically increased their bombings, hijackings and kidnappings of foreign (largely American and French) targets. More decisive, perhaps, was the October 1985 Achille Lauro hijacking.


61. See Fouchard, Crime international, supra note 19, at 130-36 (examining exclusion clauses).

62. As pointed out above, even in the event such a convention is applicable, it will trigger only inter-state cooperation; prosecution will occur before a domestic court applying domestic law. See supra note 30 and accompanying text.

63. Norberg, A Harmonized Approach, supra note 18, at 206 n.15.
and murder of a wheelchair-bound American passenger by Palestinian gunmen.\footnote{64}{See Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21 (2d Cir. 1990); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989).}

In December of that year, the UN General Assembly adopted a resolution "unequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed."\footnote{65}{G.A. Res. 40/61, ¶ 1, U.N. GAOR, 40th Sess., 108th plen. mtg., U.N. Doc. A/RES/40/61 (Dec. 9, 1985).} Soon thereafter, General Assembly terrorism resolutions dropped the exemption for acts committed in the course of armed liberation struggles and the incitement to address the underlying causes of terrorism,\footnote{66}{Until 1991, the General Assembly adopted its semi-annual terrorism-related resolutions under the heading: Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes. See G.A. Res. 3034 (XXVII), U.N. GAOR, 27th Sess., 2114th plen. mtg., U.N. Doc. A/RES/3034 (XXVII) (Dec. 18, 1972).} and the Security Council declared acts of terrorism to be threats to international peace and security.\footnote{67}{See S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) (addressing the bombings in 1988 of Pan Am flight 103 and in 1989 of UTA flight 772, respectively).} It was thus in a position to take action, as it did in 2001, under Chapter VII of the UN Charter. Nonetheless, the emerging consensus that terrorism is inexcusable produced only two, competing definitions of terrorism per se at the United Nations level.\footnote{68}{Regional conventions adopted a comprehensive approach from the outset, but the results have been unsatisfactory due not only to problems with the definitions, but also because ratification has often been subject to reserves. See Norberg, A Harmonized Approach, supra note 18, at 205.}

The 1994 resolution on “Measures to Eliminate International Terrorism” provides a general definition of terrorism similar to that of the 1937 League of Nations convention. Terrorism comprises

\begin{quote}
[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.\footnote{69}{G.A. Res. 49/60, ¶ 13, U.N. GAOR, 49th Sess., 84th plen. mtg., U.N. Doc. A/RES/49/60 (Dec. 9, 1994).}
\end{quote}

The difference lies in the implicit inclusion of state terrorism and the clear intent to disallow any exceptions. This resolution did not, however, lead to a convention evidencing agreement on a definition of terrorism. In fact, the 1999 Terrorist Financing Convention provides a different one,
Any... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, 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 to abstain from doing any act.70

Whether or not this constitutes a definition of terrorism,71 it is not the product of consensus: prior to September 11, 2001, only four states had ratified this convention, and subsequent ratification may in large part be due to Security Council Resolution 1373 of September 28, 2001,72 which requires all UN member states to ratify it.73

This definition is broader than the previous one in that it requires only intimidation, rather than a “state of terror,” and includes both state and anti-state—or even anti-international-organization—terrorism. But it is limited to situations of armed conflict, thus paradoxically limiting the scope of what, by force of a Security Council Resolution taken in response to specific attacks, has become the globally applicable, if not globally agreed, definition. In fact, even had it been the law at the time, the reference to “civilians” and “armed conflict” might exclude those attacks.74 As Susan Tiefenbrun has pointed out, the international community cannot agree on just who qualifies as a “civilian.”75 Moreover, a significant block of states insists on maintaining an exception for conduct perpetrated during armed struggle: the 1999 conventions of the Organization for African Unity (OUA) and

70. Terrorist Financing Convention, supra note 30, art. 2(b).
73. See Norberg, A Harmonized Approach, supra note 18, at 208.
74. Though the term “civilian” may apply to any person not engaged in military service even in peacetime, the phrase “or any other person not taking an active part in the hostilities” (emphasis added) arguably indicates that “civilian” is used to distinguish non-military from military personnel in an ongoing armed conflict. See Terrorist Financing Convention, supra note 30, art. 2(b). Despite rhetoric that the Al Qaeda strikes constituted the opening salvo in an armed conflict, the definition of “aggression” proposed in February 2009 by the Special Working Group on the Crime of Aggression excludes “acts of terrorism performed by non-State actors, such as leaders of Al-Qaida [sic].” Press Release, United Nations, Press Conference on Special Working Group on Crime of Aggression, ¶ 5 (Feb. 13, 2009), http://www.un.org/News/briefings/docs/2009/090213_ICC.doc.htm (last visited Oct. 30, 2009).
the Organisation of the Islamic Conference (OIC)\textsuperscript{76} both recite in General Assembly terms their unequivocal condemnation of terrorism in all its forms, then exempt acts committed during armed liberation struggles.\textsuperscript{77}

Thus, more than seventy years after the first attempt to define terrorism in an international convention, consensus is still lacking on some important elements. Various authors maintain there is enough agreement on at least three elements to constitute a consensus definition of terrorism,\textsuperscript{78} but the internationalized struggle against terrorism has been conducted with, at best, competing definitions that have led to disparate state responses. Judge Rosalyn Higgins thus concludes that "[t]errorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."\textsuperscript{79}

Higgins may be wrong with respect to states, however. Despite the 1999 Convention's implicit inclusion of them as perpetrators of terrorism, as mentioned above, they have been excluded as such from international definitions since 1937. Domestic law also makes this clear. For example, the French Penal Code places the section on terrorism in the portion dedicated to crimes against the state or national security.\textsuperscript{80} In fact, state actors responsible for reigns of terror or "dirty" wars are prosecuted (or pursued under the Alien Tort Statute)\textsuperscript{81} for the international crimes within the ICC's jurisdiction and for grave, systematic human

\textsuperscript{76} The Arab Convention concluded at this time by the League of Arab States, which maintains observer status at the United Nations, is substantially similar to the OIC Convention.

\textsuperscript{77} See OAU Convention, \textit{supra} note 60, art. 3(1) ("[T]he struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination . . . shall not be considered as terrorist acts."). The phrase "in accordance with" clearly modifies "the struggle waged" and may be interpreted to mean that the means used during such struggle must comply with international law. Such restrictive intent is unclear, however, and even less so in the French version. Cf. OIC Convention, \textit{supra} note 60, art. 2(a) ("Peoples' struggle . . . aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.").


\textsuperscript{79} Guillaume, \textit{Terrorism and International Law}, \textit{supra} note 71, at 541 (citing ROSALYN HIGGINS, \textit{The General International Law of Terrorism, in RO}SALYN HIGGINS & MAURICE FLORY, \textit{INTERNATIONAL LAW AND TERRORISM} 28 (1997)).

\textsuperscript{80} See \textsc{C. Pén., Livre IV. Des crimes et délits contre la nation, l'État et la paix publique.}

rights violations, even though there may well be both intent to intimidate a population and a result of intimidation or terror.

Indeed, the focus on anti-state terrorism is a key element in the definitional conundrum and politically expedient designation (or not) of certain individuals as terrorists. While these factors led to terrorism’s exclusion from the ICC statute, the alleged lack of a definition is not an absolute barrier: terrorism could join aggression as a crime too imprecisely defined to be prosecuted. A higher hurdle is the nature of the response to terrorism, as the lack of a definition has posed no obstacle to state repression.

III. When Anti-terrorism Means Anti-Human Rights

Unlike genocide or crimes against humanity, for example, terrorism is the subject of ongoing police operations and measures that at times violate the very human rights the ICC at least indirectly protects. In fact, the 1951 Refugee Convention\(^8^2\) instituted an uneasy tension between human rights and terrorism by denying its protections to suspected terrorists. Tension became a rift as terrorism and other transnational crimes increased and incited states to tighten their borders. Due to measures adopted in the wake of the World Trade Center and Pentagon attacks of 2001, the Madrid bombing of 2004 and the London bombing of 2005, a chasm now yawns between human rights and counter-terrorist regimes as, in the name of fighting terrorism, states have reneged on their commitments, \textit{inter alia}, not to discriminate or torture, and to protect privacy, free speech and the presumption of innocence. Key factors in lifting taboos are the United States’ response to the September 11 attacks and Security Council resolutions implicitly granting priority to preventing terrorism, thus contributing to an internationalized state of emergency reflecting an authoritarian model of criminal justice at best.\(^8^3\)

\textbf{A. From an institutionalized state of emergency in the United States . . .}

More than a period of crisis, a state of emergency is a legal tool. Employed according to rules laid out in domestic and international law and governed by the


\(^{83}\) Portions of the following discussion are adapted from Naomi Norberg, L’internationalisation du droit américain: l’Alien Tort Claims Act, le dispositif antiterroriste et l’acteur civique (2008) (unpublished Ph.D. dissertation, University of Paris I (Panthéon-Sorbonne)) (on file with the Bibliothèque Cujas).
rule of law, it enables states to temporarily derogate from certain fundamental rights, but only in the sole interest of preserving democracy and restoring order. When the tool is misused, such as when the state of emergency is prolonged unnecessarily or serves purposes other than facilitating a return to normal, there is a danger it will become institutionalized, i.e., it will gain constitutional status and become the norm. There is also a danger of slipping from a liberal model of criminal justice policy to an authoritarian or even a totalitarian model.

1. Criminal justice, terrorism and states of emergency: when the exception becomes the norm

Criminal justice policy refers to the way in which society organizes its response to deviant behavior. This term includes social deviation as well as criminal delinquency, while “response” includes prevention as well as the post-hoc reaction. As their names suggest, Mireille Delmas-Marty’s models track their underlying political ideologies while describing who responds to what phenomenon under ideal conditions. For example, the liberal model corresponds to the twentieth-century liberal democracy in which social deviance remains distinct from criminal delinquency. Society responds to the former; the state responds to the latter, subject to the law and the separation of powers typical of the rule of law. The authoritarian model represents a system in which executive power is strengthened and the state may respond to both deviance and delinquency, though these remain distinct. The distinction is lost in the totalitarian model, however: all is either deviance or delinquency. In the latter case, called “repressive networks,” social or political deviance—thinking, believing or acting differently, or just being different—is considered to pose as much of a threat as criminal delinquency and is met with a penal response from the state.

In a state of emergency, a liberal state shifts to an authoritarian model: emergency measures, whether designed to contain terrorism or a threat to public

86. See DELMAS-MARTY, MODELES ET MOUVEMENTS, supra note 85, at 13.
87. Id. See also DELMAS-MARTY, GRANDS SYSTÈMES, supra note 85, at 55-6, 198-200.
health, target dangerousness rather than guilt. They therefore constitute an extension of the state response, usually reserved for criminal delinquency, to deviance. When this extension results in dangerousness becoming the target of penal sanctions, the state has slid over into the totalitarian model of criminal justice.

Typical techniques for extending the application of criminal law to deviants include broad or vague statutes, retroactive application of criminal law, and elimination of the presumption of innocence, the right to choose one’s own legal counsel, or the right to confront one’s accusers. Further techniques such as closed trials and preventive detention (i.e., long-term administrative detention or, in extreme cases, forced disappearance) help break the link between society and the deviant-delinquent, who is then perceived as “other.” Psychological barriers between society and the “other” then arise or are reinforced, while those between society and the state dissolve, leading to state-society fusion (hence the name “totalitarian”).

Many “liberal” states have instituted criminal procedure regimes dedicated to crimes considered particularly serious, such as terrorism, drug trafficking and organized crime. These regimes constitute a permanent derogation from generally applicable criminal defense rights and track the authoritarian model. For example, pre-charge police custody may be extended, and this extension may be coupled with severe limits on the right to consult a lawyer.8 Such exceptional regimes may also be instituted in the face of an emergency. In this latter instance, despite the adoption of the American and Universal Declarations of Human Rights89 and the entry into force of the major regional and international human rights conventions and covenants, such regimes are often abused. Claiming terrorists to be in their midst, more than one state has declared a state of emergency, suspended fundamental rights and perhaps even prosecuted alleged terrorists in military commissions closed to the public.90 Activating such an exceptional regime may

88. See discussion infra.
90. See, e.g., TRIBUNAUX MILITAIRES ET JURIDICTIONS D’EXCEPTION EN MUTATION: PERSPECTIVES COMPARÉES ET INTERNATIONALES (Elisabeth Lambert-Abdelgawad ed., 2007) (encouraging international jurisdiction over terrorism since 2001 as an alternative to military commissions, as if these were the only two options). See generally Mégret, Justice in Times of Violence, supra note 7.
thus put the state on the slippery slope from the authoritarian model to the totalitarian model and/or the institutionalization of a state of emergency.

2. The post-2001 institutionalization of a state of emergency and slide toward the totalitarian model of criminal justice in the United States

The United States took its first step onto this slope when it failed to comply, as it consistently had in the past and continued to do thereafter, with its obligation under the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{91} to notify the United Nations that it had declared a state of emergency and to indicate the territorial and temporal extent of that emergency.\textsuperscript{92} It planted its second foot by passing the Patriot Act under conditions indicative of a lack of separation of powers\textsuperscript{93} typical of a situation of institutionalized emergency.\textsuperscript{94} At the same time, the Attorney General issued orders authorizing him to (1) override immigration judges and detain aliens until he has determined they are not dangerous,\textsuperscript{95} and (2) monitor communications between detainees and their attorneys.\textsuperscript{96} With both feet thus firmly planted, the executive pushed off under cover of Congress’s joint resolution authorizing the use of force,\textsuperscript{97} issued the President’s Military Order of November 13, 2001 (Military Order)\textsuperscript{98} and whizzed on down.


\textsuperscript{97} S.J. Res. 23, 107th Cong., 147 CONG. REC. S9413-01 (2003) (enacted) authorizing the President to use all "necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.").

An in-depth examination of these measures and their consequences is beyond the scope of this article and can be found elsewhere.\textsuperscript{99} I will simply review here some of the ways in which these measures constitute a shift to a model of criminal justice that bears a striking resemblance to Delmas-Marty's totalitarian model and satisfies the laundry list of criteria for institutionalizing a state of emergency set out by the UN Special Rapporteur on states of emergency. Essentially, both phenomena involve a significant increase in executive and perhaps military power. The executive then takes on the role of legislator and sometimes judge to respond not only to crime, but also to deviance, particularly dangerousness.

The Patriot Act was passed under conditions indicating a weakening of the separation of powers, and significantly consolidates executive power. For example, executive spying replaced criminal investigations in cases subject, most notoriously, to sections 213 ("sneak and peak"), 215 (access to library and other records), 218 (electronic surveillance) and 505 (National Security Letters).\textsuperscript{100} These provisions allow(ed)\textsuperscript{101} the executive to undertake searches and seizures with less judicial scrutiny than is required in a criminal investigation under the Fourth Amendment and in conditions that violate the First Amendment.\textsuperscript{102} The Attorney General’s order regarding the detention of aliens further overrides the judicial check, while the order authorizing monitoring of detainee-attorney


\textsuperscript{101} Sections 218 and 505 have both been held unconstitutional, though the judge’s inability to check the executive was at issue only with respect to section 218. See Doe v. Gonzales, 500 F. Supp. 2d 379 (S.D.N.Y. 2007) (holding section 505’s gag order violates the First Amendment); Mayfield v. United States, 504 F. Supp. 2d 1023, 1039 (D. Or. 2007).

communications eliminates one of "the oldest of the privileges for confidential communications known to the common law." The limits placed by these measures on important First, Fourth and Sixth Amendment rights were then completed by the Military Order, which seeks to deny designated non-citizens any Fifth Amendment rights aliens may have. In this way, derogations were introduced that limit constitutional guarantees of free speech, protection from unreasonable searches and seizures, and due process, as well as any protections offered by international humanitarian law. Not all were necessarily intended to have indefinite effect: the Patriot Act was to expire December 31, 2005, but the bulk of it was made permanent in an only slightly improved form. The Military Order was then made permanent by the Military Commissions Act of 2006, in reaction to the Supreme Court's ruling in Hamdan v. Rumsfeld.

The Military Order contains a very broad, vague definition of delinquent or deviant behavior subject to a state (in this case, military) response. Any non-citizen the President has "reason to believe" has been, is or may in the future be involved in "international terrorism" that will or is intended to negatively affect "the United States, its citizens, national security, foreign policy, or economy" will be subject to the order, provided this serves the interests of the United States. The Order provides for trial by military commission of some individuals subject to the order, but says nothing about what will be done with those who are not tried and places no time limits on detention. Indefinite preventive detention is therefore possible, as Guantánamo has shown. Moreover, due to its provision of exclusive military commission jurisdiction and explicit denial of detainee recourse to "(i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal," the Order places detainees in a "legal black hole." Though this regime is not intended to constitute a derogatory criminal

108. Id. § 4(a).
109. Id. § 3.
110. Id. § 7(b)(2).
procedure regime, it functions as one any time the president decides there is “reason to believe” it is necessary. The possibility for arbitrary application of the regime, the broad definition of conduct subject to the Military Order, the establishment of military commissions and the provision for indefinite detention are all hallmarks of the totalitarian criminal justice model.

By militarizing the struggle against terrorism, the executive usurped both legislative and judicial power, a usurpation confirmed by the legislature in the Detainee Treatment Act of 2005\textsuperscript{112} and the Military Commissions Act. Both acts entrench the exceptional regime and may be considered an illustration of the weakened separation of powers typical of an institutionalized state of emergency. Though some Supreme Court decisions invalidate certain aspects of this regime,\textsuperscript{113} it nonetheless still stands.\textsuperscript{114} This entrenchment moves the United States in the direction of institutionalizing a state of emergency and toward a totalitarian model of criminal justice.

In addition, Security Council resolutions adopted between 2001 and 2005 implicitly encourage the conflation between immigration, asylum and terrorism and the adoption of repressive measures in these areas that contribute to an “us versus them” mentality. Many states having derogatory regimes fitting the authoritarian criminal justice model have thus also moved closer to the totalitarian model under which terrorism is fought by repressing speech and excluding from society individuals considered to be dangerous, either through criminal detention or administrative measures designed to keep them beyond borders.

B. \textit{... to a united (undeclared) state of emergency}

Security and liberty have always been in tension, but September 11 tipped the scales firmly in favor of security, as antiterrorism legislation that had been stalled for months to years in various countries and at the European level were whisked through the approval process. Just days after the attacks, Canada passed both an

\textsuperscript{113} See Hamdan, supra note 106.
antiterrorism law that had been blocked for years due to likely conflicts with the Canadian Charter of Rights and Freedoms, and harsh new immigration legislation increasing detention powers and providing new reasons to reject asylum applications.\textsuperscript{115} Similar “Patriot Acts”\textsuperscript{116} were passed in France and the United Kingdom; the UK even took the extra step of declaring a state of emergency and its intent to derogate from the European Convention on Human Rights (ECHR or European Convention).\textsuperscript{117} The European Union also took advantage of the post-September 11 climate to adopt framework decisions that, like the Canadian legislation, had long been under discussion but unable to gain acceptance. Proclaimed “Europe’s Response to 9/11,”\textsuperscript{118} the Framework Decisions on Terrorism\textsuperscript{119} and the European Arrest Warrant\textsuperscript{120} cap years of effort by the Trevi working group, established in 1976 to counter \textit{terrorisme, radicalisation, extremisme} and \textit{violence internationale}.

Examining these developments and defining a state of emergency as the “hyper-production of new law,”\textsuperscript{121} Kim Lane Scheppel thus wrote in 2007 of an undeclared international state of emergency resulting from the plethora of texts adopted across the globe after 2001. This state of emergency was reinforced by post-2001 terrorism-related Security Council resolutions. I will first discuss conflicts between the international human rights and antiterrorism regimes before examining the consequences in terms of specific measures in various countries illustrating the axiological difficulty in extending ICC jurisdiction to terrorism.

1. Normative Conflicts and Security Council Resolutions

Conflicts between the human rights and antiterrorism regimes raise the issue of normative hierarchy and, more specifically, whether Security Council resolutions taken under Chapter VII relieve states of their human rights obligations.\textsuperscript{122} While

\begin{itemize}
\item 115. See Norberg, A Harmonized Approach, supra note 18, at 210-11.
\item 118. The name of a now nonexistent website.
\item 120. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 1 (EC).
\item 121. Scheppel, Memorandum to Syracuse Participants, supra note 12.
\item 122. See Andrea Bianchi, Security Council’s Anti-Terror Resolutions and Their Implementation by Member States, 4 J.I.C.J. 1044 (2006) [hereinafter Bianchi, Security Council’s Anti-
Resolution 1373 does not grant states complete latitude to fight terrorism as they will, it does contribute to their broadening their antiterrorism laws to include new forms of conduct and enables them to claim their repressive tactics are part of the international struggle against terrorism.

Resolutions 1373 and 1624 both implicitly give fighting terrorism precedence over protecting human rights. Resolution 1373 contains no language recalling states’ human rights obligations and Sir Jeremy Greenstock, the first chairman of the Counter-Terrorism Committee created to monitor compliance with the resolution, initially made statements to the effect that making sure states continued to meet their obligations under international human rights conventions while implementing the resolution was beyond the Committee’s mandate.

To correct the impression that the Security Council was not going to trouble itself over human rights, subsequent resolutions remind states of their human rights obligations. But Resolution 1624 generally gives human rights a back seat. It begins by reaffirming “the imperative to combat terrorism ... by all means,” \[condemning in the strongest terms all acts of terrorism \[and\] \[condemning also\] in the strongest terms the incitement of terrorist acts ...\] Only thereafter, Terror Resolutions]. The Council of Europe continues to answer “no” to whether Security Council resolutions under Chapter VII relieve states of their human rights obligations. In January 2008, the Council’s Parliamentary Assembly adopted a resolution with respect to the “United Nations Security Council and European Union blacklists,” the no-fly lists and asset-freezing orders aimed at ending terrorist financing. The Assembly considers that “the procedural and substantive standards currently applied by the UNSC and by the Council of the European Union ... in no way fulfill [minimum procedural standards] and violate the fundamental principles of human rights and the rule of law.” EUR. CONSULT. ASS., United Nations Security Council and European Union blacklists, 61st Sess., Res. 1597, ¶ 6 (2008), http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm. The European Court of Justice took a similar position in Kadi and Al Barakat International Foundation v. Council, C-402/05 P, C-415/05 P, [2008] O.J. C 285/2.

123. Id. at 1051 (citing Law 2003-239 of March 18, 2003, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 19, 2003, p. 4769 [hereinafter Internal Security Act] (adds article 421-2-3, “living from terrorism,” to the Code Pénal; “the inability to justify resources corresponding to one’s lifestyle while maintaining habitual relations with one or several persons engaging in one or more acts of terrorism.”).

124. See, e.g., Mirko Sossai, The Internal Conflict in Colombia and the Fight Against Terrorism, 3 J.I.C.J. 253 (2005) (discussing the Colombian government’s efforts to characterize its internal conflict, which has been ongoing since 1948, as part of the international struggle against terrorism, and the effect on the applicability of international humanitarian law of applying international law with respect to terrorism to internal conflicts).

125. See S.C. Res. 1373, supra note 10; S.C. Res. 1624, supra note 11.


127. S.C. Res. 1624, supra note 11, pmbl., ¶ 2 (emphasis added).

128. Id. pmbl., ¶ 3-4.
"[d]eeply concerned that incitement of terrorist acts . . . poses a serious and growing danger to the enjoyment of human rights, . . . and emphasizing the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life,"\textsuperscript{129} does the Council recall the rights to freedom of expression and to seek and enjoy asylum. Though this latter right is coupled with the obligation of non-refoulement, the same sentence ends by "recalling" that persons suspected of committing "acts contrary to the purposes and principles of the United Nations,"\textsuperscript{130} namely terrorism, do not benefit from the protections offered by the Refugee Convention or its Protocol. States are then called upon to prohibit inciting to terrorism, to refuse asylum to persons reasonably suspected of doing so, and to tighten their borders.\textsuperscript{131} It is then "stressed" that states must comply with their human rights obligations, with no apparent consequences if they do not (the Counter-Terrorism Committee is simply directed to include states' efforts to implement this resolution in its "dialogue" with them).\textsuperscript{132}

Despite efforts by the General Assembly to reintroduce the notion of protecting human rights while combating terrorism,\textsuperscript{133} the United Nations Global Counter-Terrorism Strategy\textsuperscript{134} eliminates any lingering doubts about where priority lies. For example, in the Action Plan set out in the Annex, the Member States resolve, \textit{inter alia}, to "consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations . . . as it constitutes one of the most serious threats to international peace and security."\textsuperscript{135} The language includes domestic as well as international terrorism and, perhaps not coincidentally, mirrors that of the ICC statute granting jurisdiction to the Court over "the most serious crimes . . . ."\textsuperscript{136}

According to this Action Plan, one of the first "urgent action[s]" Member States will take to "prevent and combat terrorism" is to "implement all General Assembly resolutions on measures to eliminate international terrorism and relevant General

\begin{enumerate}
\item\textsuperscript{129} \textit{Id.} pmbl., ¶ 5.
\item\textsuperscript{130} \textit{Id.} pmbl., ¶ 7.
\item\textsuperscript{131} \textit{Id.} ¶ 1-2.
\item\textsuperscript{132} \textit{Id.} ¶ 4-6.
\item\textsuperscript{135} \textit{Id.} Annex, Plan of Action, ¶ 1.
\item\textsuperscript{136} ICC Statute, supra note 2, art. 5, ¶ 1.
\end{enumerate}
Assembly resolutions on the protection of human rights and fundamental freedoms while countering terrorism." The limitation to relevant GA resolutions somewhat contradicts the document's preamble, in which all such resolutions are recalled, but it is compatible with the ranking of Member States' obligations set out in the preamble's fifth paragraph. Firstly, "world leaders rededicated themselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence." These are of course founding principles of the United Nations, and their primacy sets the logical order for those that follow: non-recourse to the use of force and peaceful resolution of disputes are second and third on the list, followed by the right to self-determination and the principle of non-interference in other states' domestic affairs. "[R]espect for human rights and fundamental freedoms" follows in sixth place; the principles of non-discrimination, international cooperation and "the fulfillment in good faith of the obligations assumed in accordance with the Charter" bring up the rear.

The emphasis on controlling immigration and asylum to prevent terrorism fuels fear of foreigners and occults the fact that the terrorist threat is not strictly foreign or international. The result is to strengthen measures having a disparate impact on foreigners, particularly those from countries with large Muslim populations, and even citizens of Arab or Muslim origin.

2. Combating Terrorism or Excluding the "Other"?

The Geneva Convention of 1951 on the Status of Refugees entrenched what at the time seemed a logical limit: the definition of "refugee" excludes individuals reasonably suspected of having committed "a crime against peace, a war crime, ... a crime against humanity, [or] a serious non-political crime outside the country..."
of refuge prior to his admission to that country as a refugee[, or] acts contrary to the purposes and principles of the United Nations." Such persons are therefore not protected by this convention against refoulement, even if they face torture in their home countries. The Torture Convention tries to close this gap, as does the European Convention as interpreted by the European Court of Human Rights (ECtHR). But since 2001, states have increasingly relied on so-called "diplomatic assurances" to circumvent the refoulement prohibition. This practice is arguably encouraged by Resolution 1624 of 2005, which calls on states to prohibit fomenting terrorism and to refuse asylum to persons reasonably believed to do so. This Resolution was not taken under Chapter VII, but by asking states to report on their efforts in this area to the Counter-Terrorism Committee created by Resolution 1373, it is implicitly given binding effect.

regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

143. Convention relating to the Status of Refugees, supra note 82, art. 1 F (a)-(c).
146. A diplomatic assurance is an agreement whereby the receiving states promises to treat deported individuals humanely after their return. In Saadi and Chahal, the European Court held that states cannot rely on diplomatic assurances in situations where there are serious reasons to believe the expelled person runs the risk of torture or other ill treatment). See Saadi, supra note 145; Chahal, supra note 145; Ashley Deeks, Introductory Note to European Court of Human Rights Decision: Case of Saadi v. Italy, 47 ILM 542 (2008); Fiona de Londras, Saadi v. Italy, 102 Am. J. Int'l L. 616 (2008). See also Human Rights Watch, Empty Promises: Diplomatic Assurances No Safeguard against Torture, http://www.hrw.org/en/reports/2004/04/14/empty-promises; Khouzam v. United States, 549 F.3d 235 (3d Cir. 2008) (concerning an Egyptian resident of the United States challenging a deportation order on the grounds that he is at risk of torture despite diplomatic assurances received from the Egyptian government). To resolve this dilemma, the European Union introduced "subsidiary protection" through its Directive on minimum standards for qualifying for refugee status. See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. (L 304) 12, 12-23 (EC). Subsidiary protection constitutes an alternative regime designed to grant temporary protection to asylum seekers who risk torture but do not satisfy the criteria for protection under the UN Refugee Convention.
147. See S.C. Res 1624, supra note 11, ¶ 1.
Exclusion of suspected terrorists from the definition of “refugee” was directed at keeping out persons who had committed terrorist acts in their home states. Today, it serves to bar passage to those feared to be seeking entry to commit terrorist acts in their state of refuge. In either case, it fuels discourse on so-called “false refugees” and the conflation of asylum seekers, illegal immigrants and terrorists. Consequently, terrorism has been fought largely with immigration law, particularly since 2001: by keeping or ejecting suspected terrorists beyond national borders, the territory is secured against the external threat. At the same time, criminal provisions such as prolonged detention aim to preserve the nation from the internal threat. As mentioned earlier, such detention excludes suspected terrorists from society and contributes to the perception of them as “other.” This further fuels anti-immigrant sentiment and more draconian restrictions on immigration and asylum. The post-2001 emphasis on combating “Islamic” terrorism has the double effect of excluding persons of Arab or Muslim origin from society through both immigration and asylum laws and preventive criminal measures.

The derogatory criminal procedure regimes instituted in many countries to address serious forms of criminality, including terrorism, typically restrict access to counsel and provide for a longer pre-charge custody period (i.e., police custody prior to seeing a judge and being either charged or, in France, placed under investigation) than that applicable under the normal regime. France instituted such a regime in 1986 when it adopted its first anti-terrorism law in response to the bombing of the Paris prefecture. A second law was passed in 1995 after a commuter train was blown up at the Saint Michel station and explosive devices were found in garbage cans around the city over the next several months. Between November 2001 and January 2006, four more terrorism-related laws were passed: the 2001 temporary law adopted in direct response to 9/11; a 2003 omnibus measure rendering permanent all but one of the 2001 provisions; the 2004

148. A discourse begun much earlier that resulted in the Schengen Acquis’ institution, as of 1990, of heavy fines for air carriers for each “false refugee” brought into a country.
149. This term is at least reductionist as it conflates acts committed by fundamentalist groups of varying beliefs for a variety of politico-religious reasons with the major religion with which they share some beliefs and practices.
151. Internal Security Act, supra note 123 (called the Perben Act after the then-Interior Minister; extends the derogatory procedural regime applicable to terrorism to organized crime and drug trafficking).
revision of this measure; and the 2006 law relative to “the struggle against terrorism and containing various provisions relating to border security and controls.” The 1986 law increased pre-charge custody from 24 hours renewable one time in normal cases to 48 hours renewable one time in terrorism cases. The 2006 law increased this to a total of 144 hours, or six days, while the normal custody period is still limited to 48 hours maximum. In addition, suspects held under the normal regime have a right to consult with counsel for thirty minutes as soon as detention begins and again upon renewal, whereas the 2004 and 2006 revisions result in terrorism suspects having no right to counsel until after 72 hours of detention (or 96 if custody is extended to six days). Persons suspected of organized crime, however, may consult with counsel after 48 hours. The French Constitutional Council (Conseil constitutionnel) upheld these provisions on the grounds that the right to life they protect outweighs the rights claimed to be infringed.

Similarly, the Spanish Code of Criminal Procedure was revised in November 2003 to increase incommunicado detention of terrorism suspects from five to thirteen days. During this time, they are held in isolation and “represented” by an appointed attorney (not of their choosing) who accompanies them to interrogations and appearances before the judge but who may not address them directly.

154. C. PR. PEN., art. 63-4.
155. Id. art. 63 & 63-4.
156. Id. art. 63-4 & 706-88.
While there is no exceptional criminal procedure regime for terrorism in the United States, the material witness statute has been used successfully to bypass the limits placed on police custody. For example, an appellate court upheld a detention of several weeks even though no testimony was taken, and many individuals, citizens as well as non-citizens, were detained as material witnesses in the wake of 9/11 for periods of a few days to several months or even longer.

The United Kingdom responded to the September 11 attacks by providing, inter alia, for the unlimited detention of alien terrorism suspects. In December 2004, the House of Lords held that the law was discriminatory, but the Lords cannot

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160. See Military Commissions Act of 2006, supra note 105 (creating an exceptional regime that denies the protections of criminal due process to certain suspected terrorists by placing them under military authority).

161. 18 U.S.C. § 3144 (2008) (providing for the arrest, pursuant to a warrant, of a person believed to have information material to a criminal proceeding whose presence at trial may not reasonably be assured).

162. Two forty-eight-hour post-arrest time limits apply to any arrest without a warrant. First, a judge must make a determination of probable cause, which does not require presentation of the detainee, within forty-eight consecutive hours. Gerstein v. Pugh, 420 U.S. 103, 113-4 (1975) ("[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest."); County of Riverside v. McLaughlin, 500 U.S. 44 (1991) ("[A] jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."). Second, arraignment must occur within forty-eight hours, but the clock runs only while court is in session. Detainees are thus often held three to four days before seeing a judge or being informed of the charges against them, or even, in many cases, consulting counsel, as counsel is appointed at arraignment for those who so require. See, e.g., ALAMEDA COUNTY OFFICE OF THE DIST. ATT'Y, POINT OF VIEW, POST ARREST TIME LIMITS (2003), available at http://le.alcoda.org/publications/point_of_view/files/postarrestsummer2003.pdf ("A defendant in custody must be arraigned within 48 hours of his arrest. Unlike the time limits for probable cause determinations, the 48-hour countdown does not proceed nonstop.").


166. See A(FC) v. Sec y'of State for Home Dep't, [2004] UKHL 56 [73] (appeal taken from EWCA) ("[S]ection 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.").
abrogate a law. It therefore remained in force—and the plaintiffs in detention—until Parliament adopted replacement legislation. The Prevention of Terrorism Act 2005 overcomes the 2001 act’s defects with respect to discrimination by extending the indefinite detention provision to citizens as well as aliens. It also corrects separation of powers problems by providing that such detention, transformed into house arrest rather than incarceration, must be approved by a judge rather than ordered by the Home Secretary. However, individuals not subject to such detention were subject to a fourteen-day pre-charge custody period. Prime Minister Tony Blair sought to have that period increased to ninety days, but had to settle for twenty-eight in the Terrorism Act 2006.

Such provisions make a mockery of the 1988, Brogan v. UK, ruling by the ECtHR that police custody lasting from four days and six hours to six days and sixteen hours violates the right to “be brought promptly before a judge,” as guaranteed by Article 5 of the European Convention. Even Spain’s original five-day custody period and certainly its thirteen-day period, as well as France’s six-day custody period arguably violate the Convention as interpreted in Brogan. Detention of this sort counters the presumption of innocence, weakens the link between society and the detainee and may well contribute to the latter’s radicalization.

In addition to flirting with violating arbitrary detention provisions, various countries have shown open disregard for their obligation under the ICCPR, the

168. See id.
169. See id.
Convention Against Terrorism and the ECHR not to deport or return aliens at risk of torture.

In addition to excluding suspected terrorists from the definition of "refugee," the Refugee Convention denies its protections against expulsion to any refugee reasonably "regarded as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." Persons reasonably suspected of having committed terrorist acts prior to entering the state of refuge, or who constitute a threat to the security of that country, are therefore subject to expulsion or refoulement. But in the almost fifty years between the Refugee Convention's entry into force and 2001, the right to be free from torture had come to be recognized as a *jus cogens* norm: an absolutely protected right subject to no derogations. States Parties to the ICCPR, the European Convention and the Torture Convention must not only refrain from committing acts of torture themselves, they must also prevent torture by refraining from returning or expelling a refugee to a country where s/he is in danger of being subjected to torture or other inhuman or degrading treatment. But the choice is not between allowing persons suspected of having committed terrorist acts or otherwise posing a security risk to roam free, on the one hand, and deporting them to face torture, on the other. According to the terms of terrorism conventions' *aut dedere, aut judicare* provisions, it is between extraditing and prosecuting terrorists found within state territory. States should therefore investigate and prosecute if necessary any individuals reasonably suspected of terrorism who cannot be returned.

Nonetheless, shortly after the Security Council emphasized in Resolution 1373 the need to prevent abuse of asylum, the Supreme Court of Canada validated the return, despite the risk of torture, of a refugee whose ties to terrorism posed a security risk to Canada. Legislation implemented in Spain and Italy enables these countries to take similar steps by providing for the expedited expulsion of

175. See ICCPR, *supra* note 91, art. 7; ECHR, *supra* note 117, art. 3; Convention Against Torture, *supra* note 144, art. 3(1).
176. See Bennoune, *supra* note 14, at 57.
aliens administrative officials have at least "good reasons to believe" constitute a
security threat.\textsuperscript{178} Neither country's procedure provides adequate safeguards
against torture or inhuman or degrading treatment in the country of deportation;\textsuperscript{179}
each may therefore lead to a violation of the prohibition against torture. Similarly,
between September 2001 and September 2006, French authorities forcibly
removed seventy-one individuals, including fifteen imams, "described as "Islamic
fundamentalists"" and suspected of ties to extremism and terrorism.\textsuperscript{180} Such
national security removals are not new, but they now play an important role in
countering terrorism and other forms of violent extremism in France. Removal
procedures, however, do not provide adequate protection against torture or other
ill-treatment.\textsuperscript{181}

To avoid liability for a violation of the prohibition against torture, many states
have relied on so-called diplomatic assurances.\textsuperscript{182} In a case against the UK in 1996
and again in a 2008 case against Italy in which the UK intervened, the ECtHR held
that where there are serious reasons to believe the person expelled runs a risk of
torture or inhuman or degrading treatment, states may not so rely.\textsuperscript{183} Still the UK
has persisted in concluding such safe-return agreements, particularly since, in the
wake of the July 2005 bombings, it adopted guidelines providing for the
deporation of any non-Briton "using any medium to 'foment, justify or glorify’."\textsuperscript{184}

\begin{itemize}
\item \textsuperscript{178} See Valery Grebennikov, Introductory memorandum, Respect for human rights in the fight
against terrorism, ¶¶ 60-3, Council of Europe Expert Committee on Terrorism (CODEXTER), \textit{available at}
http://www.coe.int/t/e/legal_affairs/legal_co-operation/force/terrorism/3_codelex/working_documents/207/CODEXTER
\item \textsuperscript{179} In Spain, persons subject to expedited expulsion have only 48 hours in which to challenge
the order; Italy's expedited orders are subject to immediate execution, which appeal does
not suspend.
\item \textsuperscript{180} Human Rights Watch, Letter to Members of the United Nations Human Rights Committee,
at 4 (June 17, 2008), \textit{available at}
http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRWFrance93_170608.pdf. \textit{See also}
LA JUSTICE COURT-CIRCUITEE, supra note 172.
\item \textsuperscript{181} See id.
\item \textsuperscript{182} Manfred Nowak, Special Rapporteur for the United Nations on Torture, criticized this
practice as reflecting "a tendency in Europe to circumvent the international obligation not to
depart’ persons who are at risk of torture. See Norberg, \textit{A Harmonized Approach, supra
note 18}, at 216.
\item \textsuperscript{183} Saadi, supra note 145. \textit{See also Chahal, supra note 145.}
\item \textsuperscript{184} Scheppele, \textit{Other People’s PATRIOT Acts, supra note 116, at 92-3. See Terrorism Act
2006, supra note 170, at § 12 (criminalizing "[t]respassing etc. on nuclear sites"). This
means that distributing pamphlets or otherwise encouraging or participating in anti-nuclear
protest actions such as the peace camp established by the women of Greenham Common in
the 1980s could be found to fall within the meaning of the act. If so, not only might non-
\end{itemize}
terrorism. But once it was discovered that three of the individuals responsible for the attacks had been born and raised in Britain, legislation was passed criminalizing such behavior committed by Britons and non-Britons alike.

In particular, the Terrorism Act 2006 establishes the rather vaguely and broadly defined offenses of encouraging terrorism and disseminating “terrorist publications.” In this regard, the British law complies with the Council of Europe’s 2005 Terrorism Convention, which calls on states to criminalize “public provocation to commit a terrorist offence.” France needed no encouragement in this regard, as it criminalized public expression directly provoking or justifying acts of terrorism in 1881. Since 2004, to the extent such expression constitutes incitement “to discrimination, hatred or violence against a specific person or group of persons,” it has been grounds for deportation as well.

With tighter controls at the borders to keep aliens out and new deportation criteria providing more grounds for expulsion, immigration law has become a highly effective weapon in the struggle against international terrorism. The Bush administration, for example, claimed progress in this struggle after expelling for petty infractions unrelated to terrorism most of the over 700 individuals of Arab or Muslim origin rounded up in the initial investigation into the September 11 attacks. The Bush administration is not alone in this regard. The asylum-immigration-terrorism link has been reinforced by post-2001 Security Council resolutions and has led to a struggle against the “other,” a struggle that bears no relation to the responses implemented to combat genocide, crimes against humanity or war crimes. Granting the ICC jurisdiction over terrorism would implicitly condone such an approach, casting doubt on the legitimacy of that grant.

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185. Id. § 1.
186. Id. § 2.
Conclusion

To be legitimate, a criminal statute must change something, it must be proportional, and its application must be foreseeable. I have shown that terrorism is the subject of inconsistent, competing definitions the application of which often results from political expediency. While ICC jurisdiction to prosecute necessarily means developing a consensus definition, application of such a definition is lacking in foreseeability given the abundance of preceding, competing definitions and entrenched national counter-terrorism regimes, as well as the political concerns too often motivating the designation of individuals as terrorists. Because the international crimes currently within the Court’s jurisdiction originate in international law, there is less discrepancy between the ICC and national definitions; application of these norms is therefore sufficiently foreseeable.

Would ICC jurisdiction be proportional? If there were a consensus that terrorism constitutes one of the “most serious crimes of concern to the international community as a whole,” the answer would be “yes.” But the inability to arrive at a precise, consensus definition—particularly one that includes currently ignored forms of terrorism—91—as well the continued refusal of a major block of states to consider acts committed during liberation struggles as terrorism indicate that such consensus is lacking. Moreover, as I have shown with respect to Security Council resolutions emphasizing the “imperative” of combating terrorism, elevating the status of terrorism from internationalized to international crime may have the same effect as these resolutions: to incite states to take increasingly harsh measures. Many of these measures limit fundamental rights to an extent that may be considered disproportional; in some cases they lead to violations of the prohibition against torture. ICC jurisdiction could be interpreted as approval of such measures, while, again, they have little in common with those taken to combat the crimes already within its jurisdiction.

Would ICC jurisdiction change anything? Would it be effective? Here again, with respect to the expressive function of criminal law, the answer might seem to be “yes,” as it would express solidarity with terrorism’s countless victims. But here again, the problem lies in determining just whose consensus is being expressed. And there is also a problem with respect to deterrence. Former Chief Prosecutor Richard Goldstone asserts that international criminal law proved to have at least some deterrent effect: some war crimes were avoided and the indictment of

191. See supra notes 39 & 40 and accompanying text.
Radovan Karadžić opened the door to the negotiations culminating in the Dayton Accords. But deterrence is linked to values: the less an individual shares the values expressed by the norm or of the system producing it, the lower the norm’s deterrent effect. ICC jurisdiction would arguably have little to no deterrent effect on much of contemporary terrorism, which is motivated by religious extremism.

In this regard, the March 11, 2004 Madrid bombing had an unexpected effect: Security Council Resolution 1566 of October 8, 2004 reintroduced the preoccupation with underlying causes that had disappeared from General Assembly resolutions in 1991. After reiterating the imperative of combating terrorism and reminding Member States of their human rights obligations, the Security Council emphasized that enhancing dialogue and broadening the understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and addressing unresolved regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation, which by itself is necessary to sustain the broadest possible fight against terrorism.

These are goals that international criminal law is ill equipped to meet. In fact, "courageous politics" are needed. A group of former heads of state and government called the Club de Madrid released policy papers a year after the bombing emphasizing that civil society has a significant role to play in combating terrorism through cultural exchange. The Club emphasizes the need to spread democracy, but as Pippa Norris and Robert Inglehart show, "Islamic" terrorism

193. But see Mégrét, Justice in Times of Violence, supra note 7, at 343-44 (arguing that the criminal process, as opposed to military commissions, would serve criminal law’s function of rehabilitating terrorists and reintegrating them into society).
195. The problem is not limited to international criminal law. See Sunder, supra note 52, at 1413-15 (explaining that due to the Enlightenment separation of law (based on reason) from religion, as well as cultural relativism (or the fear of it), human rights law has been unable to “theorize change within cultural communities”). Law thus “defers to fundamentalist claims to discriminate in the name of religion or culture, thwarting the claims of dissenting women and other advocates of change.” Id. at 1425.
196. Bennoune, supra note 14, at 58.
197. See Norberg, A Harmonized Approach, supra note 18, at 218. In particular, the Club suggests citizens’ networks to build democracy. It explicitly excludes non-governmental organizations from this task, which are seen as imposing democracy from above or from outside.

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expresses less disagreement with democracy than it does with gender equality. Indeed, in the same way that "violence against women should be seen as a warning sign for armed conflict," it should be seen as a warning sign for terrorism. “Groups that engage in these sorts of attacks on civilians as a whole often pursue misogynist agendas and carry out, or advocate, severe forms of violence against women.” In addition, women’s organizations often provide early warning of the rise of such groups, as did Women Living Under Muslim Laws “since at least the early 1990s” with respect to an “‘Islamist international’ with the organizational, human, financial, and military means to threaten secularists, feminists and democrats.” Bennoune therefore suggests that “[e]mpowering women [may offer] a kind of counter-terror method that is antithetical to those based on human rights abuses, like torture,” and cites Valentine Moghadam, head of UNESCO’s gender unit, for the proposition that “[w]omen’s peace movements in particular constitute an important counter-movement to terrorism, and they should be encouraged and funded.”

With respect to “courageous politics,” studies by the Centre for the Study of Global Governance at the London School of Economics indicate that 2003 was a turning point in civil society relations between Islamic and western countries and that a global civil society capable of bridging gaps and achieving some of the goals set out in Resolution 1566 is emerging. Thus, just as civil society was largely responsible for making the dream of an international criminal court a reality, so it may be responsible for doing what law cannot do, and what ICC jurisdiction over terrorism might undo.

In his study of litigation under the Alien Tort Statute (ATS), Jaykumar Menon suggests that its very existence might depend on grandeur: an action brought under international law has greater moral force than one brought under domestic law.

199. Bennoune, supra note 14, at 49.
200. Id.
201. Id. (quoting Valentine Moghadam, Violence and Terrorism: Feminist Observations on Islamist Movements, States and the International System, ALTERNATIVES: TURKISH J. INT’L REL. (Summer 2002)).
202. Id.
Thus, though the ATS grants only tort jurisdiction, defendants are tried not for wrongful death or battery, but for summary execution or torture, for example. Domestic prosecution for crimes against humanity, such as the French prosecutions of Klaus Barbie, Paul Touvier and Maurice Papon, bears all the moral weight associated with an international crime. Seeking to confer the status of international crime on terrorism constitutes an understandable search to bring this moral weight to bear on those responsible for terrorist acts. But it would not necessarily deter them, nor bring justice to any more victims than is currently available: since the ICC has no police force of its own, prosecution depends on state cooperation. Prosecution of terrorism cases might therefore still be politically biased.

In his lecture on the Future of International Criminal Law, Goldstone implicitly equates international criminal justice with war crimes. I have shown that terrorism is fundamentally different from war crimes, genocide, and crimes against humanity in terms of both its transnational, rather than international, nature, and the ongoing state responses to it. Elevating terrorism to the rank of "crime of crimes" would condone these responses, which since at least 2001, have increasingly resulted in the violation of human rights and encouragement of an "us versus them" attitude. ICC jurisdiction over terrorism would thus be counter to the fundamental principles the Court aims to uphold, and would not be likely to fulfill the goals of international criminal law.

Moreover, Goldstone cautions in his lecture that "[I]f you want to understand international criminal justice, look at the politics. If you don’t understand the politics of these situations, you don’t understand what’s happening." Those politics currently prevent agreement on an exception-free definition of terrorism and consistent application of existing definitions. If they succeed in extending ICC jurisdiction to terrorism, they may succeed in proving international crimes to be the "hoax" some suspect them of being: a reflection of "what the most powerful states consider to be criminal, depending on their political and economic interests . . . ."
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