

Terrorism and Unilateralism: Criminal Jurisdiction and International Relations

Madeline Morris†

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Introduction

The present symposium has been convened to consider “the significance of unilateral United States actions since the tragic September 11 attacks on the World Trade Center.”¹ “Unilateralism” is taken, in much of contemporary political discourse, to imply a selfish wrong-headedness, perhaps born of arrogance, on the part of the unilateral actor. On closer inspection, however, the matter is more complex (as matters generally tend to be). At least in the context of responding to international terrorism, certain aspects of “U.S. unilateralism” are, in fact, understandable, perhaps inevitable, and probably prudent. The present essay will consider the issue of U.S. unilateralism within the particular context of criminal prosecutions for terrorists offenses.

† Professor of Law, Duke Law School; Director, Duke/Geneva Institute in Transnational Law. This essay develops ideas earlier presented in Madeline Morris, *Arresting Terrorism: Criminal Jurisdiction and International Relations*, in *ENFORCING INTERNATIONAL LAW RULES AGAINST TERRORISM* (Andrea Bianchi, ed., 2004).

1. Letter from Jean Carmalt, Symposium Editor, to Madeline Morris (invitation to Professor Morris to speak at the symposium, “US Unilateralism: International Law, Security, and Policy Post-9/11”) (on file with author).

International terrorism sits at the cusp of crime, domestic politics, and international relations. Precisely because terrorist offenses are poised at that volatile intersection, significant practical, legal, and political difficulties attend the exercise of criminal jurisdiction over terrorist crimes in any forum. Prosecutions in the domestic courts of affected states pose one set of concerns, while prosecutions in an international criminal court, or in the domestic courts of third-party states under universal jurisdiction, pose others. While the impetus to "internationalize" enforcement of anti-terrorism laws is understandable and its logic compelling in certain respects, this essay will conclude that the United States' preference for domestic prosecutions reflects a sensible choice and, likely, the best choice among the available range of imperfect options.

I. The Impetus to Internationalize Enforcement

Most crime is prosecuted at the national, not the international, level. This is true even of cross-border crime. For the most part, states criminalize conduct domestically. Where states need to cooperate with other states to enforce their domestic criminal law, they do so through mutual legal assistance agreements, extradition treaties, coordination of investigations, and the like.

But terrorism is not ordinary crime. It is not even ordinary cross-border crime. Although the term "terrorism" has no international legal definition, the term would seem to indicate, at a minimum, an unlawful violent act committed for a political purpose. Unsurprisingly, since terrorism has political motives, states are typically the targets and, not infrequently, the sponsors of terrorism. This fact enormously complicates the issue of criminal jurisdiction over terrorism. The likely involvement of states as targets or sponsors of terrorism creates an impetus to resort to some authority above the state for the handling of terrorist offenses.

It is easy to understand this impulse to seek an authority above the state for the handling of terrorist offenses when the alternative would be to rely for law enforcement on the very state that has sponsored the terrorist act. Consider, for example, the bombing of Pan Am flight 103, the flight that exploded over Lockerbie, Scotland. It appears that the bombing was in fact sponsored by the government of Libya.²

The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) criminalizes and provides for the prosecution of aircraft bombing.³ Libya, the UK, and the United States each were parties to that treaty at all times relevant to the

2. Libya has formally accepted responsibility for the bombing. See Letter of Aug. 15, 2003 from the Representative of the Libyan Arab Jamahiriya to the President of the U.N. Security Council; see also U.N.S.C. Res. 731, Preamble (1992) (in which the Security Council states that it is "[d]eeply concerned over the results of investigations, which implicate officials of the Libyan government" in the bombing of Pan Am flight 103).

3. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter "Montreal Convention"].

Lockerbie case.⁴ The Montreal Convention provides that whenever an individual suspected of aircraft bombing is found on the territory of a state party to the treaty, that state must either prosecute the suspect or extradite him for prosecution elsewhere.⁵ This provision for “aut dedere, aut judicare” is quite standard in the several multilateral treaties dealing with what would generally be thought of as “terrorist offenses.”⁶

The two suspects in the Lockerbie case were Libyan nationals living in Libya. Libya indicated that it would prosecute the suspects in its own national courts. Since there was evidence that Libya had sponsored the bombing, this posed a problem. The United Kingdom and the United States insisted that Libya not prosecute the suspects but, rather, extradite them to the United States or the United Kingdom for prosecution. The issue was presented to the U.N. Security Council. Based on the evidence that Libya itself was implicated in the crime, the Security Council issued resolution 748, under Chapter VII of the U.N. Charter, effectively requiring the extradition of the suspects.⁷

Libya took the position that the Security Council lacked the authority to issue that resolution. This dispute resulted in cases, brought by Libya against the United Kingdom and the United States, before the International Court of Justice (“ICJ”).⁸

4. See 46 U.N. Y.B.RBK. 52 (1992).

5. Specifically, Article 7 of the Montreal Convention provides: “The Contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.” Montreal Convention, *supra* note 3, art. 7.

6. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention, *supra* note 3; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19; Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668; International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, Dec. 15, 1995, U.N. GAOR 49th Sess., Supp. No. 49, Vol. 1, at 299, U.N. Doc. A/49/49 (1994), 34 I.L.M. 482 (1995); International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 270 (2000).

For an analysis of the jurisdictional provisions of the terrorism treaties and their legal bases and implications, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 60-66 (2001).

7. See U.N.S.C. Res. 748, para. 1 (1992).

8. See Application Instituting Proceedings, I.C.J. Gen. List No. 88, filed 3 March 1992 [Libya v. UK]; Application Instituting Proceedings, I.C.J. Gen. List No. 89, filed 3 March 1992 [Libya v. US].

At the joint request of the parties, on September 10, 2003, the ICJ ordered these cases to be discontinued with prejudice. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Order, I.C.J. Gen. List No. 88, 10 September 2003; Questions of Interpretation and Application of the 1971 Montreal Convention Arising

At the base of that dispute is the legal problem posed by state sponsorship of terrorism. Libya, which would ordinarily be responsible for the enforcement of the law against aircraft sabotage in this case, hardly could be relied upon for that purpose if the government of Libya is in fact responsible for the crime. In this respect, the terrorism treaties, with their "prosecute-or-extradite" structures for jurisdiction, have a built-in limitation: they do not provide for the foreseeable circumstance in which the crime was in fact sponsored by the state that has custody of the suspect.

State-sponsored terrorism has led logically to an impetus toward some form of supra-national authority for the handling of terrorist offenses. Resort to a supra-national authority is sought to safeguard against perpetrators' being shielded from justice by the states that have sponsored their terrorist acts.

The United States and United Kingdom resorted to a supra-national authority in responding to state sponsorship of terrorist crimes in the Lockerbie bombing case. In that instance, the authority resorted to was the U.N. Security Council acting under Chapter VII of the U.N. Charter. To be sure, the purpose of recourse to the Security Council was to gain custody of the defendants for criminal prosecution in the domestic criminal courts of the United States or United Kingdom. But the route through which that outcome was sought to be attained was the supra-national authority of the Security Council.

Another supra-national mechanism that some have advocated for the handling of terrorism cases is the International Criminal Court or "ICC."⁹ The ICC would both provide the supra-national authority to assure that the case would be pursued and, also, constitute the criminal forum in which the case would actually be tried.

The prospect of the ICC serving as an international forum for the prosecution of terrorism presents a number of questions. The next Section will examine the broad policy issues concerning international jurisdiction over terrorism that arise from the political nature of terrorist offenses. The final Section of this essay will then consider particular legal questions concerning the ICC's capacity to adjudicate international terrorism cases. As the political and legal impediments to effective "internationalized" or multi-

from the Aerial Incident at Lockerbie (Libyan Jamahiriya v. United States of America), Order, I.C.J. Gen. List No. 89, 10 September 2003.

That joint request for discontinuance of the cases followed the resolution of the dispute through political channels. See Letter of Aug. 15, 2003 from the Representative of the Libyan Arab Jamahiriya to the President of the U.N. Security Council.

9. The ICC is intended to be a permanent international criminal court. It was established pursuant to a multilateral treaty. Rome Statute of the International Criminal Court, July 17, 1998, U.N. DOC. A/CONF. 183/9 [hereinafter ICC Treaty].

The ICC had not been established at the time of the Lockerbie bombing. However, the use of an *ad hoc* international criminal tribunal was proposed, though ultimately rejected at that time, as a jurisdictional resolution for the Lockerbie dispute. See James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 408 (1995).

lateral prosecution of terrorist offenses are identified, the logic underlying "US unilateralism" in this arena becomes evident.

II. Is Internationalizing Enforcement Good Policy?

It is fairly easy to understand the impulse to internationalize law enforcement—for example, through recourse to the UN Security Council or to the ICC—where the state that would otherwise be relied upon for law enforcement is itself implicated in terrorist offenses. Enforcement by an international authority impedes the capacity of implicated states to shield perpetrators from justice. It is somewhat more difficult, however, to understand the impulse to internationalize law enforcement where the state that would otherwise exercise jurisdiction is not the perpetrator state but, rather, the state that was the target or "victim" of the crime.

Why is it, then, that, when the United States suffered terrorist attacks on September 11, 2001, there were suggestions that prosecutions should be conducted outside of the courts of the United States, in third-party states or in an international tribunal? A major reason appears to be that the United States was viewed, in effect, as a "party to the conflict." The courts of the United States, it was said, could not be relied upon to be neutral or, in any case, might be perceived to be non-neutral. Therefore, some argued, the case should be handled by an entity outside of the principally-affected state: an international court or a third-party state exercising universal jurisdiction.

In fact, this was essentially the same argument as was made by Libya before the ICJ in the Lockerbie case, and the same concern as was expressed by several of the ICJ judges in separate and dissenting opinions in the ICJ's 1992 opinion denying provisional measures in that case. Judge Shahabuddeen, for example, questioned whether the accused could receive an impartial trial in the United States.¹⁰ Judge *ad hoc* El-Kosheri stated that the accused "could not possibly receive a fair trial, neither in the United States or in the United Kingdom, nor in Libya."¹¹

The impulse to internationalize justice processes in this area is an understandable and, perhaps, logical response to the recognition that crimes of terrorism have a political component. Because of the political aspect of international terrorism cases, the reasoning goes, states (be they perpetrator states or target states) are interested parties in these cases. And, as interested parties, states—perpetrator states or target states—cannot be permitted to stand as judges in their own causes.

Internationalization of justice in this field might be a tidy solution to this problem if there were an international institution that states trusted sufficiently to decide these matters. The problem is that this sort of confi-

10. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, 1992 I.C.J. Reports 1992, p. 114, 141 (separate opinion of Judge Shahabuddeen).

11. *Id.* at 216 (Judge *ad hoc* El-Kosheri, dissenting).

dence in international institutions frequently is lacking, and for comprehensible reasons.

States accused of sponsoring terrorism question the legitimacy and the neutrality of the international institutions that would assert authority. Certainly, Libya has challenged the Security Council's action on both of those grounds in the Lockerbie case.

Significantly, states that are the targets of terrorism also have been unwilling to rely upon international handling of those cases. A targeted state may question the effectiveness of international investigative and prosecutorial mechanisms, particularly if the targeted state has highly developed investigative and prosecutorial systems domestically and has substantial resources to devote to the cases. Targeted states also are aware that different states have different interests; not all states are similarly situated relative to terrorism. Targeted states may therefore be unwilling to relegate the handling of terrorism cases to an international court that may have different priorities from those of the targeted state. In addition, a targeted state may question whether the international institution that would handle the cases will share the state's view of the law in this field in which there remain so many differences of interpretation and so many open legal questions.¹² The United States, certainly, declined any suggestion of an international tribunal for prosecution of the crimes of September 11, 2001. Precisely because terrorist crimes do pose a threat to the national security of targeted states, and precisely because terrorist crimes do have volatile political and foreign-relations dimensions, states are particularly wary of relinquishing control over these cases to international bodies.

Having identified some of the difficulties that attend international jurisdiction over crimes of terrorism, it quickly becomes clear that a similar set of weaknesses affects the option of holding terrorism trials in the domestic courts of third-party states under universal jurisdiction. Under the international law doctrine of universal jurisdiction, any state may prosecute individuals for certain international crimes without regard to the territory where the crimes were committed or the nationality of perpetrators or victims.¹³ Universal jurisdiction is thus distinguished from other internationally recognized bases for jurisdiction by the fact that universal jurisdiction is not based on a particular nexus between the offense and the prosecuting state.¹⁴

12. The definition of "terrorism" has itself remained highly controversial. Certainly, there is no international legal definition of the term. The General Assembly debates following September 11, 2001 reflected the highly contentious nature of this question, with Middle East politics virtually assuring that no international consensus on a definition will be arrived at in the near future. See Christian Miller, *U.S. Strikes Back*, L.A. TIMES, Oct. 11, 2001, at p.3.

13. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS 404, 423 (1987).

14. Universal jurisdiction is one among the five bases for jurisdiction comprising the standard list of internationally recognized forms of jurisdiction. Each of the other four jurisdictional bases (territoriality, nationality, passive personality, and protective principle) is founded on a particular nexus between the offense and the state asserting

Two distinct arguments are put forward in favor of universal jurisdiction over terrorism cases. The first is that terrorist crimes are of concern to all states. The second is that third-party states may be relied upon to be more impartial in terrorism cases than the principally-affected states. Neither of those arguments withstands scrutiny.

The first argument for universal jurisdiction over terrorism, that all states have an interest in ensuring accountability for terrorist crimes, is belied by the very existence of state-sponsored terrorism. But, even if we were to accept, *arguendo*, the existence of such a unity of interest at least among states that do not themselves sponsor terrorist crimes (a point which certainly could be debated), the interests of states obviously diverge on a great number of other matters. Because criminal trials for terrorism do not exist in isolation from those other aspects of interstate relations, we may anticipate that universal jurisdiction would sometimes be used as a tool for achieving other political ends. For this reason, third-party states may not be consistently relied upon to be impartial in the handling of terrorism-related cases.

Certainly, we can envision a state selectively targeting for prosecution the officials of another state with which it is in conflict. But, beyond the blatant use of universal jurisdiction to pursue an opponent state in the courtroom rather than on the battlefield, there is the more subtle and, in some ways, more serious problem of states adjudicating cases with such highly politicized content that the political perspective of the prosecuting state (or individual prosecutor) is inevitably consequential. Belgian magistrates, for example, have taken up investigations (with or without subsequent indictment) of Ariel Sharon, Yasser Arafat, Henry Kissinger, Ali Akbar Hashemi-Rafsanjani, Fidel Castro, Saddam Hussein, and others. In such politically charged contexts, the decision of which cases to pursue and which to bypass cannot help but be informed by the political perspectives of the prosecuting state or the individual prosecuting official.

Thus, the second argument for universal jurisdiction over terrorism cases—that third-party states can be relied upon as neutral adjudicators in relation to terrorist acts—is simply unrealistic. Precisely because terrorism has a political component—and international terrorism has an international political component—it would be naive to assume that the state that would step forward to exercise universal jurisdiction would reliably be more neutral or impartial than the principally affected state.¹⁵

The fundamental quandary posed by the position of states as interested parties in terrorism cases lies at the base of the political debate concerning the best configuration of criminal jurisdiction over terrorism. The terrorism treaties, with their “extradite-or-prosecute” clauses, have fallen far short of resolving the difficulties concerning jurisdiction over terrorist

jurisdiction. See generally Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 785-88 (1988).

15. For a fuller consideration of the political implications of universal jurisdiction, see Madeline Morris, *Universal Jurisdiction in a Divided World*, 35 *NEW ENG. L. REV.* 337 (2001).

offenses. Because international terrorism implicates volatile issues of international politics and interstate relations, the extradite-or-prosecute regime for jurisdiction over terrorism is flawed insofar as it relies on states: non-neutral perpetrator states, or non-neutral targeted states, or third-party states that, in fact, cannot be presumed to be—or will not be perceived to be—neutral. Similarly, because of the political features of international terrorism, utilizing international fora for the prosecution of terrorist crimes also does not satisfactorily fulfill the complex requirements for effective enforcement in this field. The inherent political impediments to effective use of international fora for the prosecution of terrorist offenses are well exemplified in the context of the ICC.

III. The ICC as an International Enforcement Mechanism

The political difficulties surrounding the use of international fora for the prosecution of terrorist crimes are reflected in a number of legal constraints on the powers of the ICC. These limitations concern the ICC's jurisdictional structure, its complementarity regime, and the international law of immunities. Unsurprisingly, these legal limitations, which reflect states' political concerns, also in practice place constraints on the ICC's capacity effectively to prosecute crimes of international terrorism.

A. Limitations Arising from the ICC's Jurisdictional Structure

As the subject-matter jurisdiction of the ICC is currently defined, terrorist crimes come within the subject-matter jurisdiction of the ICC only if the particular terrorist acts also constitute genocide, war crimes, or (as is more likely) crimes against humanity. Those are the three crimes currently within the subject-matter jurisdiction of the ICC.¹⁶ Therefore, only if a terrorist act comprised the elements of one of those three crimes would that terrorist act come within the jurisdiction of the ICC.¹⁷ Proposals to include terrorism per se within ICC jurisdiction were defeated in the ICC treaty negotiations process, in part because of politically charged disagreements between states as to the appropriate definition of "terrorism."

In addition to limitations on ICC powers based on subject-matter jurisdiction, there are also limitations on the ICC's exercise of jurisdiction that are based on nationality and territoriality. By the terms of the ICC Treaty, unless the U.N. Security Council refers a case to the ICC, the ICC may exercise jurisdiction only if the crime was committed by the national of or on the territory of a state party to the ICC treaty (or by the national of

16. See ICC Treaty, *supra* note 9, art. 5. While the ICC Treaty also provides for jurisdiction over the crime of aggression, see *id.* art. 5(1)(d), the treaty further provides that the ICC shall not exercise that part of its subject-matter jurisdiction until such time as the treaty is amended to include provisions defining the crime of aggression and setting out the conditions under which the court will exercise jurisdiction over that crime. See *id.*, art. 5(2).

17. Concerning the possibility of future expansion of the ICC's jurisdiction to include terrorism crimes that do not constitute genocide, war crimes, or crimes against humanity, see *infra* Part III.D.

or on the territory of a non-party state that has consented to ICC jurisdiction ad hoc for the matter in question).¹⁸ Consequently, crimes committed on the territory of a non-consenting, non-party state by the national of a non-consenting, non-party state may not be prosecuted before the ICC. In the course of the ICC treaty negotiations, some states advocated that the ICC should be accorded universal jurisdiction (that is, jurisdiction without regard to the territory where the crime occurred or to the nationality of the perpetrator or victim). However, other states prevailed in their view that ICC jurisdiction should be limited, absent Security Council referral, to cases in which a state party to the treaty had territorial or nationality-based nexus to the crime in question (or in which such a state consented ad hoc to ICC jurisdiction.) These limitations on the ICC's exercise of jurisdiction preclude ICC prosecution of terrorist acts committed by a non-consenting, non-party state's national within his own state and, also, terrorist acts committed by a non-consenting, non-party state's national in a different non-party state. Based on the current state of ICC ratifications, these limitations would, for instance, have precluded ICC prosecution of any of the nineteen hijackers responsible for the attacks of September 11, 2001 (had they survived, and had the ICC been established at that time).

In addition to those limitations on the ICC's exercise of jurisdiction that are based on the terms of the ICC Treaty itself, there also is a question about whether the ICC may lawfully exercise jurisdiction when the defendant is a national of a non-consenting, non-party state—even if the crimes were committed on the territory of a state party. Such an exercise of jurisdiction over a non-party national is permitted under the terms of the ICC Treaty. But some states—notably, the US—have argued that such ICC jurisdiction over non-party nationals would be unlawful.¹⁹ This issue remains unresolved, as a political as well as a legal matter. Since state sponsors of terrorism are unlikely to become parties to the ICC Treaty, this issue may be of particular significance in relation to ICC jurisdiction over terrorism offenses.

B. Limitations Arising from the ICC's Complementarity Regime

An additional set of impediments to effective ICC jurisdiction over terrorism offenses is posed by the ICC's "complementarity" regime, encompassed in articles 17-19 of the ICC Treaty. Under article 17, a case is admissible before the ICC only if the states that would otherwise have jurisdiction are unable or unwilling genuinely to investigate and, where appropriate, to prosecute the case in question. The complementarity regime was designed to reflect the position, arrived at in the course of the ICC treaty negotiations, that states should retain primary authority and

18. ICC Treaty, *supra* note 9, art. 12.

19. For a comprehensive treatment of concerns regarding ICC jurisdiction over non-party nationals, see Madeline Morris, *High Crimes*, *supra* note 6. The arguments in that article formed the legal basis of the U.S. position on this issue. See David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 66 n. 68 (2002).

control over prosecutions for international crimes, with the ICC serving as a fail-safe enforcement mechanism of last resort.

The apparatus for implementing the complementarity regime, laid out in Articles 18 and 19 of the ICC Treaty, may allow state sponsors of terrorism opportunities to forestall, if not to prevent, terrorism prosecutions before the ICC. Under Article 18, the ICC prosecutor is required to publicize his or her intention to proceed with an investigation. Notice must be sent to all states parties and to all states that would ordinarily exercise jurisdiction over the crimes in question. At a minimum, this provision would require notice to the state where the crime was committed and to the suspect's state of nationality. This means that, where state-sponsored terrorism is involved, that state sponsor is likely to be among the states entitled to early notice of the prosecutor's intentions. The ICC Treaty does provide that the prosecutor may make such notice confidentially, and may limit the scope of information provided in order to prevent the destruction of evidence or the absconding of suspects. But, where a notified state is complicit with the suspects, those provisions cannot obviate the potential disadvantage to the prosecution.

The obstacles to effective terrorism prosecutions that are posed by Article 18 do not end there. Within one month of receiving notice of investigation from the ICC prosecutor, a state may inform the prosecutor that the state itself is investigating or has investigated the crime in question, and may request that the ICC prosecutor defer to the state's investigation. Having been so requested by a state, the prosecutor may not proceed further with an investigation unless he receives authorization to do so from the ICC's Pre-Trial Chamber.²⁰ Article 18 applies to all cases except those referred by the U.N. Security Council.

An additional determination of the admissibility of a case before the ICC may also be made through a proceeding under Article 19 of the treaty. The Article 19 procedure is applicable to all cases before the ICC, including those based on a referral by the U.N. Security Council. Article 19 permits challenges based on jurisdiction or admissibility. Those challenges may be brought by the accused, by a state with jurisdiction over the case, or by a state whose consent would be required for the ICC to exercise jurisdiction over the case. If a challenge is made by a relevant state, then "the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17."²¹ Challenges under Article 19 may be made before or after confirmation of the charges.

The pre-trial proceedings provided for under Articles 18 and 19 of the ICC Treaty, then, provide opportunities for a state to forestall an investiga-

20. Under Article 18, if the Pre-Trial Chamber declines to authorize the continuation of investigation by the ICC prosecutor, the prosecutor may re-apply subsequently based on new facts or evidence. A determination by the Pre-Trial Chamber on this issue may be appealed by the prosecutor or by the relevant state. The prosecutor may apply for provisional measures in order to preserve evidence during the course of Article 18 proceedings.

21. ICC Treaty, *supra* note 9, art. 19(7).

tion or prosecution. The Treaty does provide that the court may give exceptional authorization to the prosecutor to continue an investigation "where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."²² But, once again, that safeguard, while ameliorating the problem, cannot eliminate it.

Cumulatively, the complementarity provisions of the ICC Treaty would allow a state sponsor of terrorism to impede ICC prosecution of a case. The ICC might, nevertheless, ultimately succeed in concluding an effective and appropriate prosecution. While Article 17 provides that a case shall not be admissible before the ICC where that case is being investigated or prosecuted by a state with jurisdiction over it, an exception is made where that state is determined by the ICC to be unable or unwilling genuinely to carry out the investigation or the prosecution. If the ICC determines that a state is unable or unwilling "genuinely" to proceed, then the ICC, by the terms of the Treaty, may exercise jurisdiction even over the objection of that state. But much time will have passed between the moment when the prosecutor informed a state of his intention to investigate and the time when that state is determined to be—contrary to its protestations—unwilling genuinely to investigate or to prosecute. Perhaps in some cases the outcome will nevertheless, ultimately, be desirable. In other cases, very likely, the ICC's effectiveness will be limited by the exigencies of complementarity.²³

C. Limitations Arising from the International Law of Immunities

The international law of diplomatic, sovereign, and head-of-state immunities embodies the principle of the sovereign equality of states (by prohibiting one state from standing in judgment on the official acts or the head of state of another state) and facilitates diplomatic relations (by prohibiting one state from bringing legal process against a foreign diplomat present on its territory). The law of immunities is thus intended both to reflect the fundamental structures of international law and to facilitate peaceful interstate relations.

If a high government official bears responsibility for the perpetration of a terrorist crime (as may often be the case), that individual may be immune from ICC jurisdiction under the international law of immunities. This problem is not at all evident on the face of the ICC Treaty. Indeed, the Treaty clearly states that immunities will not be recognized for the crimes now within the jurisdiction of the Court.²⁴ However, the international law of immunities cannot in fact be dispensed with so quickly. The problem becomes clear upon examination.

22. ICC Treaty, *supra* note 9, art. 19(6); *see also id.*, art. 95.

23. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 101-103 (2001).

24. *See* ICC Treaty, *supra* note 9, art. 27.

The best starting point for examination of this issue is the 2002 decision of the International Court of Justice (ICJ) in the case of the Democratic Republic of the Congo (D.R.C.) versus Belgium.²⁵ The case concerned an international warrant, issued by Belgium, for the arrest of the then foreign minister of the D.R.C. for crimes including crimes against humanity. The D.R.C. claimed that the international law of immunities was violated by the issuance of that warrant.

The ICJ held that:

The Court . . . concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.²⁶

However, the ICJ majority went on to say that, even though a foreign minister would be immune from criminal proceedings before the courts of another state,

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include . . . the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."²⁷

The ICJ appears to have spoken too broadly in this respect. In fact, if the question is analyzed consistently with the ICJ majority's own holding on immunities, the conclusion must be that the ICC would have the power to prosecute an incumbent foreign minister (or other covered official) of a state that is a party to the ICC Treaty, but would not be empowered to prosecute a covered official of a state that is not a party to the treaty. This point becomes clear when we consider the basis for the ICC's purported jurisdiction over nationals of states that are not parties to the ICC Treaty.

The ICC Treaty provides that, under certain circumstances, the ICC may exercise jurisdiction even over nationals of states that are not parties to the treaty and have not otherwise consented to the Court's jurisdiction. Article 12 provides that, in addition to jurisdiction based on Security Council referral and jurisdiction based on consent by the defendant's state of nationality, the ICC will have jurisdiction to prosecute the national of any state when crimes within the Court's subject-matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents ad hoc to ICC jurisdiction for that case.²⁸ That territorial basis

25. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), I.C.J. General List No. 121, 14 February, 2002.

26. *Id.* at 54.

27. *Id.* at 61.

28. ICC Treaty, *supra* note 9, art. 12.

would empower the Court to exercise jurisdiction even in cases where the defendant's state of nationality is not a party to the treaty and does not consent to the exercise of jurisdiction.²⁹

Advocates of ICC jurisdiction over non-party nationals argue that the foundation for the ICC's jurisdiction over non-party nationals when the crime is committed on the territory of a state party is that the territorial state has delegated its territorial jurisdiction to be exercised by the ICC.³⁰ The reasoning is that, since the territorial state would have the right to prosecute for offenses committed on its territory, the territorial state also has the right to delegate that jurisdiction to be exercised by an international court.³¹

Offering a variant on this rationale, some proponents have contended that ICC jurisdiction over the nationals of non-party states is based upon the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain international crimes. Since any individual state could prosecute perpetrators regardless of their nationality, it is argued, a group of states may create an international court empowered to do the same. Under this theory, each state party, in effect, delegates to the international court its universal jurisdiction.³² Under either theory (delegated territorial jurisdiction or delegated universal jurisdiction), the ICC's jurisdiction over nationals of non-party states rests on the delegated jurisdiction of one or more states.

The overbreadth in the ICJ's reasoning concerning immunity before the ICC now becomes clear. Obviously, states (the territorial state or, under the delegated-universal-jurisdiction theory, any or all states parties) can delegate to the ICC only such jurisdiction as those states have. If states are obliged to recognize a certain immunity, as the ICJ's decision in *Congo v. Belgium* requires, then those states' delegated jurisdiction logically must carry that immunity with it. The consequence is that, if states would be legally required to afford immunity from prosecution to sitting heads of state, foreign ministers, and perhaps other high officials, then the ICC (when acting without Security Council referral and without the consent of the officials' state of nationality) would be similarly constrained.

This immunity before the ICC would apply only to non-party nationals; it would not apply to officials of states parties to the ICC Treaty. States parties waive the immunity of their officials under Article 27 of that treaty, which states that "immunities . . . which may attach to the official capacity of a person . . . shall not bar the Court from exercising its jurisdiction over

29. The issue of ICC jurisdiction over non-party nationals is addressed briefly above, *supra*, III.A.

30. See, e.g., Michael Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMP. PROBS.* 67 (Winter 2001).

31. For full and contrasting treatments of the issue of ICC jurisdiction over non-party nationals, see Morris, *High Crimes and Misconceptions*, *supra* note 6 and Scharf, *supra* note 30.

32. See, e.g., Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, *supra* note 30 at 77. For a critique of this view, see Morris, *High Crimes*, *supra* note 6.

such a person.” But that treaty provision constitutes a waiver of immunity only by states parties. The head of state or foreign minister of a non-party state would maintain immunity.³³ So where an individual responsible for a terrorist crime is a head of state, foreign minister or, perhaps, other high official of a non-party state, the ICC cannot lawfully exercise jurisdiction over that individual, at least not consistent with international immunity principles as articulated in the ICJ’s decision in *Congo v. Belgium*.

D. Additional Limitations Affecting the ICC’s Capacity to Adjudicate Crimes Added by Amendment to the ICC Treaty

The ICC Treaty limits the ICC’s subject-matter jurisdiction to genocide, war crimes, and crimes against humanity.³⁴ However, in the negotiations leading up to the adoption of the ICC Treaty, extensive debate focused on the possibility of encompassing within the jurisdiction of the ICC certain “treaty crimes”—including the terrorism crimes defined in the treaties on hijacking and aircraft sabotage,³⁵ crimes against internationally protected persons,³⁶ hostage taking,³⁷ sabotage of marine navigation,³⁸ and the like. In the course of the negotiations, the decision ultimately taken was to exclude those treaty crimes from the jurisdiction of the Court.³⁹ But Resolution E, adopted at the last moments of the Rome Conference at which the ICC Treaty was adopted, provides for reconsideration of the inclusion of the “treaty crimes.” Resolution E states that the Rome Conference, “[A]ffirm[s] that the Statute of the ICC provides for a review

33. This conclusion is consistent with the thrust of Article 98(1) of the ICC Treaty, which provides that:

[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

ICC Treaty, *supra* note 9, art. 98(1).

34. See *supra* note 9 and accompanying text.

35. See Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 6; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 3; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *supra* note 6.

36. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 6.

37. International Convention Against the Taking of Hostages, *supra* note 6.

38. Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 6.

39. There were a number of reasons for excluding terrorist offenses (as well as drug trafficking and other “treaty crimes”) from the jurisdiction of the ICC under the Rome Treaty. In part, the attempt to include terrorist offenses failed because of states’ disagreement over the proper definition of “terrorism.” See *supra* note 12. In addition, those who advocated exclusion of terrorism argued that the ICC would be unable to investigate terrorism cases as efficiently and effectively as national governments would be able to do and, also, that the inclusion of terrorism and drug trafficking within ICC jurisdiction would overburden the limited investigative and prosecutorial resources of the ICC. See, e.g., *Comments of the United States of America Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary General*, at 10-13, U.N. Doc. A/AC.244/1/Add.2 (1995).

mechanism, which allows for an expansion in future of the jurisdiction of the Court, [and] [r]ecommends that a Review Conference . . . consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."⁴⁰ Therefore, crimes of terrorism—even when they do not constitute genocide, war crimes, or crimes against humanity—may be brought within ICC jurisdiction in the future.

If the ICC Treaty is amended in the future to include terrorist crimes that do not constitute genocide, war crimes, or crimes against humanity, the limitations on the ICC's capacity to prosecute those additional offenses will be greater than those that affect the ICC's jurisdiction over the crimes currently within its jurisdiction. In addition to the existing limitations based on jurisdictional structure, complementarity, and immunities that affect prosecutions for genocide, war crimes, and crimes against humanity, there is a further significant limitation that will apply to offenses added to the jurisdiction of the ICC through amendment of the ICC Treaty. Article 121(5) of the Treaty states that: "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."⁴¹ The ICC treaty amendment process is based on the vote of a super-majority of ICC states parties.⁴² The limiting provision in Article 121(5) was included because states parties were not prepared to relegate future decisions concerning ICC jurisdiction over crimes committed on their territories or by their nationals to a super-majority of ICC states parties. Consequently, with regard to states parties, the ICC would have jurisdiction over terrorist crimes added by amendment only if the crime were committed by the national of a state and on the territory of a state that had accepted the addition of that particular crime to the jurisdiction of the ICC.

The implications of Article 121(5) are less clear for states that are not parties to the ICC Treaty. While the Treaty allows states parties to opt out of ICC jurisdiction over added offenses, the Treaty appears, ironically, to assert ICC jurisdiction over non-party nationals for those same added offenses. The US has proposed language, to be included in the Rules of Procedure for the ICC Assembly of States Parties, which would provide that,

[w]ith respect to a crime added by amendment to the Statute pursuant to article 121, paragraph 5, the court may exercise jurisdiction only if the amendment has entered into force for both the State of nationality of the alleged perpetrator and the State in whose territory the crime was

40. FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, Annex I, Resolution E, adopted 17 July 1998, UN Doc. A/CONF. 183/10.

41. ICC Treaty, *supra* note 9, art. 121(5).

42. ICC Treaty, *supra* note 9, art. 121.

committed.⁴³

That proposal has not been adopted to date, and this issue remains the subject of controversy.⁴⁴ What is clear, at a minimum, is that, if terrorism offenses are added to the jurisdiction of the ICC, states parties may decline to accept this jurisdiction. This opt-out provision represents a significant additional limitation that would affect the ICC's capacity to prosecute terrorist crimes added to the ICC's jurisdiction through amendment of the ICC Treaty.

E. The Potential for ICC Terrorism Prosecutions in Conjunction with Action by the UN Security Council

In sum, when the ICC acts in the absence of a Security Council referral, its ability to exercise jurisdiction over terrorist crimes is limited in a variety of ways reflecting underlying international political concerns. Those constraints may be substantially circumvented in the event that the UN Security Council, acting under Chapter VII of the UN Charter, refers the case in question to the ICC.

Under the terms of the ICC Treaty, when the Security Council refers a case, it is not a precondition to the exercise of the ICC's jurisdiction that the territorial state or the defendant's state of nationality be a party to the treaty.⁴⁵ Complementarity likely also can be circumvented through the use of a Chapter VII resolution (though this is less clear).⁴⁶ (The reasoning here is that, acting under Chapter VII, the Security Council could effectively require a state to forego domestic handling of a case in order for the ICC to handle the matter.) Immunities, evidently, can be abrogated by Chapter VII resolutions, as was done in the Chapter VII resolutions that established the the International Criminal Tribunals for the former Yugoslavia and Rwanda.⁴⁷

If the Security Council were to refer a case to the ICC, and thereby to use its Chapter VII powers to augment the powers of the ICC⁴⁸ (or, for that matter, if the Security Council were to create a separate ad hoc international criminal tribunal to address some particular situation or were to use

43. Working Group on Rules of Procedure and Evidence, Proposal Submitted by the United States of America Concerning Rules of Evidence and Procedure Relating to Part 13 of the Statute (Final Clauses) 2, U.N. Doc. PCNICC/2000/WGRPE(13)/DP.1 (2000).

44. See Scheffer, *supra* note 19, at 81.

45. See ICC Treaty, *supra* note 9, arts. 12(2), 13.

46. See Ruth B. Philips, *The International Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L. FORUM 61, 73, 81 (1999).

47. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 7(2), in *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, U.N. Doc. S/25704 (1993); Statute of the International Criminal Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

48. The present Essay will not consider the actual likelihood of Security Council referrals to the ICC, which may be remote given the relevant political factors including US objections to provisions of the ICC Treaty. See generally, Morris, *High Crimes*, *supra* note 6 (regarding US objections to the ICC Treaty).

its Chapter VII powers to augment or supplement the authority of national courts), we would return, full circle, to the posture of the Lockerbie case, where resort was made to the UN Security Council as the authority “above” the state. In this way, as in so many others, the Security Council wields superordinate powers within the international legal system.

Conclusion

The likely involvement of states as targets or sponsors of terrorism has created an impetus to internationalize law enforcement in this field through the use of international criminal courts, universal jurisdiction, or UN Security Council powers. But the international political features of international terrorism significantly limit the potential scope and efficacy of such internationalizing mechanisms. Consequently, the prosecution of terrorism cases to date is pursued at the national level, largely in the targeted state. To attribute this state of affairs simply to “US unilateralism” is to ignore much of the relevant political and legal context. When the political and legal realities are properly taken into account, it becomes evident that the practice of relying on domestic courts for the prosecution of terrorist offenses—in the US and elsewhere—as imperfect as it is, likely will, and quite probably should, remain in place for the foreseeable future.

