



COVITE

COLECTIVE OF VICTIMS TERRORISM IN THE BASQUE COUNTRY

TERRORISM, INTERNATIONAL CRIME

PROPOSED AMENDMENTS FOR THE INTERNATIONAL CRIMINAL COURT'S REVIEW CONFERENCE

A project to include terrorism among the cases of international crimes within the jurisdiction of the International Criminal Court

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INTRODUCTION

The Collective of Victims of Terrorism in the Basque Country (**COVITE**) has embarked on achieving the International Criminal Court to include terrorism among the cases of international crimes within its jurisdiction.

COVITE, together with two experts, Carlos Fernandez of Casadevante and Valentín Bou, Professors of Public International Law and International Relations at the University King Juan Carlos and the University of Valencia, respectively, and with the support of the Victims of Terrorism Foundation, has embarked on achieving the International Criminal Court to include terrorism among the cases of international crimes within its jurisdiction.

A. PRESENTATION OF COVITE

The **Collective of Victims of Terrorism in the Basque Country (COVITE)** is an association of victims of different terrorist groups that have operated in the Basque Country, mainly of ETA. COVITE was born in 1998 to denounce years of institutional neglect and to vindicate their voice and their right to democratic justice. For over ten years of work, COVITE found that all issues related to **justice** are both those that bind most closely all the victims of terrorism and those that more uneasiness produces to them, regardless of terrorist authorship, of the time or the geographical area where the crime occurred. The faith in the Administration of Justice that all the victims profess at the end is no more than an attempt to reconstruct the cracked relationship with the aforementioned human condition.

COVITE, along with other Spanish associations of victims of terrorism, especially the Victims of Terrorism Foundation, works to eliminate areas of **impunity** for terrorists and is working with governmental branches to improve the evolving legislation in this field towards this goal, contributing in its own capability from the actual knowledge of the situations, experiences and necessities of the victims.

In relation with this initiative, Terrorism, International Crime, COVITE is working to provide **academic arguments**, fostering **analysis** and looking for **government** and **non-government support** to reach an aim that seems praiseworthy and become an achievement for the international protection of human rights. This initiative is consistent with the world-wide conscience against terrorism, with the increasingly widespread expressions of rejection caused by terrorism, as

much as other singularly reprehensible crimes like genocide, crimes against humanity, war crimes and the crime of aggression.

B. ELEMENTS THAT RENDER THE CRIMES OF TERRORISM AS SINGULARLY REPREHENSIBLE CRIMES

There are three components that render the crimes of terrorism as singularly reprehensible crimes and approach terrorism to the status of crimes against humanity:

- 1) The **exemplary action** that attacks large segments of the population
- 2) The **objective dehumanization of the victim** and of human life considered as a simple means to reach a collective achievement of a presumed superior character
- 3) The attempt to undermine human and democratic structures and societies.

1. The exemplary action

The totalitarian character of the terrorist action is concreted in its contempt for the individual against the supposed supremacy of the collective. This, that for too many eyes constitutes a mitigating factor, should develop into a moral aggravating circumstance. Terrorism threatens and extorts large segments of a population through the implementation of an **exemplary** and **selective** violence. Thus, through individual assassinations, the terrorist succeeds in spreading fear, terror and threat among an important part of the components of a single society. This exemplary and expansive character is the feature that best reveals a greater criminal load, since while the entire humanity is not attacked and persecuted, at least a large percentage of people in a society is in fact attacked and persecuted, either for ideological, ethnic, political or religious reasons, a feature that more experts each time begin to consider as a process of **macro-victimization**.

2. The objective dehumanization of the victim and of human life

In the crimes of terrorism the victim and human life are considered as a simple means to reach a collective achievement of a presumed superior character. The victim and human life are considered by terrorists as a simple means to reach a collective achievement of a presumed superior character.

The victims of terrorism go a process of added victimization as the reason for the attack they suffered is far away from the mere individual existence of the own victim, a factor that further dehumanizes the primary violent action. When a surviving victim is able to overcome certain stages of physical and psychological recovery, the victim verifies that one of the aspects that most has been able to change in their previous perceptions and vision of the world is the general loss of confidence in the human

condition. It is the very human condition that has finally come to attack them, to assassinate a loved person or who has intentionally violated the existence of a fellow man or woman.

3. The attempt to undermine human and democratic structures and societies

Terrorism also tries to undermine from their interior the systems, organizations, societies and States that enjoy an established democratic character. What the terrorists can not get through a participatory and democratic way becomes an aim linked to terror. If at a time it was possible to reach consensus on certain legal concepts in international law, conceived as crimes against humanity, this has been done, without doubt, from the side of those who over the past century won and defeated totalitarian projects.

PROPOSED AMENDMENTS FOR THE INTERNATIONAL CRIMINAL COURT'S REVIEW CONFERENCE

A. EXPLANATION

There are **two legal ways** to include terrorism among the international crimes within the jurisdiction of the International Criminal Court:

1. The inclusion of terrorism as a particular offence among international crimes against humanity
2. The inclusion of terrorism as a new and independent international crime

1. The inclusion of terrorism as a particular offence among international crimes against humanity

The first way consists in proposing the inclusion of terrorism as a particular offence among international crimes against humanity. In this case, it would suffice with the introduction of two very simple subsections in Article 7 of the Statute, entitled "Crimes against humanity".

- Firstly, Article 7 (1) enumerates in consecutive subsections different offences that "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" constitute "crimes against humanity". In Article 7 (1), the following subsection might be included: "(k) acts of terrorism", and then re-enumerate present subsection "(k)" as subsection "(l)"²³⁷.
- Secondly, Article 7 (2) ¹ of the Statute provides for a definition (not an exhaustive list) of the different offences that constitute crimes against humanity. In Article 7 (2), the following subsection might be included: "(j) «Acts of terrorism» means acts 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

¹ The present text of Article 7 (1) (k) enjoys a residual character ("Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health") that must be kept as a residual provision.

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". As far as this definition of "acts of terrorism" is taken from Resolution 1566 (2004) adopted by the Security Council on 8 October 2004, acting under Chapter VII of the Charter of the United Nations², it should provoke neither rejection nor opposition by the participating States in the Review Conference.

Moreover, it must be pointed out that, for crimes against humanity, **international jurisprudence** has framed the "gravity" requirement of a conduct in order to be considered as an international crime ("the most serious crimes of concern to the international community as a whole", pursuant to Article 5 of the Rome Statute) in the context elements of crimes against humanity, that is, when the listed conducts are committed "as part of a **widespread** or **systematic attack** directed against any civilian population"³. It is especially interesting for the inclusion of acts of terrorism among crimes against humanity to note that, in its Final Report on the draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission held that terrorism (or the term "policy of terror") could satisfy either of these two alternative requirements.

Hence, on the "**widespread attack**" requirement, the **International Law Commission** held that:

"[This] alternative requires that the inhumane acts be committed «**on a large scale**» meaning that the acts are directed against a **multiplicity of victims**. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Charter of the Nierenberg Tribunal did not include this second requirement either. Nonetheless the Nierenberg Tribunal further emphasized that the policy of terror was «certainly carried out on a vast scale» in its consideration of inhumane acts as possible crimes against humanity. The term «mass scale» was used in the text of the draft Code as adopted on first reading to indicate the requirement of a multiplicity of victims. This term was replaced by the term «large scale» which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, **as a result of the cumulative effect of a series of inhumane acts** or the singular effect of an inhumane act of extraordinary magnitude"⁴

On the second alternative requirement, that is, on the "systematic attack", the **International Law Commission** considered that:

² Security Council Resolution 1566 (2004) of 8 October 2004, paragraph 3.

³ A good analysis of both alternative requirements may be found in: TORRES PÉREZ, M., *La responsabilidad internacional del individuo por la comisión de crímenes de lesa humanidad*, 2007, Valencia, Tirant lo Blanch, pp. 109 y ss.

⁴ United Nations, "Report of the International Law Commission on the work of its forty-eighth session", *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, p. 47, paragraph 4.

“This alternative requires that the inhumane acts be «committed in a **systematic manner**» meaning pursuant to a **preconceived plan or policy**. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Charter of the Nierenberg Tribunal did not include such a requirement. Nonetheless the Nierenberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were «in many cases... organized and systematic» in considering whether such acts constituted crimes against humanity”⁵

2. Terrorism as a new and independent international crime

The second way for including terrorism among the international crimes within the jurisdiction of the International Criminal Court consists in proposing the inclusion of terrorism as a new and independent international crime. In this case, Article 5 (1) of the Statute ought to be modified, as well as a new Article 8A should be introduced.

- Article 5 (1) of the Statute lists the international crimes included within the jurisdiction of the Court. The following subsection should be included into Article 5 (1): “(e) Crimes of terrorism”.
- As a novelty, Article 8A, entitled “Crimes of terrorism”, should be added. This Article might be structured in two sections. Section 1 of Article 8^a should be devoted to require a minimum threshold of gravity for crimes of terrorism in order to be included within the jurisdiction of the International Criminal Court. By analogy with Article 8 (1) concerning war crimes, section 1 of Article 8A could have the following wording: “1. The Court shall have jurisdiction in respect of crimes of terrorism in particular when committed as part of a plan or policy or as part of a largescale commission of such crimes”. Section 2 of Article 8A should be devoted to contain an exhaustive list of offences considered as crimes of terrorism. Its wording could be the following:

“2. For the purpose of this Statute, «crimes of terrorism» means any of the following acts when 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:

(a) attacks upon a person’s life which may cause death;

(b) attacks upon the physical integrity of a person;

⁵ Ibid, paragraph 3.

- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h)''.

The heading of this section follows **Resolution 1566 (2004)** adopted by the Security Council on 8 October 2004, acting under Chapter VII of the Charter of the United Nations; hence its acceptance should provoke neither rejection nor opposition by the participating States in the Review Conference⁶. The question of the exhaustive list of offences that might be considered as crimes of terrorism is more complex. The draft proposal is taken from the European Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,⁷ which is considered as the most complete international legal instrument on combating terrorism.

THE PROPOSAL TEXT OF THE PROPOSED AMENDMENTS

The present proposal submits a double alternative proposal, consisting in,

1. Submitting firstly, the inclusion of crimes of terrorism within the Statute as a new and independent crime (the second proposal previously commented).

⁶ Security Council Resolution 1566 (2004) of 8 October 2004, paragraph 3.

⁷ Official Journal of the European Communities, L 164, 22.6.2002, p. 3-7.

2. In case of (1) not being accepted, it proposes as an alternative the inclusion of acts of terrorism among the offences of crimes against humanity (the first proposal previously commented).

With these precedents, the text of the articulated proposed amendments that are submitted to the Review Conference would be the following.

1. OPTION 1: include the crimes of terrorism into the Statute of the International Criminal Court as a new and independent crime

In order to reach this aim:

1. Modify the present Article 5 of the Statute, adding the following subsection: “(e) Crimes of terrorism”.
2. Introduce the following Article 8A into the Statute of the International Criminal Court:

“Article 8A. Crimes of terrorism

1. The Court shall have jurisdiction in respect of crimes of terrorism in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, «crimes of terrorism» means any of the following acts when 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:

 (a) attacks upon a person’s life which may cause death;

 (b) attacks upon the physical integrity of a person;

 (c) kidnapping or hostage taking;

 (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

 (e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h)".

2. OPTION 2: Should the first proposal would not be accepted, include the acts of terrorism among the offences that constitute crimes against humanity in the Statute of the International Criminal Court

In order to reach this aim:

1. Re-enumerate present subsection (k) of Article 7.1 of the Statute as the new subsection (l) of this Article.

2. Introduce as the new subsection (k) of Article 7.1 of the Statute the following text:

“(k) acts of terrorism”.

3. Introduce the following subsection in Article 7.2 of the Statute:

“(j) «Acts of terrorism» means acts 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”.

THE CONVENIENCE OF THIS CONSIDERATION

The discussion by States Parties to the Treaty of Rome about considering terrorism an international crime is necessary in accordance with the universal persistence of terrorism at the beginning of this century. Terrorism is not just a local phenomenon that perverts the democratic rules and leave their individual victims dispossessed of rights. Crimes of terrorism afflict the entire international community and is one of the major security problems for the free co-existence. Without doubt, the legal precisions must be assessed, analyzed and studied if only for a simple consideration for the international victims of terror, no matter how complicated it is to achieve decisions. We are aware of the dimension of the challenge.

In this regard, there have been international developments, insufficient but relevant advances: unequivocal statements on the heinous nature of the crimes of terrorism. In 2006, the United Nations Secretary General in his annual Report entitled "United against terrorism" pointed out that "the United Nations must project a clear and immutable message based on the principle that terrorism is unacceptable whatever are the pretended causes to defend, regardless of the injustices that they try to respond, terrorism can not be justified".

The advantages to include the crimes of terrorism within the jurisdiction of the International Criminal Court are multiple: it would avoid impunity, it would guarantee the non-applicability of statute of limitations for the crimes of terrorism, it would ensure the right of victims to the application of Justice, it would reinforce the international position and role of victims, who repeatedly at international conferences have positioned in favour to support this claim.

The victims of terrorism who have rejected the vengeance and assumed the imperfect protection of laws, courts and the judicial system defend the need for international improvement of a universal justice that recognizes and protects them in the deep dimension of their victimization.