



1-1-2010

Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC

Kathleen Maloney-Dunn

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

Recommended Citation

Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC*, 8 SANTA CLARA J. INT'L L. 69 (2010).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol8/iss1/4>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and Fundamental Human Rights at the ICC

Kathleen Maloney-Dunn*

Is terrorism destined to be to international law what obscenity has been to U.S. law for over four decades—linked to the lens of the beholder¹ and ineffable “community standards,” defying definition beyond a multi-pronged test of its outer limits, exploiting the gap between civil society and criminality, and denying meaningful legal recourse to those harmed by it? Or will it be more akin to the law of rape over the last decade, progressing rapidly in international law due primarily to prosecutions by international tribunals and despite differing statutory definitions? The answer may depend on whether terrorism follows the fate of war

* Adjunct Professor, International Human Rights Clinic at Willamette University College of Law; Visiting Professional, Appeals Chamber, International Criminal Court, 2008. LL.M. equiv./Mst. International Human Rights Law, University of Oxford, expected 2012; J.D., *Summa Cum Laude, Order of the Coif*, James E. Rogers College of Law, University of Arizona; B.A., M.A., Stanford University.

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (“I know it when I see it.”).

crimes, crimes against humanity, and genocide as prosecutable by supranational judicial institutions.

Naomi Norberg, in *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, advocates against adding terrorism to the list of crimes codified by the Rome Statute of the International Criminal Court (“ICC”).² Definitional deadlock, discord over proscribing terrorism as an international crime, and human rights abuses related to “anti-terrorist” policies complicate prospects of ICC jurisdiction over terrorism.³ Norberg points to the perils of broadening police powers and restricting immigration and asylum in response to the 11 September 2001 attacks, increasing global repression and stigmatization of the “other.” She fears that bringing terrorism cases before the ICC would politicize the Court and undercut its fundamental mission as states, upon whose cooperation the Court depends, might disregard human rights abuses in investigating and prosecuting terrorist acts.⁴

2. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for the Future*, 8 SANTA CLARA J. INT’L L. 11 (2010) [hereinafter Norberg]; Rome Statute of the International Criminal Court, July 17, 1998, 2178 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].
3. Human rights violations committed in countering terrorism have generated global concern. See, e.g., H. R. Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, U.N. H.R. COUN. Res. 10/3 (Mar. 20, 2009). Anti-terrorism “state of emergency” powers not only hamper human rights protections in many countries, but also interfere with the proper application of international humanitarian law in conflict and post-conflict settings. See, e.g., Simon Bradley, *ICRC Demands Full Access to Sri Lanka Camps*, SWISSINFO.CH, May 27, 2009, http://www.swissinfo.ch/eng/front/ICRC_demands_full_access_to_Sri_Lanka_camps.html. Nevertheless, subjecting terrorist crimes to universal or ICC jurisdiction may be more effective in punishing and deterring human rights abuses than other measures lacking enforcement mechanisms or concrete sanctions. For example, the Peruvian Supreme Court’s recent conviction of former President Alberto Fujimori for “crimes against humanity,” including extra-judicial killings of suspected terrorists by military and paramilitary forces implementing counter-terrorism policies, demonstrates how governments that infringe human rights in combating terrorism can be held accountable by international criminal law. See, e.g., Simon Romero, *Peru’s Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 7, 2009, http://topics.nytimes.com/topics/reference/timestopics/people/f/alberto_k_fujimori/index.html.
4. Norberg, *supra* note 2, at 13, 14, 27-45. Yet this same conundrum already applies to the core crimes under ICC jurisdiction. This stance also discounts a major advantage of the ICC: perpetrators of proscribed crimes may not be shielded by states, including states sponsoring the crime or failing to prosecute it. The ICC could thus address state complicity in terrorism, just as it now deals with state actors accused of committing other crimes under its jurisdiction, like the state leaders presently charged in the Darfur, Sudan situation. Furthermore, the mere act of investigating alleged atrocities calls vital public attention to

Delegations establishing the ICC voiced similar qualms, with those favoring limiting its jurisdiction to core crimes under customary international law prevailing over those favoring the inclusion of terrorism as one of various “exceptionally serious crimes of international concern” under treaty-based law.⁵ Nevertheless, delegates adopted an annexed Resolution, which provided for future expansion of the ICC’s jurisdiction and recommended a Review Conference to consider terrorism and drug crimes and agree upon an acceptable definition so these crimes could be included.⁶ Amending the Rome Statute to bring terrorism within the Court’s subject matter jurisdiction, thus, remains a distinct possibility.⁷

It is important to consider that terrorist acts already fall under the ICC’s jurisdiction if they encompass elements of war crimes, crimes against humanity, or genocide.⁸ If the ICC had existed and the relevant states had been parties to the Rome Statute at the time of the terrorist attacks of 9/11, these crimes could have been prosecuted at the ICC as crimes against humanity, as some public leaders and international legal experts recommended.⁹ Such a *supranational* approach by a

human rights abuses and may result in independent prosecutions, by either domestic or foreign authorities. For instance, investigations of torture authorized by senior legal advisors of the Bush Administration initiated by Spain, aiming to prosecute these crimes under universal jurisdiction, have increased world focus on accountability for breaches of international human rights law. *See Spain: Judge Opens Investigation into Guantanamo Torture Allegations*, 33 E-BULL. ON COUNTER-TERRORISM & HUM. RTS. (May 2009).

5. *See* Prep. Comm. on Establishment of Int’l Crim. Ct. art. 20(e), U.N. Doc. A/AC.249/CRP.2/Add.4/Rev.1 (Apr. 9, 1996); *See* Prep. Comm. on Establishment of Int’l Crim. Ct., *Crimes of Terrorism*, U.N. Doc. A/AC.249/1997/WG.1/CRP.4 (Feb. 20, 1997).
6. Final Act of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E, U.N. Doc A/CONF. 183/10 (July 17, 1998). Resolution E provides more than the “clues” sought, *see* Norberg, *supra* note 2, regarding crimes fitting into the category of “the most serious crimes of concern to the international community as a whole.” Rome Statute, *supra* note 2, pmb1.
7. *See* Rome Statute, *supra* note 2, art. 121 (amendments may be proposed and adopted) and art. 123 (review to consider amendments to Statute, including but not limited to list of crimes in article 5); Madeline Morris, *Prosecuting Terrorism: The Quandaries of Criminal Jurisdiction and International Relations*, in *TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 133-146 (Wybo P. Heese ed., 2003) (discussing challenges of amending ICC jurisdiction and immunities regarding terrorism).
8. *See* Rome Statute, *supra* note 2, arts. 5-8. “And if temporal, nationality, and territoriality conditions are also met.” *id.* arts. 11-12. Once these preconditions are met, issues of admissibility, complementarity, and challenges to the jurisdiction of the Court or the admissibility of a case might also preclude investigation or prosecution of a given situation involving terrorist acts, as is the case already with crimes specifically enumerated by the Statute. *See id.* arts. 17-19.
9. Daniele Archibugi & Iris Marion Young, *Envisioning a Global Rule of Law*, in *TERRORISM AND INTERNATIONAL JUSTICE* 158, 166 (James P. Sterba ed., 2003).

neutral institution could have averted the devastation wrought by interpreting 9/11 as an attack upon a *state*, precipitating wars against the Afghani and Iraqi *states*, but causing losses of life and freedom suffered by countless *individuals*.

Accordingly, it is even more important to consider the main alternative to the over-investment in international criminal law that Norberg laments: the over-investment in global militarism, including military trials. This trajectory involves dangers riskier than recognizing terrorism as an objectively-defined crime subject to international criminal justice, including (1) states justifying the use of force, responsively or preemptively, unilaterally or multilaterally, individually or collectively, on an *ad hoc* basis, against terrorism as an *act of war*, yet defying or twisting universally binding *laws of war* beyond recognition; and (2) non-compliance of states with internationally-recognized standards for detention and fair trials for terror suspects—during, after, or outside armed conflicts—and concomitant state policies that curtail human rights and criminal due process in the name of “national security.”

Regarding the first menace, military responses to terrorism may violate *jus in bello* tenets of discrimination and proportionality to the original terrorist act or threat, yet are justified as conforming with the *jus ad bello* principle of “necessity”¹⁰ and the United Nations’ requirement of “self-defense,” thus circumventing designation as an illicit “aggressive” war.¹¹ Terrorist “spectaculars” like 9/11 triggering mass fear or hysteria produce greater public support for, and less scrutiny of, retaliatory wars and how they are waged. Such belligerent campaigns engender not only the short-term repressive impacts of war, but also the second, longer-term menace: the protracted suspension of civil liberties of entire populations. This erosion of human rights may continue indefinitely as pre-emption¹² and prevention of future terrorism become entrenched priorities.

While both military and non-military reactions to terrorism may entail human rights transgressions, resort to the use of force produces additional harms that must not be ignored in the important debate Norberg has enriched. These include

10. *See, e.g.*, Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict, *adopted* June 8, 1977, 1125 U.N.T.S. 3.
11. Charter of the United Nations arts. 1, 2(4), 39, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945); G.A. Res. 3314 (XXIX), annex, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).
12. *See* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).

breaches of well-established international customary and humanitarian law, with derogations defended on grounds that terrorists do not respect the rule of law,¹³ cannot be deterred or reformed,¹⁴ and that the “global war on terrorism” is “exceptional.”¹⁵ Such rationales have been invoked to excuse the evisceration of widely-accepted international legal norms, including, *inter alia*, definitions of torture and non-enemy combatants, proper treatment of detainees or prisoners of war, legality of targeted assassinations, extra-territorial jurisdiction, or wars of aggression.¹⁶ Other more direct harms entail deaths, injuries, displacement, and property losses suffered by innocent civilians and institutions through such reprisals and transnational law enforcement operations.

The use of force leads to spiraling cycles of violence, suppression of human rights, and dehumanization of the “other”—the same effects that Norberg condemns in non-military anti-terrorism initiatives. Significantly, a primary goal of international criminal tribunals is holding individuals accountable in order to mitigate collective assignments of guilt¹⁷ that perpetuate group-based hatred and discrimination. The ICC and other international tribunals may thus serve to counteract stigmatization of the “other” that Norberg denounces.

Furthermore, these tribunals protect the human rights of those accused of international crimes, including the presumption of innocence; the right to counsel and an impartial, fair, public trial; the right of suspects to confront testimony and evidence against them; proof of guilt beyond a reasonable doubt; the right of appeal, and; fair sentencing. These fair trial procedures help ensure not only that

13. Some ask why, then, must victims of terror respect the rule of law? *E.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 221-22 (2002) (discussing dilemma of states observing laws of war, avoiding civilian casualties while pursuing terrorists hiding among civilians, while terrorists deliberately target civilians and yet exploit international law by demanding its protections when captured); WALTER LAQUEUR, NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY 96 (2003).
14. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12 (Mar. 16, 2006).
15. See RICHARD JACKSON, WRITING THE WAR ON TERROR: LANGUAGE, POLITICS AND COUNTER-TERRORISM (2005).
16. Helen Duffy, *Human Rights Litigation and the 'War on Terror'*, 90 INT'L REV. RED CROSS 573 (2008); Richard Falk, *Opening Statements at the World Tribunal on Iraq*, in CRIMES OF WAR: IRAQ 167 (Richard Falk, Irene Gendzier, & Robert Lifton eds., 2006) [hereinafter *Falk et. al.*]; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121 (2007); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror'*, 87 INT'L REV. RED CROSS 39 (Mar. 2005).
17. JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS WARS AND AMERICA'S RESPONSE 124, 143 (2003).

justice is done, but also is seen to be done, which is “particularly important in the context of the fight against terrorism,”¹⁸ especially since denying fair trial rights creates exclusion and injustice that might cause some to resort to the “inexcusable tactics of terrorism.”¹⁹

Wartime military tribunals, such as the military commissions authorized in the aftermath of 9/11 for non-citizen terrorist suspects, accord fewer due process safeguards than civilian courts or even military courts-martial.²⁰ Administrative, arbitrary, indefinite, or prolonged detention has also affected American citizens and long-time residents, designated as “enemy combatants.”²¹ Many governments around the world have insisted that post-9/11 repressive policies were warranted to combat terrorism, from summary military trials to brutal crackdowns on political agitators.²² Such campaigns invariably involve dehumanization.

In contrast, international criminal justice exerts countervailing pressures on the forces of dehumanization for both victims and suspects of grave crimes. International criminal law—through both its aims and its incorporation of international humanitarian law and fundamental human rights norms in its *corpus juris*—can play a cardinal role in humanizing international law and politics, even in the realm of terrorism. Therefore, although I share Norberg’s disapproval of the repressive results of *ad hoc* efforts to criminalize terrorism to date, I think classifying terrorism as an international crime subject to a supranational tribunal’s jurisdiction is essential for five reasons.

18. International Commission of Jurists, *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights 16 (2009), available at <http://icj.org/IMG/EJP-report.pdf> [hereinafter *Eminent Jurists Report*].
19. Press Conference, Press Conference by Special Rapporteur on Human Rights and Countering Terrorism (Oct. 22, 2008), http://www.un.org/News/briefings/docs/2008/081022_Schenin.doc.htm; but see, RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 171-202, 231 (Rowman & Littlefield 2007) (critiquing weaknesses of over-investment in criminal law enforcement and judicialization as counterterrorism tools, and proposing greater use of intelligence tools instead).
20. DERSHOWITZ, *supra* note 12, at 214-221; See U.S. Presidential Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 222,57833 (Nov. 13, 2001); Military Commissions Act of 2006, 10 U.S.C § 948 (2006).
21. See generally JENNIFER K. ELSEA, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS (2008).
22. Richard Norton-Taylor, *Terror crackdown ‘encourages repression’: human rights warning over responses to September 11*, GUARDIAN.CO.UK, July 17, 2002, <http://www.guardian.co.uk/world/2002/jan/17/afghanistan.richardnortontaylor> (summarizing Human Rights Watch’s findings on post-9/11 strategies in fight against terror involving wide-ranging human rights abuses in many countries).

First, treating terrorism as an international crime would help de-legitimize war as the only, best, or requisite response to terrorist threats and acts. Second, criminal investigations and prosecutions provide a systemic, corrective, non-belligerent alternative, although by no means the sole or sufficient one, to anti-terrorism military and political repression by governments. Third, providing redress for terrorist crimes through an international judicial “branch” would help “check” and “balance” executive and legislative branches wherein the margins of abuse of power and majoritarian discrimination against the “other” tend to be higher. Fourth, subjecting the crime of terrorism to ICC jurisdiction would help standardize national laws on terrorist crimes due to the Rome Statute’s principles of complementarity, jurisdiction, and admissibility,²³ which promote uniformity and specificity to a greater degree than the obligations of states under customary international law and United Nations resolutions to enact domestic laws, no matter how disparate, proscribing terrorism.²⁴ Finally, victims of terrorism deserve rights equal to those that victims of other crimes of serious concern to the international community enjoy, as a matter of human rights, justice, and reconciliation,²⁵ including the opportunity for reparations.

Without such legal recourse, or even the promise of participation in the international criminal justice system, the temptation will persist for victims of terrorism—whether individuals, states, or organizations—to react to terrorist attacks in ways that compromise international peace, security, human rights, and the rule of law. The 2007 creation of the Special Tribunal for Lebanon by United Nations Security Council Resolution 1757 implicitly acknowledges this danger and

23. Rome Statute, *supra* note 2, arts. 17-19.

24. This trend already operates with respect to the ICC’s core crimes of genocide, war crimes, and crimes against humanity, as domestic jurisdictions adopt the elements of these crimes set forth in the Rome Statute. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL CRIMINAL LAW* 141-47 (2007).

25. Special Representative to Rwanda, *Report on the situation of human rights in Rwanda by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1998/69*, ¶11, U.N. Doc. E/CN.4/1999/33 (Feb. 8, 1999) (victims of genocide “must have the opportunity of redress, for the sake of justice as well as of reconciliation.”); see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Ann. ¶¶ 4, 6(b), U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985); Rome Statute, *supra* note 2, art. 75; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 (Dec. 16, 2005).

gives victims the right to participate in the first-ever international criminal tribunal exercising subject matter jurisdiction over a terrorist attack.²⁶

Accordingly, the time is ripe for a paradigmatic shift from an international security approach to a human rights approach to terrorism, which would put the focus where it belongs—on victims, who are the most vulnerable both to terrorist attacks and to counter-terrorism measures, especially individuals frequently comprising society’s most disempowered and disenfranchised members. International criminal law can help correct the error in contemporary terror by moving state and non-state actors away from the war paradigm so prevalent today. Just as the plight of victims of other heinous crimes galvanized the establishment of the ICC, which has been built and depends upon fundamental human rights guarantees, the rights of terrorism victims should likewise be legally recognized and protected by the international criminal justice system.

The Preamble of the Rome Statute creating the world’s only permanent international criminal tribunal elucidates the central objectives of the founding States Parties. Concern for victims “of unimaginable atrocities that deeply shock the conscience of humanity,” expressed in the second of the Preamble’s eleven clauses, ranks high on the priority list.²⁷ This priority granted victims of war

26. S.C. Res. 1757, U.N. Doc. S/RES/1787 (Dec. 10, 2007) (“[T]his terrorist act *and its implications* constitute a threat to international peace and security.”)(*emphasis added*); *id.*, Ann., art. 17 (“Where the personal interests of victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of proceedings determined to be appropriate by Pre-Trial Judge of the Chamber and in a manner not prejudicial to or inconsistent with rights of accused and a fair and impartial trial.”).

The jurisprudence arising out of the Special Tribunal may provide definitional and procedural precedents useful to other courts, such as the ICC under amended subject matter jurisdiction or domestic courts prosecuting terrorism under universal jurisdiction, including guidance on terrorist victims’ rights. Application of Lebanese law at the Tribunal mirrors the principle of complementarity imbedded in the Rome Statute, whereby national courts trying any of the core international crimes apply the corresponding national laws. Norberg’s assertion that terrorism continues to be prosecuted according to national laws, as in Lebanon and France, thus simply reflects (1) the fact that no international tribunal for terrorism has been established before and that the same complementarity principles as the ICC imposes for jurisdictional purposes have been applied to terrorist attacks, and (2) the principles of legality and territoriality that are central to international law, rather than a sound basis for concluding that terrorism is, or should remain, a domestic and “transnational,” instead of an international crime.

27. Rome Statute, *supra* note 2, pmb. at 91.

crimes, crimes against humanity, and genocide the right to participate at all stages of the ICC's proceedings²⁸ and to receive reparations.²⁹

These provisions, unprecedented in international criminal law, reflect the world community's mounting recognition of the essential role victims play in ending impunity for these atrocities and the importance of giving victims effective legal access to an impartial judicial institution if justice is to be achieved.³⁰ This notion of justice is not only substantive, but also procedural. As mandated in the "General Principle" of the ICC's Rules of Procedure and Evidence, all Chambers and organs of the Court in performing their functions "shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence."³¹ A wide cross-section of the international community has effectively endorsed the goals and functional framework of the ICC, with 139 state signatories to the Rome Statute and 110 states ratifying it to date.³²

This collective effort to provide justice for victims of war crimes, crimes against humanity, and genocide has withstood many procedural and substantive legal challenges as the ICC has begun investigating situations and prosecuting cases. The elements of certain crimes have been defined by the ICC's authoritative texts,³³ yet interpreting the ICC's definition of victims³⁴ of these crimes has

28. *Id.* art. 68(3), at 130; Gilbert Biti & Hakan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456-57, 460 (Roy S. Lee ed., 2001); David Donat-Cattin, *Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 1280, 1284, 1288-90 (Otto Triffterer ed., 2nd ed., 2008).
29. Rome Statute, *supra* note 2, art. 75(1), at 134. Reparations may include "restitutions, compensation and rehabilitation . . . for any damage, loss and injury to, or in respect of, victims . . ." *Id.* art. 75(1); the Court may order reparations directed against a convicted person or "through the Trust Fund provided for in article 79." *Id.* art. 75(2); and the Court "may invite and shall take into account representations from or in respect of . . . victims, other interested persons or interested States." *Id.* art. 75(3).
30. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2002/62, p. 9, Annex (Jan. 18, 2000); *Proposed Guiding Principles for Combating Impunity for International Crimes*, in POST-CONFLICT JUSTICE 255 (M. Cherif Bassiouni, ed., 2002) (positing victim's right to justice includes access to all judicial, administrative, or other public processes under domestic and international laws).
31. I.C.C. R.P. & EVID. 86 (2002).
32. Coalition for the International Criminal Court, *available at* http://www.coalitionfortheicc.org/documents/RATIFICATIONSbyRegion_21_July_20091.pdf (last visited April 4, 2010).
33. Rome Statute, *supra* note 2, arts. 6-9; I.C.C. ELEMENTS OF CRIMES (2005).

involved complex interlocutory pre-trial appeals and rulings. The nature, scope, and timing of victims' rights to participate in proceedings in situations and cases before the Court have been the subject of myriad contentious deliberations and time-consuming decisions.

Issues that have been raised and settled on appeal include, *inter alia*, (1) the procedures victims must follow and what they must demonstrate to be considered a victim and participate in proceedings at trial,³⁵ on appeal,³⁶ and in pre-trial investigations;³⁷ (2) that the "personal" harm suffered by an individual can attach to both direct and indirect victims, the harm must be linked to the charge, and victims are not precluded from leading evidence or challenging its admissibility at trial;³⁸ (3) that if a victim is claiming emotional harm as the result of the loss of a family member, the Pre-Trial Chamber must require some sort of proof of the identity of the family member and his or her relationship to the applicant.³⁹ Resolution of these issues—even in the extremely complicated contexts of ongoing conflicts and massive numbers of victims in the Democratic Republic of the Congo, Darfur, and Uganda—has delayed, but not thwarted the provision of justice at the ICC thus far.

34. I.C.C. R.P. & EVID. *supra* note 31, rule 85(a) ("Victims' means natural persons who have suffered harm as a result of the commission of any crime with the jurisdiction of the Court."). No claims have yet been lodged on behalf of another class of victims recognized by the Rome Statute, i.e., "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places or objects for humanitarian purposes." *Id.*, rule 85(b).
35. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1-193, Procedural Matters, ¶¶ 61-64. (June 17, 2009).
36. Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, Case No. ICC-02/05-111-Corr, ¶¶ 12-14 (Dec. 14, 1997).
37. Judgment on Victim participation in the Investigation Stage of the Proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, U.N. Doc. ICC-01/04-556 (Dec. 19, 2008) available at <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>; Judgment on Victim participation in the Investigation Stage of the Proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, U.N. Doc. ICC-02/05-177 (Feb. 2, 2009) available at <http://www2.icc-cpi.int/iccdocs/doc/doc625413.pdf>.
38. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-92-ENG, Judgement (July 11, 2008) available at <http://www.icc-cpi.int/iccdocs/doc/doc527234.pdf>.
39. Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04-179, Judgment (Feb. 23, 2009) available at <http://www.icc-cpi.int/iccdocs/doc/doc635538.pdf>.

Recognizing terrorism as a crime covered by the ICC would present equally complex victim issues, as terrorist attacks may indiscriminately harm individuals and institutions, including random or third party victims.⁴⁰ Norberg, focusing mainly on such symbolic or indirect victims, avers that terrorism is fundamentally different from war crimes, crimes against humanity, and genocide, and concludes that ICC jurisdiction would neither deter contemporary terrorism “nor bring justice to any more victims than is currently available.”⁴¹

I disagree, particularly with this last point. Terrorism and its victims have much in common with core crimes over which the ICC exercises jurisdiction and with its statutorily-approved and jurisprudentially-approved victims. Whether a terrorist attack constitutes a mass atrocity that transcends national borders, such as 9/11,⁴² “carefully designed to maximize fear or suffering,”⁴³ or involves sexual or gender-based assaults on individuals as a tool of local or ethnic terror,⁴⁴ terrorism inflicts collective harms similar to those associated with war crimes, crimes against humanity, and genocide. Acts of large-scale terrorism, along with these three core crimes, have been characterized as “[a]cts of atrocity . . . against the world community, or, more emotively, as offense against us all.”⁴⁵ As scholars have noted, at least with respect to mass killings:

Terrorism is a shared experience because attacks are most often directed towards groups of people rather than individuals. . . . In addition, the particular group of people attacked is often chosen and based upon their symbolic membership in a larger racial, ethnic, or

40. See K. Chase Stovall-McClough & Marylene Cloitre, *Traumatic Reactions to Terrorism: The Individual and Collective Experience*, in *PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT* 113, 122-23 (2006).
41. Norberg, *supra* note 2, at 49.
42. DRUMBL, *supra* note 24, at 4, 132.
43. Stovall-McClough & Cloitre, *supra* note 40, at 119.
44. Rape as a Tool of War: A Fact Sheet, Amnesty International, <http://www.amnestyusa.org/women/rapeinwartime.html> (last visited Dec. 11, 2009); Anne-Marie Goetz & Joanne Sandler, *War and Sexual Violence: An Issue of Security*, OPEN DEMOCRACY NEWS ANALYSIS (Dec. 3, 2007), http://www.opendemocracy.net/article/5050/16_days/war_sexual_violence (“Even when the guns fall silent, sexual violence as a political strategy means that to live in the body of a woman or girl is to live in terror.”); See Martha G. Logsdon, *Ethnically Targeted Rape as “Terrorism”: Social Responses to Riot-Related Violence in Indonesia*, 10 A.J.W.S. 35, 36 (2004) (discussing political role rape has played in wars, pogroms, and ethnic intimidation, from rape of blacks in America, whites in Congo, in armed conflicts in Haiti, Somalia, Rwanda, Peru, against Muslims in Bosnia and ethnic Chinese in Indonesia); SHARON FREDERICK, *RAPE: WEAPON OF TERROR* (2000).
45. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 540 (2005).

sociopolitical community. Thus, there is both a direct attack on a set of individuals and an indirect attack on an entire identified sociopolitical community.⁴⁶

This commonality as well as the primary importance to victims of terrorist attacks and other atrocities of creating a historical record⁴⁷ bolsters the argument for ICC jurisdiction over the crime of terrorism. A permanent trial record condemning atrocities such as widespread rape not only provides impetus for additional protection and prosecutions, perhaps deterring some future crimes, but also provides a voice to victims and reduces cultural stigmas against them.⁴⁸

Moreover, terrorist acts generally involve more isolated attacks and fewer victims than armed conflicts, which generate ongoing attacks and often incalculable victims of war crimes, crimes against humanity, or genocide. Therefore, the quandaries posed by victim participation in terrorism prosecutions may not be as enormous as those with which the ICC must already grapple in cases arising from situations of armed conflict. Ongoing conflicts or post-conflict settings where tensions remain high in a war-ravaged society pose extremely difficult victim and witness protection challenges. The *ad hoc* International Criminal Tribunals (“ICTs”) for the former Yugoslavia (ICTY) and Rwanda (ICTR), along with other ICTs (special courts or hybrid chambers in Sierra Leone, Cambodia, Kosovo, and East Timor), have developed effective rules, regulations, and procedural and substantive law to effectively manage such challenges. The ICC can be expected to do the same or better as it draws upon the ICTs’ precedents, and wrestles with comparatively less-complex issues associated with a single or non-recurring terrorist crime.

There is little doubt, however, that currently-divergent views among various organs of the Court about how to best protect victims and witnesses, ensure non-prejudicial proceedings consistent with the rights of the accused, and guarantee a

46. Stovall-McClough & Cloitre, *supra* note 40, at 119.

47. See Wayne Logan, *Confronting Evil: Victims’ Rights in an Age of Terror*, 96 GEORGETOWN L.J. 721, 776 (2008); Press Release, Secretary-General, Opening Symposium on Victims of Terrorism, Urges Governments to Draw Upon Their Courage, Strength, in Implementing Counter-Measures, U.N. Doc. SG/2142 (Sept. 9, 2008) (urging end to dehumanization of terrorism victims pursuant to unanimously-adopted 2006 U.N. Global Counter-Terrorism Strategy, and reviewing importance, for humanity’s sake, of giving voice to victims and of an international compensation fund for rehabilitating victims).

48. Jamie O’Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violations Console Their Victims?* 46 HARV. INT’L. L.J. 295, 310, 319-20 (2005); Rebecca Corcoran, Note, *Justice for the Forgotten: Saving the Women of Darfur*, 28 B.C. THIRD WORLD L.J. 203 (2008).

fair and impartial trial, will persist in the context of terrorist crimes. If terrorism is added to the ICC's jurisdictional mix, it could exacerbate disagreements on how to balance these competing interests, both within the Court and the international community. But the same is true of the equally politically charged crime of aggression currently under consideration for ICC jurisdiction.

This concern about politicization has long plagued the prospect of prosecuting crimes of aggression at the ICC.⁴⁹ Adding the crime of aggression to the Court's jurisdiction, which was provided for by the founding States Parties⁵⁰ and subject to proposed amendments to the Statute⁵¹ upon mandatory review⁵² risks unraveling the fragile international consensus the ICC represents. Despite the enormity of the challenges in defining and codifying elements of the crime of aggression, though, states have not abandoned their collective quest for agreement in order to deter, and provide justice to victims of, this crime.⁵³

Victims of terrorist acts deserve no less. They merit equal access to international criminal justice systems available to similarly situated victims of other crimes of serious international concern. The Rome Statute's carefully constructed safeguards against use of the ICC for politically-motivated purposes⁵⁴ would also apply to the challenges inherent in determining which terrorist acts and victims would meet the Court's jurisdictional, admissibility, and participation requirements. Rather than citing the imperfections of current procedures at the ICC as an excuse to avoid legal restrictions on government altogether, especially

49. See generally THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION (Maurito Politi & Guiseppe Nesi eds., 2001).

50. Rome Statute, *supra* note 2, art. 5(1)(d).

51. *Id.* arts. 5(2) and 121.

52. *Id.* art. 123(1).

53. See Anja Seibert-Fohr, *The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC*, 12 ASIL INSIGHTS 24 (2008).

54. These safeguards include the principle of complementarity, allowing intercession by the ICC only when national jurisdictions are unwilling or unable to investigate or prosecute a case, see Rome Statute *supra* note 2, art. 17; the Pre-Trial Chamber's mandatory oversight of the Prosecutor's request to authorize and proceed with an investigation, see *id.* arts. 15(3)-15(4), and its discretionary review of the Prosecutor not to initiate an investigation, see *id.* art. 53; deferral of investigations and prosecutions by the UN Security Council, see *id.* art. 16; challenges to jurisdiction of the Court or admissibility of a case or investigation, see *id.* arts. 18-19; and removal from office of the Prosecutor, deputy prosecutor, and others, all of whom must take article 45 vows or "solemn undertakings" of impartiality, see *id.* arts. 45-46.

regarding police and military tactics in waging the war on terror, critics of the Court should help fortify its rules and protections against political bias.⁵⁵

The core elements of terrorism and the proscription against it under international criminal law are sufficiently agreed upon by myriad United Nations and Security Council resolutions as well as multilateral treaties⁵⁶ that the lack of terminological consensus or a comprehensive terrorist convention should not preclude terrorism victims' equal rights to justice that international law grants to victims of similar atrocities. Just as victims of rape are not denied legal rights at the ICC because the core elements of rape are not objectively or comprehensively defined by the Rome Statute,⁵⁷ or because no convention on rape yet exists, or because different domestic and international courts apply divergent statutes and produce inconsistent jurisprudence regarding rape crimes, or because debate simmers about whether prohibiting widespread rape is a *jus cogens* norm,⁵⁸ neither should victims of terrorism be denied the same at the ICC. Terror's victims should not be deprived of justiciable rights within the same international criminal system that provides or promises justice to victims of other serious crimes under international law.

If terrorism is excluded from the jurisdiction of the ICC, victims of terrorist crimes will remain without redress or public recognition except where their domestic legal system recognizes their rights to participate in criminal proceedings or administrative or judicial processes, and receive compensation. Victims seeking

55. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS OF THE TWENTY-FIRST CENTURY* 478, 496-97 (2008); see Drumbl, *supra* note 45, at 547 (noting U.S. opposition to ICC based on its possible prosecution of U.S. soldiers or officials, not on appropriateness of the international criminal justice paradigm, which U.S. has supported from Nuremberg to the ICTs today). However, the selection of which atrocities to "judicialize" or prosecute are inherently and deeply political in domestic as well as international criminal bureaucracies. *Id.* at 550. Therefore, it is not surprising that gender-based crimes have been neglected or omitted from ICC charges and prosecution despite ample available evidence. See, e.g., Suzan M. Pritchett, Note, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court*, 17 *TRANSN'T'L L. & CONTEMP. PROBS.* 265 (2008).
56. Jordan J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 *SANTA CLARA J. INT'L L.* 51, 54-59 (2010); Cf. George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 *J. INT'L CRIM. JUST.* 894 (2006) (delineating eight primary factors that apply to terrorism, which is more a "family of crimes" in the United States Code or a "super-crime" incorporating some features of warfare).
57. Rome Statute, *supra* note 2, art. 7(1)(g); see I.C.C. *ELEMENTS OF CRIMES* (2005).
58. Dean Adams, Comment, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 *SAN DIEGO INT'L L. J.* 357-98 (2005); see Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 *CASE W. RES. J. INT'L L.* 225, 246 (2007).

redress in foreign courts may also face barriers, even in the U.S.⁵⁹ The exclusion of terrorism from crimes subject to international jurisdiction would amount to a collective normative determination that victims of terrorism should not have equal access to a system of adjudication, including the right to participate in proceedings, that the community of nations has endorsed for victims of similar crimes.

This poses a particular dilemma for victims of terrorism located in jurisdictions that offer them no legal rights for terrorist wrongs. While any state can try *jus cogens* crimes such as war crimes, crimes against humanity, genocide, torture, slavery and other serious crimes under international law on the basis of universal jurisdiction,⁶⁰ victims of terrorism have no such recourse *per se*;⁶¹ in any event, victims within and across state boundaries are at the mercy of prosecutorial discretion and citizenship requirements that hardly encourage hope, even if forum-shopping in such circumstances were possible. The response of such disenfranchised victims, especially stateless and displaced persons or refugees, without any forum where their harm can be addressed by civil or criminal systems, may involve reprisals, extra-judicial violence, or intergenerational transmission of grievances. Consequently, vicious cycles of vengeance create even more victims and higher barriers to international criminal law's goals of ending impunity and providing justice for victims.

Codifying terrorism as an international offense whose victims are legally entitled to redress would help dismantle some of these domestic and transnational barriers to justice. Submitting the crime of terrorism to ICC prosecution, and hence complementary domestic jurisdiction, would help pressure states to refrain from *ad hoc* politically expedient, repressive, or belligerent measures to combat terrorism, thus circumscribing derogations from international legal norms. The current

59. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (claims of Israeli victims of PLO bus bombing dismissed as treaties to which U.S. was bound regarding human rights, laws of war, and terrorism do not create individually enforceable rights); see generally Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 382-478 (2009) (reviewing U.S. legal developments since *Tel-Oren*, including civil lawsuits, and international prosecution of terrorism, especially at ICTY).
60. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988); *The Princeton Principles on Universal Jurisdiction (2001): The Challenge*, FALK ET AL., *supra* note 16, at 145-151.
61. See *United States v. Yousef*, 327 F.3d 56, 103-110 (2d Cir. 2003) (universality principle cannot be expanded judicially and indefinite category of "terrorism" not subject to universal jurisdiction, but crimes committed fall within U.S. jurisdiction by its obligations under Montreal Convention and security or "protection principle" of customary international law); see also van Schaack, *supra* note 59, at 445, 446.

mayhem of disparate anti-terrorism “solutions” has created significant human rights “problems,” disregard for core principles of international law, and a weakening of the global legal framework painstakingly constructed over the last fifty years.⁶²

International criminal justice, particularly within the ICC’s system of member cooperation and institutional safeguards, is uniquely well-situated to combine the best precedents and practices of human rights and international humanitarian law and usher in higher standards for what is politically permissible, or militarily impermissible, in an era of terror. Disagreements over the requisite elements of the international crime of terrorism will be settled over time⁶³ as an international court investigates and prosecutes actual cases, much as the constituent elements of war crimes, crimes against humanity, and genocide evolved from Nuremburg to international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and now the ICC—all of which have applied different statutes but have produced a rich body of case law on these crimes. The progressive jurisprudence on sexual violence emerging from international and hybrid courts serves as an example of the way the international crime of terrorism may be defined and refined for the benefit of its previously invisible and most vulnerable victims.

The crime of terrorism needs, and its victims deserve, the chance for an analogous evolution in legal recognition. However imperfect the original statute defining elements of the crime may be at the ICC (or other international tribunal) exercising jurisdiction over terrorist crime, it will provide the scaffolding necessary for the development of jurisprudential authority advancing justice for its victims. The international law of rape provides an example of how even conflicting statutes can lead to cohesive standards and even relative consensus through the practice of international criminal law.

The most promising prospect may be that prosecutions of terrorism could capture gender-based human rights violations that have been under-charged, under-prosecuted, or have otherwise fallen through the cracks of the international justice system, which has failed to provide sufficient redress to its victims.⁶⁴ Rape and its horrendous manifestations are now recognized by international criminal law

62. *See Eminent Jurists Report, supra* note 18, at 159.

63. *But see* Fletcher, *supra* note 56, at 911 (concluding that concept of terrorism is “probably like the notions of ‘democracy’ or ‘constitutionalism’ or ‘rule of law’—too important to be settled once and for all in a legislative definition”).

64. *See* Karima Bennouna, *Do We Need New International Law to Protect Women in Armed Conflict?* 38 CASE W. RES. J. INT’L L., 363, 385-91 (2007).

as war crimes, crimes against humanity, and means of genocide; international tribunals have essentially verified that “[w]hether organized or random, orchestrated or opportunistic, sexual violence generates mass terror, panic, and destruction.”⁶⁵ Looking to the progressive recognition of rape as an international crime, albeit prosecuted until now as a subset of the core crimes over which the ICTs and ICC exercise jurisdiction,⁶⁶ as an example of how terrorism may be a crime subject to international adjudication, seems apt given their commonalities.⁶⁷

Conversely, prosecuting the crime of terrorism may provide a fresh frontier in international law for victims of such violence. How ironic it would be if international criminalization of terrorist acts, committed by extremists and the desperately disempowered, resulted in greater protection and justice for those marginalized and disempowered in both wartime and peacetime. These victims include, *inter alia*, those terrorized by battery or rape within marriage and stoning for sex outside it, bride burnings, child abuse, sexual assault, stalking, violent attacks for improper purdah, genital or sexual mutilation, hate crimes, bombings of contraceptive or abortion clinics, sexual enslavement, human trafficking, racial profiling and other forms of group-based bigotry.

Focusing on justice for victims of terrorism may be the wedge that cracks the rock of illegitimate violence and oppression wide open and revitalizes the international legal order. The tragedy of 9/11 and subsequent mass terrorist attacks may lead to an increased recognition of our shared humanity and common vulnerability, and hence the need to enforce codified fundamental human rights through an international criminal justice system. A similar recognition after the atrocities of World War II led to the now universally ratified Geneva Conventions and the creation of international criminal tribunals. While local or indigenous practices, national courts, quasi-judicial commissions for truth and reconciliation,

65. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 288 (2003).

66. *See id.* at 317-349.

67. “Terror is the norm for entire peoples trying to survive in acute poverty; or under military, theocratic, or totalitarian rule; or in refugee or displacement circumstances. But this is new for the U.S. The populace is exhibiting post-traumatic stress syndrome...[insomnia, nightmares, flashbacks, depression, obsessing about violence]...Yet such symptoms aren’t new to *everyone* in the U.S. These are exact descriptions of the rape survivor’s condition, the battered survivor’s reality; the abused child’s experience. A terrified man isn’t as much a cultural fixture as a terrified woman or cowering child for a reason: the latter are familiar images.” ROBIN MORGAN, *“Isolated Incidents”*: Introduction to the 2001 Edition, in *THE DEMON LOVER: THE ROOTS OF TERRORISM* xvii (2001); *see* Logsdon, *supra* note 44, at 36.

and alternative dispute resolution may also be well-suited for, and essential to, this effort, the ICC is a critical institution of last resort for investigating and prosecuting crimes committed not only during war, but also those like terrorism committed during periods of (relative) peace.

Finally, and most importantly, the ICC provides unique participatory and compensatory rights for victims that are indispensable in securing meaningful justice and thus preventing future conflicts, including those arising from not only terrorist crimes, but also from human rights violations committed in the name of counter-terrorism. If terrorism occurs, as an Oxford philosopher stated, “in the absence of a substantively just legal process,”⁶⁸ then strengthening substantively just legal processes in the international arena, like those enshrined at the ICC, may diminish terrorism, and its victims’ suffering, in the future.

68. David Rodin, *Terrorism Without Intention*, 114 ETHICS 752, 755 (2004).