



HAL
open science

Terrorism: criminalization, definition of the crime and extension of the ICC's jurisdiction *ratione materiae*

Allassane Sagara

► To cite this version:

Allassane Sagara. Terrorism: criminalization, definition of the crime and extension of the ICC's jurisdiction *ratione materiae*. 2024. hal-04861606

HAL Id: hal-04861606

<https://hal.science/hal-04861606v1>

Preprint submitted on 12 Jan 2025

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Copyright

Terrorism: criminalization, definition of the crime and extension of the ICC's jurisdiction *ratione materiae*

Alassane Sagara,
Doctor of Private Law and Criminal Science
Lecturer at University of Paris 8

Plan

§1 The criminalization of terrorism in domestic law

- I. Definition of the crime of terrorism in domestic law
- II. The constituent elements of the offence of terrorism in domestic law

§2 The need to criminalize terrorism in international criminal law

- I. The need for a definition of the crime of terrorism in international criminal law
- II. The referral of terrorist acts to the International Criminal Court

Introduction

1. The “war on terror”¹ or the war on terrorism is based on law.² The criminal law of the enemy is a law of exception³. The criminalization of terrorist acts is an essential preventive and dissuasive lever in the elimination of the various forms of terrorism.

2. The clinical approach to the criminalization of terrorism will be emphasized. More broadly, the criminological diagnosis will deal strictly with its definition and the international repressive arsenal. Illustrations will be based on legal arguments. The analysis undertaken will not be concerned with the details of terrorist acts,⁴ repression, the para-penal aspects of terrorism, or aspects relating to diplomatic and political battles between States, as well as economic, philosophical, social and religious issues.

3. Notwithstanding acts of terrorism, is there a generic definition of the crime of terrorism in domestic and international law? Following the example of domestic repressive systems, is there an international penal arsenal to repress the crime of terrorism?

4. Terrorist acts remain largely hybrid offences, making their legal classification in domestic law extremely complex (§1). States cannot react to terrorism on their own.⁵ Consequently, these crimes are universal in scope (§2).

¹ The term “war on terrorism” or “war on terrorism” includes all measures to combat terrorist acts, including legal, judicial and administrative measures.

² OULD ABDALLAH Ahmedou, « Terrorisme et responsabilité pénale internationale », in W. A. SCHABAS (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Ed. Calmann-Lévy, 2003, p. 504.

³ The punishment of terrorist acts is a derogating offence under ordinary law. It concerns the nature of the offence, the jurisdiction of the national anti-terrorism prosecutor’s office, its diversity (ecological terrorism, apologia of terrorism). See JAKOBS Günther, « Aux limites de l’orientation par le droit : le droit pénal de l’ennemi », RSC, n°1, January - March 2009, p. 17 and 18.

⁴ Terrorism has been extensively defined: the Convention on the Prevention and Punishment of Terrorism, 16 November 1937, article 1(2); The 1999 International Convention for the Suppression and Financing of Terrorism, article 2(b), PC, articles 421 et seq.

⁵ MASSÉ Michel, « La criminalité terroriste », RSC, 2023/02, p. 483 to 500.

§1. The criminalization of terrorism in domestic law

The war on terrorism is also the criminal law of the enemy,⁶ which should be defined **(I)** but also its constituent elements **(II)**.

I. The definition of the crime and offence of terrorism in domestic law

A clear definition of the crime and offence of terrorism **(A)** as well as clarifications of this type of offence seem necessary **(B)**.

A) The lack of a legal definition of the crime of terrorism

5. Internally, war crimes and offences are explicitly defined in article 461-1 of the Criminal Code. The same applies to crimes against humanity (PC: Penal Code, article 212-1). It is important to note that the expression “terrorist crime” or “terrorism offence” does not appear very clearly in criminal law. It should be remembered that the law favours the term “terrorist acts” in articles 421-1 et seq.

6. It is clear that terrorist acts are characterized by an autonomy of criminalization which can lead to a particular legal qualification without taking up the common law.⁷ This autonomy must expressly justify the nature of the offence: the crime or offence of terrorism. This leaves no doubt as to the existence of a terrorism law.⁸ Yet, the multifaceted nature of terrorism is at the root of the lack of a unified definition.⁹

B) *De lex ferenda* of the definition of the crime of terrorism in domestic law

7. Criminal law lists terrorist acts jointly, in this case *delictum* and *criminis*, notwithstanding a clear distinction. This being the case, a distinction needs to be drawn between primary acts and crimes or acts¹⁰ “by assimilation”,¹¹ which can be qualified as terrorist offences, and whose explicit recognition seems necessary in domestic law. These offences are very varied, between

⁶ PAPA Michel, « Le droit pénal de l'ennemi et l'inhumain : Débat international », RSC, n°1, January - March 2009, p. 198 ; In the same vein, see PAPA Michel and *alii*.

⁷ PELLÉ Sébastien, *Le terrorisme : nouveaux enjeux, nouvelles stratégies, aspects juridiques et criminologiques*, Presses universitaires de Pau et des pays de l'Adour, Acte du colloque, 25 November 2016, « Le Droit en mouvement », p. 62.

⁸ RENOUX Thierry S., « Juger le terrorisme », Cahiers du Conseil constitutionnel, n°14 (dossier : « La justice dans la Constitution »), May 2003.

⁹ *Ibid.*

¹⁰ PELLÉ Sébastien, *op. cit.*, p. 63 et seq.

¹¹ *Ibid.*, p. 67 et seq.

crimes and offences (financing a terrorist enterprise,¹² apologia of terrorism,¹³ etc.). Thus, the perception of the legal and material nature of these acts seems delicate to the reading of the above-mentioned law.

It is highly significant to explicitly enshrine the “crime of terrorism” and the “offence of terrorism” in the Penal Code. Moreover, it would seem appropriate for these terrorist offences to be placed under separate headings, namely “terrorist offences against persons” and “terrorist offences against property”, for the sake of legal rationalization. This would make it possible to rationalize the roles of the institutional players in criminal proceedings, in this case the public prosecutor and the investigators, and the judge's role with regard to qualification.

8. For all intents and purposes, an express definition of the crime and offence of terrorism would be appropriate because of the implications for the principle of criminal legality and the right to a fair trial guaranteed by Article 6 of the ECHR. With regard to the definition of the crime and offence of terrorism, a proposal for a generic definition common to both domestic and international law will be considered at a later date.¹⁴

II. The constituent elements of the offence of terrorism in domestic law

Classically, all offences, including the specific offence of terrorism, are made up of a legal **(A)**, material **(B)** and moral **(C)** element.

A) Parameters of the legal element of the offence of terrorism

9. Terrorism has been governed by a legislative arsenal since the 1986 law. This law defines terrorism broadly. The French Supreme Court (Cour de cassation) considers that article 706-16 of the Code of Criminal Procedure does not introduce a new offence, but designates offences relating to an individual or collective undertaking aimed at seriously disturbing public order through intimidation or terror.¹⁵ Repressive anti-terrorist legislation is inspired by ordinary law offences. However, it differs from them in that it has been made autonomous and specialized by law, with a procedural impact: the centralization and specialization of the anti-terrorist public prosecutor's office (parquet antiterroriste) under the jurisdiction of the Paris court.¹⁶

¹² PC, article 421-2-2.

¹³ Law n°2014-1353 of 13 december 2014; PC, article 421-2-5; Cass. Crim., 14 january 1971, n°70-90.558; crim., 8 november 1988, n°87-91.445; crim., 16 november 1993, n°90-83.128; crim., 19 july 1988, n°85-90.767; crim., n°12-81.505; crim., 11 december 2018, n°18-82.712.

¹⁴ *Infra*, p. 7 and 8.

¹⁵ Cass. crim., 7 may 1987, n°87-80.822.

¹⁶ CPP, article 706-17.

10. From 1996 to 2024, several laws were passed. Acts of terrorism are covered in Title II of Book IV of the Criminal Code, “Crimes and offences against the nation, the state and public peace”, specifically in its articles 421-1 et seq. This title is divided into two chapters. These acts are criminalized independently of common criminal law crimes. Terrorism does not meet the classical rule of the trilogy of elements of the offence. In addition, acts are similar and taken up by articles 1 to 4 of the European Union Framework Decision.¹⁷

B) Parameters of the material element of the terrorism offence

11. The crime of terrorism is characterized by the *actus reus*, involving the substantive criminal law of the offence of terrorism (the crime and the offense). The latter takes over the characteristics of common law. Compared to ordinary offences, the materiality of the offence of terrorism is widespread in terms of both manifest harm to human lives and destruction of material property. The material element makes it possible to distinguish specifically between terrorism offences and ordinary offences. The criminal actions of the officer on the victims are large-scale and affect both the physical integrity of individuals and public or private property.

12. Clearly, the material element of the offence of terrorism is also characterized by the *iter criminis*, i.e. the degree of involvement of the perpetrator in the commission of the offence, and the *modus operandi*, i.e. the formal offence of the terrorist agent. In concrete terms, this means the planning, financing, preparation and execution of terrorist acts, on an individual or collective basis. Consequently, the aim is to carry out a material offence.

C) Parameters of the mental element of the terrorist offence

The perpetrator of a terrorist act is driven cumulatively by a double *means rea*: general intent (1) and special intent¹⁸ (2).

1) General malice as part of the *means rea* of the crime of terrorism

13. Like crimes and common law offences, the perpetrator of a terrorist act intends to commit a deliberate miscarriage of justice. The crime of terrorism generally shares this common character with other offences. This general *dol* is explicitly specified in article 421-1 of the PC, by the adverb as “intentionally”. In the case of a crime, the agent’s intention is to sow terror by

¹⁷ Council framework Decision of 13 June 2002 on combating terrorism (2002/475/JAI).

¹⁸ PRADEL Jean et DANTI-JUAN Michel, Droit pénal spécial, Ed. Cujas, 8th ed., Collection « Préférence », 2020, p. 816.

killing or destroying property as much as possible. This criminal spirit is not sufficient to characterize the crime of terrorism because of its legal nature.

2) Special offence as a component of the means of terrorism offence

14. The legal and procedural qualification of the crime of terrorism requires the existence of a *dolus specialis*. It seems clear that “terrorist intent” has not been legally defined.¹⁹ Article 421-1, para. 1 of the French Penal Code clearly specifies two elements of special intent: the intention “to seriously disturb public order” “through intimidation or terror”.

In the same vein, Article 1(1) of the Council of Europe Framework Decision of June 13, 2002 on combating terrorism (2002/475/JHA), specifies that “the perpetrator commits them with the aim of: seriously intimidating a population, unduly compelling public authorities or an international organization to perform or refrain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization”.

In this case, the special intent of the terrorist agent or group is to highlight the failure of public authorities to ensure peace and security, and to instill widespread and perpetual fear. It's a perpetual “sword of Damocles” hanging over public authorities and society. In simple terms, the decisive motive for classifying a crime as terrorism is to intimidate the public, influence public authorities and promote religious, political, ideological or philosophical objectives.

§2. The need for criminalization of terrorism in international criminal law

International criminal law remains the criminal law of the enemy,²⁰ with no generic definition of the crime of terrorism **(I)**. However, the absence of a criminal arsenal is regrettable **(II)**.

I. The need for a definition of the crime of terrorism in international criminal law

The crime of terrorism is not defined in a generic way **(A)** but is based on sectoral definitions **(B)**. However, a generic definition is possible from the criminological point of view **(C)**.

A) The lack of a general definition of the crime of terrorism in international criminal law

¹⁹ BAUER Alain, DEPRAU Alexis et FERRAGU Gilles, *Juger les terrorismes : Regards croisés de la criminologie, du droit et de l’histoire*, Ed. du Cerf, 2024, p. 215.

²⁰ CONDE MUNOZ Francisco, « Le droit pénal international est un droit pénal de l’ennemi », RSC, n°1, January - march 2009, p. 19.

15. The definition of terrorist acts is not difficult. However, the general definition of terrorism and the crime of terrorism is subject to differences within regional and international organizations. At the outset, it is appropriate to stress that the crime of terrorism remains one of the international crimes not defined in European law.²¹ Moreover, no indication of the crime of terrorism can be found in the draft 1996 Crimes against Security and Peace Code.²²

What about the definition of the crime of terrorism in international criminal law? The crime of terrorism appears in the preparatory work of the ICC. However, the lack of a legal definition is regrettable. Nevertheless, the draft statute defines acts of terrorism.²³

Finally, the crime of terrorism was voluntarily excluded from the jurisdiction *ratione materiae* of the ICC in 1998 and at the 2010 review conference in Kampala (Kenya).

16. The non-existence of a definition of the crime and acts of terrorism in international criminal law stems from several factors. Firstly, criminal law is regarded as an element of State sovereignty. Secondly, the exclusion of this crime in the Rome Statute of the ICC stems from the fact that it is essentially political.²⁴ Thirdly, it is a protean concept.²⁵

As a result, the crime of terrorism suffers from a generic definition in international criminal law, public international law, and so on.

²¹ Treaty on functioning of European Union, 2 october 1997, article 83; Council framework Decision of 13 june 2002 on combating terrorism (2002/475/JAI).

²² The 1996 draft Code of Crimes against the Security and Peace of Humanity lists five types of crime (the crime of aggression, the crime of genocide, crimes against humanity, crimes against UN personnel and associated personnel, and war crimes).

²³ Report of Precom to creation of ICC, Official document, Volume 15 june - 17 july 1998, p. 22: "For the purposes of this Statute, "crime of terrorism" shall mean: [...].

2) Any offence defined in the following conventions:

a) Convention for the suppression of unlawful acts against the safety of civil aviation;

b) Convention for the suppression of unlawful seizure of aircraft;

c) Convention of the prevention and punishment of the crime against internationally protect persons including diplomatic agents;

d) International convention against the taking hostage;

e) Convention of the suppression unlawful acts against the safety maritime navigation;

f) Protocole to the above-mentionned to the Convention for the suppression of unlawful against the safety of fixed platforms located continental shelf.

3) The use of firearms or other weapons, explosives or dangerous substances to commit acts of indiscriminate violence which cause death or serious injury, either individually or in groups of persons or populations, or which cause significant material damage."

²⁴ DOUCET Ghislaine, « Terrorisme : recherche de définition ou dérive liberticide ? », in W. A. SCHABAS (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, op. cit., p. 389 and 397 ; quoted by KIRSCH Philippe, « Terrorisme, crimes contre l'humanité et Cour pénale internationale », in Livre noir, publié par S.O.S. Attentats, 2002, p. 114 and 115.

²⁵ BAUER Alain, and *alii*, op. cit., p. 45.

B) Sectoral legal definitions of the offence of terrorism

17. Terrorist financing is an offence. Under Article 2 of the UN Convention for the Suppression of the Financing of Terrorism: ‘1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part’.²⁶

18. Moreover, there are other sectoral definitions of the terrorist offence, such as attacks,²⁷ hostage taking,²⁸ etc. It should be stressed that the application of these sectoral definitions is a matter for the will of States. The application of these conventions is not conferred on an international law enforcement apparatus.

C) *De lege ferenda* concerning the definition of the crime of international terrorism

19. The definition of the crime of terrorism is set out by the drafters of the Rome Statute. According to the draft statute: ‘The act of undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence directed against nationals or property of another State and of a nature to provoke terror, fear or insecurity among leaders, groups of persons, the public or populations, whatever the considerations and objectives of a political, philosophical, ideological, racial, ethnic, religious or other nature which may be invoked to justify them’.²⁹ This definition makes no distinction between the act and crime of terrorism. However, there is room for improvement. *A fortiori*, it would have been desirable to define the two concepts separately for legal reasons. It would therefore be necessary to draw up a list of terrorist acts incriminated by international conventions.

Furthermore, the preparatory work of the sixth committee on the General Convention on Terrorism is based on previous conventions, specifically on the financing of terrorism. They define the offence of terrorism in section 2 (1) as follows: ‘Any person commits an offence

²⁶ International Convention for the suppression of the financing of terrorism, 1999.

²⁷ International Convention for the suppression of terrorism bombings, 2 (1): ‘Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, place, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a) With the intent to cause death or serious bodily injury; or b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

²⁸ International Convention against the taking hostages. Adopted by General Assembly of the United Nations on 17 december 1979, article 1.

²⁹ Report of Precom to creation of ICC, Official document, Volume 15 june - 17 july 1998, p. 22.

within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause”.³⁰ This definition is based on terrorist acts referred to in this article.³¹ It is questionable whether it strictly meets the requirements of international criminal law. It seems clear that the legal and judicial classification of terrorism falls within the category of international crimes³² or mass crimes.

According to Professor Bassiouni, this type of crime undeniably falls within the scope of *jus cogens*³³ and customary law, which is in principle non-derogable.

20. The notion of terrorism is relatively and eminently political.³⁴ In truth, if the definitions of international crimes seem legally limited, they have been judiciously adopted by consensus.³⁵ Any definition of the offence seems limited, but remains perfectible. These limitations should not be an obstacle to the adoption of a consensual definition of the crime of terrorism, in keeping with universal principles.

More significantly, it is important to stress that the search for a definition of the offence of terrorism concerns exclusively the crime of terrorism. This is proof that the punishment of terrorist crimes is a matter for the states. The use of criminal justice requires the ratification and

³⁰ Draft comprehensive International Convention of terrorism, article 2(1).

³¹ *Idem*, article 2: ‘‘1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause: (a) Death or serious bodily injury to any person; or (b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss; when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act. 2. Any person also commits an offence if that person attempts to commit an offence or participates as an accomplice in an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person: (a) Organizes, directs or instigates others to commit an offence as set forth in paragraph 1 or 2; or (b) Aids, abets, facilitates or counsels the commission of such an offence; or (c) In any other way contributes to the commission of one or more offences referred to in paragraphs 1, 2 or 3 (a) by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.’’

³² Final act of the United Nations diplomatic Conference of plenipotentiaries on the Establishment of an international Criminal Court, Rome on 17 July 1998, (E), (UN Doc. A/CONF.183/10) ‘‘Recognizing that terrorist acts, by whomsoever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community’’; OTTENHOF Reynald, « Approche criminologique et victimologie du terrorisme », in W. A. SCHABAS (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, *op. cit.*, p. 499.

³³ DOUCET Ghislaine, « Terrorisme : recherche de définition ou dérive liberticide ? », *op. cit.*, p. 389 and 397; in BASSIOUNI C., « International Crimes : *Jus cogens* and *Obligatio Erga Omnes* », *op. cit.*, p. 265.

³⁴ BLANCO Jean-François, « Le point de vue de l’avocat : quels droits de la défense en matière de terrorisme ? Libre propos à partir d’une expérience pratique », in PELLÉ Sébastien, *Le terrorisme : nouveaux enjeux, nouvelles stratégies, aspects juridiques et criminologiques*, *op. cit.*, p. 57 ; DOUCET Ghislaine, « Terrorisme : définition, juridiction pénale internationale et victimes », *Revue internationale de droit pénal*, vol. 76, 2005/3, p. 251 to 273.

³⁵ It should be noted that the definitions of the crime of aggression, crimes against humanity, the crime of genocide and war crimes are subject to both material and legal limitations. Nevertheless, States have made efforts to adopt them by consensus. Clearly, the crime of terrorism requires such a consensus for its adoption.

adoption of universal legal instruments against terrorism.³⁶ Of course, defining terrorism involves a legal,³⁷ political, social, economic, philosophical and cultural necessity.

21. In our view, the crime of terrorism covers the instigation, planning, preparation, financing, initiation or execution, by one or more natural or legal persons, of terrorist acts which cause bodily harm to one or more persons or their property (movable or immovable) through terror and intimidation, irrespective of their motives, perpetrated during an armed conflict or otherwise, and likely to cause a manifest disturbance of domestic or international public order.

II. Terrorist acts referred to the International Criminal Court

22. States have an obligation, under the principle *aut dedere, aut judicare*, “to prosecute or extradite” the perpetrators of crimes of terrorism.³⁸ As things stand, there is no doubt that the ICC is justified in judging serious human rights violations, including terrorist acts **(A)**. However, an overhaul of the Rome Statute seems unavoidable if the victory against terrorism is to be crystallized **(B)**.

A) De lege lata relating to the referral of a *notitia criminis* of terrorist acts to the Court

23. Under the Statute, States, the Prosecutor *proprio motu* and the Security Council³⁹ are legally entitled to refer a *notitia criminis* situation concerning the commission of acts of terrorism to the ICC. The Court's jurisdiction can therefore be exercised in respect of crimes against humanity **(1)** and war crimes **(2)**.

1) Criminalising terrorist acts as crimes against humanity

24. As a matter of principle, it is essential to emphasize that crimes against humanity can be committed in times of peace as well as war. Terrorist acts are likely to be qualified as crimes against humanity on the basis of Article 7 of the Rome Statute, according to the approach of the

³⁶ BAUER Alain and *alii*, *op. cit.*, p. 19.

³⁷ OTTENHOF Reynald, *op. cit.*, p. 487.

³⁸ DOUCET Ghislaine, « Conclusion : nécessité d’une réponse universelle aux crimes de terrorisme », in W. A. SCHABAS (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, *op. cit.*, p. 531 et seq.

³⁹ *A fortiori*, the parties to the referral of a case to the Court are entitled to refer situations in which one or more terrorist acts appear to have been committed under the seal of Article 13 of the Statute. The Security Council is entitled to refer the situation of a State Party or third party to the Prosecutor under the rule of Articles 39 et seq. of the Charter of the United Nations, regardless of whether terrorist acts are committed in time of peace or war. Nothing, absolutely nothing, can prevent such a situation being referred to the Court of Justice. The Council is therefore the central body of the international counter-terrorism machinery.

majority doctrine.⁴⁰ By its hybrid nature, the crime of terrorism has characteristics similar to those of “crimes against humanity”. The conversion of terrorist acts into crimes against humanity and war crimes is flexible.

Article 7 (1) states: “ For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

It should be noted that the acts listed in this article can also be qualified as terrorist acts, such as: “(a) Murder”, the elements of which are detailed in paragraphs 1 to 4, and “(b) Extermination”, the elements of which are determined in paragraphs 1 to 4.

25. On the other hand, the conversion of the crime of terrorism into a crime against humanity must be relativized on the grounds that there is no significant judicial precedent for such a qualification.⁴¹ Moreover, some authors, notably William Schabas and *alii*, express reservations and base their arguments on the principle of the legality of offences and penalties under article 22(1) of the Rome Statute.⁴²

2) The criminalization of terrorist acts as war crimes

26. In terms of international humanitarian law, it is *a priori* accepted that the Geneva Conventions apply to both international and non-international conflicts.⁴³ It has been ruled that “international humanitarian law applies from the outbreak of such armed conflicts and extends beyond the cessation of hostilities to the general conclusion of peace [...]”.⁴⁴ Terrorist acts against persons **(a)** and property can be qualified as war crimes **(b)**.

⁴⁰ KIRSCH Philippe, « Terrorisme, crimes contre l'humanité et Cour pénale internationale », *op. cit.*, p. 111 ; DOUCET Ghislaine, « Terrorisme : définition, juridiction pénale internationale et victimes », *op. cit.*, p. 267 et seq.; DOUCET Ghislaine, « Terrorisme : recherche de définition ou dérive liberticide ? », *op. cit.*, p. 396 et seq.

⁴¹ SCHABAS William A. et OLIVIER Clémentine, “Le terrorisme : Crime contre l’humanité”, in W. A. SCHABAS (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, *op. cit.*, p. 380.

⁴² Rome Statute, Chapter III : « General Principle of Criminal Law », article 22 (2): “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”

⁴³ TPIY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Case n°IT-94-1, Judgment on the defense appeal concerning the preliminary objection of lack of jurisdiction, 2 october 1995, para. 67; TPIY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Case n°IT-94-1, Judgment on the defense appeal concerning the preliminary objection of lack of jurisdiction, 2 october 1995, *idem*, p. 13, para. 70; CPI, Trial Chamber II, *The Prosecutor v. Katanga*, Case n°ICC-/01-04/07, Judgement on pursuant to article 74 of Rome Statute, 7 mars 2014, p. 477, para. 1173; CPI, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on pursuant to article 74 of Rome Statute, 14 mars 2012, ICC-01/04-01/06, para. 531 et seq.; TSSL, *The Prosecutor v. Moinina Fofana*, Case n°SCSL-2004-14-AR72 (E), Décision on preliminary motion lack of jurisdiction *materia*: nature army conflict, 25 mai 2004, para. 21.

⁴⁴ TPIY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Case n° IT-94-1, *op. cit.*

a) Classification of terrorist acts against persons as war crimes

27. *A priori*, article 21(b), entitled “Applicable Law”, states that the Court applies, “In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”. There is no doubt that the Court has the authority to apply international humanitarian law.

28. *De jure*, it should be noted that terrorist acts under article 8 of the Rome Statute are liable to be classified as war crimes. Also, they are taken by the elements of crimes. In the view of the majority doctrine, a terrorist attack is tantamount to a declaration of war against a state.⁴⁵ When committed in wartime, it can be qualified as a war crime⁴⁶ under article 8 of the Rome Statute.

29. It follows from Article 8(2) that “For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments”. This incrimination is based almost word for word on Article 4 of Protocol II to the Conventions of August 12, 1949.⁴⁷

30. Article 4(2)(c) and article 34 of Protocol II of 12 August 1994 prohibit the taking of hostages. In 1979, inspired by the above-mentioned convention, the UN General Assembly adopted the International Convention against Hostage Taking, considering it a serious crime.⁴⁸ Based on these texts, the States Parties criminalize, according to article 8(2)(a)(viii) of the Rome Statute, hostage taking, whose interpretation falls within paragraphs 1 to 5 of the elements of crimes.

31. According to Article 8(2)(c), the following are considered war crimes, “In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who

⁴⁵ DOUCET Ghislaine, « Conclusion : nécessité d’une réponse universelle aux crimes de terrorisme », *op. cit.*, p. 534.

⁴⁶ Rome Statute, article 8; Statute of ICTR, article 4 (Geneva Conventions of 12 august 1949 and Protocol additional II, articles 27, 33, 34 and 51).

⁴⁷ Protocol additional to the Geneva Conventions of 12 august 1949, and relating to the Protection of Victims Non International Armed Conflict, (Protocol II), 8 june 1977, article 2 “Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism”.

⁴⁸ Internationale Convention of taking hostages, adopted by the General Assembly, 17 december 1979, para. 4.

have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment”.

32. In the event of a non-international armed conflict, Article 8(2)(c)(iii) further criminalizes hostage-taking. These qualification criteria are defined in paragraphs 1 to 7 of the Elements of Crimes document. It should be noted that the latter are a very clear characterization of the crime of terrorism on the basis that article 8(2)(c)(iii) and (3) states “ The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.”

The prohibition of *de jure* acts of violence and intimidation is prescribed by provisions of the aforementioned text, specifically articles 27, 33, 34 and 51. Consequently, it seems clear that the ICC is empowered to judge crimes of terrorism.

Moreover, relevant provisions of international humanitarian law formally prohibit the use of terrorist acts. Article 13(2) of Additional Protocol II states that “ Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

As things stand, there is no significant case law to convert acts of terrorism against persons and property into war crimes. This does not prevent the use of the terms “terror” or “intimidation” in *obiter dictum* by international criminal courts.

b) Classification of terrorist acts against property as war crimes

33. Terrorist offences against property during international or non-international armed conflicts remain officially prohibited by the Geneva Conventions of August 12, 1949.⁴⁹ It is worth noting that the International Convention on Terrorist Bombings, adopted by the General Assembly on January 9, 1998,⁵⁰ refers to the above-mentioned text. It follows that Article 8 of the Rome Statute incriminates terrorist attacks on property.

⁴⁹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, (Protocol II), 8 June 1977, “Protection of indispensable to the Survival of civilian population” (article 14); “Protection of works and installation containing dangerous force” (article 15); “Protection of cultural objects and places of worship” (article 16).

⁵⁰ International Convention for the Suppression of Terrorist Bombings, A/RES/52/164, Adopted by General Assembly, 9 January 1998. This text applies to public and private infrastructures of each signatory state, pursuant to its article 1.

Legally, the following cases are initially war crimes. However, they can be qualified as crimes of terrorism, subject to the elements of terrorizing the population and intimidating the public authorities.

34. Article 8(2)(b) states that the following constitute war crimes: “ Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

35. According to Article 8(2)(b)(ix) of the Statute, the following also constitute war crimes “ Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”. In doing so, the characterization of these acts is clearly indicated in paragraphs 1 to 4 of the elements of crimes.

36. Article 8(2)(e)(ii) of the Statute states that it is a war crime “ Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law”. Interpretation criteria are set out in paragraphs 1 to 4 of the crime elements.

37. Finally, section 8(2)(e)(iv) of the Statute considers a war crime “ Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”. Details of application are provided in paragraphs 1 to 5 of the Crime Elements document.

38. In the final analysis, it is indisputable that the Rome Statute confers on the Court the power to interpret universal and customary rules for the exercise of its jurisdiction. Crimes of terrorism are clearly defined by international humanitarian law, the Rome Statute and the Elements of Crimes. The failure to enshrine this crime in the Court's overall legislative framework would appear to be inconsistent with and contradictory to the relevant instruments of universal value.

B) *De lege ferenda* of the crime of terrorism in relation to *nullum crimen sine lege sine iudex*

39. What about the International Criminal Court for Terrorism? In any case, and *per se*, the creation of a repressive court for terrorism is nothing new. The Convention on the Prevention and Punishment of Terrorism, adopted on November 16, 1937, provides for the creation of an international criminal court⁵¹ to punish terrorist offences.⁵² However, this court never became operational, as the number of states required to ratify the convention was insufficient. Article 2 (1) of the Convention sets out the principle *aut dedere, aut iudicare*. Furthermore, in 2007, the Security Council created the Special Tribunal for Lebanon to punish the terrorist acts perpetrated against the Lebanese Prime Minister, Rafic Hariri.⁵³

40. Of course, it seems clear that crimes of universal scope cannot go unpunished.⁵⁴ The international community is in the wake of preventing and suppressing large-scale crime. The crime of terrorism should not be excluded from this field. The Assembly of States Parties affirms that “the Statute of the International Criminal Court provides for a review mechanism to further expand the jurisdiction of the Court”.⁵⁵ It further recommends that “ Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”⁵⁶

41. On analysis, it is essential always to bear in mind that there is a draft ICC statute from 1998 in which terrorist acts are enumerated. However, there is room for improvement. With this in mind, almost all States have ratified the international conventions on terrorism, the Geneva Conventions. This should pave the way for extending the ICC's jurisdiction to terrorist crimes.

It is useful, *ultima ratio*, to criminalize the crime of terrorism on the grounds that the principle of equality of offences and penalties and that of legal certainty make it an unqualified prescription. If the States Parties succeed in adopting the amendment to the crime of terrorism at the end of the future Review Conference, the latter will be enshrined in the Rome Statute, more specifically in Article 5, along with new provisions. In addition, it could make it possible

⁵¹States parties to the Convention establishing an International Criminal Court: Belgium, Bulgaria, Czechoslovakia, France, Greece, Monaco, Netherlands, Romania, Spain, Turkey and Yugoslavia.

⁵²Convention for the Establishment of an International Criminal Court, League of Nations, n°C547, M.384, 1937.

⁵³UN, Security Council, S/RES/1757, adopted at its 5685th meeting, May 30, 2007, §1 et seq.

⁵⁴Rome Statute, Preamble, para. 4.

⁵⁵UN doc., A/CONF.183/10, *op. cit.*, p. 73.

⁵⁶*Idem.*

to enshrine it among the elements of crimes. The amendment of the entire procedural framework (rules of evidence and procedure, regulations of the Court, regulations of the Office of the Prosecutor of the Court, etc.) seems necessary.

42. Very schematically, the actors involved in the referral of a *notitia criminis* to the Prosecutor for the purpose of bringing the case before the Court on the basis of Article 13 of the Statute. A reorganization of the Court's organs seems unavoidable. The Conference could provide for a counter-terrorism division within the Office of the Prosecutor. The latter would not focus on the mere executors, but would dismantle the networks in order to bring the real perpetrators before the Court for prosecution. It could also create an Anti-Terrorism Division or Pre-Trial Chamber and an Anti-Terrorism Division or Trial Chamber.

Conclusion

43. More fundamentally, the criminological diagnosis shows that the perpetrators of terrorist acts aim, *de jure* and *de facto*, to blatantly violate domestic law, human rights, particularly the right to life, international humanitarian law, general international law and customary law.

44. *Prima facie*, in domestic law it is desirable that the legislator should establish the crime of terrorism as an imprescriptible crime on the grounds that it is a mass crime expressly and officially prohibited by the ECHR, the Charter of Fundamental Rights of the European Union, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Conventions of 12 August 1949, the Rome Statute,⁵⁷ etc.

45. Secondly, in international criminal law, the principle of legality requires a precise definition of terrorist acts for their repression.⁵⁸ The concept of terrorism offence is moving towards stability, given the diversity of conventions adopted. It is desirable for the international community to consider a universal definition of the crime of terrorism.

⁵⁷ Rome Statute, Chapter II: General Principles of Criminal Law, article 29.

⁵⁸ OTTENHOF Reynald, « Approche criminologique et victimologie du terrorisme », *op. cit.*, p. 488.