KICKING A HABIT OF IMPUNITY: A CALL TO PROSECUTE IN THE ICC PERSONS WHO FINANCE TERRORISM THROUGH THE DRUG TRADE

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ABSTRACT

Despite recent efforts to combat sources of terrorist financing, the drug trade continues to provide terrorist organizations with the means to finance their operations. International legal instruments currently in force, including the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the International Convention for the Suppression of the Financing of Terrorism, have fallen short in their attempts to curb drug trafficking and terrorist financing. These shortcomings can be attributed in large part to the unwillingness and inability of state authorities to prosecute domestically alleged drug traffickers and terrorist financiers. In light of the problems associated with prosecutions at the domestic level, as well as the seriousness of financing terrorism through the drug trade, prosecutorial solutions should be sought within international institutions. Because the International Criminal Court has jurisdiction over the most serious crimes concerning the international community and can effectively leverage the power of complementarity, persons who provide to terrorists funds raised through the drug trade should be prosecuted in the ICC.

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I. INTRODUCTION

“I knew the money would be used by the Taliban to buy weapons, but I had to pay the tax,” said Rahman Turabi to Afghan and NATO officials investigating recent attacks on NATO forces in Afghanistan. Turabi, an Afghan national, owns thirty hectares of land in Helmand Province, Afghanistan. Turabi uses the land exclusively to farm poppy, a crop used to cultivate opium. The Taliban, Afghanistan’s governing authority and a designated terrorist organization, has levied a twelve percent “tax” on all opium harvests in the region. As a result, Turabi pays to Taliban tax collectors approximately $400 per year (twelve percent of profits earned from his opium harvests). Tax revenues are used, in large part, to finance the Taliban’s armed attacks against NATO forces currently deployed in Helmand Province. Although Turabi is personally opposed to drug use, he refuses to cultivate other crops because opium sales are the most lucrative. Turabi is not affiliated with the Taliban or any other terrorist organization (in fact, he opposes radical Islamist ideology altogether). During the Taliban’s rule, there have been no prosecutions of drug traffickers in Afghanistan.

“This is a revolution! We will do whatever it takes to liberate our brothers and sisters from the yoke of imperialism perpetuated by the Colombian government,” shouted Maria Alberto as she fled unabated—from Colombian police officers. Alberto, a Colombian drug smuggler, is a former Colombian drug lord notorious for her “nasty temper and penchant for unyielding violence.”

1. All persons, numbers, and events described in this section are hypothetical.

national, is second-in-command of the Revolutionary Armed Forces of Colombia (FARC), a recognized terrorist organization in Colombia. Alberto, often referred to simply as “La Reina” (or, the “Queen,” which is shorthand for the “Queen of Narcotics”), has been affiliated with the FARC for over twenty years. Fueled by a propensity for violence, she rose quickly through the FARC’s ranks and has become one of the most feared persons in all of Latin America. She is based in the coastal city of Cartagena, Colombia, and frequently traffics cocaine to the United States via southern Florida. She traffics about one thousand kilograms of cocaine per month. Profits derived from her trafficking activities exceed $30 million per year. Most of this money is used to acquire weapons for FARC guerrillas, who regularly wage armed attacks on Colombian government entities and officials, including judges, prosecutors, and investigators. Last year, such attacks resulted in the deaths of over three hundred Colombian law enforcement officers, as well as five Colombian judges and four Colombian prosecutors. Although Alberto is one of the most wanted persons in the region, prosecutors and law enforcement in Colombia have privately refused, out of fear of reprisal, to pursue and arrest members of the FARC. Judges have also made clear they will summarily dismiss any case involving FARC members.

“Terrorism and drugs go together like rats and the bubonic plague. They thrive in the same conditions, support each other, and feed off each other.” Like the bubonic plague in the Middle Ages, terrorism has spread rampantly across the world and caused tens of thousands of deaths, particularly in the past few decades. As a result, states have devoted significant attention and resources to combat terrorism through military means, most notably in the “War on Terror” led by the United States. Recently, however, states have augmented counterterrorism policies with non-military efforts. Indeed, states have focused more intently on disrupting the sources upon which terrorist organizations rely to carry out attacks. In particular, states have targeted sources of terrorist financing and the vehicles used to transmit funds clandestinely to terrorist organizations, such as money laundering practices. In 1999, for example, the United Nations General Assembly adopted the Inter-

5. See generally Mary Alice Young, Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking (2013) (discussing international anti-money laundering efforts).
national Convention for the Suppression of the Financing of Terrorism, which required, inter alia, States-Parties to pass domestic legislation criminalizing the act of raising funds for terrorist activities.\(^6\)

Although anti-money laundering efforts disrupt facilitating agents of terrorist financing, these efforts do little to root out and choke off the underlying sources of revenue, namely, the drug trade. The lack of attention given to the nexus between terrorism and the drug trade is particularly disturbing in light of the amount of revenue provided to terrorists by the drug trade, as well as the inability of states to effectively prosecute those who use funds derived from the drug trade to finance terrorist activities.\(^7\)

In order to shed light on the alarming nexus between terrorism and the drug trade, Part II of this Paper examines two historical cases: the Taliban in Afghanistan and the Revolutionary Armed Forces of Colombia (FARC). Part III first discusses the existing state of international law with respect to drug trafficking and terrorist financing, and then identifies challenges faced at the domestic level in terms of enforcement of international law. The primary challenged identified is the inability and/or unwillingness of state authorities to prosecute alleged drug traffickers and terrorist financiers. Part IV argues that the jurisdiction of the International Criminal Court should be expanded to allow for the prosecution of persons who provide to terrorist organizations funds raised through the drug trade. Part IV also proposes a draft amendment to the Rome Statute delineating the scope of the International Criminal Court’s jurisdiction over such prosecutions. Part V revisits the hypothetical Taliban and FARC cases and argues only the hypothetical FARC member could—and should—be prosecuted in the International Criminal Court.

II. THE INTERSECTION OF TERRORISM AND THE DRUG TRADE

“Terrorism consists of two components: ideology and money. Ideology is slow; money is fast. And when it comes to choose sides in the war on terrorism, it’s clear that nothing talks louder than money—lots of it.”\(^8\)

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Money is essential to terrorist organizations. Terrorists need money to recruit and train members, bribe government officials, acquire weapons, develop communication networks, disseminate propaganda, establish camps, and build political support. Thus, terrorists are constantly searching to secure reliable sources of funding. Historically, many terrorists were sponsored financially by states or state entities. However, state-sponsored terrorism has decreased noticeably in the modern age. In order to fill some of the financial vacuum left by the decline of state sponsors, terrorist organizations “turned to other illicit means of financing.”

In particular, terrorists turned to the drug trade as a source of funding. As a result, the traditional line between the drug trade and terrorism has been “blurring, crossing, and mutating as never before.” The reason terrorists turned to the drug trade is obvious: the drug trade offers a “financial windfall” to terrorists and allows them to clandestinely distribute funds across financial networks established by the narcotics industry that are thoroughly organized and difficult to detect. In 2004, for example, the United Nations Office on Drugs and Crime estimated that $2 to $3 billion of all revenues from the drug trade ended up in the hands of terrorist organizations. More recent estimates put the figure at around $7 to $8 billion. As a result, the drug trade has become the most common and lucrative source of terrorist financing. Thus, it is no wonder why, in the early 2000s,

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10. See Gurulé, supra note 7, at 21.
11. Durnagol, supra note 9, at 67.
13. See id. at 317.
14. Id.
16. Id.
17. Id.
18. See Durnagol, supra note 9, at 68.
one-third of the terrorist groups included on the U.S. Department of State’s Foreign Terrorist Organizations List were involved in drug trafficking.\(^{22}\)

The nexus between terrorism and the drug trade is best exemplified in two recent cases: (A) the Taliban in Afghanistan and (B) the Revolutionary Armed Forces of Colombia.\(^{23}\) Considered the “blue chips” of the illicit narcotics industry, the Taliban and FARC have received worldwide notoriety for their ability to derive massive revenues from the drug trade in their respective countries.\(^{24}\) Although the two organizations benefited from fortuitous geography (both groups developed near drug trafficking hotspots—Afghanistan in Asia’s “Golden Crescent” and Colombia in South America’s Andean region),\(^{25}\) the two have taken somewhat different approaches to the drug trade in order to extract revenues.

**A. The Taliban in Afghanistan**

Between 1996 and 2002, the Taliban, an Islamic fundamentalist organization, was the primary ruling authority in Afghanistan and, according to U.S. Drug Enforcement Administration reports, controlled as much as ninety-six percent of the opium-growing area in Afghanistan.\(^{26}\) Because narcotics were seen as against traditional

\(^{22}\) Ehrenfeld, supra note 3.

\(^{23}\) The Taliban and FARC are leading examples of the nexus between drug trafficking and terrorist financing. However, this problem is not exclusive to Afghanistan and Colombia; Southeast Asia, among others, is plagued by this problem as well. For instance, Abu Sayyaf, a terrorist organization based in the Philippines, relies on drug trafficking to finance its operations. For further discussion about Abu Sayyaf’s reliance on drug trafficking, see Ehrenfeld, supra note 3, at 168.

\(^{24}\) The Threat Posed from the Convergence of Organized Crime, Drug Trafficking, and Terrorism, supra note 15.

\(^{25}\) Jonathan M. Winer, *Globalization, Terrorist Finance, and Global Conflict—Time for a White List?*, in Financing Terrorism 5, 6 (Mark Pieth ed., 2002) (“It is no accident that each of the three countries which produce most of the world’s opium and coca crops—Afghanistan, Burma, and Colombia—have ongoing insurrections fuelled by drug money, in which terrorist acts . . . have become a common element of daily life.”). See International Global Terrorism: Its Links with Illicit Drugs as Illustrated by the IRA and Other Groups in Colombia: Hearing Before the H. Comm. on Int’l Relations, 107th Cong. 37 (2002) (statement of Asa Hutchinson, Adm’t, Drug Enforcement Admin.) (“Afghanistan is a major source country for the cultivation, processing and trafficking of opiate and cannabis products. Afghanistan produced over 70% of the world’s supply of illicit opium in 2000.”).

Islamic law, however, the Taliban imposed a “ban” on the production of poppy, a key opium ingredient, and levied a “religious tax” on the trade of manufactured drugs.\textsuperscript{27} Opium harvests were taxed at around twelve percent, heroin manufacturing labs were taxed at about $70 per kilogram, and transportation permits were issued for $250 per kilogram of heroin.\textsuperscript{28}

Despite its ostensible opposition to narcotics, the Taliban went beyond taxation and actually trafficked drugs.\textsuperscript{29} The United Nations found that the Taliban had even stockpiled drugs for sale.\textsuperscript{30} This finding led many to conclude that the Taliban’s purported “ban” on poppy production was a “coldly calculated plot” and “cynical joke” meant to control the international market prices for opium and heroin.\textsuperscript{31} In all, the Taliban received over $50 million per year\textsuperscript{32} and approximately eighty percent of its total revenue from the drug trade.\textsuperscript{33} According to the United Nations Committee of Experts on Afghanistan, the Taliban used money raised from taxing and trafficking drugs to purchase weapons, train terrorists, and finance the operations of extremists.\textsuperscript{34}

B. The FARC in Colombia


\begin{itemize}
\item \textsuperscript{27} Id. As explained later, the Taliban’s religious “ban” and “tax” were both part of a scheme to increase its profits from the drug trade. See infra text accompanying note 31.
\item \textsuperscript{28} The Threat Posed from the Convergence of Organized Crime, Drug Trafficking, and Terrorism, supra note 15.
\item \textsuperscript{29} Drug Trade and the Terror Network, supra note 26, at 5.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. See Bantekas, supra note 12, at 318.
\item \textsuperscript{32} Drug Trade and the Terror Network, supra note 26, at 5.
\item \textsuperscript{33} The Threat Posed from the Convergence of Organized Crime, Drug Trafficking, and Terrorism, supra note 15.
\item \textsuperscript{34} Drug Trade and the Terror Network, supra note 26, at 7.
\item \textsuperscript{35} Sanderson, supra note 21, at 51.
\end{itemize}
regions and exacting tolls on the transit of drugs. However, the FARC quickly took a more active role in the cultivation, refining, and trafficking processes. As a result, the FARC became involved in the drug trade from beginning to end. The FARC’s active involvement in all aspects of the drug trade (from beginning to end) allowed it to acquire weapons and provide money-laundering services, which elevated the organization from a local guerrilla insurgency to an international terrorist network.

At its peak, the FARC derived more than half of its annual income from the drug trade. Although statistics vary, estimates suggest the amount reached approximately $300 million per year, making the FARC one of the best-funded terrorist organizations in the world. The FARC used this drug money to recruit supporters, acquire weapons, and become “the most violent, disruptive, and destabilizing terrorist organization in the Western Hemisphere.” As a result, the FARC represents perhaps the best current example of the alarming nexus between the drug trade and terrorism.

III. The State of International Law and “Narco-Terrorism”

“[T]he chief purpose of the international conventions [governing drug trafficking and terrorist financing] seems to be illusory—to create the impression that steps are being taken to remedy a situation, while in reality nothing is accomplished.”

37. Ehrenfeld, supra note 3, at 160.
39. See Ehrenfeld, supra note 3, at 160 (linking the FARC to terrorist organizations across the world, including the Irish Republican Army, Al Qaeda, and Hezbollah).
40. Library of Cong., supra note 36, at 51 (finding the FARC obtained as much as 62 percent of its income from the drug trade in the early 1990s).
41. International Global Terrorism, supra note 25, at 27. Conservative estimates suggest the FARC received about $180 million annually, while other reports—accounting for the FARC’s control of coca crops—estimate the FARC earned approximately $600 million per year; Library of Cong., supra note 36, at 54-56.
42. Library of Cong., supra note 36, at 56.
43. Id.
44. International Global Terrorism, supra note 25, at 27.
45. Sanderson, supra note 21, at 51.
46. Ehrenfeld, supra note 3, at 178.
The convergence of drug trafficking and terrorism (sometimes referred to as “narco-terrorism”) poses a grave threat to international peace and security. Asa Hutchinson, former Administrator of the U.S. Drug Enforcement Administration, remarked that this convergence posed “the greatest challenge of all” in the fight against global terrorism. Although the international community has responded to this challenge with a series of conventions and resolutions, the current international legal regime lacks an international enforcement mechanism and struggles noticeably in terms of ensuring enforcement at the domestic level, particularly with respect to the prosecution of offenders.

A. Today’s International Regime

The international community has addressed the convergence of drug trafficking and terrorism by dealing with each of the two issues separately. The rampant use of illegal narcotics—and resulting deaths—in the latter half of the twentieth century prompted the international community to take action in order to curb the production, distribution, and sale of drugs. In 1988, these efforts culminated in the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “Drug Trafficking Convention”).

The Drug Trafficking Convention recognizes that trafficking in illicit narcotics constitutes an “international criminal activity,” and calls on States-Parties to criminalize and prosecute under domestic law certain offenses related to drug trafficking. In addition, the Drug Trafficking Convention sets forth measures to confiscate proceeds and substances, extradite offenders, provide mutual legal assistance, and facilitate cooperation amongst States-

47. International Global Terrorism, supra note 25, at 25.
48. See infra Part IV(B).
51. See Drug Trafficking Convention, supra note 49, at arts. 3–4.
Two related United Nations Security Council (UNSC) Resolutions bolster the Drug Trafficking Convention. UNSC Resolution 1214 demands the Taliban “halt the cultivation, production and trafficking of illegal drugs.” Similarly, UNSC Resolution 1333 demands the Taliban “halt all illegal drug activities . . . the proceeds of which finance Taliban terrorist activities.”

More than a decade after adopting the Drug Trafficking Convention, the international community turned its attention to terrorist financing. In 1999, the United Nations General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism (hereinafter “Terrorist Financing Convention”). The Terrorist Financing Convention not only recognizes terrorism as “criminal and unjustifiable,” but also sets out a definition of terrorism. Moreover, the Terrorist Financing Convention calls on States-Parties to prevent and prosecute under domestic law acts that directly or indirectly finance terrorism, including illicit drug trafficking. UNSC Resolution 1373, passed in the wake of the September 11, 2001 terrorist attacks, reinforces the Terrorist Financing Convention and calls on states to prevent, suppress, criminalize, and punish under domestic law the financing of terrorist acts.

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52. See id. at arts. 5-9.
54. S.C. Res. 1333, ¶ 9 (Dec. 19, 2000). There are no similar UNSC Resolutions with respect to the FARC.
56. BIBI VAN Ginkel, THE PRACTICE OF THE UNITED NATIONS IN COMBATING TERRORISM FROM 1946 TO 2008: QUESTIONS OF LEGALITY AND LEGITIMACY 161 (2010). See Terrorist Financing Convention, supra note 6, at art. 2(1) (defining terrorist act as any “act intended to cause death or serious bodily injury to a civilian . . . when the purpose of such act . . . is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”).
57. See Terrorist Financing Convention, supra note 6, at art. 4.
B. Shortcomings in the International Regime

To date, the current international regime has fallen short in its efforts to curb drug trafficking and terrorism (via terrorist financing). For one, the drug trade continues to flourish, particularly in Afghanistan and Colombia. Between 2013 and 2014, opium production in Afghanistan increased by seventeen percent, while cocaine production in Colombia increased by twelve percent.\(^59\) There is also evidence that heroin from Afghanistan has recently reached new markets in Southeast Asia.\(^60\) Moreover, terrorism continues to wreak havoc throughout the world. Since 2000—a year after the conclusion of the Terrorist Financing Convention—the world has experienced a fivefold rise in terrorism.\(^61\) Although terrorist organizations such as the Taliban primarily target private property and citizens, attacks on law enforcement personnel have increased noticeably over the past few years.\(^62\) As Rachel Ehrenfeld, founder of the American Center for Democracy and expert on terrorist financing and law enforcement, explains,

Although the [Terrorist Financing Convention] has been in place since 1999, it evidently has had little or no effect upon the behavior of signatories, or upon the flow of money to terrorist organizations . . . . The same can be said for the [Drug Trafficking Convention]; since this convention’s adoption, drug trafficking and drug money laundering, instead of decreasing, have increased exponentially.\(^63\)

One of the main reasons why the international regime has fallen short is because it depends entirely on enforcement through prosecution\(^64\) at

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\(^{60}\) UN World Drug Report, supra note 26, at 23.

\(^{61}\) INSTITUTE FOR ECONOMICS AND PEACE, GLOBAL TERRORISM INDEX 12 (2014), http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdf [hereinafter GLOBAL TERRORISM INDEX REPORT]. According to the Institute of Economics and Peace, this means that the number of deaths resulting from terrorist acts in 2013 was about five times more than the number of deaths resulting from terrorist acts in 2000. Id. at 13.

\(^{62}\) Id. at 29.

\(^{63}\) EHRENFELD, supra note 3, at 177. Cocaine and heroin are the most trafficked drugs. UN World Drug Report, supra note 26, at 12.

\(^{64}\) Of course, there are other forms of enforcement, such as civil penalties and seizures. However, this Paper focuses exclusively on prosecution. For further discussion on private civil causes of action, see GURULÉ, supra note 7, at 12.
the domestic level.\textsuperscript{65} However, states have demonstrated an unwillingness and/or inability to prosecute drug traffickers\textsuperscript{66} and terrorist financiers.\textsuperscript{67}

Corruption and intimidation are perhaps the biggest reasons why states have been unwilling and/or unable to prosecute drug traffickers.\textsuperscript{68} Due to the proliferation of the drug trade, “[t]he practice of narcotics-related corruption has attained previously unimagined levels of scale, deeply wounding the State at its very heart, penetrating its key institutions like a cancer, eating away at their flesh, subverting the highest levels.”\textsuperscript{69} Most notably, profits derived from the drug trade have been used to bribe law enforcement officials, prosecutors, witnesses, judges, and jurors in order to avoid capture and punishment.\textsuperscript{70} Both Afghanistan and Colombia are leading examples of such corruption.\textsuperscript{71} According to the U.S. Department of State’s 2015 International Narcotics Control Strategy Report, corrupt practices in Afghanistan include facilitating drug-related activities, benefiting from drug trade revenues, and utilizing law enforcement officials to avoid capture and punishment.

\textsuperscript{65} Molly McConville, \textit{A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court}, 37 AM. CRIM. L. REV. 75, 76 (2000). Although the International Narcotics Control Board (INCB) was established to oversee the Drug Trafficking Convention, the INCB does not have authority to enforce implementation or punish non-compliance. Id. at 87-88. Similarly, the sanctions committee created under UNSC Resolution 1333 has little effect in practice because it cannot regulate the circulation of products, such as narcotics, that are carried outside legitimate markets. Bantekas, \textit{supra} note 12, at 318.

\textsuperscript{66} McConville, \textit{supra} note 65, at 75-76 (“Despite the best efforts of nations to cooperate, prosecution under the current enforcement system fails to keep pace with the traffickers.”).

\textsuperscript{67} See \textit{GURULÉ}, \textit{supra} note 7, at 11 (finding a lack of prosecutions in the United States under the legislation implementing the International Convention for the Suppression of Terrorist Financing).

\textsuperscript{68} See Winer, \textit{supra} note 26, at 6 (noting the drug trade is a “generator of corruption and weakened governance”); see also Sanderson, \textit{supra} note 22, at 50; Anne H. Geraghty, \textit{Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World’s Most Pervasive Problems}, 16 FLA. J. INT’L L. 971, 382 (2004).


and thwarting prosecution.\textsuperscript{72} Similarly, in Colombia, despite efforts to crack down on corruption, narcotics-related corruption still pervades all levels of government, particularly at the local levels.\textsuperscript{73}

Moreover, narco-terrorist groups like the FARC use their resources to intimidate judicial branch officials. In 2006, for example, eight Colombian judicial branch employees were killed, thirty-one received death threats, one was kidnapped, and “five fled the country in fear of their lives.”\textsuperscript{74} That same year, a prosecutor in charge of an investigation that resulted in the capture of over one thousand FARC members fled Colombia after receiving death threats from the FARC.\textsuperscript{75} As a result of such corruption and intimidation, “arrest and prosecution is at worst impossible and at best a distant concern” for Colombia and other states plagued by the drug trade.\textsuperscript{76}

Intimidation and corruption also stymie the ability of other (more willing and able) states to prosecute. In some instances, government officials have refused to extradite nationals to requesting states out of fear of personal reprisal\textsuperscript{77} or internal backlash against members of their own citizenry.\textsuperscript{78} In Colombia, for example, terrorist groups such as the FARC dissuaded extradition through violence and harassment targeted at government officials.\textsuperscript{79} Similarly, drug cartels such as the Medellín, led by the infamous Pablo Escobar, threatened and assassinated political leaders to evade extradition.\textsuperscript{80} In other instances, govern-

\textsuperscript{72} INCS REPORT, supra note 59, at 97. The effects of such corruption on prosecution were most evident during the Taliban’s reign. For example, in 1998, at the height of the Taliban’s power, there were no reported arrests or prosecutions of drug traffickers in Afghanistan. McConville, supra note 65, at 81. This suggests that prosecution of drug traffickers is much less likely in those states where ruling authorities—i.e., those empowered to enforce the rule of law—directly participate in and benefit from the drug trade. Id.

\textsuperscript{73} Id. at 139.

\textsuperscript{74} Jennifer S. Easterday, Deciding the Fate of Complementarity: A Colombian Case Study, 26 ARIZ. J. INT’L & COMP. L. 49, 89 (2009).

\textsuperscript{75} Id. at 89 n.205.

\textsuperscript{76} Sanderson, supra note 21, at 51; see Joshua H. Warmund, Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic, 22 FORDHAM INT’L. L.J. 2373, 2401-11 (1999) (finding narco-terrorism contributed significantly to high impunity rates and low conviction rates in Colombia during the 1980s and 1990s).

\textsuperscript{77} Warmund, supra note 76, at 2401-02.


\textsuperscript{79} Warmund, supra note 76, at 2401-02.

ment officials have refused extradition requests in exchange for bribes.81 This is often the case in Mexico, where “most traffickers simply buy protection [against extradition] from corrupt politicians who line their pockets with drug money.”82 Even though the Drug Trafficking Convention seemingly requires states to extradite offenders (in the event they do not prosecute domestically), 83 states can conceivably hide behind one of the Convention’s broad exceptions84 in order to justify refusal.85

At the same time, states have been unwilling and/or unable to prosecute under the Terrorist Financing Convention. This is largely because no mechanism exists under the Terrorist Financing Convention to compel prosecution.86 Even the United States, the leader in the “War on Terror,” has been “reluctant” at times to go after those persons and groups responsible for raising, collecting, and laundering funds to terrorist organizations.87 In fact, despite a spike in U.S. prosecutions after the terrorist attacks on September 11, 2001, there has been a “dramatic decline” in the number of terrorist financing cases brought by the Department of Justice (DOJ) over the past decade.88 For example, prosecutions involving charges for “terrorism-related financing”89 filed by the DOJ in Fiscal Year (FY) 2005 and FY 2006 totaled

81. Warmund, supra note 76.
82. Melanie Reid, Mexico’s Crisis: When There’s a Will, There’s a Way, 37 OKLA. CITY. U. L. REV. 397, 428 (2012) (estimating that drug cartels pay Mexican politicians between $150,000 and $450,000 per month). Recently, Colombia and, to a lesser extent, Mexico have shown a greater willingness to extradite drug traffickers to the United States. Id. at 408-09. In Mexico, however, it remains to be seen whether this is a “passing trend or a continuing tradition.” Id. at 409.
83. Drug Trafficking Convention, supra note 49, at art. 6(9).
84. For example, a requested state may refuse to extradite where there are “substantial grounds” to believe that extradition would “facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinion . . . .” Drug Trafficking Convention, supra note 49, at art. 6(6).
85. David Aronofsky & Jie Qin, U.S. International Narcotics Extradition Cases: Legal Trends and Developments with Implications for U.S.-China Drug Enforcement Activities, 19 MICH. ST. J. INT’L L. 279, 281 (2011) (explaining that a country may refuse extradition based on a legal exception, even though all other extradition requirements are satisfied); cf. Luz E. Nagle, The Rule of Law or the Rule of Fear: Some Thoughts on Colombian Extradition, 13 LOY. L.A. INT’L & COMP. L.J. 851, 865-66 (1991) (explaining how the former President of Colombia, Belisario Betancur, denied an extradition request from the United States for two Colombian drug traffickers on grounds that Colombia had a tradition of not extraditing its own nationals; in reality, however, the decision was made in order to further his own political interests and avoid backlash from drug cartels).
86. See Ehrenfeld, supra note 3, at 177-78.
87. GURULÉ, supra note 7, at 11.
88. Id. at 308.
89. As used here, “terrorism-related financing” prosecutions include, inter alia, charges for alleged violations of the statute implementing the Terrorist Financing Convention, 18 U.S.C.
forty-nine and fifty-three, respectively.\textsuperscript{90} In contrast, prosecutions involving the same charges filed by the DOJ in FY 2013 and FY 2014 totaled sixteen and seven, respectively.\textsuperscript{91} More disturbingly, since 2006, there have been no prosecutions filed by the DOJ in which the lead charge was brought under the statute implementing the Terrorist Financing Convention.\textsuperscript{92}

The recent decline in prosecutions begs the question: why are U.S. prosecutors so reluctant to prosecute terrorist financiers? Jimmy Gurule, a Professor of Law at the University of Notre Dame Law School, suggests there are three possible explanations. First, federal prosecutors may lack expertise about complex financial instruments used to launder money, namely, foreign banking systems and “front entities” such as charities and shell corporations.\textsuperscript{93} This lack of expertise may make prosecutors less willing to take on burdensome and time-consuming terrorist financing cases. Second, federal agencies charged with investigating and prosecuting terrorist financing cases have struggled to coordinate their efforts.\textsuperscript{94} For example, the Federal Bureau of Investigation (FBI) often clashes with Immigration and Customs Enforcement (ICE) over which agency is to lead the investigation.\textsuperscript{95} A Department of Homeland Security report found ICE agents tend to “drop leads that appear to have a terrorism nexus, or choose to ignore a terrorism nexus and select violations unrelated to terrorism, in order to continue the case without FBI involvement.”\textsuperscript{96} Such territoriality disrupts the process of gathering evidence and sharing it with

\textsuperscript{90} SYRACUSE UNIV., TERRORISM-RELATED FINANCING PROSECUTIONS, http://0-tracfed.syr.edu.gull.georgetown.edu/index/index.php?layer=cri (last visited Apr. 24, 2015). Although the number of prosecutions increased from twelve in FY 2009 to twenty-eight in FY 2010, the number has remained at or below thirty since FY 2007. Id.

\textsuperscript{91} Id. It is difficult to understand why the number of prosecutions of terrorism-related financing has declined recently. The fact that terrorism has increased fivefold since 2000 suggests, instead, that the number of prosecutions for terrorism-related financing should have increased accordingly. Id.

\textsuperscript{92} Id. This statute, which was passed in 2002, is codified at 18 U.S.C. § 2339A-B (2012).

\textsuperscript{93} See Gurule, supra note 7, at 385-86.

\textsuperscript{94} See id. at 309 n.264 (noting that coordination issues between the FBI and Treasury Department arose after 9/11).

\textsuperscript{95} See id. at 309.

prosecutors, who need the evidence to build cases against alleged financiers. Last, prosecutors may have simply lost the sense of urgency that flooded the U.S. government in the wake of 9/11. Whatever the reason, and despite the DOJ’s statements to the contrary, the dearth of prosecutions brought under the Terrorist Financing Convention “strongly suggests that prosecuting terrorist financing cases is not a priority for the U.S. government.”

In short, enforcement of the current international regime is far too dependent on unwilling and/or unable domestic authorities. Further, given the pervasiveness of corruption in areas plagued by the drug trade, as well a downward trend in prosecutions of terrorist financing in the United States, there is nothing to suggest the performance of domestic authorities will improve anytime soon. Therefore, solutions must be sought elsewhere—namely, within international mechanisms. Because the nexus between the drug trade and terrorism transcends national borders, so too must the prosecution of those drug traffickers who operate at the nexus and finance terrorism. Accordingly, persons who provide to terrorist organizations funds raised through, or otherwise derived from, the drug trade should be prosecuted in an international tribunal, namely, the International Criminal Court.

97. Id.
99. GURULÉ, supra note 7, at 385.
100. See supra text accompanying notes 68-92.
101. See infra Part IV(B) (explaining why the nexus between the drug trade and terrorism is of international concern).
102. Even the U.S. Department of Justice would agree that international mechanisms are necessary in the fight against terrorist financing. Countering Terrorist Financing: Progress and Priorities: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary, 112th Cong. 5 (2011) (statement of Lisa Monaco, Asst. Att’y Gen., U.S. Dep’t of Justice) (“Although domestic prosecutions are important, the Department [of Justice] recognizes that because the networks that finance and support terrorist organizations are international, so must be our efforts.”).
IV. A Venue for Justice

“The international community must be more certain that these offenders will face justice, and the International Criminal Court is the best way to fulfill this need.”

International institutions currently play a very limited role at the nexus of terrorism and drug trafficking. For the most part, international institutions focus on preventing and interdicting money-laundering schemes designed to transmit funds from drug traffickers to terrorists. However, international institutions play no role in prosecuting persons who provide to terrorists funds raised through the drug trade. That such persons continue to avoid facing justice is quite perplexing given the devastating consequences of their actions. Therefore, this Paper recommends that persons who provide to terrorist organizations funds raised through, or otherwise derived from, the drug trade should be prosecuted in the International Criminal Court (hereinafter “ICC” or the “Court”). Although many have debated the prospect of including drug trafficking within the jurisdiction of the Court, scholars have largely overlooked the nexus between terrorism and drug trafficking. It is precisely the financing link between the two that elevates the crime of drug trafficking to a level of seriousness that warrants prosecution in the International Criminal Court.

The ICC has jurisdiction over the “most serious crimes of concern to the international community as a whole.” At present, those crimes are limited to genocide, crimes against humanity, war crimes, and aggression. Although the drafters of the Rome Statute heavily considered including within the Court’s jurisdiction both terrorism and drug trafficking, ultimately neither crime was included in the Court’s jurisdic-

103. McConville, supra note 65, at 99 (arguing the ICC’s jurisdiction be expanded to include drug trafficking).
105. Compare McConville, supra note 65, at 99 (arguing in favor of expanding the ICC’s jurisdiction to include drug trafficking), with Heather L. Kiefer, Just Say No: The Case Against Expanding the International Criminal Court’s Jurisdiction to Include Drug Trafficking, 31 Loy. L.A. Int’l & Comp. L. Rev. 157, 180 (arguing against).
107. Id.
tion because states could not agree on acceptable definitions.\textsuperscript{108} The initial decision to exclude both crimes from the Court’s jurisdiction necessarily begs the question of why the international community should now include within the Court’s jurisdiction a crime located at the nexus between the two (i.e., providing to terrorist organizations funds raised through the drug trade).

As the following analysis makes clear, the time is ripe for inclusion of this crime in the Court’s jurisdiction for three main reasons: (A) states have coalesced around a workable definition of the offense, (B) the offense has risen to the level of seriousness envisioned in the Rome Statute, and (C) the Court’s complementary role will motivate states to prosecute more offenders at the domestic level. Of course, expanding the Court’s jurisdiction will (D) require an amendment to the Rome Statute and (E) have to overcome certain opposition.

A. A Workable Definition

Drafters of the Rome Statute excluded both terrorism and drug trafficking from the Court’s jurisdiction because states could not agree on definitions of the crimes.\textsuperscript{109} However, a definitional problem is largely avoided with respect to the crime at issue here. As discussed in Part III, both terrorist financing and drug trafficking have now been defined under international law through the Terrorist Financing Convention and the Drug Trafficking Convention.\textsuperscript{110} In fact, the specific act of providing to terrorists funds collected through the drug trade appears to fall squarely within the definition of terrorist financing provided in Article 2 of the Terrorist Financing Convention.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{109} See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, supra note 108.
\item \textsuperscript{110} See Drug Trafficking Convention, supra note 49, at art. 3(1) (defining drug trafficking).
\item \textsuperscript{111} See Terrorist Financing Convention, supra note 6, at art. 2(1). The fact that the Terrorist Financing Convention and Rome Statute were negotiated around the same time begs the question: why didn’t states just incorporate into the Rome State the definition of terrorism agreed upon in the Terrorist Financing Convention? One reason is perhaps states had already abandoned any hope of including terrorism in the Rome Statute because the United States had decided at least a year and a half before the conclusion of the Terrorist Financing Convention that it would categorically oppose the inclusion of terrorism in the original Rome Statute. See David J. Scheffer, \textit{The United States and the International Criminal Court}, 93 Am. J. Int’l L. 12, 13 (1999) (noting the United States decided to oppose the inclusion of terrorism by mid-1997).
\end{itemize}
States-Parties acknowledged as much in the Preamble when recalling
drug dealing as a means of financing terrorist activities.\textsuperscript{112} Because a
generally acceptable definition of the crime at issue already exists
under international law, states can seamlessly work this definition into
an amendment to the Rome Statute.

B. Seriousness of the Offense

Providing to terrorists funds raised through the drug trade rises to
the level of seriousness and concern to the international community
envisioned in the Rome Statute. As previously mentioned, the Court’s
jurisdiction is limited to “the most serious crimes of concern to the
international community as a whole.”\textsuperscript{113} This suggests that two ele-
ments in particular must be met in order to vest in the Court jurisdic-
tion over an offense. First, the crime must be serious. Second, the crime
must concern the international community as a whole. The four crimes
already within the Court’s jurisdiction (genocide, war crimes, crimes
against humanity, and aggression) shed light on these elements. In
terms of seriousness, the four crimes suggest that an act must result in
large-scale injuries or deaths. In terms of international concern, the
four crimes suggest that an act must affect a number of states and draw
widespread condemnation.\textsuperscript{114}

First, the act of providing to terrorists funds acquired through the
drug trade is quite serious. For one, terrorists use funds provided to
them by drug traffickers in order to carry out lethal attacks. In 2013, for
example, terrorist attacks resulted in over 18,000 deaths worldwide.\textsuperscript{115}
Moreover, drug trafficking—the underlying offense—itself provokes
deadly altercations between cartels and law enforcement. For example,
in Mexico, between 2006 and 2012, approximately 60,000 people were

\textsuperscript{112} See Terrorist Financing Convention, supra note 6, pmbl.

\textsuperscript{113} Rome Statute, supra note 106. In addition, a case is admissible in the ICC only if a state
that has jurisdiction over the crime is “unwilling or unable genuinely to carry out the investigation
or prosecution.” \textit{Id.} at art. 17. As discussed in Part III(B), states have demonstrated an unwilling-
ness and/or inability to prosecute at the domestic level both drug trafficking and terrorist
financing offenses. This suggests that prosecuting in the ICC the crime of financing terrorism
through the drug trade should not encounter significant issues of admissibility.

\textsuperscript{114} See Kiefer, supra note 105, at 180 (noting the Rome Statute requires more than just the
existence of a wide-scale problem; it requires at least the same level of severity found in the other
offenses currently within the Court’s jurisdiction).

\textsuperscript{115} \textit{GLOBAL TERRORISM INDEX REPORT}, supra note 61, at 2.
killed in drug-related violence.\textsuperscript{116} In addition to fueling violence, drug trafficking also contributes to crippling drug addictions and fatal overdoses all over the world.\textsuperscript{117} In light of the number of deaths resulting from both terrorism and drug trafficking, the intermediate act—providing to terrorists funds raised through the drug trade—is serious.

Second, the act of providing to terrorists funds raised through the drug trade concerns the international community as a whole. Indeed, terrorist attacks and drug trafficking occur all over the world. In 2013, for example, terrorist attacks occurred in approximately 87 states, 60 of which experienced loss of life as a result.\textsuperscript{118} That over 35\% of these terrorist attacks targeted state entities, including governments and police,\textsuperscript{119} shows terrorism concerns countries as a whole. Moreover, the act of providing to terrorists funds raised through the drug trade has been criminalized under international law.\textsuperscript{120} This suggests the matter has already drawn widespread condemnation. In fact, several international legal instruments, including the Terrorist Financing Convention and UNSC Resolution 1373, have stated expressly that financing terrorism through the drug trade is both a serious offense and threat to international security.\textsuperscript{121}

Like genocide, war crimes, crimes against humanity, and aggression, the act of providing terrorists funds raised through the drug trade is serious and concerns the international community as a whole. Therefore, the act qualifies for prosecution in the ICC.

C. The Power of Complementarity

The ICC was founded on the principle of complementarity. Article 1 of the Rome Statute states expressly that the Court “shall be complementary to national criminal jurisdictions.”\textsuperscript{122} As a result, the primary

\begin{itemize}
\item[117.] In 2012, there were about 183,000 deaths worldwide related to drug use. UN World Drug Report, supra note 26, at 3.
\item[118.] GLOBAL TERRORISM INDEX REPORT, supra note 61, at 12.
\item[119.] Id. at 28. The FARC, in particular, is notorious for attacks against Colombian government and law enforcement officials. See Amanda Taub, Colombia’s war with FARC and why it might finally end, explained, Vox (Dec. 18, 2014), http://www.vox.com/2014/12/18/7412615/farc-colombia-ceasefire.
\item[120.] Terrorist Financing Convention, supra note 6, at art. 2.
\item[121.] See id., pmbl. See also Resolution 1373, supra note 58, at art. 4.
\item[122.] Rome Statute, supra note 106, at art. 1.
\end{itemize}
obligation and right to prosecute offenders is reserved to states. By reserving to states the primary right to prosecute, the principle of complementarity serves a dual catalyst function. First, complementarity motivates and helps states to exercise their obligation to prosecute at the domestic level. This is known as “positive complementarity.” Second, complementarity helps prevent and deter future offenses. This has come to be described as the prevention (or, deterrence) effect. Through both positive complementarity and prevention, the Court increases the likelihood that offenders will be brought to justice and would-be offenders will be deterred from committing the crime in the first place.

1. Positive Complementarity

Through positive complementarity, ICC jurisdiction over drug trade funding for terrorist activity can help motivate states to domestically prosecute offenders. The Court takes a positive approach to complementarity in order to motivate and help states prosecute at the domestic level. Under this approach, the ICC and its Office of the Prosecutor “work to engage national jurisdictions in prosecutions, using various methods to encourage states to prosecute cases domestically whenever possible.” The primary goal is to “strengthen domestic capacity” through cooperation between the Court and States-Parties. To this end, the Court offers carrots and sticks to States-Parties.

In terms of sticks, the Court uses the threat of intervention to motivate states to act. In other words, the ICC “can cajole states into action by threatening to thrust the issue onto the global stage by taking up the case itself.” David P. Stewart, a Professor of Law at Georgetown University Law Center, describes the logic behind the “stick”

125. Id.
126. Id.
127. James F. Alexander, The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact, 54 Vill. L. Rev. 1, 20 (2009); accord Mauro Politi, Reflections on complementarity at the Rome Conference, in 1 The International Criminal Court and Complementarity: From Theory to Practice, 142, 145 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (noting “the purpose of complementarity is to ensure that states abide by their duty to prosecute international crimes in an effective and substantive way”).
component as follows: because states prefer not to have their “dirty laundry taken to The Hague” to be cleaned, the Court in effect acts as a “compulsory motivator” and says to states, “either prosecute domestically, or your nationals will face prosecution in the ICC.”128 Thus, when faced with the possibility of ICC prosecution and absent other deterring factors, rational state authorities will elect to prosecute domestically in order to manage the proceedings internally and minimize political damage internationally.

In terms of carrots, the ICC and its Office of the Prosecutor can encourage and assist states to undertake investigations and prosecutions.129 Among other incentives, the ICC can provide are legal and judicial training, as well as monitor local judicial processes.130 Early evidence suggests that states have responded positively to such assistance from the ICC.131 For example, the Court’s involvement in the civil conflict in Uganda has motivated the Government of Uganda to create additional judicial institutions in order to prosecute domestically members of the Lord’s Resistance Army, a rebel group suspected of human rights crimes.132 Similarly, the Court’s investigation in the Democratic Republic of the Congo (DRC) spurred Congolese leaders to reform institutions and increase capacity within the national judiciary in order to prosecute rebels alleged to have committed war crimes and other human rights offenses.133 Thus, simply by vesting in the Court jurisdiction over the crime of financing terrorism through the drug trade, the Court’s policy of positive complementarity can motivate states to initiate investigations and help states prosecute alleged offenders.

2. Prevention Effect

ICC jurisdiction over the financing of terrorism through the drug trade can also help prevent such activity by deterring current perpetra-

128. Interview with David P. Stewart, Professor of Law, Georgetown University Law Center, in Washington, D.C., (Mar. 3, 2015); see Easterday, supra note 74, at 50 (“With the International Criminal Court, there is a new law under which impunity is no longer an option. Either the national courts must do it or [the ICC] will.”) (quoting Luis Moreno-Ocampo, then-Chief Prosecutor of the ICC) (internal quotation marks omitted).
129. Marshall, supra note 124.
130. Id.
131. See infra text accompanying notes 132-33.
tors. In addition to its positive incentives, the principle of complementarity can help prevent and deter future offenses. Prevention is one of the stated goals of the Rome Statute and a leading basis for the Court’s establishment. According to conventional prevention and deterrence theory, potential offenders are less likely to commit a crime where the threat of prosecution (and thus punishment) is more certain. The ultimate goal is to end a “culture of impunity,” such that offenders are less likely to escape justice.

Vesting in the Court’s jurisdiction the crime of providing to terrorists funds raised through the drug trade would increase the likelihood that offenders will be prosecuted, either in the ICC (when states are unwilling and/or unable) or in domestic courts (as a result of the ICC’s catalyzing effects on national authorities). Because the threat of prosecution is more certain, potential offenders will be less likely to engage in the criminal behavior. Potential egregious offenders, in particular, would be even less likely to engage in the criminal act given they face the greatest threat of prosecution in the ICC. In other words, “[p]rosecuting [in the ICC] should have a greater chance of deterring other big fish.” A conviction in the ICC would go a step further and put would-be offenders on notice that their crimes will not go unpunished. Therefore, including this crime in the Court’s jurisdiction

134. Rome Statute, supra note 106, pmb. (stating the Court is “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”); see Julian Ku & Jide Nzelibe, Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?, 84 Wash. U. L. Rev. 777, 788 (2006).


136. See generally Alexander, supra note 127, at 10-20 (explaining the basic principles of deterrence theory). The dearth of empirical studies on point makes it prohibitively difficult to quantify the Court’s “preventive potential” (i.e., deterrence effects resulting from ICC prosecution). See id. at 43.

137. See Ku & Nzelibe, supra note 134, at 789 (“By subjecting such offenders to the credible threat of . . . ICC prosecution, such a culture of impunity would slowly be undermined.”).


139. Alexander, supra note 127, at 14. But see Ku & Nzelibe, supra note 134, at 807-09 (finding high-risk offenders are unlikely to be deterred by the threat of ICC prosecution; admitting, however, that such findings are limited to those individuals seeking to achieve political change in Africa through armed struggle).

140. Cf. Press Release, U.S. Dep’t of State, ICC Conviction of Thomas Lubanga Dyilo (Mar. 16, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/185964.htm (noting that the ICC convic-
would help tear away at the culture of impunity currently insulating from prosecution those who finance terrorism through the drug trade.\(^{141}\)

D. Proposed Amendment to the Rome Statute

Including within the Court’s jurisdiction the crime of providing to terrorists funds raised through the drug trade would require an amendment to the Rome Statute.\(^{142}\) Despite the Court’s relative youth, modifying the Rome Statute is not a taboo in today’s international community. That this would not even be the first proposed amendment\(^{143}\) suggests the Rome Statute is indeed a living organism,\(^{144}\) which should continue to evolve in response to changing circumstances and norms. Because the Terrorist Financing Convention and Drug Trafficking Convention provide the most comprehensive definitions of terrorist financing and drug trafficking, respectively, the amendment should incorporate and draw heavily on these two legal instruments. Therefore, the proposed amendment should read as follows:

**Amendment to Article 5 of the Rome Statute,\(^{145}\)**

Add to Article 5, paragraph 1, the following:

“(d) the crime of financing terrorism through the drug trade.”

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\(^{141}\) Examples of such persons include those who collect taxes on drug production, manufacture and refine narcotics, or traffic and sell drugs, for the purpose of providing the proceeds to terrorists.

\(^{142}\) See Rome Statute, *supra* note 106, at art. 121 (explaining amendment process).

\(^{143}\) See Int’l Criminal Court, Rome Conference Res. 5, (June 10, 2010) (amending article 8 of the Rome Statute). *See also* Int’l Criminal Court, Rome Conference Res. 6, (June 11, 2010) (specifying the crime of aggression).

\(^{144}\) This phrase is commonly used in the debate over whether the United States Constitution is a “living document.” For further discussion on this debate, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

\(^{145}\) This abbreviated proposed amendment is meant as an illustration. It omits certain formalities for the sake of brevity and clarity. Also, the amendment itself does not explicitly require that an alleged crime concerning the international community. In the author’s view, any international effects of an alleged crime are more pertinent to the “gravity” inquiry under admissibility (i.e., the greater the international effects of an alleged crime, the more likely the crime is to be of sufficient gravity). See Rome Statute, *supra* note 106, at art. 17 (requiring a crime be of sufficient gravity to be admissible).
For the purpose of this Amendment, “crime of financing terrorism through the drug trade” means, directly or indirectly, willingly or voluntarily, providing to terrorists funds raised, collected, or otherwise derived from the illicit traffic in narcotic drugs with the intention that said funds should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out any act intended to: damage property or cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. 146

For the purpose of this Amendment, “funds” mean any assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit. 147

For the purpose of this Amendment, “illicit traffic” means (i) the cultivation, production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance. 148

146. This provision is adapted from article 2(1) of the Terrorist Financing Convention. See Terrorist Financing Convention, supra note 6, at art. 2(1). Like its counterpart in the Terrorist Financing Convention, this definition includes a scienter requirement (i.e., knowledge that the funds provided may be used to carry out terrorist activities). Although omitting a scienter requirement may make it easier to prosecute alleged offenders (given one’s knowledge is often difficult to prove), such an omission does not make prosecution more just. In any event, satisfying a scienter requirement in the narco-terrorist context should not be too onerous because groups like the FARC traffic drugs specifically to raise money so they can carry out attacks. See Drug Trade and the Terror Network, supra note 26, at 12 (noting the FARC used funds raised from drug-related activities to carry out violent acts). However, unlike its counterpart in the Terrorist Financing Convention, this definition includes damage to property. This addition was made in response to the confusion over whether the Terrorist Financing Convention applied to property damage resulting from alleged terrorist attacks. See Van Ginckel, supra note 56, at 290 (suggesting the definition of terrorism under the Terrorist Financing Convention could be construed narrowly to exclude those acts which do not result in death or serious bodily injury, but do cause other destruction, such as damage to infrastructure).

147. This definition is taken directly from article 1, paragraph 1 of the Terrorist Financing Convention. See Terrorist Financing Convention, supra note 6, at art. 1, ¶ 1.

148. This definition is adapted from article 3, paragraphs 1 and 2, of the Drug Trafficking Convention. For the sake of simplicity and clarity, this definition omits language incorporating
For the purpose of this Amendment, “narcotic drug” means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.149

For the purposes of this Amendment, “psychotropic substance” means any substance, natural or synthetic, or any natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971.150

E. Overcoming Opposition to ICC Expansion

Critics of expanding the Court’s subject matter jurisdiction generally rest their opposition on two arguments: (1) states will be reluctant to subject their nationals to a foreign court; and (2) the ICC lacks sufficient resources to prosecute additional cases. However, prosecuting the particular crime at issue in the ICC largely avoids national sovereignty concerns and resource limitations.

1. Reluctance to Extradite

Critics argue that states are usually reluctant to extradite their nationals to foreign courts, especially when the criminality of the offense at issue, including related punitive consequences, varies across states.151 For instance, some states may believe that the offense at issue is relatively harmless and thus does not warrant much punishment at all. This is often the case in terms of small-scale drug-related offenses, e.g., use or sale.152 Other states may oppose certain punishments, such

149. This definition is taken from article 1, paragraph n, of the Drug Trafficking Convention. See Drug Trafficking Convention, supra note 49, at art. 3 ¶¶ 1-2.

150. This definition is taken from article 1, paragraph r, of the Drug Trafficking Convention. See Drug Trafficking Convention, supra note 49, at art. 1, ¶ r. Because the list of narcotic drugs is quite lengthy, the definition here is made via reference and incorporation for the sake of brevity.

151. See SAMUEL, supra note 58, at 167 (noting Islamic states, in particular, are hesitant to submit to the jurisdiction of an international tribunal “because Islamic law puts limits on the types of international commitments that Islamic states can make”) (internal quotation marks omitted).

152. Kiefer, supra note 105, at 172-77 (explaining that penalties imposed for drug-related offenses vary markedly across states).
as the death penalty, no matter the circumstance.\footnote{153} Still, other states may simply believe that any foreign court with jurisdiction over a state’s nationals infringes on state sovereignty.\footnote{154}

However, because these concerns are mostly absent in the ICC context, states should be far less reluctant to subject their nationals to prosecution in The Hague. First, states made clear when ratifying and implementing the Terrorist Financing Convention that financing terrorism through the drug trade is not a harmless offense and thus does warrant punishment.\footnote{155} This is exemplified in Colombia’s domestic terrorist financing law, under which any person who provides financial resources to terrorist organizations shall be liable to a term of imprisonment of thirteen to twenty-two years.\footnote{156} Second, the ICC is not permitted to impose the death penalty, so states do not run the risk of subjecting their nationals to a potential death penalty case. Therefore, states, especially in Latin America, should be less hesitant to extradite. Finally, because the ICC is a Court of “last resort”\footnote{157} and performs only a complementary role in terms of prosecution, the Court is less likely to infringe states’ sovereign right to prosecute nationals.\footnote{158} Indeed, if a state is willing and able to prosecute, it has the priority—and, in fact, obligation—to do so.

2. Insufficient Resources

Critics also argue that the ICC lacks sufficient resources to prosecute more cases.\footnote{159} In particular, critics note that the ICC already hears very

\footnotesize{153. See Joshua S. Spector, Extrading Mexican Nationals in the Fight Against International Narcotics Crimes, 31 U. Mich. J.L. Ref. 1007, 1018 (1998) (noting some states, particularly in Latin America, have refused to extradite their nationals to requesting states that may impose the death penalty).}

\footnotesize{154. See Kiefer, supra note 105, at 178.}

\footnotesize{155. See Terrorist Financing Convention, supra note 6, pmbl. (considering the financing of terrorism to be a matter of “grave concern to the international community”).}


\footnotesize{157. Luis Moreno-Ocampo, A positive approach to complementarity: the impact of the Office of the Prosecutor, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 21, 21 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).}

\footnotesize{158. Dr. Thomas Weatherall, Address at the Georgetown University Law Center Journal of International Law Symposium: World Cops without World Courts (Apr. 10, 2015).}

\footnotesize{159. Harold Koh, a former legal advisor at the U.S. Department of State, made a similar argument in response to the proposed addition of the crime of aggression. Koh believed the}
few cases and prosecutors struggle to investigate and gather evidence. However, such criticism is misguided because, as in domestic criminal justice systems, “[t]here will always be more criminals to adjudicate than there are resources to prosecute them.” This is certainly the case in Colombia, where the judiciary is “chronically overburdened” and the justice system is “under-resourced, understaffed, and lacks cooperation from the security forces and government entities.” Furthermore, while it is true that ICC Prosecutors struggle to investigate and gather evidence, this problem is not unique to the Court. Indeed, building cases is difficult for prosecutors at the domestic level as well. That is one of the main reasons why the U.S. Department of Justice has a “mixed record of success in prosecuting terrorist finance cases,” which sometimes end in an “embarrassing acquittal or hung jury.”

Despite resource limitations, building cases against terrorist financiers at the ICC is not impossible. For one, the Office of the Prosecutor has the power to initiate an investigation, collect and examine evidence, and question suspects and witnesses. Moreover, the Office of the Prosecutor has the ability to coordinate an investigation with state authorities.

Inclusion of an additional crime at such an early stage in the Court’s development would divert the Court’s attention away from its “core mission.” Harold H. Koh, Legal Advisor, U.S. Dep’t of State, Statement at the Resumed 8th Sess. of the Assembly of States Parties to the ICC: Regarding Crimes of Aggression (Mar. 23, 2010), http://usun.state.gov/briefing/statements/2010/139000.htm.

160. There have been twenty-two cases in nine situations since the Court was established. Situations and Cases, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Mar. 22, 2015).

161. See Kiefer, supra note 105, at 179.


163. Easterday, supra note 74.

164. Professor Voeten considers this a “manageability” problem, which contributes to the gap between the small number of prosecutions brought before Court and the high costs of maintaining the Court. Interview with Erik Voeten, supra note 135.

165. See supra Part III(B) (discussing some of the problems that U.S. prosecutors have faced when trying to build terrorism-related financing cases, including a lack of cooperation amongst federal agencies).

166. GURULÉ, supra note 7, at 12.

167. See Richard, supra note 104, at 44 (discussing various ways to gather information and evidence about terrorist financing).

168. Rome Statute, supra note 106, at art. 54(1)-(3).

169. Id. In fact, the Office of the Prosecutor has already coordinated with national authorities in Afghanistan and Colombia after initiating preliminary investigations into both states. See Office
the individuals and groups involved in the drug trade are frequently engaged in public criminal activities and thus tend to confront police forces much more easily.\textsuperscript{170} When confronted, drug traffickers are actually eager to provide to law enforcement authorities information about other traffickers, especially those in rival cartels.\textsuperscript{171} As a result, law enforcement authorities would have opportunities to pursue leads, track and arrest suspects,\textsuperscript{172} and provide mutual legal assistance to the Office of the Prosecutor in the ICC.\textsuperscript{173}

In any event, the ICC should not require many additional resources because the Court’s role is not to prosecute all, or even most, offenders.\textsuperscript{174} Rather, the Court’s role is to prosecute only some of the most egregious offenders,\textsuperscript{175} such as the leaders of organizations allegedly responsible for the crimes.\textsuperscript{176} Such offenders (the proverbial “big fish”) are likely to be found at points further along the “crime-terror con-

\textsuperscript{170}. See Durnagol, supra note 9, at 74.

\textsuperscript{171}. See id.

\textsuperscript{172}. Of course, the ICC will inevitably face challenges in terms of apprehending indicted fugitives. In order to overcome some of these challenges, the ICC should strongly consider the “International Criminal Court Arrest Procedures Protocol” drafted by David Scheffer, a Professor of Law at Northwestern University School of Law and former U.S. Ambassador at Large for War Crimes. See David Scheffer, Proposal for an International Criminal Court Arrest Procedures Protocol, 12 Nw. J. Int’l Hum. Rts. 229 (2014) (calling on States-Parties to establish the means by which trained personnel and equipment can be provided to states to help track and arrest indicted fugitives and transport them to The Hague).

\textsuperscript{173}. Although such assistance depends entirely on state cooperation, mutual legal assistance amongst states has become more routine and standardized over the past few years, especially after the adoption of the Drug Trafficking Convention. Interview with David P. Stewart, supra note 128. States can employ and build on these measures in order to cooperate with ICC Prosecutors. In time, such efforts will help ICC Prosecutors build cases and prosecute offenders.

\textsuperscript{174}. This aligns with the Court’s policy of hearing only a “limited number of cases.” See Moreno-Ocampo, supra note 157, at 22. In fact, a lower number of cases brought before the ICC could suggest that the Court’s power of complementarity is indeed motivating states to prosecute more offenders at the domestic level. See William A. Schabas, The rise and fall of complementarity, in 1 The International Criminal Court and Complementarity: From Theory to Practice 150, 155 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

\textsuperscript{175}. Interview with David P. Stewart, supra note 128. See Politi, supra note 127, at 145 (“There is no doubt that one important goal [of the Rome Statute] is to establish a division of labour between national jurisdictions and the ICC, under which the Court should essentially concentrate on those who have the major responsibility for the crimes involved”); Alexander, supra note 127, at 14 (noting the ICC focuses its efforts on the proverbial “big fish”).

\textsuperscript{176}. Alexander, supra note 127, at 14.
“continuum,” where individuals transition from passive beneficiaries of the drug trade to more active participants.177 Ultimately, it is the Court’s ability to motivate, and help, states to prosecute domestically—not the actual number of prosecutions in The Hague—that will play the biggest role in reducing terrorist financing through the drug trade.

V. WHICH OFFENDERS SHOULD BE PROSECUTED IN THE ICC?

Returning to the hypothetical (yet realistic) cases of Rahman Turabi and Maria Alberto discussed at the outset of this Paper, instructive examples can be provided regarding the scope of the amendment to Article 5 of the Rome Statute proposed in Part IV. While Turabi would likely not be prosecuted under the proposed amendment, Alberto would and should be prosecuted given the extent and gravity of her terrorist financing. This differentiation falls in line with the ICC’s role of prosecuting only the most egregious offenders.

A. The Afghani Poppy Farmer—Rahman Turabi

Although Turabi likely falls within the scope of the proposed Rome Statute amendment under a literal reading, he would probably not be prosecuted by the ICC. Granted, the money he pays in taxes to the Taliban is used to wage injurious and deadly attacks on NATO forces. Moreover, because Turabi voluntarily cultivates opium (and refuses to cultivate other crops), he is a willing participant in the drug trade, albeit at the earliest and least profitable stage. However, because the amount of money that Turabi provides to the Taliban is relatively small ($400 per week), and because Turabi does not actually traffic refined narcotic drugs (a far more lucrative activity), he is not likely to be considered an egregious offender.178 Put simply, there are bigger fish to fry. Therefore, he would—and should—not be prosecuted in the ICC for the crime of financing terrorism through the drug trade. Nevertheless, the ICC could help monitor judicial processes in Afghani-

177. Durnagol, supra note 9, at 72. It may be argued that prosecuting only “big fish” will contribute to an “impunity gap,” which emerges “where an international forum prosecutes only those most responsible for international crimes, leaving lesser offenders a degree of impunity.” See Burke-White, supra note 133. However, the Court’s positive complementarity (discussed in Part IV) can help close this gap by motivating states to prosecute domestically the “small fish,” i.e., those whose crimes are not of sufficient gravity to warrant prosecution in the ICC. Id. at 83-84.

178. See YOUNG, supra note 5, at 47 (explaining that traffickers benefit the most from the drug trade).
stan to ensure that Turabi faces justice domestically.  

B. The Colombian Drug Smuggler—Maria Alberto

Alberto is precisely the type of person that would—and should—be subject to prosecution in the ICC. Alberto willingly traffics large amounts of drugs overseas, and she provides to the FARC significant sums of money raised from her trafficking activities. The money she provides is used to acquire weapons for FARC attacks, which have killed hundreds of Colombian law enforcement officials, as well as several Colombian prosecutors and judges. The transnational nature of her drug trafficking and the number of deaths resulting from her drug trafficking make Alberto a “big fish” worthy of prosecution in the ICC. Furthermore, prosecuting Alberto at the domestic level is highly unlikely in the absence of ICC intervention because local judges, prosecutors, and law enforcement are unwilling to arrest and try FARC members like Alberto. Therefore, Alberto falls within the scope of the proposed amendment and would be subject to prosecution in the ICC. The more difficult issue, however, is where to draw the line between egregious and non-egregious offenders (or, big and small fish).  

Consider the following hypothetical case.

C. The Tax Collector—The Case of Radullan Sali

Radullan Sali, a national of the Philippines, has been a member of Abu Sayyaf, an Islamist terrorist organization operating primarily in the Philippines, for over ten years. As part of his membership, Sali collects transportation taxes along a route running through Isabela City, the capital of Basilan Province in the Philippines, which is frequented by drug traffickers transporting cocaine and heroin to

179. See supra text accompanying notes 131-33 (discussing the impact of ICC assistance on the situations in Uganda and the DRC).

180. One scholar has dubbed this dividing line the “gravity threshold.” Burke-White, supra note 133, at 74. Although it is beyond the scope of this Paper to identify precisely the “gravity threshold”—i.e., the division between egregious and non-egregious offender—it is this author’s opinion that egregious offenders warranting prosecution in the ICC would be found in the top levels of drug cartels with ties to terrorist organizations around the world, as well as in the top ranks of international terrorist organizations that traffic drugs for profit.

181. The Philippines is a State-Party to the Drug Trafficking Convention, the Terrorist Financing Convention, and the Rome Statute.

182. Although the character described in this hypothetical is fictional, Abu Sayyaf is a real terrorist organization and the information provided relating to Abu Sayyaf is factual. For further discussion on Abu Sayyaf and its reliance on drug trafficking, see Ehrenfeld, supra note 3, at 168.
Southeast Asia. Taxes paid by drug traffickers to Sali average $10,000 per month and are used by Sali to purchase weapons for Abu Sayyaf. Many of these weapons have been used by Abu Sayyaf militants in attacks on Basilan government buildings and employees, including judges, prosecutors, and law enforcement. As a result, local investigators and prosecutors have frequently balked at opportunities to arrest and investigate members of Abu Sayyaf. On occasions when Abu Sayyaf militants have been prosecuted, local judges have summarily dismissed the cases without ever reaching the merits. Assuming the proposed amendment to the Rome Statute has been adopted and implemented by all States-Parties, including the Philippines, would Sali be subject to prosecution in the ICC for providing to terrorists funds raised or collected through the drug trade? Should he be? These questions would likely remain open to debate under the proposed Rome Statute amendment and would have to be determined by ICC prosecutors and adjudicators based on drafting history as well as international and domestic jurisprudence.

VI. CONCLUSION

“The convergence of organized crime, drug trafficking, and terrorism demands a new paradigm in strategic thinking.”

The links between drug trafficking and terrorism have increased steadily over the past few years. Thus, the need to reduce these links and limit terrorist funding is more important than ever. One of the best ways to accomplish this goal is to vest within the ICC jurisdiction to prosecute those persons responsible for providing to terrorists funds raised from the most lucrative source of financing—the drug trade.

183. In this author’s opinion, it is unlikely that Sali would—or should—be subject to prosecution in the ICC. First, as a tax collector, he is not near the top levels of Abu Sayyaf. Second, the relatively small amount of money he collects is unlikely to provide Abu Sayyaf militants with enough weapons to make him an egregious offender. Last, Abu Sayyaf is confined primarily to the Philippines and does not have significant ties to other terrorist organizations.


185. Even the United States, which has often been at odds with the ICC, should be amenable to this proposal for several reasons. First, this proposal does not run up against certain definitional concerns that historically caused the United States to oppose other crimes in the ICC, namely, the crime of aggression. See Special Briefing, U.S. Dep’t of State, U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm (noting the United States objected to the
Of course, prosecution in the ICC is not a panacea and should not be the only course of action taken to end terrorist financing schemes.\textsuperscript{186} For example, making the crime subject to universal jurisdiction is another option.\textsuperscript{187} This is a step in the right direction, but would ultimately suffer from many of the problems that stifle the current international regime.\textsuperscript{188} Moreover, as illustrated in the hypothetical case of Rahman Turabi discussed above, the ICC would not—and should not—prosecute all suspected drug-related financiers of terrorism. Rather, the ICC would—and should—prosecute only the most egregious offenders (i.e., the “big fish”). To achieve this goal, the international community must first adopt a “new paradigm of strategic thinking”\textsuperscript{189} that allows the ICC to prosecute persons who provide to terrorists funds raised through the drug trade.

crime of aggression in part because it “considered the definition of aggression flawed”). Indeed, states have already coalesced around a workable definition for the crime of financing terrorism through the drug trade. See supra, Part IV(A). Second, the United States has recently entered into an era of “positive engagement” with the Court, in which the ICC is now seen as “part of the solution and not the problem.” Special Briefing, U.S. Dep’t of State, U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm. Thus, the United States seems to be more willing to consider a greater role for the Court in international criminal law. Third, prosecuting only the most egregious offenders should limit the investigative burden placed on ICC Prosecutors. See David J. Scheffer, Staying the Course with the International Criminal Court, 35 Cornell Int’l L.J. 47, 50 (2002) (noting the United States originally opposed including terrorism and drug trafficking within the Rome Statute in part because it was concerned the crimes would create an “investigative overload”). Last, including this crime within the Court’s jurisdiction serves the national interests of the United States because it advances two of the United States’ most pressing foreign policies—the “War on Terror” and the “War on Drugs.”


\textsuperscript{187} See Geraghty, supra note 68, at 383 (proposing the crime of drug trafficking be subject to universal jurisdiction).

\textsuperscript{188} For example, issues regarding national sovereignty and the severity of punishment would continue to exist in the context of universal jurisdiction. See id. at 395-98(discussing arguments against subjecting drug trafficking offenses to universal jurisdiction).

\textsuperscript{189} The Threat Posed from the Convergence of Organized Crime, Drug Trafficking, and Terrorism, supra note 15.