

January 2019

Protecting Due Process During Terrorism Adjudications: Redefining "Crimes Against Humanity" and Eliminating the Doctrine of Complimentary Jurisdiction in Favor of the International Criminal Court

Daniel N. Clay
Elmira College

Follow this and additional works at: <https://scholarworks.uark.edu/alr>

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [International Law Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Daniel N. Clay, *Protecting Due Process During Terrorism Adjudications: Redefining "Crimes Against Humanity" and Eliminating the Doctrine of Complimentary Jurisdiction in Favor of the International Criminal Court*, 71 Ark. L. Rev. 571 (2019).

Available at: <https://scholarworks.uark.edu/alr/vol71/iss3/1>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact scholar@uark.edu, ccmiddle@uark.edu.

Protecting Due Process During Terrorism Adjudications: Redefining “Crimes Against Humanity” And Eliminating The Doctrine Of Complimentary Jurisdiction In Favor Of The International Criminal Court

Daniel N. Clay*

“When we sit in judgment we are holding ourselves out as people—as the kind of a community—that are worthy of this task. It is the seriousness, the gravity, of the act of judgment which gives rise to our legitimate and laudable emphasis on procedural fairness and substantive accuracy in criminal procedure. But these things focus on the defendant—the one judged. I am concerned about us who would presume to sit in judgment. Who are we that we should do this? Whether we intend to do so or not, we answer this question in part through the way we conduct our trials.”¹

* Prof. Daniel N. Clay is currently a Tenure-Track Assistant Professor at Elmira College, Division of Social and Behavioral Sciences, Departments of Criminal Justice and Legal Studies. He holds a Bachelor of Arts in Criminology and Political Science from Drury University (2011), a Master of Science in Crime and Justice Studies from Suffolk University (2015), a Juris Doctor from Suffolk University Law School (2015), and a Master of Laws in International Criminal Law and Justice from the University Of New Hampshire School Of Law (2016). Prior to Dr. Clay’s first academic appointment at the University of Alabama, his legal career included a position with the United States Court of Appeals for the First Circuit (J. Torruella) who aided in the dissenting opinion in *In Re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015). In addition to his present academic duties and scholarship on international and domestic criminal law, Dr. Clay serves on the Board of Directors of an innovative, free online legal research platform targeting United States federal law.

1. SHERMAN J. CLARK, *THE TRIAL ON TRIAL, VOLUME 2: JUDGMENT AND CALLING TO ACCOUNT* 85 (R.A. Duff, et al. eds., 2006).

INTRODUCTION

A. THE BOSTON MARATHON BOMBING

On April 15, 2013, at approximately 2:49 p.m., two homemade bombs made from pressure-cookers, packed with shrapnel, and hidden in backpacks exploded within feet of the finishing-line of the Boston Marathon – killing three and wounding more than 260 others.¹ A four-day manhunt for the perpetrators of the bombing, involving over “1000 federal, state and local law enforcement” officers, then ensued.² Three days later, on April 18, 2013, authorities identified two brothers, Dzhokhar and Tamerlan Tsarnaev, as suspects in the attacks.³ Following their identification, the brothers attempted to flee the city as police gave chase.⁴ In the small Boston suburb of Watertown, Massachusetts, the chase ended in a shootout with police in which one of the suspects, Tamerlan Tsarnaev, was killed and the other suspect, Dzhokhar Tsarnaev, escaped.⁵

The morning following the escape of Dzhokhar Tsarnaev, April 19, 2013, the Governor of Massachusetts, in what the United States Court of Appeals for the First Circuit would later call “an unprecedented move,” issued a “shelter-in-place”⁶ order for Boston-proper and the surrounding areas, including

1. A&E Networks, *Boston Marathon Bombing*, HISTORY.COM, <https://www.history.com/topics/boston-marathon-bombings> [<https://perma.cc/3WX8-LMLV>] (summarizing the events of the Boston Marathon bombing and the subsequent manhunt).

2. *Id.*; *In re Tsarnaev*, 780 F.3d 14, 30-31 (1st Cir. 2015) (J. Torruella dissenting) (denying Dzhokhar Tsarnaev’s first petition for a writ of mandamus ordering a change of venue).

3. *In re Tsarnaev*, 780 F.3d at 30.

4. *Id.*

5. *Id.*

6. When a “shelter-in-place” order is issued government officials have determined that the “best place to be safe [from a known threat] is indoors.” Daily Bulletin, *There are the Terms You Need to Know in the Event of a Disaster*, DailyBulletin.com, <https://www.dailybulletin.com/2016/03/17/there-are-the-terms-you-need-to-know-in-the-event-of-a-disaster/> [<https://perma.cc/47KX-7P9Z>]. During the course of the “shelter-in-place,” residents are instructed to “turn off air-conditioner and fan units, seal the gaps around windows and doors, and listen to the radio for authorities to announce the threat has passed.” *Id.* Further, residents are warned: “Do not venture out of your shelter until you are instructed it is safe to do so.” *Id.*

Watertown, effective at 5:45am.⁷ As a part of the order, citizens were confined⁸ to their homes while Specialized Weapons and Tactics (“SWAT”) teams were deployed to conduct house-to-house searches for the suspects within a secured perimeter around Watertown.⁹ As the searches began, one resident described her reaction: “I was more scared of them than anything else . . . [t]hese were big men in black with guns [, searching while] I had a 9-year-old hiding under the covers. . . . I have never felt so powerless in my own home.”¹⁰ However, largely due to media coverage, this fear was not localized to Watertown; instead, by that morning, it had already spread across the nation.¹¹

B. TRIAL IN THE COURT OF PUBLIC OPINION

Immediately following the first bomb blast on April 15, 2013, until Dzhokar Tsarnaev surrendered on April 19, 2013, national news organizations descended upon Boston and began providing “nonstop coverage and live updates” of the bombing, the ensuing manhunt for Dzhokar Tsarnaev, and the door-to-door

7. *In re Tsarnaev*, 780 F.3d at 30-31. The order extended to Newton, Waltham, Cambridge, Boston, and the entire MBTA (subway, commuter rail, and bus) systems. EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY, AFTER ACTION REPORT FOR THE RESPONSE TO THE 2013 BOSTON MARATHON BOMBINGS 7 (2014), <https://www.mass.gov/eopss/docs/mema/after-action-report-for-the-response-to-the-2013-boston-marathon-bombings.pdf> [<https://perma.cc/M5WY-94MA>].

8. Reports following the shelter-in-place concluded that the order was precautionary rather than mandatory. Associated Press, *Massachusetts Gov. Deval Patrick: Closing City Amid Hunt for Boston Marathon Bomber ‘Tough,’* MASSLIVE, http://www.masslive.com/news/boston/index.ssf/2014/04/massachusetts_governor_deval_p.html [<https://perma.cc/WZ2B-JDQZ>].⁷ However, despite subsequent reports noting the order was merely precautionary, most citizens obeyed the order believing they did not have a choice. *Id.*

9. EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY, *supra* note 8, at 7. The legality of the searches have since been hotly contested, yet no formal challenges have succeeded to-date. National Lawyers Guild Massachusetts Chapter, *Were the Watertown Lockdowns Lawful?*, MASS DISSENT (Mar. 31, 2015), <http://www.nlgmasslawyers.org/were-the-watertown-lockdowns-lawful/> [<https://perma.cc/XS35-P7V3>].

10. Jaclyn Reiss, *Unease Lingers a Year After Manhunt*, THE BOSTON GLOBE (Mar. 9, 2014), <https://www.bostonglobe.com/metro/regionals/west/2014/03/09/watertown-residents-question-police-tactics-manhunt-for-bombing-suspects/V2cAugxzqcNvlsP82pLZZL/story.html> [<https://perma.cc/YY9C-BA8V>].

11. Teresa Welsh, *Did the Media Botch the Boston Bombing?*, U.S. NEWS & WORLD REPORT (Apr. 19, 2013), <https://www.usnews.com/opinion/articles/2013/04/19/has-media-coverage-of-boston-marathon-bombings-been-responsible> [<https://perma.cc/3WN5-F3B5>].

searches in Watertown.¹² Despite numerous instances of misinformation motivated by the pressures of the twenty-four hour news cycle, viewership on the major cable news networks increased dramatically during the live coverage.¹³ Specifically, following the attack, Cable News Network's ("CNN") audience increased by a staggering 194%, averaging 1.2 million viewers at any given time during daytime hours of the coverage.¹⁴ Similarly, Fox News Channel ("FOX") increased by 48% to an average of 1.6 million daytime viewers.¹⁵ Combined, CNN, FOX, and MSNBC broadcast live updates to an average of 3.5 million viewers during the day and approximately 8 million views during primetime.¹⁶ However, these averages pale in comparison to the combined reach of other media sources, such as the broadcast networks (i.e. ABC, NBC, CBS, etc), non-traditional televised programs (i.e. Jon Stewart), news blogs (i.e. CNN.com), social media (i.e. Twitter), independent websites, etc.¹⁷ In other words, within four days following the first bomb blast, most people in the United States had engaged with at least one news report regarding the bombing via some form of media source.¹⁸

Following Dzhokar Tsarnaev's surrender, national media coverage began to slowly dissipate as the public seemingly lost interest or was no longer in need of the reassurance and comfort provided by obsessive media coverage.¹⁹ However, new research conducted at the University of California at Irving related to Boston Marathon bombings suggests that engagement with media coverage during a terrorist attack or mass-shooting may: (1) cause acute stress symptoms greater than those who were at or near the

12. *Id.*

13. Lisa Richwine, *Despite Error, CNN Gets Ratings Boost From Boston Bombing, Trails Fox*, REUTERS (Apr. 19, 2013, 6:05 PM), <https://www.reuters.com/article/entertainment-us-usa-explosions-boston-m-idUSBRE9311B320130419> [<https://perma.cc/9D43-24KM>].

14. *Id.* CNN's primetime viewership peaked at 2.75 million viewers. Michael O'Connell, *TV Ratings: Viewership Surges During Cable News Coverage of Boston Marathon Bombing*, HOLLYWOOD REPORTER (Apr. 16, 2013), <https://www.hollywoodreporter.com/live-feed/tv-ratings-viewership-surges-cable-440488> [<https://perma.cc/X4BZ-63VY>].

15. Richwine, *supra* note 14.

16. O'Connell, *supra* note 15.

17. *See In re Tsarnaev*, 780 F.3d at 41.

18. *See* O'Connell, *supra* note 15.

19. *In re Tsarnaev*, 780 F.3d at 48.

actual attack; (2) trigger flashbacks to different attacks or the same attack later in life; (3) encourage subconscious fear conditioning; and (4) result in chronic stress about the event from repeated exposure.²⁰ Specifically, the study found that “exposure to media coverage of the Boston Marathon bombings in the week afterward was linked to more [emotional harm] than having been at or near the marathon, even if the stress was not immediately apparent.”²¹ In other words, engaging with tragic events, such as the Boston Marathon bombing, via the media may result in secondary victimization among a nation’s many viewers.²²

Further, engaging with these criminal acts via the media (i.e. pre-trial reporting or non-objective pre-trial publicity) statistically results in the cultivation of significant anti-defendant bias.²³ More specifically, media reports present a very condensed (2-5 minute) recitation of the underlying “facts,” while emphasizing the most damaging evidence; thus, empowering the viewer to make a judgment based upon extremely limited information.²⁴ Even the Supreme Court acknowledged this phenomena in *Rideau v. Louisiana*, holding: “[f]or anyone who has ever watched television[,] the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense’ was the actual trial.”²⁵ Predictably,

20. *Prolonged Viewing of Boston Marathon Bombings Media Coverage Tied to Acute Stress*, UCI NEWS (Dec. 9, 2013), <https://news.uci.edu/2013/12/09/prolonged-viewing-of-boston-marathon-bombings-media-coverage-tied-to-acute-stress/> [<https://perma.cc/SG27-BB8M>].

21. *Id.*

22. *See id.*

23. Lorraine Hope, et al., *Understanding Pretrial Publicity Predecisional Distortion of Evidence by Mock Jurors* (2004), http://luna.cas.usf.edu/~ruva/Psychology%26Law/Readings/Hope_Memon_Predecisional_Distortion.pdf [<https://perma.cc/UZ96-4PM7>]; Cf. Jeffery R. Wilson & Brian H. Bornstein, *Methodological Considerations in Pretrial Publicity Research: Is the Medium the Message?*, 22 J. OF L. & HUM. BEHAV. 585-97 (1998). “[T]he bulk of the literature [concludes] . . . PTP has a deleterious effect.” *Id.* at 593. *But see* Rob Tricchinelli, *Pretrial Publicity’s Limited Effect on the Right to a Fair Trial*, THE NEWS MEDIA AND THE LAW (Spring 2013), <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/pretrial-publicitys-limited#sthash.zysOBRRRC.dpuf> [<https://perma.cc/N4DJ-G4QT>].

24. Wilson & Bornstein, *supra* note 24, at 586, 593.

25. *In re Tsarnaev*, 780 F.3d at 34 (quoting *Rideau v. Louisiana*, 373 U.S. 723 (1963) (internal quotations omitted)).

this influence was felt as jury selection began in Dzhokar Tsarnaev's trial.²⁶

C. DUE PROCESS & JURY SELECTION

On February 1, 2015, the 1,373 prospective jurors were summoned to the U.S. Federal Courthouse in Boston, Massachusetts to complete juror questionnaires before beginning the process of *voir dire*.²⁷ Twenty-four days later, only seventy-five jurors were provisionally qualified to the jury pool.²⁸ Of the staggering number of jurors excluded from the pool, their juror questionnaires are telling of a significant anti-defendant bias in the Eastern Massachusetts venire (of which only 5% presumed Tsarnaev innocent); these are just a few of the sample responses to the questionnaire: “[h]e does not deserve a trial,” “[t]hey shouldn’t waste the [bullets] or poison; hang them,” “I have formed the opinion that a convicted terrorist should receive the death penalty. They’re the enemy of my country,” “[t]here was so much media coverage, even just the shootout in Watertown. I watched it on TV. And so I feel like there’s involvement there, like I think it’s—anybody would think that,” etc.²⁹ However, despite overwhelming evidence of significant anti-defendant bias within the venire, in two-to-one opinions, the United States Court of Appeals for the First Circuit twice denied Tsarnaev’s petition for *writ of mandamus* seeking a change of venue outside of the Eastern District of Massachusetts.³⁰

Writing for the dissent in both opinions, Judge Juan Torruella argued, under the circumstances, the majority’s decision violated Tsarnaev’s constitutional right to a fair trial by a panel of impartial jurors because *every* juror within the Eastern Massachusetts venire had been significantly affected or victimized by the bombing.³¹ Specifically, Judge Torruella noted:

[A] number of . . . residents were not at the Marathon, did not know anyone at the Marathon, or were not personally subject to the shelter-in-place order. Still,

26. *Id.*

27. *Id.* at 35.

28. *Id.*

29. *Id.* at 35-37. These excerpts are derived directly from J. Torruella’s dissent.

30. *In re Tsarnaev*, 780 F.3d at 16-17.

31. *Id.* at 44-45.

they were nevertheless affected because the entire city of Boston was the intended victim of the bombings. That is the whole point of terrorism—not just to kill or injure a few innocent people, but to make *everyone* scared and make *everyone* believe it could have been them or that they could be next.³²

Based upon this reasoning, Judge Torruella advocated that the trial be moved outside of the Eastern District of Massachusetts and, preferably, the state; therein eliminating bias from the jury pool.³³

D. ANALYTICAL OVERVIEW

This analysis disagrees with Judge Torruella’s opinion in-so-far as it implies a defendant charged with terrorism can receive an impartial jury in the country where the alleged attack occurred. More specifically, if “the whole point of terrorism [is]—not just to kill or injure a few innocent people, but to make *everyone* scared and make *everyone* believe it could have been them or that they could be next,”³⁴ then, because *everyone* in a target country can be considered a victim (including prosecutors, judges, and jurors), venue cannot be properly maintained since victimization (primary or secondary) naturally creates bias.³⁵ Instead, this analysis contends that venue for alleged acts of terrorism should properly lie with an independent international adjudicatory body such as the International Criminal Court (“ICC”). However, presently, the ICC only assumes jurisdiction³⁶ when a member

32. *Id.* at 44.

33. *See id.* at 47-48. To this end, Tsarnaev’s lawyers commissioned a survey of potential jurors in Boston, Springfield, New York City and Washington D.C. to study relative prejudice. WCVB, *58 Percent of Potential Jurors Say Bombing Suspect Guilty* (June 19, 2014), <http://www.wcvb.com/news/58-percent-of-potential-jurors-say-bombing-suspect-guilty/26564784> [<https://perma.cc/9ZQ9-XEK4>]. The survey found 57 percent of Bostonians, 47.9 percent of New York City residents, 51.7 percent of Springfield, Massachusetts, and 37.4 percent of Washington D.C. residents already believed Tsarnaev was “definitely guilty.” Dennis Lynch, *Boston Bombing Tsarnaev Trial: Most Prospective Jurors Believe Suspect Is Guilty*, IBT (Jan. 22, 2015), <http://www.ibtimes.com/boston-bombing-tsarnaev-trial-most-prospective-jurors-believe-suspect-guilty-1791570> [<https://perma.cc/9AMY-NQCR>].

34. *In re Tsarnaev*, 780 F.3d at 44.

35. *Id.* at 45.

36. “A government’s general power to exercise authority over all persons and things within its territory.” *Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

State fails to initiate genuine prosecutions of war crimes, genocide, or crimes against humanity.³⁷ Thus, to effectuate true due process (a fundamental human right), the ICC's jurisdictional mandate should be extended to implicitly include acts of terrorism. In advancing this position, this analysis will: (1) examine competing statutory definitions of "terrorism," emphasizing the scope of civilian impact anticipated by statutes in the United States, the United Kingdom, India, Iraq, and the United Nations; (2) examine prevailing due process standards of impartiality and fairness juxtaposed to its application in terrorism proceedings; (3) examine current subject-matter jurisdiction limitations of the ICC in terrorism prosecutions; and (4) ultimately propose the Rome Statute's definition of "crimes against humanity" be expanded to implicitly include "terrorism," therein providing an impartial venue for terrorism prosecutions.

II. THE FIRST CHALLENGE TO ICC JURISDICTION: DEFINING "TERRORISM"

Conceptually, terrorism has an ancient lineage tracing to the Assyrians in the 9th Century B.C.³⁸ Over time, the concept has gone through many ideations, with most recent evolution reflecting a shift from ideological terrorism, which emerged in the 1960s, to religious terrorism following the collapse of the Communist Bloc in the 1980s.³⁹ More specifically, following the

37. *How the Court Works*, INT'L CRIMINAL COURT [https:// www.icc-cpi.int/ about/how-the-court-works/Pages/default.aspx#legalProcess](https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess) [https://perma.cc/7UKS-JF3Z]. Article 5 of the Rome Statute of the International Criminal Court anticipates that the Court will acquire jurisdiction over "the crime of aggression" in the future. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Art. 5(1)(d)-(2), https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [https://perma.cc/T4PX-2QX3] [hereinafter ROME STATUTE]. While the Assembly of States Parties have agreed that "a 'crime of aggression' means the planning, preparation, initiation[,], or execution of an act [(i.e. invasion, military occupation, annexation, etc.)] using armed forces by a State against the sovereignty, territorial integrity[,], or political independence of another State," the Court may not begin exercising subject matter jurisdiction over the crime until after January 1, 2017 when the Amendment must be approved by a two-thirds majority of the States Parties to the Rome Statue and ratified by at least 30 States Parties. ICC, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, [https:// www.icc-cpi.int/ iccdocs/ pids/ publications/ uicceng.pdf](https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf) [https://perma.cc/9A24-SVXB].

38. HARRY R. DAMMER & JAY S. ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 241 (5th ed., 2014).

39. *Id.* at 242.

Cold War, “certain states [(primarily in the Middle East and Southeast Asia)] [were left] in unstable or anarchic conditions, [which gave] impetus to the rise of new set of extremists whose ideology or motivations allow, or even call for [] indiscriminate targeting [of civilian populations].”⁴⁰

Yet, despite the rise of indiscriminate targeting of civilians following the Cold War and major attacks on “Western” cities (i.e. 9/11, the London Underground bombing, the Paris shootings, and the Belgium bombings), there remains no universally recognized definition of “terrorism.”⁴¹ As such, legal dictionaries generally adopt broad definitions of “terrorism,” to capture differing, modern conceptions of the term.⁴² Thus, definitionally, the term “terrorism” is most commonly interpreted by both States and tribunals through the lens of their respective experiences, cultures, and values.⁴³

However, while such flexibility may permit States to tailor definitions to specific threats, this lack of uniformity may be irreconcilable across borders and result in an “unmooring from [traditional] rule of law principles.”⁴⁴ Specifically, given the flexibility of the term “terrorism,” states may adopt criminal codes that share “common core elements, such a condemnation of the purposeful killing of civilians,” however, ancillary elements in the definition (i.e. motivation) is largely based on each State’s own experience with terrorism.⁴⁵ As such, to truly understand the definition of “terrorism,” one must examine its codification

40. John Moore, *The Evolution of Islamic Terrorism: An Overview*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/modern.html> [<https://perma.cc/LZV9-GXYN>].

41. GRANT NIEMEN, FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW 176 (2014). In part, this lack of a consist stems from Cold War sentiment that “one [man’s] terrorist is another [man’s] freedom fighter,” which, according the American Psychology Association, accurately defines the perspective that both victims and perpetrators adopt when confronted with a violent act. Tori DeAngelis, *Understanding Terrorism*, 40 MONITOR ON PSYCHOLOGY 60, 60 (2009); Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. Pa. J. Int’l L. 1, 7 (2011).

42. For example, Black’s Law Dictionary defines “terrorism” extremely broadly as “[t]he use or threat of violence to intimidate or cause panic, esp. as a means of achieving a political end.” *Terrorism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

43. *Id.*

44. Setty, *supra* note 42, at 2 (discussing application of counterterrorism law in the United States, United Kingdom, and India); R.A. Friedlander, *Terrorism*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 846 (1999).

45. Setty, *supra* note 42, at 10-11.

through the lenses of drastically different cultures and legal traditions with particular emphasis on the scope of civilian impact anticipated by each applicable definition. Thus, this analysis examines Western definitions of “terrorism” (i.e. the United States and the United Kingdom), South Asian definitions (i.e. India), Middle Eastern definitions (i.e. Iraq), and the prevailing universal definition (i.e. the United Nations).

A. WESTERN PERSPECTIVES

The United States Code, relatively concisely, defines “international terrorism” as:

[V]iolent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; [and] appear to be intended . . . *to intimidate or coerce a civilian population*; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping⁴⁶

While this definition is relatively restrained, the United States only ranks thirty-second on the Global Terrorism Index of countries most likely to be affected by terrorism;⁴⁷ a fact reflected by a restrained definition emphasizing small groups/sects within the general population (note the language: “*a population*” as opposed to “*the population*”).⁴⁸ One legal commentator suggests this emphasis – absent significant losses of civilian life – is premised upon the belief that “the political goals of terrorists are often contrary to the vital interests of democratic countries, including the United States and its closest allies.”⁴⁹ In other words, the United States’ definition of “terrorism” is largely

46. 18 U.S.C. § 2331 (1)(A)-(B) (emphasis added). Similarly, 22 U.S.C. § 2656f(d)(2) provides: “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”

47. THE GLOBAL TERRORISM INDEX: COUNTRIES MOST AFFECTED BY TERRORIST ATTACKS, World Atlas (Dec. 9, 2015), <https://www.worldatlas.com/articles/the-global-terrorism-index-countries-most-affected-by-terrorist-attacks.html> [https://perma.cc/Y3XL-58EN].

48. *Id.*

49. THE OXFORD COMPANION TO AMERICAN LAW 799 (Kermit L. Hall, et al. eds., 2002).

informed by possible future threats to political goals, rather than as a response to civilian casualties.

Whereas the United States Code largely defines terrorism by its impact on groups/sects within the population, on the surface, the United Kingdom emphasizes individual motivation over impact in that it encompasses both the population as a whole as well as groups/sects within the population.⁵⁰ Specifically, the United Kingdom’s the Prevention of Terrorism Act of 2000, provides in relevant part:

‘[T]errorism’ means the use or threat of action where . . . the use or threat is designed to influence the government [or an international governmental organization] [sic] or to *intimidate the public or section of the public*, and the use or threat is made for the purpose of advancing a political, religious[, racial], or ideological cause.⁵¹

However, the United Kingdom has also adopted a supplemental “catch all” provision – in which both motivation and scope of civilian impact are irrelevant – providing: “*any* violent act committed against another person where a firearm [or explosive device] is involved may be considered terrorism by the government”⁵² In other words, the United Kingdom has reserved the right to classify any event involving a firearm or explosive device as “terrorism” within its sole discretion.⁵³ Commentators suggest this liberal “catch all” provision may have been influenced by “numerous internal and external threats to [it’s] national security and emergency situations over many decades,”⁵⁴ placing the United Kingdom thirty-fifth on the Global Terrorism index – well above the relative security of the United States and its definitional application.⁵⁵

50. Setty, *supra* note 42, at 31-45.

51. TERRORISM ACT 2000, 2000 c. 11, Part 1, Section 1(1), [http:// www. legislation. gov. uk/ ukpga/ 2000/11/section/1](http://www.legislation.gov.uk/ukpga/2000/11/section/1) [<https://perma.cc/WBU6-A2Q8>].

52. Setty, *supra* note 42, at 33 (emphasis added).

53. *Id.*

54. Setty, *supra* note 42, at 30; GLOBAL TERRORISM INDEX, *supra* note 48.

55. GLOBAL TERRORISM INDEX, *supra* note 48.

B. EASTERN PERSPECTIVES

While the United Kingdom's broad definition of "terrorism" (one that could be arbitrarily applied at the discretion of the government) has been influenced by numerous internal and external threats, it pales in comparison to the extraordinary broad language of India's prevailing definition (also encompassing the population as a whole as well as groups/sect) originally codified in the Terrorist Affected Areas Act of 1984:

'Terrorist' means a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communication essential to the community or in damaging property with a view to – *putting the public or any section of the public in fear*; or affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities; or coercing or overawing the Government established by law; or endangering the sovereignty and integrity of [the Republic of] India . . .

.⁵⁶

In 2008, this definition was broadened even further to encompass any act "*likely to cause*" the type anticipated in the prevailing definition.⁵⁷

56. TERRORIST AFFECTED AREAS (SPECIAL COURTS) ACT, 1984, NO. 61, §2(1)(H) ACT OF PARLIAMENT (1984) <http://www.satp.org/satporgtp/countries/india/document/actandordinances/terroristaffecteddact.htm> [<https://perma.cc/ACY7-G5X5>] (emphasis added); Setty, *supra* note 42, at 48.

57. Setty, *supra* note 42, at 53. Section 15 of the Unlawful Activities (Prevention) Ordinance provides:

Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign

Legal commentators suggest the breadth of India’s definition may be even more susceptible to abusive or arbitrary application than the “catch all” provision of the United Kingdom’s definition; possibly including traditionally protected activities such as potentially offensive speech, protest, and assembly.⁵⁸ For example, the publication of Hindu literature urging conversation among Muslims⁵⁹ and Christians⁶⁰ while advocating Hindu nationalism, could easily fall within the definition articulated in the Terrorist Affected Areas Act of 1984, if the publication is “likely” to “affect[] adversely the harmony” between the religious communities.⁶¹ While this prevailing definition is severe by Western standards, India ranks eighth on the Global Terrorism Index and has consistently “struggle[d] with issues concerning national security . . . since its independence in 1947.”⁶² As a result, based upon its individual experiences, India has adopted one of the most broad, fluid definitions of “terrorism” in modern history that anticipating broad victimization.⁶³

Paradoxically, Iraq, first on the Global Terrorism Index,⁶⁴ has adopted a much more conservative definition of “terrorism” than India while defining the scope of civilian impact on the individual and group/sect levels.⁶⁵ Specifically, Iraq’s Anti-Terrorism Law defines “terrorism” as:

country or any other person to do or abstain from doing any act, commits a terrorist act.

THE UNLAWFUL ACTIVITIES (PREVENTION) ORDINANCE (2004), [http:// www.satp.org/satporgtp/countries/india/document/actandordinances/the_unlawful_activities__amendord2004.htm](http://www.satp.org/satporgtp/countries/india/document/actandordinances/the_unlawful_activities__amendord2004.htm) [<https://perma.cc/7LRA-6LGD>].

58. See generally Setty, *supra* note 42.

59. 13.4% of the population. CENSUS OF INDIA: RELIGION, Office of the Registrar & Census Commissioner (2011) http://censusindia.gov.in/Census_And_You/religion.aspx [<https://perma.cc/UF6B-MSE8>].

60. 2.3% of the population. *Id.*

61. TERRORIST AFFECTED AREAS, *supra* note 57. Violent attacks on religious minorities (i.e. Christians and Muslims) average approximately one per day. Colleen Curry, *Christians and Muslims Face More Persecution by Hindu Extremists in India, Groups Say*, VICE (Mar. 17, 2016) <https://news.vice.com/article/christian-and-muslims-are-facing-more-and-more-persecution-by-hindu-extremists-in-india> [<https://perma.cc/LDR2-Q2A4>].

62. GLOBAL TERRORISM INDEX, *supra* note 48; Setty, *supra* note 42, at 45.

63. Setty, *supra* note 42, at 45.

64. GLOBAL TERRORISM INDEX, *supra* note 48.

65. Counsel of Ministers, *Anti-Terrorism Law No. 13 of 2005* (Nov. 7, 2005) (on file with author).

Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and *fear among people* and to create chaos to achieve terrorist goals.⁶⁶

However, despite the law's predicate requirement of a "criminal act," the definition has been heavily criticized by Shiite lawmakers who argue the law was created with too much Western influence (particularly by former occupying forces, such as the United States, that still retain a significant stake in Iraq's legislative process).⁶⁷ Specifically, following the United States led invasion in the Summer of 2003 until the withdrawal of the United States' military presence in 2011, coalition forces were responsible for all governance as well as the creation and implementation of the post-withdrawal legislative structure.⁶⁸ However, many within Iraq's post-coalition government, including Deputy Prime Minister Saleh al-Mutlak, suggest American influence was nonexistent at the time of Iraq's Anti-Terrorism Law;⁶⁹ though this position largely seems untenable given the striking similarities between Iraq and the United States' definition of "terrorism" (excepting its anticipated civilian impact).⁷⁰

66. *Id.* (emphasis added).

67. *Iraqi Parliament Passes Anti-Terror Law*, CHINA DAILY (Oct. 5, 2005), http://www.chinadaily.com.cn/english/doc/2005-10/05/content_482721.htm [<https://perma.cc/8ECB-DZ3V>]; *Iraq: A Broken Justice System: Ten Years After Invasion, Opponents Punished, Trial Rights Ignored*, HUMANS RIGHTS WATCH (2010), <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system> [<https://perma.cc/RZ2F-ET7X>] (noting claims that "officers and judges use the country's anti-terrorism law to harass innocent civilians.").

68. See generally Katia Papagianni, *State Building and Transitional Politics in Iraq: The Perils of a Top-down Transition*, 8 INTERNATIONAL STUDIES PERSPECTIVES 253, 253–71 (2007).

69. See Ernesto Londoño, *A Decade After Iraq Invasion, America's Voice in Baghdad Has Gone From a Boom to a Whimper*, WASH. POST (Mar. 23, 2013), https://www.washingtonpost.com/world/national-security/a-decade-after-iraq-invasion-americas-voice-in-baghdad-has-gone-from-a-boom-to-a-whimper/2013/03/23/2f334826-9303-11e2-a31e-14700e2724e4_story.html [<https://perma.cc/FJH6-G2QE>].

70. *Id.*

D. THE GLOBAL PERSPECTIVE

Not only have individual States struggled to uniformly define “terrorism” and its impact, but so too have international bodies.⁷¹ One of the first working international definitions of “terrorism” appears in Article 33 IV Geneva Convention of 1949, Article 51(2) Additional Protocol I of 1977, and Article 3 and 14 Additional Protocol II of 1977 and anticipates the victimization applies to civilian populations as a whole (as opposed to individuals or groups/sects within the population):

[I]ndicat[ing] 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*. . . contain[ing] the same elements of the definition used in the common language: the element of innocent victims (civilians), a violent act and the existence of a political end which, however, does not justify the means, because of their disproportionality.⁷²

Comparatively, “[o]ver the course of four decades, the international community, under the auspices of the United Nations, has developed 13 conventions [on] the prevention and suppression of terrorism.”⁷³ Specifically, in 1994, the United Nations General Assembly adopted Resolution 49/60 (Declaration on Measures to Eliminate International Terrorism) which expanded upon the Geneva Convention’s definition to include individuals, groups, and the population as a whole:

‘[C]riminal acts intended or calculated to *provoke a state of terror in the general public, a group of persons or particular persons for political purposes*’ and that

71. See generally BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2010).

72. Roberta Arnold, *The Prosecution of Terrorism as a Crime Against Humanity*, 64 ZAÖRV 979, 989 (2004), http://www.zaoerv.de/64_2004/64_2004_4_a_979_1000.pdf [<https://perma.cc/YFG4-UNSQ>].

73. *Human Rights, Terrorism and Counter-terrorism: Fact Sheet No. 32*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS 13 (2008), <http://www.refworld.org/docid/48733ebc2.html> [<https://perma.cc/VJ27-UA8K>] [hereinafter HCHR].

such acts ‘are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.’⁷⁴

Ten years later, in 2004, the United Nations Security Council again revisited the definition (without changing the scope of application), providing in Resolution 1566 (2004) “terrorism” includes:

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a *state of terror in the general public or in a group of persons or particular persons*, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act.⁷⁵

However, that same year, the Secretary-General’s High-level Panel on Threats, Challenges and Change scaled back the definition (i.e. the application to individuals) to: any act “intended to cause death or serious bodily harm to civilians or noncombatants, when the purpose of such an act, by its nature or context, is to intimidate *a population*, or to compel a Government or an international organization to do or to abstain from doing any act”⁷⁶ Interestingly, both of the 2004 definitions are remarkably similar to the United States’ definition of “terrorism” codified in 18 U.S.C. § 2331 (1)(A)-(B) and 22 U.S.C. § 2656f(d)(2) both in language and anticipated civilian impact.⁷⁷

As of 2016, the definitions articulated by the General Assembly in 1994, the Security Council in 2004, and the Secretariat in 2004 are the most current working international definitions of “terrorism.”⁷⁸ However, since 2005, the Sixth Committee (Legal) of United Nations (“Sixth Committee”) has been drafting a comprehensive convention against terrorism

74. *Id.* at 6 (emphasis added).

75. *Id.* (emphasis added).

76. *Id.* (emphasis added).

77. *See Id.*; 18 U.S.C. § 2331(1)(A)-(B) (2012); 22 U.S.C. § 2656f(d)(2) (2012).

78. *Various Definitions of Terrorism*, ARIZONA DEPARTMENT OF EMERGENCY AND MILITARY AFFAIRS, <https://dema.az.gov/sites/default/files/Publications/AR-Terrorism%20Definitions-BORUNDA.pdf> [<https://perma.cc/6MV7-GPJ6>].

designed to augment the existing legal regime on the topic.⁷⁹ In its most current draft, the Committee defines the scope of “terrorism” as a group/sect within the general population:

‘[U]nlawfully and intentionally’ causing, attempting or threatening to cause: ‘(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems. . . , resulting or likely to result in major economic loss, when the purpose of the conduct, 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.’⁸⁰

Yet, despite the Security Council’s recognition that the adoption of a universal anti-terrorism instrument, including a universal definition, as a “top priority,”⁸¹ debate over the proposed definition’s bearing upon liberation movements continues to stall its adoption.⁸² Specifically, the Organisation of Islamic Cooperation (the second largest inter-governmental organization after the United Nations) has opposed and obstructed any definition that does not “distinguish between acts of terrorism and the legitimate struggle of peoples under foreign occupation and colonial or alien domination in the exercise of their right to self-determination.”⁸³ In response to these demands, the General Assembly has since “reaffirmed the right to self-determination and independence of all peoples [by upholding] the legitimacy of national liberation movements . . . [while] mak[ing] it clear that this does not legitimate the use of terrorism by those seeking to

79. *Agreed Definition of Term “Terrorism” Said to be Needed for Consensus on Completing Comprehensive Convention Against It*, UNITED NATIONS (Oct. 7, 2005), <https://www.un.org/press/en/2005/gal3276.doc.htm> [<https://perma.cc/S7F3-FJ88>].

80. HCHR, *supra* note 74, at 6.

81. *Id.* at 14.

82. *Id.* at 6-7.

83. *History*, ORGANISATION OF ISLAMIC COOPERATION, https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en [<https://perma.cc/Z6SW-DS8K>]; Rohan Perera, *Oral Report of the Chairman of the Working Group on Measures to Eliminate International Terrorism*, HUMANS RIGHTS VOICES (Nov. 13, 2015), http://www.humanrightsvoices.org/assets/attachments/documents/11.13.2015.Eliminate_Intl_terrorism_Chair_Wkg_Grp.pdf [<https://perma.cc/5BG9-FYVG>].

achieve self-determination.”⁸⁴ Thus, the adoption of a universal anti-terrorism instrument remains in legislative limbo.

However, unfortunately, given the most current draft of the Sixth Committee, statutory definitions appear to be trending towards an anticipated impact upon groups/sects away from the Geneva Conventions’ recognition that even “targeted terrorism” against small groups affects populations as a whole.⁸⁵ Thus, as a result, the final draft of the Sixth Committee must acknowledge the broad impact of even “targeted terrorism” in order to justify international jurisdiction.

In the interim, there will be no prevailing, universal definition of “terrorism.”⁸⁶ This void has been expressly condemned by the United Nations’ High Commissioner for Human Rights who notes: “[c]alls by the international community to combat terrorism, without defining the term, might be understood as leaving it to individual States to define what is meant by it. This carries the potential for unintended human rights abuses,”⁸⁷ including violations of internationally recognized norms in due process.⁸⁸

THE SECOND CHALLENGE TO ICC JURISDICTION: DEFINING A “FAIR TRIAL”

A. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Despite the lack of a prevailing definition of “terrorism,” there is an international consensus that due process, including the right to a fair and impartial trial, predicated a criminal conviction is a fundamental human right.⁸⁹ Specifically, 170 countries,

84. HCHR, *supra* note 74, at 41.

85. Arnold, *supra* note 73, at 980.

86. *Id.* However, some legal commentators argue that since our Geneva Conventions of 1949 amount to customary law, the definition of “terror” under Article 33 IV GC could be used universally until the United Nations adopts a comprehensive convention on terrorism. *Id.*

87. HCHR, *supra* note 74, at 39.

88. *Id.*

89. HCHR, *supra* note 74, at 38; Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN COOPERATION WITH THE INTERNATIONAL BAR

including the United States, have ratified the International Covenant on Civil and Political Rights (“ICCPR”), guaranteeing: “[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a *fair* and public hearing by a competent, independent and *impartial tribunal* established by law.”⁹⁰ In its official statutory comments to the ICCPR, the Human Rights Committee notes this requirement of impartiality is “an absolute right that is not subject to any exception.”⁹¹ Specifically, the Committee concludes:

The notion of fair trial includes the guarantee of a fair [] hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.⁹²

To this end, the ICCPR mandates that the trier of fact “must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other” while

ASSOCIATION 215, <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf> [<https://perma.cc/2M6A-R779>] (noting “[e]very person has the right to a fair trial both in civil and in criminal cases, and the effective protection of all human rights very much depends on the practical availability at all times of access to competent, independent and impartial courts of law which can, and will, administer justice fairly.”).

90. *Status of Ratification Interactive Dashboard: International Covenant on Civil and Political Rights*, UNITED NATIONS HUMAN RIGHTS; OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (subject to several reservations); International Covenant on Civil and Political Rights, Art. 14(1) (Mar. 23, 1976), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [<https://perma.cc/H2R8-PX4H>] (emphasis added).

91. *General Comment No. 32*, UNITED NATIONS HUMAN RIGHTS COMMITTEE 5 (Jul. 27, 2007).

92. *Id.* at 7-8.

maintaining an outward appearance of the tribunal's impartiality.⁹³

The language contained within the ICCPR (opened for signature in 1966) guaranteeing the right to a fair and impartial jury was largely derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") (opened for signature in 1950), providing: "[i]n the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."⁹⁴ Since the European Convention served as the model for the ICCPR, cases and statutory interpretations arising under the European Convention are not only highly persuasive precedent, but also serve as a relatively accurate statement of the modern consensus on human rights.⁹⁵ For instance, the European Court of Human Rights articulated the prevailing test for determining impartiality under the European Convention and the ICCPR.⁹⁶

Further, the European Convention was also the first instrument to give effect to the Universal Declaration of Human Rights (1948) which recognized, for the first time, fundamental and inalienable rights for all humanity, including "a fair and public hearing by an independent and *impartial tribunal*, in the determination of his rights and obligations and of *any* criminal charge against him."⁹⁷ In fact, this right of *impartiality* in the face of *any* criminal charge is so fundamental and non-derogable that most legal scholars regard it as forming part of customary

93. *Id.* at 6.

94. *European Convention on Human Rights*, COUNCIL OF EUROPE 9, https://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/2F86-EB2A>].

95. *In re Tsarnaev*, 780 F.3d at 29.

96. Nuala Mole & Catharina Harby, *The Right to A Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights*, 3 HUMAN RIGHTS HANDBOOKS 32 (Aug. 2006), <http://www.refworld.org/docid/49f180362.html> [<https://perma.cc/MX8C-HYRG>]. *Id.* at 33 (citing *Fey v. Austria*, 24 Feb. 1993, para. 30) ("[I]n deciding whether . . . there is a legitimate reason to fear that a particular [court] lacks [independence or] impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.").

97. *Universal Declaration of Human Rights*, UNITED NATIONS 22 (Dec. 10, 1948), http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf [<https://perma.cc/69L4-75WQ>] (emphasis added).

international law.⁹⁸ As such, “[g]uaranteeing the right of terrorist suspects to a fair trial is critical for ensuring that anti-terrorism measures respect the rule of law” as well as preventing a derogation from a non-derogable right in violation of international custom.⁹⁹

B. OBFUSCATION OF THE ICCPR BY THE UNITED STATES

In furtherance of the ICCPR, as recognized by the United States Supreme Court, “[r]egardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies, our system of justice demands trials that are fair in both appearance and fact.”¹⁰⁰ To this end, the federal constitution, proper venue lies within the state and district in which the alleged offense took place – something that is also recognized by Federal Rule of Criminal Procedure (“FRCP”) 18, providing “[u]nless statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”¹⁰¹ However, this requirement is not without limitation. Instead, the Sixth Amendment of the Federal Constitution trumps this venue provision by requiring the trial occur where “the jury guaranteed to the defendant [can] be impartial.”¹⁰² This too is reflected in the FRCP which provides “the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the

98. *News and Events: Digital Record of the UDHR*, HCHR (2009), <http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx> [<https://perma.cc/UP22-7X8P>]. As evidence of this custom, international humanitarian law provides largely identical protections, in the context of armed conflicts. *Promotion and Protection of Human Rights*, UNITED NATIONS COMMISSION ON HUMAN RIGHTS 16 (Feb. 7, 2005). For instance, as codified in the Third and Fourth Geneva Conventions of 1949 as well as the Rome Statute of the International Criminal Court, the denial of fair, regular, and impartial trial constitutes a war crime. *Rule 100. Fair Trial Guarantees*, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [<https://perma.cc/SQ6R-RXSU>]; ROME STATUTE Art. 8(1)(a)(vi).

99. HCHR, *supra* note 74, at 38.

100. *In re Tsarnaev*, 780 F.3d at 29 (internal quotations and citations omitted); *see also* U.S. CONST. amend. 5; 14.

101. FED. R. CRIM. P. 18. *See* U.S. CONST. art. III § 2, cl. 3; amend. VI.

102. *Forty-Second Annual Review of Criminal Procedure*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 597 (2013).

defendant cannot obtain a fair and impartial trial there.”¹⁰³ In other words, where an unfair prejudice exists, a court must relinquish jurisdiction in favor of another, non-prejudiced venue.

Specifically, the FRCP even prevailed in terrorism cases. For instance, in the 1995 trial of Timothy McVeigh, whose bombing of an Oklahoma City, Oklahoma federal building resulted in 684 injured and 167 dead (19 of whom were babies or young children) was still guided by the ICCPR compliant FRCP, even though at the time, it was considered the worst terrorist attack in the country’s history.¹⁰⁴ Specifically, United States courts followed standard procedure in granting¹⁰⁵ McVeigh’s motion for a change of venue:

An accused need not establish the existence of a lynch mob atmosphere to merit a change of venue: . . . ‘When a spectacular crime had aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt’¹⁰⁶

Further, as noted in McVeigh’s accomplice’s motion for a change of venue:

Here, neither time nor close inquiry will erase the physical, psychological, emotional, and economic

103. See FED. R. CRIM. P. 21(a) (emphasis added). These constitutional and statutory requirements have historically been relied upon by defendants where the nature of the charges and the scope of the publicity has “tainted” the jury pool in a given district – including in cases of terrorism. For instance, in the McVeigh trial, District Court Judge Matsch, without hesitation or reservation, ordered a change of venue from the Western District of Oklahoma to the District of Colorado because “[t]he effects of the explosion on that community [were] so profound and pervasive that no detailed discussion of the evidence [was] necessary. . . . The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.” *United States v. McVeigh*, 918 F.Supp. 1467, 1470-72 (W.D. Okla. 1996).

104. See Sheryll Shariat, et al., *Oklahoma City Bombing Injuries*, OKLA. STATE DEP’T OF HEALTH (Dec. 1998), https://www.ok.gov/health2/documents/OKC_Bombing.pdf [<https://perma.cc/YA24-FYNM>]. See also *Oklahoma City Bombing*, HISTORY.COM, <http://www.history.com/topics/oklahoma-city-bombing> [<https://perma.cc/6Q85-CWGN>].

105. *McVeigh*, 918 F.Supp. at 1469.

106. Brief in Support of Motion to Transfer, *United States v. McVeigh*, CR 95-110-A (1995) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (citing *People v. Williams*, 774 P.2d 146, 155 (1989)).

effects of the bombing on the citizens of Oklahoma. These tangible connections intensify and are only intensified by the effects of massive, highly prejudicial pretrial publicity upon the citizens of Oklahoma. The people of Oklahoma are exposed to this publicity not as disinterested individuals, but as people who themselves have been victimized by the bombing and who identify themselves closely with those who are suffering from the loss or injury of a loved one and with those who are attempting to recover from the damage or destruction of their home or business. Based on the combined effects of pervasive, inflammatory, and incriminating publicity [] along with the special interest that Oklahomans have in the outcome of [the] trial¹⁰⁷

However, a decade following McVeigh’s trial, the United States was again attacked, with bombs at the finish line of the Boston Marathon Bombing (discussed above); the end result of which would be an obfuscation of the line drawn by the ICCPR and the FRCP and a refusal to change venue even despite evidence of overwhelming prejudice.¹⁰⁸ Specifically, the two-to-one majority in *In Re Tsarnev* noted:

It is true that there has been ongoing media coverage of the advent of the trial and petitioner’s pre-trial motions, both locally and nationally. But that would be true wherever trial is held, and the reporting has largely been factual. These factors persuade us that petitioner has not demonstrated a clear and indisputable right to relief based on a presumption of prejudice from pretrial publicity.¹⁰⁹

Therefore, the First Circuit Court refused to comply with the ICCPR and the FRCP in what the dissent called “trial-by-media and raw emotion” that ensured the Defendant would not receive “a fair trial [or be] accorded the utmost due process.”¹¹⁰

107. See Motion for Change of Venue and Supporting Brief, *United States v. McVeigh*, <http://www.goextranet.net/Seminars/Ohio/Thurschwell/Pretrial/Venue.htm> [<https://perma.cc/CD3X-4M8L>].

108. See *United States v. Tsarnaev*, 157 F.Supp. 3d 57, 59 & n.1 (D. Mass. 2016).

109. *In re Tsarnaev*, 780 F.3d 14, 22 (1st Cir. 2015).

110. *Id.* at 50 (Tourella, J., dissenting).

C. TERRORISM'S COLLECTIVE IMPACT UPON "FAIRNESS"

The United States' seeming shift away from the ICCRP and FRCP may likely be the result of bias resulting from continued "third party victimization," brought about by the 24-hour-news-cycle's collective coverage of terrorism attacks and threats to Americans.¹¹¹ Specifically, as noted above,¹¹² within four days following the first bomb blast, most people in the United States had engaged with at least one news report regarding the bombing via some form of media source; this fact was even recognized by the majority in *In Re Tsarnev* who noted "the events here, like the 1993 bombing of the World Trade Center and the September 11, 2001 attacks, received national and international attention. Petitioner does not deny that a jury anywhere in the country will have been exposed to some level of media attention."¹¹³

To this end, studies suggest "[m]edia coverage of collective traumas may trigger psychological distress in individuals outside the directly affected community."¹¹⁴ Specifically, as noted above, engagement with media coverage during a terrorist attack or a mass-shooting may: (1) cause acute stress symptoms greater than those who were at or near the actual attack; (2) trigger flashbacks to different attacks or the same attack later in life; (3) encourage subconscious fear conditioning; and (4) result in chronic stress about the event from repeated exposure.¹¹⁵ Thus, anyone with a television connection can become a "third party victim" and suffer trauma – including lasting psychological effects such as PTSD, depression, anxiety, etc. – as a result of watching coverage associated with a terrorist act.¹¹⁶ Therefore, in accordance with

111. See E. Alison Holman, et al., *Media's Role in Broadcasting Acute Stress Following the Boston Marathon Bombings*, 111 PROC. NAT'L. ACAD. SCI. 93, 93 (2013).

112. See *supra* note 20.

113. *In Re Tsarnev*, 780 F.3d at 16.

114. Holman, *supra* note 112.

115. U.C. Irvine, *Prolonged Viewing of Boston Marathon Bombings Media Coverage Tied to Acute Stress* (Dec. 9, 2013), <https://news.uci.edu/press-releases/prolonged-viewing-of-boston-marathon-bombings-media-coverage-tied-to-acute-stress/> [<https://perma.cc/D8VL-LUYD>].

116. See Holman, *supra* note 112, at 93. Specifically, as noted in one study following the Boston Marathon Bombing:

[M]edia exposure in the week after the bombings was associated with higher acute stress than direct exposure to the bombings . . . Repeatedly engaging

traditional due process interpretations, such “third party victims” should be rendered ineligible for jury service.¹¹⁷

Importantly, these observations are not just limited to the attacks on the Boston Marathon, instead, similar effects were perceived following the terrorist attacks of: the Oklahoma City Bombing,¹¹⁸ September 11, 2001¹¹⁹ and the Sandy Hook School shooting.¹²⁰ Thus, the effects of wide-spread “third party victimization” appear whenever there is a terrorist attack or other instance of wide-spread manmade violence.¹²¹ In explaining this phenomenon, some psychologists hypothesize:

Repeatedly watching disturbing images may also affect threat appraisals and may contribute to stress-related symptoms. Because rumination keeps the mind focused on a past negative event, media exposure may perpetuate activation of fear circuitry in the brain, especially in the early aftermath of the event when memory consolidation is most pronounced; this could contribute to the abnormal consolidation of fear conditioning that is associated with development of acute and PTS responses. Unlike direct exposure to a collective trauma, which can end when the acute phase

with trauma-related media content for several hours daily shortly after collective trauma may prolong acute stress experiences and promote substantial stress-related symptomatology. *Mass media may become a conduit that spreads negative consequences of community trauma beyond directly affected communities.*

Id. (emphasis added).

117. See generally Oregon State Bar, *Handbook for Jurors*, <https://www.osbar.org/public/jurorhandbook.htm> [<https://perma.cc/7NE9-JNL4>] (noting victims have “actual bias” in adjudications of their alleged offender).

118. Pfefferbaum B, et al., *Television Exposure in Children after a Terrorist Incident*, 64 PSYCHIATRY, 202, 207–09 (2001).

119. Jennifer Ahern, et al., *Television Images and Psychological Symptoms After the September 11 Terrorist Attacks*, 65 PSYCHIATRY 2002, 289–300 (2002). Participants “who repeatedly saw ‘people falling or jumping from the towers of the World Trade Center’ [on television] had higher prevalence of PTSD . . . and depression . . . than those who did not.” *Id.* Another study found that “[f]orty-four percent of the adults reported one or more substantial symptoms of stress; 90 percent had one or more symptoms to at least some degree. Respondents throughout the country reported stress symptoms.” Mark A. Schuster, et al. *A National Survey of Stress Reactions After the September 11, 2001, Terrorist Attacks*, 345 N ENGL J MED. 1507, 1507 (2001).

120. See Holman, *supra* note 112, at 94.

121. See *id.*

of the event is over, media exposure keeps the acute stressor active and alive in one's mind.¹²²

To this end, “[g]iven the significance of media in our daily lives, its impact on our health is likely to grow,” including the bias it produces.¹²³ As a result, as terrorist attacks continue, it is likely that: (1) more States will turn a “blind eye” to the dictates of the ICCRP as a matter of judicial policy governing terrorism trials, and (2) populations (and jury pools) will become increasingly “de facto prejudiced” by the effects of media coverage and the “third party victimization” it causes.¹²⁴ Therefore, in compliance with the ICCRP, proper venue must lie with an independent, unaffected body – the International Criminal Court.

THE SOLUTION PART I:

REDEFINING “CRIMES AGAINST HUMANITY” TO PERMIT ICC JURISDICTION OVER TERRORISM ADJUDICATIONS

In 1872, International Committee of the Red Cross co-founder, Gustav Moynier, first proposed a permanent international court to adjudicate crimes committed during the Franco-Prussian war.¹²⁵ Moynier's proposal went largely overlooked until 1919, when the drafters of the Treaty of Versailles, unsuccessfully called for the creation of an international court to adjudicate war crimes committed during the First World War.¹²⁶ While Moynier's proposal was laudable, it could not overcome concerns of state sovereignty.¹²⁷ Instead, it would take nearly seventy-five years until Moynier's proposal first became a partial-reality with the creation of *ad hoc*

122. *Id.*

123. *Id.*

124. *Id.*

125. *History of the ICC*, COAL. FOR THE INT'L CRIM. CT., <http://archive.iccnw.org/?mod=icchistory> [https://perma.cc/5MEZ-GTEF].

126. *Id.*

127. André Durand, *Gustav Moynier and the Peace Societies*, 314 INT.L REV. OF THE RED CROSS (Oct. 31, 1996), <https://www.icrc.org/eng/resources/documents/article/other/57jnaw.htm> [https://perma.cc/4YZE-CJB7].

Nuremberg and Tokyo tribunals following the Second World War.¹²⁸

Following the Second World War and the resulting Tokyo and Nuremberg ad hoc international tribunals, the United Nations was established in 1945 in part, to prevent future, similar atrocities.¹²⁹ Within one year of its creation, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide which “called for criminals to be tried ‘by such international penal tribunal[s] as may have jurisdiction’ . . . [and] invited the International Law Commission ‘to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide.’”¹³⁰ However, these efforts were largely abandoned in the 1950’s in response to the Cold War, despite near agreement on an “International Code of Crimes.”¹³¹

Following the end of the Cold War, in 1989, the United Nations General Assembly requested the International Law Commission to resume the creation of an international adjudicatory organ.¹³² The need for such a body was underscored, within a matter of years, in which the United Nations Security Council was forced to establish separate ad hoc tribunals in response to conflicts in Bosnia, Croatia, and Rwanda.¹³³ As a result of this pressure, in 1994, the International Law Commission presented a drafted statute calling for the creation of the International Criminal Court (“ICC”).¹³⁴ After years of debate and revision, on July 17, 1998, representatives from 160 member nations convened in Rome to vote on the adoption of the ICC.¹³⁵ As a result, over 125 years after Moynier’s first proposal, the

128. Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST. 830, 830, 832 & n. 7 (2006).

129. *Id.* at 837.

130. U.N. Office of Legal Affairs, *Rome Statute of the International Criminal Court* (1999), <http://legal.un.org/icc/general/overview.htm> [https://perma.cc/N3QM-GH42] (quotations omitted); U.N. Treaty Series, *Convention on the Prevention and Punishment of the Crime of Genocide* at 282–83 (1951), <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [https://perma.cc/LZM8-BZPR]; *See History of the ICC*, *supra* note 126.

131. *See History of the ICC*, *supra* note 126.

132. *See* U.N. Office of Legal Affairs, *supra* note 131.

133. *See History of the ICC*, *supra* note 126.

134. *Id.*

135. *Id.*

Rome Statute was adopted with 120 nations voting in favor, 7 nations voting against (including the United States, Israel, China, Iraq, and Qatar), and 21 nations abstaining.¹³⁶ Upon reaching its ratification threshold, the Rome Statute entered into force on July 1, 2002 and investigations into crimes within the limited jurisdiction of the Court began almost immediately.¹³⁷

A. SUBJECT MATTER JURISDICTION OF THE ICC¹³⁸

In addition to establishing the ICC, the Rome Statute also codified the applicable criminal law within the court's subject matter jurisdiction.¹³⁹ Specifically, Article 5 of the Rome Statute limits the jurisdiction of the Court "to the most serious crimes of concern to the international community as a whole,"¹⁴⁰ including: genocide (i.e. murder, causing seriously bodily harm, etc. "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group");¹⁴¹ crimes against humanity (i.e. murder, extermination, enslavement, deportation, imprisonment, torture, rape, etc. "committed as part of a widespread or systematic attack directed against any civilian population");¹⁴² and war crimes (i.e.

136. *Id.*

137. *Id.*

138. This discussion is limited to the Court's subject matter jurisdiction in that the United States is *not* a party to the Rome Statute, thus the ICC does not retain subject matter jurisdiction unless "the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court, the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime," or the United States accepts jurisdiction of the court. *See How the Court Works*, *supra* note 38. Thus, while a territorial jurisdiction analysis may render this analysis moot, these alternatives to territorial jurisdiction—however unlikely—provide a path for the subject matter jurisdiction analysis to proceed.

139. *See* ROME STATUTE, *supra* note 38, at Art. 5.

140. *Id.* at Art. 5(1).

141. ROME STATUTE, *supra* note 38, at Art. 6(a)-(e). "[A]lthough the negotiators of the Rome Statute contemplated adding many crimes to the Court's jurisdiction including terrorism, drug trafficking, hostage-taking, and aggression, it was ultimately decided that it would be preferable to begin with universal 'core crimes' defined in treaties or found in customary international law . . ." Leila Sadat, *The International Criminal Court*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW* 137, 145 (William A. Schabas ed., 2016).

142. ROME STATUTE, *supra* note 38, at Art. 7(1)(a)-(k).

grave breaches of the Geneva Conventions of 1949 such as willful killing, torture, deprivation of a fair and regular trial, taking hostages, etc. committed “against persons or property protected under the provisions of the relevant Geneva Convention” as part of a plan, policy, or large-scale commission).¹⁴³ However, despite the fact terrorism, in its contemporary practice, “is always and everywhere in violation of international law,”¹⁴⁴ the Rome Statute does not explicitly grant the Court jurisdiction over acts of terrorism nor does it define the term (see definitional discussion above).¹⁴⁵ As such, the Court may only prosecute terrorist acts if they fall within the elements of genocide, crimes against humanity, or war crimes as enumerated in the Rome Statute.¹⁴⁶

To that end, as early as the 1919, the Commission of the Responsibility of the Authors of the War and on the Enforcement of Penalties, terrorism has been incorporated within the definition of “crimes against humanity.”¹⁴⁷ In 1945, the Nuremberg Trials became the first to adjudicate the “crime against humanity of ‘systematic terrorism,’”¹⁴⁸ specifically, in rendering its verdict, the International Military Tribunal (“IMT”) found:

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps [(deemed by the tribunal as a terrorist tool to implement a policy of crimes

143. *Id.* at Art. 8(1)-(2)(a)(viii). Article 5 of the Rome Statute also anticipates the Court will acquire jurisdiction over “the crime of aggression” in the future. *Id.* at Art. 5(1)(d)-(2). While the Assembly of States Parties have agreed that “a ‘crime of aggression’ means the planning, preparation, initiation[,] or execution [of an act] [(i.e. invasion, military occupation, annexation, etc.)] us[ing] [] armed force[s] by a State against the sovereignty, territorial integrity[,] or political independence of another State,” the Court may not begin exercising subject matter jurisdiction over the crime until after January 1, 2017 when the Amendment must be approved by a two-thirds majority of the States Parties to the Rome Statute and ratified by at least 30 States Parties. *Id.* at Art. 11(1)-(2); *Handbook: Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC*, GLOBAL INSTITUTE FOR THE PREVENTION OF AGGRESSION (June 2012), <https://crimeofaggression.info/documents/1/handbook.pdf>.

144. Darren C. Zook, “Terrorism,” in 4 *The Oxford International Encyclopedia of Peace* 145, 145 (Nigel J. Young ed., 2010).

145. *Cf. How The Court Works*, *supra* note 38.

146. ROME STATUTE, *supra* note 38, at Art. 5.

147. Arnold, *supra* note 73, at 987-88.

148. *Id.* at 980-81.

against humanity)] in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic.¹⁴⁹

Thus, the IMT held that terrorist acts, in order to be considered a crime against humanity, the act(s) “are characterised by either their seriousness and their savagery, or by their magnitude, or by the circumstance that they were part of a system of terrorist acts, or that they were a link in a deliberately pursued policy against certain groups of the population.”¹⁵⁰ In other words, IMT jurisprudence unequivocally established that terrorism falls within the definition of “crimes against humanity” under the customary law when the alleged offense is: (1) particularly savage or serious, (2) large in scale, (3) part of a series of attacks, or (4) committed with discriminatory purpose.¹⁵¹

More recently, in *Prosecutor v. Galic* (2003), the International Criminal Tribunal for the former Yugoslavia (“ICTY”) convicted a defendant for the war crime of terror against the civilian population in Sarajevo based upon the precedential foundation of the Nuremburg Trials.¹⁵² However, *Galic*, with respect to its *war crimes* analysis, represented a significant deviation from ICTY jurisprudence in which, generally, “[t]he Trial Chambers characterises . . . the crime[] of terror . . . as constituting crimes against humanity, that is, persecution and inhumane acts” under explicit holding of the IMT.¹⁵³

However, the IMT and ICTY iterations of the international customary law were not explicitly codified in the Rome Statute.¹⁵⁴ Instead, during the Rome Conference, “several delegations argued for the inclusion of terrorism in the jurisdiction of the Court as a separate crime,” but a majority of States disagreed

149. *Id.* at 989 (quoting *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, YALE LAW SCHOOL: THE AVALON PROJECT (2008), <http://avalon.law.yale.edu/imt/judlawre.asp> [<https://perma.cc/ZF93-NWRZ>]).

150. Niemann, *supra* note 42, at 176 (quoting Special Court of Cession in the Netherlands (Apr. 11, 1949), *Nederlandse Jurisprudentie* (1949) No 435, 747).

151. *See id.*

152. *See* HCHR, *supra* note 74, at 14-15.

153. Arnold, *supra* note 73, at 990; *Prosecutor v. Krstic*, Case No. IT-98-39, Judgment, 607 (August 2, 2001).

154. Compare Arnold, *supra* note 73, at 990-91 with ROME STATUTE, *supra* note 38, at Art. 5(1).

because of the lack of a commonly agreed upon definition (see above).¹⁵⁵ As a result, the Rome Statute does not currently include “terrorism” as a separate crime, yet an attack may still constitute a crime against humanity within the jurisdiction of the ICC *only* if it is committed as part of a *widespread or systematic* attack directed against any civilian population.¹⁵⁶ However, this jurisdictional hook is significantly more limited than that originally articulated by the IMT, specifically: terrorism falls within the definition of “crimes against humanity” when it is particularly savage or serious, large in scale, part of a series of attacks, or committed with discriminatory purpose.¹⁵⁷

B. PROPOSED STATUTORY REVISIONS TO “CRIMES AGAINST HUMANITY”

The limited jurisdictional hook of the ICC over acts of terrorism falling within the definition of “crimes against humanity” is predicated upon Article 7(1) of the Rome Statute, necessitating the enumerated crimes be “committed as part of a widespread or systematic attack directed against a civilian population.”¹⁵⁸ According to the statute’s interpretive language, this requires “the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁵⁹ While this continuity and organizational requirement, is arguably applicable to liberation or ideocentric organizations such as Irish Republican Army, Islam State of Iraq and Greater Syria, and Al-Qaeda,¹⁶⁰ it seemingly would not apply to non-organized actors such as Dzhokhar and Tamerlan Tsarnaev (even though their acts would have likely fallen within the IMT’s interpretation of crimes against humanity).

As such, to effectuate the precedent established by the IMT and expand the ICC jurisdiction to include terrorism within the

155. HCHR, *supra* note 74, at 14.

156. *Id.* at 14-15.

157. See Niemann, *supra* note 42, at 176.

158. ROME STATUTE, *supra* note 38, at Art. 7(1).

159. *Id.* at Art. 7(2)(a).

160. *Country Reports on Terrorism*, U.S. DEPT. OF STATE: OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM (April 30, 2007), <https://www.state.gov/j/ct/rls/crt/2006/82738.htm> [<https://perma.cc/3WEF-43ZK>].

meaning of “crimes against humanity,” the operative language articulated in Article 7(1), should be amended:

From: “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”¹⁶¹

To: “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”

Further, the interpretive language, articulated in Article 7(2)(a), should be amended

From: “the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”¹⁶²

To: the multiple commission of *any* acts . . . against any civilian population, *or* pursuant to or in furtherance of a State or organizational policy to commit such attack.”

These revisions would not only give effect to the broad interpretation established by IMT (while retaining complementarity), but also avoid the controversy associated with explicitly defining “terrorism” in the Statute.

THE SOLUTION PART II:

DECLINING “COMPLIMENTARY JURISDICTION” OVER TERRORISM ADJUDICATIONS

The preamble of the Rome Statute of the International Criminal Court (“Rome Statute”) codifies international customary law, providing “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”¹⁶³ However, Article I of the Rome Statute also establishes the ICC as a permanent institution with “the power to exercise its jurisdiction over persons for the most serious crimes

161. ROME STATUTE, *supra* note 38, at Art. 7(1).

162. *Id.* at Art. 7(2)(a).

163. *Id.* at Preamble.

of international concern”¹⁶⁴ To avoid any resulting jurisdictional conflicts, the ICC’s jurisdiction is subject to limitation. Specifically:

The [ICC] may exercise jurisdiction if [t]he accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; [t]he crime took place on the territory of a State party or a State otherwise accepting jurisdiction of the Court; or [t]he United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.¹⁶⁵

Even when the court may exercise jurisdiction, it may decline to exercise its power based on the “principle of complementarity.”¹⁶⁶ Under this principle, the Court will decline jurisdiction over a case if it “has been or is being investigated or prosecuted by a State with jurisdiction.”¹⁶⁷ However, this exception is limited if the “prosecuting State is unwilling or unable to *genuinely* [] carry out the investigation or prosecution.”¹⁶⁸ As such, despite being able to assert jurisdiction, the ICC will decline jurisdiction if a State with complementary jurisdiction has or is, in the largely subjective judgment of the Court, “legitimate” investigation or prosecution individuals charged with genocide, crimes against humanity, or war crimes.¹⁶⁹

Not only is such a policy not in keeping with the wide-spread effects of terrorism, which renders a “genuinely” fair trial nearly impossible at the State-level, but abolishing the ICC’s recognition of complimentary jurisdiction in terrorism prosecutions is of

164. *Id.* at Art. 1.

165. *How the Court Works*, *supra* note 38. Specifically, under the Rome Statute, the ICC retains jurisdiction over “those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.” *International Crimes and Accountability: A Beginner’s Introduction to the Duty to Investigate, Prosecute and Punish*, DIAKONIA (October 2013), <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/international-crimes-and-accountability-a-beginners-introduction-to-the-duty-to-investigate-prosecute-and-punish.pdf> [<https://perma.cc/NPC5-LYGM>].

166. *International Crimes and Accountability*, *supra* note 166.

167. *Id.*

168. *Id.* (emphasis added).

169. *Id.*

paramount importance now that most states, with the exception of Germany, have largely abandoned the controversial concept of “universal jurisdiction,” in which, largely as a matter of custom,¹⁷⁰ a third-party country can “try and punish perpetrators of some crimes so heinous that they amount to crimes against the whole of humanity, regardless of where they occurred or the nationality of the victim or perpetrator.”¹⁷¹

A. THE RISE OF “UNIVERSAL JURISDICTION”

“Although almost two-thirds of all states have national legislation permitting their courts to exercise universal jurisdiction over certain conduct committed abroad amounting to one or more of the following crimes: war crimes, crimes against humanity, genocide, torture, extrajudicial executions or ‘disappearances,’”¹⁷² very few States have taken action under their respective statutory grants.¹⁷³ However, in 2002, Germany began asserting jurisdiction over international cases involving at least some German connection – be it as a victim, offender, or a third party affected by genocide, war crimes, or crimes against humanity.¹⁷⁴

In many respects, German “universal jurisdiction,” was predicated upon Spain’s historical allowance for its national courts (*Audiencia Nacional*) to pursue criminal cases outside of its territorial jurisdiction since 1985.¹⁷⁵ Pursuant to Organic Law 6/1985 on the Judiciary (*Ley Organica del Poder Judicial*) Article 23 § 4, Spanish Criminal Courts could assert jurisdiction over

170. See Rule 157. *States Have the Right to Vest Universal Jurisdiction in Their National Courts over War Crimes*, INT’L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157 [<https://perma.cc/64XW-6XNX>].

171. *Questions and Answers on the ICC and Universal Jurisdiction*, AMERICAN NGO COALITION FOR THE INTERNATIONAL CRIMINAL COURT, https://docs.wixstatic.com/ugd/e13974_eb835efd38ac47e4917bbf7f283e4564.pdf [<https://perma.cc/5WA8-CEBJ>].

172. *Universal Jurisdiction: The Duty to Enact and Enforce Jurisdiction*, AMNESTY INTERNATIONAL (Sept. 2001), <https://www.amnesty.org/download/Documents/128000/ior530172001en.pdf> [<https://perma.cc/478R-S3SC>].

173. *Id.*

174. Helen Zuber, *Universal Jurisdiction? Spain’s ‘World Court’ May Be Restricted*, SPIEGEL INTERNATIONAL (June 2, 2009), <http://www.spiegel.de/international/world/universal-jurisdiction-spain-s-world-court-may-be-restricted-a-628112.html> [<https://perma.cc/FB33-MCSQ>].

175. *Id.*

“offenses of an international nature or with an international dimension.”¹⁷⁶ This provision was broadly conceived to provide Spanish courts with “absolute jurisdiction, no links with Spain were required and no criteria of subsidiarity applied; furthermore, anybody could file a claim.”¹⁷⁷ Spain justified this unparalleled jurisdiction as a “necessity” following the Nuremberg Trials in which a “general consensus [] formed . . . that acts of horror should [not] go unpunished, especially when they [cannot] be prosecuted in the country where they occurred.”¹⁷⁸

In the years following the enactment of Organic Law 6/1985, Spain opened several investigations into international offenses – most notably against former Chilean dictator General Augusto Pinochet.¹⁷⁹ Spain’s investigation into Pinochet began in 1996 when a non-governmental organization – the Spanish Union of Progressive Prosecutors – filed a complaint in the Spanish courts “accusing members of the Argentine military . . . of genocide, terrorism, and other crimes”¹⁸⁰ Despite several requests from judges, Chile refused to extradite Pinochet or make him available for questioning – causing the case to stall.¹⁸¹ However, the case regained new life when Pinochet, then age 82, traveled to London for medical care in 1997.¹⁸²

Pinochet’s arrival in London for medical care sparked a year-long diplomatic and legal battle, which ultimately culminated in Pinochet’s arrest in October 1998 at London Bridge Hospital on an Interpol Red Notice alleging the commission of numerous international atrocities between 1973 and 1983.¹⁸³ However, following Pinochet’s arrest, the Chilean government

176. Ley Orgánica del Poder Judicial, art. 23(4) (Spain).

177. Rosa Ana Alija Fernandez, *The 2014 Reform of Universal Jurisdiction in Spain From All to Nothing*, 9 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 717, 717 (2014).

178. Zuber, *supra* note 175.

179. Daniel Del Pino, *Spain, Universal Judge*, PUBLIC (June 5, 2009), <http://www.publico.es/internacional/espana-juez-universal.html> [https://perma.cc/KE35-3KXP] (citation based on English translation).

180. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311 (2001).

181. David Connett et al., *Pinochet Arrested in London*, THE GUARDIAN (Oct. 17, 1998), <http://www.theguardian.com/world/1998/oct/18/pinochet.chile> [https://perma.cc/NG38-GR5Z].

182. *Id.*

183. *Id.*

sought to enjoin Pinochet's extradition to Spain asserting Pinochet was traveling on a diplomatic passport and subject to diplomatic immunity.¹⁸⁴ After a legal battle that ultimately reached the House of Lords twice, English court's held, following pressures from the United States and then Prime Minister Margaret Thatcher (who was a close, personal friend of Pinochet) that: (1) Pinochet was not entitled to diplomatic immunity because certain international crimes allowed for a piercing of the "diplomatic veil"; and (2) Pinochet could only be extradited for crime committed after 1988 – the year which the United Kingdom recognized the UN Convention Against torture.¹⁸⁵ Since the arrest warrant was for alleged violations of international law between 1973 and 1983, the United Kingdom could not hold or extradite Pinochet to Spain.¹⁸⁶ As such, Pinochet was ultimately released and returned to Chile a free man.

B. THE FALL OF "UNIVERSAL JURISDICTION"

In the years following the Pinochet debacle, despite dozens of on-going investigation and some successful prosecutions, international pressure eventually forced Spain to reduce the scope of Organic Law 6/1985.¹⁸⁷ The first limitation of Organic Law 6/1985 was imposed in October 2005 by Spain's Constitutional Court decided that Spain's criminal courts could not maintain "absolute" jurisdiction, but could maintain "universal jurisdiction" in which "judges in Madrid had a duty to pursue breaches of international agreements – like the Geneva Convention on handling prisoners of war, or treaties against

184. *Id.*

185. *The Extradition of General Augusto Pinochet*, HUMAN RIGHTS WATCH (Oct. 14, 1999), <https://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet> [<https://perma.cc/U7EC-HDGA>]. Interestingly, the House of Lords did not address nor did the Chilean government raise the issue of Spain's *ex post facto* application of Organic Law 6/1985. *Id.* Specifically, Interpol's warrant sought Pinochet's extradition to Spain for crimes occurring between 1973 and 1983 – two years prior to Spain's adoption of Organic Law 6/1985. Connett et al., *supra* note 182. Instead, the decision to not extradite was predicated on the *ex post facto* application of UK law.

186. Andrea Gattini, *Pinochet Cases*, OXFORD PUB. INT. LAW (June 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859> [<https://perma.cc/SJ5J-BUMM>].

187. Soeren Kern, *Spain Rethinks Universal Jurisdiction*, GATESTONE INSTITUTE (Jan. 31, 2014), <https://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction> [<https://perma.cc/JHK3-5P8C>].

genocide or torture – which Spain had signed[;] [however,] [a]ll the justices had to determine was that no other court in the world was already trying the same crime.”¹⁸⁸ In so doing, Spain adopted a “principle of complementarity” which was nearly identical to that of the ICC. Yet, despite this limitation, prosecutions continued largely unhindered until 2009.¹⁸⁹

In 2009, a Spanish court sparked international backlash when it announced several high-profile investigations into the activities of Israeli and United States nationals.¹⁹⁰ Specifically, in January 2009, Spanish Judge Fernando Andreu announced the investigation into seven top Israeli military and government official for crimes against humanity.¹⁹¹ In March of that year Judge Baltasar Garzon announced the investigation of six former Bush administration officials for facilitating torture at the Guantanamo Bay detention center.¹⁹² Finally, in May 2009, Judge Santiago Pedraz announced formal charges against three United State soldiers for crimes against humanity relating to the shelling of a Baghdad hotel.¹⁹³ A diplomatic fight then ensued, led by the United States, in which, ultimately, the Spanish Congress of Deputies and the Spanish Senate voted to restrict Organic Law 6/1985.¹⁹⁴

As the first major legislative amendment of Organic Law 6/1985, Organic Law 1/2009, provided several significant limitations on the country’s “universal jurisdiction.”¹⁹⁵ Specifically, Spanish courts could only exercise of jurisdiction if: (1) the alleged perpetrator was within the territorial jurisdiction of Spain, (2) the case involve Spanish victims - including those of Spanish descent, or (3) there was some other relevant link connecting the offense/case to Spain.¹⁹⁶ While the third provision, was somewhat vague, “[s]uch relevant link has been . . . described as historical, social, cultural, legal, political, and other similar relations (belonging in the past to the same

188. Zuber, *supra* note 175.

189. *Id.*

190. Kern, *supra* note 188.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Fernandez, *supra* note 178.

196. *Id.*

political unit, sharing a common language with relevant cultural nexus, participating in political international organisations [sic] that must be analysed [sic] on a case-by-case basis.”¹⁹⁷ As a result of Organic Law 1/2009, which applied to pending cases as well as future cases, the cases involving United States and Israeli nationals were summarily dismissed.¹⁹⁸

Within the limitations imposed by Organic Law 1/2009, Spanish courts still continued opening dozens of high-profile investigations involving international law.¹⁹⁹ In October 2013, Spain again shocked the international community when Spanish High Court Judge Ismael Moreno accepted a case filed by the Madrid-domiciled Tibetan Support Committee and the Barcelona-domiciled Tibet House Fund and found sufficient evidence to issue arrest warrants for former Chinese President Jiang Semín, former Chinese Prime Minister Li Peng, and three other high-ranking Chinese officials.²⁰⁰ Under the arrest warrants which claimed the parties “aimed at eliminating the uniqueness and existence of Tibet as a country, imposing martial law, carrying out forced deportations, mass sterilization campaigns and torture of dissidents,” the official could be arrested when traveling to any country with which Spain has an extradition treaty.²⁰¹ In response to the arrest warrants, the Chinese parliament officially condemned the action and urged Spain to “face up to China’s solemn position, change the wrong decision, repair the severe damage, and refrain from sending wrong signals to the Tibetan independences forces, and hurting China-Spain relations.”²⁰²

Almost immediately following China’s condemnation, Spanish lawmakers responded to avoid an international incident and economic reprisals.²⁰³ Specifically, lawmakers sought to avoid damaging its trade relationship with China – which is Spain’s biggest trading partner outside of the EU and is the second largest holder of Spanish debt – in the same way that Norway did “after the Norwegian Nobel Committee in 2010

197. *Id.* at fn. 5.

198. Kern, *supra* note 188.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Kern, *supra* note 188.

awarded the Nobel Peace Prize to Liu Xiaobo, a dissident serving an 11-year prison term in China.”²⁰⁴ In response, Spanish lawmakers drafted, presented, and passed Organic Law 1/2014 within two months.²⁰⁵ Spanish law now provides that that the country’s criminal courts may only assert jurisdiction when:

[I]n cases of genocide, crimes against humanity or war crimes, . . . the alleged perpetrator [must] be a Spanish national, a foreigner who habitually resides in Spain or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite . . . for crimes of torture and enforced disappearance if the alleged perpetrator is a Spanish citizen or, the victim is a Spanish citizen at the time the act was committed and the alleged perpetrator is on Spanish territory [, and] for crimes not covered by the law itself, Spain shall respect the rules of jurisdiction provided by treaties to which it is a party.²⁰⁶

Further, the revised law prevents non-victim third parties, such as the Tibetan Support Committee and the Tibet House Fund, from filing cases before Spanish criminal courts.²⁰⁷ In essence, Organic Law 1/2014 stripped Spain of its “universal jurisdiction,” implicitly deferring instead to the use of “universal jurisdiction” by other States or the ICC.²⁰⁸

C. THE REMAINING JURISDICTIONAL VOID

With the collapse of “universal jurisdiction” resulting from Organic Law 1/2014, and the exception of German efforts, the ICC stands alone in its ability to provide a neutral, third-party adjudication of war crimes, crimes against humanity, genocide, the crime of aggression, etc.²⁰⁹ However, its ability to hear such

204. *Id.*

205. Fernandez, *supra* note 178, at 718.

206. International Committee of the Red Cross, *Organic Law 1/2014 Modifying the Organic Law 6/1985 of the Judicial Power, on Universal Jurisdiction*, https://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=26DF035F7A2CB224C1257E6C002D426C&action=openDocument&xp_countrySelected=ES&xp_topicSelected=GVAL-992BU6&from=state [https://perma.cc/84A7-BBJ5].

207. *See id.*

208. *See* Fernandez, *supra* note 178, at 718.

209. *See supra* Part II.

cases is significantly curtailed by “principle of complementarity” which requires a subject judgment of whether a State-party “is “unwilling or unable” to *genuinely* carry out the investigation or prosecution.”²¹⁰ As a result, if “crimes against humanity” is redefined to include terrorism (as proposed above), the Court’s jurisdiction will be a subjective determination, much like that in *In Re Tsarnaev*.²¹¹ Therefore, as the only remaining viable third-party adjudicator, the Court must *de facto* decline to abide by the “complimentary jurisdiction” rule in cases of terrorism as no target-state is “able to genuinely carryout the investigation or prosecution” in keeping with the Court’s charge to abide by “the principles of due process recognized by international law.”²¹²

CONCLUSION

As discussed in this analysis, there is no universally accepted definition of “terrorism,” nor is there agreement upon the scope of terrorism’s civilian impact (i.e. individuals, groups/sects, and/or the population as a whole). Unfortunately, many States, including the United States and Iraq, as well as the Sixth Committee of the United Nations, appear to be trending away from statutory schemes embracing the Geneva Conventions’ recognition that even “targeted terrorism” affects the population of a State as a whole; a fact supported by emerging data on secondary victimization in the age of the twenty-four-hour news cycle. Further, prevailing social science data concludes that not only does terrorism result in widespread secondary victimization, but it also cultivates significant anti-defendant bias among the population. As a result, the fundamental right to a fair and impartial trial in cases of terrorism is becoming increasingly impossible to realize, especially within a target country (as exemplified by the trial of Dzhokhar Tsarnaev in the United States). Thus, given the lack of “universal jurisdiction” alternatives, international tribunals – primarily the ICC – must be empowered to assume subject-matter jurisdiction through the

210. *How the Court Works*, *supra* note 38.

211. *Id.*

212. ROME STATUTE, *supra* note 38, at Art. 17 § 1(a), 2; *see supra* Part I and Part II.

2019 *REDEFINING "CRIMES AGAINST HUMANITY"* 611

expansion of existing, codified jurisdictional "hooks," such as "crimes against humanity," while retaining internationally accepted norms of "due process."