

FROM ROME TO NUREMBERG WITH ROMANTICISM: ON TERRORISM*

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* On the theory of Romanticism, see ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* (Henry Hardy ed., Princeton University Press 2001) (1999). In this article, Romanticism is used as a theoretical lens through which traditional views are analyzed through modern ones.

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I. ABSTRACT

The Rome Statute is the ultimate treaty-based code on individual criminal liability, whereby the International Criminal Court was established as the first permanent international court with the jurisdiction to try the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Insofar as crime and punishment are concerned, I believe that the Rome Statute is a common law oriented code rather than a continental law based code. At the Rome Conference, several proposals to extend the Court's jurisdiction over terrorism were rejected, primarily due to the lack of consensus on a single definition for 'terrorism.' In this article, I argue against the ongoing calls to amend the Rome Statute to incorporate the crime of terrorism within the Court's jurisdiction. In my view, 'terrorism' represents an overriding motivation which is associated with other 'ordinary crimes' and, thus, reflects the high degree of dangerousness that characterizes the actors. In criminal law systems based upon common law tradition, the dangerousness question bears upon the sentencing stage, and, therefore, a conceptual definition for factors that address criminal punishment complies with the legality principle on fair notice. Accordingly, I propose a conceptual definition that reflects the basic features of 'terrorism,' whereby it represents a notion of extreme fear imposition on the nation as such. In my view, this approach is valid in respect to terrorism of the nineteenth century exactly as to that of the twenty-first, and probably the twenty-fifth as well. In conclusion, I argue that this kind of conceptual understanding of 'terrorism,' as well as its legal nature in the realm of criminal law, was well addressed during the Nuremberg Trials, and, thus, I suggest invoking the Nuremberg experience vis-à-vis the Rome Statute.

II. INTRODUCTION

Reading through the provisions of the Rome Statute on Individual Criminal Responsibility (Statute) leaves no doubt as to the absence of the word ‘terrorism.’ The Statute limits the jurisdiction of the International Criminal Court (ICC or the Court) to four crimes: the crime of genocide, crimes against humanity, war crimes, and crimes of aggression (Core Crimes).¹

Although the possibility of including the crime of terrorism was discussed during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, June 15–July 17, 1998 (Rome Conference),² eventually such a crime was not established within the Statute’s premises, to a great extent, due to the lack of agreement on a clear accepted definition for ‘terrorism.’³

Among the variety of legal tools, criminal law plays an important role, both at the national and the international levels, in fighting terrorism. In absolute terms, it is well understood that criminal law aims at seeking justice for the society in general and for the victims of the criminal commission in particular.⁴ Justice can be thus achieved, *inter alia*, by reaching those who are

1. Rome Statute of the International Criminal Court, art. 5(1), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

2. Several delegations in attendance supported the inclusion of terrorism within the jurisdiction of the International Criminal Court, including: Kyrgyzstan, Costa Rica, Armenia, Albania, Macedonia, India. II Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3d Plenary Meeting, ¶¶ 69, 74, 83, A/CONR183/13 (June 16, 1998); II Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th Plenary Meeting, ¶¶ 12, 45, 52, A/CONR183/13 (June 16, 1998) (showing representatives of a wide variety of countries in attendance expressed their support for including the crime of terrorism in the Rome Statute).

3. See II Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th Plenary Meeting, ¶ 67, A/CONR183/13 (June 16, 1998) (noting trepidation voiced by the Observer for the League of Arab States to the inclusion of the crime of terrorism because the crime did not have a fixed definition). As captured by the aphorism: ‘One man’s terrorist is another man’s freedom fighter.’ Angela Hare, *A New Forum for the Prosecution of Terrorists: Exploring the Possibility of the Addition of Terrorism to the Rome Statute’s Jurisdiction*, 8 LOY. U. CHI. INT’L L. REV., 95, 97 (2010).

4. Rome Statute, *supra* note 1, pmb., ¶¶ 1, 2, 5, (showing the purpose of the Rome Statute and the ICC is to seek justice for all of society and the prevention of future crime).

responsible for harming certain socially protected interests, denouncing and condemning them for their wrongs, and, consequently, punishing them for their guilt. However, one may not simply assume that an individual is liable for an act of terrorism; the individual's guilt must be proved, beyond a reasonable doubt – until then, the individual is presumed innocent.

For legal purposes, the enigma surrounding defining 'terrorism' is of the utmost importance, particularly in the context of criminal law. The legality principle is one of the most significant principles of criminal law theory. One of the most important protections that the legality principle provides to those who are subject to criminal law is the requirement of fair notice, which stipulates that crimes must be defined in enough detail to put a person on notice of the behavior prohibited.⁵ It is the promise that individuals must know what the 'law' is before they violate it. It is a constitutional requirement⁶ that suspects of criminal activity, being, first and foremost, human beings, are to be treated with dignity *i.e.* as rational persons, who are capable of distinguishing between right and wrong.⁷ Accordingly, the legality principle suggests that once individuals have received the above-mentioned prior fair notice, attributing criminal guilt to them for choosing what had already been defined as criminally wrong constitutes a just, right, and fair condemnation.⁸ The legality principle widely appears in bold letters across domestic criminal law codes as well as in the Rome Statute; it is an essential requirement of criminal justice.

Despite the decisive position that the state parties took at the Rome Conference against establishing a crime of terrorism,

5. 1 INTERNATIONAL CRIMINAL LAW 95-96 (M. Cherif Bassiouni ed., 3d ed. 2008).

6. *Kolender v. Lawson*, 461 U. S. 352, 357-358 (1983) (discussing the void for vagueness doctrine that requires a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement). The principle has also found application in the context of EU jurisprudence. See James Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT'L & COMP. L. 541, 549 (2007)

7. INTERNATIONAL CRIMINAL LAW, *supra* note 5, at 95.

8. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L.R. 189, 205-06 (1985).

scholars of international criminal law have not given up; they continue to seek the amendment of the Rome Statute in this regard. To this end, they call for articulating a distinct international crime of terrorism or a sub-category within the scope of one of the Core Crimes. In this context and by virtue of the legality principle, a variety of possible detailed definitions for 'terrorism' have been proposed. Generally speaking, the common grounds for these proposed definitions are influenced by the aftermath of the tragic 9/11 attacks, which have been politically described as acts of terror.

In this article, it is argued that these scholars have been mistaken in perceiving 'terrorism' as a form of action. In my view a conceptual definition is needed to appropriately and accurately evaluate terrorism, one in which 'terrorism' represents the kind of motivation that incites those criminals whose aim to inflict extreme fear on the nation as such, as a means to accomplish some other ends. This motivation must be distinguished from the classic *mens rea*, an essential requirement for the establishment of criminal guilt. In my opinion, the motivation behind acts of terrorism represents the level of dangerousness, which is relevant for criminal punishment.

The distinction between the guilt/innocence proceedings and the sentencing stage is of the utmost importance, given that the Rome Statute, as a criminal code, is highly influenced by the common law tradition, as compared to the continental tradition. As for the guilt/innocence proceedings, the burden of proving the defendant's guilt, beyond a reasonable doubt, is laid on the prosecution's shoulders. At the sentencing stage both sides bear the burden of proving, by the preponderance of the evidence, aggravating elements (the prosecution) and mitigating elements (the convicted person).

It is my view that 'terrorism' does not bear on the guilt question but, rather, on the determination of the convicted person's dangerousness, as it represents the terrorist's overriding motivation of imposing extreme fear on the nation as such. The assessment of dangerousness is reserved for the sentencing stage. Accordingly, for the purposes of criminal law, there is no need to articulate a detailed definition for 'terrorism,' thus a conceptual

understanding of this phenomenon complies with the legality principle.

In conclusion, I argue that this understanding of the conceptual meaning of ‘terrorism’ as well as its legal features in the realm of criminal law is romanticized in the Nuremberg Trials. At Nuremberg, the Charter of the International Military Tribunal⁹ (IMT) did not include a crime of terrorism; however, the conceptual nature of ‘terrorism’ as well as its characteristics as an aggravating factor in sentencing was aptly and manifestly expressed in the opening statement by Justice Robert H. Jackson, the Chief United States prosecutor at the Nuremberg Trials.

III. THE QUEST FOR INTERNATIONAL CRIMINALIZATION OF TERRORISM

The ICC was established as a permanent, treaty-based, institute that provides a forum to try individuals of flesh and blood¹⁰ for “the most serious crimes of international concern,”¹¹ which “shock the conscience of humanity”¹² and are, thus, deemed as grave crimes that “threaten the peace, security and well-being of the world.”¹³ The Statute aims at putting an end to “impunity for the perpetrators of these crimes,”¹⁴ hence realizing that such crimes “must not go unpunished, and that their effective

9. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 (note that terrorism is not mentioned in the Charter).

10. Rome Statute, *supra* note 1, art. 25(1) (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”).

11. *Id.* art. 1, pmb. at ¶ 4; *see also* Mohammed Saif-Alden Wattad, *The Rome Statute & Captain Planet: What Lies Between ‘Crimes Against Humanity’ and the ‘Natural Environment?’* 19 FORDHAM ENVTL. L. REV. 265, 269-78 (2009) (“This is a source of great concern to the international community and for this reason ‘international crimes’ mandate prosecution namely because humanity as a whole is the victim.”).

12. Rome Statute, *supra* note 1, pmb.

13. *Id.* at ¶ 3.

14. *Id.* at ¶ 5; *see also* MAHMOUD CHERIF BASSIOUNI, THE INT’L INST. OF HIGHER STUDIES IN CRIM. SCIENCES, FIGHTING IMPUNITY AND PROMOTING INTERNATIONAL JUSTICE 8 (2009) (discussing the alternatives many states have undertaken to prosecute perpetrators of international crimes in lieu of the lack of criminal accountability on the international stage); Mahmoud Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 420-21 (2000) (discussing how the ICC will sharply curtail impunity for international criminals).

prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”¹⁵ Ultimately, this sentiment coalesced into the four Core Crimes¹⁶ that were adopted by the member states at the Rome Conference and codified in the Statute, over which the ICC has jurisdiction.¹⁷

The 1994 Declaration on Measures to Eliminate International Terrorism¹⁸ recognizes that “terrorism constitute[s] a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security.”¹⁹ However, the Rome Statute – which extends the ICC’s jurisdiction over “the most serious crimes of international concern”²⁰ – does not provide an explicit reference to ‘terrorism,’ neither as a distinct international crime nor as a sub-category of any of the Core Crimes.

A review of the summary records of the Rome Conference shows that the possibility of criminalizing ‘terrorism’ for the purposes of the ICC’s jurisdiction was expressly brought to the state parties’ attention.²¹ However, the inclusion of ‘terrorism’ within the Statute was decisively rejected by the majority of the

15. Rome Statute, *supra* note 1, pmb. ¶ 4.

16. The four Core Crimes are genocide, crimes against humanity, war crimes, and crimes of aggression. *Id.* art. 5.

17. *Id.* art. 5(2); Official Records of the Review Conference of the Rome Statute of the International Criminal Court, U.N. Doc. RC/9/11 (May 31–June 11, 2010) (demonstrating the steps taken by the international community to add the crime of aggression to the Rome Statute and bring it into the ICC’s jurisdiction).

18. See G.A. Res. 49/60, Measures to Eliminate International Terrorism (Dec. 9, 1994); G.A. Res. 51/210 Supplementary Declaration on Measures to Eliminate International Terrorism (Dec. 17, 1996).

19. See G.A. Res. 49/60, Annex, ¶ 2 (Dec. 9, 1994); Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT’L L. 11, 13 (2010); Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 41-45 (2008) (discussing the history of the international community recognizing terrorism as a human rights violation).

20. Rome Statute, *supra* note 1, art. 1, pmb. ¶ 4; see also Wattad, *supra* note 11, at 269-78 (discussing the formal approach of examining international crimes by breaking down the factors that crystallize an international crime).

21. See II U.N. GAOR, 52nd Sess., 6th mtg. at 170-81, U.N. Doc. A/CONF.183/13 (June 18, 1998). In years following the Rome Conference, member states have been unable to adopt a definition for terrorism and all attempts to include terrorism in the ICC’s jurisdiction have failed. Hare, *supra* note 3, at 97-98.

state parties.²² It is remarkable that at the conclusion of the Rome Conference, terrorism was addressed solely in Resolution E in the Annex to the Final Act, which recommended revisiting the issue of including terrorism in the Statute when a Review Conference will meet.²³ However, it is noteworthy that this issue was not revisited during the Review Conference in Kampala in 2010.²⁴

Since the conclusion of the Rome Statute, a great amount of scholarly writing has been published in support of amending the Statute and extending the Court's jurisdiction over terrorism,²⁵ either as a distinct international crime²⁶ or as a sub-category of

22. For example, see statements made by the delegates of United Kingdom. II Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3d plen. mtg. at 177, ¶ 117, U.N. Doc. A/CONF.183/13 [hereinafter Official Records of the Rome Conference]. Other examples of countries who opposed the inclusion of the term include Syria, Morocco, Iraq, Belgium, Greece, Sweden, Senegal, Ukraine, United States of America, Brazil, Ethiopia, Iran, and the Netherlands. *Id.* at 174-81. State parties who *did not* oppose the inclusion of terrorism in the statute, see the statements made by the delegates of Israel; Tunisia, Republic of Korea, Costa Rica, Sri Lanka, Algeria, India, New Zealand, Turkey, Cuba. *Id.* 173-81. For additional information see generally Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorist*, 20 MICH. ST. INT'L L. REV. 219, 223 n.7 (2012) (discussing the three categories into which the proposed – but ultimately not adopted – definition of terrorism would fall); Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L.J. 455, 456 (2004) (suggesting that the ICC may have been found to be more acceptable to the United States if the term terrorism had been included in its jurisdiction)

23. Rome Statute, *supra* note 1, annex I, res. E; *see also* McKay, *supra* note 22, at 456-57.

24. See Review Conference of the Rome Statute of the International Criminal Court (Kampala, 31 May – 11 June 2010), https://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf. At the Review Conference, the state parties adopted a definition of the crime of aggression, thus empowering the ICC, for the first time, to exercise its jurisdiction over this crime. The Review Conference also included an expansion of the list of war crimes. *Id.* at ¶ 36 and Annex II, art. 8 (2)(e)(xiii) (xv). Amendments proposing the addition of 'terrorism' to the ICC's jurisdiction were not reviewed at the Review Conference. *Hare, supra* note 3, at 98.

25. Norberg, *supra* note 19, at 14 (describing the crime of terrorism as the “crime of crimes” of the 21st century”); Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT'L L. REV. 1009, 1025-26 (2004); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995 (2001).

26. Cohen, *supra* note 22, at 238; Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 U. NEW S. WALES L.J. 454, 481 (2004) (favoring

one or more of the Core Crimes.²⁷ In asserting their arguments in this regard, various models and reasoning have been invoked. Some scholars have invoked the Nuremberg Trials discussing the conduct of the Nazi Regime in terrorizing civilians, which fits within the general understanding of ‘terrorism,’ as both a war crime and a crime against humanity.²⁸ Others have proposed recognizing ‘terrorism’ as a crime against humanity, either as one of the listed sub-categories of crimes against humanity,²⁹ or as an “inhuman act” pursuant to Article 7(1)(k) of the Statute.³⁰ Additionally, others have endeavored to recognize ‘terrorism’ within the scope of any of the Core Crimes by proposing interpretive models of the existing, broad language of the definitions of these crimes.³¹

However, although most scholars agree that, for international criminal law purposes, a clear definition for ‘terrorism’ needs to be articulated, they dispute the components that should constitute such definition. In his well-articulated manuscript, Aviv Cohen proposed six reasons why ‘terrorism’ has, thus far, been excluded from the scope of the ICC’s jurisdiction.³² He noted,

terrorism a distinct international crime while also acknowledging that “international criminal law remains in a state of confusion in relation to terrorism as a distinct international crime”). See generally Daniel Moeckli, *The Emergence of Terrorism as a Distinct Category of International Law*, 44 TEX. INT’L L.J. 157 (2008).

27. Roberta Arnold, *The Prosecution of Terrorism as a Crime Against Humanity*, 64 ZAÖRV 979, 994-97 (2004); Cohen, *supra* note 22, at 239-50; 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. 69-70, 79 (discussing the different opinions concerning the inclusion of terrorism as one of the recognized Core Crimes).

28. Arnold, *supra* note 27, at 988-90; David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 100 n.59 (2004).

29. Bennoune, *supra* note 19, at 46; Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. J. INT’L L. 121, 127-29 (2006); Neil Boister, *Treaty Crimes, International Criminal Court?*, 12 NEW CRIM. L. REV. 341, 355-56 (2009).

30. Cassese, *supra* note 25, at 995; Proulx, *supra* note 25, at 1025-29; see also Wattad, *supra* note 11, at 282 (discussing the non-conclusive nature of Article 7 of the Statute).

31. See Cohen, *supra* note 22, at 239-50.

32. The six reasons are:

1. “[T]he lack of a clear and universally accepted definition of what of what constitutes terrorism . . .” *Id.* at 224

though, that only one reason “may still prove to be a real obstacle”: “the lack of an acceptable definition of terrorism.”³³

IV. THE ENIGMA OF DEFINING ‘TERRORISM’

Insofar as international criminal law is concerned, there is no question as to whether a definition of ‘terrorism’ is needed, rather, such a definition is required by the legality principle: *nullum*

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2. “[T]he notion that the three core crimes—war crimes, crimes against humanity, and genocide—represented the crimes of greatest concern to the international community, and terrorism does not rise to this level of international concern.” *Id.* at 224. *Contra* David Scheffer, *Staying the Course with the International Criminal Court*, 35 *CORNELL INT’L L.J.* 47 (2001/2002) (arguing that the September 11th terrorist attacks were crimes against humanity that would have fallen within ICC jurisdiction had the court existed at the time); Norberg, *supra* note 19, at 13 (reasoning that terrorism is a serious crime that affects the international community just as other gross violations of human rights do).
 3. “[T]he desire to avoid overburdening the ICC and the need for a gravity threshold.” Cohen, *supra* note 22, at 225-26.
 4. “[S]uch an inclusion would impede the acceptance of the Rome Statute.” *Id.* at 226.
 5. “[T]here was already in place a system of international cooperation to deal with it [such as] the counter-terrorism conventions [that] attempt to create a regime of “extradite or prosecute” between their member states and ensure the cooperation between them” *Id.* at 226-27; *accord* McKay, *supra* note 22, at 457 (providing examples of international treaties that condemn acts of terrorism as criminal acts, such treaties include: Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971, the Convention against the Taking of Hostages of 1979, and the 1998 International Convention for the Suppression of Terrorist Bombings); Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 81 (Roy S. Lee ed., 1999).
 6. “[S]ince terrorism is such a politically-sensitive term, if the ICC would deal with cases of terrorism, it will be forced into the political realm and thus will hurt its legitimacy and credibility as an impartial judicial institution.” Cohen, *supra* note 22, at 227-28; *accord* Norberg, *supra* note 19, at 13.

33. Cohen, *supra* note 22, at 229; *see also* Hare, *supra* note 3, at 97 (stating ‘terrorism’ has never been defined in the international legal order and developing such a definition will take both time and effort); McKay, *supra* note 22, at 456 (recounting the disagreement about how to define ‘terrorism’ during the Rome Statute negotiations); Proulx, *supra* note 25, at 1,033 (commenting that states disagree on the definition of terrorism, and the United Nations has never been able to reach a compromise on a definition for terrorism); Aaron Noteboom, *Terrorism: I Know It When I See It*, 81 *OR. L. REV.* 553, 563-65 (2002) (discussing the history behind the definition of terrorism debate and how both the League of Nations and the United Nations have failed to properly define terrorism).

crimen, nulla poena, sine lege – There is no crime and no punishment without prior legislative warning.³⁴ Put another way, only when the law clearly prohibits an act can the commission of the act fairly be construed as a knowing violation of the law by an actor. The basic principle is that individuals have a right to know what the law is before it can be said that they violated it.³⁵ This is a notion of fair condemnation, namely, individuals “have a right to know that which [bears upon their moral choice] to engage in the action or not.”³⁶ Accordingly, the legality principle also prescribes that a crime must be defined in detail; a vague definition does not provide fair notice.

The legality principle is widely accepted at the national and international level. Like the vast majority of domestic legal systems,³⁷ the Rome Statute has reserved a place of honor for the legality principle. Accordingly, criminal liability under the Statute is not possible unless the conduct at stake constitutes a crime within the jurisdiction of the Court at the time it took place.³⁸ Additionally, the Rome Statute compels the articulation of narrowly tailored definitions for the Core Crimes and demands strict interpretation of such crimes, as well as avoiding expansion of their scope by analogy.³⁹ Moreover, the Statute necessitates an interpretation in favor of the defendant where ambiguity exists.⁴⁰ In addition, the Statute prohibits retroactive legislation, thus making criminal liability impossible for acts that took place prior to the entry into force of the Statute.⁴¹ Finally, the Rome Statute

34. Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine, Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 41 (2005).

35. *Id.*; Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33 NEW ENG. J. CRIM. & CIV. CONFINEMENT 501, 545-46 (2007).

36. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 13 (1998).

37. See Iulia Crisan, *The Principles of Legality* “Nullum Crimen, Nulla Poena Sine Lege” and *Their Role*, EFFECTIVUS NEWSL., June 2010, at 2 (most countries in the European Union); Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYDNEY L. REV. 413, 414 (2013) (Australia); Lee W. Potts, *Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa*, 73 J. CRIM. L. & CRIMINOLOGY 1061, 1067 (1982) (New Zealand and Canada).

38. Rome Statute, *supra* note 1, art. 22(1).

39. *Id.* art. 22(2).

40. *Id.* art. 22(2). “Defendant” includes persons being investigated, prosecuted, or convicted

41. *Id.* art. 24(1).

stipulates that punishments for convicted persons cannot be imposed unless it is in accordance with the Statute.⁴² Below follows an analysis of the problem that arises from applying these international legal norms in the context of punishing those who have committed or will commit acts of terrorism.

With respect to international law,⁴³ there are treaties that prohibit certain acts that may be employed by terrorist organizations and that may be fairly characterized as ‘Acts of Terrorism,’ depending on the actor, but no particular treaty has provided a conclusive and comprehensive definition; rather, they simply address certain actions, ignoring the motivation specific to the actor.⁴⁴ In accordance with the legality principle, scholars who

42. *Id.* art. 23.

43. Under international humanitarian law, “terrorism” has been addressed in general terms as an act of violence in breach of the principles of military necessity, proportionality and distinction, which is primarily aimed at spreading fear among the civilian population. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 75 U.N.T.S. 973 (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”) *Id.* art. 4(2)(d) (“[T]he following acts . . . shall remain prohibited at any time and in any place whatsoever: . . . Acts of terrorism . . .”). The Geneva Conventions of 1949 amount to customary international law; *see* Arnold, *supra* note 27, at 980 (stating that the meaning of “terror” under Article 33 of the Fourth Geneva Convention could be used universally because the four Geneva Conventions of 1949 amount to customary law).

44. Notably among others, these are the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 1974 (prohibiting certain acts that cause or threaten to cause damage to aircraft); Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (prohibiting the taking of hostages or kidnapping of individuals to compel another to act or refrain from acting); International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256 (entered into force May 23, 2001) (prohibiting the detonation of explosives in a “place of public use, a State of government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction . . ., where such destruction results in or is likely to result in major economic loss”). For a more detailed discussion, see DAVID P. STEWART,

have called for criminalizing ‘terrorism,’ have found themselves forced to propose a particular definition for what constitutes, from their point of view, ‘terrorism.’⁴⁵ Insofar as international criminal law is concerned, it has been aptly perceived by Cohen that the various definitions for ‘terrorism’ that have been proposed contain four basic elements:

[F]irst, the use or threat of use of violence; second, the act is indiscriminate in that the immediate victims are chosen randomly and are not the ultimate audience of the act; third, the violence is intentionally targeted towards civilians as opposed to combatant forces; and finally, the purpose of the act is to compel a government or an organization to perform or abstain from performing a certain action.⁴⁶

These elements (Core ‘Terrorism’ Elements) are not substantively different from the international community’s early attempts to draw a general definition for ‘terrorism,’⁴⁷ which have not been accepted and, at best, remain a source of academic reference. There are several problems with the Core ‘Terrorism’ Elements. *First*, to a great extent, it was the attacks of 9/11 and the suicide bombings in other countries that captured scholars’ minds in

INTERNATIONAL CRIMINAL LAW 315 (2014) (stating that no comprehensive treaty definition of terrorism has been created).

45. See Cohen, *supra* note 22, at 229 (“The number of definitions given to terrorism might directly correspond to the number of people asked.”); JENNIFER JEFFERIS, ARMED FOR LIFE 101, 103 (2001) (commenting that scholars, politicians, and pundits have been forced to define their own concepts of terrorism).

46. Cohen, *supra* note 22, at 229-30; cf. James D. Fry, *The Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda*, 43 NEW ENG. L. REV. 337, 393-94 (2009) (commenting that the acts described by treaty provisions as ‘antiterrorist’ are criminalized regardless of if they have been classified as terrorist or not thus there is no need to define ‘terrorism’); George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 OXFORD J. INT’L CRIM. JUST. 894, 910 (2006) (stating that there are at least eight primary factors of terrorism—violence, required intent, nature of victims, connection of the offender to the state, justice and motive of their cause, level of organization, element of theatre and absence of guilt).

47. See Convention for the Prevention and Punishment of Terrorism art. 1(2), Nov. 16, 1937, 1035 U.N.T.S. 167 (“[A]cts of terrorism’ means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular person, or a group of persons or the general public.”); see also 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 228-32 (2014) (discussing the current agreement on the definition of terrorism as having evolved since the 2000s and now being embodied in the U.N. Draft Comprehensive Terrorism Convention).

defining ‘terrorism,’ and, hence, scholars have been attempting to portray ‘terrorism’ as close as possible to what we have seen in the recent century.⁴⁸ *Second*, the Core ‘Terrorism’ Elements have a more political inspiration than a legal one, which is problematic in terms of divorcing the term from its social, political, and cultural connotations.⁴⁹ For legal purposes, I believe that a conceptual definition is required, one that can accurately describe terrorism of the twenty-first century to the same extent as terrorism of the eighth century and of the twenty-fifth century. And *third*, it seems that scholars of international criminal law, in an attempt to comply with the legality principle, are enthusiastic to include as many components as possible to the various definitions they propose.⁵⁰ This overwhelming enthusiasm is driven by their understanding that the word ‘terrorism’ is the *actus reus* which underscores criminal guilt.⁵¹

As noted in an earlier work by the author:

48. See Norberg, *supra* note 19, at 13 (arguing that since 2001 there has been a shift in concentration to international hyperterrorism that overshadows other forms of terrorism); Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT’L L. 1, 2-3 (2011) (arguing that post 9/11, nations have repurposed and broadened various definitions of terrorism); Proulx, *supra* note 25, at 1012 (proposing that the ICC has the jurisdiction to prosecute acts of international terrorism such as those that occurred on September 11th because those acts qualify as crimes against humanity under the Rome Statute); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 29 (2006) (stating that following the attacks on 9/11, the Security Council, the U.N. General Assembly and other states and non-state entities have taken up the terrorism debate to define, outlaw and prevent terrorism).

49. Young, *supra* note 48, at 30 (arguing that the term “terrorism” has previously been used as a pejorative political term, so the increasing use of the term in the legal sphere requires “terrorism” be given a discrete meaning to prevent confusion regarding the meanings of the term).

50. Setty, *supra* note 48, at 6-10 (stating that the attempts to reach a universal definition has failed because inherently “terrorism” is subjective and each nation has a different desire to criminalize or exempt from criminalization various acts); Alex Schmid, *Terrorism: The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 396 (2004) (quoting a British sociologist arguing that definition for ‘terrorism’ could be agreed upon because the process of defining it is part of a wider contestation over ideologies and political objectives).

51. See Setty, *supra* note 48, at 7; Schmid, *supra* note 50, at 391.

The word ‘terror’ owes its etymology to Middle English; which means ‘to frighten’, ‘to be afraid’, and ‘to tremble’. The word ‘terror’ entered western European lexicons through French in the fourteenth century and was first used in English in 1528. The French Revolution provided the first political connotations to the word ‘terrorism’, in reference to the Reign of Terror initiated by the revolutionary government. The word ‘terror’ owes its etymology to Middle English: from Anglo-French *terroure*, from Latin *terror*, from *terrere*, which means ‘to frighten’, akin to Greek *trein*, which means ‘to be afraid’ and *tremein*, which means ‘to tremble’.⁵²

While ‘terrorism’ is not a new phenomenon, the history of ‘terrorism’ shows no single common form of ideology – religious, political, national, and various others ideologies⁵³ – but rather a single common conceptual ground, that of imposing extreme fear on the nation as such. Accordingly, we do not recognize ‘terrorism’ once we see it but, rather, when we feel it.⁵⁴

In light of the requirements in the legality principle, the question then becomes whether such conceptual definition, of imposing extreme fear on the nation as such, can be of any help in the realm of criminal law. In this respect, a preliminary query ought to be addressed, that which concerns classifying ‘terrorism’ as an independent crime, namely that which bears on the guilt/innocence proceedings, or as an element which is relevant sentencing stage, i.e. as an aggravating or mitigating factor in the criminal punishment. As will be shortly addressed, such distinction between these two stages of the criminal trials is recognized by the Rome Statute’s provisions.

52. Mohammad Saif-Alden Wattad, *Islam, Terrorism, and Modern Liberal Societies*, 3 NUJS L. REV. 143, 154 (2010).

53. As noted in an earlier work by the author, there is no common feature among acts of terror throughout history. For example, there exists various motives for engaging in terrorism, such as political or religious motives. *Id.* at 154; *see also* Young, *supra* note 48, at 28 (discussing varying uses of the word “terrorism” throughout history).

54. Wattad, *supra* note 52, at 154-55. The author has previously written about this by way of comparison to Justice Stewart’s standard for distinguishing between “hardcore pornography” and other form of constitutionally protected pornography: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

V. THE ROME STATUTE: CRIME AND PUNISHMENT

A point of contention that the participating delegations had to deal with while negotiating the Rome Statute related to the differences in legal traditions among the many participating nations. The primary competition has been between the common law and continental law traditions.⁵⁵ Insofar as criminal law is concerned, there can be several premises that distinguish between the common law and continental law traditions, leading, among others, to the trial proceedings. As discussed below, I believe that the Rome Statute is common law based.

Continental law systems provide for a single trial proceeding, where both guilt and punishment are discussed and decided.⁵⁶ Under continental law systems, the trial judge has the power to interrogate the defendant about such matters as his or her prior criminal record, personal status and occupation.⁵⁷ This is not the case for common law systems,⁵⁸ which distinguish between two distinct phases of the trial proceedings: the first phase is when the trial judge (or the jury, in jury-based systems) determines the

55. See, e.g., M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 464 (1999) (noting that the Rome Statute's drafters were unable to agree on the requisite mental state required for each of the crimes within ICC jurisdiction because of differences between common law, civil law, and other legal systems); Jingbo Dong, *Prosecutorial Discretion at the International Criminal Court: A Comparative Study*, 2 J. POL. & L. 109, 109-12 (2009) (discussing prosecutorial discretion as a hybrid of the common-law adversarial model and the inquisitorial approach of civil law systems); Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT'L & COMP. L.Q. 325, 325-27 (2012) (describing Article 30 of the Rome Statute as an ambitious attempt at codifying the rules relating to the mental element in international criminal law as well as a compromise between continental and Anglo-American criminal law); Adrian Hoel, *The Sentencing Provisions of the International Criminal Court: Common Law, Civil Law, or Both?*, 33 MONASH U. L. REV. 264 (2007) (discussing how the sentencing provisions of the ICC contain both common law and civil law systems).

56. Hoel, *supra* note 55, at 268.

57. GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT* 543-44 (2005); Wattad, *supra* note 74, at 1,018 ("In contrast to the strict division between the guilt and sentencing phases of the common law trial, civilian judges interrogate the defendant about his person, name, residence, occupation, marital status and prior criminal record.").

58. See Wattad, *supra* note 74, at 1,018 (contrasting common law and European legal systems).

guilt or the innocence of the defendant (the guilt/innocence proceedings); and the second phase concerns the determination of the defendant's punishment once the court has found him or her guilty (the sentencing stage).⁵⁹ The idea behind distinguishing between these two trials stages is that at the guilt/innocence proceedings the defendant is presumed innocent until the prosecution proves his guilt beyond a reasonable doubt. At this stage, the trial judge (or the jury, in jury-based systems) can be exposed only to evidence related to the criminal commission⁶⁰ but not to prejudicial evidence that might establish possible bias against the defendant's presumed innocence, such as prior criminal record which might feature the defendant as a dangerous recidivist.⁶¹ However, while prejudicial evidence, i.e. those facts which evidence indicia of dangerousness such as prior convictions, are deemed irrelevant at the guilt/innocence proceedings, they are relevant during the sentencing stage, where the prosecution can present before the trial court aggravating factors, and the convicted person can submit mitigating factors.⁶²

On a side note, I shall clarify that the burden of proof for the guilt/innocence proceedings is beyond a reasonable doubt. However, once the defendant has proven to be guilty, the burden of proof for the sentencing stage is a lower one: the preponderance of the evidence.⁶³

59. *Id.*

60. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 518 (noting that continental judges will not admit a defendant's prior criminal record as part of the guilt determination unless *modus operandi* from a prior conviction permits rational inference).

61. Fletcher, *supra* note 57, at 544.

62. See Rome Statute, *supra* note 1, art. 78(1) (requiring the Court to consider factors of the crime based on the Rules of Procedure and Evidence); Rules of Procedure and Evidence, Rule 145 (1)(b) (requiring, in conjunction with Article 3 of the Rome Statute the Court to balance relevant factors such as mitigating and aggravating factors); see also James B. Jacobs, *Admissibility of the Defendant's Criminal Record at Trial*, 4 BEIJING L. REV. 120, 125 (2013).

63. See Ashley Joy Stein, *Reforming the Sentencing Regime for the Most Serious Crimes of Concern: The International Criminal Court Through the Lens of the Lubanga Trial*, 39 BROOK. J. INT'L L. 521, 530 (2014) ("The ICC has currently set the standard of proof for aggravating circumstances as proof beyond a reasonable doubt, whereas mitigating circumstances are determined by the balancing of the probabilities, also known as preponderance of the evidence"); Fletcher, *supra* note 36, at 16 (discussing the standard of proof in both common law and continental law systems).

Bearing in mind this jurisprudential distinction between common law and continental law theories, as well as the competition between both traditions to influence the drafting process of the Rome Statute, I am of the view that the Statute is common law oriented. To start with, the Statute provides a clear normative protection for the presumption of innocence,⁶⁴ thus laying the onus on the prosecution to prove the defendant's guilt⁶⁵ beyond a reasonable doubt.⁶⁶ In addition, the Statute limits the scope of evidence that may be requested by the court at the guilt/innocence proceedings to that which is considered "necessary for the determination of the truth."⁶⁷ In my view, the term "determination of the truth" is synonymous with the concept of finding either guilt or innocence, which is a process that aims at evaluating whether the particular defendant committed the crime alleged, from which liability would flow. In support of my view, I invoke Article 74(2) of the Statute, which states in this regard that the submitted evidence "shall not exceed the facts and circumstances described in the charges and any amendments to the charges."⁶⁸ Moreover, the Statute stipulates that in assessing the particular sentence, the Court "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence."⁶⁹ Additionally, the Statute, at an additional hearing, allows for the submission of further evidence "relevant to the sentence."⁷⁰ In my view, this is the stage at which the prosecution may present additional evidence that reflects the convicted person's dangerousness and seek the aggravation of his or her sentence. This is also the stage at which the convicted person may present evidence that may mitigate his or her sentence. This is particularly relevant given that the penalties in accordance with the Statute are not mandatory but, rather, a spectrum is made available which the judge may apply as is deemed appropriate (but generally not in excess of a set

64. Rome Statute, *supra* note 1, art. 66(1).

65. *Id.* art. 66(2).

66. *Id.* art. 66(3).

67. *Id.* art. 69(3).

68. *Id.* art. 74(2).

69. *Id.* art. 76(1).

70. *Id.* art. 76(2).

maximum penalty).⁷¹ Compelling in this regard is the language of Article 78(1) of the Statute, which requires the ICC to consider “[i]n determining the sentence . . . such factors as the gravity of the crime and the individual circumstances of the convicted person.”⁷²

The question becomes now whether ‘terrorism’ is a crime that stands by itself – and must, therefore, be defined in detail and proved by the prosecution beyond a reasonable doubt – or, rather, a factor which is relevant to the sentencing stage – and can, therefore, be defined in abstract terms and sufficiently proved by the preponderance of the evidence. In order to address this query, a theory of substantive criminal law needs to be articulated.

As much as the distinction between the guilt/innocence proceedings and the sentencing stage seems to be clear, this is not always the case when it comes to which factors should bear on the guilt/innocence question and which factors should address the degree-of-dangerousness determination at the sentencing stage.

VI. THE CONCEPTUAL DEFINITION AND THE LEGALITY PRINCIPLE

Recalling the legality principle in the context of criminal guilt and punishment, it is of fundamental importance that individuals have the right to know what the law is, so that, should they violate it, they do so with knowledge aforethought. However, the question remains: In how much detail should a crime be defined?

As noted above, the Rome Statute is more common law oriented. Common law systems distinguish between elements that bear on the determination of guilt or innocence and other elements that pertain to the determination of dangerousness. The former elements must be defined in detail whereas the latter can be defined in abstract terms. The reason for this position is that individuals have a right to know that which could make a moral difference in their choosing to engage in the action or not, but they “do not have a right to know that which could make utilitarian differences in their choosing to engage in the action or not.”⁷³

71. *Id.* art. 77(1)(a).

72. *Id.* art. 78(1).

73. Wattad, *supra* note 35, at 546.

Accordingly, “individuals have a right to know that which bears retrospectively on their choosing to engage in the action or not but not that which bears prospectively on the ultimate calculation of their choice.”⁷⁴ Insofar as guilt and dangerousness are concerned, guilt bears upon the past, whereas dangerousness addresses the future. Moreover, guilt is a notion of fair condemnation, whereas dangerousness is a notion based primarily on social protection.⁷⁵

The distinction between elements that bear on the guilt question and others that address the sentencing is rooted in the premises of Article 78, which states: “In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”⁷⁶ In other words, Article 77 provides that the penalties, in accordance with the Statute, are maximum-based, thus not mandatory, *i.e.* that the Court may not exceed the maximum of thirty years imprisonment.⁷⁷ Within this maximum, the Court has the judicial discretion to aggravate the sentence in light of the convicted person’s dangerousness (“the gravity of the crime”⁷⁸) or to mitigate it by virtue of his or her “individual circumstances.”⁷⁹ This rule also applies to life imprisonment, which is not provided in the Statute as a mandatory punishment, but rather is possible upon the Court’s conclusion that such a draconian sentence is justified by “the extreme gravity of the crime and the individual circumstance of the convicted person.”⁸⁰

I now turn to the query whether ‘terrorism’ should be analyzed as part of the guilt determination or on the dangerousness assessment. The resolution to this question will determine whether the definition of ‘terrorism’ must fulfill the legality principle, requiring a detailed definition, (*i.e.* the determination of ‘terrorism’ takes place in the guilt/innocent

74. *Id.*; Wattad, *Is Terrorism a Crime or an Aggravating Factor in Sentencing?*, 4 OXFORD J. INT’L CRIM. JUSTICE 1,017, 1028-30 (2006).

75. Fletcher, *supra* note 36, at 12; Wattad, *supra* note 35, at 544-45.

76. Rome Statute, *supra* note 1, art. 78(1).

77. *Id.* art. 77(1)(a).

78. *Id.* art. 78 (1).

79. *Id.*

80. *Id.* art. 77(1)(b).

proceeding) or whether abstract standards may be used (i.e. the determination of 'terrorism' takes place during the sentencing phase).

I believe that terrorism is analogous to domestic crimes associated with special overriding motivations, such as hate crimes. In other words, terrorism is nothing but another acknowledged criminal wrongdoing we are familiar with coupled with special, aggravating circumstances.⁸¹ These acknowledged criminal wrongdoings may constitute several domestic crimes, e.g. murder that is committed with malice aforethought, manslaughter that is committed recklessly, and a hate crime that is committed with a purpose to intimidate an individual or a group of individuals because of, *inter alia*, race or ethnicity.⁸² Likewise, if such conduct is associated with the intent to destroy, in whole or in part, members of a national group, such conduct may constitute an international crime of genocide.⁸³

With respect to punishing terrorists at the international level, it is my view that there is no need to establish a new, distinct international crime of terrorism, nor is there a need to establish a new sub-category within the scope the Core Crimes. Additionally, I do not think that we should put legal effort in interpreting the Core Crimes in hope of uncovering loopholes that would allow for criminalizing terrorism under one of the pre-existing Core Crimes.

In my opinion, an act of killing, for example, may constitute 'terrorism' if committed with the traditional intent necessary to prove murder, or other violent crimes, and with the goal of inspiring extreme fear and dread on the target nation, as distinguished from the 'ordinary fear' associated with 'ordinary crimes.' This is what makes terrorism different from 'ordinary murder.' Namely, it may target specific persons for physical harm as its means, but the ends sought extend beyond the individual; the intent is the psychologic mental trauma to the nation itself.

81. For a detailed discussion of the wrongdoing element in criminal law, see Mohammed Saif-Alden Wattad, *The Meaning of Wrongdoing – A Crime of Disrespecting the Flag: Grounds for Preserving “National Unity”?*, 10 SAN DIEGO INT'L L.J. 5, 33-44 (2008).

82. Wattad, *supra* note 74, at 1,028.

83. Rome Statute, *supra* note 1, art. 6.

As intentional murder generates greater social harm and public fear relative to reckless or negligent killing similar to genocide relative to murder motivated by animus toward a particular group (a hate crime), terrorism generates a level of fear that categorically exceeds the anxiety associated with ‘ordinary crimes.’⁸⁴ The overriding motivation of imposing extreme fear on nation as such associated with the concept of ‘terrorism,’ constitutes the degree of dangerousness posed by terrorists. As noted in a previous discussion on the matter:

[T]errorist crimes are not new crimes. The aforementioned ‘overriding motivation’ does not even bear upon the so-called guilt constitutive elements; but rather on the degree of the danger that terrorists demonstrate. For this reason, the overriding motivation should not be confused with the *mens rea* element, which bears on the constitutive elements of criminal guilt. The dangerousness of terrorists might be taken into account in imposing criminal punishment; but this may not happen until they have been proven guilty of the commission of common crimes of violence beyond a reasonable doubt.⁸⁵

In other words, while terrorists may not be guiltier than other criminals, they are more dangerous, particularly in light of the public nature of their crimes, which endanger the commonwealth and not just an individual person.

The degree of dangerousness a convicted person poses does not bear on the guilt question but, rather, on the degree of punishment. Factors in the sentencing phase are not required to be defined in detail, thus an abstract conceptual definition will fulfill the requirements of the legality principle. In addition, the prosecution is not required to prove such elements beyond a reasonable doubt; instead, it must be proven only by the lower standard of preponderance of the evidence.

Accordingly, there is no real need to amend the Rome Statute or to provide a detailed definition for ‘terrorism’ within the Statute. It is, thus, unnecessary to search for a universally accepted definition of ‘terrorism.’ Eventually, the assessment of

84. Wattad, *supra* note 74, at 1,028.

85. *Id.*

the degree of dangerousness is a judicial question that is determined by the Court at the sentencing stage. Ultimately, the nature of criminal punishment in accordance with the Statute's provisions is maximum-based sentences.⁸⁶ Assessing the convicted person's dangerousness is determined by "the gravity of the crime and the individual circumstances."⁸⁷

This approach allows all international crimes within the jurisdiction of the ICC to be swept within the Statute's ambit, so long as the other elements of the crime are met. In determining the proper punishment for convicted persons for any of the Core Crimes, the Court may impose an aggravated sentence if such crimes were committed with the motivation to impose extreme fear on the nation as such.

VII. EPILOGUE: ROMANTICS IN INTERNATIONAL CRIMINAL LAW

With the rise of globalization, terrorism has spread its reach, becoming more transnational and international.⁸⁸ With the tremendous power and influence of the media in modern life, exacerbated by the rise of wide-spread use of social media,⁸⁹

86. The Statute does not require mandatory punishments on convicted persons, but rather provides the Court with the discretion to determine the proper sentence, which shall not exceed a maximum of 30 years. *See* Rome Statute, *supra* note 1, art. 77(1)(b). In addition, even in the case of life imprisonment, the Statute leaves it for the Court to decide on the proper cases where such sentence is appropriate and justified, "by the extreme gravity of the crime and the individual circumstance of the convicted person." *Id.* art. 77(1)(b).

87. *Id.* art. 78(1).

88. On the arguable distinction between international crimes and transnational crimes, see Norberg, *supra* note 19, at 14-18.

89. Yigal Carmon & Steven Stalinsky, *Terrorist Use of U.S. Social Media Is A National Security Threat*, FORBES (Jan. 30, 2015, 1:36 PM), <http://www.forbes.com/sites/realspin/2015/01/30/terrorist-use-of-u-s-social-media-is-a-national-security-threat/#19a8ed5212d0>; Brian Mastroianni, *Could Policing Social Media Help Prevent Terrorist Attacks?*, CBS NEWS (Dec. 15, 2015, 7:15 AM), <http://www.cbsnews.com/news/could-policing-social-media-prevent-terrorist-attacks/> (discussing how a proactive approach by social media sites of filtering for terroristic activity could have prevented the San Bernardino massacre); *How Terrorists Are Using Social Media*, TELEGRAPH (Nov. 4, 2014, 4:02 PM), www.telegraph.co.uk/news/worldnews/islamic-state/11207681/How-terrorists-are-using-social-media.html.

terrorists are significantly privileged and empowered.⁹⁰ The distinguished scholar Cherif Bassiouni argues that terrorists are ideologically motivated persons, and, thus, they usually “select targets likely to attract the widest media and public interest.”⁹¹ The media, especially social media, has the capacity to serve terrorists in accomplishing their goals, namely by aiding in the dissemination of their message and inciting extreme fear in the target nation.⁹²

This conceptual understanding of ‘terrorism’ in the realm of criminal law is well anchored in the history of international criminal law, as developed during the Nuremberg Trials.⁹³ Correctly, in my view, the word ‘terrorism’ was not included in the language of the IMT’s Charter but was aptly and repeatedly referred to in the opening statement by Justice Robert H. Jackson, delivered on November 21, 1945 in the Palace of Justice at Nuremberg.⁹⁴ The word ‘terrorism’ served perfectly Justice Jackson’s description of what the Nazis aimed to achieve, beyond the horrific actions themselves: the spread of extreme fear. Justice Jackson’s goal was to show the Nazi-defendants as living symbols of “racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power.”⁹⁵ He perceived his position as a means of making known to the public the Nazi’s “seizure of the German State, their subjugation of the German people, their terrorism and extermination of dissident elements.”⁹⁶ He characterized the Nazi campaign as a “campaign of terrorism,”⁹⁷

90. Mahmoud Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. L. & CRIMINOLOGY 1, 33 (1981).

91. Mahmoud Cherif Bassiouni, *Prolegomenon to Terror Violence*, 12 CREIGHTON L. REV. 745, 759 (1979).

92. See Bassiouni, *supra* note 90, at 3; Mahmoud Cherif Bassiouni, *Media Coverage of Terrorism: The Law and the Public*, 33 J. COMMUN. 128 (1982).

93. Bassiouni, *supra* note 90, at 3.

94. See 2 INT’L MIL. TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 99, 104, 106 (1947) (quoting Justice Jackson as stating that “we will show them to be living symbols of racial hatred, of terrorism and violence,” referring to the “terrorism and extermination” of the Nazi Party, and describing how the Nazi Party program “foreshadowed the campaign of terrorism”).

95. *Id.* at 99.

96. *Id.* at 104.

97. *Id.* at 106.

and portrayed the Nazis' motivation as "the terrorization of adversaries."⁹⁸ Moreover, he described the silence that is often associated with terrorized people as the "terrorized and silenced democratic opposition."⁹⁹ And, finally, Justice Jackson's argument that anti-Semitism is the "spearhead of terror,"¹⁰⁰ elaborates on our understanding of the nature of the above-mentioned extreme fear.

This is the romantic¹⁰¹ understanding of the nature and the conceptual meaning of 'terrorism,' which 'glorifies' the historical grounds from where this concept, as criminal law related notion, has evolved. This was true then at the Nuremberg Trials and so it should be in respect to the Rome Statute.

98. *Id.* at 108.

99. *Id.* at 109.

100. *Id.* at 118.

101. *See supra* note *.

