

A NEW FORUM FOR THE PROSECUTION OF TERRORISTS: EXPLORING THE POSSIBILITY OF THE ADDITION OF TERRORISM TO THE ROME STATUTE'S JURISDICTION

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Introduction

The International Criminal Court (“ICC”) is “the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”¹ On July 17, 1998, 120 states adopted the Rome Statute to establish the ICC.² Subsequently, the Rome Statute was ratified by 60 countries and became effective on July 1, 2002.³ Currently, there are 113 states that are parties to the ICC.⁴ However, it is important to note that the U.S., China, India, and Russia have refrained from joining the ICC.⁵

The Rome Statute’s jurisdiction includes: genocide, crimes against humanity, and war crimes.⁶ Crimes of aggression are also included in the court’s jurisdiction; however, these crimes were just recently defined on June 11, 2010.⁷ Heretofore, the international community has failed to include terrorism in the Rome Statute. In light of that failure terrorist acts have not been brought to the ICC because member states could not agree on a definition for terrorism.⁸ There has been continuous discussion regarding whether terrorism should be added to the Rome Statute’s jurisdiction since “terrorism is one of the biggest and most challenging threats the world is facing in the twenty-first century.”⁹ As of June 11, 2010, ICC members developed a definition for crimes of aggression so that these cases can be heard by the international tribunal.¹⁰ However, the ICC will not be

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¹ ABOUT THE COURT, THE INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/menus/ICC/About+the+Court/> (last visited Mar. 25, 2010).

² *Id.*

³ *Id.*

⁴ ASSEMBLY: STATES PARTIES, <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

⁵ *Id.*

⁶ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998) [hereinafter Rome Statute].

⁷ *Id.*

⁸ Thalif Deen, *Politics: UN Member States Struggle to Define Terrorism*, INTER PRESS SERVICE, July 25, 2005, <http://ipsnews.net/news.asp?idnews=29633>.

⁹ ICC Report of the Working Group on the Review Conference, ICC Res 8/20, app. III, ICC ASP/8/20 (Nov. 2009) [hereinafter Working Group].

¹⁰ Coalition for the International Criminal Court, *Delivering on the Promise of a Fair, Effective and Independent Court: The Crime of Aggression*, <http://www.iccnw.org/?mod=aggression> (last visited Oct. 17, 2010).

able to exercise jurisdiction until January 1, 2017.¹¹ The ICC should follow similar steps in order to include terrorism to the Rome Statute.

The focus of this article will be to examine the reasons why terrorism should be included in the Rome Statute's jurisdiction. First, it will examine the steps that must be taken by ICC members to amend the Rome Statute to include terrorism. The analysis will focus on how terrorism can be added to the Rome Statute by following the steps used to include crimes of aggression. The article will examine the actions taken by member states to have crimes of aggression included in the Rome Statute and apply that process to the crime of terrorism. Secondly, this article will address the reasons why terrorism should be added to the ICC's jurisdiction. Finally, this article will discuss the United States stance on the ICC and why the US will likely not become a member state.

I. Jurisdictional Amendments to the Rome Statute

A. Adoption of a definition for crimes against aggression

On November 26, 2009, the Special Working Group on the Crime of Aggression presented a proposed amendment on the crime of aggression. The amendment puts forth the definition, elements, and jurisdiction conditions for the crime of aggression.¹² The proposal was considered at the ICC Review Conference held May 31 to June 11, 2010 and a definition was established.¹³

It has taken many years for the ICC to develop a definition for crimes of aggression. The Special Working Group on the Crime of Aggression started working with the U.N. General Assembly Resolution 3314's definition of aggression, which was adopted in 1974.¹⁴ However, the road to the development of this definition by the U.N. was anything but smooth. It took numerous special committees and almost 24 years for the U.N. to develop the definition for aggression.¹⁵

As of June 11, 2010, a definition for crimes of aggression has been established. Article 8 defines the individual crime of aggression as "the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression."¹⁶ Most notably, the definition requires that the act of aggression constitute an explicit violation of the Charter of the United Nations.¹⁷ Article 8 further states:

An act of aggression is defined as the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council. The definition of the act of aggression, as well as the actions qualifying as acts of aggression contained in the amendments [for example inva-

¹¹ *Id.*

¹² ICC-ASP Res. 8/6, art. 8-15, 8th Sess., ICC-ASP/8/Res.6 (Nov. 26, 2009).

¹³ Coalition for the International Criminal Court, *supra note* 10.

¹⁴ GA Res. 3314 (XXIX), U.N. Doc A/9890) (Dec. 14, 1974).

¹⁵ Coalition for the International Criminal Court, *supra note* 10.

¹⁶ *Id.*

¹⁷ *Id.*

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sion by armed forces,¹⁸ bombardment and blockade], are influenced by the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.¹⁹

The history of the crime of aggression is an important factor with respect to the addition of terrorism to the ICC's jurisdiction. If ICC member states want to include terrorism in the jurisdiction, they have a road map to follow. The ICC has made significant progress because it will be able to prosecute crimes of aggression starting in 2017.²⁰ Member states should follow the steps used to add crimes of aggression to the Rome Statute in order to have terrorism added to the ICC's jurisdiction.

B. Addition of Terrorism to Rome Statute

In contrast to the crimes of genocide, crimes against humanity and war crimes, crimes of terrorism have never been defined in a widely recognized international treaty. Furthermore, the U.N. has failed to develop a definition for terrorism. Although the history of the crime of aggression lays out a path for developing a definition for terrorism, the development of the definition of terrorism will take time and significant effort similar to the development of a definition for crimes of aggression.

1. *Development of an Internationally Accepted Definition of Terrorism*

In order to add terrorism to the Rome Statute, the U.N. must first adopt a definition for terrorism. The reason the U.N. has not yet adopted a definition for terrorism is because there is no internationally agreed upon definition. Worldwide, states vary on what acts they consider to be terrorism. For instance, states disagree on whether activities of national armed forces could be considered acts of terrorism and whether certain acts should be allowed because of a state's right to self-determination.²¹ The aphorism "one man's terrorist is another man's freedom fighter" seems to apply here. One state may consider an act of terrorism with political motives to be a legitimate act of aggression, while another state does not. For example, the Arab leaders believe that Israel is guilty of terrorism against the Palestinians in the occupied territories, while Israel condemns the "freedom fighting" acts of Palestinians against Israelis as terrorism.²²

Furthermore, while some nations "unequivocally condemn all terrorist attack[s], that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."²³ Therefore, the U.N. has a large hurdle in developing a definition that will be universally accepted. This obstacle has a significant impact on the ICC's ability to add terrorism to its jurisdiction.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Deen, *supra* note 8.

²² *Id.*

²³ Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 795 (D.C. Cir. 1984).

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The U.N. has been working to adopt a definition.²⁴ In 2005, a U.N. panel proposed the following definition: “any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.”²⁵ However, this definition was rejected by U.N. member states.²⁶ The U.N. took another step forward at the 2005 World Summit when the Outcome Document, which was unanimously endorsed by world leaders, included an “unqualified condemnation of terrorism.”²⁷ The U.N. continues to work on the development of a definition for terrorism that will be accepted by member states in the Comprehensive Convention of International Terrorism.²⁸ There have been no recent developments regarding the addition of terrorism to the ICC. At the ICC Review Conference ending June 11, amendments proposing the addition of terrorism to the ICC were not reviewed.²⁹

The addition of terrorism to the Rome Statute is dependent upon the development of an international definition of terrorism. Considering that it often takes many years to develop a definition that will be accepted, similar to the adoption of the definition of crimes of aggression by the U.N., the U.N. should not yet give up hope on the ability to develop a definition. Although a “substantial political push will be needed to reach a consensus [on terrorism],” the U.N. seems optimistic in its pursuit to define terrorism.³⁰

2. *Creation of an ICC Special Working Group on the Crime of Terrorism*

Secondly, the ICC needs to create a Special Working Group on the Crime of Terrorism. This working group could then use the U.N.’s definition of terrorism to develop a definition that could be included in the Rome Statute. Similar to the development of the definition for crimes of aggression, a Special Working Group should be able to develop the definition, elements, and jurisdictional conditions for the crime of terrorism.

In the Report of the Working Group on the Review Conference, the Netherlands has proposed that the same technique used to include the crime of aggression in the Rome Statute should be used for the inclusion of terrorism.³¹ The proposal states that terrorism should be included under article 5, with the condi-

²⁴ Deen, *supra* note 8.

²⁵ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, para. 91, U.N. Doc. A/59/2005 (March 21, 2005).

²⁶ *Id.*

²⁷ Ibrahim A. Gambari, *A Multilateral Response to Terrorism*, in COMMONWEALTH MINISTERS REFERENCE BOOK (Henley Media Group, 2006), available at http://www.un.org/terrorism/docs/gambari_med-final.pdf.

²⁸ G.A. Res. 63/129, U.N. Doc. A/RES/63/129 (Jan. 15 2009) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/478/53/PDF/N0847853.pdf?OpenElement>.

²⁹ The Hague Justice Portal, *ICC Review Conference concludes in Kampala*, <http://www.haguejusticeportal.net/smartsite.html?id=11779> (last visited October 17, 2010).

³⁰ Gambari, *supra* note 26.

³¹ Working Group, *supra* note 9, art. 42.

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tion that there should be a deferral of the exercise of jurisdiction until a definition for the crime can be developed.³² It also suggests that a working group should be created similar to the Special Working Group on the Crime of Aggression.³³ The proposal states that terrorism should not be excluded from the Rome Statute simply because there is no universal definition of terrorism.³⁴ The special working group would not have any effect on the development of a definition of terrorism by the U.N. The special working group would only be tasked with determining whether other changes would need to be made to the Rome Statute as a result of the inclusion of a definition of terrorism. Therefore, the proposal includes the addition of the crime of terrorism to Article 5 of the Rome Statute along with the following:

The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.³⁵

In the end, the addition of terrorism to the Rome Statute will lie in the hands of the U.N. The crime cannot be added to the Rome Statute without an internationally agreed upon definition. The ICC can speed up the process of adding terrorism to the Rome Statute by appointing a special working group now, rather than after a definition is established. If the proposal by the Netherlands is not accepted, the ICC members should still follow the path used to include crimes of aggression. Once the U.N. develops a definition, a special working group can be commissioned. However, the former option would likely encourage the U.N. to develop a definition with greater celerity. By following the technique used to include crimes of aggression in the Rome Statute, member states can certainly have terrorism included in the future.

III. Why Terrorism Should be Added to the Rome Statute

Terrorism should be added to the Rome Statute so that those responsible for terrorist acts can be held accountable internationally. The ICC was developed to prosecute the most serious crimes of concern to the international community, such as terrorism. “In 1998, the Rome Conference adopted Resolution E, which specifically regards terrorist acts as such [one of the most serious crimes of concern to the international community].”³⁶ Furthermore, the international community specifically condemns acts of terrorism. “We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Working Group, *supra* note 9, app. III.

³⁶ *Id.*

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whatever purposes, as it constitutes one of the most serious threats to international peace and security.”³⁷

The ICC should be allowed to prosecute terrorists because the state with jurisdiction over the criminal is oftentimes unable or unwilling to do so. The ICC is a court of last resort. It has jurisdiction only when a state is unwilling or unable to investigate or prosecute the crime. Therefore, the ICC can ensure that serious crimes, such as terrorism, do not go unpunished.

One instance where the ICC would be a better forum for the prosecution of terrorists is when a state would prefer to surrender a suspect to the ICC rather than to another state with a legal system it has concerns over. Furthermore, “the ICC does not have to rely on complicated extradition and cooperation treaties in order to obtain evidence and suspects.”³⁸

For example, the ICC could have prosecuted the Lockerbie situation if terrorism was added to the ICC’s jurisdiction. In this case, two Libyan nationals were accused of assisting in the bombing of Pan AM Flight 103.³⁹ Libya refused to extradite its nationals to stand prosecution in the U.S.⁴⁰ Libya did not want to extradite its nationals to the U.S. because “it was uncertain what treatment the United States would afford to the suspected terrorists.”⁴¹ On the other hand, the U.S. was concerned that if the suspected terrorists were not extradited to the U.S. then “there would be a significant risk that those individuals would not face national sanctions to the crimes committed or, worse yet, no punishment at all.”⁴² In this situation, the ICC could have been the best forum for the trial in order to quell the concerns of both the U.S. and Libya.⁴³ Therefore, referral of a terrorist case to the ICC could be helpful when “governments are deadlocked over the surrender of suspected terrorists.”⁴⁴

The ICC should be given jurisdiction over terrorism cases. States should not be worried about their own efforts to prosecute terrorism because the court will only be used when a state is unwilling or unable to prosecute a terrorist crime. The addition of terrorism to the ICC’s jurisdiction will also help countries deal with difficult extradition issues. Therefore, “the greater international cooperation which is possible through the ICC should give rise to greater international stability and efficacy in the fight against terrorism.”⁴⁵

³⁷ G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

³⁸ Richard J. Goldstone, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 23 (2003).

³⁹ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J. 3, 4 (Apr. 14, 1992).

⁴⁰ *Id.*

⁴¹ Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT’L L. REV. 1009, 1015 (2004).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1016.

⁴⁵ Goldstone, *supra* note 37, at 23-24.

IV. U.S. Involvement in the ICC

Since the creation of the Rome Statute, the U.S. has avoided becoming involved with the ICC. The U.S. signed the Rome Statute in 2000; however, Bill Clinton did not submit it to the Senate for ratification because there were “significant flaws in the treaty.”⁴⁶ In 2002, George Bush notified the U.N. that the U.S. would not ratify the Rome Statute and stated, “[T]he United States has no legal obligations arising from its signature [of the Rome Statute].”⁴⁷

Bush took further steps to ensure that Americans would not be subject to the ICC. The U.S. negotiated bilateral agreements, which are known as Article 98 agreements, which prevent states from turning U.S. nationals over to the ICC.⁴⁸ These agreements “prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and U.S. employees (including contractors) and nationals.”⁴⁹ In addition, in 2002, the American Servicemembers’ Protection Act (“ASPA”) was adopted by the U.S. Congress, which restricts U.S. cooperation with the ICC.⁵⁰ The ASPA grants the President “permission to use any means necessary to free U.S. citizens and allies from ICC custody” as well as refusing U.S. military assistance to states that do not sign a bilateral agreement with the U.S.⁵¹ The Bush administration clearly opposed U.S. involvement in the ICC.

In contrast, the Obama administration appears to be more open to the idea of the ICC. In November 2009, Stephen Rapp, U.S. Ambassador-at-Large for War Crimes, was sent by the Obama administration to a meeting of the ICC member states.⁵² This indicates a shift of policy from the Bush administration. Rapp stated that the United States’ attendance at the meeting was aimed at “gaining a better understanding of the issues being considered and the workings of the court.”⁵³ Hillary Clinton has even expressed her regret that the U.S. is not a signatory of the ICC.⁵⁴ However, Rapp did acknowledge that the U.S. is still

⁴⁶ Bill Clinton, President of the United States, Statement on the Rome Treaty on the International Criminal Court (December 31, 2000), in BNET, available at http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100.

⁴⁷ Letter from John R. Bolton, U.S. Undersecretary General for Arms Control and International Security, to Kofi Annan, U.N. Secretary-General, Regarding the Rome Statute of the International Criminal Court (May 6, 2002), available at <http://asil.org/ilib0506.cfm#r3>.

⁴⁸ Marion Smith, The Heritage Found., *An Inconvenient Founding: America’s Principles Applied to the ICC*, BACKGROUND, (February 18, 2010), available at <http://www.Heritage.org/research/internationalorganizations/bg2370.cfm>.

⁴⁹ OVERVIEW OF THE UNITED STATES’ OPPOSITION TO THE INTERNATIONAL CRIMINAL COURT, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.coalitionfortheicc.org/documents/CICCFS_US_Opposition_to_ICC_11Dec06_final.pdf (last visited Oct. 15, 2010).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Smith, *supra* note 47, at 1.

⁵³ Aaron Gray-Block, U.S. Makes Debut Attendance at Hague War Crimes Court, REUTERS, Nov. 19, 2009, <http://www.reuters.com/article/idUSTRE5A13G220091119>.

⁵⁴ *Id.*

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concerned that “U.S. officials or servicemen and women could risk ICC investigation for their roles in wars due to politically inspired prosecutions.”⁵⁵

Moreover, the U.S. does not believe that terrorism is a crime that should be dealt with in international courts and would not be accepting of the addition of terrorism to the ICC’s jurisdiction. The U.S. adheres to the belief that there is no universal jurisdiction over terrorism because it is not in violation of the laws of nations.⁵⁶ In contrast, the U.S. court does find that torture is in violation of the law of nations.⁵⁷ If the U.S. cannot recognize terrorism as the law of nations in domestic courts they similarly would not participate in the international prosecution of such crimes.⁵⁸ Clearly, the U.S. condemns terrorist acts, but this belief is not held by all nations worldwide.⁵⁹ Therefore, the U.S. view is that terrorist acts should be prosecuted domestically by the states that are affected by the act.

The U.S. has made some contradictions to their stance against the ICC. The “Dodd Amendment” to the ASPA allows “the U.S. to cooperate with international efforts, including the ICC, in order to bring to justice against a foreign national accused of genocide, war crimes or crimes against humanity such as Saddam Hussein, Slobodan Milosevic, Osama Bin Laden and other members of Al Qaeda or the Islamic Jihad.”⁶⁰ It appears that the U.S. will make exceptions for cooperating with the ICC when it comes to prosecuting nationals of other countries for terrorism. However, the U.S. will most likely continue their opposition of the ICC in order to protect U.S. nationals and military personnel from prosecution.

The addition of terrorism to the ICC will promote international stability and efficiency in the fight against terrorism.⁶¹ U.S. opposition to the ICC may affect the ability of the ICC to effectively fight terrorism. U.S. bilateral agreements and the ASPA may prevent certain criminals from being turned over to the ICC. For instance, a U.S. national who commits a terrorist attack on a Rome Statute members’ territory could be excluded from prosecution in the ICC because of the aforementioned U.S. agreements. Furthermore, there will continue to be no court available to prosecute a case that quells both parties concerns when a situation arises between the U.S. and another country similar to the Lockerbie situation. If the U.S. does not use the ICC for terrorist cases, then it is possible that other states will not see the ICC as a viable court for dealing with terrorist crimes. The ICC would be most effective with the participation of the U.S.

The U.S. will continue to have to deal with the ICC despite opposition to its principles. In 2009, the ICC began an investigation into U.S. and NATO actions

⁵⁵ *Id.*

⁵⁶ Tel-Oren, *supra* note 21, at 798.

⁵⁷ *Id.* at 797.

⁵⁸ *Id.* at 797.

⁵⁹ *Id.*

⁶⁰ *No to American Exception: Under Cover of War Against Terrorism, a Destruction Offensive Against the ICC*, <http://www.coalitionfortheicc.org/documents/fidh200209english.pdf> (last visited Mar. 31, 2010).

⁶¹ See Goldstone, *supra* note 35, at 23.

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in Afghanistan.⁶² Since Afghanistan is a member of the Rome Statute, the ICC has jurisdiction over crimes that are committed within its territory.⁶³ The U.S. will continue to possibly be subjected to the ICC. Not all ICC states have bilateral agreements with the U.S. and “these protections are imperfect.”⁶⁴ Therefore, the U.S. may still play a role in the ICC despite its opposition and unwillingness to ratify the Rome Statute.

V. Conclusion

The creation of the ICC was a “historic milestone” for the international community, which “has long aspired to the creation of a permanent international court.”⁶⁵ The ICC’s current jurisdiction does not include terrorism, which is a serious crime of international concern. Although controversial, many nations have rallied for the inclusion of terrorism in the Rome Statute’s jurisdiction.

Certain steps must be taken before terrorism can be added to the ICC’s jurisdiction. First, the U.N. will need to develop a definition for terrorism that will be both functional and accepted in the international community. Second, the ICC will need to establish a Special Working Group on the Crime of Terrorism to develop the definition, elements, and jurisdictional conditions for the crime of terrorism in the Rome Statute. Furthermore, the ICC should consider adding the crime of terrorism to the Rome Statute similar to the way crimes of aggression are included. The Rome Statute can list terrorism as a crime within the jurisdiction of the ICC with a clause that limits the prosecution of crimes of terrorism until a definition for terrorism can be established.

Most likely, it will take a great deal of time and effort to establish a definition for terrorism. However, there will be many benefits in equipping an international court with the ability to prosecute crimes of terrorism. The ICC will ensure that terrorists are prosecuted when a state is unwilling or unable to prosecute the crime.

Unfortunately, the United States will likely continue to oppose the ICC. It seems the U.S. will never agree to have U.S. nationals or military personnel prosecuted in an international court. However, the U.S. has shown that it is willing to cooperate with the court in certain areas. The ICC will continue to effectively prosecute crimes without the membership of the U.S.; however, U.S. membership would lend the institution greater legitimacy. In certain scenarios, the U.S. may be forced to cooperate with the ICC if a U.S. national becomes subject to ICC jurisdiction for actions committed in a member states’ territory,

⁶² Brett Schaefer & Steven Groves, The Heritage Found., *The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC*, (Sep. 14 2009), available at <http://www.heritage.org/research/reports/2009/09/the-icc-investigation-in-afghanistan-vindicates-us-policy-toward-the-icc>; see also Michael Peel, *ICC Examines Possible Afghan War Crimes*, FIN. TIMES, Sept. 10, 2009, <http://www.ft.com/cms/s/0/43060b66-9d?cc=11de-8de8-00144feabdc0.html>.

⁶³ See Assembly: States Parties, *supra* note 4.

⁶⁴ Smith, *supra* note 47, at 7.

⁶⁵ ABOUT THE COURT, *supra* note 1.

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and provided the member state is one that does not have a bilateral agreement with the U.S.

The development of a definition of crimes of aggression in 2010 gives hope to the development of an international definition for terrorism. Although the ICC will not have jurisdiction over crimes of aggression until 2017, the development of a definition is a great feat. In the future, the ICC should similarly add terrorism to the jurisdiction of the ICC.