International instruments related to the prevention and suppression of international terrorism

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ABSTRACT: The thesis gives a brief introduction into the theoretical foundation of transnational criminal co-operation and the customary law status of "terrorism". Within this contextual background the thesis analyses twelve of the 13 international counter-terrorism instruments currently in force and the legal mechanisms provided hereunder, as well as their application. It illustrates that all the agreed instruments adopted to date essentially follow the same structure, first established in the Hague Convention, requiring the criminalisation of specific conduct, establishing a clear basis of extra-territorial prescriptive and adjudicative jurisdiction under international law as well as providing associated obligations of co-operation in relation the prosecution of the alleged offender. The thesis analyses the inherent weaknesses of the established regime focusing *inter alia* on the common principle of *aut dedere aut judicare,* the imperfection of the obligation to extradite, the normative status of the *political offence exception* and the influence of human rights principles. The study illustrates that although in formal terms the international accomplishments are considerable the analysed treaties have been inefficacious in obtaining their expressed aims of preventing and punishing international terrorism, and that their practical application has been negligible. The thesis, nevertheless, concludes that the established system represents the highest attainable level of international criminal co-operation since the lack of common values prevent more effective transnational co-operation.

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Thesis

The present thesis argues that the inherent weaknesses of the existing counter-terrorism regime make it inefficacious in obtaining its expressed aim of preventing and punishing international terrorism.[1] This argument is based on a review of the legal instruments and analysis of the practice.

The thesis is divided into three parts.

The first Part gives a brief introduction into the theoretical foundation of transnational criminal co-operation and the customary law status of "terrorism". The purpose of this preliminary exercise is to illustrate that the term "terrorism" is not a legal term of art and that no international obligation arise simply because conduct is described as "terrorism".

The second Part analyses 12 of the thirteen existing universal counter-terrorism instruments with the purpose of evaluating their scope and theoretical effectiveness.

The third part provides an overview of the exiting counter-terrorism regime. It analyses the legal mechanisms availed within the instruments currently in force and comments on their there application. The thesis does not seek to evaluate the complex matter of causation between international treaties and terrorism as such, but merely seeks, from a legal theoretical point, to evaluate the suitability of the instruments to fulfil their objectives.[2] The thesis concludes that, despite its serious flaws and legal ambiguities, the current system represents the highest attainable level of international criminal co-operation.

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[1] By regime is meant a "sets of explicit or implicit principles, norms, rules and decision-making procedures around which actor expectations converge in a given area of international relations", S. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. Krasner (ed.) *International Regimes* (1983) 275.

[2] This seems to bee the motivation expressed in the preambles of all international counter-terrorism instruments.

Transnational Criminal Co-operation

Despite strong demand for international justice and the clear benefits arising from the apprehension and prosecution of authors of international crimes, or even of transnational fugitive offenders, no customary rule exists to this effect.[3] The absence any of such rule derives from the so-called *Lotus principle*, elaborated by the Permanent Court of International Justice (PCIJ) in the *Lotus* case, according to which "international law governs the relation between independent States" and consequently "rules of [international] law emanate from their own free will.[4] In other words, States are bound only by their express consent, or actions that can be interpreted as consent. Thus States are under no international obligation to prosecute or extradite any individual without a specific obligation requiring them to do so. Consent may, in this respect, either concern acceptance of a specific rule or principle emerging in international law or, in relation to new States, it may imply acceptance to the body of rules and the international system as a whole. Thus the overriding importance is in the presumption of the *Lotus principle* and its emphasis on consensualism, any aberration from this constitutional principles of international law requires the consent or acquiescence of a State.[5] Despite strong emphasis on consensualism States are not, however, free to do whatever they want. The PCIJ expressed this by stating that: "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule – it may not *exercise* its power in any form in the territory of another State."[6] Thus the powers of States are essentially limited by the territory of other States. The use of the word "exercise" has, however, lead to some debate because it seems only to refer to jurisdiction to prescribe.[7]

In this respect a preliminary remark is necessary in relation to the terminology used throughout the thesis. The word "jurisdiction" is predominantly used to denote limits of legal competence or powers of a State, which is further categorised into three different types of jurisdiction: i) *jurisdiction to prescribe*, referring to the authority to legislate or prescribe legal rules; ii) *jurisdiction to adjudicate*, referring to the right of

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[3] G. Gilbert, *Transnational Fugitive Offenders in International Law*, (1998) 47.
[4] *Case of the SS Lotus*, PCIJ Series A. No. 10 (1927).
[5] Cf. C. Warbrick, 'States and Recognition in International Law' in Evans (ed.) *International Law*, (2003) 231-232.
[6] *Case of the SS Lotus*, PCIJ Series A. No. 10 (1927).
[7] Cf. generally, V. Lowe, 'Jurisdiction' in M. D. Evans, *International Law*, (2003) 343-336.

courts to receive try, and determine cases referred to them; iii) *jurisdiction to enforce,* referring to the application of the law by State authorities, *e.g.* arrest and detention etc (the later will often be implied in *jurisdiction to prescribe* unless otherwise stated). All three heads of jurisdiction must be satisfied if an undertaking is to conform with the requirement of international law.

Thus the use of the word "exercise" by the PCIJ is important because it may be read as an indication that it is only jurisdiction to exercise, *i.e. jurisdiction of enforcement,* that is territorially limited under international law. This is highly contested.[8] It suffice to say that there is no uniformly accepted understanding on how far a State may extend its criminal prescriptive jurisdiction beyond its own territory although there is agreement that States may not exercise enforcement jurisdiction in any territory of another State. In relation to *jurisdiction to prescribe* some authors demand a connecting factor, such as nationality, but even this is disputed.[9] In relation to so-called terrorist conduct there seems, however, to be a growing consensus that Stats may prescribe offences extra-territorially,[10] and within the counter-terrorist instruments, as illustrated below, they may even obliged to do so.

Various treaties provide for quasi-universal jurisdiction and an obligation to prosecute a variety of international crimes, the repression of which is generally held to be of universal interest.[11] Even within such systems, however, prosecution is noticeably lacking. This is most striking in relation to the 1949 Geneva Conventions and the '*grave breaches*' regime which,[12] despite providing jurisdiction and creating a clear obligation to bring war criminals to justice, has remained virtually

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[8] Compare O. Spiermann, *International Legal Argument in the Permanent International Court of Justice*, (2005) 251 *et seq* and V. Lowe, 'Jurisdiction' in M. Evans *International Law*, (2003) 335 *et seq.*

[9] Cf. *ibid.*, at 336.

[10] In 1986, for instance the U.S. Congress passed the Omnibus Diplomatic Security and Anti-Terrorism Act (18 USC 1223), which gave U.S. courts jurisdictions over any killing of a U.S. national if it was intended thereby to coerce, intimidate or retaliate a governments or civilian population, §§ 2331(a) and (e). See also cases mentioned below.

[11] The word "quasi-universal" is used because it only provides jurisdiction to the Contracting States, whereas universal jurisdiction, properly so called, allows for *any* State to assert jurisdiction over an offence, cf. R. Higgins, *Problems and Process*, (1994) 64.

[12] Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (1949), Articles 49-50; Geneva Convention II for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), Articles 50-51; Geneva Convention III Relative to the Treatment of Prisoners of War (1949), Articles 129-130; Geneva Convention IV Relative to the Protection of Civilians in the Time of War (1949), Article 146-147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 85-86.

unemployed.[13] Only after the establishment of the ad hoc tribunals for the Former Republic of Yugoslavia (ICTY) and Rwanda (ICTR) have some States started to make use of the repression system within these instruments. A similar pattern emerges in relation to other international crimes for which there are both jurisdiction under international law and an explicit obligation to ensure prosecution.[14] The establishment of the International Criminal Tribunals for the former Republic of Yugoslavia and Rwanda may have signalled the arrival of a new era of international criminal justice. The co-operation of States is, however, still a prerequisite to the effective functioning of any international system of criminal justice.[15] Without the assistance of States to ensure the apprehension of offenders and the collection of evidence, no international court can fulfil its role. With regard to "terrorism", no international court has at present jurisdiction over any conduct as desribed as "terrorism" falling short of crimes against humanity or war crimes and, as a result, States still retain complete discretion over the exercise of their jurisdiction.[16] States have, however, been reluctant to exercise any such jurisdiction, this despite a number of treaties providing States with far-reaching jurisdiction to prosecute so-called terrorist crimes. International law, in addition, generally leaves States a wide measure of discretion to extend and apply their laws and adjudicative jurisdiction to acts occurring outside their territory, limited only by certain prohibiting rules.[17] Very few such rules exist and three broad bases of jurisdiction to prescribe are generally accepted under international law: the territorial, personal and protective principles.[18] Notwithstanding countless declarations of goodwill and the use of concepts such as '*civitas maxima*' or the '*international community*', State practice clearly demonstrates that little communal spirit exists. States have remained mostly indifferent to crimes committed outside their territory and have confined themselves to instituting criminal proceedings against crimes committed within their territory or against residents and those who have acquired nationality.[19] This may include international terrorist acts, even though most States

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[13] Cf. A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 9 European Journal of International Law 1 (1998) 2-17.

[14] The Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article 1. The Convention against Torture and Other Cruel, Inhuman of Degrading Treatment or Punishment (1984), Article 7.

[15] Cf. A. Cassese, *International Criminal Law*, (2003) 348-360.

[16] Cf. ASIL Insight 1998 available at <www.asil.org/insights/insigh20.htm>.

[17] *Case of the SS Lotus*, PCIJ Series A. No. 10 (1927).

[18] See generally, V. Lowe, 'Jurisdiction' in M. D. Evans, *International Law*, (2003) 329-355.

[19] Cf. A, Cassese, *International Law 2nd ed.* (2005) 451-453.

have unequivocally condemned these as criminal and unjustifiable and characterised them as a threat to the international community.[20]

Terrorism as a legal term

Before starting analysis of the existing counter-terrorism regime some remark must be made about the term "terrorism" and its legal significance.

There are at present 13 so-called counter-terrorism instruments with universal application. Even so, there is no universally accepted definition of "terrorism", nor do any of the instruments adopted at the global level contain a comprehensive definition of the concept. Certain acts, such as hostage taking, aircraft hijacking and indiscriminate bombing, are nevertheless commonly identified as acts of "terrorism", an especially unacceptable form of crime.[21] This brings to mind the famous quote of Justice Potter Stewart when trying to define 'obscenity' under U.S. law: "I shall not today attempt further to define the kinds of material I understand to be embraced... [b]ut I know it when I see it..."[22] This, "know it when I see it position", is clearly, from a legal point of view, unsatisfactory; since an ad hoc definition of terrorism provides no legal certainty. The definition of "terrorism", furthermore, cannot only rely on references to acts committed, but also on other factors as well, such as the motive of the offender and the context in which the conduct takes place.[23] There is at present no international consensus on these other factors and the concept of terrorism is, in the words of Rosalyn Higgins: "a term without legal significance."[24]

There are, nonetheless, those who see an emerging consensus on certain elements of the definition of the concept of terrorism. Professor Cassese, for instance, takes the

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[20] See for instance General Assembly Resolution 49/60 of 9 December 1994 UN Doc. A RES/49/60, 1994.

[21] See International Convention for the Suppression of the Financing of Terrorism (1999), Article 2(1)(a).

[22] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). The first definition of obscenity by the U.S. Supreme Court was set forth in *Roth v. United States* (1957). This standard was later changed in *Miller v. California*, 413 U.S. 15, 24-25 (1973), which is more or less still in effect today.

[23] R. Higgins, 'The general international law of terrorism', in R. Higgins and M. Flory (ed.), *International law and Terrorism*, (1997) 15.

[24] *Ibid.*, at 28. For an opposite view see *Suresh v. Canada* (Minister of citizenship and education) para. 96, " We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication", in 41 I.L.M. (2002) 954, p. 82.

position that the agreement laid out in General Assembly Resolution 49/60 of 9 December 1994 "sets out an acceptable definition of terrorism".[25]

Terrorism as a norm of custom

Before analysing the proposition made by Professor Cassese, a brief comment must be made on the special requirements to the establishment of a customary norm, especially a norm creating individual criminal responsibility.

From a legal point of view, the term "terrorism", as a practical concept, has to meet certain qualitative requirements. This, first of all, includes some degree of certainty in application, at least if it is to serve as a basis for criminal prosecution. This derives from the principle of *nullum crimen sine lege*, a general principle of justice.[26] The Inter-American Commission on Human Rights has specified that any definition of a crime must be:

"Classified and described in precise and unambiguous language that narrowly defines the punishable offence, by providing a clear definition of the criminalised conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable by other penalties."[27]

The principle of legal certainty was also early acknowledged by the European Court of Human Rights (ECtHR) which, in *Kokkinakis v. Greece,* pronounced:

"...that Article 7 para. 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."

Thus the protection by fair trial against arbitrary or oppressive use of the criminal law

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[25] A. Cassese, *International Law 2nd ed.,* (2005) 449.
[26] Specific Human Rights Issues: New Priorities, in Particular Terrorism, UN Doc. E/CN.4/Sub.2/2003/WP.1, para. 62-7.
[27] See Report on Terrorism and Human Rights, OEA/ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, "Recommendations", No. 10 (a).

follows on the proper identification of the conduct that constitutes the crime. This enables the defendant to know what has to be proved against him consequently allowing him to prepare his defence. Predictability is fundamental to this process.

In addition, the European Convention of Human Rights (ECHR) specifically provides that any interference with the right to 'liberty and security' (Article 5), 'freedom of conscience and religion' (Article 9), 'freedom of expression' (Article 10) and 'freedom of assembly and association' (Article 11) explicitly necessitates that the respective interference is "prescribed by law". In the *Sunday Times case* the ECtHR clarified that the "prescribed by law" requirement entails not only accessibility to the law in question, but also that the law is formulated with sufficient precision that the individual, to some degree of reasonableness, will be able to predict the consequence of a given act.[28] With regard to 'liberty and security', the interference must not only be prescribed by law; it must also follow a lawful procedure.[29] In *Winterwerp v. The Netherlands* this was interpreted not only to mean that the relevant procedure followed had to be in conformity with municipal law and the "general principles" contained in the Convention, but also that the relevant rules should ensure that no one be arbitrarily deprived of his liberty.[30]

Underlying principles thus exist to protect against exercise of arbitrary power, which is fundamentally in opposition to the principle of *fair trial*. The safeguard against arbitrariness is above all ensured by clarity and predictability. Thus international human rights law sets a high threshold before an international prescribed conduct can serve as foundation for a criminal prosecution. This was to some extent a problem for the International Military Tribunal in Nuremberg, set up after the Second World War to secure the prosecution of the major war criminals, but it is no longer disputed.[31]

Bearing this in mind, we may now analyse Professor Cassese's proposition, according to which "terrorism" is defined as:

"Criminal acts intended or calculated to provoke a State of terror in the general public, a group of

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[28] See ECtHR *Sunday Times Case*, Judgment of 26 April 1979, Series A, Vol. 30, para. 49.
[29] Cf. generally, D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (1995) 104.
[30] ECtHR, *Winterwerp v. Netherlands* (1979) 2 EHRR 387, para. 37.
[31] Cf. A. Cassese, *International Criminal Law* (2003) 143 and R. Cryer, *Prosecuting International Crimes* (2005) 232-288. See further below p. 14.

persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"[32]

This definition, according to Cassese, contains the three main requirements: firstly, "the acts must constitute a criminal offence under national legal systems" The use of the plural form implies that at least two jurisdictions have criminalised the conduct in question. If, however, the relevant conduct is to be regarded as a norm of customary status, then this requires widespread practice. According to the requirement established by the International Court of Justice (ICJ) in the *North Sea Continental Shelf cases,* a customary rule of international law consists of two elements. First of all, a material element consisting of State practice, and secondly a psychological element, *opinio juris*, which is the belief that a norm is binding as law. There are several other variations in the literature, but these are the main ingredients in the formation of a customary norm under international law.[33] This was explicitly stated by the ICJ in the *North Sea Continental Shelf cases*:

"...- for in order to achieve this result [the establishment of a customary norm], two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice. But they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[34]

Practice in itself is therefore not enough; we also need to know why this practice occurred. In other words, it is not enough that a large group of States has criminalised specific conduct in their national legislation: for this practice to be relevant in the process of formation of a customary norm, this also has to be done in the conviction that this was required by international law. This presents a serious obstacle for Cassese's proposition. Numerous States have by now criminalised many acts generally considered "terrorist" offences. Most such offences, however, existed long

[32] UN Doc. A RES/49/60, 1994, para. 3.
[33] Ian Brownlie suggest for instance four elements: (a) duration, (b) uniformity, consistence of practice, (c) its generality, but not universality; and (d) *opinio juris necessitates*, in *Principles of Public International Law* 4th ed.), p. 4-11. Anthony A. D'Amato suggest a whole new system in *The Concept of Custom in International Law,* (1971) 73-98 and 270-272.
[34] ICJ, *North Sea Continental Shelf Case,* I.C.J. Reports (1969), para. 77.

before any serious consideration was given to the concept of terrorism, *e.g.* the crime of murder, criminal damage and other violent offences. They may also have come about as part of the implementation procedure of specific treaty obligations. It is, however, uncertain whether this practice can be relied on as evidence of customary international law, at least without further considerations.[35] In relation to terrorism, one very important consideration is the varying degree of participation within different counter-terrorism treaties. Before the SC called upon States to "become parties as soon as possible to the relevant international conventions and protocols relating to terrorism" many counter-terrorism instruments only had a modest number of ratifications.[36] The Convention for the Suppression of the Financing of Terrorism, for instance, had at that time only been ratified by two States.[37] This seems to imply that is was the SC that incentivated States to become parties to the counter-terrorist instruments since ratification was not previously seen as being rendered obligatory by the existence of a rule of law requiring it. Although the relevant part of the SC resolution was not legally binding this may weaken any customary argument since it is questionable whether State practice in such circumstances satisfies the subjective element referred to as *opinio juris*. Additionally, as will be illustrated below, relatively little State practice exists that may sustain an argument that a customary norm exists defining and criminalising so-called terrorism. The difficulty of acquiring information, and not least verification, of the prosecution or other dispositions in such cases, further confuses the matter. This is so despite the relatively high number of terrorist attacks. The lack of any definition of " terrorism" further complicates the identification of the relevant practice. Even if national legislation, implementing certain counter-terrorist obligations, were to be relied on as a source to establish a customary norm, then this could still not sustain the definition proposed by Cassese because it contains elements that are not present within these instruments.

The second element suggested by Cassese, that the act "must be aimed at spreading terror among civilians with a view of intimidating, coercing or influencing the policy of a government", does not correspond with the text adopted by the General Assembly. There is no requirement that the group be civilian; neither does the text

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[35] Cf. R. Baxter, 'Multilateral treaties as evidence of customary international law', 41 British Yearbook of International Law 275 (1965) 275.

[36] Security Council Resolution 1373, 28 September 2001.

[37] The United Kingdom of Great Britain and Northern Ireland (7 March 2001) and Uzbekistan (9 July 2001). See <http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp>.

specify the purpose of the criminal act, other than that it has to be political, which is entirely open-ended.

Nor, likewise, does the third element recommended by Cassese, that the act "be politically or ideologically motivated", seem to correspond to the text.[38] The text approved by the General Assembly lists different forms of motive, but significantly ends with the words "or any other nature" which makes it non-exhaustive. Consequently, it cannot be concluded on the basis of this text that any act of terrorism has to be politically or ideologically motivated. This is also sustained by the lack of political or ideological motive requirement in existing counter-terrorism instruments. Thus according to the definition prepared by the General Assembly, it is not only politically or ideologically motivated acts that cannot be justified, but all criminal acts intended or calculated to provoke a state of terror in the general public. Accordingly, acts with a pure economic or other motive also fall within the definition.

It is furthermore noteworthy that the definition suggested by Cassese is almost identical with that he earlier identified.[39] In the late eighties, Cassese described terrorism on the basis of 109 definitions identified by the American political scientist Walter Laqueur, as: "any violent act against innocent people intended to force a State, or any other international subject, to pursue a line of conduct it would not otherwise follow".[40] None of the suggested definitions contributes anything significant to the legal workability of the concept of "terrorism" because they do not satisfy the qualitative requirements and thus serve no legal purpose. No matter how optimistically one views this possible convergence of common perceptions of terrorism, it cannot override the forceful criticism that terrorism is dysfunctional as a legal concept. The ever-expanding meaning given to the "terrorism" and subjective bias only works to reinforce this opinion.[41] As expressed by Judge Higgins:

> "Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the method used are unlawful, or the targets protected, or both... [T]he term is at once a shorthand to allude to a

[38] A. Cassese, *International Law 2nd ed.*, (2005) 450.
[39] Cf. Also the 1937 Convention for the Prevention and Punishment of Terrorism, which never came into force: "criminal acts directed against a State and intended to calculate or to create a State of terror in the minds of particular persons, or group of persons or the general public".
[40] A. Cassese, *Terrorism Politics and Law*, (1989) 5-6 (emphasis original).
[41] For the concept of the speaker-oriented bias see T. Kaptain, 'The Terrorism of "Terrorism"' in J. P (ed.) *Terrorism and International Justice*, (2003) 49.

variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned".[42]

Similarly Professor Baxter:

We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."[43]

Despite of this, some authors still take the position that some of the conduct prescribed within the counter-terrorism regime gives rise to legal obligations, also for non-Party States. Bassiouni, for instance argues that the *aut dedere aut judicare* principle, which is common to all the counter-terrorism instruments subsequent to the Tokyo Convention, applies to all international crimes however prescribed; considering twenty different acts, including hijacking, kidnapping of diplomats and hostage-taking, he states that:

"That system [of international crimes] is predicated on the assumption, by each signatory State to an international criminal law convention, to enforce its provisions under its national criminal laws and to cooperate in the prosecution and punishment of such offenders... Under such a scheme, international crimes established by conventional or customary international law *must* be enforced by the national criminal laws of the States"[44]

Bassiouni seems, in other words, to imply that all international crimes, irrespective of whether they are established as a result of treaty or under customary international law, contain an obligation to co-operate and ensure prosecution of the alleged offender. There are several flaws inherent in this argument. Firstly, the position taken by Bassiouni seems to rely on a very broad conception of "international crime". He thereby overlooks the very important distinction, pointed out by Neil Boister, between international criminal law *strictu sensu* and transnational criminal law; the former covering so-called core crimes of international concern that are directly criminalised under international law and the latter providing for indirect criminalisation through the obligation to establish crimes under domestic law. Transnational criminal law

[42] R. Higgins, *The general international law of terrorism*, in R. Higgins/M. Flory (ed.), *International law and Terrorism*, (1997) 28.
[43] R. Baxter, 'A Sceptical Look at the Concept of Terrorism', Arkon Law Review 7 (19973/74) 388.
[44] M. C. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law', 15 Case Western Reserve Journal of International Law (1983) 29.

offences are thus not international crimes *strictu sensu,* but conduct that international law prescribes, with binding effect, that States must criminalise within their domestic criminal system.

Transnational criminal law offences may therefore not comply with the principle of *nullum crime sine lege* without first having been implemented into a domestic legal system. The principle of *nullum crime sine lege* entails *inter alia* that criminal offences may normally only be established in written law enacted by parliament. This is based on the *principle of strict legality,* which is to be found in most civil law jurisdictions. Although variations exist within the domestic application of the doctrine its essential purpose is to safeguard individuals against arbitrary interference from the State. International law is far less restrictive in regard to the application of the doctrine of strict legality then domestic jurisdictions.[45] Although is growing importance is reflected in the fact that it has gradually replaced the more relaxed principle of substantive justice.[46] This is among others expressed in various human rights instruments.[47] The International Military Tribunal, established after the Second World War, adopted the principle of substantive justice by focusing on the obvious knowledge of the wrong.[48] This was partly due to the lack of clearly enunciated international crimes at the time. The principle of *nullum crime sine lege* is by now, however, a well-established principle of international criminal law. This is for instance sustained by the Secretary-General's report pursuant to SC resolution 808 (1993) establishing the ICTY, where the Secretary-General stated:

"In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[49]

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[45] See for instance H-H. Jescheck, *Lehrbuch des Strafrecht – Allgemeiner Teil (5.ed.)*, (1996) 133 *et seq.*

[46] A. Cassese, *International Criminal Law 2nd ed.*, (2003) 138.

[47] See for instance ICCPR, Article 15; ECHR, Article 7, ACHR, Article 9.

[48] "The maxim *'nullum crimen sine lege'* is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." IMTFE Judgment (English Translation) Chapter II, The Law, pp.25-26.

[49] UN Doc. S/25704 (1993).

The principle was later acknowledged by the ICTY itself.[50] The principle is also contained in the Rome Statute.[51] Transnational criminal law does not fulfil the requirements of *strict legality* under international, let alone domestic legal systems, because of its inherent lack of precision. The lack of precision, as will be illustrated below, is the result of a desire to ensure rapid conclusion and broad agreement of the counter-terrorism instruments. Thus counter-terrorist instruments were never intended to define international crimes, they merely seek to establish an minimum agreement on the illegitimate use of force by prescribing certain conduct which State are obliged to criminalise.

The principle of *strict liability* is often is considered redundant in relation to international crimes because of a tendency to focus on the most heinous crimes where the relationship between the individual and the State is easily forgotten.[52] Although the ever expanding scope and application of international law, its growing influence on individuals especially in the area of counter-terrorism and the trend to rely on international law as a source of legitimacy for repressive actions increasingly necessitate a doctrine of restrictive interpretation, *i.e. favor rei* (in favour of the accused). Thus the doctrine has not lost its importance. On the contrary, the doctrine of *strict legality* is becoming ever more important as the influence of international law penetrates the domestic sphere.

In regard to Bassiouni's proposition, that all international crimes imply an obligation to co-operate and ensure prosecution of the alleged offender, it should further be kept in mind that "a treaty does not create either obligations or rights for a third State without its consent."[53] This, the so-called principle of *pacta tertiis*, can be seen as a logical consequence of the *Lotus principle*. Consequently there can be no obligation on non-contracting States to comply with the principle of *aut dedere aut judicare*: that is, unless this principle has crystallized as a norm of customary international law. Given the nature of international law, *i.e.* a system of independent States where rules emanate from their own free will,[54] one should always be careful about implying obligations. There might be a right to prosecute international crime,

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[50] ICTY, *Prosecutor v Milomir Stakic*, Judgment of Trial Chamber II (IT-97-24-T), 31 July 2003, para. 411.
[51] The Rome Statute, Article 22.
[52] See for instance, J. Keegan, '*Saddam deserves the fate of the Nazis*', Daily Telegraph 20 October 2005.
[53] Vienna Convention on the Law of Treaties, Article 34.
[54] See *Case of the SS Lotus*, PCIJ Series A. No. 10 (1927).

even a mandatory obligation under certain instruments, but there is no clear evidence of any customary norm requiring compulsory prosecution. The most one could argue is that where treaties provide such an obligation, a corresponding customary rule may have emerged or be in the process of crystallising.[55]

The counter-terrorism instruments

The first Part of this thesis argued that the term "terrorism" is not a legal term of art and that no international obligation arises with respect to the conduct so described. This is important to understand the context of the present analysis because the nature of the international system does not presuppose obligations on States. The establishment of the counter-terrorism regime was therefore innovative, creating novel obligations. The purpose of the second part of this thesis is to provide an overview of these new obligations and analysis the individual instruments scope and theoretical efficacy. The purpose of this exercise is to illustrate that, although in formal terms the international accomplishments are considerable, their efficacy is limited and their practical application has been negligible.

The first international attempts to deal with the problem of terrorism took place as early as the late 1920s and 1930s under the auspices of international conferences for the unification of penal law.[56] Later, the Council of the League of Nations took the initiative, as a result of the assassination of King Alexander of Yugoslavia and the French Foreign Minister Barthoru in 1934, to establish a committee with a view of drafting an international counter-terrorism convention.[57] This resulted in 1937 Convention for the Prevention and Punishment of Terrorism. This Convention was a "complete failure".[58] The Convention was signed by 24 States but was only ever ratified by India.

Despite the absence of a generally accepted definition of terrorism in international law, an increasing number of counter-terrorism instruments, sometimes referred to as

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[55] A. Cassese, *International Law 2nd ed.*, (2003) 264.
[56] S. M. Finger, 'International terrorism and the United Nations', in Y. Alexander (ed), *International Terrorism*, (1976) 323.
[57] *Ibid.*
[58] A. Cassese *Terrorism, Politics and Law*, (1989) 9.

"suppression conventions", have been agreed.[59] These have gradually expanded the list of conduct that could be considered terrorist acts. The following provides and overview of the instruments currently in force.[60]

The Convention on Offences and Certain Other Acts Committed on Board an Aircraft

The first international instrument related to the prevention and suppression of terrorism was the Convention on Offences and Certain Other Acts Committed on Board and Aircraft [Hereinafter the 'Tokyo Convention'].[61] Sometimes referred to as the "catalyst" of a serious of multilateral conventions concerning problems of offences committed against civil aviation.[62] It is the first of the so-called counter-terrorism instruments.[63] It was not, however, strictly speaking, intended as a counter-terrorist instrument. In fact, the Convention originates from a question concerning the "legal status of aircraft" presented by the Mexican representative at the Sixth Session of the legal Council of the International Civil Aviation Organisation (ICAO) in 1950.[64]

The problem concerning aircraft was that many States had not extended their criminal jurisdiction to cover these when flying abroad.[65] This left open a considerable jurisdictional problem, especially over the high seas, where aircraft were literally "flying oases of lawlessness".[66] The original purpose of the Tokyo Convention was

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[59] For the term "suppression conventions" see N. Boister, 'Human Rights Protection in the Suppression Conventions', Human Rights Law Review, (2002) 199-227.

[60] Thus the analysis does not encompass the most recent instrument, the International Convention for the Suppression of Acts of Nuclear Terrorism, which opened for signature on 14 September 2005.

[61] The Convention on Offences and Certain Other Acts Committed on Board and Aircraft, signed on 14 September 1963, in force 4 December 1969.

[62] A. E. Evans, 'Aircraft and Aviation Facilities', in A. E. Evans and J. F. Murphy, *Legal aspects of International Terrorism* (1978) 3.

[63] It is the first instrument to be listed in the UN compilation of global and regional instruments on terrorism, *International Instruments related to the Prevention and Suppression of International Terrorism*, (2001).

[64] ICAO Document 7035-LC/128, p. 10, referred to by R.P. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964) 307.

[65] For case concerning the difficulties of jurisdiction of crimes committed on board an aircraft see for instance. *R. v. Martin* [1956] 2 QB 272 or *USA v. Cordova* U.S. District Court E.D. New York, 1950. 89 F.Supp. 298

[66] B. Cheng, 'International Legal Instruments to Safeguard International Airtransport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at

thus not to establish international jurisdiction nor to define an international crime, but to overcome jurisdictional problems by the recognition of the entitlement of States to establish jurisdiction of their courts under national laws.[67] This was not strictly necessary since international law leaves States a wide measure of discretion to extend and apply their laws and jurisdiction to acts occurring outside their territory, which is only limited by certain prohibiting rules.[68] The undertaking of the Tokyo Convention nonetheless proceeded, primarily establishing obligations for Contracting States to establish and assert jurisdiction to prescribe over aircraft of their own registration and not so much creating obligations towards other States, with the notable exception of Article 11, which deals with hijacking.[69] This provision was a last-minute amendment. In fact it was not before several years of drafting had elapsed that in March 1962 the notion of hijacking was introduced.[70] The proposal to include hijacking in the Convention was presented by the United States and Venezuela who viewed the Tokyo Convention as an appropriate vehicle to combat this evolving threat.[71] The proposal was sponsored by a growing insecurity in civil aviation due to the rise in hijacking incidents occurring in the early 1960s.[72]

The work on the Tokyo Convention was concluded in 1963. None of the obligations in the Convention are onerous and yet the Convention did not attract enough ratification to enter into force before 1969.[73] That it took six years for the Convention to enter into force, ironically with the ratification of the United States, which was the most affected State and a most active contributor during the drafting process, might, at least to some extent, be explained in a broader perspective of the serious events that occurred in the early part of the 1960s, *i.e.* the Cuban missile crisis, extension of the Sino-Soviet rift, the India-China border hostilities, the Cyprus

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International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997) 25.

[67] Cf. .P. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964) 317.

[68] *Case of the SS Lotus*, PCIJ Series A. No. 10 (1927) at 18-19.

[69] B. Cheng, 'International Legal Instruments to Safeguard International Airtransport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997) 25.

[70] P. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964) 325.

[71] *Ibid.*, Cf. G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation, International Conciliation', (1971) 47.

[72] For a Statistic overview of hijacking see A. E Evans, 'Aircraft Hijacking: What is being done', American Journal of International Law (1973) 643.

[73] The Tokyo Convention, Article 13(3).

dispute, the assassination of President Kennedy, the international war in Yemen, among others.[74]

Aim and object

The aim of the Tokyo Convention was twofold. Firstly, it aimed to ensure that in the case of offences against penal law on board an aircraft the State of registration would always have jurisdiction and, secondly, to authorise the aircraft commander and other specified persons to take certain measures to secure the safety of the aircraft.[75] This was established through the penal legislation of the Contracting States and their discretion in the interpretation of acts, which may jeopardize aviation safety.[76]

Definition of the criminalised conduct

The Tokyo Convention, which bears the title of "Convention on *offences* and certain other acts Committed on Board an Aircraft" [emphasis added], offers no general definition of any offence.[77] Neither does it offer any guidance as to the establishment of an international crime or the concept of terrorism. The only provision with any connection to terrorism is Article 11, which provides:

"When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting State shall take all appropriate measures to restore control of the aircraft to its lawful commander, or to preserve his control of the aircraft."

This provision establishes the requirement of certain conditions that must be fulfilled before "hijacking" is committed, within the meaning of the Convention.[78]

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[74] Cf. N. D. Joyner, *Aerial Hijacking as an International Crimes*, (1974) 132. See Also *A. Abramovsky, Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention*, Columbia Journal of Transnational Law (1974) 389-91.
[75] G. F. Fitzgerald, 'Offences and certain other Acts committed on Board Aircraft: The Tokyo Convention of 1963', Canadian Yearbook of International Law (1964) 192.
[76] The Tokyo Convention, Article 1(b).
[77] emphasis added.
[78] For the notion of "hijacking" under the Tokyo Convention see S. Shubber, 'Is hijacking of aircraft piracy in international law, British Yearbook of International Law (1968-69) 194-202.

Firstly, the provision clearly narrows the potential group of hijackers, *i.e.* the persons taking control or interfering with the aircraft, to people on board the aircraft.[79]

Secondly, any attempted interference or control has to be unlawfully committed. The question of what constitutes unlawful control or interference will according to most commentators have to be determined either by reference to the law of the State of registration, or the territorial State in whose airspace the plane might be in flight.[80]

Thirdly, an indispensable element of hijacking is the use of force, or threat thereof. This naturally implies physical violence but as Sami Shubber argues that it would constitute an unreasonable interpretation of the Convention if it did not also entail non-physical violence such as for instance the use of certain forms of drug.[81] Shubber emphasizes that Article 11 deals specifically with the crime of hijacking even though this crime is covered by the general scope of Article 1(a). With this in mind, he concludes that it cannot reasonably be argued that an act having all of the characteristics of hijacking, except the means mentioned in the provision, is not to be regarded as an unlawful seizure of an aircraft.[82] This is also concordant with the statement made by the Australian representative at the drafting of the Tokyo Convention, who stated that

"...what the conference was concerned with in the particular case under consideration was the end result and not the means by which it had been accomplished. Hijacking of an aircraft might be accomplished in many ways other than by violence"[83]

This is obviously true for the concept of hijacking, but it does not at first sight seem to be coherent with the popular perception of terrorism.

It is furthermore notable that the Tokyo Convention does not require any specific political motive on behalf of the offender. In other words, whether the hijacking is intended for political purposes or mere extortion of money, like the incident concerning D.B. Cooper, is irrelevant in relation to the fulfilment of the intent (*mens*

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[79] *Ibid.*, at p. 195.
[80] R. P. Boyle and P. Roy, 'The Tokyo Convention on offences and Certain other Acts Committed on Board Aircraft', Journal of Air law and Commerce, 30 (1964) 345.
[81] S. Shubber, 'Is hijacking of aircraft piracy in international law', British Yearbook of International Law (1968-69) 196.
[82] *Ibid.*, at p. 197.
[83] International Conference on Air Law, Tokyo August-September 1963, vol. 1, Minutes, I.C.A.O. Doc. 8565-LC/152-I, p. 325, paragraph 97.

rea) requirement.[84] Although it is open for each Contracting States to apply their own domestic standards since the Convention does not, unlike later instrument, require the criminalisation of the described conduct.

Jurisdiction

The spatial application of the Tokyo Convention is restricted by several factors.[85] The convention only applies to "acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight[86] or on the surface of the high seas or of any other area outside the territory of any State"[87] hereby excluding any external interference such as sabotage on the ground. Nor does the Convention apply to aircraft used in military, customs or police services.[88]

The first restriction, limiting the application of the Tokyo Convention to acts occurring outside the territory of any State, is a natural result of the aim of the Convention, to secure jurisdiction, which is evidently superfluous within the territory of a State.[89] Anything further was viewed as an unnecessary intrusion into the purely domestic affairs of a Contracting State.[90]

The second restriction, the exemption altogether of military or law-enforcing agencies, was at that time viewed as a continuation of the customary principle applying to piracy,[91] *i.e.* that States maintain exclusive jurisdiction over their military vessels or it was attributed to the fact that the military incidents of hijacking were nominal compared with the rising number of commercial offences and consequently international attention was only given to the latter.[92] This might have been the case at that time, but it is worth noting that this so- called "military carve-out" is continued in all the so-called counter-terrorism instruments, a feature that will be examined below.

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[84] The D.B. Cooper incident concerned a hijacking of a U.S. passenger plane in 1971 where the hijacker demanded a parachute as part of his ransom. This was later used to escape the airplane. Cf. generally D. Gero, *Flights of Terror: Aerial Hijack and Sabotage since 1930,* (1997) 100-101.
[85] The Tokyo Convention, Article 1(2-4).
[86] *Ibid.*, Article 1(3).
[87] *Ibid.*, Article 1(2).
[88] *Ibid.*, Article 1(4).
[89] Compare with the Montreal Convention, Article 5(1).
[90] Cf. P. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964) 332.
[91] N. D. Joyner, *Aerial Hijacking as an International Crimes*, (1974) 130.
[92] *Ibid.*

Obligations of co-operation and human rights limitations

The Tokyo Convention closely regulates the powers of the aircraft commander. Other than that, the Convention obliges contracting States, when "circumstances so warrant", to secure the presence of any person suspected of hijacking.[93] Detention or other measures must, according to the Tokyo Convention, only be continued for "such time as is reasonably necessary to enable any criminal or extradition proceedings to be initiated."[94] Thus the Tokyo Convention specifically provides an obligation of *due process* similar to those contained in human rights instruments.[95]

The Tokyo Convention also provides for consular representation. Article 13(3) specifically provides that "Any person in custody... shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national." This is in all probability not an individual right and consequently does not have direct effect in national law.[96] Even so, it does create an obligation of the State where that person is in custody to assist with communication. A literal interpretation of the phrase "be assisted in communication", on the face of it, does not require that communication be actually established. Nevertheless, this would probably be too literal an interpretation given modern circumstances and the ease of communication we enjoy today. A more reasonable interpretation would doubtlessly entail a quite far-reaching obligation to ensure that lines of communication were in fact established. Any other interpretation would seem to go against the aim and object of the provision, effectively rendering the provision redundant. It is important to stress, however, that the right to consular communication is a right of the State.[97] Thus the benefits to the individual from communication may vary significantly depending on the domestic law of the detainee and the will of the national authorities.[98] It is

[93] The Tokyo Convention, Article 13(2).
[94] *Ibid.*
[95] C.f. *e.g.* ECHR Article 5(3) or ICCPR Article (14).
[96] ICJ, *LaGrand Case* (Germany v. United States of America), Judgment of 27 June 2001.
[97] ILC Fifty-sixth Session (3 May to 4 June and 5 July to 6 August 2004), UN Doc. A/CN.4/536, Chap. 7, p. 28.
[98] In Germany for instance the Federal Constitutional Court in the *Rudolph Hess case* accepted that the Federal Republic were under a constitutional duty to provide diplomatic protection to German nationals. *Rudolph Hess* (Case number 2 BVR4 19/80), 90 International Law Reports 386. Whereas in the United Kingdom, the Court of Appeals in the *Abassi case* held that it could only order the Government to give due consideration to the facts of a given case. Beyond this, the Court did not believe it possible to make any general proposition. [2002] EWCA Civ 1598, para. 104-105.

furthermore uncertain, from the wording, whether the provisions require the detaining State to initiate communication if the detainee refuses such communication.

The obligation to establish communication between the detained person and the State of nationality is further contained in Article 13(5), which provides that when a State has taken a person into custody, then the respective State is under an obligation "immediately to notify the State of registration of the aircraft and the State of nationality of the detained person". There can therefore be no doubt that the arresting State is under an obligation to inform the national State of the person in custody of its actions. The Tokyo Convention contains a further commitment, qualified by the words "if it [the State holding the person] considers it advisable", to contact any other interested State of the respective persons in custody and of the circumstances warranting the detention."

The Tokyo Convention contains no obligation to extradite. In fact, it clearly rejects the latter in that Article 16(2) provides "nothing in this Convention shall be deemed to create an obligation to grant extradition." Nevertheless, Article 16(1) specifies that any offences committed on an aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft. Article 9 further provides the aircraft commander with powers to deliver, to the competent authorities in the territory of which the aircraft lands, any person whom the aircraft commander has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft. In other words, if an aircraft is registered in State A and flies between State B and C, then the aircraft commander may deliver a person of nationality X to State C (the State of landing) for any serious offence in violation of the penal laws of State A (the State of registration), provided that the acts in question were committed on board the aircraft. Any contracting State to which a person is delivered or in whose territory a hijacked aircraft lands shall immediately make a preliminary enquiry into the facts of the case.[99]

The Tokyo Convention contains no express human rights provisions, with the possible exception of the obligation to ensure *due process* for any person taken into

[99] The Tokyo Convention, Article 13(4).

custody.[100] The Convention does, however, contain protection against persecution. The Convention neither authorises nor requires "any act in respect of offences against penal laws of a political nature or those based on racial or religious grounds."[101] This is puzzling when viewing the Convention as a counter-terrorism instrument, because this provision might deny the Convention any scope of application in terrorist cases, since a successful offender may be received in a third State as a political refugee.[102] This was for instance the case in 1983, when an Iran Air flight, with 400 people on board, on its way from Shiraz to Teheran was hijacked. The hijackers wanted to fly to Iraq but agreed instead to go to Paris, where they subsequently surrendered. They were sentenced to prison terms, but these were later suspended and they were granted political asylum by the French authorities.[103] This was despite French ratification of the Tokyo Convention in September 1970.[104]

Despite the Tokyo Convention's lenient wording, there is evidence to suggest that States view their obligations as somewhat stricter than the wording would lead one too expect. This is apparent in some of the documents released under the 30-year rule,[105] giving an insight into the consideration of the UK government during the 1970 Black September incident. On the 6th of September 1970, four airliners were seized by the Popular Front for the Liberation of Palestine (PFLP). They demanded the release of Fedayeen (members of the Palestine movement) imprisoned in Germany, Switzerland and Israel. Two of the hijacked aircraft were forced to land at the Dawson Field airstrip in Jordan and another was taken to Cairo Airport. The fourth hijacking failed when the terrorist were overpowered. One was killed while another, a woman named Leila Khaled, was arrested. The plane was diverted to Heathrow where Khaled was taken into custody. The PFLP demanded Khaled's release. To emphasise their demands, the group hijacked another plane a few days later. The PFLP held the all the hijacked passengers and crew, more than 400 people of whom 65 were of British nationality, as hostages in Jordan. On the 9 of September the Security Council adopted a resolution calling for the immediate release of all hostages.[106] The UK

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[100] *Ibid.*, Article 13(2).
[101] *Ibid.*, Article 2.
[102] N. D. Joyner, *Aerial Hijacking as an International Crimes*, (1974) 131.
[103] D. Gero, *Flights of Terror: Aerial Hijack and Sabotage since 1930*, (1997) 81.
[104] See <www.icao.int/icao/en/leb/Tokyo.htm>.
[105] Section 5(1) of the Public Records Act 1958, as amended in 1967. Partly replaced by the Freedom of Information Act 2005.
[106] Security Council Resolution 286, 9 September 1970.

government was faced with a difficult decision. The release of the person in their custody, Leila Khaled, was an essential part of the demands made by the PFLP. During a cabinet meeting on the 9th of September 1970, officials considered the pros and cons of her release. The advantages were - "We should get her out of our area of responsibility and should be seen to have fulfilled the PFLP demands and thereby saving the lives of the United Kingdom Nationals." The disadvantages on the other hand were that, " The pilots and the airlines share the view that that there should be no capitulation to blackmail" and in relation to the legal obligations of the UK, "We should also be throwing overboard our previously declared attitude on hijacking and should lose all credibility in international civil aviation circles. We should also be in breach of the Tokyo Convention of 1963."[107] Since the Tokyo Convention does not provide for any obligation either to extradite or to prosecute this Statement on the law seems overstated. It does however provide a rare insight in to the legal obligations felt by the UK Government.

Conclusion

The Tokyo Convention had several inadequacies as an effective instrument against the then growing international problem of aircraft hijacking.[108] It only obliges States to take such actions that are "appropriate" thereby leaving a considerable margin of appreciation to the Contracting States. Such inadequacy makes it difficult to consider the Tokyo Convention a proper counter-terrorist instrument. This is especially true because of its very broad political exception clause.[109] It is furthermore doubtful whether the Tokyo Convention falls within the category of so-called "suppression conventions", *i.e.* multilateral treaties that oblige States to criminalise certain forms of conduct and to provide legal assistance in order to suppress these treaty crimes.[110] This is so because it does not oblige States to criminalise any conduct. On the

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[107] See CM (70) 13th Conclusions, 9th September 1970, Document reference CAB 128/47, Emphasis added.

[108] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 51.

[109] Article 2. Cf. generally R. P. Boyle and P. Roy, 'The Tokyo Convention on offences and Certain other Acts Committed on Board Aircraft', Journal of Air law and Commerce, 30 (1964) 333.

[110] N. Boister, 'Human Rights Protection in the Suppression Conventions', Human Rights Law Review, (2002) 199.

contrary, the Tokyo Convention relies to a large extent on already existing penal legislation of the Contracting States and only obliges these to take such measures as may be necessary to establish their jurisdiction as the State of registration over offences committed on board an aircraft.[111] Article 11 clearly avoids any attempt either to define any crime under international law.[112] Thus the line between legitimate and illegitimate force, according to the Tokyo Convention, is to be established on the basis of domestic law. Neither does the Tokyo Convention establish an obligation to extradite. Considerable emphasis is put on the safe return of the aircraft and the powers of the commander. Little consideration is, however, given to the obligation towards the offender. To refer to the Tokyo convention as a "counter-terrorist convention" might thus seem exaggerated. This is at least so, if the term "counter" entails anything that refers to deterrence. The Tokyo Convention entails no punitive prevention device and only Article 11 directly relates to the phenomenon of terrorism. The draft convention did originally contain more potent measures dealing with punishment and extradition, but these were taken out early on.[113]

The Convention for the Suppression of Unlawful Seizure of Aircraft

During the late 1960s the face of hijacking changed from a relatively crude and amateurish affair to more violent and highly organised offences.[114] This was partly due to the transformation of hijacking into a political weapon. Political fronts started to use hijacking as method of international 'blackmail',[115] *e.g.* extorting money from governments, forcing them to consent to the release of prisoners or simply as a way of achieving publicity for their demands.[116] The transformation of hijacking, coupled

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[111] The Tokyo Convention, Article 3(2).
[112] R. P. Boyle and P. Roy, 'The Tokyo Convention on offences and Certain other Acts Committed on Board Aircraft', Journal of Air law and Commerce, 30 (1964) 345.
[113] See Documents of the Legal Committee, Fourteenth Session, I.C.A.O. Doc. 8302, LC/150-2 at 71 (1963).
[114] See Address made by E. McWhinney in the Proceedings of the American Society of International law 65th annual meeting concerning the New Developments in the Law of International Aviation: The Control of Aerial Hijacking, pp. 71-75.
[115] See Address made by K. E. Malmborg in the Proceedings of the American Society of International law 65th annual meeting concerning the New Developments in the Law of International Aviation: The Control of Aerial Hijacking, pp. 76.
[116] For a listing of such instances see, A. E Evans, 'Aircraft Hijacking: What is being done', American Journal of International Law (1973) 644.

with the obvious shortcomings of the Tokyo Convention, created a sense of "urgency".[117] As a result, the ICAO was in 1968 requested to initiate a study to resolve the problem of unlawful seizure of aircraft.[118] This study resulted in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft [Hereinafter the 'Hague Convention'].[119] The rapid acceptance and conclusion of the Hague Convention may to some extent be attributed to the before mentioned PFLP Hijacking spree in September 1970.[120] This was the most dramatic hijacking ever seen and the event that signalled the arrival of international terrorism.[121]

At the time of the drafting of the Tokyo Convention there was general consensus that the aim was to patch up an existing lacuna in international law. The Hague Convention on the other hand was by many seen as a codification of customary international law.[122] It is, however, questionable whether at the time of its conclusion there was sufficient State practice to sustain this proposition.[123]

Aim and object

As expressed in the preamble of the Hague Convention, unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services and undermine the confidence of the peoples of the world in the safety of civil aviation. The Hague Convention was accordingly drafted with the purpose of deterring such seizure by providing an international obligation to provide for domestic deterrent systems ensuring the punishment of offenders.

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[117] *Ibid.*, at p. 648.
[118] ICAO Assembly Res. A16-37, ICAO Doc. 8779 at 92 (1968).
[119] Convention for the Suppression of Unlawful Seizure of Aircraft, Signed at The Hague on December 1970 in force on October 1971.
[120] A. E Evans, 'Aircraft Hijacking: What is being done?', American Journal of International Law (1973) 652.
[121] C. Gearty, *Terror*, (1991) 53.
[122] Cf. Hague Conference , *loc. cit.*, Vol.1, p. 41 paras 44-46.
[123] See Address made by A. E. Evans in the Proceedings of the American Society of International law 65th annual meeting concerning the New Developments in the Law of International Aviation: The Control of Aerial Hijacking, p. 90. Cf. generally S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 700-703.

Definition of the criminalised conduct

The Hague Convention does not mention the word "hijacking" but instead provides that:

"Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts any such act, or
(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence"

The Hague Convention does not define an international crime. Nor does it even use the expression "unlawful seizure of aircraft". The Convention merely enumerates the constituent elements of the "offence", which are to be criminalised in the domestic law of Contracting States.[124] There are three essential components of hijacking within the meaning of the Hague Convention, which can only be committed while the aircraft is in flight.[125]

Firstly, the use of force or threat hereof. This requirement is similar to that of Article 11(1) of the Tokyo Convention, and it evidently includes physical violence. The definition, however, is on the face of it, wider than that entailed in the Tokyo Convention, by virtue of the words "or any other form of intimidation". Sami Shubber, relying on the natural interpretation of the word "intimidation", argues that this phrase adds nothing to the provision because "it is very difficult to envisage any kind of situation on board an aircraft where people are being intimidated, for the purpose of hijacking of the aircraft, without the use of force or threat thereof in one

[124] For the concept of hijacking in the Hague Convention see, S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 689-699.

[125] Flight is defined in Article 3(1). The definition of "flight" within the Hague Convention is wider than that entailed in the Tokyo Convention, because it the closure of the external doors and not the take-of that is the decisive moment for the commencement of the Convention's application. (Compare The *Hague Convention* Article 3(1) with *Tokyo Convention* Article 1(3). Cf. generally S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 696-699.) The flight, and the application of the Convention, ends when the external doors are opened, with the exception of forced landings where the flight is deemed to continue until the competent authorities take control of the situation. In comparison, the application of the Tokyo Convention ended when the landing runs ends.

form or another..."[126] Shubber nevertheless concludes that the provision must be interpreted more broadly than its normal literal meaning thus covering all forms of hijacking irrespective of the use of force or threat hereof. This conclusion is reached, despite rejection of a proposal to widen the scope of the provision to cover means other than those mentioned,[127] on the basis of reasonableness and the principle that a treaty shall be interpreted in accordance with its aim and purpose.[128] One has to agree with the conclusion, that hijacking also covers seizure or control over an aircraft without the use of force or threat hereof, but it is respectfully submitted that the interpretation applied by Shubber is incoherent and based on the false premise that intimidation excludes non-forcible measures. Intimidation is not exclusively a result of force or the threat hereof as it could be achieved in other ways for instance through the use of blackmail.[129] The definition of hijacking in the Hague Convention is therefore literally wider than the definition entailed in the Tokyo Convention because the wording entails non-forcibly measures. Its drafting history leaves some uncertainty as to whether this was the intention of the drafters. The original proposal to include "intimidation" was introduced by Japan, who suggested the inclusion of psychological force.[130] The Australian delegate supported this initiative and further suggested that the provision should read: "by force or threat thereof" as well as "in any other manner".[131] This proposal was rejected.[132] The reason for this rejection is open to discussion. Shubber views this rejection as a result of unwillingness in the parties to include non-forcible measures,[133] whereas Abramovsky suggests that the extension was viewed as unnecessary.[134] In any case, when interpreting the intention of the parties, it is the common intention of all parties and not the unshared intention

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[126] *Ibid.*, at p. 691. See also A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 393.

[127] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 694.

[128] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 694.

[129] Cf. G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation, International Conciliation (1971) 53.

[130] ICAO Doc. 8877-LC/161 (1970), at. 26.

[131] *Ibid.*, at 27.

[132] See Legal Committee, 17th Session, *loc. Cit.* P. 28 paras 39 and 41 see also supporting positions, *ibid.* p. 30, para 53.

[133] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 692.

[134] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 393.

of individual States that is in point, a factor that is increasingly difficult to determine, rising in proportion with the number of parties. Moreover, since this intent is the very goal of interpretation, it cannot exclusively be used as the means of attaining it.[135] One cannot therefore conclusively infer that inclusion of the word intimidation was not to cover non-forcible measures.[136] This also seems most closely to coincide with the meaning of the word "intimidation" and the aim and object of the Convention. The scope of the Convention is therefore wider then its predecessor which seems to imply that the drafter viewed the threat as more serious and thus were willing to concede greater obligations, although this is only a is tentative conclusion given the uncertainty of the intention of the provision.

The second element in the definition of hijacking on the Hague Convention is the seizure or exercise of control over the aircraft.[137] Just like the Tokyo Convention, the Hague Convention is restricted in its scope to people on board the aircraft. The Hague Convention is nevertheless narrower in its scope because it does not include "interferences".[138]

The third element of hijacking under the Hague Convention is the requirement that the use of force or threat thereof must be "unlawful". The inclusion of "unlawfully" serves to emphasis that the conduct must be without legal excuse or justification. Consequently, the conduct defined does not include preventive action from the police or other governmental forces, for instance in an attempt to regain control of an aircraft seized by hijackers.[139] This is a similar to the Tokyo Convention. There is no guidance according to which legal system the reference to lawfulness has to be solved. Some argue that, similar to the Tokyo Convention, it is the law of the competent jurisdiction, *i.e.* the law of the State of registration, State of landing or the State where the alleged offender is found.[140] Pragmatically, and this holds true for the Tokyo Convention as well, one could add that it would always be the State of custody that would have the final say.[141] This uncertainty may significantly undermine the

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[135] Cf. M. koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument,* (1989) 298.
[136] For an opposite view see I. Bantekas & Susan Nash, *International Criminal Law* (2003) 24.
[137] Article 1(a). Cf generally, S. Shubber, Aircraft Hijacking under the Hague Convention 1970 - A New Regime?, International and Comparative Law Quarterly (1973) 694-696.
[138] The Tokyo Convention Article 11(1).
[139] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 48.
[140] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 696.
[141] See below the *Lockerbie incident*, p. 52.

effectiveness of the system because hijacking, within the meaning of the Convention, per definition would always involve more than one legal system and a State sympathising with the offender may refer to "lawfulness" of the most lenient system to avoid prosecution. It should moreover be emphasised that similar to the Tokyo Convention, the Hague Convention does not require that the criminalised conduct be performed with any particular ideological or political motive.

Jurisdiction

In an attempt effectively to combat hijacking the Hague Convention seeks to provide jurisdiction for as many States as possible.[142] The Hague convention thus attributes jurisdiction to prescribe to any State where an aircraft is registered and the State where the aircraft lands, if the hijacker is still on board.[143] Prescriptive Jurisdiction may furthermore be based on the lease of an aircraft without crew to a person whose principal place of business or residence is in a Contracting State.[144] More importantly, however, is jurisdiction to prescribe based on the mere presence of the offender within the territory of a Contracting State.[145] Thus, potentially, the Hague Convention provides concurrent jurisdiction to three, even four States, without any priority.[146]

The first, and most uncontroversial, base of jurisdiction is that bestowed the State of registration. This is similar to the notion of 'flag State' jurisdiction, which applies to ships on the high seas, which is an extension of the territorial principle.[147] Thus a State may have jurisdiction to prescribe over an act of hijacking even though it

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[142] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 395.
[143] The Hague Convention, Article 4(1)a.
[144] Respectively Article 4(1) (a-c). Cf. generally S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 705-716.
[145] The Hague Convention, Article 4(2) "*Each contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in the territory and does not extradite him...*"
[146] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 396.
[147] Cf. P. Malanczuk, *Akehurst's Modern Introduction to International law (7th ed.)*, (1997) 185.

occurred outside its airspace and only involved foreign nationals by the mere certification of registration.[148]

The State of landing is also ascribed prescriptive jurisdiction. This jurisdictional base is broader than the territorial principle because it may also provide jurisdiction to prescribe over an offence that might not have occurred within the territory of the prosecuting State. This was in fact the purpose of its inclusion.[149] This jurisdictional foundation was inserted to provide a base of jurisdiction where the hijackers would be overpowered before entering the territory of the State of landing. In such circumstances, and without any other link to the crime, the State of landing would have found itself without any authority under traditionally recognised principles of jurisdiction to prescribe.[150] This very broad jurisdictional scope, described by Shubber as "extra-territorial", did not receive unanimous approval.[151] It was nevertheless retained since it was viewed as essential to the aim of securing prosecution. The initial resistance does, however, give evidence of the reluctance of some States to exercise jurisdiction over events occurring outside their territory or against persons not of their nationality, even in relation to terrorism. Such resistance is, however, understandable because the Hague Convention applies to "any person on board an aircraft in flight", whereas the Tokyo Convention only applied to acts committed on board any aircraft "registered in a Contracting State". Hence the State of landing might arguably be required to exercise adjudicative jurisdiction of over an act of hijacking occurring outside the traditional base of prescriptive jurisdiction of any Contracting State, *e.g.* if the hijacking took place over the high seas, were committed by non-nationals and on board an aircraft registered in a non-Party State and the hijackers were overpowered before entering the airspace of the State of landing. Such a situation is highly unlikely but nonetheless theoretically possible. Likelyhood is moreover, inversely proportional to the number of State parties to the Convention. In other words, it was more likely to happen in the early years when the Convention had a small number of signatories. The reference to the "lawfulness" of the prescribed conduct might alleviate the State of landing of any obligation, but this is far from certain.

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[148] See the 1944 Convention on International Civil Aviation, (Chicago Convention) Articles 13 and 17.
[149] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 397.
[150] *Ibid.*
[151] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 709.

Jurisdiction based on the principal place of business or permanent residence of the lessee is a clear innovation of The Hague Convention and does not fall within any of the traditionally established bases of jurisdiction to prescribe.[152] Shubber provides an clear example of the wide scope of the provision: if an aircraft is registered in State A and leased without crew to a person whose permanent residence is State B, and the aircraft is hijacked over the high seas (or in State X) by nationals of State C, then, he concludes, there is "no connection whatsoever between State B and the crime"; yet State A might still have jurisdiction to prescribe under the Hague Convention.[153] In his example Shubber disregards the contentious *passive nationality principle* where it is the nationality of the victim, and not the offender, that is decisive. Previously this was anathema to most common law jurisdictions.[154] The theory has, however, increasingly been accepted in relation to terrorist acts.[155]

The most innovative and expansive base of prescriptive jurisdiction is that based on the mere presence of the offender within the territory of a State. There is no requirement of any link between the prosecuting State and the crime. On the contrary, the immediate proximity of the offender within the territory of the prosecuting State is enough to establish jurisdiction. Thus the offence may be committed by a foreign national against a foreign aircraft in foreign airspace, or over the high seas, yet the mere presence of the offender within the territory of a Contracting State would entitle it to exercise jurisdiction. Shubber regards this as a "new principle in the sphere of extra-territorial jurisdiction".[156] Unclear terminology has, however, meant that some view the non-existent nexus requirement between the act of hijacking and the jurisdiction of the State of detention as a form of universal jurisdiction.[157] This was for instance indicated in the *Yunis case*.[158] The case concerned the hijacking, by Yunis

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[152] *Ibid.* at 710.
[153] *Ibid.*, at 712.
[154] In one of the leading precedents, the *Cutting case,* the United States challenged Mexico's claim to jurisdiction under Mexican libel law to try an American citizen for a publication made in the United States. U.S.For.Rel., 1887, pp. 766-767.
[155] Cf. G. Gilbert, Transnational Fugitive offenders in International Law, (1998) 101.
[156] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 712.
[157] See also the Counter Memorial of The United Kingdom of Belgium 28 September, at 3.3.36-41, Dissenting opinion of Judge Van Den Wyngaert, para 59. For the different terminology see for instance A. Cassese, 'When May Senior Officials Be tried for International Crimes? Some Comments on the Congo v. Belgium Case', European Journal of International Law (2002) 855 *et seq.*
[158] *United States of America v. Yunis* (No 3), ILR Vol. 88 at 176. In regard to the definition of universal jurisdiction see the Joint separate opinion of Judges Higgins, Kooijamans & Buergental, in the *Arrest Warrant case*, para 41.

and four others, of a Jordanian passenger plane from Beirut airport in June 1985. The hijackers took control of the aircraft shortly before departure and forced the pilot to take off immediately. They wanted the plane to fly to Tunis but were refused landing and consequently had to return to Beirut. After a press conference in Beirut, where the hijackers reiterated their demands of all Palestinians leaving Lebanon, the hostages, among them two United State nationals, were released and the plane blown up. Yunis was identified as the probable leader of the hijackers and the FBI was ordered to secure his arrest. In 1987 FBI agents lured him on board a yacht in the Mediterranean and arrested him in international waters. The agents then transferred him to the United States where he was charged with several offences. He was convicted of conspiracy, hostage taking and aircraft damage.[159] He appealed; stating *inter alia* that the court lacked jurisdiction and the purported exercise of jurisdiction had violated established principles of international law. Yunis had been tried under the 1974 U.S. Antihijacking Act, which *inter alia* was an implementation of the Hague Convention. The Antihijacking Act stated that persons prosecuted for air piracy must be "found" within the United States.[160] It was argued that this precluded prosecution of hijackers that were "brought" within the United States to stand trial. The Court of Appeals, however, rejected this "fact-specific" argument. They further stated that the relevant act had to be interpreted in accordance with the wording of the Hague Convention, "present within the territory", which did not indicate any voluntarism. According to the Court of Appeal, this was reinforced by the obligation of the United States to extradite or prosecute offenders in their custody. They therefore found that international law did not restrict the statutory jurisdiction of the Antihijacking Act, adding further that:

"Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that States may assert universal jurisdiction to bring offenders to justice, even when the State has no territorial connection to the hijacking and its citizens are not involved."[161]

It is important to note, however, that the Court of Appeals did not rely on universal jurisdiction but merely stated its availability. It might be added that the Government of the United States in its appellate brief argued that "the universal and passive

[159] Respectively 18 U.S.C § 371 (1988), 18 U.S.C. § 1203 (1988) and 49 U.S.C. § 1472(n) (1988).
[160] 49 U.S.C. App. § 1472(n).
[161] *United States v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991).

nationality theories of extraterritorial jurisdiction together provided ample ground... to assert jurisdiction over Yunis".[162]

This almost unrestrained base of jurisdiction to prescribe raises some obvious questions, especially in relation to non-State Parties. To draw a parallel, the single most problematic part of the Rome Statute for the United States was Article 12, which delegates territorial jurisdiction of State Parties to the International Criminal Court (ICC), potentially also covering over nationals of non-Party States.[163] This was the main reason for which the United States objected to the establishment of the ICC,[164] even though the United States several times has itself exercised adjudicative jurisdiction over a foreign national under legislation implementing an international treaty providing extra-territorial jurisdiction. This was so in the above-mentioned *Yunis case*.[165] Likewise in the *Rezaq case* the United States exercised extra-territorial jurisdiction, also this time under laws *inter alia* implementing the Hague Hijacking Convention.[166] Rezaq was a Palestinian national, but according to Madeline Morris this made little difference since the United States does not recognize the normal attributes of statehood in relation to Palestine.[167] Professor Michael P. Scharf has pointed to other inconsistencies in the U.S. position.[168] He mentions, among others, several cases in which the United States has asserted adjudicative jurisdiction pursuant to the Hostages Convention over Chinese, China not being party to the Convention.[169] The main difference between these cases and the ICC is, according to Madeline Morris, is that no State objected to the extra-territorial prosecution of the

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[162] Brief for the United States at 32-43, United States v. Yunis, 924 F. 2d 1086 (D.C. Cir. 1991) United *States v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991). It might be added that the Court also referred to the draft of the Restatement, which mentioned that the theory "has been increasingly accepted when applied to terrorist and other organized attacks on a State's nationals by reason of their nationality, or to assassinations of a State's ambassadors, or government officials." This was later adopted in the final version (Restatement (Third) Of the Foreign Relations of the United States § 404 (1987).

[163] Cf. David Scheffer (U.S. Ambassador at Large for War Crimes Issues), 'International Criminal Court: The Challenge of Jurisdiction, The Violence: Panel Summary: The Future of the International Criminal Court', Am. Soc'y Int'l L. Proc. 69 (1999) 69.

[164] M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 LCP 1 (2001) 14.

[165] Yunis was a Lebanese national but Lebanon never objected to his prosecution in the United States. This might have been because Lebanon was a Party to the Hague Convention. *Ibid.* at 63.

[166] *United States .v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998).

[167] M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 LCP 1 (2001) 63.

[168] M. P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: S Critique of the U.S. Position', 64 Law & Contemporary Problems. 67 (Winter 2001) 99.

[169] See *United States v. Wang Kun Lue*, 134 F. 3d 79 (2d Cir. 1997); *United States v. Lin*, 101 F.3d 760 (D.C. Cir. 1996); *United States v. Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997); United States v. Chen De Yian, 905 F. Supp. 160 (S.D.N.Y. 1995). Cf. *United States v. Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999).

conduct criminalised under the counter-terrorist conventions.[170] The jurisdictional provisions of the counter-terrorism treaties have thus been accepted, or acquiesced to, whereas the objection by the United States to the Rome Statute prevents persuasive consensus, thus precluding it instant customary status.[171]

The Hague Convention provides not only for distinct bases of jurisdiction to prescribe and adjudicate it also obliges each Contracting State to "take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him..." The obligation to establish jurisdiction was, according to Judge Guillaume, a "conscious turning point in the combating of hijacking."[172] From this point on, the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.[173] The broad jurisdictional scope of the Hague Convention can be seen as an expression of the intentions of the drafters to close all possible gaps and therefore also the seriousness with which the threat of hijacking was viewed, as illustrated by the UK delegate at the Hague Conference, who stated,

"that normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence... he was prepared to support...[the proposal on mandatory jurisdiction on the part of the State where a hijacker is found]"[174]

This clearly testifies to the seriousness with which the threat was viewed and the lengths to which States were willing to go to eradicate the menace of hijacking and to create an effective transnational criminal regime.

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[170] M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 LCP 1 (2001) 62.
[171] *Ibid.*, at 60.
[172] Separate opinion of President Guillaume, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), 14 February 2002, para. 7.
[173] *Ibid.*
[174] Quoted in S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 712.

Obligation of criminal co-operation and human rights limitations

The Hague Convention borrows heavily from the Tokyo Convention but also goes further than the latter, *e.g.* by extending the scope of application, requiring each Contracting State to provide a basis of prosecution - regardless of where the hijacking occurred, requiring States to submit the case to the competent authorities for the purpose of prosecution and by providing for the notion of an accomplice.[175] The most important development introduced by The Hague Convention, in relation to criminal co-operation, was the introduction of the principle of *aut dedere aut judicare*,[176] according to which:

"the Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

The Hague Convention thereby builds on a on a principle similar to that applied to *grave breaches* within the Geneva Conventions.[177] Importantly, it does not amount to an obligation to prosecute *per se* but merely obliges the respective State to present the case to the competent prosecuting authorities.[178] These then have to proceed in a manner consistent with normal practice, acting within the law applicable to criminal offences of a similar serious nature. In other words, States are required to treat terrorism as ordinary but serious crime. Thus if the evidence available does not establish a *prima facie,* case and this under normal circumstances prohibits the initiation of proceedings, then there will be no breach of the Convention if

[175] Article 1(b). The term accomplice only covers people on board an aircraft. Cf. generally A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 394.

[176] This system is predicated on the maxim of Hugo Grotius (See H. Grotius, *De Jure Belli Ac Pacis*, Book II, Chapter XXI, § IV(1) (1624) in The Rights of War and Peace (A. Campbell trans. 1901) *aut dedere aut punire*, which was re-phrased by Bassiouni as *aut dedere aut judicare* (See M.C. Bassiouni, International Extradition and World Public Order (1974) 7.

[177] See below p. 65.

[178] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 398.

prosecution is not undertaken.[179] Even though the obligation under the *aut dedere aut judicare* principle is not absolute, some still regard it as a success because it has been copied in other instruments.[180] The introduction of the *aut dedere aut judicare* principle can, according to Lissitzyn, be viewed as a reflection of State's willingness to overcome the impediment, inherent in the existing diversity, and to develop an effective international criminal system.[181] It might further be added, that it also gives some insight into how far States are willing to acquiesce to international obligations in relation to an acknowledged international problem.

To facilitate extradition, Article 8 of the Hague Convention includes hijacking as an extraditable offence in present and future extradition treaties, thereby establishing a principle facilitating the prosecution of the alleged offender similar to the provisions of the Genocide Convention and the four Geneva Conventions.[182] Shubber takes the position that this excludes hijacking from the *political offence exception.* He writes:

"According to Article 8, para.1, all Contracting Parties undertake to consider hijacking of aircraft an offence the perpetrator of which can be extradited. This means that, if previously some States could claim hijacking was a political offence and as such was not covered by extradition treaties, this plea in no longer"[183]

On the face of it, this argument seems persuasive, but a more thorough analysis of the provision leads to an opposite conclusion. Article 8 reads in full:

"1) The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

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[179] D. Costello, 'International terrorism and the development of the principle of *Aut Dedere Aut Judicare*', Journal of International Law & Economics (1975) 487.

[180] B. Cheng, 'International Legal Instruments to Safeguard International Airtransport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997) 33. Mentioning the Convention on the Prevention and Punishment of Crimes against internationally Protected Persons (1973) and the European Convention on the Suppression of Terrorism (1977).

[181] Cf. Address made by O. J. Lissitzyn in the Proceedings of the American Society of International law 65th annual meeting concerning the New Developments in the Law of International Aviation: The Control of Aerial Hijacking.

[182] Respectively, Convention on the prevention and punishment of the crime of Genocide (1948) Article VII, Geneva I, Article 49, Geneva II, Article 50 Geneva III, Article 146, Geneva IV, Article 150.

[183] S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 718.

2) If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3) Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State."

Shubber's argument is convincing in relation to subparagraph 1. However, both subparagraphs 2 and 3, makes it clear, at least in relation to extradition in the two mentioned scenarios, that Article 8 does not require any modification of the existing law. Instead, extradition is subject to the conditions of the requested State, which may or may not provide for extradition. This leads to the conclusion that also subparagraph 1 does not exclude the *political offence exception.* Any other interpretation would mean that the Contracting States were under different legal obligations depending on their prior commitments in relation to extradition.[184] States, which enter into or have entered into extradition treaties, are would therefore be more restricted than States with no prior obligation, at least according to the interpretation suggested by Shubber. This is so despite the fact that these general extradition treaties might have no relation to the Hague Convention. The interpretation suggested by Shubber is therefore unreasonable and does not conform to the principle of reciprocity, which is a general principle of international law.[185] FitzGerald writes that Article 8 was the outcome of a "labyrinthine drafting process." He further writes that:

"In 1969, at the first session of the ICAO Legal Subcommittee on Unlawful Seizure of Aircraft, the United States had proposed that the alleged offender be surrendered but the State in which he was present to the State of registration of the aircraft even in circumstances where the hijacking had taken place for political motives. Nevertheless, in the Subcommittee, a majority of nine members against

[184] This would for instance mean that a Contracting State under the Hague Convention, whose national law provides for the *political offence exception*, could rely on this exception when it was requested to extradite an offender to another State with which it did not have an extradition agreement. The same State could not, however, rely on the same *political offence exception* if it were requested by another Contracting State with which it already had an extradition treaty, despite the fact that the treaty might explicitly provide for a *political offence exception*; whereas, States that generally do not require any extradition treaties are in a position where they may rely on the *political offence exception* if this is a condition provided for in the law of the requested State.

[185] See *mutatis mutandis Norwegian Loans case*, P.C.I.J. Reports 1957, p. 9.

three believed that any State, whether or not it was the State in the territory of which the offender left the aircraft, may refuse extradition of the alleged offender in accordance with its national law - for example, when the offender was its own national, or was seeking asylum from persecution, or acted from political motives. The minority, including the United States, took the view that the existence of political motives should not be a basis for refusal of extradition. After this session, the minority view never received serious support in any of the bodies discussing extradition'.[186]

The Convention is conspicuously silent on the matter of the *political offence exception*, especially when compared with other instruments facilitating extradition. For example, the 1948 Convention for the Prevention of Genocide specifically provides in Article 7 that: "Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition." Similarly, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid States in Article IX(1) that: "Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition." One vital difference exists between these instruments and the Hague Convention, since the former established crimes under international law whereas the Hague Convention merely obliges States to criminalise the relevant conduct under its domestic law. Nevertheless, the clear wording of these other instruments is in stark contrast to the Hague Convention. This is despite the formulation in the Genocide Convention being drafted before the Hague Convention and generally well known. There can accordingly be no doubt that if the drafters had wished to exclude the *political offence exception,* then the wording would have been more unambiguous. Thus Article 8 does not exclude hijacking from the *political offence exception*, but merely amends the list of extraditable offences, which simply means that aircraft hijacking is one of the crimes for which extradition may be granted. [187] Thus a State may refuse extradition on the basis of the *political offence exception.* Importantly, however, it would still be obliged to present the case to the relevant authorities in accordance with the principle of *aut dedere aut judicare.*

This rather vague provision can, according to Lissitzyn, be attributed to the large opposition to a mandatory extradition provision. He writes, that a large proportion of

[186] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 60.

[187] See, however, the 1977 European Convention on The Suppression of Terrorism, which provides that defined terrorist activities shall not be regarded as a political offence so as to prevent extradition, Article 1.

drafting States was not prepared to deprive hijackers escaping from totalitarian regimes the protection of *due process* of law if returned.[188] This was despite supporters of a mandatory provision including such powerful countries as the Soviet Union and the United States.[189] The effect of the discretionary wording of the extradition provision is enhanced by the fact that the State of custody *de facto* has sole discretion as to whether the conduct falls within the *political offence exception.*[190] This might seriously undermine the effectiveness of the Hague Convention and of the whole system of national prosecution of terrorist offenders.[191] The system established by the Hague Convention does therefore provide a loophole allowing States not to prosecute or extradite, at least for as long as the case is presented to the competent authorities.[192] This legal ambiguity of the aut *dedere aut judicare* principle is also present in the 1984 Torture Convention. A fact that may have been exploited by the Danish authorities in relation to the prosecution of the former Israeli Ambassador Gillon for admitted acts of torture.[193]

Similar to the Tokyo Convention the Hague Convention also provides for an obligation to take the alleged offender into custody.[194] Article 6(1) provides that: "The custody and other measures shall be as provided in the law of the State but may only be continued for such time as is necessary to enable criminal or extradition proceedings to be instituted."[195] The alleged hijacker must therefore be treated in accordance with domestic law, as any other criminal, and the proceedings must be conducted with *due process*. This includes that the detention must not be

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[188] See address made by O. J. Lissitzyn in the Proceedings of the American Society of International law 65th annual meeting concerning the New Developments in the Law of International Aviation: The Control of Aerial Hijacking, p. 84.

[189] Cf. A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 400-405. A number of countries have accede to bilateral or multilateral treaties requiring extradition regardless of motive, Cf. V. Epps, 'Abolishing the *Political offence exception*', M. C. Bassiouni (ed.), *Legal Response to International Terrorism – U.S. Procedural Aspects.*

[190] M. C. Bassiouni, 'Ideologically motivated offences and the *political offence exception* in extradition – a proposed juridical standard for an unruly problem', De Paul Law Review (169) 222.

[191] See R. I. R. Abeyratne, 'Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offence of Unlawful Interference with Civil Aviation', Transport law Journal (1998) 118-119.

[192] Cf. A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law (1974) 399. For an opposite view see, S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 717-719.

[193] Cf. J. Hartmann, 'The Gillon Affair', 54 International and Comparative Law Quarterly (2005) 745-755.

[194] The Hague Convention, Article 6(1).

[195] *Ibid.*, Article 6(1).

disproportional in length when compared to its aim, *i.e.* enabling criminal or extradition proceedings to be instituted.

The Hague Convention also contains a provision on consular protection, identical with that contained in the Tokyo Convention.

In relation to criminal co-operation, Article 10 requires that Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in connection with conduct falling within the scope of the Convention. The Convention does not specify what this obligation might entail. Neither, however, does it specify any grounds on which co-operation may be refused. It is therefore difficult to conceive any specific obligation that may born out of this rather amorphous provision other than a general requirement of good faith.

Conclusion

The Hague Convention was the first proper counter-terrorist convention and model for subsequent instruments. It was the first counter-terrorism instrument to introduce the principle of *aut dedere aut judicare*, which was not only copied into latter counter-terrorist conventions but also other instruments, such as the UN Torture Convention.[196] The Hague Convention was also the first in a series of instruments containing an enumerative formula of separate offences which contracting States consent to criminalise in their national legislation. It is therefore the first of the so-called "suppression conventions".[197] Like its Tokyo counterpart, the Hague Convention does not require any specific motive. The lack of any such requirement means that the Convention applies to all acts of hijacking. This has led to some debate concerning the importance of motive in relation to terrorist crimes. Joseph J. Lambert, in his commentary on the Hostages Convention, quotes Axel P. Schmidt who in his extensive work, 'Political terrorism: A research guide to concepts, theories, data bases, and literature' criticised the enumerative method applied in most counter-terrorist instruments, including the Hague Convention, saying that "[t]he nature of

[196] For a list of intruments see ILC Preliminary report on the obligation to extradite or prosecute ("aut dedere aut judicare"), 7 June 2006, UN Doc. A/CN.4/571.
[197] N. Boister, 'Human Rights Protection in the Suppression Conventions', Human Rights Law Review, (2002) 199.

terrorism is not inherent in the violent act itself".[198] In response hereto, Lambert argues that simply because a hijacker is not really a "terrorist" in the sense that he is trying to instil "terror" does not mean that his act not reprehensible. He continues:

"With respect to the hijacker or hostage taker who is trying to escape a repressive or terroristic regime, as a moral or legal matter it may be queried whether even an oppressed person should be given the right to take hostages or hijack a civil aircraft in order to gain his freedom. As a practical matter, an explicit exception on that basis would be so subjective as to be unworkable: who would decide what States are terror regimes? ... Any international co-operation on the subject would break down immediately. The decision to make all such acts illegal, regardless of the underlying motivation, was the only way to achieve and keep any sort of international consensus"

Despite the Hague Convention's unqualifying criminalisation of hijacking, it does not exclude the application of legal justifications and excuses, even in the scenario painted by Lambert. This was in fact illustrated in the *Safi case*.[199] The case concerned the hijacking of an aeroplane from Afghanistan to England. During the hijacking the plane landed in several places, including in Moscow, before finally landing at Heathrow, England, were the hijackers surrendered after three days of negotiation. The hijacker was later prosecuted *inter alia* on the count of hijacking under the 1982 Aviation Security Act s.1(1). The first jury to try the case was unable to agree on a verdict and a re-trial was ordered where the hijackers were convicted. The case was appealed on grounds of a material misdirection of the jury. The hijackers had argued the defence of duress because, as they submitted, they had no other way of escaping death or serious injury at the hands of the Taliban Regime, then in Power in Afghanistan.

The defence of duress, although available, was highly questionable since the hijackers landed in several countries before reaching the United Kingdom. The possibility of the defence of duress was in relation to hijacking was first established in the *Abdul-Hussain case*.[200] Here, the hijackers were Shiite Muslim fugitives from the Saddam regime living in Sudan. Fearing return to Iraq in 1996 they hijacked a plane and flew to Stansted, England. They believed that they would face the death penalty if returned to Iraq. The judge ruled that the defence of duress should not be left to the

[198] J. J. Lambert, *Terrorism and Hostages in International Law – a Commentary on the Hostages Convention 1979*, (1990), 50.
[199] *R v Safi (Ali Ahmed and Others)* [2003] EWCA Crim 1809.
[200] *R v Abdul-Hussain* [1999] Crim LR 570.

jury because the threat of death was insufficiently close and immediate. The Court of Appeals forcefully overturned this ruling.[201] In the *Safi case* the Court of Appeals likewise overturned the lower court's decision since the judge had directed the jury to apply an objective, as apposed to a subjective test, for the defence of duress. Both cases thus allowed for the defence of duress.

The availability of the defence of duress or other exculpating defence may seriously hamper the effectives of the counter-terrorism regime. The Convention itself is silent on the matter. The forms of conduct defined in the counter-terrorism instruments are not, however, crimes in or against international law but national crimes and as such subject to domestic criminal law and procedure. Diverse legal systems therefore allow for a variety of distinct legal defences, potentially creating great uncertainty of application in the system as a whole,[202] especially if the judiciary is influenced politically or by other considerations. As correctly pointed out by Lambert: "who would [or should, it might be added] decide what States are terror regimes".

This is not the only uncertainty it relation to the counter-terrorism system initiated by the Hague Convention. There are other serious flaws that allow States legitimately to evade the underlying obligation of securing prosecution or extradition, especially if the prosecution authorities are not immune to political influence. The system nonetheless represents the highest attainable level of transnational criminal co-operation available at the time.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

Even before the work on the Hague Convention had been completed, its deficiencies were already evident. The Hague Convention only covered the unlawful

[201] In the word of Vice President Rose: "If Anna Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our judgment, have denied here a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door." *Ibid.*

[202] For an overview of the defence of duress in different jurisdictions see *Prosecutor v. Drazen Erdemovic*, Judgment of 7 October 1997, Case No. IT-96-22-T.

seizure of aircraft and only while the aircraft was "in flight" and it did not therefore address the growing problem of unlawful interference not committed from within the aircraft, such as sabotage.[203] The ICAO Assembly therefore adopted a resolution directing the ICAO Council to convene a legal committee for the preparation of a draft convention on acts of unlawful interference against international civil aviation other than those covered by the draft convention on unlawful seizure of aircraft.[204] This culminated in the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [hereinafter the 'Montreal Convention'].[205]

Aim and object

The objectives of the Montreal Convention and those of the Hague convention are identical. Their primary concern is a multilateral response ensuring deterrence and punishment of unlawful acts against international civil aviation. There common aim is evident from their identical preambles and the extensive copying of provisions from The Hague to the Montreal Convention. In fact, the only difference is the nature of the offence targeted because otherwise the mechanism that is used in the Montreal Convention is identical with that of the Hague Convention.

Definition of the criminalised conduct

The problem facing the drafters of the Montreal Convention was to choose between a short abstract formula, which would cover the substantial number of offences intended to come under the convention or an enumerative formula containing separate definitions of the offences concerned.[206] No short comprehensive formula could be agreed upon and the following list of enumerative offences of unlawful interference with aircraft was adopted:

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[203] P. S. Dempsey, 'Aviation Security: The Role of Law in the War Against Terrorism', Columbia Journal of Transnational Law (2003) 657.
[204] Cf. I.L.M 9 (1970) 1183.
[205] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Concluded in Montreal on 23 September 1971. In force 26 January 1973.
[206] Cf. G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 67.

"Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders is incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be places on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of and aircraft in flight."

The scope of the Convention was further extended in 1998 by a supplementary Protocol, further including any act of violence against a person at an airport serving international civil aviation, which causes or is likely to cause serious injury or death as well as any act that destroys or seriously damages the facilities of an airport serving international civil aviation if such an act endangers or is likely to endanger safety at that airport. [207]

The list of criminalised conducts entailed in the Montreal Convention is far more comprehensive than those of previous instruments and a more detailed examination is required.

The Montreal Convention lists five offences all of which have the dual requisite of unlawfulness and intent, also applicable to attempts and complicity.[208] As with the Tokyo and Hague Conventions the inclusion of the term "unlawful" serves to exclude conduct that is legally justifiable.[209] It is noteworthy that all the described offences have a minimum threshold incorporated at the end of each paragraph so that only acts

[207] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988) Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation Done at Montreal on 24 February 1988

[208] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 67.

[209] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 80.

that are "likely to endanger the safety of aircraft in flight" fall within the scope of Article 1.

Subparagraph (a) covers acts of violence against a person on board an aircraft in flight. This naturally covers any physical use of force intended to hurt or kill a person on board the aircraft so long as this act is likely to endanger the safety of the aircraft in flight. The requirement that the act must endanger the safety of the aircraft does however create some uncertainty as to the scope of this provision. It is evident that not all acts of violence are covered. A scuffle between unruly passengers, for instance, might not fulfil this requirement. Abramovsky goes so far as to suggest that even the intentional killing of a passenger on board an aircraft might not fulfil the requirement of endangering the safety of the plane, unless the tumult and panic caused by such an act would constitute the necessary threat.[210] Violence against the pilot or navigator, on the other hand, would undisputedly endanger the safety. It is more uncertain whether violence against the stewards/stewardess would fall within the scope of Article 1(1)(a). This might be seen as an over legalistic discussion but violence on board civil aircraft is far from uncommon.[211] Violence against the stewards/stewardess might not *sine qua non* endanger the safety of the aircraft, but since the training of the stewards/stewardess is vital in emergencies, an argument could be advanced that any obstruction of their functions is likely to endanger the safety of the aircraft.[212] Fitzgerald further argues that the term "violence" may also be interpreted to mean not only an armed attack or physical assault, but also cover the administration of poison,[213] including from outside the aircraft since the Convention, unlike the previous conventions, has no requirement that the offender is on board the aircraft. If, however, as suggested by Abramovsky, the intentional killing committed by a person on board is not enough to fulfil the requirement of endangering the safety of the aircraft, then neither would poisoning, unless of course the poisoned person is the

[210] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 285.
[211] See S. R. Ginger, 'Violence in the Skies: The right Rights and Liabilities of Air Carriers when Dealing with Disruptive Passengers', Air and Space Law, Vol. XXIII Number 3, 1998, p. 106.
[212] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 285.
[213] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 68.

captain or some other essential personnel. Since it is not a prerequisite that the offender is on board the aircraft, then actions committed from the ground, *e.g.* shelling, could also fall within the ambit of Article 1(1)(a) provided that is causes harm to an essential person on board the aircraft. This would, however, also fall within the scope of Article 1(1)(b). One should further add that any violence committed on board the aircraft serious enough to pass the minimum threshold of the Montreal Convention would also, in most instances, fall within the scope of the Hague Convention.[214]

Subparagraph (b) covers any act that destroys, damages, renders the aircraft incapable of flight or is likely to endanger its safety in flight. Firstly of things to note is the wide temporal scope of this paragraph, because it not only covers the aircraft "in flight" but also whilst "in service".[215] There is no requirement that the offender be onboard the aircraft. The provision therefore covers attacks from the ground, such as shelling and the use of shoulder-launched surface-to-air missiles, which have been used on a number of occasions to bring down commercial aircraft.[216] Nor is it a prerequisite that there be any threat, injury or death of passengers. In fact, subparagraph (b) is not intended cover acts against passengers or crew. Instead, its scope is aimed at acts directed at the aircraft itself.[217] The lowest threshold is the causing of damage that is likely to endanger the safety of the aircraft in flight. This could be damage to inexpensive but vital parts, such as wiring.[218] This is so for any act committed from beginning of pre-flight preparation until 24 hours after landing.[219]

Subparagraph (c) covers the use of bombs or other incendiary or destructive devices or substances, likely to destroy or damage the aircraft. The method of bringing the device on board is left open ended by the insertion of the words "by any means whatsoever", including, sending luggage with a bomb on a plane, as allegedly

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[214] See Hague Convention, Article 1(1)(a).
[215] For the definition of "in service" see the Montreal Convention, Article 2(b).
[216] J. S. Szyliowicz, 'Aviation Security: Promise or Reality?', Studies in Conflict & Terrorism, 27 (2004) 55.
[217] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 68.
[218] *Ibid.*
[219] The Montreal Convention, Article 2(b).

happened in the *Lockerbie incident.* The broad scope of this paragraph attempts to encompass all possible situations involving explosives or other destructive devices.[220]

Subparagraph (d) covers destruction, damage or interference of air navigational facilities, but only if these are used in international navigation.[221] The term "air navigation facilities" is based on Article 28 of the 1944 Chicago Convention[222] and refers to such facilities as airport control towers and radio and meteorological services.[223]

Subparagraph (e) concerns the situation where a person knowingly communicates false information to an aircraft and thereby endangers the safety of the flight. The threshold of "effect on the safety of the flight" is higher than in the previous paragraphs. The use of "thereby" indicates that the danger must occur as a result of the communication and not, as in the preceding paragraphs, be "likely" to occur. The provision was introduced to deal with the issue of bomb hoaxes.[224] There was some discussion during negotiation whether the respective provision should refer to extortion or diversion, but this was nonetheless left out.[225] The aim of any hoaxer is therefore irrelevant provided that he fulfils the requirement of unlawfully and intentionally communicating the false information. The provision thus has very wide potential scope and could cover situations that were not thought of at the time of drafting, *e.g.* so-called cyber terrorism.[226]

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[220] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 286.
[221] The Montreal Convention, Article 4(5).
[222] Convention on International Civil Aviation, signed at Chicago on 7 December 1944.
[223] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation, International Conciliation (1971) 69.
[224] *Ibid.*, at p. 70.
[225] *Ibid.*
[226] A 'terrorist' could potentially hack into an air traffic control system where he would add false information for instance about the aircraft location, altitude and speed etc. Thereby causing the air traffic controller to give the pilot falls information. This might not cause a midair collision; since pilots routinely double-check such information with their own data, but it would arguable endanger the safety of aircraft in flight. See J. S. Szyliowicz, *Aviation Security: Promise or Reality?,* Studies in Conflict & Terrorism, 27 (2004) 49.

It is apparent that the Montreal Convention has very broad scope of application despite not applying to aircraft used in military, customs or police services.[227] The two previous conventions were mostly applicable in relations between individuals and a State, because of the prerequisite that the act in question take place on board an aircraft, which in most cases would not involve a State actor. The Montreal Convention, on the other hand, has no such limitation. This means that civilian airliners that are shot down by military forces either because they are mistaken for military aircraft or the victims of faulty judgment may fall within the scope of its operation. This is not uncommon.[228] For instance, in 1999, the Democratic Republic of the Congo (DRC) brought an application before the ICJ in which it sought to establish jurisdiction based on the compulsory jurisdiction clause in Article 14 of the Montreal Convention, alleging that in 1998 a civil aircraft had been shot down by the forces of Rwanda, Uganda or Burundi. The DRC later discontinued proceedings but reserved the right to invoke new grounds of jurisdiction.[229] In 2002, the DRC again instituted proceedings, this time against Rwanda, for "massive, serious and flagrant violations of human rights and of international humanitarian law". The DRC *inter alia* relied on Article 14 of the Montreal Convention to establish jurisdiction and asked the Court, as its third submission, to declare that by shooting down a Boeing 727 owned by Congo Airlines on 9 October 1998 in Kindu, Rwanda had violated the United Nations Charter and other international instruments but also the Hague Convention and the Montreal Convention. The assertion made by the DRC that there should be jurisdiction on the basis of the Hague Convention is highly questionable. The application of the Montreal Convention on the other hand, on the face of the allegations, is undeniably correct. The Court made its final judgment on the 19th December 2005.[230] No specific considerations were made about the shooting down of their passenger plane or the Montreal Convention. This is not, however, the only case to reach the ICJ. In 1989 the Islamic Republic of Iran instituted proceedings against the U.S. for the destruction of an Iranian airplane and the killing of 290 passengers, on 3 July 1988. This application was likewise based *inter alia* on the Montreal Convention.

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[227] The Montreal Convention, Article 4(1).
[228] See D. Gero, *Flights of Terror: Aerial Hijack and Sabotage since 1930,* (1997) 104-117.
[229] *I.C.J. Yearbook 2000-2001,* Vol. 55, p. 286.
[230] ICJ, *Armed activities on the territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005

The case was later settled out of court and the case discontinued in 1996.[231]

Jurisdiction

The jurisdictional scope of the Montreal Convention is in many respects similar to that of its predecessor and counterpart the Hague Convention.[232] The former entails a further jurisdictional base because it also entails a mandate to prescribe based on territorial jurisdiction,[233] which is essential, given its aim of covering acts of sabotage on the ground, but not necessary under international law. In conformity Tokyo and Hague Conventions the Montreal Convention further establish jurisdiction to prescribe for conduct committed on board aircraft in the State of registration.[234] Identical with the Hague Convention, the Montreal convention further confers jurisdiction to the State of landing.[235] Significantly, the Montreal Convention also obliges States to establish jurisdiction, with the exception of the destruction of navigation facilities or communication of false information, in the case where the alleged offender is present within the territory.[236]

Obligation of criminal co-operation and human rights limitations

As mentioned above, the Montreal Convention contains a provision establishing a duty to secure the effective exercise of jurisdiction over the alleged offender, identical to that in the Hague Convention. This provision further provides that if an alleged offender is within the territory of a Contracting State, then that State has a duty either to present the case to its competent authorities or to extradite, *i.e.* the principle of *aut dedere aut judicare*.[237] This provision was the focal point of the *Lockerbie case*. On

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[231] Order of the International Court of Justice of 22 February 1996 case of Aerial incident of 3 July 1988 (Islamic Republic of Iran *v.* United States of America).
[232] Cf. generally A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law (1975) 268-300.
[233] The Montreal Convention, Article 5(1)(a).
[234] The Montreal Convention, Article 5(1)(b).
[235] *Ibid.*, Article 5(1)(c).
[236] *Ibid*, Article 5(2).
[237] *Ibid*, Article 7.

the 21 December 1988 a bomb exploded on board the Pan Am flight 103 over Lockerbie, Scotland. All of the 259 passengers were killed as well as 11 people on the ground. As a result of subsequent police investigations, the Lord Advocate of Scotland issued an arrest warrant against two Libyan nationals on the 14 November 1991.[238] The same day the Attorney General of the United States issued a similar arrest warrant against the two Libyan nationals. France also issued an arrest warrant.[239] A tripartite declaration was made on the 27 of November 1991 in which the United Kingdom, United States and France called upon the Libya, *inter alia*, to hand over the two Libyans for trial in Scotland or the U.S. and to satisfy the requirements of French justice[240]. Libya's response was not to comply with the request but to take steps to prosecute the accused in its own courts in accordance with Article 7 of the Montreal Convention.[241] Following Libya's refusal to comply with the request for extradition, the three parties took the case to the Security Council, which passed Security Council resolution 731 on January 1992, which, *inter alia*, urged Libya to comply with the request for extradition.[242] Libya claimed it had complied fully with its obligations under the Montreal Convention and instituted proceedings before the ICJ against the United States and United Kingdom. The proceeding concerned the interpretation and application of the Montreal Convention. Libya asked the Court to declare that (i) it had complied with its obligations under the Montreal Convention by taking the required steps to investigate the case and prosecute the two Libyans and (ii) the United Kingdom had breached the Montreal convention by seeking to force Libya to return the alleged offenders and not providing assistance for the Libyan proceedings. Libya further applied for provisional measures. These were, however, rejected because of a subsequent resolution by the Security Council.[243] This later resolution was adopted under Chapter VII on the basis of Libya's failure

[238] The two Libyans were accused of conspiracy, murder and an offence under the Aviation Security Act 1982.
[239] The two Libyans were accused of being involved in the in a 1989 explosion of UTA Flight 772 over Niger.
[240] France did not demand that the Libyans whom the sought be extradited; French law like most civil law systems, does not provide for the extradition of nationals.
[241] Both the United States, the United Kingdom and France were parties to the Montreal convention.
[242] Security Council Resolution 731, 21 January 1992.
[243] Lockerbie provisional measures Paras 39-41.

"to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the request in Resolution 731 (1992) constitutes a threat to international peace and security".[244]

The Court did not find that Libya' claim was without object as a consequence of the subsequent Security Council resolutions. Instead it found, despite claims of the opposite by the United States and United Kingdom, that a dispute existed between the two States and Libya as to whether the destruction of the Pan Am flight was governed by the Montreal Convention. The Court further considered that there was a more specific dispute concerning the interpretation and application of Article 7 of the Montreal Convention and Article 11. As known, the case was discontinued in 2003.[245] The two Libyan nationals were, after years of negotiations and sanction against Libya, handed over to Netherlands where a Scottish court was set up in the former U.S. military base known as "Camp Zeist".[246] The Court delivered its verdict on the 31st of January 2001, finding one of the two defendants not guilty, upon which he was immediately retuned to Libya. The second defendant was found guilty of murder and was sentenced to a minimum of 20 years imprisonment. The verdict was unsuccessfully appealed. Libya later compensated the families but still denies any involvement.[247] The whole incident added little to the interpretation of the Montreal Convention or to the principle of *aut dedere aut judicare*.[248] It did however demonstrate the problems inherent in the vague formulation of the *aut dedere aut judicare* principle and inadequacies of sanctions intended to secure prosecution. It might even be the first step of a neutral venue principle to solve any future disputes concerning existing extradition/prosecution provisions.[249]

Identical to the Hague Convention, the Montreal Convention requires that any alleged offender be taken in to custody and the case treated with *due process*.[250] A further duplicate is the obligation to ensure consular protection.[251] In relation to

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[244] Security Council Resolution 748, 31 March 1992, preamble.
[245] See ICJ press release 2003/29 of 10 September 2003.
[246] Cf. generally A. Aust, 'Lockerbie: The Other Case', 49 International and Comparative Law Quarterly (2000) 278-296.
[247] See http://news.bbc.co.uk/2/hi/uk_news/politics/3515589.stm.
[248] See ICJ Press Release 2003/29, 10 September 2003.
[249] Cf. generally M. Plachta, ' The Lockerbie Case: The Role of the Security Council in Enforcing the Principle of Aud dedere Aut Judicare', 12 European Journal of Internationa Law (2001) 125-140.
[250] The Montreal Convention, Article 6(1).
[251] *Ibid.*, Article 6(3).

criminal co-operation the Montreal Convention contains the same broad provision as its predecessor obliging the Contracting States to "afford one another the greatest measure of assistance" in connection with criminal proceedings falling within the scope the Convention. The Montreal Convention also contains an obligation to take preventive measures. Article 10 specifies that, "Contracting States, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1."

Like to the Hague Convention, the Montreal Convention does not specify what measures are required in relation to criminal assistance, but only that "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences."[252]

Conclusion

The scheme established by the Montreal Convention is identical with that provided by the Hague Convention. The later adoption of the Montreal Convention is generally either attributed to of the jealousy of States of their sovereign powers,[253] or to concerns of delaying work on the Hague Convention, which had not been adopted at the time when the work on the Montreal Convention commenced.[254] There is, however, one crucial difference between the two. In fact, the Montreal Convention is atypical also when compared with all the later counter-terrorist instruments in that its scope of application does not entirely exclude acts committed by military or other Governmental services. Article 4(1) specifies that the Convention "shall not apply to aircraft used in military, customs or police services". This *military carve-out*, common to all counter-terrorist instruments in one form or another, does not provide a general exclusion. Neither does the exemption in the Hague Convention, but the decisive difference, when compared with its predecessor, is that the Montreal Convention also covers acts committed outside the aircraft, as in the two cases

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[252] *Ibid.*, Article 11.

[253] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law (1975) 279.

[254] B. Cheng, 'International Legal Instruments to Safeguard International Airtransport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997) 36.

mentioned above.[255] The Montreal Convention is thus not only applicable in relations between individuals on board a civilian aircraft, which in most cases would not include military forces, but it also, potentially, includes acts committed from outside the aircraft, which are more likely to be attributable to a State under international law. Hence the Montreal Convention opens up for even broader interpretation of the term "terrorism", including the even more contentious and politically loaded notion of so-called "State terrorism".

Despite the broad scope of application and the large number of signatories, little accessible practice exists in relation to prosecution or extradition under laws implementing the Convention. Extensive copying from the Hague to the Montreal Convention, moreover, meant that many of the flaws of the Hague Convention were incorporated in the Montreal Convention, and the *Lockerbie* case clearly illustrated how an uncooperative State can bring the whole international criminal system to a halt.

The Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

The use of violence for political ends has not been restricted to attacks on civil aviation. A principal catalyst for the adoption of The Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents [Hereinafter, the 'New York Convention'], was the raid on the Saudi Arabian Embassy in Khartoum, Sudan, by the Palestinian Group 'Black September', in March 1973. Several diplomats, including the U.S. Ambassador, Cleo Noel and Charges d'Affaires George Curtis More were held hostage and subsequently killed. Thus like previous counter-terrorism instruments, the New York Convention was the product of an ad hoc response to an emerging threat.[256] The work on the

[255] ICJ, *Armed activities on the territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005. Order of the International Court of Justice of 22 February 1996 case of Aerial incident of 3 July 1988 (Islamic Republic of Iran *v.* United States of America).

[256] For a list of attacks see A. B. Green, 'Notes – Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis', Virginia Journal of International Law, 14 (1973-1974) 704, L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention*, (1975) 2-27.

Convention was originally initiated in 1970 by a letter, from the United Nations representative of the Netherlands, concerning the need to ensure protection and inviolability of diplomatic agents in view of the increasing threat.[257] This was communicated to the International Law Commission (ILC), via the President of the Security Council. This led the ILC to agree in its 23rd session, in 1971, that it should consider the possibility of producing a set of draft articles regarding attacks on persons entitled to special protection under international law.[258] The course of events that lead to the completion of the draft articles is summarised in the Commission's 1972 report.[259] It is enough here to say that the Sixth Committee debated the issued whether ILC should be requested to submit such draft articles to the General Assembly and that some of the following observations were made.

In the Sixth Committee some representatives acknowledged the problem of an increasing threat to diplomatic agents.[260] It was even pointed out that these attacks could endanger international peace and security. Opponents of a treaty pointed out that adequate protection was afforded under general international law. The General Assembly nonetheless, by resolution 2780 (XXVI) of December 3, 1971, requested the ILC to prepare a set of draft articles concerning offences committed against diplomats. The ILC debated the need for a special convention.[261] In this forum, supporters stressed that not only would such a convention strengthen the international juridical order, but also that it was of vital importance for the maintenance of world peace. Opponents, on the other hand, questioned the effectiveness of yet another international counter-terrorism instrument. After their preparation, both in the Sixth Committee and in the ILC, the draft articles were adopted by the General Assembly in resolution 3166 (XXVIII) of December 14th, 1973.

The drafters of the New York Convention found inspiration for their work in many contemporary conventions.[262] They made especially extensive use of the Hague and

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[257] L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 47.
[258] I Yearbook ILC (1971), 3 (1087th meeting, para. 38), quoted in L. M. Bloomfield and G. F. FitzGeral, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 47.
[259] See *Report of the International Law Commission on the work of its twenty-fourth session*, 2 May to 7 July 1972 (A/8710/Rev.1,) pp. 88-90.
[260] L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 47.
[261] See generally *Ibid.*, at p. 49.
[262] Such as the Vienna Convention on Diplomatic Relations (1961), The Convention on Consular Relations (1963), The Convention on Special Missions (1969), the Organization of American States

Montreal Conventions. The New York Convention resembles these earlier conventions in many respects. They were not, however, used as the starting point for the New York Convention as the Sixth Committee's draft articles departed radically from these in many respects and many topics were discussed all over again.[263]

Aim and object

The purpose of the New York Convention was to some extent similar to that of the general convention on terrorism, which had been initiated by the General Assembly in 1972.[264] The New York Convention, however, had an intended far more limited focal point and a narrower scope of application and was therefore presumed more effective in the fight against the specific threat against diplomats and other persons granted special protection under international law.[265] Unlike the previous instruments it does not concern all forms of attack but only those against so-called "international protected persons" as defined in Article 1(1)(a-b). The term "international protected persons" was new and has no autonomous meaning outside the Convention.[266] The reason for affording this limited group such special protection is related to their being considered of particular importance to maintenance of international friendly relations and co-operation among State.[267]

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International significance (1971). Cf L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 53.

[263] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 792.

[264] See generally T. M. Frank, 'Preliminary Thoughts Towards an International Convention on Terrorism', American Journal Of International Law, 64 (1974) 69-90.

[265] A. B. Green, 'Notes – Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis', Virginia Journal of International Law, 14 (1973-1974) 703.

[266] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 779. In respect to immunity see Statement by dissention Judge Van den Wyngaert ICJ, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), 14 February 2002, para. 19.

[267] The Preamble States "crimes against... these persons create a serious threat to the maintenance of normal international relations". See also ICJ, *U.S. Diplomatic and Consular Staff in the Tehran case* (Provisional measures), ICJ Reports 1979, para. 38 and ICJ, *U.S. Diplomatic and Consular Staff in the Tehran case* (Judgment), ICJ Reports 1980, para. 92.

Definition of the criminalised conduct

The New York Convention sets out to ensure protection for a specially protected group of States representatives in accordance with Article 1(1)(a). In doing so it obliges State to criminalise specific conduct committed intentionally against the protected group. The crimes in question are defined in Article 2, which provides:

> "1. The intentional commission of:
>
> a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
> b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
> c) a threat to commit any such attack;
> d) an attempt to commit any such attack; and
> e) an act constituting participation as an accomplice;
>
> shall be made by each State Party a crime under its national law."

The New York Convention, like its predecessors, had to choose between a short abstract definition and a longer list enumerating the conducts to be criminalised by the Convention. As had previous instruments, it opted for the latter. Importantly, it is also the first Convention not to rely on unlawfulness in national law as a qualification of the criminalised conduct. Instead, the New York Convention simply obliges States to criminalise the conduct described irrespective of its status under national law. This has to been seen in the light of the fact that the conduct criminalised under the Convention could never be lawfully committed by law enforcing officials and consequently there was no need to distinguish between unlawful and lawful acts.[268]

The first prerequisite for the commission of an offence within the New York Convention is the fulfilment of the condition of intent (*mens rea*). There are two requirements.

Firstly, the perpetrator has to have knowledge that the attacked or threatened person belongs to the protected group. This was discussed during the negotiations

[268] See for instance Vienna Convention on Diplomatic Relations (1961), Articles 22(1) and 27(5).

where some representatives rejected this viewpoint. The objection was not, however, sustained during the drafting.[269] The text, besides, leaves no other conclusion.

Secondly, as with the Montreal Convention, the perpetrator must intend to fulfil the specific conduct described in the article, thereby ruling out recklessness, for instance as a consequence of an accident.[270] The ILC draft also included the words "regardless of motive" after "intentional commission". The Commission in its commentary explained this as follows:

> "While criminal intent is regarded as an essential element of the crime covered by article 2, the expression "regardless of motive" states the universally accepted legal principle that it is the intent to commit the act and not the reason that lead to its commission that is the governing factor... As a consequence the requirements of the Convention must be applied by a State party even though, for example, the kidnapper of an ambassador may have been inspired by what appeared to him or is considered by the State party to be the worthiest of motives."[271]

The words "regardless of motive" were later deleted. Bloomfield and FitzGerald infer from this that the extradition provisions of the Convention might be weakened since the motive of the alleged offender could be invoked as a reason for non-extradition.[272] Wood, on the other hand, says that the deletion does not affect the meaning of the paragraph.[273] Both are probably right in that it does not seem to change the meaning of article 2. Nevertheless, it may make a difference to the overall application of the Convention since the extradition provision in the New York Convention is modelled on previous counter-terrorism instruments and, as seen above, it does not rule out the application of the *political offence exception,* but only amends existing extradition treaties.[274] Green takes a similar position. He States that when the deletion is taken in

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[269] See generally L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 77.
[270] See the Commissions commentary, [1972] ILC Report, p. 95, quoted in M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 802.
[271] [1972] ILC Report, p. 75, quoted in M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 804.
[272] See generally L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 80.
[273] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 804.
[274] See Article 8 and L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 108.

conjunction with the right to asylum in Article 12, definite erosion to the original ILC draft can be seen and the mandate providing for prosecution and extradition becomes hollow as the State in which the alleged offender is present can, if it deems the offence political, grant asylum.[275] It is important to stress, however, that even the grating of asylum would not alleviate a State from the obligation of presenting the case to the competent authorities for the purpose of prosecution since nothing precludes prosecution of a person granted asylum.[276]

Subparagraph (a) offers nothing for the objective elements of the crimes mentioned except for their general name, *i.e.* murder and kidnapping. Interestingly, the New York Convention was the first, and so far the only, counter-terrorist instrument that specifically includes murder as a terrorist offence.[277] The lack of guidance means that the objective and subjective elements (*actus reus* and *mens rea*) must be established on the basis of the national law of the State parties.[278] The precise scope of the individual criminalised conduct is therefore dependant on the legal tradition of respective States. It is questionable whether the lack of any specification of a result deriving from the acts delineated means that it must be categorised as a so-called conduct crime (sometimes referred to as act of commission) as opposed to a result crime. This is, however, unlikely to become a problem as most countries doubtlessly already have provision defining the crimes in question and only if the crimes had been defined as result crimes might this uncertainty come into conflict with the principle of *favor rei* (preference for the accused).[279]

The original draft Article both from the ILC and the Sixth Committee contained the phrase "violent attack" without enumerating specific individual crimes. The ILC preferred this more abstract approach because it found that it would be difficult to incorporate into national law a precise definition of the individual crimes to be covered by the Convention, which would lead to difficulties in reaching any

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[275] A. B. Green, 'Notes – Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis', Virginia Journal of International Law, 14 (1973-1974) 714.

[276] J. J. Lambert, *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*, (1990) 329.

[277] The 2005 amendment Protocol to the Maritime Convention also includes murder, see below.

[278] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 802.

[279] The principle has been endorsed in international law. See Rome Statute (1998), Article 22(2).

agreement on the matter.[280] Consequently, the ILC decided to leave it open for each individual State to use applicable criminal offences comprised within the concept of "violent attack".[281] By marked contrast, however, during negotiations in the Sixth Committee, some members found that the use of the excessively vague and imprecise term of "violent attack" would have implications for the future application, which again would make it difficult for States to participate.[282] Consequently the wording was changed to its present form.

Subparagraph (a) originally contains the word "serious" limiting the scope to murder, kidnapping or other serious forms of attack. The term "serious" was deleted "since it restricted the scope of the Convention by introducing an element of uncertainty."[283] The deletion apparently widens the scope of application since it sets a lower threshold to the provision's operation. In this regard, the United States representative to the United Nations stated in the General Assembly "obviously the words "other attack" mean attacks of a similar serious nature to those expressly mentioned".[284]

Subparagraph (b) contains the more abstract definition of "violent attack" without any further explanation as to the meaning of the term. It is arguable that when subparagraph (b) is read in its context and guidance is sought in the preparatory work that it includes several of the same acts as subparagraph (a). The difference being that where subparagraph (a) concerns attacks on the individual, subparagraph (b) concerns violent attack on the accommodation or transportation of the protected person. This means that the drafters of the New York Convention not only sought to protect persons but also facilities affiliated with them because if the first had been the sole object then this would have been adequately covered under the attempt provision in subparagraph (d).

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[280] See generally L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention*, (1975) 76.
[281] *Ibid.*
[282] *Ibid.*, at p. 77.
[283] A/C.6/SR.1434, p. 12, quoted in M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 803.
[284] [1972] ILC Report, p. 95, quoted in M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 803.

Subparagraph (c) covers, similarly to Article 1 of the Hague Convention, threats of any of the above-mentioned acts. Like both the Hague and the Montreal Conventions the New York Convention also criminalises attempt and participation as accomplice, respectively by subparagraph (d) and (e). According to the view taken by the ILC, all the concepts of threat, attempt and participation are well-defined under national law and there was accordingly no need for any detailed explanation.[285] Reference to these concepts would therefore have to be dealt with in the national law of the respective State.

Jurisdiction

With regard to jurisdiction, the New York Convention is modelled closely on the provisions of The Hague and Montreal Conventions, Article 4 and 5 respectively. The New York convention, firstly, establishes mandatory jurisdiction to prescribe on the basis of the territorial and nationality principles.[286] Article 3(1)(c) further provides that States shall take such measures as may be necessary to establish its jurisdiction when the crime is committed against an internationally protected person who enjoys his status as such by virtue of functions he exercises on behalf of that State. This is a novelty under international law. Wood argues that it might be thought similar to the passive personality principle. He further suggests the provision is somewhat akin to the provisions in the Hague and Montreal Conventions concerning the State of principal place of business or permanent residence of the lessee of the aircraft, Article 4(1)(c) and 5(1)(d) respectively, or to the provision concerning the State of registration of the aircraft against which an offence is committed in Article 5(1)(b) of the Montreal Convention.[287]

It should further be noted that during the drafting of the New York Convention, a number of States proposed that the Convention be inapplicable to national liberation movements. As a compromise, between those States that wanted to exclude acts of

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[285] See generally L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention*, (1975) 78.
[286] Article 3(1)(a) and (b).
[287] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 808.

national liberation movements from the scope of the Convention and those who insisted that the Convention should allow for no exception, the General Assembly resolution to which the New York Convention is annexed recognises that:

"The provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid."

The final paragraph of the resolution further states that "the present resolution, whose provisions are related to the annexed Convention, shall always be published together with it". There can therefore be no doubt that the Convention has to be interpreted in agreement with the above quote.

Obligations of co-operation and human rights limitations

The New York Convention contains significant innovations when compared with its predecessors, especially with regard to the obligations to facilitate international co-operation. Contracting States are not only obliged to take certain preventive measures, in accordance with Article 4, but are also obliged proactively to co-operate in the prevention of the conduct described. This obligation goes far beyond the timid obligations contained earlier instruments.[288] It is, however, not a novelty in itself. According to the ILC, it is a well-established principle of international law that States must ensure that its territory is not used for the preparation of crime to be committed in other States.[289]

This is, among others, is reflected in the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, where it is specifically stated that:

[288] The Montreal Convention, Article 10,

[289] Cf L. M. Bloomfield and G. F. FitzGeral, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 88.

"Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."[290]

The obligation entailed in the New York Convention goes further than this in obliging Contracting States to exchange information and to co-ordinate measure to prevent the commission of crimes.[291] This provision was based upon Article 8 of the 1971 Convention of the Organisation of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism.[292] There is no corresponding provision in any of the previous analysed instruments. The New York Convention further obliges Parties to communicate to all other States concerned facts regarding the crime committed if there is reason to believe that the alleged offender has fled the territory.[293] This obligation is a clear innovation: as it has no predecessor in any on the previous analysed conventions or in the OAS Convention.[294]

The Principle of *aut dedere aut judicare* is contained in article 7:

"The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."

It is almost identical to its predecessors, although some minor changes have been made. Firstly, by introduction of the words "and without undue delay", which seems to require promptness in the handling of the case, although without implying any priority is given to the case. Secondly, the words "whether or not the offence was committed in its territory" has been omitted. This corresponds with the New York

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[290] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution. 2625, Annex, 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217, at 121 (1970).
[291] The New York Convention, Article 4(2).
[292] The Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International significance, (1971).
[293] The New York Convention, Article 5.
[294] See generally, Cf L. M. Bloomfield and G. F. FitzGeral, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 89-91.

Convention's not affording jurisdiction on the basis of the mere presence of the offender within the territory of the apprehending State. Thirdly, the last paragraph of the previous instruments, *i.e.* "Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." has been abbreviated to "through proceedings in accordance with the laws of that State." Essentially, however, both wordings convey the same idea that the conduct in question should be treated as an ordinary crime.

Another innovation of the New York Convention of special interest to the present analysis is the inclusion of a guarantee of "*fair treatment*" in Article 9.[295] This provision is intended to safeguard the rights of the alleged offender during all stages of the proceedings. According to the ILC the expression "*fair treatment*" was chosen because of its generality and it must therefore be interpreted more broadly than the standard expressions such as *due process* or *fair trial.*[296] This means that the obligation to provide *fair treatment* commences at an earlier stage. This seems to be the position taken by Bloomfield and FitzGerald, who State that the protection is intended to "safeguard the alleged offender form the moment he is found and measures are taken to ensure his presence until the final decision is taken on the case."[297] Wood takes the position that an argument could be advanced that the provision has to be interpreted in accordance with Article 9 of the International Covenant of Civil and Political Rights (ICCPR).[298] If this is correct, the New York Convention would be the first international counter-terrorism instrument to incorporate human rights protection.

The right to a *fair trial* is by now also established as a norm under customary international law,[299] but one should not underestimate the importance of its inclusion at the time. The original ILC draft also included a reference to domestic statutory limitation in accordance with the rules under domestic law for the most serious

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[295] The New York Convention, Article 9: "Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings."

[296] L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 112.

[297] *Ibid.*

[298] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 721. On Article 9 generally ICCPR General Comment 8 (Sixteenth session, 1982): Article 9: Right to Liberty and Security of Persons, A/37/40 (1982).

[299] A. Cassese, *International Criminal Law 2nd ed.*, (2003) 395.

crimes. This gave rise to considerable debate.[300] Some members of the Commission found that the crimes in question and their effect on international relations were of such a serious nature that no limitation should be made upon the time within which prosecution could be brought; others found that statutory limitations were a necessary protection to ensure that innocent persons were not charged after the passage of so much time that no evidence could be obtained to present a defence.[301] The provision concerning a statutory limitation was subject to severe criticism and was ultimately deleted.[302] Contracting States arguably may still rely on national statutory rules when complying with their obligations under the New York Convention. In other words, a Contracting State may refuse to extradite an alleged offender even without initiating prosecution if a statutory limitation under its domestic law has expired. This is based, firstly, on the fact that the principle of *aut dedere aut judicare*, contained in Article 7 of the New York Convention, does not contain an absolute obligation to ensure prosecution and, secondly, the last paragraph of Article 7 specifies that proceedings shall be in "accordance with the laws of that State", which is broad enough to encompass statutory limitations. This is yet another uncertainty that might be exploded by an uncooperative State.

The New York Convention further provides a right for the offender to communicate without delay with the nearest appropriate representative of the State of which he is a national, thereby ensuring the possibility of consular protection. The right to consular protection has developed significantly since the drafting of the New York Convention, most notably with the decision of the ICJ in the *LaGrand case*.[303] The case concerned two German nationals prosecuted in the U.S. for armed robbery having been denied the right of access to consular representation in accordance with Article 36(2) of the Vienna Convention on Consular Relations.[304] Germany contended that this constituted not only an infringement of the rights of Germany as a State, but that it also entailed a violation of the individual rights of the two German nationals.[305] The United States, on the other hand, stated that rights to consular notification and

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[300] See generally L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 113.
[301] *Ibid.*
[302] *Ibid.*, at p. 114.
[303] The New York Convention, Article 6(3). See *mutatis mutandis* ICJ, *LaGrand case*, Judgment of 27 June 2001, para 77.
[304] ICJ, *LaGrand Case* (Germany v. United States of America), Judgment of 27 June 2001.
[305] *Ibid.*, at para 75.

access under the Vienna Convention are rights of States, and not of individuals.[306] The ICJ then delivered the following decisive paragraph:

"The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State. [...] Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand ()[307] Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case."

The Court followed the line set out in the *Advisory Opinion in Danzig Railway Officials* emphasising the intention of the contracting Parties. In doing so, the Court stated that the clarity of the provisions, especially in the use of the words "his rights" leaves no doubt. The Court could thus not reach any other conclusion than that this was an individual right. In addition, such an individual right is, according to the Court, to be given "full effect" thus preventing the United States to relying on the national procedural default rule.[308] The Court thereby affirmed that the right to consular representation, depending on its specific formulation might give rise to an individual right with direct effect in domestic law. It is noteworthy that the Court did not find it necessary to consider whether the right to be informed without delay in accordance with Article 36(2) of the Vienna Convention assumed the character of a human right.[309] This leads to the conclusion that individual rights are not reserved to human rights instruments, even though these most commonly set out substantial individual rights. The precedent of the *LaGrand case* was followed in *Avena and other Mexican Nationals* thus sustaining the line of reasoning that treaties can

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[306] *Ibid.*, at para 76.
[307] PCIJ, *(see Acquisition of Polish Nationality,* Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20*; Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, I.C.J. Reports 1950, p. 8*; Arbitral Award of 31 July 1989,* Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, I.C.J. Reports 1994, p. 25, para. 51).
[308] ICJ, *LaGrand Case* (Germany v. United States of America), Judgment of 27 June 2001, para. 88–91 and para. 125.
[309] *Ibid.*, para. 78.

establish individual rights with direct effect in national law.[310] This precedent is directly applicable to Article 6(2) of the New York Convention, which provides:

"Any person regarding whom the measures referred to in paragraph 1 of this article are being taken *shall be entitled*:

a) to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect *his rights* or, if he is a Stateless person, which he request and which is willing to protect his rights; and

b) to be visited by a representative of that State. [emphasis added]

Despite the clear differences between provisions of the Convention on Consular Protection and the New York Convention they both make use of the same decisive wording. Both provisions use the term "his right". The wording of the New York Convention therefore compels the same conclusion as the ICJ reached in the *LaGrand case*, *i.e.* the New York Convention provides any person that is taken into custody or against whom other measures are taken the right to consular communication. Thus even if no such right exist in the national procedural rules then this does not serve as a justification for not providing the individual with the right to communication, because under international law a State may not rely the provisions of its national law as an justification not to perform an treaty obligation,[311] Not even constitutional provisions may be relied upon for non-compliance.[312] The consequences of non-compliance with this obligation are nevertheless uncertain. Although any wrongdoing may give rise to a right of diplomatic protection by the national State.

The New York Convention further heightens the standard of certainty with regard to the application *ratione personae*. Both the Hague and Montreal Conventions use the term "alleged offender" and in some provisions the term "offender".[313] The Tokyo Convention use the expression "suspected offender".[314] The New York Convention was, however, the first instrument to establish any definition of the concept. Article 1(2) defines an "alleged offender" as a person as to whom there is sufficient evidence

[310] ICJ, *case concerning Avena and other Mexican nationals* (2004), para. 40. In relation to the question of the human rights status of Article 36(2) of the Vienna Convention see para. 124.
[311] Vienna Convention on the Law of Treaties (1969), Article 27.
[312] Cf. *Qatar v. Bahrain* (Jurisdiction on admissibility 1) ICJ Report [1994] 112, pr. 24-25.
[313] The Hague Convention, Article 3(5) and 4(1); The Montreal Convention, Article 4(3) and 6(1).
[314] The Tokyo Convention, Article 9(3).

to determine *prima facie* that he has committed or participated in one or more of the crimes set forth in Article 2. The original ILC draft followed the precedents of the earlier instruments applying the term "alleged offender" explaining in the comments that "to make clear that in order to set in motion the machinery envisaged in the articles against an individual there must be grounds to believe that he has committed one of the crimes to which the draft articles apply."[315] This was later changed to include the above definition. This seems to imply a stricter requirement because the words "sufficient evidence to determine *prima facie*" sets a higher threshold than "grounds to believe".[316] Bloomfield and FitzGerald points out that the second half of the definition is somewhat more flexible because the definition does not only concern persons linked to the commission of the crime but also with any participation.[317] Wood takes an even stronger position declaring the definition is somewhat unsatisfactory.[318] It does not, however, seem to make any difference whether the person in question has committed or only participated in the commission of the respective act since the crucial factor is that the authorities in both cases have to present evidence that *prima facie* point to the implication of the alleged offender. In regard to Wood's comment, one could ask what more should be necessary. The ECtHR pronounced in the case of *Fox, Campbell and Hartley v UK* on the meaning of "reasonable suspicion" for the purpose of Article 5(1)(c) of the ECHR.[319] The Court firstly acknowledged that the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention, and further that this presupposes facts or information which would satisfy an objective observer that the person concerned may have committed the offence.[320] In the same breath, however, the Court pronounced that in this respect, terrorist crime falls into a special category.[321] What the Court required in the end was *bona fide* evidence that enabled them to ascertain whether the essence of the safeguard afforded by Article

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[315] [1972] ILC Report, p. 93-94, quoted in M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 802.
[316] L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention,* (1975) 73.
[317] *Ibid.*
[318] M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 802.
[319] ECtHR, *Fox, Campbell and Hartley v UK*, A 182 (1990) 13 EHRR 157.
[320] *Ibid.*, at para. 32.
[321] *Ibid.*

5(1)(c) had been secured. Consequently the respondent Government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence. On the basis of this Statement by the ECtHR, it seems fair to conclude that the New York Convention provision concerning the requirement of *prima facie* evidence complies with general human rights standards.

In relation to assistance, Article 10 to some extent clarifies the open-ended nature of this obligation when compared with previous instruments. The obligation to provide assistance reads in full:

"States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes set forth in article 2, including the supply of all evidence at their disposal necessary for the proceedings."

The obligation to assist therefore, at least, includes the supply of evidence. Subparagraph 2 further stipulates that the Article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty. In other words, the Contracting State may have more far-reaching obligations to provide assistance depending on their existing international commitments.

The New York Convention was also the first Convention to introduce a provision in relation to asylum. Article 12 specifies "the provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention". This provision, with a clear humanitarian inspiration appears, at least in certain situations, to create an exception to the principle of *aut dedere aut judicare*. Nevertheless, the exception only applies to a very limited number of treaties that were predominantly in force among Latin American States, and as pointed out by Lambert, no provision of those treaties prevents the subsequent prosecution of a person granted asylum.[322] This is in line with the position taken by the International Commission of Jurists who has expressed the view that "asylum is intended to secure a person's safety from persecution rather than his impunity," which leads Lambert to

[322] J. J. Lambert, *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*, (1990) 329. See also G. S. Goodwin-Gill, *The refugee in international law* (2nd ed.) (1998) 149.

conclude that there appears to be no rule of international law which would preclude the prosecution of a person granted asylum.[323]

Conclusion

The New York Convention was the first counter-terrorism instrument to be adopted within the UN system. The relatively short time it took to be drafted and adopted demonstrates the serious concern with which States viewed the threat. Despite this, the Convention still incorporates several human rights provisions with the potential effect of seriously hampering criminal co-operation. The very broad obligation to provide "*fair treatment*" today seems almost redundant because of the extensive effect of human rights instruments in the sphere of criminal law. At the time of drafting, however, and given the seriousness with which terrorism was viewed, the inclusion of this requirement is a powerful indication of the importance of proper legal procedures, once again emphasising that not even terrorists are outside the law. The growing importance of human rights considerations is further reflected in the requirement to establish a *prima facie* case based on evidence before any action can be taken against an alleged offender, thereby increasing the protection of the presumed innocent.

Notwithstanding the seriousness with which the threat was viewed, the New York Convention exhibits the same shortcomings as previous instruments thus allowing States to evade the ultimate aim of securing the prosecution terrorist.

The International Convention against the Taking of Hostages

By the late seventies the world saw the emergence of yet another terrorist threat. By then hostage taking had become a favoured tool in the terrorist arsenal allowing weak, often obscure, groups to exhort concessions from powerful governments.[324]

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[323] *Ibid.*

[324] See generally J. J. Lambert, *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*, (1990).

The Entebbe incident is a good example. On the 26 of June 1976 members of the PFLP hijacked an Air France aircraft departing from Israel. The more than 250 passengers were taken to the Entebbe Airport in Uganda, where Israeli passengers were separated from the others and the latter released. The hijackers demanded the release of 50 Palestinians imprisoned in different countries. The most well known fact about this event was the subsequent rescue operation of the remaining passengers by an Israeli military commando on the 3rd July 1976. All of the hijackers were killed as well as some Ugandan and Israeli soldiers. The episode let to a heated debate in the Security Council where two draft resolutions were introduced.[325] The resolution sponsored by the United Kingdom and the United States condemned hijacking and *inter alia* called on States to prevent and punish all such acts while reaffirming the need to respect the sovereignty and territorial integrity of all States, whereas the draft submitted by Tanzania, Libya and Benin *inter alia* condemned Israel's violation of Uganda's sovereignty and territorial integrity and demanded compensation for damages to and destruction of Uganda's property and lives. The incident led the Federal Republic of Germany (FRG) to propose that the topic of the drafting of an international convention against the taking of hostages be included on the agenda of the thirty-first session of the General Assembly.[326] This led to the adoption of the International Convention against the Taking of Hostages [Hereinafter the 'Hostages Convention'].[327] This was the first counter-terrorist instrument to name an offence.

Aim and Object

The aim and object of the Hostages Convention was to ensure friendly relations and co-operation among States by eradicating another manifestation of terrorism, hostage-taking. This was to be facilitated by ensuring the right to life, liberty and security of every person in accordance with the principles set out in the Universal Declaration of Human Right and the ICCPR. Interestingly the preamble also reaffirms

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[325] See 15 I.L.M. 1976) 1224.

[326] UN Doc. A30/242 (1976). Although the FRG proposal came two month after the Entebbe incident, the FRG apparently began to build informal support for the idea of such a convention in January 1976, following the April 1975 siege of its embassy in Stockholm by members of the Holger Meins Kommando.

[327] *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on 17 December 1979, in force on 3 June 1983.

the right to self-determination; a right that is not directly related to the issue of hostage taking but intimately related to the concept of terrorism.[328]

Definition of the criminalised conduct

The objective element (*actus reus*) of the crime of hostage-taking is defined as the taking of any person with the purpose of compelling a third party, namely a State, an international intergovernmental organisation, a natural or juridical person or a group of persons, to do or abstain from any act. The Hostages Convention is thus the first Convention to have a political purpose as an element of the crime. The relevant provision reads in full:

"Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person... in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention."

Like the New York Convention, the Hostages Convention does not rely on unlawfulness when defining the criminalised conduct.[329] The reason for this, similar to the New York Convention, is that law-enforcement officials are not expected to perform any of the acts that States are required to criminalise and consequently there is no need to distinguish between legal and illegal acts of hostage taking.

The Hostages Convention is the first instrument to contain a political element within the definition of the criminalised conduct, which is part of the intent (*mens rea*) requirement, *i.e.* the intent to compel the relevant third party to do or abstain from doing any act as an explicit or implicit condition for the release of the hostages. The Hostages Convention hence resembles the definition suggested by Cassese, and it fits better than any of the other instruments analysed with the popular perception of the term "terrorism". Even so, it does not require any particular political ideology of the

[328] See below p.75.
[329] See S. Shubber, 'The International Convention Against the Taking of Hostages', 52 British Yearbook of International Law (1981) 221.

offender. In other words, any attempt to compel a third party would fall within the Convention. Including demands for ransom based on pure economic considerations.

Jurisdiction

During the negotiations of the Hostages Convention it quickly became clear that some States were very divided on many issues relevant to the proposed Convention.[330] This was especially so in relation to the definition and scope of hostage taking. Some delegations took the view that the convention should only prohibit the taking of "innocent" hostages.[331] Lambert argues that this suggests that "guilty" individuals, *i.e.* those connected with colonialism or foreign domination, could legitimately be taken hostage.[332] The proposal faded away rather quickly. However, another proposal, excepting any act carried out in the process of national liberation against colonial rule, racist and foreign regimes by liberation movements turned out to be a serious obstacle to the Convention.[333] A compromise was achieved in the form of Article 12, which reads:

"In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self- determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

As clarified by Lambert, neither the wording nor the preparatory works of this provision give reason to conclude that this limits the application of the Convention,

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[330] On the drafting see generally, J.J. Lambert, Terrorism and Hostages in International Law, A commentary on the Hostages Convention, (1990)
[331] UN Doc. A/AC.188/L.5, p.11.
[332] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 62.
[333] *Ibid.*, at pp. 266-272.

either excluding acts of hostage-taking committed during armed conflict or excepting so-called "freedom fighters" from the scope of the Convention.[334] On the contrary, the Hostages Convention is designed in such a way as to complement the Geneva Conventions to ensure that all acts of hostage taking, whether committed during peace time or in an armed conflict, result in the obligation *aut dedere aut judicare*.[335] Thus the Hostages Convention does not only apply in peacetime but also in times of armed conflict when the Geneva Conventions does not entail an obligation either to present the case for the relevant authorities or extradite. It may be recalled that the obligation of *aut dedere aut judicare* is contained in Articles 49-50 of the First Geneva Convention, Articles 50-51 of the Second Geneva Convention, Articles 129-130 of the Third Geneva Convention and Articles 146-147 of the Fourth Geneva Convention. The identical provisions *inter alia* provide:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

In other words, all *grave breaches* falling within the four Geneva Conventions are subject to the principle of *aut dedere aut judicare*. The *grave breaches* regime, however, only applies to international armed conflict. In the case of an internal armed conflict the same violations are prohibited; they may even amount to war crime, nevertheless they are not *grave breaches* within the meaning of the Geneva Conventions.[336] This is evident from the fact that the Geneva Conventions only apply to "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties".[337]

In this connection reference should be made to Article 3, common to the four Geneva Conventions. Article 3 *inter alia* prohibits the taking of hostages in internal

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[334] *Ibid.*, at pp. 264-265.
[335] *Ibid.*, at p. 274.
[336] Cf. A. Cassese, *International Criminal Law 2nd ed.*, (2003) 55-56.
[337] Article 2 of, respectively, Geneva Convention I *for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* (1949), Geneva Convention II *for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949), Geneva Convention III *Relative to the Treatment of Prisoners of War* (1949), Geneva Convention IV *Relative to the Protection of Civilians in the Time of War* (1949).

armed conflicts. Importantly, common Article 3 is not subject to the principle of *aut dedere aut judicare*. Hence while it might be said that that common article 3 is "applicable" to an act of hostage taking, it does not impose any obligation to present the case for the relevant prosecutorial authorities or to extradite. Consequently, it does not fulfil the prerequisite, established by Article 12 of the Hostages Convention, that the State Party must be "bound under those conventions to prosecute or hand over the hostage taker". Thus it does not preclude the application of the Hostages Convention. Consequently, the Hostages Convention applies to acts of hostage-taking in internal armed conflicts, provided, in accordance with Article 13, that the offence is not committed within a single State, the hostage and the alleged offender are nationals of that State, and the alleged offender is found in the territory of that State. Thus Article 12 of the Hostages Convention does not limit the application of the Convention in relation to internal armed conflicts covered by common Article 3.[338]

Additional Protocol II, which likewise is applicable to non-international armed conflicts, repeats in Article 4 the prohibition against hostage taking. Similarly to common Article 3, however, it does not impose any obligation of extradition or prosecution.

The critically important distinction between 'international' and 'internal' armed conflict might not, however, be so relevant in relation to grave breaches. In the *Tadic case* the Trial Chamber, at the International Tribunal for the Former Republic of Yugoslavia (ICTY), held that the existence of an international armed conflict was not a requirement for the exercise of jurisdiction *inter alia* under Article 2 of the ICTY Statute, despite Article 2 covering *grave breaches* of the Geneva Conventions which therefore seemingly imply the existence of an international armed conflict.

The Trial Chamber held that the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Article 2, 3 or 5 of the ICTY Statute.[339] The Trial Chamber understood that, despite its reference to *grave breaches* of the Geneva Conventions, Article 2 of the Statute did not confine the Tribunal to applying the *grave breaches* provisions of the Conventions but enabled the Tribunal to treat those provisions as declaratory of customary law and to try persons

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[338] See on this issue the decision of the London Central Criminal Court (old Bailey) in *R v Zardad* (Ruling on the Taking of Hostages Act 1982), Judgment of 5 October 2004.

[339] *Prosecutor v. Dusko Tadic A/K/A "Dule"* Decision on the Defence Motion on Jurisdiction (rule 73), 10 August 1995On the decision see generally C. Greenwood, International Humanitarian Law and the Tadic Case, 7 European Journal of International Law (1996) 265-284.

committing the acts listed in the *grave breaches* provisions even in an internal armed conflict to which those provisions would not apply as treaty law.[340] The protection against the infringement of sovereignty, which according to the Trial Chamber was the underlying motive for the distinction between international and internal armed conflicts, was not directly applicable to the Tribunal, given its status as an international court.[341] In view of this, the Trial Chamber considered it unnecessary to determine the character of the armed conflict in Bosnia-Herzegovina, although it noted that there were "clear indications" in the material before it that the conflict was an international one.[342] The by now widespread acceptance that the *grave breaches* regime is part of customary international law and the fact that this might give rise to an universal obligation of *aut dedere aut judicare* even in relation to violations committed during non-international armed conflicts, may however have little effect on the applicability of the Hostages Convention.

Firstly because, the language of Article 12 of the Hostages Convention – "in so far as States Parties to this Convention are bound under those conventions" – indicates that it will not be rendered inapplicable because a customary norm provides and obligates of *aut dedere aut judicare* but only when this obligation is contained within the Geneva Conventions themselves.[343]

Secondly, even if a customary norm would preclude the application of the Hostages Convention, then such a norm would have to exist in the Geneva Convention as well. Given almost universal adherence to the four Geneva Convention, any such customary norm would add little to the already existing system. Moreover, a review of the four Conventions reveals that it is only Convention IV, relative to the Protection of Civilian Persons in Time of War, that makes any reference to hostage-taking while at the same time including it within the category of *grave breaches*, thereby making it subject to the principle of *aut dedere aut judicare*.[344] The importance of this is limited by Geneva Convention IV only protecting civilians who are enemy nationals and only while in the hands of a State

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[340] *Ibid.*, paras. 46-52.
[341] *Ibid.*, para. 52.
[342] *Ibid.*, para. 53.
[343] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 277
[344] Geneva Convention IV *Relative to the Protection of Civilians in the Time of War* (1949). Geneva IV, Article 147.

Party.[345] In other words, it does not include acts of non-State actors. This means that the Hostages Convention still covers acts of groups, commonly referred to as "terrorist", even if the alleged conduct is committed during an armed conflict, regardless of whether the conflict is international or national.

The use of the word "power" in common Article 2, which denotes the area of application of the Geneva Convention, has led some commentators to conclude that this could refer to an entity another than a State, although a more traditional interpretation does not allow for such a conclusion. As observed by Cassese, "the whole context and wording of the various provisions of the Geneva Conventions make it clear that when they mention 'Powers' they intend to apply to States only"[346]

This discussion is somewhat irrelevant for States Parties to the Additional Protocol I of 1977 (AP I), to which Article 12 of the Hostages Convention makes specific reference. This additional protocol, supplementing the 1949 Geneva Convention relation to the Protection of War Victims, created a whole new category of armed conflicts.[347] By Article 1(4) international armed conflicts include:

"armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

In accordance herewith, any armed conflict directed toward the achievement of self-determination is now, at least for the signatories to AP I, regarded as an international armed conflict. One of the consequences of AP I is that an authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1(4) may undertake to apply the Geneva Conventions and AP I

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[345] Geneva Convention IV *Relative to the Protection of Civilians in the Time of War* (1949). Geneva IV, Article 4, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State that is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

[346] A. Cassese, 'Wars of National Liberations and Humanitarian Law', in Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* , (1984) 316.

[347] L. C. Green, *The Contemporary Law of Armed Conflict*, (2000) 109.

in relation to that conflict by means of an unilateral declaration.[348] Thus the prohibition of hostage taking and the principle of *aut dedere aut judicare* contained in Geneva Convention IV could theoretically apply to national liberation movements and as a result preclude the application of the Hostages Convention. Importantly, this could only happen after a unilateral declaration from the appropriate authority of the national liberation movement and only if the State against whom the struggle is conducted is a Party to AP I. However, neither AP I nor the Declaration on Principles of International Law concerning Friendly Relations makes any provisions for determining what constitutes a struggle for self-determination and thus qualifies as a national liberation movement within the meaning of Article 1(4). In fact, it seems that the decision as to whether the requirements of Article 1(4) have been meet are completely subjective and within each State's discretion.[349] Moreover, the class of groups that fall within the notion of liberation movements in this respect are only those fighting for self-determination against "colonial domination, and alien occupation and racist regimes", which, as pointed out by Lambert, is a very restricted group.[350] In relation to the Hostages Convention, the critical question is whether a national liberation movement can bind itself to the Geneva Conventions in such a way as to bring them into application, thus engaging the application of the *aut dedere aut judicare* principle, which supersedes the equivalent obligation contained in the Hostages Convention. In this respect it is important to note that AP I apparently broadens the group of protected persons in relation to hostage taking thus widening the scope of application of the principle of *aut dedere aut judicare,* thereby potentially limiting the application of the Hostages Convention. Article 85 provides:

"Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol."

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[348] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1979), Article 96.
[349] L. C. Green, *The Contemporary Law of Armed Conflict*, (2000) 63-64.
[350] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 235.

AP I thereby extends the definition of *grave breaches* in regard to anybody protected by the protocol, *i.e.*, combatants and prisoners of war, any person who has taken part in the hostilities and to refugees and Stateless persons, as well as wounded, sick and shipwrecked, medical and religious personnel, medical units and transports under the control of an adverse party.[351] Although the provision is not entirely clear, it seems to indicate that all *grave breaches* described in all four of the Geneva Conventions are *grave breaches* if they are committed against any of the listed categories of people.[352] If this interpretation were to be correct, then this would mean that the group of persons protected under the provision prohibiting hostage-taking would have been significantly broadened both in relation to liberation movements but also, more importantly, in relation to conflicts between Contracting Parties to AP I. Any expansion of the category of protected persons naturally implies wider application of the obligation of *aut dedere aut judicare*, affecting the potential scope of the Hostages Convention.

Thus in relation to armed conflicts, Article 12 may preclude the application of the Hostages Convention. Since, however, Geneva Convention IV only protects a limited class of civilians, there is still a number of possible situations wherein the Hostages Convention would still apply. The widening of the group of protected persons between the Parties to AP I to some extent diminishes the importance of the Hostages Convention but it does not make it obsolete. Moreover, that acts of national liberation movements recognised under AP I and subject to the rules of international humanitarian law, thus excluding them from the scope of the Hostages Convention, does not change *lex lata*. On the face of it, Article 12 of the Hostages Convention might seem to contain an important statement about the relationship between terrorism and international humanitarian law. Some have even concluded that the Article recognises that the taking of hostages by national liberation movements is a legitimate means of their struggle.[353] Others have criticised the Article for providing for an argument that "the structure and language of Article 12 represents some measure of acceptance that members of national liberation movements are

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[351] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1979), Articles 44, 45, 73 and 85(2).
[352] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 298.
[353] *Ibid.*, at 265.

combatants, not terrorists"[354] While it is undeniably true that an act of hostage taking by a national liberation movement which falls within the ambit of the AP I in such a way as to impose an obligation of *aut dedere aut judicare* would also entitle the offender, as a combatant, to other benefits granted by Convention III relative to the treatment of prisoners of war and by AP I. As pointed out by Lambert, however, this situation is created by AP I and not by the Hostages Convention.[355] It should further be added, that this would have been the result, even without the specific reference in Article 12 of the Hostages Convention, by application of the well-established principle of *lex specialis derogate legi generali.*[356] Additionally, national liberation movements are only exempt from the application of the Hostages Convention when a similar system of extradition/prosecution applies. Pragmatically therefore Article 12 makes little difference. Moreover, one of the characteristics of national liberation movements is that they often fight within a single State against a government with which they share their nationality and as result their hostages are also likely to be of that same nationality. In other words, peoples fighting against colonial domination and racist regimes who in their struggle make use of hostage taking, might not even fall within the scope the Hostages Convention because their acts lack the necessary transnational element that is a prerequisite for the application of the Hostages Convention.[357] The real importance of Article 12 is therefore that is the only provision within the existing counter-terrorism instruments that is directly related to the relationship between terrorism and international humanitarian law.

As mentioned initially, the Hostages Convention was drafted in the aftermath of the Entebbe incident. As a result, there was a strong will among developing States, which had been highly critical of the rescue operation, to ensure that no such future actions would occur.[358] This resulted in another provision limiting the scope of the Convention. Article 14 provides that: "Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a

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[354] *Ibid.*, at p. 266.
[355] *Ibid.*
[356] The *lex specialis* character of international humanitarian law has been authoritatively been stated on several occasion in relation to human rights law and the same finding would presumable also apply to international criminal law, see *e.g.* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 104-106. On the principle of *les specialis* see generally, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law*, (2003) 385 *et seq.*
[357] The Hostages Convention, Article 13.
[358] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 314.

State in contravention of the Charter of the United Nations." Although the purpose of this Article was to prevent future actions like the Entebbe incident, the reference to the Charter of United Nations adds nothing new to the rules regulating the use of force.[359] Moreover, that it is only States in whose territory hostages are held that are obliged in accordance with Article 3 to "take all measures... in particular to secure his [the hostages] release" does not mean that other States are prohibited from attempting rescue operations.[360] Although the legality of the use of force to rescue national in a foreign State without the consent of that States is highly contentious.[361]

Obligations of co-operation and human rights limitations

The Hostages Convention is the first counter-terrorist instrument directly to refer to human rights.[362] Not only was the right to life and liberty among the considerations that initiated the legal steps aimed at eliminating this terrorist threat; it also provides a provision providing "*fair treatment*" of the alleged offender,[363] thereby building on the protection first envisaged in the New York Convention but extending this by adding the words "including enjoyment of all rights and guarantees provided by the law of the State in the territory of which he is present."[364] The obligation to ensure the presence of the offender, common to all of the counter-terrorist instruments, reflects other human rights considerations. The alleged offender must not only be treated as any other criminal in accordance with the law, but the time of detention must be proportional to the purpose of ensuring either prosecution or extradition, exactly as first envisaged in the Tokyo Convention.[365] Moreover, the obligation to "immediately make a preliminary inquiry into the facts" further ensures that no one has their liberty infringed unnecessarily.[366]

Similar to the New York Convention, the Hostages Convention also includes a right to consular protection. Article 6(3) provides:

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[359] *Ibid.*, at 322.
[360] *Ibid.*, at p. 323.
[361] Cf. C. Gray, *International Law and the Use of force,* (2000), 108-111.
[362] The Hostages Convention, Preamble.
[363] *Ibid.*, at Article 8(2)
[364] *Ibid.*,
[365] *Ibid.*, Article 6(1).
[366] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention,* (1990) 174.

"Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled: to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a Stateless person, the State in the territory of which he has his habitual residence;"

The use of the words "any person" followed by the words "shall be entitled" led to the same conclusion as with the New York Convention: that the Hostages Convention provides any individual taken into custody or against whom other measures are taken with a right to consular communication. This conclusion is further strengthened by the fact that Article 6(5) directly reflects the language of Article 36(2) of the Vienna Convention on Consular Relations by adding that laws and regulations applicable to communication and visit from a representative of the protecting State "must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 of this article are intended." Moreover, the importance attributed to consular protection is evident in Article 9(1), which states that if communication with the alleged offender by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected, then a request for extradition shall not be granted.[367] No comparable provision existed in any of the earlier counter-terrorism instruments.

In addition to normal consular protection, the Hostages Convention also contains a provision according to which the International Red Cross (ICRC) may also be invested with the right to visit the alleged offender. This is "without prejudice" to the right of the State having a claim to jurisdiction. This provision is highly unorthodox and resembles the system envisaged under the Geneva Conventions. Rosenstock notes that it,

"reflects commendable concern with the right to communicate with accused persons and a creative approach to facilitating communication in precisely the circumstances in which it may be most necessary, that is, when relations between States involved are such that no diplomatic or consular relations exist."[368]

Despite the strong commitment entailed in the Hostages Convention, to ensure communication with the alleged offender, one must not lose sight of the reality that

[367] See generally, J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 222-223.
[368] Quoted *ibid.*, at p. 182.

neither the State of nationality nor the ICRC is under any obligation to visit or communicate with the detainee. The protection is therefore only as strong as the determination of the State of nationality, a fact that was amply illustrated in relation to detainees in Guantanamo Bay.[369] The exception to extradition contained in this provision exists to ensure *due process* and *fair trial* requirements.[370] Nevertheless, in relation to consular protection it only applies where the "appropriate authorities of the States entitled to exercise rights of protection cannot be effected." Hence it is not any failure of lack of communication that prompts the protection against extradition, but only situations where the entitled State is prevented from providing consular protection. In other words, if a State refuses to make use of its access to a detainee or declines an invitation to do so, there would be no bar to extradition on that basis of lack of communication.[371]

The principle of *aut dedere aut judicare* is contained in Article 8 and is an exact reproduction of its forerunner in the Hague Convention, with the exception that the phrase "through proceedings in accordance with the laws of that State "has been retained from the New York Convention. The effectiveness of the principle of *aut dedere aut judicare* might nevertheless be significantly weakened by the obligation contained in Article 3 to ease the situation. Article 3(1) prescribes that:

"The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure."

The State in whose territory the hostage is being held is therefore free to take whatever measure it considers appropriate in order to secure the release of hostages, including the possibility of granting immunity to the hostage takers in return for the release of hostages.[372] The possible conflict between Article 3 and 8 was discussed during the drafting.[373] According to Lambert, the debate ended with a statement of the FRG, according to which article 3 and 8 were of equal rank, but that Article 3

[369] See for instance the *Abassi case* [2002] EWCA Civ 1598 and the *Al-Rawi case* [2006[EWCH 972 (Admin). In the latter case the applicants were not a national but a resident.
[370] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 223.
[371] *Ibid.*.
[372] *Ibid.*, at pp. 112-114.
[373] See Second Report of the Hostages Committee, p. 72, para 18.

provided States a *carte blanche* to take the measures it deems appropriate.[374] Any decision to grant immunity would not however be binding on other States, which would still be under an obligation to ensure prosecution or extradition if the hostage takers were subsequently apprehended in the territory of another contracting State. Given that any grant of immunity would be inconsistent with the very object and purpose of the Convention, it goes without saying that States should only grant immunity as a last resort and only while in good faith.[375]

Despite this, the *Achille Lauro affair* amply illustrates how political considerations will often outweigh legal obligations. The facts of the case are not entirely clear, but an agreement was reached between the representatives of Egypt, Italy and the FRG to provide the hijackers, who in 1985 hijacked an Italian liner within the territorial waters of Egypt, with an assurance of "safe-passage". In other words, the signatory States promised not to initiate criminal proceedings and not to extradite the hijackers, if they released the hostages.[376] This was despite both Egypt and the FRG were parties to the Hostages Convention. Italy, who had signed but not yet ratified the Convention, was under no obligation to comply with the provisions of the Hostages Convention. Although it was under an obligation to refrain from acts that would defeat the object and purpose of the Convention.[377] Italy was furthermore obliged under a 1983 bilateral extradition treaty to hand over the alleged mastermind of the whole incident, Abu Abbas. The decision by Italy subsequently not to extradite Abu Abbas was according to Cassese an "outright violation of Article 12 of the treaty."

Similar to previous instruments, the Hostages Convention also modifies preceding extradition treaties and allows for the Convention to be used as a surrogate extradition treaty.

Article 4 of the Hostages Convention, similar to earlier instruments, provides an obligation to prevent the commission of the criminalised conduct.[378] It is similar to the equivalent provision in the New York Convention. Although the language contained in the Hostages Convention is both stronger and more precise than its predecessor in

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[374] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 114.
[375] *Ibid.*
[376] For a copy of the agreement see A. Cassese, *Terrorism, Politics and Law*, (1989) 44.
[377] Vienna Convention on the Law on Treaties (1969) Article 19(1)(8).
[378] The Hostages Convention, Article 4.

the New York Convention and therefore also stronger than the Declaration of Friendly Relations among States. The obligation included:

"taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages;"

Thus if a State is unwilling or incapable of preventing terrorist activities from taking place on their territories then this might give rise to a right of self-defence in accordance with Article 51 of the UN Charter. Traditionally such a right was dependent on the attributability of the acts in question to the respective State.[379] Often, however, no clear link exists between terrorist groups and the official apparatus of a State. Thus except for cases of *de facto* control of the terrorist by the State such attributability would be a matter of degree. This lead to significant uncertainties as to how much assistance would suffice to establish a right of self-defence.[380] The attack on the World Trade Centre and the Pentagon, however, brought a "revolutionary challenge to the doctrine of self-defence and a reassessment of the law in this area".[381] Despite the fact that the use of force against Afghanistan went far beyond what was permitted under the traditional doctrine of self-defence the actions of the United States and the United Kingdom found widespread acceptance.[382]

The obligation to ensure co-operation further entails the requirement to exchange information and other administrative measures that may prevent commission of hostages taking. It thereby follows the somewhat amorphous nature of previous instruments in its ample lack of specificity in relation to co-operation.[383]

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[379] Cf. A. Cassese, "Legal" Response to terrorism, 64 Foreign Affairs (1986) 597-600.
[380] See *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] I.C.J Reports 14, pp. 103-104
[381] C. Gray, 'The Use of Force and the International Legal Order', in M. Evans, *International Law*, (2003) 603.
[382] *Ibid.*, at 604.
[383] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 128.

Conclusion

The Hostages Convention follows the pattern established by previous instruments seeking agreement on the prohibition of certain specific conduct. It is the first instrument to regulate the relationship between terrorism and international humanitarian law and to restate the prohibition on the use of force found in Article 2(4) in the UN Charter. Both issues are nevertheless of little significance in relation to the application of the Convention. The protection of human rights is stronger than in the previous instruments and the underlining premise seems to be that the act of hostage taking is a crime. The prohibition on the taking of hostages can also be found in other international instruments, notably, as seen above, humanitarian instruments.[384] This has led Meron to conclude that the prohibition contained in the Hostages Convention' is maturing into a customary norm.[385] In his words:

> "...the taking of hostages has been solemnly prohibited by the International Convention on the Taking of Hostages... and by other authorative Statements, such as treaties criminalizing hijacking of aircraft and resolutions condemning hostages-taking. I would therefore, submit that the norm tracking the prohibition started in Article 1 of the Convention of 17 December 1979 is maturing into customary humanitarian and human rights law.

Even if correct, and such a customary norm has matured, then this would nevertheless not necessarily entail an obligation to prosecute hostage takers; since a right to prosecute international crime does not imply any obligation to do so.

The Hostages Convention, like previous counter-terrorism instruments, contains serious flaws. In addition to the usual problems relating to the *aut dedere aut judic*are principle, the uncertainty relating to the applicability of the Convention in relation to international armed conflicts and national liberations movements, as well as the possibility to grant amnesty to hostages, may seriously hamper the effectives of the Convention.

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[384] Cf. common Article 3 in the Geneva Convention, Article 75(2) of Protocol I and Article 4(2)(c) of Protocol II.
[385] T. Meron, *War Crimes Coming of Age: Essays*, (1998) 162.

The Convention on the Physical Protection of Nuclear Material

The Convention on the Physical Protection of Nuclear Material was drafted to avert the risk experienced at the height of the cold war.

Aim and Object

The aim of the Convention on the Physical Protection of Nuclear Material [Hereinafter the 'Nuclear Convention'][386] was to avert the potential dangers posed by the misuse of nuclear material. The convention therefore seeks to establish conformity in national laws relating to the protection of nuclear material by providing among others for an obligation to ensure the prevention, detection and punishment of the conduct, which Parties are obliged to criminalise under domestic law in accordance with the Convention.

Definition of the criminalised conduct

The Nuclear Convention is not so much concerned with criminalising a specific conduct as with providing rules for effective protection of nuclear material.[387] In doing so it provides for an obligation upon States to ensure certain preventive measures in regard to offences concerning nuclear material. It therefore criminalises the unlawful possession, use, transfer, etc. of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage. The Convention further requires Contracting States to make these acts punishable and subject to the well know established system of prosecution and extradition. Article 7 obliges States to criminalise the following forms of conduct:

"The intentional commission of:

[386] The Convention on Offences and Certain Other Acts Committed on Board and Aircraft, signed on 14 September 1963, in force 4 December 1969.
[387] The Convention for the Physical Protection of Nuclear Material, adopted at Vienna on 26 October 1979, in force on 8 February 1987.

a. an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;

b. theft or robbery of nuclear material;

c. an embezzlement or fraudulent obtaining of nuclear material;

d. an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

e. threat:

   i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or

   ii) to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

f. an attempt to commit any offence described in paragraphs (a), (b) or (c); and

g. an act which constitutes participation in any offence described in paragraphs (a) to (f) shall be made a punishable offence by each State Party under its national law.

Each State Party shall make the offences described in this article punishable by appropriate penalties which take into account their grave nature."

Subparagraph (a) covers any unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material, which causes, or is likely to cause death or serious injury to any person or substantial damage to property. The scope of this provision is evidently wide. Any unauthorised possession of nuclear material within the meaning of the Nuclear Convention is therefore *per se* obliged to be criminalised because of nuclear material's extremely harmful qualities.[388] Similar to the earlier counter-terrorism instruments, the Nuclear Convention is dependant on national law in the qualification of the criminalised conduct. The method applied in the Nuclear Convention is, however, far more wide reaching. This is so because past Conventions

[388] For a definition of "Nuclear Material" within the Nuclear Convention see Article 1(1).

relied on the unlawfulness of the respective act, and therefore the qualification of the specific conduct as a crime under domestic law, whereas the Nuclear Convention takes the opposite approach, criminalising all forms of unauthorised control of nuclear material of potentially serious harmful effect. While previous instruments only required the criminalisation of specific conduct, the Nuclear Convention, arguably, obliges Contracting States to criminalise any conduct relating to handling of nuclear material unless authorised under national law.

Subparagraph (b)-(c) reinforces the already wide scope of subparagraph (a). This is so because, evidently, any form of theft, robbery, embezzlement or fraud *per se* constitutes an unauthorised way of acquiring possession of the nuclear material. Contrary to subparagraph (a), however, the criminalised conduct in subparagraph (b)-(c) is not qualified by any potential harmful effect.

Similar in subparagraph (d) requires Contracting States to criminalise any demand to obtain nuclear material by force or threat thereof. Interestingly the Convention does not demand the criminalisation of inchoate demands.[389] Most legal systems, however, contain individual provision criminalising attempt. Thus any attempt to demand nuclear material by force or threat may be covered by these.

Subparagraph (e)(i) covers the threat to use nuclear material to cause death or serious injury to any person or substantial property damage. There no requirement that the person who threatens to use nuclear material is actually in possession of the material he threatens to use, only that the threat is intentional. Thus any threat of serious injury or destruction by the use of nuclear material within the meaning of the Convention on the Physical Protection of Nuclear Material is prescribed to be a criminalised offence. A parallel could be drawn between to criminalisation of bomb hoaxes under the Montreal Convention, Article 1(1)(e). Both provisions cover, and draw within the ambit of international terrorism a wide range of acts. Subparagraph (e)(ii) further covers the threat of theft or robbery in order to compel any of the covered subjects to do or refrain from doing any act.

[389] Nuclear Convention, Article 7(1)(f).

Jurisdiction

Like previous instruments, the Nuclear Convention covers acts committed within the territory of a Contracting State, including on board a ship or an aircraft. Other then that, the Convention is rather limited in its scope, including as the only other principle of jurisdiction to prescribe the active nationality principle. Article 8(3) potentially broadens the limited scope of jurisdiction by providing that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law", thereby leaving the States free to choose whatever form of jurisdiction to prescribe and adjudicate their respective domestic system provides. Article 8(4) further provides jurisdiction "consistent with international law" to importing and exporting States. The provision is somewhat superfluous in view of the fact that if the jurisdiction has to conform to international law, then it must exist independent of the Convention. The reference to the importing and exporting State, nevertheless, reinforces the point that these could also have jurisdiction to prescribe, *e.g.* on the basis of the protective or the passive nationality principles.

Obligations of co-operation and human rights limitations

The Nuclear Convention is essentially modelled on the same framework used since the Hague Convention. Article 5 deals with co-operation in some detail. This provision *inter alia* requires States to provide, to the maximum extent feasible, co-operation and assistance to ensure the recovery and protection of nuclear material in the case of any unlawful taking of such material or any credible threat thereof. All other obligations entailed in Article 5 are qualified by the word "appropriate", which significantly diminishes the obligation to co-operate and leaves a considerable margin of appreciation to respective States.

The obligation to "take appropriate steps" to inform other States of any unlawful taking of nuclear material, Article 5(2)(a), is not only qualified by the rather vague formulation but also by Article 6(2) which provides:

"States Parties shall not be required by this Convention to provide any information which they are not permitted by to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material"

This provision potentially removes from Article 5(1)(a) any scope of application because any unlawful taking of nuclear material, within the meaning of the Nuclear Convention, would arguably always constitute a threat to the security of the State concerned. This is presumably what is meant in the preamble to the Convention, when reference is made to the "potential dangers posed by the unlawful taking of nuclear material" and constitutes the whole basis for the existence of the Convention. The other provisions in Article 5 are of a similarly indefinite nature.

The principle of *aut dedere aut judicare*, common to all of the counter-terrorism instruments, is contained in Article 10. Article 11 further provides that the Convention can be used as a surrogate extradition treaty.

In relation to criminal proceedings brought in respect of the Convention, Article 13 specifies that Contracting States shall afford one another the greatest measure of assistance, including the supply of evidence. Moreover, the Convention also specifically provides for the obligation to protect human rights among other by obliging Contracting States to ensure fair *treatment* for the alleged perpetrator.[390]

Conclusion

The Nuclear Convention is in some respects atypical when compared with the other counter-terrorist instruments. It is primarily concerned with the physical protection of nuclear material and not so much with the criminalisation of a specific conduct. Nevertheless, the Convention still sits comfortably within the so-called suppression convention because of Article 7, which requires the criminalisation of any unauthorised possession of nuclear material.

The Nuclear Convention is more protective of national interest than previous instruments, as can be seen *e.g.* in Article 2, which concerns the scope of the

[390] The Nuclear Convention, Article 12.

Convention.[391] Thus the Convention only applies to nuclear material used for peaceful purposes. Nuclear material used for military purposes is not covered by the Convention, neither is the use thereof. This is easily understandable when seen in light of realties of the cold war. It further fits within the pattern established by previous instruments generally exempting acts committed by State authorities. Ironically, however, this might mean that theft of or the threat to use, for instance, a ballistic nuclear missile may not fall within the scope of the Convention. The only reference to nuclear material used for military purposes is in the preamble, which recognises the importance of the physical protection of nuclear military weapons.

The obligations under the Convention in relation to the recovery of nuclear material are far more comprehensive than any of the co-operation provisions in the previous instruments, although severely restricted by considerations of national security. Thus the potential efficacy is limited by their vagueness.

Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation

The Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation [Hereinafter the 'Maritime Convention'],[392] was initiated after the *Achille Lauro affair*,[393] which prompted the United Nations Security Council to condemn the terrorist acts and the General Assembly to request that the International Maritime Organisation (IMO) recommend appropriate action.[394]

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[391] Cf. Article 2(3) specifies that: "Apart from the commitments expressly undertaken by States Parties in the Articles covered by paragraph 2 with respect to nuclear material used for peaceful purposes, while in domestic use, storage and transport, nothing in this Convention shall interpreted as affecting the Sovereign rights of a State regarding the domestic use, storage and transport of such material's also Articles 4(7), 6(2) and 14(3).

[392] The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988, in force on 1 march 1992. See generally G. Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', 39 International and Comparative Law Quarterly (1990) 27.

[393] See generally A. Cassese, *Terrorism, Politics and Law*, (1989), T. Treves, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of maritime Navigation', in *Maritime Terrorism and International Law*, N. Ronzitti (ed.), (1990) 69-90.

[394] At the 2618th meeting of the Security Council on 9 October 1985, the president made a Statement saying *inter alia*, "They [the members of the SC] resolutely condemn this unjustifiable and criminal hijacking as well other acts of terrorism including hostages/taking", UN Doc. S/17554. GA Resolution 40/61 (1985).

Aim and Object

The purpose of the Maritime Convention was to secure international peace and security. This was done in recognition of the innocent life lost in violation of international human rights by the escalation of maritime terrorism, which, according to the preamble, was of "grave concern to the international community as a whole". The aim of the Convention was to provide an instrument ensuring that effective and practical measures were taken for the prevention of such acts by providing that appropriate action is taken against persons committing unlawful acts against ships.

Definition of the criminalised conduct

The Convention essentially follows the pattern from the previous instruments requiring Contracting States to make it an offence unlawfully and intentionally to:

a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

f) communicates information which he knows to be false, thereby endangering the s afe navigation of a ship; or

g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

Similar to the ICAO instruments concerning international aviation, the Maritime Convention needed to include the requirement of unlawfulness in the definition of the criminalised conduct to exclude the legally justifiable acts by police or other State agents, for instance when trying to gain control of a hijacked ship.[395]

Subparagraph (a) covers the seizure or control of a ship and corresponds *mutatis mutandis* to Article 11(1) of the Tokyo Convention and Article 1(a) of the Hague Convention. It consequently includes non-forcible measures such as '*blackmail*'. A further similarity to these instruments is that the criminalised conduct is qualified by requirement of "unlawfulness". The determination of the lawfulness of the measures in question presumably has to be settled by reference to the law of the State of registration or the territorial State in whose territorial waters the ship might be navigating. It is worth noting that there is no requirement that the control or seizure actually endanger the safety of the ship, contrary to the subsequent provisions.

Subparagraphs (b) covers violence against persons on board a ship and corresponds, *mutatis mutandis*, to Article 1(a) of the Montreal Convention. The requirement that the act must endanger the safety of the navigation of the ship creates the same uncertainty as with what constitutes a danger to the safety of an aircraft in flight. It is evident that not all acts of violence are covered and the threshold is presumable higher in relation to ships than to aircraft because of the increased vulnerability of the latter. It would for instance be highly unlikely that a scuffle between unruly passengers would fulfil the requirement of endangering the safe navigation of the ship while it might endanger the safety of an aircraft in flight.[396] This would at least be the conclusion in relation to the normal use of the term "ship", *i.e.* a vessel larger than a boat for transporting people or goods by sea. However, for the purpose of the Maritime Convention the term "ship" means, "a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft,

[395] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 190.
[396] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 283.

submersibles, or any other floating craft."[397] This means that any ship, "navigating... through or from the waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States" except warships or other State-owned ships,[398] would fall within the scope of the Maritime Convention. Hence any small recreational type of vessels could theoretically fall within the ambit of the Convention. Even a small dinghy crossing the territorial waters of an adjacent State could fall within the scope of the Convention. This was in all likelihood not the intent of the drafters. However the question concerning the dangers of a scuffle or even, as suggested by Abramovsky in relation to the Montreal Convention, the intentional killing of a passenger is highly dependant on the size and type of the vessel. There is, however, little doubt that violence against the captain or other indispensable crew would always endanger safe navigation.

Subparagraphs (c) covers destruction or damage to a ship or its cargo and corresponds, *mutatis mutandis*, to Article 1(b) of the Montreal Convention, with the exception that the Maritime Convention also includes destruction or damage to the cargo of the ship. Similar to the Montreal Convention, the main focus of subparagraph (c) does not seem to be passengers but cargo. There is no requirement that the destruction or damage be committed while on board the ship, only that it is committed unlawfully and intentionally with the likelihood of endangering the safety of the ship. This means also that intentional damage committed by others ships could fall within the scope of the Convention. It not clear whether this also includes damage as a result of acts of State-owned vessel *e.g.* naval ships.

Subparagraph (d) covers the use of bombs or other incendiary or destructive devices or substances likely to destroy or damage the ship, its cargo, or to endanger safe navigation and corresponds, *mutatis mutandis,* to Article 1(c) of the Montreal Convention.

Subparagraph (e) covers destruction, damage or interference of maritime navigational facilities and corresponds, *mutatis mutandis*, to Article 1(d) of the Montreal Convention. In fact, it is almost a verbatim copy of the corresponding provision.

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[397] The Maritime Convention, Article 1.
[398] Cf. The Maritime Convention, Article 2(1) and 4(1).

Unlike the Montreal Convention, the Maritime Convention does not specifically require that the navigational facilities be used for international navigation. It may therefore, arguably, also include damage to lighthouses or national radio towers used for maritime navigation, as long as these were likely to endanger the safe navigation of a ship. The provision does not require any specific result but only that the act creates a dangerous situation. Since, however, the Convention only applies to transnational navigation, a minimum requirement seems to be that the act in question could potentially endanger international shipping. In other words, navigation facilities situated outside the reach of transnational navigation, such as in internal waters with no passage to international straits, would arguably not come within the scope of the Convention.

Subparagraph (f) covering false communication to ships and corresponds, *mutatis mutandis*, to Article 1(e) of the Montreal Convention. Analogous to the Montreal Convention, the Maritime Convention concerns the situation where a person knowingly communicates false information thereby endangering the safe navigation of the ship. The use of the word "thereby" indicates that the danger must occur as a result of the communication and not, as in the preceding paragraphs, be "likely" to occur. Unlike the Montreal Convention there is no requirement that the communication is unlawful. The aim of the communication is moreover irrelevant as there is no requirement of any specific motive. The provision thus has a wide potential scope and could, similarly to the Montreal Convention, cover situations that were not thought of at the time of drafting, *e.g.* so-called cyber terrorism.

Jurisdiction

Similar to the previous instruments, the Maritime Convention contains the so-called *military carve-out*. Article 2(1) clearly specifies that the Convention "does not apply to" warships and other State operated ships used for auxiliary purposes such as those of customs and police. It is not clear, however, whether this is an absolute exception or whether it only removes such vessels from the list of possible targets. In

this respect, a parallel might be drawn to the territorial scope of the Terrorist Bombing Convention and whether it applies to attacks on military facilities.[399]

In general the jurisdictional clause is broader than in previous conventions allowing not only to prescribe for the passive nationality principle, as does the Hostages Convention, but also acts committed in an attempt to compel a State to perform or abstain from a specific act, *i.e.* the protective principle.[400] It further contains the extra-territorial principle, introduced by the Hague Convention, based on the mere presence of the offender within the territory of a State.[401] The importance of the assertion of the otherwise contentions principle of passive nationality is somewhat attenuated by this latter, all encompassing, principle.

The Maritime Convention has been amended several times, most notably by the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, which widened the scope encompassing "fixed platforms" on the continental shelf.[402] The IMO adopted further amendments on 14 October 2005.[403] These significantly broaden the scope of the conduct States are required to criminalise so that it also, under certain circumstances, covers the transport of nuclear material, thereby creating an overlap with the Nuclear Convention.[404] The latest amendments do not, however, come into force before it has reached the necessary number of signatures or ratifications.

Obligations of co-operation and human rights limitations

The Maritime Convention resembles the previous instruments in providing for extradition and co-operation. The key provision, as in all previous instruments, is the obligation either to present the case to the competent authorities for the purpose of

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[399] See below p.107.
[400] *Ibid.*, Article 6(2)(c). For the protective principle see generally, I. Cameron, *The Protective Principle of international criminal jurisdiction,* (1994).
[401] The Maritime Convention, Article 6(4).
[402] Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, (1988).
[403] See www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686
[404] Unlike the Nuclear Convention, however, the Maritime Convention is not restricted to nuclear material for peaceful purposes.

prosecution or to extradite.[405] This provision was slightly modified from its original form by the change of the word "serious" to "grave".[406] This modification, however, does not change the meaning of the provision. The Maritime Convention further contains the amendment first introduced by the New York Convention, that the case shall be submitted to the relevant authorities without undue delay.

The aid provided by the Convention in regard to extradition, even though essentially based on previous provisions, also goes further in modifying all extradition treaties between Contracting States to the extent that they are incompatible with the Convention.[407]

The Maritime Convention might be seen taking a step backward in regard to human rights protection, since it does not provide an exception from the obligation to initiate extradition if that extradition is founded on otherwise normally excluded grounds such as race, religion, and nationality. This, however, has been modified by the 2005 amendments.[408] Thus it seems that States are still not willing to establish a system that provides for mandatory extradition.

Conclusion

The Maritime Convention resembles counter-terrorism instruments dealing with aviation security. In fact, many of the comparable provisions have been copied from these earlier instruments into the Maritime Convention.

The 2005 amendments included several features first introduced in the Hostages Convention, such as the exclusion of the political offence. The exclusion of the *political offence exception* from the Maritime Convention may be read as yet another step facilitating international criminal co-operation. Importantly the increase in human rights protection excluding extradition also shows that States are still not willing to establish a system that provides for mandatory extradition, even in relation to terrorism. A further innovation in the Maritime Convention is the broadening of the scope of application so that it now also covers, in certain circumstances, the transport

[405] The Maritime Convention, Article 10.
[406] As a result the final paragraph of Article 10 reads: "Those authorities shall take their decision in the same manner as in the case of any other offence of a *grave* nature under the law of that State.".
[407] *Ibid.*, Article 10(7).
[408] Article 11*bis*.The amendments were adopted on 15 October 2005 but have not yet entered into force. Cf. <www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686>

of nuclear material, thereby creating a clear overlap with the Nuclear Convention. The 2005 amendments have yet to come into force, but even when sufficient ratifications have been made, the Protocol does nothing to address the inherent weakness of the counter-terrorism regime: *i.e.* that prosecution might be influenced by political motive.

The Convention for the Marking of Plastic Explosives for the Purpose of Detection

The Convention for the Marking of Plastic Explosives for the Purpose of Detection [Hereinafter the 'Explosives Convention'],[409] was drafted in the aftermath of the *Lockerbie bombings*. The Security Council specifically expressed their concern that plastic explosives could be used in terrorists' acts and further urged the ICAO to intensify work on the prevention of acts of terrorism.[410] The Convention is similar to the Nuclear Convention in that it is not primarily intended to define criminal conduct but to control and limit the used of unmarked and undetectable plastic explosives.

Aim and Object

The aim of the Explosive Convention is to ensure some form of protection against plastic explosives, which are highly versatile and almost undetectable.[411] The Convention therefore aims to ensure the prohibition domestically of unmarked plastic explosives for non-military use.

Definition of the criminalised conduct

Unlike all the other instruments the Explosives Convention does not criminalise any specific conduct. Instead Article II provides:

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[409] The Convention for the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991, in force on 21 June 1998.
[410] Security Council Resolution 635, 14 June 1989.
[411] C. Towsend, '*Terrorism – A very short introduction*' (2002) 28.

"Each State Party shall take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives."

It may be inferred from this provision, even though it is not stated directly, that the Convention obliges States to ensure that manufactures use a marking agent, *i.e.* a substance introduced into an explosive to make it detectable.

The Convention further contains very strict provisions on the movement and possession of unmarked plastic explosives.[412] In relation to the movement of explosives then these obligations do not cover "movements for purposes not inconsistent with the objectives of this Convention, by authorities of a State Party performing military or police functions".[413] The military and police are not completely exempt from the prohibition on possession, by virtue of Article IV (3):

"Each State Party shall take the necessary measures to ensure that all stocks of those explosives referred to in paragraph 1 of this Article held by its authorities performing military or police functions and that are not incorporated as an integral part of duly authorized military devices are destroyed or consumed for purposes not inconsistent with the objectives of this Convention, marked or rendered permanently ineffective, within a period of fifteen years from the entry into force of this Convention in respect of that State."

Notwithstanding the exception to the *military carve-out* it still represents a significant gap in the scope of the Convention, a gap that might significantly influence its efficiency.

Obligations of co-operation and human rights limitations

The only obligation incumbent on the Contracting States in relation to co-operation is a very timid obligation "if possible" to assist the Commission, establish pursuant to Article VI, to evaluate technical developments relating to the manufacture, marking and detection of explosives, to discharge its functions. There is no other obligation on inter-State co-operation. Neither is there any provision on detention or extradition. The latter might be explained by the fact that the Convention does not provide for the

[412] The Explosives Convention, Articles III-IV.
[413] *Ibid.*, Article III (2).

criminalisation of any conduct. Although it does not explain why there are no provisions on co-operation. If, as expressed in the preamble, the marking of plastic explosives for the purpose of detection contributes significantly to the prevention of terrorist acts, *i.e.* the destruction of aircraft etc., then it seems reasonable to infer that also co-operating ensuring development and proliferation of such technology would enhance the stated objective. Nevertheless no such obligation exists. The above-mentioned Commission only serves to "evaluate technical developments" not to promote or proliferate. The efficiency of the Convention may further have been strengthened by obliging Contracting States to co-operate in relation to the recovery of explosives, similar to the obligations within the Nuclear Convention. Especially when once takes into account that State are not obliged to mark explosives for military purposes thus potentially allowing for vast quantities of unmarked explosives.[414]

Conclusion

The Explosive Convention is different from all other counter-terrorist instruments because it is not directed at the arrest and prosecution of terrorist. Instead it aims to ensure better control and detection of plastic explosives. It does not therefore fall within the category of so-called "suppression conventions".[415] Aust, States that the only reason that the United Nations lists the Explosives Convention as one of the twelve (now thirteen) counter-terrorist instruments is only because of it importance for the continual fight against terrorism.[416] It is therefore difficult to comment on it in relation to the efficiency of the counter-terrorism regime as a whole. Although, given the fact that explosives for terrorist purposes comes from varies sources, including stolen from military installations and extracted from landmines, the efficiency may be questioned since the Convention does not oblige the marking of all such explosives.[417]

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[414] In might be recalled that more than 350 tons of plastic explosives apparently dissapeared in Iraq, see http://news.bbc.co.uk/2/hi/middle_east/3950493.stm

[415] N. Boister, 'Human Rights Protection in the Suppression Conventions', Human Rights Law Review, (2002) 199.

[416] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) Commonwealth Secretariat.

[417] M. Krausa and A. A. Reznev, *Vapour and Trace Detection of Explosives for Anti-Terrorism Purposes: Proceedings of the NATO Advanced Research Workshop, held in Moscow, Russia, 19-2, Moscow, Russia, 19-20 March 2003*, (2004), 51.

The International Convention for the Suppression of Terrorist Bombings

The International Convention for the Suppression of Terrorist Bombings [Hereinafter the 'Terrorist Bombing Convention'],[418] was initiated by the United States after the truck bombing attack on the U.S. military personnel in Dhahran, Saudi Arabia, in June 1996.[419]

Aim and Object

The preamble to the Convention notes that "terrorist attacks by means of explosives or other lethal devices have become increasingly widespread" and that "existing multilateral legal provisions do not adequately address these attacks". Thus testifying to the inefficiency of the previous instruments. The aim of the Bombing Convention was to establish a more effective instrument in the fight against international terrorism.

Definition of the criminalised conduct

The Convention entails a comprehensive definition of an offence, which must be quoted in full. Article 2(1), States:

"Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss."

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[418] The International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, in force 12 January 1998.
[419] See S. M. Witten, 'The International Convention for the Suppression of terrorist Bombings', 92 American Journal of International Law (1998) 774.

Similar to previous instruments the Terrorist Bombing Convention contains in the definition of the criminalised conduct the dual requirement of unlawfulness and intent.

The requirement of "unlawfulness" was included to exclude the proper employment of explosives or other lethal devices by police or military forces.[420] This, however, leaves a considerable uncertainty regarding improper or excessive use of lethal devices by governmental agents.[421] This is not just a theoretical question because the Convention also covers the use of toxic chemicals and potentially therefore also the use of tear gasses and other chemical agents employed by police forces.[422] In this connection, it is important to bear in mind that the Convention applies whenever one of the victims is a national of another State. The Convention could therefore be applicable to mass demonstrations where protesters are of different nationalities like the demonstrations during the G8 Summit in Genoa in July 2001. Moreover, unlike previous instruments, unlawfulness cannot be established with reference to any State of 'registration'. The legality of the act must therefore presumably be determined by reference to the law of the territorial State where the event occurred. Although the term "unlawfully" is open to a broader interpretation.

This ambiguity is a consequence of the significant development in the definition of the prescribed conduct that the Convention represents. Previous instruments have relied on an enumerative description of a narrowly defined conduct. In addition, there was a strong presumption that State agents would never carry out such acts or that States could have any legitimate interest in perpetrating these atrocities. The conduct prescribed by the Terrorist Bombing Convention, on the other hand, is very broad. The method of attack is wide, covering not only traditional explosive and incendiary devices but also attacks with toxic chemicals, biological agents, radioactive material or other lethal substances.[423] This means that not only does the Convention overlap with other instruments, *e.g.* the Chemical Weapons Convention,[424] the Montreal

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[420] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 244.
[421] *Ibid.*
[422] Whether tear gases are to be considered as "lethal device" within the meaning of the Explosives Convention is uncertain. However under extreme circumstances the inhalation of tear gases in high concentration could lead to fatal pulmonary oedema. Thus, it could arguable be considered a lethal weapon. Cf. H. Hu and others, 'Tear gas - harassing agent or toxic chemical weapon?', The Journal of the American Medical Association 265 (1989) 5, pp. 660-663.
[423] *Ibid.*, at p. 777.
[424] Cf. C. Hunt. 'Legal Assistance: The Chemical Weapons Convention and Complementary Agreements', in Yepes-Enriquez and L. Tabassi (eds.) *Treaty Enforcement and International*

Convention and the Maritime Convention, but more importantly, it also covers activities that States normally carry out and have a legitimate desire to perform. This also justify the very explicit military 'carve-out', according to which:

"The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention."[425]

The geographical scope is also substantial, covering any "place of public use, a State or government facility, a public transportation system or an infrastructure facility". This was, according to S. M. Witten, chosen with a view to criminalise attacks in locations where terrorist would normally attack and civilians are at greatest risk.[426] Although the Convention does not seem to distinguish between civilian and non-civilian targets. In fact, the scope of the Convention is broad enough to encompass attacks on military facilities since "State or government facility" includes any permanent or temporary facility or conveyance that is used or occupied "by officials or employees of a State or any other public authority or entity", which may included military personnel.[427]

Jurisdiction

Similar to previous instruments, the Bombing Convention does not cover activities of military forces. Already in the preamble it is noted that:

"[T]he activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws"

Cooperation in Criminal Matters with Special Reference to the Chemical Weapons Convention (2002) 29 *et seq.*

[425] Terrorist Bombing Convention, Article 19(2).

[426] S. M. Witten, 'The International Convention for the Suppression of Terrorist Bombings', 92 American Journal of International Law (1998) 776.

[427] Terrorist Bombing Convention, Article 1(1).

The exception of military forces is further re-stated in Article 19(2), quoted above. Similar to the Hostages Convention therefore, the Terrorist Bombing Convention does not apply in circumstances regulated by international humanitarian law. Thereby reiterating the principle of *lex specialis derogate legi generali.* Given the very broad definition of the prescribed criminalised conduct, the exception provided covers a far wider area of activities than the parallel exception in the Hostages Convention. It is, however, noteworthy that the exception only includes "armed forces of a State" and "activities undertaken by military forces of a State", thus clearly not including so-called liberation movements. To the extent that activities of liberation movements fall within the scope of international humanitarian law these, may however still be exempted from the jurisdiction of the Convention by application of the above-stated principle of *lex specialis derogate legi generali.* This would, however, only apply where there was a genuine conflict, *i.e.* overlap *ratione materia.*[428] This would mean not only that the same acts would have to be covered but also that they would have to be subject to the principle of *aut dedere aut judicare.*

The potentially wide scope of application of the Terrorist Bombing Convention is further limited be reference to sovereignty and exclusive jurisdiction. In this respect, Article 17 reaffirms the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs. In addition, Article 18 ensures that:

"Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law."

Thus the Convention clearly prohibits the exercise of enforcement jurisdiction in the territory of another State. This is in conformity with international law. The exercise of extra-territorial enforcement jurisdiction, such as arrest or kidnapping of an individual, are thus clearly not sanctioned by the Convention.

[428] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law*, (2003) 367.

Obligations of co-operation and human rights limitations

The Convention is structured on the previous counter-terrorism instruments and includes the principle of *aut dedere aut judicare* similar to the modified provision in the Maritime Convention.[429] The Bombing Convention further builds on the principle of *aut dedere aut judicare* allowing for the temporary transfer of an alleged offender for the purpose of standing trial in a country other than the State of custody. Article 8(2) reads in full:

"Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article.

Thus the Terrorist Bombing Convention allows conditional extradition, reflecting a parallel development of international criminal law – primary repatriation – that in some case has become a feature of national law. The Bombing Convention thereby provides a greater room for manoeuvre while complying with the principle of *aut dedere aut judicare*.

In relation to extradition, Article 9(1) modifies existing extradition treaties so that the conduct defined in Article 2 of the Convention is included as an extraditable offence in any existing extradition treaty in force between the parties. Article 9(2) further allows for the Bombing Convention to be used as a surrogate extradition treaty. Further, in relation to extradition, the Bombing Convention contains a series of innovations facilitating criminal co-operation.

Several previous instruments explicitly stated that political motive could in no circumstances justify any act falling within their respective scope of application. This is followed up in Article 5 of the Bombing Convention where it is explicit stated that:

"Criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a State of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial,

[429] The Bombing Convention, Article 8.

ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."

Hence not only is the conduct defined in Article 2 referred to as criminal and most be dealt with accordingly, but it is under no circumstances justifiable. Thus aiming at the substantive liability of the offender. One of the consequences is expressed in Article 11, which clearly States that none of the offences within the Convention shall be regarded as a political offence for the purpose of extradition or mutual legal assistance. The relevant provision reads in full:

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

The Bombing Convention thereby took another step in facilitating international co-operation, a step that previously had not been possible. This, nevertheless, does not impose an obligation to extradite where there are substantial grounds for believing that the request was made for the purpose of prosecution or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion.[430] Thus despite the fact that, by the time of drafting of the Bombing Convention there was an increased will to enable extradition, there was no desire to remove all safeguards. In fact the removal of the traditional safeguards associated with extradition has been coupled with an increased human right protection. The Bombing Convention thus limits the obligation to extradite to a request made in good faith. Article 14 provides:

"Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."

[430] The Bombings Convention, Article, 12.

Humanitarian considerations are further evident in Article 19(1) according to which:

"Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law."

Thus the Bombing Convention indirectly affirms the application of human rights instruments. This would undoubtedly also has been the result without the reference.[431] Nevertheless, the mentioning of "rights... of... individuals" makes this claim irrefutable.

The obligations of assistance are wider than those of previous instruments. Article 10 contained the by now standard open-ended reference to the obligation to provide the "greatest measure of assistance" and the reference to comply in conformity with other treaties on mutual legal assistance. In addition, Article 13 relates to the possible transfer of detainees for the purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention. No similar provision exists in any of the preceding instruments. In relation to prevention of terrorist bombing, Article 15 makes reference to domestic legislation, the exchange of information and research into methods of detection of explosives. The reference to research is another clear innovation.

Conclusion

The Bombing Convention is the closest so far to a comprehensive counter-terrorism instrument. Its scope of application is far-reaching and overlaps with many of the previous instruments. In further incorporates many of the advances developed since the Hague Convention. Importantly, it was also the first of the analysed instruments clearly to exempt terrorism from the *political offence exception*, thereby removing another yet another obstruction and facilitating better international co-operation.[432] The Bombing Convention builds on the principle of *aut dedere aut judicare* by providing for the transfer of alleged offenders to stand trial in a country

[431] Cf. Vienna Convention on the Law of Treaties (1969), Article 31(3)(c).
[432] See also the European Convention on the Suppression of Terrorism (1977), Article 1.

other than the State of custody. Despite its many advances, it still suffers from many of the same problems as its predecessor, which might explain the limited number of extraditions and prosecution under laws implementing the Convention.

The International Convention for the Suppression of the Financing of Terrorism

The Convention for the Suppression of the Financing of Terrorism [Hereinafter the 'Financing Convention'] is one the few instruments not intimately linked to a specific incident.[433] The Convention is not directed against specific terrorist activities but against the support and means facilitating such acts. The aim of the Convention is therefore preventive unlike most of the previous conventions that relied more on a deterrent effect of national criminal law, although the Financing Convention also encompasses deterrent elements.

It was initiated by a request of France.[434] The General Assembly decided in 1999 that a previously established ad hoc terrorism committee should elaborate on a draft for an international convention for the suppression of terrorist financing to supplement related existing international instruments.[435] Initially there was some resistance, especially among western States, against a new instrument covering the financing of terrorism since this would be covered by the ancillary offence of being an accomplice.[436] It was further questioned whether the financing of terrorism was as serious an offence as the crime itself. Nevertheless, compared with previous instruments, negotiation of the Financing Convention went surprisingly fast. In fact it was negotiated in two two-weeks sessions in New York in 1999.[437] The initial reluctance may, according to Anthony Aust, be attributed to "perceived domestic

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[433] See generally W. Gilmore, 'International Financial Counterterrorism Initiatives', in C. Fijnaunt, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against Terrorism – A Transatlantic Dialogue*, (2004) 189.
[434] A. Aust, 'Counter-Terrorism – A New Approach', Max Planck Yearbook of International Law 5 (2001) 286.
[435] C.M. Johnson, *Introductory Note to the International Convention for the Suppression of the Financing of Terrorism*, 39 ILM (2000) 268. UN Doc. A/RES/53/108, para. 11.
[436] A. Aust, 'Counter-terrorism – A New Approach', Max Plank Yearbook of International Law 5 (2001) 288.
[437] *Ibid.*, at p. 285.

problems in enacting the necessary implementation legislation" and not so much with the underling idea of the new convention.

The unusually short drafting time is even more remarkable when one considers that in relation to the financing of terrorism it is not enough, as in previous instruments, to enumerate the constituent elements of specific conduct that needs to be criminalised. Instead, the conduct of financing has to be all-encompassing and a new offence of financing terrorism therefore had to be drafted. As will be seen below, this problem was essentially solved by listing the conduct States are obliged to criminalised in earlier instruments.[438] Some representatives, however, argued that this approach was unsatisfactory since earlier instruments did not cover all forms of terrorist acts such as murder committed by shooting, stabbing, strangulation etc. This led to demands of the inclusion for a more general definition. The main opposition against this was based on the view that any discussion of an abstract definition would inevitably reopen the dormant debate on what constitutes terrorism, which would unavoidable have delayed the drafting of the Convention. These objections turned out to be wrong.

Aim and object

The preamble notes that the number and seriousness of acts of international terrorism depend on the financing and further that existing multilateral legal instruments do not expressly address this issue. The aim of the Convention, stated by France at the first meeting of the Sixth Committee's working group, was "to prevent the crime of terrorism and punish its financing." The Convention therefore seeks to enhance international co-operation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators. Thus indirectly bearing witness of the deficiency of previous instruments.

[438] For a informal summary of the discussion in the Sixth Committee's working group see UN Doc. A/C.6/54/L.2, pp. 55-83.

Definition of the criminalised conduct

The Convention has an extremely broad scope of application and the definition of the offence is far more complicated than any of its predecessors. Article 2 reads as follows:

"1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to 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.

The wide scope of application is further sustained by the fact that for an act to constitute an offence set forth in paragraph 1, it is not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1.[439] The Convention contains a further advance by enumerating different forms of accessory to the offence.[440] The rather complicated definition is too extensive to be commented on in detail here.[441] Some minor remarks are nevertheless necessary.

Firstly it should be noted that the phrase "any person" in Article 2(1) refers not only to a private individual but also legal entities, such as companies. This is sustained by Article 5, which requires States parties to:

"take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence as set forth in article 2."

[439] The Financing Convention, Article 2(4).
[440] *Ibid.*, Article 2(5).
[441] For a more complete commentary, see A. Aust, 'Counter-Terrorism – A New Approach', Max Planck Yearbook of International Law 5 (2001) 294-301.

Moreover, the phrase "by any means directly or indirectly" was adopted to prevent any loophole. Thus it does not matter how funds get to a terrorist as long as the person supplying the funds has the necessary intention or knowledge.[442]

The Financing Convention, like previous instruments, also contains the requirement of "unlawfulness". This was discussed at length.[443] Suggestions were made to delete the term since it was thought as redundant. The view was, however, also expressed that it would be useful to retain the reference to "unlawful" since it added an element of flexibility by, for example, excluding from the ambit of application of the draft convention legitimate activities, such as those of humanitarian organisations and ransom payments.[444] One of the points made in this respect was that law enforcement agencies might be needed to fund terrorist organisations in order infiltrate them or money might have to be paid as part of a ransom.[445]

Similar reasons led to the inclusion of the word "wilfully" to emphasise that financing had to be deliberate, not accidental or negligent, although, as Anthony Aust remarks, the requirements of intention or knowledge would probably be sufficient.[446]

In addition to the agreed formulation of "provides and collects funds", the original French working paper had also included the concept of "reception".[447] Those that opposed its inclusion expressed the concern that it would cast the meaning of the term "financing" too broadly, criminalising a wide variety of activities beyond what was originally intended.[448] Others expressed strong support for the inclusion of the reference to "reception" of funds so as to enhance the capability of States to counter the funnelling of funds through middlemen, who possessed the specific intention required by the draft convention, or through other similar complex financial arrangements used to finance terrorist acts. It was noted that, without a reference to "reception", the middleman who possesses the funds with the required intent, but declines to transfer them or is apprehended before he has transferred them might not fall within the scope of the definition of "financing".[449]

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[442] *Ibid.*, at p. 294.
[443] *Ibid.*
[444] See UN Doc. A/C.6/54/L.2, p. 60, para. 67. The ICRC and the United Nations High Commissioner had such Concerns, see UN Doc. A/AC.252/1999/INF/2(ICRC) and A/C.6/54/WG.1INF/1(UNHCR).
[445] A. Aust, 'Counter-Terrorism – A New Approach', Max Planck Yearbook of International Law 5 (2001) 294.
[446] *Ibid.*
[447] See UN Doc. A/C.6/54/L.2, p. 60, para. 36-41.
[448] UN Doc. A/C.6/54/L.2, p. 60, para. 37.
[449] UN Doc. A/C.6/54/L.2, para. 38.

In relation to intent (*mens rea*) the view was expressed by the United Kingdom that for the purpose of the offence it should suffice that there was a reasonable suspicion that the fund would be used in for terrorist purposes, unless the suspect could prove otherwise.[450] Some representatives opposed this since they felt that it shifted the burden of proof to the accused contrary, to fundamental human rights principles.[451] It was also suggested that reference to intent of use should be deleted, since in practice, it would be difficult to prove the intention to use funds to commit an offence set forth in article 2.[452] Furthermore, the view was expressed that while the reference to intended use was included in article 5, paragraph 1 (b), of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, such a reference was not appropriate in the context of the current draft convention, since the possession of funds (as opposed to drugs) did not, per se, present any danger.[453]

Despite absence of any general prohibition on the use of strict liability under human rights law,[454] there are serious *fair trial* concerns related to the use of the principle in criminal law. In fact, most civil law jurisdictions reject the notion of strict liability within the criminal sphere, at least for serious offences. Moreover, concern about the use of a strict liability principle in criminal cases is increased in relation to terrorist cases where the defendant might not always have access to the information on the basis of which he is accused.

In a human rights context the accused must generally be allowed an opportunity to rebut evidence presented.[455] The applicant's right to disclosure of evidence is, nonetheless, not absolute and may be balanced against competing interest, such as for instance national security.[456] The combination of strict liability and secret evidence may, however, result in absurd situations.[457] Nobody has the means to prove his

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[450] A. Aust, 'Counter-Terrorism – A New Approach', Max Planck Yearbook of International Law 5 (2001) 294.
[451] *Ibid.*
[452] UN Doc. A/C.6/54/L.2, para. 213.
[453] UN Doc. A/C.6/54/L.2, para. 213
[454] Cf. generally, D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (1995) 243-244.
[455] *Ibid.*, at 244.
[456] See *e.g.* ECtHR, *Doorson v. The Netherlands*, Judgment of 26 March 1996, para. 70 and ECtHR, *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, para. 54. None of the cases, however, concern terrorism.
[457] See the exchange of words between the Guantanamo Bay detainee Mustafa Aid Idr and the President of the Combatant Status Review Tribunal, which serves as a forum for detainees at Guantanamo Bay. The case is not directly applicable to the Financing Convention because it dealt with the status of

innocence without knowing the evidence on which an accusation is made. The intent requirement is therefore an imperative *fair trial* safeguard, especially since the funds, according to Article 3, do not have to be used to carry out and offence. In other words, there mere possession of funds is enough to constitute an offence. The general fungible nature of money would mean that virtually anybody could fall within the scope of the Convention if there was no specific requrement of intent (*mens rea*). Even more so, when one takes into account the very wide definition of the word "funds", within the Convention.[458]

Subparagraph 1(a) lists the instruments that define the scope of application of the Financing Convention. It includes all of the above-analysed instruments with the exception of the Tokyo and the Nuclear Conventions. The exclusion of these instruments is understandable since neither directly deals with international terrorism. The Tokyo Convention only deals with hijacking when it is an offence "against the penal law", and the Nuclear Convention does not seek the criminalisation of any conduct. Their inclusion would therefore add nothing to the scope of the Financing Convention. The criminalised conduct referred to in the listed instruments include ancillary offences such as attempts and complicity. Subparagraph 2(a) allows States to make a declaration that a specific treaty shall be deemed not to be included in the list contained in subparagraph 1(a), thereby decreasing the number of treaties and potentially limiting the scope of the Convention. Most conduct covered by earlier instruments would, nevertheless, undoubtedly be covered by subparagraph 1(b). The prospective effect of any such declaration would therefore, in all likelihood, be of greater political than legal impact.

Subparagraph 1(b) is the first provision not exclusively to rely on an enumerative definition of a criminalised conduct. Instead it also contains an abstract "mini-

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detainees as "enemy combatants" and not with the accusation of a criminal offence, as would be the case under the Financing Convention. Nevertheless, the exchange gives a rare insight into the realties of the secret world of counter-terrorism and the criticism of Mustafa Aid Idr strikingly captures the dilemmas involved in shifting the of burden of proof especially while relying on classified information. In *Re*: Guantanamo Detainee Cases, District Court of Columbia, Civil Action No. 2002-0299 Memorandum Opinion issued January 31, 2005, p. 46-48.

[458] The Financing Convention, Article 1(1): ""Funds" means 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, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit."

definition" of terrorism,[459] making it an offence to fund acts "intended to 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 organisation to do or to abstain from doing any act."[460] This was a substantial breakthrough in relation to the definition of terrorism. Importantly, however, it is not a comprehensive definition since its only scope of application is in relation to the financing of terrorism within Article 1(1). The abstract definition contains both the *military carve-out*, which is common to all of the counter-terrorism instruments, and only covers injuries to persons "not taking an active part in the hostilities in a situation of armed conflict". The provision also borrows from the Hostages Convention when it requires that the respective act, by its nature or context, is to "intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act." The category of relevant entities that can be compelled is however narrower than in the Hostages Convention since the latter also included "natural or juridical person, or a group of persons".[461] The scope of the provision is nevertheless wide and covers conduct already criminalises by earlier instruments.[462]

Obligations of co-operation and human rights limitations

Despite the fact that the Financing Convention concerns a rather novel area in the combating of international terrorism, it still borrows heavily from previous instruments. The provisions directly related to the administration of terrorist funds, such as those relating to seizure of funds etc. in Article 8, are new and naturally have no counter-parts in earlier instruments. Many other provisions are, however, taken from earlier instruments.

The common obligation to take into custody a person and to investigate any act, when the circumstances so warrant, exist in Article 9. Similarly, the right of the

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[459] See W. Gilmore, 'International Financial Counterterrorism Initiatives', in C. Fijnaunt, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against Terrorism – A Transatlantic Dialogue*, (2004) 191.
[460] The Financing Convention, Article 2(1)(b).
[461] *Ibid*, Article 2.
[462] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 298.

detainee to consular communication, introduced by the Tokyo Convention, is expanded to include entitlement to be visited by State representatives and to be informed of the relevant right.[463] As with the Bombing Convention, the detainee may also be visited by members of the ICRC.[464]

The provision containing the obligation of *aut dedere aut judicare* is identical with the comparable provision in the Bombing Convention and includes the possibility to transfer the alleged offender to stand trial in another country than the State of custody.[465] Articles 13-14 stipulate that none of the criminalised conduct within Article 2 shall be regarded either as fiscal or political offences for the purpose of extradition or mutual legal assistance.[466] The removal of the traditional safeguards has been compensated by the introduction of the same human rights provisions as used in the Bombing Convention.[467] Finally the *fair treatment* clause has been extended with the words "including treatment in conformity with applicable provisions of international law, including human rights law."[468]

In relation to extradition, the Financing Convention resembles earlier instruments and provides for a system securing effective extradition by supplementing prior extradition agreements and enabling the Convention to be used as the legal basis for extradition.

In regard to legal assistance, obligations are in substance the same as in the Bombing Convention. The Financing Convention, however, also deals with more specialised areas such as for instance bank secrecy.

Conclusion

Prior to the Financing Convention, most counter-terrorism instruments dealt with the criminalisation of specific conduct, such as hijacking, hostage-taking and terrorist bombings. All these instruments also criminalised attempt and, depending on national

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[463] The Financing Convention, Article 9(3)(b) and (c).
[464] *Ibid.*, Article, 6(5).
[465] Ibid., Article 10.
[466] Traditionally fiscal offences are treated separately from other crimes and are generally excluded from the list of extraditable offences, see *e.g.* the European Convention on Extradition (1957), Article 5.
[467] The Financing Convention, Article 15.
[468] *Ibid.*, Article 17.

law and the underlying doctrine of attempt, could be very far reaching. The Financing Convention is focused only on the funding of terrorist acts. Hence it criminalises conduct that may take place before any of the acts contemplated in the previous instruments. The Convention thereby moves forward the moment of completion of the material elements of the crime (*actus reus*) for all of the instruments mentioned in Article 2(1)(a). In other words, before the Financing Convention, States were free to apply their own rules pertaining to the fulfilment and withdrawal from attempt in relation to so-called terrorist conduct. After the Financing Convention, however, the mere collection of funds in itself constitutes a complete 'crime', provided that the offender had the necessary intent (*mens rea*) and there is no requirement for the funds to have been materially used. The Convention further contains provisions regarding attempt, accomplices, organising and directing others to commit an offence and conspiracy. The last included both the civil law concept of *association malfaiteur* and the common law concept of conspiracy.[469]

The Financing Convention is also the first instrument not only to engage States but also private actors.[470] Indeed, private institutions have felt most of the impact of terrorist financing legislation.[471]

The Financing Convention represents another sizable step in the fight against terrorism, a step that goes far beyond the traditional criminal approach to terrorism. The method applied is not unprecedented in international law but follows the approach taken in relation to money laundering. This conventional framework may not, however, be directly applicable to terrorism because of two significant differences.[472] Firstly, funds that finance terrorist offences might not have been obtained illegally. Most evidence indicates, on the contrary, that a large percentage of funds used in terrorist attacks derive from legal sources.[473] This represents a problem in relation to money laundering because it is the criminal origin of funds that separates illegal from legal financial transactions and thus constitutes the offence of money laundering.[474] Secondly, terrorism is not, unlike ordinary economic crimes,

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[469] *Ibid.*, Article 2(5)(a-b).
[470] Cf. I. Bantekas, *The International Law of Terrorist Financing*, 97 American Journal of International Law (2003) 324.
[471] *Ibid.*, at p. 330.
[472] On this issue see generally, W. C. Gilmore, *Dirty Money* (3rd ed.), (2004).
[473] See *Special Report: Financing Terrorism*, The Economist, October 22nd-28th 2005, pp. 81-83.
[474] M. Kilchling, 'Financial Counterterrorism Initiatives in Europe', in C. Fijnaunt, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against Terrorism – A Transatlantic Dialogue*, (2004) 207.

profit orientated. In other words, the reason a terrorist might wish to conceal or disguise the origin of funds is not to evade the legal consequences of the criminal action that led to the proceeds of the crime. Instead terrorists follow money laundering-like methods to avoid detection of their terrorist activities. This means that the traditional framework for money laundering offences, requiring a specific intent (*mens rea*) to profit, may be not directly applicable to terrorism.[475] There will, as pointed out by Mark Pieth, be a criminal intent, but it makes no sense to view the funds used to promote the terrorist cause as the "proceeds" of that criminal intent.[476]

Thus, even this late convention does not provide a clear definition or obligations on Contracting States. Instead it seems to include even more conduct within the counter-terrorism regime without making any substantive improvements; thus not repairing the fault of the regime.

The Counter-Terrorism Regime

Beginning with the Hague Convention, all of the instruments, with the exception of the Explosives Convention, are essentially modelled on the same limited framework. Many forms of conduct that the instruments seek to criminalise would doubtless already have been crimes under existing domestic law. It was, nevertheless, viewed as essential that all States criminalise the relevant conduct to ensure that there were no safe havens around the world. The approach taken throughout all these instruments has been enumerative, obligating States to criminalise one form of conduct after another. Not until the Financing Convention has it been possible to reach any agreement on an abstract definition "terrorism". All the agreed instruments essentially follow the same structure, first established in the Hague Convention, requiring the criminalisation of specific conduct, establishing a clear basis of extra-territorial legislative and adjudicative jurisdiction under international law and providing associated obligations of co-operation in relation the prosecution of the alleged offender. This approach has been described as "sectoral", "segmental" or "incremental", which clearly indicates the problem of reaching agreement on a

[475] For a definition of money laundering see for instance the United Nations Convention Against Transnational Organized Crime (not in force), Article 6(1).
[476] M. Pieth, *Financing Terrorism*, (2002) 56.

comprehensive definition of "terrorism" with the consequential focus on particular conduct, which most States agree constitutes a manifestation of an unjustifiable form of violence. The following will provide a short review of the legal instruments within this regime.

Jurisdiction

All of the Counter-terrorism instruments oblige Contracting State to establish jurisdiction in order to facilitate criminal prosecution. The requirements to the establishment of jurisdiction may be either discretionary or mandatory.

Thus all of the above-analysed instruments oblige States to take such measures as may be necessary to establish jurisdiction based on territoriality and nationality. In relation to the ICAO instruments, territorial jurisdiction goes beyond the normal doctrine by obliging the State of landing and possibly the State of business of the lessees to establish jurisdiction. The Hostages Convention also obliges States to establish jurisdiction on the basis of the protective and passive nationality principles.[477] Moreover, Contracting States are obliged to effectuate such jurisdiction in accordance with the principle of *aut dedere aut judicare*, *i.e.* they are obliged to present the case for their prosecuting authorities if they do not extradite the alleged offender. Most of the instruments further stipulate that they do not exclude any criminal jurisdiction exercised in accordance with national law or declare that Contracting States may exercise jurisdiction on jurisdictional theories going beyond the traditional jurisdictional principles, *viz.* the territorial and nationality principles.[478] These other bases of jurisdiction to prescribe are, however, expressed as entitlements, not as obligations. Thus States may rely on them but they are not obliged to establish criminal jurisdiction on these other bases of jurisdiction.

The Conventions' mandatory obligations oblige Contracting States both to criminalise the respective conduct as well as exercise mandatory jurisdiction under certain specific circumstances, that is to say, they explicitly provide and oblige Contracting States to establish jurisdiction to adjudicate and to prescribe extra-territorially. They do not, however, provide any extra-territorial enforcement jurisdiction. In other words, they do not allow States to arrest suspects or otherwise

[477] Hostages Convention, Article 5(c) and (d).
[478] See generally, V. Lowe, 'Jurisdiction' in M. D. Evans, *International Law*, (2003) 329-355.

enforce national laws outside the territorial State. The discretionary forms of jurisdiction provide the same entitlements but do not oblige States to exercise such jurisdiction.

The most far-reaching jurisdictional principle contained in the counter-terrorism instruments, with the exception of the Tokyo, Explosive and New York Conventions, is that according to which States shall establish criminal jurisdiction on the mere basis of the presence of the offender within their territory, *i.e.* regardless of where the offence was committed, the nationality of the offender or the nationality of the victims. In other words the instruments provide for a form of extra-territorial or even quasi-universal jurisdiction. This is similar to the obligation of Parties to the Geneva Conventions to "undertake to enact legislation necessary to provide effective penal sanctions" for persons responsible for grave breaches.[479] Despite the potentially very broad scope of application, in only very few cases have States exercised such jurisdiction.[480]

One of the few[481] precedents where a State has exercised jurisdiction over a person with no other connection other than the mere presence of the offender within the territory of the prosecuting State is the *Zardad case* in which the English Central Criminal Court convicted an Afghan national for crimes committed in Afghanistan between 1991 and 1996 on the basis of the 1984 Torture Convention and the 1979 Hostages Convention.[482]

Despite the counter-terrorism instruments' going beyond the traditional accepted forms of jurisdiction under international law, few objections have been made hereto by non State Parties. This, coupled with the fact that the jurisdictional principle has been copied in many other instruments, leads Aust conclude that, "its legality is

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[479] Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (1949), Article 49; Geneva Convention II for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), Articles 50; Geneva Convention III Relative to the Treatment of Prisoners of War (1949), Article 129; Geneva Convention IV Relative to the Protection of Civilians in the Time of War (1949), Articl 146 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85.

[480] Cf. A Cassese, *International Criminal Law*, (2003) 297.

[481] One could also mention the *Belgian Genocide* case and the *Pinochet case*.

[482] See in relation to the Torture Convention decision of the London Central Criminal Court (old Bailey) in *R v Zardad* (Judgment and Ruling pursuant to a preparatory hearing held under s.29 of the Criminal Procedure and Investigation Act 1996), Decision of 7 April 2004 and in relation to the Hostages Convention decision of the London Central Criminal Court (old Bailey) in *R v Zardad* (Ruling on the Taking of Hostages Act 1982), Decision of 5 October 2004. It should be noted that both the UK and Afghanistan were Parties to the Torture Convention whereas only the UK was a Party to the Hostages Convention at the time of the offence.

beyond reasonable doubt".[483] It is sometimes asserted that the obligation to establish jurisdiction prescriptive also entails an obligation to exercise such jurisdiction. This is wrong. The obligation to establish jurisdiction over the criminalised conduct within the counter-terrorism instruments does not provide for an obligation to exercise that jurisdiction. This is evident from the *aut dedere aut judicare* principle.

The principle of 'aut dedere aut judicare'

The principle of *aut dedere aut judicare* forms the underpinning of the counter-terrorism regime.[484] The obligation is phrased slightly differently in some of the instruments, but they all contain the same core obligation. According to this principle a Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Thus the State in which an alleged offender is found has only two options: either it submits the case for the relevant prosecuting authorities or it extradites the alleged offender. It is important to note, however, that it does not require that the alleged offender is actually tried, but only that the relevant authorities take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. Hence if a decision is taken not to initiate prosecution and this decision is taken in good faith then other State Parties are not entitled to demand extradition.

During the drafting of the original provision in the Hague Convention some States, including the Soviet Union and the United States, insisted that cases of hijacking *should* result either in extradition or prosecution.[485] Other States, however, viewed this as an impermissible trespass upon the discretion of their prosecuting authorities.[486] The dispute eventually resulted in the inclusion of the wording "for the purpose of prosecution", which was subsequently retained in all of the counter-terrorism

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[483] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 6.
[484] On the principle see generally ILC Preliminary report on the obligation to extradite or prosecute ("aut dedere aut judicare"), 7 June 2006, UN Doc. A/CN.4/571.
[485] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 198.
[486] *Ibid.*

instruments with the exception of the Nuclear Convention, which contains no such obligation. It is therefore evident that there is no requirement that the alleged offender be tried or even that criminal proceedings be initiated. This to some extent reflects the problems of upholding domestic legal standards while at the same time ensuring effective international criminal co-operation. Malaysia for instance expressed the concern during the drafting of the Hague Convention that if prosecution were to be mandatory, then this would create certain constitutional difficulties.[487] The Chairman of the ICAO Subcommittee, charged with the initial drafting of the *aut dedere aut judicare* principle, further stated that it was decided not to include an absolute requirement to prosecute when the alleged offender was not extradited since it "was not considered possible to trespass upon the jurisdiction of the [public prosecutor] in this regard".[488] The discretionary provision further reflects certain humanitarian considerations,[489] which to some extent mirror some of the underlying values in the principle of *presumption of innocence*, which is a fundamental human rights principle.[490] The Latin term *aut dedere out judicare* is therefore misleading because it seems to suggest a full trial.[491] The true option open to States, as pointed out by Guillaume, is *aut dedere aut prosequi* (extradite or prosecute).[492] But even this might, however, be overstated.

It should further be noted, that unlike the European Convention on the Suppression of Terrorism, the obligation in the counter-terrorism instruments is not dependant upon prior request for extradition.[493] This is evident from the language of the instruments and from the fact that a proposal from France and the Netherlands to

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[487] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 59.
[488] ICAO Doc. 8877-LG/161, p. 69 (1970), quoted in J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 198.
[489] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 198.
[490] ICCPR, Article 14(2); ECHR Article 6(2); ACHR, Article 8(2). See also the remarks by M. C. Bassiouni, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, [1980] in the Proceedings of the American Society of International, (74Th Annual Meeting) 280.
[491] The term "judicare" primarily means to "to judge" or "to try" cf. M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare*, (1995) 4.
[492] G. Guillaume, 'Terrorism et Droit International', 215 Hague Rec. 287 (1989-III) 371.
[493] Cf. J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 196-197. For an opposite view see *A. Abramovsky, Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention*, Columbia Journal of Transnational Law (1974) 395, S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', International and Comparative Law Quarterly (1973) 707.

make extradition contingent upon a request, during the drafting of the Hostages Convention, was discarded.[494]

There may be many reasons why States do not extradite. States may refuse extradition because the alleged offender is one of it own nationals and its laws prevent their extradition. The requested State may not have confidence in the fairness of the legal system of the requesting State or human rights considerations may prevent extradition. There might be insufficient evidence, especially evidence admissible in national courts, to initiate criminal proceedings. In such circumstances the principle of *aut dedere aut judicare* would normally oblige States to present the case for its own prosecuting authorities. These may, however, exercise considerable discretion in deciding whether or not to prosecute the suspect. The requirement that the relevant authorities shall take their decision in the "same manner as in the case of any ordinary offence of a serious nature under the law of that State" or "through proceedings in accordance with the laws of that State" means, as noted above, that there a several circumstances in which the prosecution authorities may decide not to initiate prosecution. The most obvious is a lack of evidence. If the prosecution authorities, in good faith, decide that the evidence in a given case is not strong enough to justify prosecution, then this clearly falls within their discretion. Consequently, the decision not to prosecute would not constitute a breach of the principle of *aut dedere aut judicare* and as a result other States could not demand extradition. The authorities might also decide not to charge a suspect on humanitarian grounds, *e.g.* on the basis that the suspect is incapable of standing trial. Likewise, charges may be dropped against an alleged offender in return for his agreement to testify against a co-defendant or as part of an agreement securing the release of hostages. All these considerations appear to be permissible under the principle of *aut dedere aut judicare*, as expressed in the counter-terrorism instruments. The permissibility of such a decision depends on whether such a decision is available to the authorities of the respective State in ordinary criminal cases of a similar serious nature and that the relevant decision is taken in accordance with the normal procedure and in good faith.

According to Lambert, the principle of *aut dedere aut judicare* entails a serious weakness because of the broad latitude left to officials of each Party State and the

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[494] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 197.

difficulties of proving that a decision not to prosecute was taken in bad faith.[495] He nevertheless recognises that it is unlikely that a better provision could have been drafted. Similarly FitzGerald notes that most States are reluctant to extradite or prosecute political offenders and that this impinges on a sensitive area of State sovereignty.[496] The exchange between the *political offence exception* and the increase in human rights protection further testifies to the unwillingness of States to subscribe to an absolute obligation to extradite. Nevertheless, the remark made by the Irish Attorney General, Costello, in 1975, that the method favoured by the international community for bringing to trial fugitive offenders is that contained in the Hague Convention, still seems correct today.[497] This is evident from the principle's having been employed throughout all the counter-terrorism instruments and use in other instruments as well, most recently in the International convention for the suppression of acts of Nuclear Terrorism.[498]

Custody and inquiry

To ensure compliance with the principle of *aut dedere aut judicare*, including facilitating the possibility of criminal prosecution, the counter-terrorism instruments all contain certain supporting obligations upon the State in whose territory the alleged offender is found. These include the obligation to ensure the presence of the alleged offender to enable subsequent prosecution or extradition. They further oblige the States to make a preliminary enquiry into the facts, to inform certain other States about these measures and to allow for consular communication with the suspect. The relevant provisions have become more complex and elaborate but they all contain the same core from which certain realities emerge. Firstly, the discretion left to Contracting States by the qualified initial wording of all of the relevant provisions – upon being satisfied that the circumstances so warrant – indicates clearly that the States did not want to appear to bind themselves unequivocally to take measures

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[495] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 203.
[496] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation', International Conciliation (1971) 57.
[497] D. Costello, 'International terrorism and the development of the principle of *Aut Dedere Aut Judicare*', Journal of International Law & Economics (1975) 490.
[498] International convention for The suppression of acts of Nuclear terrorism (2005), Article 11(1).

against all alleged offenders, without being able to have regard to the surrounding circumstances.[499] Secondly, they all seem to reflect certain human rights considerations by requiring that detention may only be continued for such time as is necessary to enable criminal or extradition proceedings to be instituted.

Extradition

Extradition is probably the most significant instrument of international criminal co-operation, as is clear from its predominate position within the counter-terrorism system. There is nevertheless no universal extradition system. Gilbert remarks that "extradition is an imperfect obligation and there is no general international duty to extradite or punish a fugitive." This means that extradition is either dependant upon the comity of States or prior arrangements in the form of extradition treaties. Without such agreements extradition of an alleged offender can be virtually impossible because of domestic law constraints on arresting and transporting suspects in the absence of a treaty. The Hague Convention and later instruments, attempted to solve this problem by extending the scope of existing extradition treaties and by providing a legal basis for extradition where no alternative extradition arrangement existed. The first was facilitated by a provision that stipulated that the conduct criminalised should be included in existing extradition treaties between the Contracting Parties where these did not already cover the criminalised conduct. All the counter-terrorism instruments, moreover, contain a provision that obliges States to include the relevant conduct criminalised as an extraditable offence in future extradition treaties. The later was achieved by inserting a provision enabling Contracting States to use the relevant counter-terrorism instrument itself as a surrogate extradition treaty in cases where a party makes extradition conditional on the existence of an extradition treaty. Likewise, in situations where a party does not make extradition conditional upon the existence of an extradition treaty, those parties shall, according to a common provision in the counter-terrorism instruments, recognise the relevant conduct as an extraditable offence. Further to ensure that extradition is facilitated in all possible scenarios, the instruments all contain a provision that provides that the conduct in

[499] J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 170.

question may be treated, for the purpose of extradition between the parties, as if it had been committed not only in the place where it actually occurred but also in the territory of the Parties required to establish their jurisdiction over the offence. This legal fiction is intended to solve the potential problem where extradition is conditional upon the alleged offender's return to the State where he committed the offence. Since all states are obliged to criminalise the specified conduct no mention need to be made of the double criminality requirement which otherwise is standard in extradition arrangement.

Thus it is evident that the counter-terrorism instruments seek to eliminate as many obstacles as possible to facilitate extradition within Contracting States. The extradition regime within the counter-terrorism instruments is, nonetheless, ultimately based on the principle of *aut dedere aut judicare*, which, as seen above, is not absolute.

Human rights and other protective principles

There are several ways in which a regime may be appraised, among others by its ability to protect human rights.[500] This is not the intention of this thesis although the increased scope of the obligation of States to protect human rights during the implementation of these treaties necessitates some discussion, especially since the protection of human rights could substantially affect the efficiency of the system as a whole.

It is evident from the above analysis that human rights protection within the counter-terrorism system has evolved significantly. The counter-terrorism instruments have created an ever-widening system of indirect suppression by obliging Contracting States to criminalise certain specific conduct under domestic law and to co-operate in order to suppress these terrorist crimes.[501] The underlying foundation of this system has been a wide jurisdictional base and the principle *aut dedere aut judicare*. Early instruments implicitly contained some humanitarian safeguards inherent in their vague language, *e.g.* in their extradition provisions and in the *political offence*

[500] R. Cryer, *Prosecuting International Crimes* (2005) 191.
[501] Cf. D. Freestone, 'The Principle of co-operation: terrorism', in V. Lowe and C. Warbrick (eds.) *The United Nations and the Principles of International* Law, (1994) 123.

exception. Pressure for more effective international co-operation and implicit faith in domestic criminal systems facilitated the erosion of some of these traditional safeguards.[502] The weakening of the traditional State-exercised protection scheme has been accompanied by an increased protection of individual human rights in international law.[503] The growing importance of the human rights doctrine was reflected in the introduction of the *fair treatment* clause in the 1973 New York Convention. Later, the Hostages Convention specifically made reference in the preamble to the right to "life, liberty and security" as set out in the UDHR and the ICCPR. The importance of human rights increased both under general international law as well as within the counter-terrorism regime among others with direct reference of the rights of individuals in the Bombing Convention. This development finally culminated in Article 17 of the Financing Convention, which provides that:

"Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law."

The following will provide an overview of the most important protective principles relevant to the counter-terrorism instruments.

Due process – The New York Convention was the first counter-terrorist instrument to introduce a due process requirement by specifying that the State Party in whose territory an alleged offender is found shall, if it does not extradite him, submit, "without undue delay", the case to its competent authorities for the purpose of prosecution. This amendment was retained in later instruments. The ILC pointed out that the phrase sought to ensure that the alleged offender would not be kept in preventive custody longer than was reasonable and fair.[504] Preventive custody is not *per se* prohibited under international law, but it must not be arbitrary, and it has to be

[502] N. Boister, 'Human Rights Protection in the Suppression Conventions', 2 Human Rights Law Review (2002) 203.
[503] See A. Cassese, *International Law 2nd ed.*, (2003) 375.
[504] L. M. Bloomfield and G. F. FitzGerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention*, (1975) 103.

based on grounds and procedures established by law.[505] Moreover information of the reasons must be given and court control of the detention must be available.[506]

In relation to the ECHR, it is worth first recalling the distinction between detention for the purpose of criminal prosecution on the one hand and extradition on the other, Articles 5(1)(c) and 5(1)(f) respectively. There is no absolute time limit to the time proceedings may last under Article 5(1)(f). Instead it is a test of diligence appropriate to the circumstances.[507] The leading case, *Chahal*, concerned Mr. Chahal, an Indian citizen, who had illegally entered the UK in 1971.[508] In 1990 the Home Secretary decided to deport Mr. Chahal because his presence was contrary to public good, for reasons of national security and the international fight against terrorism. Mr. Chahal was subsequently detained but challenged his deportation on the basis that his political involvement in Sikhism presented him with a real risk of inhuman and degrading treatment if returned to Punjab, India. The ECtHR found, having given regard to all the facts, that there was a real risk. In relation to his detention from 6th August 1990, (when Mr. Chahal was first detained with a "view to deportation") to its determination on 3rd March 1994, (when the domestic proceedings ended) the Court noted:

"Mr Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 para. 1 (f)."

Thus in the matter of deportation proceedings, the Court did not find that detention for more than three years and four months constituted a breach of Article 5(1)(f). This leads to the conclusion that detention with a view to deportation may be of considerable duration without infringing the ECHR as long as the authorities handle the case with due diligence.

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[505] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994).
[506] *Ibid.*
[507] D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (1995) 128.
[508] ECtHR, *Chahal v. the United Kingdom*, Judgment of 25 October 1996.

The political offence exception – was present in many of the earlier counter-terrorism instruments. Importantly, this safeguard was removed from the Bombing Convention and later instruments, which seems to imply that states were willing to surrender this traditional safeguard for the benefit of more effective criminal co-operation. This was, however, not the case: as illustrated above, the exclusion of the *political offence exception* was followed by stronger human rights safeguards. Christine Van den Wijngaert notes in this regard:

"The reluctance of states to subscribe to treaty provisions excluding certain crimes from the *political offence exception* results from the fact that such provisions create an automatic duty to extradite. Since they would oblige states not to consider the crimes concerned as political offences, extradition would occur almost automatically. States' reluctance with respect to such an automatic duty to extradite is not only based on upon political consideration, but also originates from basic concerns for the individual, i.e. their wish to avoid being bound to extradite to all states without discretion, even to those who do not offer the minimum safeguards for fair trial."[509]

Even the 1977 European Convention for the Suppression of Terrorism, which is only open for accession to members of the Council of Europe (CoE) and consequently requires ratification of the ECHR, contains in Article 5 a protection against persecution.[510] Thus while States might have been willing to accept that certain types of conduct should be criminalised without regard to the location of the offence or the motive of the offender, they were not willing to bind themselves to extraditing all offenders to States which did not respect fundamental human rights. This holds true even for members of the CoE, which are all members of the ECHR and therefore presumably have the same minimum standard of human rights protection. The exception to extradition is even more strongly asserted in the 2005 Convention for the Suppression of acts of Nuclear Terrorism (2005), where Article 16 states:

"Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to

[509] C. Van den Wijngaert, *The Political offence exception to Extradition*, (1980)161. See J. J. Lambert, *Terrorism and Hostages in International Law, A commentary on the Hostages Convention*, (1990) 192.
[510] See also the Council of Europe Convention on the Prevention of Terrorism (2005), which explicitly allows for reservation to the exclusion of the political offence exception, Article 20. See further Explanatory Report, at 211.

such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."

This seriously challenges the assertion of a belief of States that extradition in some circumstances can be rendered obligatory. In fact, there is much evidence that suggest that States will not accept an absolute obligation to extradite. This seems to be sustained by the lack of practice and extensive normative status attributed to the *political offence exception.*[511]

Consular protection – is not strictly speaking a human right but it may be of paramount importance to ensuring the protection of human rights and it is therefore relevant to the present discussion. The obligation to provide consular protection is, moreover, found in all of the counter-terrorism instruments.

There is no general obligation in international law to provide consular protection and this area of the law is generally regulated by the 1963 Vienna Convention on Consular Relations. In some States municipal law may, however, provide for an obligation to provide consular protection.[512] This does not, however, reflect general international law. The obligation under the counter-terrorism instruments to ensure consular communication thus affords broader protection than is required by customary international law and in some respects also a broader protection than is afforded by the 1963 Vienna Convention. As mentioned above, the unequivocal language of some of these provisions may even give rise to individual rights with direct effect in national law.[513] This is regardless of whether they may be considered a human right.[514] It is uncertain what consequences may be inferred from the breach of such individual rights, but it would clearly amount to an *international wrongful act* and the State of

[511] Cf. for instance the reservation of Belgium to the absence of a political offence exception in the Hostages Convention, CM 6676, p. 63.
[512] This is for instance the case in Germany where the Federal Constitutional Court in the *Rudolph Hess case* accepted that the Federal Republic were under a constitutional duty to provide diplomatic protection to German nationals.*Rudolph Hess* (Case number 2 BVR4 19/80), 90 International Law Reports 386. Contrary to this, is the position in the United Kingdom, where the Court of Appeals in the *Abassi case* held that it could only order the Government to give due consideration to the facts of a given case. Beyond this, the Court did not believe it possible to make any general proposition. [2002] EWCA Civ 1598, para. 104-105.
[513] *LaGrand*, ICJ Reports (2001) 1.
[514] *Ibid.*, para. 78.

nationality may thus exercise diplomatic protection.[515] There is, however, no general obligation under international law to provide diplomatic protection. The commentary to the ILC's draft articles on Diplomatic Protection states:

"A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation."[516]

The ILC's draft Articles thereby maintain the so-called "Mavrommatis principle"[517] or "Vattelian fiction" according to which an injury to a national of a State is an injury to the State itself.[518] Hence the injury does not confer any right upon the individual.

Other than the principles explicitly protected within the instruments, the evolution of general human rights has also to some extent limited the ability of States to co-operate in counter-terrorism measures. This is especially so in relation to the so-called *Soering principle.*

The Soering principle - More important than integrated human rights protection in the counter-terrorism instruments was the development in general human rights protection. The most profound development in regard to criminal co-operation was the decision of the ECtHR in the *Soering case.*[519] Here the Court pronounced that it would be incompatible with Article 3 of the ECHR for a contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that there was real risk that he would submitted to torture or inhuman or degrading treatment.[520] The UN Human Rights Committee endorsed this approach in the *Ng v Canada.*[521] It noted, "if a state party extradites a person within its jurisdiction in such circumstances, and if, as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in

[515] Cf. ILC Report on Diplomatic Protection, Report of the fifty-second session (2000) A/55/10, p. 144.
[516] ILC Fifty-sixth Session (3 May to 4 June and 5 July to 6 August 2004), UN Doc. A/CN.4/536, Chap. 7, p. 28.
[517] *Mavrommatis Palestine Concession case, P.C.I.J. Series A*, No. 2 1924, p. 12.
[518] For a discussion of this notion, and the criticisms directed at it, see the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 61-74.
[519] ECtHR, *Soering case*, Judgment of 7 July 1989.
[520] *Ibid.*, at para. 88.
[521] UNCHR, *Ng v Canada*, UN Doc. CCPR/C/49/D/469/1991.

violation of the Covenant".[522] In addition, the 1984 Torture Convention specifically provides in Article 3 that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[523]

The ECtHR further left open the possibility that the flagrant denial of *fair trial* could also present an obstacle to extradition under the ECHR.[524] The increasingly high standard required in the area of protection of human rights further indicates that other human rights also demand this protection today.[525] Life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention.[526] This further implies that human rights other than the prohibition on torture or inhuman and degrading treatment could also represent a bar to extradition were there was a real risk of a flagrant violation of the very essence of the respective right.[527]

Human Rights and effectiveness

Human rights undoubtedly hamper the effectives of international criminal co-operation.[528] This is nevertheless unavoidable because recourse to the criminal model for response to terrorism means that States are obliged to attend to the human rights of those caught up in the investigatory and prosecutorial processes. The international treaties through which the counter-terrorism process has been conducted have to some extent reflected this. They have struck an incrementally changing balance between the increasing scope of the terrorist offences and the obligation of States to protect human

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[522] *Ibid.*, para 14.2 See also General Comment 20, 10 March 1992, para 9, and General Comment 31, 26 May 2004, para 12.

[523] See also Committee Against Torture, General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998).

[524] ECtHR, *Soering case*, Judgment of 7 July 1989, para. 113.

[525] ECtHR, *Case of Selmuni v. France*, Judgment of 28 July 1999, A no. 25803/94, para 101.

[526] See ECtHR, *Einhorn v France*, Appl. No. 71555/01, Oct. 2001, para 27.

[527] For an overview and analysis of ECtHR jurisprudence see [2004] UKHL 26 were it was accepted in principle by the Law Lords that Article 2, 4, 5, 6, 8 and 9 in principle could constitute a bar to extradition. This position was later confirmed in principle in regard to Article 8 in [2004] UKHL 27.

[528] See I. Cameron, *General Human Rights Principles Relevant to US-EU Counterterrorism Cooperation*, in C. Fijnaunt, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against Terrorism – A Transatlantic Dialogue*, (2004) 350.

rights during the implementation of these treaties, even though some would say that they have not gone far enough.[529]

The use of international criminal law against terrorism naturally encounters certain obstacles, not least because of its often transnational character. The co-operation of States is therefore an essential element in the successful implementation of a universal criminal program. This co-operation might have been made more complicated by increased and diverse human rights protection.[530] It does not, however, seem plausible to conclude that commitment to human rights and the rule of law itself is too demanding for an effective response to terrorism.[531] Effective criminal co-operation is not antithetical to human rights. That human rights may be attributed to an individual already shows evidence of the effectiveness of the criminal system. It is therefore more likely that existing regimes have been obstructed by the unwillingness of some States to co-operate, either because they sympathised with the ideology of the terrorist or simply because they did not have the resources to respond to a threat that might not even affect them directly.

The traditional criminal approach has however been questioned. Whether it is because of its transnational character or because of inherent difficulties in the prosecution of terrorist offences, States have argued that the criminal process needs modification to be effective; innovation, which may lead to conflict with human rights standards.[532] At the margins, States maintain that it is necessary to declare emergency regimes to provide mechanisms to meet the threat of terrorism, which would be incompatible with the full protection of human rights. From a human rights perspective this is problematic because it raises the classical question of how far a liberal society can itself breach liberal values to ensure it own survival.

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[529] N. Boister, 'Human Rights Protection in the Suppression Conventions', 2 Human Rights Law Review (2002) 215-216.

[530] See D. Freestone, 'Legal Response to terrorism', in J. Lodge (ed.) *Terrorism: a challenge to the State*, (1981) 195-224.

[531] See R. Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension', 11 Criminal Law Forum 2 (2002) 143-181.

[532] See for instance Prime Minister, Tony Blair, "Let no-one be in any doubt, the rules of the game are changing..." 5 August 2005, www.number-10.gov.uk/output/Page8041.asp

Practice

So far the thesis has analysed the counter-terrorism instruments and commented on their theoretical effectiveness. In some instances it has also mentioned individual cases. To assess whether the regime is efficacious as a whole, a more thorough analysis is necessary. There are, however, no comprehensive statistics on extradition or prosecution under these instruments. The thesis therefore resorts to the writings of commentators to provide an overview of existing practice under the counter-terrorism instruments.

Abramovsky early noted that the absence of a mandatory obligation to prosecute or extradite, or even the lack of will, significantly impedes the effectives of the counter-terrorism system.[533] According to him, for the instruments concerning offences committed against civil aviation to become effective they must be acceded to by almost all nations.[534] This is true not only for the ICAO instruments but for all counter-terrorism instruments that seek to eliminate safe-havens for offenders. Even the smallest number of States could undermine their effectiveness by actively to supporting or condoning the criminalised conduct.[535] This was in fact the case.[536] Evans cited in a study concerning the years from 1960 to 1977, Egypt, Iraq, Lebanon, Libya and Tunisia as States which, despite being members of at least one of the ICAO instruments, did not respect the obligations contained therein at least in on one form or another.[537] Evans also drew the conclusion that, in cases concerning extradition and prosecution of so-called international terrorism, some States consider that factors such as foreign and domestic politics impinge upon the fulfilment of international obligations.[538] Other countries such as Algeria, Cuba, Kuwait, Syria and Yemen (Aden), which were not party to the respective instruments but to the Chicago Convention, which provides the basis for the facilitation of international aviation, also

[533] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 300.
[534] *Ibid.*
[535] *Ibid.*
[536] A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft – Part III: The Legality and Political Feasibility of a Multilateral Air Security Convention', Columbia Journal of Transnational Law, 14 (1975) 452.
[537] A. E. Evans, *Aircraft and Aviation Facilities*, in A. E. Evans and J. F. Murphy, *Legal aspects of International Terrorism* (1978) 37.
[538] *Ibid.* at p. 494.

had their role to play in facilitating attacks against international aviation in the early years.[539]

It is difficult to find any evidence to sustain a general assumption of a not-uncommon trend of non-compliance. This despite Contracting States' having a duty to report any action taken in accordance with the obligation contained in the respective conventions.[540] It nonetheless seems to be the position taken by most commentators. Professor Cheng, for instance, has expressed the view that:

"Ever since 1970, in addition to the problem of failure to accept the Tokyo, Hague and Montreal Conventions, there has been also the problem of parties to them failing to comply with their obligations under the respective treaties, in the form especially of nominal penalties or the lack of any effort to prosecute after blank refusal to extradite."[541]

Anthony Aust remarks: "Although comprehensive statistics on extradition and prosecution pursuant to the conventions are not easy to find, extradition of alleged offenders appears to happen rarely, even if the person is a foreigner."[542] Professor Dershowitz even emphasised it as one of the reasons why terrorism works. In his view the pattern is quite discernible: "Terrorist who hijacked, blew up, or otherwise attacked commercial airliners would, if captured, quickly be released by most countries." According to Dershowitz the message was clear: "Terrorist attacks committed outside Israel would go unpunished and would generally achieve the desired result."[543] There are several individual incidents that confirm such opinions.[544] Given, however, the high number of terrorist attacks and the difficulty of acquiring information, and not least verification, of the prosecution or other dispositions in such cases, any conclusion can only be speculative. In an examination relating to the customary status of the principle of *aut dedere aut judicare,* Bassiouni and Wise reached the following conclusion:

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[539] *Ibid.* at p. 37.
[540] See the Hague Convention Article 13 and the Montreal Convention Article 12.
[541] B. Cheng, 'International Legal Instruments to Safeguard International Air Transport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997) 25
[542] A. Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (2002) 8.
[543] A. M. Dershowitz, *Why Terrorism Works*, (2002) 40
[544] Cf. Generally D. Gero, *Flights of Terror: Aerial Hijack and Sabotage since 1930,* (1997).

"If the question is whether State practice supports the assertion that the principle *aut dedere aut judicare* has become a customary norm, the answer may well be no. Contemporary practice furnishes "far from consistent evidence" of the "actual existence" of a general obligation to extradite or prosecute with respect to international offences."[545]

A similar conclusion was reached in relation to hostage taking by Lord Lloyd of Berwick in the *Pinochet case*, where he stated that "[n]otwithstanding the wide terms of the Torture Convention and the Taking of Hostages Convention, State practice does not at present support an obligation to extradite or prosecute in all cases."[546]

Evans suggested in 1980 that extradition was not the most popular way of establishing rendition in cases of terrorism:

"Extradition may be the established method of rendition, but it is by no means a convenient method or, indeed, a popular method. In a recent study of 231 instances of rendition of persons charged with international terrorist offences, it was found that only 6 out of 87 extradition requests were granted; on the other hand, 145 terrorist were expelled by states."[547]

In relation to terrorism this finding is further sustained by the relatively late removal of the *political offence exception,* although, as explained above, this did not signify a willingness to surrender this traditional safeguard for the benefit of more effective criminal co-operation. Most of the above statements do not consider co-operation after the 11th of September 2001. The difficulty of obtaining information on extradition and other measures of mutual criminal assistance makes it difficult to make any definite conclusion although the above statements still seem to reflect current realities. Since the events of 11th September and July 2004, for instance, no one was extradited from the United Kingdom in relation to terrorist-related activities,[548] although as of January 2005, 13 persons were subject to extradition proceedings on charges connected to terrorist activities.[549] The above seriously questions the effectiveness of the counter-terrorism regime, a subject that will be examined below.

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[545] M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare*, (1995) 43.
[546] House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1998] UKHL 41
[547] A. E. Evans, 'International Procedures for the Apprehension and Rendition of Fugitive Offenders', *Am. Soc'y Int'l L. Proc* (1974) 276.
[548] HC Deb 6 July 2004 Vol. 663 cWA72.
[549] HC Deb 25 January 2005 Vol. 668 cWA149.

Effectiveness

Evaluating the effectiveness of counter-terrorism conventions is an extremely difficult task. There is neither a yardstick of measurement nor any common definition of "terrorism", which leaves the area open for political manipulation.[550] It is therefore difficult to say anything certain about the effectiveness of the counter-terrorism regime, especially given the above-mentioned lack of comprehensive statistics on extradition and prosecution. The lack of consistent practice regarding the treatment of so-called terrorists further raises questions about the political will and enforcement of international obligations.

The question of enforcement was discussed as early as 1970 when Canada and the United States expressed their concern over securing the enforcement of international obligations under the ICAO conventions.[551] The issue was made even more pressing by the Black September hijackings and a draft convention for taking multilateral action against States found in breach of their obligations was put forward by Canada and the United States.[552] The establishment of a special Air Security Enforcement Convention nevertheless failed because of the divergent political positions taken by different countries.[553] The significance of the subject is to some extent reflected in the fact that the then Secretary-General of the UN, U Thant, proposed the establishment of an international tribunal for the prosecution of hijackers.[554] The desire for a universal enforcement instrument was later expressed in 1978 when the leaders of the major industrialised countries[555] adopted the so-called "Bonn Declaration".[556] While it did not impose any legal obligation, it did express a clear intent on behalf of the signatories to take counter-measures against noncompliant States.[557] During

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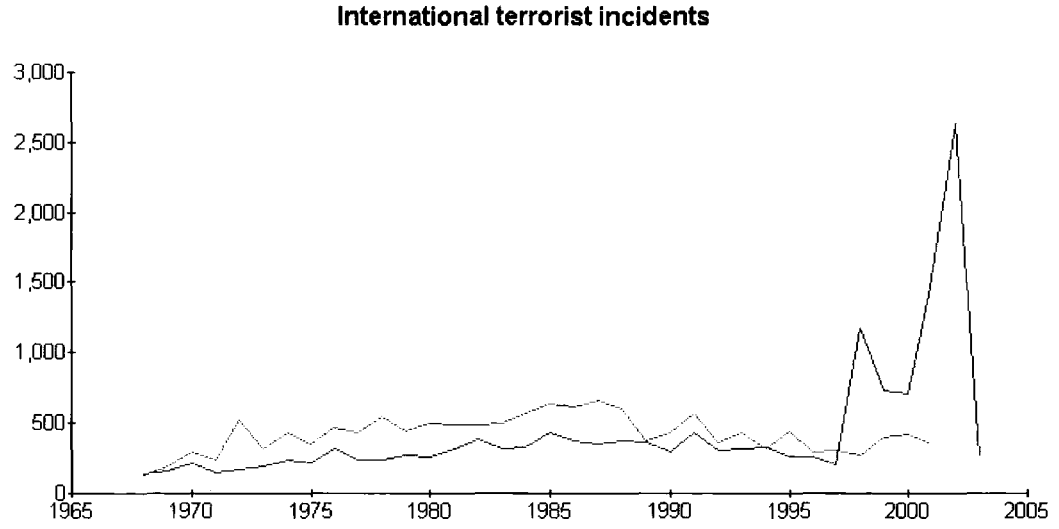
[550] A. B. Krueger and D. D. Laitin, *"Misunderstanding" Terrorism,* Foreign Affairs, September/October 2004.
[551] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation, International Conciliation', (1971) 76.
[552] *Ibid.*, at 76-77.
[553] See general, A. Abramovsky, *supra* note 222, at 451-484.
[554] G. F. Fitzgerald, 'Towards legal suppression of acts against civil aviation, International Conciliation', (1971) 47.76.
[555] Canada, France, West Germany, Italy, Japan, United Kingdom and the United States.
[556] *See* the Bonn Declaration of July 17, 1978, 17 International Legal Materials 1285 (1978). See also Subsequent at 20 International Legal Materials 956 (1981) or at 25 I.L.M. 1005 (1986).
[557] The declaration has been invoked against Afghanistan and was reportedly used against South Africa. Cf. generally, J. J. Busttil, 'The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking', 31 International and Comparative Law Quarterly (1982) 474-487.

negotiation of the Rome Statute, some States advocated a form of universal enforcement, by including violations against the counter-terrorism instruments within the jurisdiction of the International Criminal Court.[558] This suggestion was not widely accepted and was never adopted in the Rome Statute.[559]

Despite no comprehensive agreement having been reached on the definition of "terrorism", the counter-terrorism system has evolved significantly and with the conclusion of the 1997 Terrorist Bombing Convention; most forms of violence that might plausibly fall within a general conception of terrorism will fall within the several treaties thus far concluded. Nevertheless, Evans concluded in 1978, any decline in the incidence of hijacking in the United States since 1972 could largely be ascribed to the preventive measures taken and only to a lesser extent to the enforcement of anti-hijacking legislation.[560]

Without going into the complex matter of causation between international treaties and terrorist acts it might tentatively be suggested that there seems to be no correlation between the coming into force of universal counter-terrorism instruments and incidents of terrorist offences (see figure below).[561]



[558] See M. P. Scharf, Rome Diplomatic Conference for an International Criminal Court, American Society of International Law Insight 1998 available at <www.asil.org/insights/insigh20.htm>.
[559] *Ibid.*
[560] A. E. Evans, *supra* note 19, at 494.
[561] See RAND/MIPT data available at www.johnstonsarchive.net/terrorism/intlterror.html). Note on: early to line indicates U.S. DOS data, whereas the early bottom line indicates RAND/MIPT data.

This is a very difficult assessment to make because, as mentioned before, until recently the counter-terrorism instruments had far from universal adherence. The above figure is moreover misleading because States did not enter into obligations at the same time and one cannot therefore expect to see a sharp fall in terrorist incidents shortly after the adoption of one of the relevant instruments. It does, however, show that the frequency of terrorist attacks has been relatively constant since the late 1960s.

It is difficult to say whether it is the absence of specific obligation to combat terrorism or whether it was non-compliance with treaty obligation that resulted in the apparent lack of prosecution and extradition, although the comments of the authors cited above seem to suggest that latter. Nevertheless is seems reasonable to conclude that the existing counter-terrorism regime has been ineffective attaining its expressed aim of preventing and punishing international terrorism.

Conclusion

All the analysed instruments essentially concern activities that are considered a serious threat to the so-called international community. This is expressly stated in most of the preambles and is to some extent evident in the conduct that the conventions seek to have criminalised. All the counter-terrorism instruments further require an international element, which is not surprising since international criminal rules of co-operation (which are to be distinguish from rules on co-existence) generally only encompass activities that individual States are not capable of handling alone. The conduct so far criminalised moreover seems to imply some kind of threshold of seriousness. Nor is this is uncommon since it is the seriousness of the threat that explains why States feel that there is a need to resort to international co-operation instead of prosecuting offenders under existing domestic criminal systems.

It is not entirely clear whether the conventions imply a distinction between civilian and military targets, although this is arguably the case in regard to the Terrorism Bombing Convention, whose spatial application, according to S. M. Witten was specifically chosen with the aim of criminalising attacks against locations where

civilians were most at risk.[562] It is, however, certain that States have gone to great length to ensure that acts committed by their agents, especially military forces, would not be covered by the conventions. The treaties seek only to regulate the behaviour of non-State actors.[563] This is evident from the fact that many of them define the criminalised conduct by reference to the 'lawfulness' of the conduct, which in most circumstances rules out acts by governmental agents. In addition, neither of the ICAO instruments applies to aircraft used in "military, customs or police services" and all of the other instruments contain a so-called *military carve-out* which has the effect of excluding from the scope of application of the instruments the activities of armed forces.[564] A parallel might be drawn to what Michael Bothe calls "safe" and "unsafe" law enforcement mechanisms;[565] The hypothesis, which was further substantiated by Robert Cryer, is that States are more willing to take a wider view of definitions of international crimes when they themselves are not subject to their jurisdiction than when they are.[566] Although not directly applicable to the counter-terrorism regime, since it concerned international tribunals, it does give some insight into the reality that States are reluctant to confer adjudicative jurisdiction over their own nationals, especially State agents. Counter-terrorism conventions do offer prescriptive and adjudicative jurisdiction to other States but they jealously seek to retain jurisdiction over military forces and to a lesser extent State agents, thus sustaining Bothe's hypothesis on a broader and more general level.

Some might consider it wrong not to include acts of States within the notion of "terrorism", given the brutality employed by some States. From a more pragmatic perspective, however, the agreement reached so far in the existing counter-terrorism instruments reflects the conduct that States regard as unacceptable, irrespective of the perpetrator and the motive, given the lack of an international agreement on a comprehensive definition of international terrorism this represents, the furthest States have been willing and able to go.[567]

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[562] S. M. Witten, 'The International Convention for the Suppression of Terrorist Bombings', 92 American Journal of International Law (1998) 776.
[563] A similarly distinction is made in the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 1.
[564] A. Aust, *Handbook of International Law*, (2005) 292.
[565] M. Bothe, 'International Humanitarian Law and War Crimes Tribunals: Recent Developments and Perspectives', in K. Wellens (ed.), *International Law: Theory and Practice*, (1998) 581 and 593.
[566] R. Cryer, *Prosecuting International Crimes* (2005) 232 *et seq.*
[567] Cf. A. D. Sofaer, 'Terrorism and the Law', 64 Foreign Affairs (1985-1986) 903.

The concept of terrorism has been obfuscated by many complicating elements, among others, by the paradox that the very thing that distinguishes "terrorism" from crime – the motive – is not an element of the prescribed offence within suppression conventions. There is clearly no requirement that the violence prescribed by the counter-terrorism instruments be motivated by any specific political aim or ideology. In fact, most of the conventions specifically reject this. The purpose of the violence is therefore irrelevant. In this respect, it might be added that that the majority of States presumably already consider indiscriminate acts of violence, at least against civilians, as a crime deserving punishment regardless of motive. The Counter-terrorism regime does however clearly exhibit a form of "dual selectivity", which Timothy McGormack referred to in relation to international crimes.[568] This selectivity is found firstly in the acts the international community is prepared to criminalise and secondly in relation to the atrocities the international community is collectively prepared to prosecute.[569] Importantly, terrorism is neither criminalised in international law nor has any international tribunal jurisdiction over any such conduct falling short of crimes against humanity or war crimes. A parallel may nevertheless be drawn: firstly, because the lack of consensus on a comprehensive convention clearly shows selectivity in relation to the conduct States are prepared to criminalise; secondly, the above mentioned paradox of counter-terrorism – the motive – clearly testifies to selectivity on what conduct States are prepared to prosecute, especially when force is used with reference to self-determination.

The question this thesis has so far avoided is why? Keohane has stated that:

> "International co-operation does not necessarily depend on altruism, personal honor, common purposes, internalized norm, or a shared belief in a set of values embodied in a culture. At varies times and places any of these features of human motivation may indeed play an important role in processes of international cooperation; but cooperation can be understood without reference to any of them"[570]

This might be so. Motive may, however, provide a prudent reasons for co-operation and more importantly, with regard to counter-terrorism, for non-cooperation. Andrew Hurrel, for instance, quotes the pursuit of holy wars against infidels, barbarous

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[568] T. McGormack, 'Selective Reaction to Atrocites', 60 Albany Law Review(1996-1997) 683.
[569] See also R. Cryer, *Prosecuting International Crimes* (2005) 191 *et seq.*
[570] R. O. Keohane, International Institutions: Two Approaches', 32 International Studies Quarterly (1988) 380.

behaviour of imperialist powers in their treatment of indigenous people and the savagery of the fighting on the Eastern Front in the Second World War as striking examples of where absence of any shared sense of community has worked to undermine co-operative limitations on conflict based on reciprocity and self-interest.[571] It is easy to add to the list.

[571] A. Hurrell, 'International Society and Regimes, in *Regime Theory and International Relations*, V. Ritberger (ed.) (1995) 61.

Bibliography

Permanent Court of International Justice

- *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7.
- *Mavrommatis Palestine Concession case*, P.C.I.J. Series A, No. 2 1924.

International Court of Justice

- *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991.
- *Armed activities on the territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005
- *Case concerning Avena and other Mexican nationals*, Judgment of 31 March 2004.
- *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002.
- *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950.
- *LaGrand* case (Germany v. United States of America), Judgment of 27 June 2001.
- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, P.I.C.J. Reports 1971.
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.
- *North Sea Continental Shelf Cases*, I.C.J. Reports (1969).
- *Order of the International Court of Justice of 22 February 1996 case of Aerial incident of 3 July 1988* (Islamic Republic of Iran v. United States of America).
- *Qatar v. Bahrain* (Jurisdiction and Admissibility), I.C.J. Reports (1994)
- *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949)
- *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994.
- *U.S. Diplomatic and Consular Staff in the Tehran case* (Judgment), I.C.J. Reports 1980.
- *U.S. Diplomatic and Consular Staff in the Tehran case* (Provisional measures), I.C.J. Reports 1979.

European Court of Human Rights

- *Chahal v. the United Kingdom* (1996) 23 EHRR 413.
- *Doorson v. The Netherlands* (1996), (unreported)
- *Einhorn v. France*, Appl. No. 71555/01, Oct. 2001.
- *Fox, Campbell and Hartley v UK*, A 182 (1990) 13 EHRR 157.

- *Matthews v. The United Kingdom,* Judgment of 3 March 1999.
- *Neumeister v. Austria* (1968), 1 EHRR 91.
- *Selmuni v. France* (1999), 29 EHRR 403
- *Soering case v. The United Kingdom* (1989), 11 ehrr 439
- *Sunday Times v. The United Kingdom* (1979) 2 EHRR 245.
- *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997.
- *Wemhoff v. Germany* (1986), 1 EHRR 55.
- *Winterwerp v. Netherlands* (1979), 2 EHRR 387.

International Criminal Tribunal for the former Yugoslavia

- Decision on the defense motion for interlocutory appeal on jurisdiction, of ICTY, *Prosecutor v Milomir Stakic*, Judgment of Trial Chamber II (IT-97-24-T), 31 July 2003.
- *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999.

Domestic Court Decisions

Canada

- *Suresh v. Canada* (Minister of citizenship and education) para. 41 I.L.M. (2002) 954.

Germany

- *Rudolph Hess* (Case number 2 BVR4 19/80)

United Kingdom

- [2005] EWHC 1809 (Admin).
- [2004] UKHL 27.
- [2002] EWCA Civ 1598.
- [2004] UKHL 56.
- *R v Abdul-Hussain* [1999] Crim LR 570.
- *R v Safi* [2003] EWCA Crim 1809.
- *R v Zardad,* Central Criminal Court (old Bailey), (Judgment and Ruling pursuant to a preparatory hearing held under s.29 of the Criminal Procedure and Investigation Act 1996), Decision of 7 April 2004 and in relation to the Hostages Convention decision of the London Central Criminal Court (old Bailey) in R v Zardad (Ruling on the Taking of Hostages Act 1982), Decision of 5 October 2004.

- *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).
- *Iwanowa v. Ford Motor* Co., 67 F. Supp. 2d 424 (D.N.J. 1999).
- *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
- *Miller v. California*, 413 U.S. 15, 24-25 (1973).
- *R. v. Martin* [1956] 2 QB 272 or USA v. Cordova U.S. District Court E.D. New York, 1950. 89 F.Supp. 298.
- *United States of America v. Yunis* (No 3), ILR Vol. 88, 176.
- United States v. Chen De Yian, 905 F. Supp. 160 (S.D.N.Y. 1995).
- *United States v. Lin*, 101 F.3d 760 (D.C. Cir. 1996).
- *United States v. Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997).
- *United States v. Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999).
- *United States v. Wang Kun Lue*, 134 F. 3d 79 (2d Cir. 1997).

United Nations Human Rights Committee

- Concluding Observations of the Human Rights Committee, Estonia, U.N. Doc. CCPR/CO/77/EST (2003).
- Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/CO/78/ISR (2003).
- Concluding Observations of the Human Rights Committee, New Zealand, U.N. Doc. CCPR/CO/75/NZL (2002).
- Concluding Observations of the Human Rights Committee, Republic of Moldova, U.N. Doc. CCPR/CO/75/MDA (2002).
- Concluding Observations of the Human Rights Committee, Uganda, U.N. Doc. CCPR/CO/80/UGA (2004).
- Concluding Observations of the Human Rights Committee, Yemen, U.N. Doc. CCPR/CO/75/YEM (2002).
- *Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991.

Books

- A. Aust, Handbook of International Law, (Cambridge University Press, Cambridge: 2005).
- A. Cassese, *International Law 2nd ed*, (Oxford University Press, Oxford: 2005).
- A. Cassese, *Terrorism, Politics and Law*, (Polity Press, Cambridge: 1989).
- A. D'Amato, *The Concept of Custom in International Law*, (Cornell University Press, New York: 1971)
- A. Dershowitz, *Why Terrorism Works*, (Yale University Press, New Haven and London: 2002).
- B. Simma (ed.) *The Charter of the United Nations: A Commentry*, (Oxford University Press, Oxford: 2002).
- C. Gearty, *Terror* (London/Boston, Faber & Faber: 1991)
- C. Gray, *International law and the Use of Force*, (Oxford University Press: 2000)
- C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* , (Martinus Nijhoff Publishers, Geneve/The Haag: 1984)
- C. Towsend, *'Terrorism – A very short introduction'* (Oxford University Press: 2002).
- C. Van den Wijngaert, *The Political Offence Exception to Extradition*, (Kluwer, Deventer the Netherlands: 1980).
- D. Gero, *Flights of Terror: Aerial Hijack and Sabotage since 1930*, (Haynes Publications Inc., California: 1997).
- D. Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (Butterwoths, London: 1995) 104.
- A. E. Evans and J. F. Murphy, *Legal aspects of International Terrorism,* (D.C. Heath and Company Lexington/Massachusetts/Toronto: 1978).
- G. Gilbert, Transnational Fugitive Offenders in International Law, (1998) 14.
- G. S. Goodwin-Gill, *The refugee in international law* (2nd ed.) (Oxford University Press, Oxford: 1998).
- H-H. Jescheck, *Lehrbuch des Strafrecht – Allgemeiner Teil (5.ed.)*, (Duncker & Humblot, Berlin: 1996).
- I. Bantekas & Susan Nash, *International Criminal Law* (Cavendish Publishing, London: 2003).
- I. Cameron, *The Protective Principle of international criminal jurisdiction*, (Aldershot, Darmouth: 1994).
- J. Fijnaunt, Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against Terrorism – A Transatlantic Dialogue*, (Martinus Nijhoff Publishers, Leiden – Boston: 2004).
- J. Pauwelyn, *Conflict of Norms in Public International Law: How Wto Law Relates to Other Rules of International law*, (Cambridge University Press: 2003).
- L. C. Green, *The Contemporary Law of Armed Conflict*, (Manchester University Press, Manchester: 2000).

- L. M. Bloomfield and G. F. FitzGeral, Crimes Against Internationally Protected Persons: Prevention and Punishment – An Analysis of the UN Convention, (Praeger Publishers, New York, Washington, London: 1975).
- M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare*, (Martinus Nijhoff Publishers, London: 1995) 43
- M.C. Bassiouni, International Extradition and World Public Order (Sijthoff-Leyden Oceana Publishers, New York: 1974)
- M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press, Cambridge: 1989).
- M. Krausa and A. A. Reznev, *Vapour and Trace Detection of Explosives for Anti-Terrorism Purposes: Proceedings of the NATO Advanced Research Workshop, held in Moscow, Russia, 19-2, Moscow, Russia, 19-20 March 2003.* (Kluwer Academics Publishers, Dordrecht: 2004)
- N. D. Joyner, *Aerial Hijacking as an International Crimes*, (Oceana Publications Inc., New York/Leiden: 1974) 1
- N. Machiavelli, *The Prince*, (Penguin Books, London: 1985)
- N. Ronzitti (ed.), *Maritime Terrorism and International Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/London: 1990) 69-90.
- O. Spiermann, *Moderne Folkeret*, (Jurist- og Økonomforbundets Forlag, Copenhagen : 2004).
- P. Capps, M. Evans and S. Konstadinidis (eds.) *Asserting Jurisdiction*, (Hart Publishing, Oxford: 2003).
- P. Lambert, *Terrorism and Hostages in International Law – a Commentry on the Hostages Convention 1979*, (Groutius Publications Limited, Cambridge: 1990).
- P. Malanczuk, *Akehurst Modern Introduction to International Law 7th ed*, (Routledge, New York: 1997)
- R. Cryer, *Prosecuting International Crimes,* (Cambridge University Press: 2005).
- R. Higgins, *Problem and Process* , (Oxford University Press: 1994).
- R. Higgins/M. Flory (ed.), *International law and Terrorism*, (Routledge, London: 1997).
- R. Yepes-Enriquez and L. Tabassi (eds.) *Treaty Enforcement and International Cooperation in Criminal Matters - with Special Reference to the Chemical Weapons Convention* (Cambridge University Press, Cambridge 2002).
- T. Kaptain, in J. P (ed.) *Terrorism and International Justice*, (Oxford University Press: 2003).
- V. Lowe and C. Warbrick (eds.) *The United Nations and the Principles of International Law*, (Routledge, New York: 1994)
- V. Ritberger (ed.), *Regime Theory and International Relations,* (Oxford University Press, Oxford: 1995).
- W. C. Gilmore, *Dirty Money 3rd ed.*, (Council Of Europe Publishing, Strasbourg: 2004).
- Y. Alexander (ed), International Terrorism, (Praeger, New York: 1976).

Articles

- A. Abramovsky, 'Mulitlateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part 1: The Hague Convention', Columbia Journal of Transnational Law 13 (1974) 381-406.
- A. Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention', Columbia Journal of Transnational Law 14 (1975) 268-300.
- A. Abramovsky, Multilateral Conventions for the Suppression of Unlawfull Seizure and Interference with Aircraft – Part III: The Legality and Political Feasibility of a Multilateral Air Security Convention, Columbia Journal of Transnational Law, 14 (1975) 451-484.
- A. Aust, 'Counter-Terrorism – A New Approach, Max Planck Yearbook of International Law 5 (2001) 285-306.
- A. Aust, 'Lockerbie: The Other Case', 49 International and Comparative Law Quarterly (2000) 278-296.
- A. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 European Journal of International Law (1999) 23-31.
- A. Cassese, 'When May Senior Officials Be tried for International Crimes? Some Comments on the Congo v. Belgium Case', European Journal of International Law (2002) 853-877.
- A. Costello, International terrorism and the development of the principle of *Aut Dedere Aut Judicare*, Journal of International Law & Economics 10 (1975) 483-502
- A. D. Sofaer, 'Terrorism and the Law', 64 Foreign Affairs (1985-1986) 901-922.
- A. Ward, 'Building capacity to combat international terrorism: The role of the United Nations Security Council', Journal of Conflict & Security 8, (2003) 289-305.
- B. Cheng, 'International Legal Instruments to Safeguard International Airtransport - The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security', The Hague, International Institute of Air and Space Law (1997).
- B. Green, 'Notes – Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis', Virginia Journal of International Law, 14 (1973-1974) 703-728.
- B. Krueger and D. D. Laitin, '"Misunderstanding" Terrorism', Forreign Affairs September/October 2004.
- C. Bassiouni, 'Ideologically motivated offences and the political offence exception in extradition – a proposed juridical standard for an unruly problem', De Paul Law Review (169).
- C. Bassiouni, 'International Procedures for the Apprehension and Rendition of Fugitive Offenders: Remarks', 74 Proceedings of the American Society of International law (1980) 274-288.

- C. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law, 15 Case Western Reserve Journal of International Law (1983) 27-37.
- C. Greenwood, International Law and the 'war against terrorism', International Affairs, 78 (2002) 301-318.
- C. Greenwood, The Concept of War in Modern International Law, International and Comparative Law Quarterly, 36 (1987) 283-306.
- C. Harding, Statist assumptions, normative individualism and new form of personality: evolving a philosophy of international law for the twenty first century, 1 (2001) Non-State Actors and International Law 107-125.
- C.M. Johnson, 'Introductory Note to the International Convention for the Suppression of the Financing of Terrorism', 39 International Legal Materials 2 (2000) 268-270.
- E. Evans, 'Aircraft Hijacking: What is being done', Amerian Journal of International Law 67 (1973) 641-671.
- E. Evans, 'International Procedures for the Apprehension and Rendition of Fugitive Offenders', [1980] American Society of International Law Proceedings, (74th Annual Meeting).
- E. Malmborg , 'Strategies for World Order: Panel: New Developments in the Law of International Aviation: The Control of Aerial Hijacking: Remarks'65 American Society of International Law Proceedings (1971) 71-80.
- E. Rosand, Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight against Terrorism, 97 American Journal of International Law (2003) 333-341.
- F. Fitzgerald, 'Offences and certain other Acts committed on Board Aircraft: The Tokyo Convention of 1963', Canadian Yearbook of International Law (1964) 191-204.
- F. Fitzgerald, Towards legal suppression of acts against civil aviation, 585 International Conciliation (1971) 42-82.
- G. Guillaume, 'Terrorism and International Law', 53 International and Comparative Law Quarterly (2004) 537-549.
- G. Guillaume, 'Terrorism et Driot International', 215 Hague Rec. 287 (1989-III) 371.
- H. Hu and others, 'Tear gas - harassing agent or toxic chemical weapon?', The Journal of the American Medical Association 265 (1989) 5, 660-663.
- I. Bantekas, 'The International Law of of Terrorist Financing', 97 American Journal of International Law (2003).
- J. Busttil, The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking, 31 (1982) 474-487.
- J. J. Paust, 'Human Rights Responsiability of Private Corporations', Vanderbilt Journal of Transnational Law. 38 (2002) 801-825.
- J. Lissitzyn, 'International Control of Aerial Hijacking: The Role of Values and Interests Strategies for World Order: Panel: New Developments in the Law of International Aviation: The Control of Aerial Hijacking', 65 American Society of International Law Proceedings (1971) 80-86.

- J. Hartmann, 'The Gillon Affair', 54 International and Comparative Law Quarterly (2005) 745-755.
- J. S. Szyliowicz, 'Aviation Security: Promise or Reality?', Studies in Conflict & Terrorism, 27 (2004).
- M. C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', International and Comparative Law Quarterly, 23 (1974) 791-817.
- M. Sossai, 'The Internal Conflict in Colombia and Fight against Terrorism', 3 Journal of International Criminal Justice (2005) 253-267.
- N. Boister, 'Transnational Criminal Law'?, 14 European Journal of International Law (2003) 953-976.
- N. Boister, Human Rights Protection in the Suppresion Conventions, 2 Human Rights Law Review (2002) 199-227.
- N. Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11th', 35 Cornell International Law Journal (2002), 475-490.
- P. S. Dempsey, 'Aviation Security: The Role of Law in the War Against Terrorism', Columbia Journal of Transnational Law (2003).
- R. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964), 3053-55.
- R. Currie, 'Human Rights and International Mutual Legal Assitance: Resolving the Tension', 11 Criminal Law Forum 2 (2002).
- R. Ginger, 'Violance in the Skies: The right Rights and Liabilites of Air Carriers when Dealing with Disruptive Passengers', (1998) Air and Space Law, Vol XXIII Number 3.
- R. I. R. Abeyratne, 'Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offence of Unlawful Interference with Civil Aviation', Transport law Journal (1998) 118-119.
- R. O. Heohane, International Institutions: Two Approaches', 32 International Studies Quarterly (1988) 379-396.
- R. P. Boyle and P. Roy, 'The Tokyo Convention on offences and Certain other Acts Committed on Board Aircrafts', Journal of Air law and Commerce, 30 (1964).
- R. P. Boylet and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', The Journal of Air Law and Commerce (1964).
- S. Shubber, 'Aircraft Hijacking under the Hague Convention 1970 - A New Regime?', ICLQ (1973) 687-726.
- S. Shubber, 'Is hijacking of aircrafts piracy in international law', British Yearbook of International Law 22 (1968-69), 193-205.
- S. Shubber, 'The International Convention Against the Taking of Hostages', 52 British Yearbook of International Law (1981).
- T. McGormack, 'Selective Reaction to Atrocites', 60 Albany Law Review(1996-1997) 681-732.

- W. Baxter, 'A Sceptical Look at the Concept of Terrorism', Arkon Law Review 7 (19973/74).

Reports

- Aust, *Implementation Kits for the International Counter-Terrorism Conventions*, (Commonwealth Secretariat: 2002), available at www.thecommonwealth.org
- ILC Preliminary report on the obligation to extradite or prosecute ("aut dedere aut judicare"), 7 June 2006, UN Doc. A/CN.4/571.
- ILC Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506.
- REDRESS, *Terrorism, Counter-Terrorism and Torture: International Law in the Fight against Terrorism*, July 2004 available at www.redress.org.
- Report of the International Law Commission on the work of its twenty-fourth session, 2 May to 7 July 1972 (A/8710/Rev.1,)
- Report of the Secretary-General, Measures to eliminate international terrorism, UN Doc. A/51/116, 2 July 2003.
- Report of the SG pursuant to paragraph 2 of SC resolution 808 (1993), UN Doc. S/25704.
- Report on Terrorism and Human Rights, OEA/ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, "Recommendations", No. 10 (a).
- Special Report: Financing Terrorism, The Economist, October 22nd-28th 2005.
- Specific Human Rights Issues: New Priorities, in Particular Terrorism, UN Doc. E/CN.4/Sub.2/2003/WP.1.

Miscellaneous

- Documents of the Legal Committee, Fourteenth Session, I.C.A.O. Doc. 8302, LC/150-2 at 71 (1963).
- European Law Enforcement – Why the EU is Unconstitutional, Der Spiegel, 14 March 2005.
- IMO Resolution A.924 (2001).
- M. P. Scharf, Rome Diplomatic Conference for an International Criminal Court, ASIL Insight 1998 available at http://www.asil.org/insights/insigh20.htm.
- Speech of Prime Minister Tony Blair on the threat of global terrorism, 5 March 2005, available at <http://news.bbc.co.uk/1/hi/uk_politics/3536131.stm>.
- The Bonn Declaration of July 17, 1978, 17 I.L.M. 1285 (1978).
- IMTFE Judgment (English Translation) Chapter II, The Law, pp.25-26. available at www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-2.html
- HC Deb 6 July 2004 Vol. 663 cWA72.
- HC Deb 25 January 2005 Vol. 668 cWA149.
- J. Keegan, 'Saddam deserves the fate of the Nazis', Daily Telegraph 20 October 2005.