

# Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism

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Like no other event in recent history, the attacks against the United States on September 11, 2001 concentrated the world's attention on the problems of terrorism. Among the many problems terrorism poses is a familiar crux of international law: the failure of attempts by the community of nations to find an acceptable legal definition of terrorism.<sup>1</sup> The principal reason for this aporia is that members of the international community have failed to agree whether "freedom fighters" should be included in such a definition. For this reason, the international law concerning terrorism has developed haphazardly and now consists of an unsystematic hodge-podge of treaties concerning specific modes of terrorism.<sup>2</sup> Individual states have chosen which among these treaties they will ratify and incorporate into their domestic legal systems. Accordingly, prosecutions of acts of terrorism falling within the various treaties tend only to occur in domestic legal fora.

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1. See Convention for the Prevention and Punishment of Terrorism, at art. 1 para. 2, League of Nations Doc. C.546 M.383 1937 V (1937); Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission, 43d Sess., U.N. Doc. A/46/10 (1991).

2. See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on Dec. 17, 1979, 1136 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52d Sess., Supp. No. 37, U.N. Doc. A/52/653 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (1999); Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 546; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. 11080; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 Feb. 24, 1988, U.N. Stat. 1990:440; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, U.N. Stat. 1992:2226; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, U.S. Treaty Doc. 103-8.

The magnitude of the assaults on September 11 was of such shocking dimensions that immediate and widespread international concern arose. Even the administration of George W. Bush, isolationist as it had been with regard to most international matters, recognized that multilateral cooperation was essential to curb further attacks by a terrorist organization that spanned the globe. Thus the resolutions sponsored by the United States and adopted on September 12, 2001 by the United Nations Security Council (Res. 1368)<sup>3</sup> and General Assembly (Res. 56/1)<sup>4</sup> stressed the need for “all states to work together” in a showing of “international cooperation” in order to eradicate acts of terrorism. Achieving this end will require the efficient apprehension and successful prosecution of terrorism’s perpetrators. Unquestionably, the tools employed to do so must be powerful and effective. At the same time states cannot be allowed to subvert fundamental human rights and freedoms such as those guaranteed in the key international human rights instruments.<sup>5</sup>

One such legal tool may be the International Criminal Court (“ICC”), which came into being on July 1, 2002 following the sixtieth ratification of the Rome Statute on April 11, 2002.<sup>6</sup> Although the ICC currently has jurisdiction over only the most serious crimes of international law—war crimes, crimes against humanity, and genocide<sup>7</sup>—the International Law Commission’s 1994 Draft Statute for the ICC proposed the inclusion of another category of crimes within the Court’s jurisdiction: “treaty crimes,” i.e., offenses criminalized under various treaty regimes, including terrorism, drug trafficking, apartheid, and grave breaches of the four 1949 Geneva Conventions. The Rome Statute’s Preparatory Committee, however, felt strongly that the Court’s statute should define the crimes within its jurisdiction, rather than simply list them as the International Law Commission’s Draft had done. The failure to reach a consensus on the definition of the treaty crimes prevented terrorism from falling under the Court’s jurisdiction. Resolution E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court did, however, note that the Assembly of States Parties could add the crime of terrorism to the ICC’s jurisdiction at a later stage.<sup>8</sup>

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3. U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

4. U.N. GAOR, 56th Sess., 1st plen. mtg., Agenda Item 8, U.N. Doc. A/RES/56/1 (2001).

5. *See, e.g.*, The International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); U.N. CHARTER; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; European Convention on Extradition, Apr. 18, 1960, Europ. T.S. No. 24.

6. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter “Rome Statute”].

7. *Id.* art. 5.

8. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E., U.N. Doc. A/CONF.183/10 (1998).

Although trying acts of terrorism qua “terrorism” is not a part of the ICC’s current mandate, such acts can fall within the definition of one of the crimes already under the Court’s jurisdiction, namely crimes against humanity. In fact, on October 17, 2001, while speaking at the U.S. Institute of Peace in Washington, the then United Nations High Commissioner for Human Rights, Mary Robinson, expressed the opinion that the attacks of September 11 constituted such a crime. A consideration of the definition of crimes against humanity in the ICC Statute, analyzed in tandem with the elements of the crime contained in Appendix 3 to the Statute, indicates that the attacks of September 11 do qualify as “murder” and “inhumane acts” “committed as part of a widespread or systematic attack directed against [a] civilian population.”<sup>9</sup>

The High Commissioner’s opinion was of course *ex hypothesi* insofar as the ICC could have no jurisdiction over crimes committed before its own inception,<sup>10</sup> which, as noted, did not happen until July 1, 2002.<sup>11</sup> It scarcely needs saying, however, that any similar acts committed in the future need not be so excluded. It is therefore relevant and important to evaluate the role that the ICC could play in prosecuting and deterring acts of terrorism. In order to envisage the ICC’s prospects and potential in these regards, we should not simply evaluate the ICC in isolation from other fora capable of adjudicating the prosecution of acts of terrorism; we must rather compare it to them. Doing so will highlight any shortcomings in the other fora and throw light on whether the ICC might be a better venue. We will round out our discussion by considering the potential challenges to the ICC’s effectiveness as a forum for the prosecution of acts of terrorism.

## I. DOMESTIC FORA

A country’s domestic courts will have jurisdiction to prosecute perpetrators who have committed acts of terrorism against its nationals or on its territory. In terms of traditional notions of jurisdiction this may simply be because the terrorist acts are often legally indistinguishable from common crimes, like murder, which the country’s legal system will recognize. Jurisdiction will also arise when the crime of terrorism has been incorporated into the domestic legal system, as it has been in the United Kingdom.<sup>12</sup> Proceedings in domestic courts of the country where the acts occurred will likely be more accessible for witnesses, surviving victims, and their families. Domestic trials may also provide for greater access to evidence.

Perpetrators of gross acts of terrorism may also be charged in the courts of those countries whose domestic law confers universal jurisdiction with respect to such crimes. The principle of universal jurisdiction arises from the

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9. Rome Statute, art. 7.

10. *Id.* art. 11(1).

11. *See supra* text accompanying note 6.

12. Terrorism Act of 2000, 2000, c. 11 (Eng.).

recognition that certain crimes are of such a magnitude that they are committed not only against the victims themselves and the state in which they occurred, but indeed against all of humankind. The perpetrators, as *hostes humani generis*,<sup>13</sup> may accordingly be prosecuted by any country. Countries that recognize universal jurisdiction include Belgium, Germany, and Spain.<sup>14</sup>

The rules under which different domestic legal systems operate usually vary. Such nonuniformity causes legal uncertainty and can also create friction between nations. A country whose nationals were victims of a terrorist act may believe that a second country's legal system would treat the alleged perpetrators too leniently. Conversely, the severity of punishment or the procedural fairness of a trial may be deemed acceptable by the country conducting the prosecution, but simultaneously repellent to another interested state. We need only consider the fact that alleged Al Qaeda members arrested by Spanish authorities have not been extradited to the United States, where they could face the death penalty.<sup>15</sup>

Additionally, if a domestic court of a country that suffered a terrorist attack should prosecute the perpetrators thereof, doubts may arise about the court's impartiality. One imagines that this would be especially true if the act of terrorism deeply affected the country in a way apparent to the international community. In this regard, too, the presence of the death penalty could be a grave obstacle to international cooperation.

A domestic court can also sit on foreign soil. This was the solution implemented for the trial of those alleged to have committed the bombing of Pan American Flight 103 over Lockerbie, Scotland, on December 21, 1988. The trial was held by a Scottish court sitting in the Netherlands and was the result of political compromise: Libya, which held the suspects, was willing to surrender them only if the trial took place in a third country.<sup>16</sup> In such a scenario, the same disadvantages of garden-variety domestic courts pertain, and at the same time the foreign domestic court will not enjoy the advantages of the former, as the court will no longer be near to the scene of the crime and the proceedings may prove inconvenient for witnesses and victims.

Another domestic forum exists and is peculiarly problematic: the military tribunal. The rules of procedure in these tribunals usually differ from those of regular domestic courts. Insofar as such tribunals typically have jurisdic-

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13. "Enemies of humanity."

14. In 1993 the Belgian Parliament enacted a law providing for universal jurisdiction over war crimes. A 1999 amendment to that law extended its scope to crimes against humanity and genocide. In June 2002, however, the Court of Appeal of Brussels held that no investigation of these crimes could be opened in Belgium unless the suspect were to be found in the country. In September 2002 an appeal was filed against this ruling in the Court of Cassation.

15. Germany and France have refused to extradite individuals to the United States for the same reason.

16. See *Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah*, High Court of Justiciary at Camp Zeist, Case No. 1475/99 (2001).

tion over military matters, they should not be used to prosecute the crime of terrorism per se. They may, however, be employed to prosecute acts linked to an armed conflict, but only where an armed conflict exists in more than theory or rhetoric. In such prosecutions the perpetrators would of course be entitled to the protection and defenses associated with the law of armed conflict.

An advantage of military tribunals is that they allow greater secrecy, and this may protect the security of the nation engaged in armed conflict. Such secrecy, however, comes at the cost of legal transparency and can therefore not be tolerated in situations where there is no real armed conflict. Even in times of war there will be ways to vindicate national security interests and nevertheless ensure fair trials.<sup>17</sup>

A serious concern is that the standard of procedural fairness in military trials may be, and may be perceived to be, lower than in ordinary domestic fora.<sup>18</sup> Military tribunals may also be perceived as being less substantively impartial than other legal tribunals. Therefore, a country using this kind of forum renders itself vulnerable to criticism, and possibly reprisals, if its use cannot be justified.

On November 13, 2001, U.S. President George W. Bush issued a military order establishing military commissions “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.”<sup>19</sup> Problematically, the Military Order limited the commissions’ jurisdiction neither to acts linked to an armed conflict nor to an appropriately narrow range of individuals. The commissions consequently have the power to prosecute non-U.S. citizens who are Al Qaeda members and have contributed to, or aim to cause harm to, the United States,<sup>20</sup> and jurisdiction also extends to other non-U.S. citizens whose prosecution is “in the interest of the United States.”<sup>21</sup> The Military Order further states that “[i]t is not practicable to apply in military commissions under [this] order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>22</sup> It also provides that the executive act as judge, with the ability (1) to determine who will

17. The International Criminal Tribunal for the former Yugoslavia, for instance, employs scrambling to protect witnesses and security interests. Moreover, the rules of procedure of the Tribunal enable the Prosecutor to keep sensitive information confidential.

18. See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1298–1303 (2002) (arguing that the Framers of the Equal Protection Clause in the U.S. Constitution understood that discrimination against aliens was pervasive and problematic and intentionally extended the reach of the Clause to “persons” rather than confining it to “citizens”). But see Kenneth Anderson, *The Military Tribunal Order: What to do with Bin Laden and Al Qaeda Terrorists?*, 25 HARV. J.L. & PUB. POL’Y 591, 610–11 (2002) (arguing that the constitutional guarantees of the American legal system are owed to members of a particular political community, not to the entire world).

19. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, at § 1(e), 66 Fed. Reg. 57,833, 57,834 (2001) [hereinafter “Military Order”].

20. *Id.* § 2(a)(1)(i)–(iii).

21. *Id.* § 2(a)(2).

22. *Id.* § 1(f).

appear as the accused and (2) to order the accused's indefinite detention, whether he be found guilty or not.<sup>23</sup> Less stringent standards relating to the admission of evidence are to be allowed throughout the adjudicative process,<sup>24</sup> hearings will be held in camera, and there will be no presumption of innocence.<sup>25</sup> The commission has also been given the penal power to order the execution of those found guilty by a majority of its presiding officers.<sup>26</sup>

Not surprisingly, the Military Order has been bitterly criticized both in the United States and abroad for its deficient standards of procedural fairness and due process.<sup>27</sup> Such criticism may partly explain why no one has yet been brought before the commissions and why in March 2002 the White House issued detailed rules for the commissions' operation.<sup>28</sup> Provision has been made for a unanimous decision for the imposition of a death penalty by not less than seven presiding officers, guilt in all cases has to be proven beyond a reasonable doubt, and, save in those cases in which there is a need to protect highly sensitive evidence, the press will be allowed to attend trials. It remains a matter of concern, however, that there is no provision for appeal to the civilian federal court system. The President or the Secretary of Defense has the power to make a final decision in any case which includes the altering of an order, other than for acquittal. Since the rules have been made public, the Department of Defense has given notice that persons found not guilty will not necessarily be released from detention.<sup>29</sup>

## II. COALITION FORA

Coalitions of different international players can create a tribunal by treaty as an alternative to national courts.<sup>30</sup> The parties to such a treaty may be a country and the United Nations, as is the case with the Independent Special Court for Sierra Leone. They may also be various states, as was the case with

23. *Id.* § 6(e).

24. *Id.* § 4(c)(3).

25. *Id.*

26. *Id.* § 4(c)(7).

27. *See, e.g.,* Katyal & Tribe, *supra* note 18, at 1274, 1297 (contending that the Military Order violates the separation of powers under the U.S. Constitution).

28. Dep't of Def. Military Comm'n Order No. 1 (Mar. 21, 2002).

29. *See* Defense Department General Counsel William J. Haynes, DOD News Briefing on Military Commissions, (Mar. 21, 2002), at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html).

30. One might analogize the creation of coalition fora to the regional treaties that have been framed to deal with terrorism. *See, e.g.,* Arab Convention for the Suppression of Terrorism, Apr. 22, 1998, League of Arab States, at <http://al-bab.com/arab/docs/league/terrorism98.htm> (last visited Nov. 10, 2002); Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, at <http://www.oic-un.org/26icfm/c.html> (last visited Nov. 10, 2002); European Convention on the Suppression of Terrorism, January 27, 1977, 1137 U.N.T.S. 93, 94; OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, February 2, 1971, 1438 U.N.T.S. 191, 195(E), 198(F); OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, at <http://www.africa-union.org/en/commarchive.asp?Page=2&ID=141> (last visited Nov. 14, 2002); SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, at <http://untreaty.un.org/English/Terrorism/Conv18.pdf> (last visited Nov. 14, 2002).

the Nuremberg and Tokyo tribunals. The Nuremberg trials, for instance, were held in accordance with the London Agreement pursuant to which the four victorious allies of the World War II agreed to prosecute major Nazi leaders.<sup>31</sup> In this instance, the tribunals' jurisdiction was not so much universal as it was the concentration of the national jurisdiction that each of the allied powers possessed to prosecute war crimes.<sup>32</sup>

A coalition may be more likely to reach a timely consensus regarding an acceptable definition of terrorism than an international court. Moreover, by working together, the coalition members would have the benefit of international or transnational financial, legal, and policing services. A multilateral tribunal formed by such a coalition might be more reflective of different nations' legal systems and political ideals, and so benefit from an aura of greater legitimacy and impartiality in the eyes of the international community. The fact that the tribunal could be situated in a place other than the country in which the act of terrorism had occurred could also be viewed as a benefit, whether vis-à-vis security concerns or more mundane and basic matters like the availability of evidence and witnesses.

The coalition would, however, be powerless to compel other nations to cooperate in the production of evidence and suspects. Coalition members would consequently have to rely on existing extradition and cooperation treaties as well as principles of customary law like *male captus, bene detentus*.<sup>33</sup> Further impediments to tribunals of this nature include their cost, the delays associated with their inception, and the possibility that they may be perceived as applying "victor's justice" in spite of their multinational origins.

### III. INTERNATIONAL TRIBUNALS

Shifting one's focus from coalition fora, one looks to existing international tribunals. Principal among these is the International Court of Justice ("ICJ"). The ICJ, however, has jurisdiction only with respect to disputes between states. The criminal acts of individuals are beyond its purview. Acts of terrorism, unless sponsored by a government, would not fall within the ICJ's competence.

A second kind of international tribunal of great significance is the ad hoc variety established by the Security Council of the United Nations. Under Chapter VII of the United Nations Charter, the Security Council has the power to take measures to protect international peace and security.<sup>34</sup> It was under its Chapter VII authority that the Security Council established the

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31. London Agreement, Aug. 8, 1945, Nuremberg Trial Proceedings, vol. 1, at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited Jan. 12, 2003).

32. See Henry J. Steiner & Philip Alston, *International Human Rights in Context* (Oxford, 2000) at 112–22, "Judgment at Nuremberg."

33. "Wrongly captured, properly detained": a principle of extradition law that allows courts to assert jurisdiction over defendants even if they were illegally arrested and removed from a state where the defendant formerly enjoyed the protection of the authorities.

34. U.N. CHARTER art. 39.

International Criminal Tribunal for the former Yugoslavia ("ICTY")<sup>35</sup> and the International Criminal Tribunal for Rwanda ("ICTR")<sup>36</sup> in order to adjudicate the atrocities committed in those countries.

In S.C. Resolution 1373, adopted on September 28, 2001, the Security Council stated that the acts committed on September 11, 2001, "like any act of international terrorism, constitute a threat to the peace and security" of the international community.<sup>37</sup> Resolution 1373 raises the possibility that the Security Council could establish an ad hoc tribunal to prosecute acts of terrorism. Such a tribunal would exercise preemptory jurisdiction over individuals suspected of committing these acts. Invoking its Chapter VII powers, the Security Council could also compel UN member states to cooperate with the tribunal. Judges could be elected by the same procedure used for the ICTY and ICTR. For those tribunals, a short list of judges was compiled by the Security Council and the final selection was made, from the list, by the General Assembly. The input of the General Assembly allows for the representation of the interests of the diverse legal systems of the world, although it is the case that the Security Council can make the selection of its own accord. In this way the five permanent members enjoy a veto power in the event any one of them believes the General Assembly to have appointed inappropriate judges or prosecutors. In a similar way, the Security Council can also decide on a new tribunal's rules of procedure and evidence.

The tribunal would have the preemptory powers of the Security Council and would not necessarily have to rely on complicated extradition and cooperation treaties to obtain evidence and suspects. A single set of procedural and substantive laws would apply to all parties for as long as the tribunal continued to function, and this integrity would remove the uncertainty and possible unfair outcomes that can attend individual prosecutions in less integrated fora.

Because the tribunals are created pursuant to the Security Council's Chapter VII powers, they may only be established to confront discrete threats to international peace and security. Accordingly, the tribunals would have a defined and limited temporal and geographic competence, and once they had completed their tasks they would be dissolved. Whether such a tribunal could be dedicated to prosecuting acts of terrorism is a practical conundrum insofar as terrorism has been a perennial phenomenon with motivations as varied as its targets have been widespread.

Another difficulty with such a tribunal remains: if the tribunal is to rely on the support of the Security Council for the establishment and enforcement of its jurisdiction, it will face the danger of political sabotage by the

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35. Security Council Resolutions on The Establishment of an International Tribunal for the Former Yugoslavia, S.C. Res. 808, 827, *reprinted in* 14 HUMAN RIGHTS L.J. 197 (1993).

36. Statute of the International Tribunal for Rwanda, S.C. Res. 955, *reprinted in* 33 I.L.M. 1590 (1994).

37. U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

use of the veto by one or more of the permanent members of the Security Council. The delay in establishing an ad hoc tribunal might also result in the loss of valuable evidence and witnesses, and, most significantly for our purposes, members of the Security Council may hesitate before establishing another tribunal now that the ICC exists and could more readily be given jurisdiction to prosecute acts of terrorism.

Indeed, it might be preferable to adjudicate acts of terrorism in a permanent tribunal like the ICC rather than to establish an ad hoc tribunal whose temporal and geographic competency would almost necessarily be limited. The ICC, for instance, can yield all kinds of efficiencies: its “start-up” cost is a one-time expenditure; it can in a single forum manage the prosecution of crimes other than terrorism and so avoid the necessity of creating other ad hoc tribunals as they become necessary; its permanency does away with the delays associated with initiating ad hoc tribunals; and its funding comes from States Parties to the Rome Statute rather than the United Nations, whose strapped budget may preclude the creation of new tribunals.<sup>38</sup>

#### IV. THE INTERNATIONAL CRIMINAL COURT

Having discussed various fora capable of prosecuting acts of terrorism, we now turn to an analysis of the advantages and disadvantages of the ICC.

First, a statement of the obvious: the most basic role that the ICC will have is the provision of an effective tribunal in which perpetrators of certain crimes can be prosecuted under international criminal law. In the light of this primary mission, it is interesting to note that the Rome Statute does not envisage the ICC as the primary tribunal for such prosecutions. Instead, the responsibility for investigating and prosecuting perpetrators of crimes within the ICC’s jurisdiction remains first with domestic courts. This responsibility arises from the principle of complementarity, which grants jurisdiction to the ICC only when a country with primary competency is unwilling or unable to investigate or prosecute the crime at issue.<sup>39</sup>

Complementarity has various consequences. First, it allays fears that the ICC may encroach upon the sovereignty of nations. Second, the mere existence of the ICC’s potential jurisdiction over certain crimes can act as an incentive for nations to incorporate those crimes into their domestic laws and so become vigilant in investigating alleged violations. Third, in the event that domestic courts do not adjudicate a matter within the ICC’s jurisdiction, the ICC itself will be able to, thereby both ensuring that serious crimes do not go unpunished and that a measure of retribution sanctioned by the international community is meted out against the perpetrators of heinous acts.<sup>40</sup>

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38. Rome Statute, art. 115(a).

39. *Id.* art. 17.

40. A problem with complementarity is that it does not prevent a country from initiating sham investigations to preclude ICC jurisdiction. If this happened, however, the ICC could still assume jurisdiction,

The ICC rules of evidence, witness protection, testimony, and trial have been specially tailored to fit the crimes within the Court's jurisdiction.<sup>41</sup> Additionally, the ICC's punitive guidelines make provision for both restorative and compensatory measures,<sup>42</sup> and institutional support will be further provided through the Victims and Witnesses Unit.<sup>43</sup> These schemes are expected to yield positive results for law enforcement, victims, and the communities in which crimes are perpetrated.

As noted previously, a single set of procedural and substantive laws will apply to all parties and proceedings before the ICC. This unity will lead to consistency and greater legal certainty. The laws, moreover, are contained in the detailed definitions of elements of crimes which are incorporated into the ICC Statute. That they are the product of extensive negotiation by the States Parties also indicates that the Statute not only reflects the legal norms of various regions of the world but also represents the new frontier of global developments in international law.<sup>44</sup>

The operation of the Court is well-planned. A case may be referred to the ICC by the Security Council or a state that is a party to the Rome Statute. Alternatively, an investigation may be initiated by the ICC Prosecutor.<sup>45</sup> The ICC is not then solely dependent on a Security Council referral and is therefore less vulnerable to the political will of the Security Council's Permanent Members. The most that the Security Council can do to obstruct the Court's operation is to instruct the ICC to defer an investigation for a renewable period of twelve months.<sup>46</sup> A single Permanent Member will therefore not be able to use its veto right to suspend an investigation. In this way prospective cases are less likely to be stymied—although having a case referred to the ICC by the Security Council will always be advantageous, insofar as the ICC's jurisdiction over individuals and evidence will not then depend upon the ratification by any given state of the Rome Statute.<sup>47</sup>

The ICC will be able to prosecute those who fall within its jurisdiction, provided that either the state on whose territory the crime was committed, or the state the accused is a national of, is a party to the ICC.<sup>48</sup> This means that a perpetrator cannot escape the ICC's jurisdiction by fleeing to a state

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but precious time and evidence may have been lost during the interval.

41. *Id.* art. 69, 68, 70, and pt. 6.

42. *Id.* art. 75.

43. *Id.* art. 43(6).

44. Indeed, great care has been taken in defining the crimes falling within the ICC's jurisdiction. Such scrupulousness will serve to develop this area of customary law and so create greater legal certainty for all nations—not only States Parties. Additionally, people will not be held responsible for criminal conduct not clearly recognized as such by the law (the *nullum crimen sine lege* concern).

45. Rome Statute, art. 13(a)–(c). Any state unable to finance the police and intelligence agencies required to prosecute terrorism will be able to refer investigations to the ICC, thereby not only ensuring greater justice for their own citizens but also avoiding the creation of an effective safe haven for terrorists.

46. *Id.* art. 16.

47. The Security Council can use its Chapter VII powers to compel any United Nations member to cooperate with the ICC.

48. Rome Statute, art. 12(2)(a)–(b).

that is not a party to the ICC, so long as his own country, or the country where he committed the crime, is a member. Even if neither state in such a scenario is a party to the ICC, either can specially submit to ICC jurisdiction for the prosecution of the alleged perpetrator. It scarcely needs saying that in these cases the ICC will not have the power to compel a non-party state to surrender a suspect, but this is true of any tribunal in the absence of a prior agreement with the surrendering state or the conferral of powers under Chapter VII of the UN Charter. In any case, some states may prefer to surrender a suspect to the ICC rather than to extradite him to a country whose legal system is a matter of concern (such as one that imposes the death penalty). With respect to States Parties, the ICC does not have to rely on complicated extradition and cooperation treaties in order to obtain evidence and suspects, as all States Parties are obliged to cooperate with the Court.<sup>49</sup>

The Rome Statute contains various safe-guards, checks, and balances to ensure that the ICC will act with transparency and openness. Even if a case is referred to the Court by a state with a direct interest or involvement in the matter, the perception of “victor’s justice” will be diminished by such openness, which will in turn enhance the credibility of the Court and the Prosecutor. The transparency of the ICC is sufficiently distinctive that it is worth setting out a number of the measures in the Statute adopted to effect this end:

- The judges of the ICC will require for their election a two-thirds majority of the Assembly of States Parties. This should ensure that they will be, and be perceived as being, impartial and reflective of the judicial community as it exists in most nations;<sup>50</sup>
- A Pre-Trial Chamber made up of three judges will supervise the independent Prosecutor, and its approval is required before any alleged crime may be investigated;<sup>51</sup>
- Even if the accused’s home country is not a party to the ICC, either the country or the accused may challenge the Court’s jurisdiction before an impartial chamber and may participate in the proceedings;<sup>52</sup>
- The highest standards of due process are guaranteed by the Rome Statute. In furtherance of this end, the accused is entitled to compensation for wrongful arrest or detention and may choose his own counsel.<sup>53</sup>

The greater international cooperation which is possible through the ICC should give rise to greater international stability and efficacy in the fight

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49. *Id.* art. 86.

50. *Id.* art. 36.

51. *Id.* art. 15, 39.

52. *Id.* art. 19.

53. *Id.* art. 85.

against terrorism. The very nature of terrorism creates the need for international cooperation if it is to be suppressed efficiently. The flip side of this coin, however, is that the ICC's success will largely depend on international cooperation, especially insofar as the Court commands no police force of its own. The Rome Statute and Rules of Evidence and Procedure contain detailed provisions relating to such cooperation, but whether the States Parties will adhere to these provisions remains to be seen.<sup>54</sup> Should a State Party fail to comply with a request, the matter may be referred to the Assembly of States Parties or, when the reference has come from it, to the Security Council.<sup>55</sup>

The effectiveness of the ICC as a forum for the prosecution of acts of terrorism is hampered by the fact that the crime of terrorism may only be included within the ICC's jurisdiction by way of amendment, which can happen no earlier than seven years after the Statute has come into force (i.e., 2009).<sup>56</sup> Moreover, if such an amendment is made to the Statute, it will only be binding on those States Parties that accept it.<sup>57</sup> In the interim, other kinds of fora must be used to prosecute any acts of terrorism that occur, unless of course the acts also fall under the definition of one of the crimes already within the ICC's competence.<sup>58</sup> Naturally, it is possible that the States Parties will continue to disagree on the definition of terrorism, or that they will adopt only a narrow definition of the crime. The latter scenario may not be ideal, but it is preferable to the ICC having no jurisdiction whatsoever.

A critical extrinsic factor that will affect the ICC remains to be discussed, namely the active opposition the Court faces from the United States under its current leadership. Bill Clinton signed the Rome Statute on December 31, 2000, but in May 2002, President George W. Bush had his Administration formally notify the United Nations that the United States would take steps to oppose the ICC and in effect "unsign" the Statute, an action never before taken by the United States. The principal justifications offered for this decision were that the United States did not recognize the ICC's jurisdiction over the nationals of non-States Parties, and, more specifically, that it feared politicized prosecutions of Americans.

Following the Statute's ratification, the Bush Administration, with the assistance of the U.S. Congress, embarked on a series of actions aimed at ensuring impunity for any of its nationals brought before the ICC. The American Servicemember's Protection Act ("ASPA") was passed by the House and

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54. Article 86 places a general obligation on all States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes." To make this possible Article 88 provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation." The Rome Statute also makes provision for specific ways in which States Parties must cooperate with the Court. These include the arrest and surrender of a person on the State's territory (Article 89), investigations and gathering of evidence (Article 93), protection of witnesses and victims (Article 93(1)(k)), and enforcing ICC sentences, forfeiture orders, and fines (Article 109).

55. Rome Statute, art. 87.

56. *Id.* art. 121(1).

57. *Id.* art. 121(5).

58. See *supra* text accompanying note 9.

Senate on July 24, 2002 and signed into law by the President on August 2, 2002.<sup>59</sup> The ASPA includes the following provisions:

- The prohibition of cooperation with the ICC;
- The restriction on American participation in United Nations peace-keeping operations;
- The prohibition of direct or indirect transfer of classified national security information (including law enforcement intelligence) to the ICC;
- The prohibition of United States military assistance to States Parties to the ICC;
- Pre-authorized executive authority to free members of the armed forces of the United States and certain other persons detained or imprisoned by or on behalf of the ICC (the so-called “Hague Invasion Clause”).

Stringent as it is, the Act may nonetheless be diluted by the President’s right to waive its operative provisions and then by a clause stating that nothing in the Act would prohibit the United States from “rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milošević, Osama bin Laden, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”<sup>60</sup>

In addition to its own domestic efforts, the United States may set obstacles before the Court by vetoing referrals to the Security Council. While it is undesirable for this avenue to the Court to be closed, we should recall that cases may continue to be sent to the ICC by concerned states or through investigations initiated by the ICC Prosecutor.

In the light of American opposition to the Court, the Security Council adopted a resolution on July 12, 2002, in which it instructed the ICC to defer any investigation or prosecution involving current or former officials or personnel from non-States Parties for acts or omissions related to United Nations peace-keeping operations.<sup>61</sup> This order was made consistent with the provisions of Article 16 of the Rome Statute and will operate for a year from July 1, 2002, unless the Security Council decides otherwise.<sup>62</sup>

Still not satisfied by the Security Council’s resolution, the United States next made use of Article 98, which provides that the Court may not proceed with a request for surrender or assistance if doing so would require the requested state to act inconsistently with its international law obligations.

59. American Servicemember’s Protection Act, H.R. 4775, 107th Cong. (2d Sess. 2002).

60. *Id.* Title II, § 2015.

61. S.C. Res. 1422, U.N. SCOR, 4572d Meeting, U.N. Doc. S/RES/1422 (2002). This resolution followed pressure and threats from the United States that it would veto a Security Council decision to extend the peacekeeping mandate in Bosnia.

62. Rome Statute, art. 16.

The United States has approached many nations of the world and requested that they sign an agreement, thereby creating an international law obligation, guaranteeing that U.S. nationals will not be surrendered to the ICC without the permission of the United States. At this writing, only Tadjikistan, Romania, and Israel have signed such treaties, and it appears that most nations (including the European Union member states, Canada, and South Africa) will refuse to conclude such a pact with the United States.

For the time being, little can be done about American reluctance to assist the Court. There is, however, a strong possibility that the ICC can survive in spite of this opposition, especially in view of the fact that most nations have made clear their commitment to the ICC as a forum important for sustaining international order and security.

The foregoing analysis suggests that the ICC could be a very effective forum for the prosecution of acts of terrorism. Whether this will be the case will depend on the support received by the Court from the international community, the manner in which it operates during its early years, and the kinds of investigations and prosecutions that it undertakes. While it is likely that most cases that could fall within the jurisdiction of the ICC will be excluded by individual nations exercising their own jurisdiction, the ICC will nevertheless act as a safety net, ensuring that important cases do not escape prosecution.

If in the coming years the ICC acts with efficiency and transparency, there should be no doubt that this Court can be a powerful tool in the fight against terrorism. The important link between peace and prosecution by an impartial court should not be underestimated. If procedural and substantive justice is advanced by the ICC in its early years, then the Court could have a significant deterrent effect on future acts of terrorism.

In selecting a tool to fight terrorism, all governments respectful of human rights should be vigilant in ensuring that they do not sacrifice the very ideals that they are claiming to protect. If that sacrifice were made, a fearful victory would be won by the terrorist groups whose "wars" are often waged against those same ideals of human rights.

There has been healthy progress over the past century in fashioning global laws against the most serious of international crimes. We stand at the brink of having the first effective international instrument to enforce those laws. With sufficient support, the ICC could be a powerful mechanism, and it could be an especially credible one by virtue of its transparency and commitment to the legal ideals respected by most domestic legal systems. It would be a serious setback if the Court were allowed to emerge stillborn.