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The Exercise of Criminal Jurisdiction over International Terrorists

ROBERT KOLB

I. THE PROBLEM OF DEFINING INTERNATIONAL TERRORISM

IT IS NOT possible to talk about the suppression of a criminal act by the exercise of criminal jurisdiction if the act in question is not properly defined. The problem is rendered even more acute in modern criminal systems predicated on the liberal principle of *nullum crimen sine lege*.¹ The question of a proper definition is particularly delicate in the context of international terrorism. It is not only political divisions on essential points (such as the question of State terrorism, the issue of the means used by movements of national liberation or by secessionist movements, whether the motives of terrorists should be taken into account or only their acts, the question of who is an "innocent" target, etc)², which have proved to be insurmountable obstacles up to the present. It is also the

¹This principle was developed at the time of enlightenment as a protection against arbitrary acts and extraordinary penalties (*poenae extraordinariae*). The formula was coined by JPA von Feuerbach (*Lehrbuch des peinlichen Rechts* (1801), 20). On Feuerbach, see J Bohnert, *P.J.A. Feuerbach und der Bestimmtheitsgrundsatz im Strafrecht* (Minutes of the meeting of the Heidelberg academy of the sciences, philosophical — historical class, Heidelberg, 1982). See Cicero, *In Verrem*, lib II, cap XXXXII; T Hobbes, *De Cive*, cap XIII and *Leviathan*, cap XXVIII; S Pufendorf, *De iure naturae et gentium*, lib VIII, cap III, par VII. See also the foreshadowing of the principle as a maxim of interpretation in *Dig.* 50, 16, 131 (Ulpianus); and *Dig.* 50, 16, 244 (Paulus), both in the title "de verborum significatione". On these historical sources, see HL Schreiber, *Gesetz und Richter — Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege* (Frankfurt, 1976).

²On these questions there is very ample literature. See eg R Mushkat, "Technical Impediments on the Way to A Universal Definition of International Terrorism", (1980) 20 *Indian Journal of International Law*, 20, 448 ff; J Dugard, "International Terrorism: Problems of Definition", (1974) 50 *International Affairs*, 75 ff. For a more recent assessment, see J Dugard, "Terrorism and International Law: Consensus at Last?", *Essays in Honour of M Bedjaoui* (The Hague v Law International, 1999), 159 ff. The differences of opinion persist up to the present work of the United Nations bodies. See the Summary of the exchanges of views in the *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, GAOR, 56th Session, Suppl no 37 (A/56/37), Fifth Session (12–23 February 2001), Annex V,

intrinsic difficulty of grasping the constitutive elements of a crime which is over-loaded with different connotations and of finding any general element, common to its multifaceted expressions.³ It would seem, at first sight, that "terrorism" is the catch-word for a number of crimes somewhat haphazardly thrown together under this heading.⁴ One may add to this the multiplicity of functional definitions valid only in a specific context. "Terrorism" for the purpose of seizing financial assets of doubtful groups may not necessarily correspond to "terrorism" when dealing with individual criminal prosecution.⁵ Add to this that there are numerous definitions of terrorism under the domestic laws of States, definitions which differ significantly from one to the other. Each of them reflects a specific focus, due to the particular socio-political history and concerns of the collectivity in question.⁶ Some other problems can still be added to those mentioned. For example, international terrorist offences possess only a limited autonomy with respect to those defined in the municipal law of the various States. As there is an interplay between both legal orders, if only for the fact that the enforcement of international law rests largely on municipal law and the organs of the State, conflicts and tensions between these legal orders may appear.⁷ Further, there is uncertainty as to the role assigned to elements of subjective qualification of the crime of terrorism, especially intent or motive.⁸ To this list of difficulties others could easily be added.

p. 11 ff. See also the *Report of the Working Group, Sixth Committee, Measures to Eliminate International Terrorism*, 29 October 2001, Doc. A/C.6/56/L.9, Annex IV, p. 33 ff. On the ambiguities within the United Nations in that field, see also JM Sorel, "Le système onusien et le terrorisme ou l'histoire d'une ambiguïté volontaire", (1996) 6 *L'observateur des Nations Unies*, 31 ff.

³See C Daase, "Terrorismus — Begriffe, Theorien und Gegenstrategien", (2001) 76 *Die Friedenswarte*, 59.

⁴See R Higgins, "The General International Law of Terrorism", in R Higgins and M Flory (eds), *Terrorism and International Law*, (London / New York, Routledge, 1997), 27.

⁵See T Stein, "International Measures Against Terrorism and Sanctions by and Against Third States", (1992) 30 *Archiv des Völkerrechts*, 40; JF Murphy, "Defining International Terrorism: A Way Out of the Quagmire", (1989) 19 *Israel Yearbook on Human Rights*, 32 ff.

⁶Some overview over that state of affairs is offered by the periodic reports prepared by the Secretary-General of the United Nations, eg *Report of 3 July 2001*, Doc. A/56/160, p. 3 ff., and the Addendum, A/56/160/Add. 1. At the level of Europe, see the Report of the Commission of the E.C., *Proposal for a Council Framework Decision on Combating Terrorism*, 19 September 2001, COM(2001)521, p. 6–7. A Resolution by the Organization of American States calls its members to provide similar information on their internal legislation to the Organization: *Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, Resolution of 26 April 1996, see <<http://www.oas.org/juridico>>.

⁷On such problems, see eg B Stern, "A propos de la compétence universelle", *Essays in Honor of M. Bedjaoui*, (The Hague / London / Boston, Kluwer Law International, 1999), 741–6. See also JA Carrillo Sacedo, "Les aspects juridiques du terrorisme international", *Centre d'étude et de recherche de droit international et de relations internationales*, Hague Academy of International Law, *Les aspects juridiques du terrorisme international*, (1988 Session, The Hague / Boston / London, 1989), 20.

⁸See eg Murphy, above n 5, 22 ff; Mushkat, above n 2, 464 ff; TM Franck and BB Lockwood, "Preliminary Thoughts Towards an International Convention on Terrorism", (1974)

Faced with these obstacles due to a high level of conceptual uncertainty and a equally high level of political dissent, international practice has for a long time tried to avoid defining the general concept of terrorism. After an unsuccessful attempt in 1937, with an anti-terrorist Convention signed under the auspices of the League of Nations containing a general definition of terrorism,⁹ and a clear deadlock in the United Nations after the events at the Olympic games of 1972,¹⁰ a new approach to the problem was adopted. The international community shied away from any attempt to tackle the problem of terrorism generally. Instead, it was considered more conducive to success to suppress specific acts of terrorism, on which some consensus could be achieved, often after tragic events. This so-called sectoral approach produced a long series of conventions, each one dealing with a specific form of terrorism. While the subject matter of these conventions thus varies, the provisions directed at criminal prosecution are largely similar. We are thus confronted with a network of treaties,

68 *American Journal of International Law*, 78–80; K Skubiszewski, "Definition of Terrorism", (1989) 19 *Israel Yearbook on Human Rights*, 50–1. The modern tendencies are to exclude motive from the definition of terrorism through a clause termed "regardless of motive": see for example the Resolution of the Sixth Committee of the United Nations (19 November 2001), A/C.6/56/L.22, para 2: "Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them". It will be noted that there is a distinction between the general political or ideological purposes of the action (as distinguished from purely personal or private ends) and the specific motives, the concrete political, religious or other causes, which are irrelevant.

⁹On the Convention of 1937, see A Sottile, "Le terrorisme international", (1938-III) 65 *Recueil des Cours de l'Académie de Droit International*, 116 ff. P Wurth, *La répression internationale du terrorisme*, thèse, (Lausanne, 1941) 48 ff and 91 ff; H Mosler, "Die Konferenz zur internationalen Bekämpfung des Terrorismus", (1938) 8 *ZaöRV*, 99 ff; H Donnedieu de Vabres, "La répression internationale du terrorisme: Les Conventions de Genève (16 novembre 1937)", (1938) 19 *Revue de droit international et de législation comparée*, 37 ff; V Pella, "Les Conventions de Genève pour la prévention et la répression du terrorisme et pour la création de la Cour pénale internationale", (1938) 18 *Revue de droit pénal et de criminologie et archives internationales de médecine légale*, 402 ff; AF Panzera, *Attività terroristiche e diritto internazionale* (Naples, 1978), 22 ff; T Herzog, *Terrorismus — Versuch einer Definition und Analyse internationaler Uebereinkommen zu seiner Bekämpfung* (Frankfurt/Main, 1991), 170 ff; E Chadwick, *Self-Determination, terrorism and the International Humanitarian Law of Armed Conflict* (The Hague / Boston / London, Kluwer, 1996), 97 ff. On the drafting of the Convention: G von Gretschaninow, "Der Plan eines internationalen Abkommens betreffend die Bekämpfung politischer Verbrechen und die Errichtung eines internationalen Strafgerichtshofes", (1945) 5 *ZaöRV*, 181 ff. For the official documents: League of Nations, *Actes de la Conférence internationale pour la répression du terrorisme*, Doc. C.94. M. 47 1935 V.

¹⁰See SM Finger, "International Terrorism and the United Nations", in Y Alexander (ed), *International Terrorism—National, Regional and Global Perspectives* (New York, Simon & Schuster, 1976), 323 ff. L Migliorini, "International Terrorism in the United Nations Debates", (1976) 2 *Italian Yearbook of International Law*, 102 ff. JF Murphy, "United Nations Proposals on the Control and Repression of Terrorism", in MC Bassiouni (ed), *International Terrorism and Political Crimes* (Springfield, Thomas, 1975), 493 ff; Panzera, above n 9, 112 ff; R Lagoni, "Die Vereinten Nationen und der internationale Terrorismus", (1977) 32 *Europa Archiv*, 171 ff.

which could easily be unified by listing the several acts they prohibit and by adding the common jurisdictional provisions aimed at criminal repression. These treaties are mainly the following:¹¹ the three Conventions on the Safety of Civil Aviation of Tokyo (14 September 1963, Convention on Offences and Certain Other Acts Committed on Board Aircraft), The Hague (16 December 1970, Convention for the Suppression of Unlawful Seizure of Aircraft) and Montreal (23 September 1971, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, with its supplementing Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation signed at Montreal on 24 February 1988);¹² the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted via General Assembly Resolution 3166 (XXVIII) on 14 December 1973;¹³ the *New York* Convention against

¹¹ See the list of treaties presented at: <<http://www.untreaty.un.org/English/terrorism.asp>>; see also the list in the report by the Secretary General of the United Nations, *Measures to Eliminate International Terrorism*, A/56/160, 3 July 2001, 18 ff or C Bassiouni, "International Terrorism", in C Bassiouni (ed), *International Criminal Law*, vol I, 2nd edn (New York, Transnational, 1999), 767 ff. For a list of these Conventions with a brief comment on each, see B Boutros-Ghali, "The United Nations and Comprehensive Legal Measures for Combating International Terrorism", *Essays in Honor of E Suy* (The Hague / Boston / London, Martinus Nijhoff, 1998), 290 ff.

¹² On these Conventions, see JM Breton, "Piraterie aérienne et droit international public", (1971) 75 *Revue Générale de Droit International Public*, 392 ff; G Guillaume, "La Convention de La Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéronefs", (1970) 16 *Annuaire Français de Droit International*, 35 ff; RH Mankiewicz, "La Convention de Montréal (1971) pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile", (1971) 17 *Annuaire Français de Droit International*, 855 ff; K Hailbronner, *Luftpiraterie in rechtlicher Sicht* (Hannover, 1972); C Emmanuelli, "Etude des moyens de prévention et de sanction en cas d'action illicite contre l'aviation civile internationale", (1973) 77 *Revue Générale de Droit International Public*, 577 ff; E McWhinney, "Illegal Diversion of Aircraft and International Law", (1973-I) 138 *Recueil des Cours de l'Académie de Droit International*, 261 ff. E McWhinney, *Aerial Piracy and International Terrorism*, 2nd edn (Dordrecht, Kluwer, 1987). WD Joyner, *Aerial Hijacking as an International Crime* (Oceana, New York, 1974); *Proceedings of the Conference held in the Hague, Aviation Security*, Leyden, 1987; B Cheng, "Aviation, Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports", *Essays in Honor of G Schwarzenberger* (London, 1988), 25 ff. Y Alexander and E Socher (eds), *Aerial Piracy and Aviation Security* (Dordrecht, Martinus Nijhoff, 1990); G Guillaume, "Terrorisme et droit international", (1989-III) 215 *Recueil des Cours de l'Académie de Droit International*, 311 ff; Panzera, above n 9, 45 ff; Herzog, above n 9, 201 ff. See also the *Ekanayake* case (1986), Sri Lanka Court of Appeals, 87 *ILR*, 296 ff. and the *Yunis* (no 2) case (1988), US District Court, 82 *ILR*, 344 ff, 347-49, confirmed by the Court of Appeals (88 *ILR*, 176 ff).

¹³ On this Convention, see LM Blomfield and GF Fitzgerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment. An Analysis of the UN Convention* (New York, Praeger, 1975); M Wood, "The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents", (1974) 23 *International and Comparative Law Quarterly*, 791 ff; F Przetacznik, "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons", (1974) 52 *Revue de droit international, de sciences diplomatiques et politiques*, 208 ff; AF Panzera, "La Convenzione sulla prevenzione e la repressione dei reati contro persone che godono di protezione internazionale", (1975) 58 *Rivista di diritto internazionale*, 80 ff; Panzera,

the taking of Hostages (17 December 1979),¹⁴ the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation with its attending Protocol on the Safety of Fixed Platforms Located on the Continental Shelf, both concluded on 10 March 1988;¹⁵ and the International Convention for the Suppression of Terrorist Bombings adopted via General Assembly Resolution on 25 November 1997.¹⁶ One may also mention the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 26 October 1979,¹⁷ and the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations General Assembly on the 9 December 1999.¹⁸ Apart from the very first of these treaties, the Tokyo Convention, all the other

above n 9, 77–87; Herzog, above n 9, 319–42; Finger, above n 10, 337 ff; JJ Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge, Cambridge University Press, 1990); AC McWillson, *Hostage-Taking Terrorism: Incident-Response Strategy* (Basingstoke, St Martin's Press, 1992).

¹⁴On this Convention, see R Rosenstock, "The International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism", (1980) 10 *Denver Journal of International Law and Policy*, 169 ff; S Rosenne, "The International Convention Against the Taking of Hostages", (1980) 10 *Israel Yearbook of International Law*, 109 ff; HG Kausch, "Das internationale Uebereinkommen gegen Geiselnahme", (1980) 28 *Vereinte Nationen*, 77 ff; KW Platz, "Internationale Konvention gegen Geiselnahme", (1980) 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 276 ff; S Shubber, "The International Convention Against the Taking of Hostages", (1981) 52 *British Yearbook of International Law*, 205 ff; Herzog, above n 9, 343–74. See also the *Von Dardel v USSR* case, US District Court (1985), 77 ILR, 274.

¹⁵See A Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair* (Cambridge, Cambridge University Press, 1989); D Momtaz, "La Convention sur la répression d'actes illicites contre la sécurité de la navigation maritime", (1988) 34 *Annuaire Français de Droit International*, 589 ff; G Plant, "The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation", (1990) 39 *International and Comparative Law Quarterly*, 27 ff; C Joyner, "The 1988 IMO Convention on the Safety of Marine Navigation: Towards a Legal Remedy for Terrorism at Sea", (1988) 31 *German Yearbook of International Law*, 230 ff; F Francioni, "Maritime Terrorism and International Law: The Rome Convention of 1988", (1988) 31 *German Yearbook of International Law*, 263 ff; M Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", (1988) 82 *American Journal of International Law*, 269 ff; N Ronzitti (ed), *Maritime Terrorism and International Law* (Dordrecht, Kluwer, 1990); M Munchau, *Terrorismus auf See aus völkerrechtlicher Sicht*, (Frankfurt, 1994); Herzog, above n 9, 290–309.

¹⁶Annex to Resolution A/52/653, 7 ff. See (1998) 37 *ILM*, 249 ff. SM Witten, "The International Convention for the Suppression of Terrorist Bombings", (1998) 92 *American Journal of International Law*, 774 ff; SA Williams, "The Terrorist Bombings Convention: Another Step Forward in the Fight against International Terror Violence", in Canadian Council on International Law (ed), *From Territorial Sovereignty to Human Security* (The Hague, Kluwer, 2000), 96 ff.

¹⁷For its text, see (1979) 18 *ILM*, 1419 ff. On this Convention, see International Atomic Energy Agency (ed), *Convention on the Physical Protection of Nuclear Material* (New York, 1982).

¹⁸For its text, see (2000) 39 *ILM*, 268 ff. On this Convention, see R Laval, "The International Convention for the Suppression of the Financing of Terrorism", (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 491 ff. A Aust, "Counter-Terrorism, a New Approach: The International Convention for the Suppression of the Financing of Terrorism", (2001) 5 *Max Planck Yearbook on United Nations Law*, 285 ff.

texts contain a clause according to which the State on whose territory the alleged offender is found is obliged in any case whatsoever and without delay to extradite him or to submit him to the competent authorities for prosecution (*aut dedere aut prosequi*, or *aut dedere aut judicare* clause). Currently, for the first time since the deadlock of 1973, the United Nations envisages a general convention on terrorism.¹⁹ These efforts follow the particularly appalling events of 11 September 2001, which have given a new impetus to the search for an international consensus on terrorism.

These efforts have been paralleled by similar action at the regional level, where stronger cultural and political ties seem to allow less burdensome action. The Organization of American States opened the path with the adoption of the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington DC, 1971).²⁰ The European Convention on the Suppression of Terrorism (Strasbourg, 1977)²¹ followed which focuses on facilitating extradition by limiting the availability of the political-offence exception. However, this aim was imperfectly realised, due to some exceptions to the stated principle and the possibility to enter reservations, a possibility used by some States. The partial closing, at least, of such loopholes was soon considered necessary. Consequently, the European Community drafted the Dublin Convention of 1980.²² Its official title is: Agreement Concerning the Application of the

¹⁹ See Resolution of the 6th Committee of the GA, A/C.6/56/L.22, 19 November 2001, para 16. See also the *Report of the Working Group*, above n 2.

²⁰ For the text of the Convention: (1971) 10 *ILM*, 255 ff. On this Convention, see RS Brach, "The Inter-American Convention on the Kidnapping of Diplomats", (1971) 10 *Colombia Journal of Transnational Law*, 392 ff; P Juillard, "Les enlèvements de diplomates", (1971) 17 *Annuaire Français de Droit International*, 223 ff; F Przetacznik, "Convention on the Special Protection of Officials of Foreign States and International Organizations", (1973) 9 *Revue belge de droit international*, 455 ff; PP Camargo, "La protección interamericana de funcionarios diplomáticos y consulares contra el terrorismo", (1973/4) 26/7 *REDI*, 111 ff. Panzera, above n 9, 74–77; Herzog, above n 9, 310–328.

²¹ See the text of the Convention in (1976) 15 *ILM*, 1272 ff. On the European Convention, see C Vallee, "La Convention européenne pour la répression du terrorisme", (1976) 22 *Annuaire Français de Droit International*, 756 ff; L Migliorino, "Iniziativa europea nella lotta al terrorismo: la Convenzione del 27 gennaio 1977", (1977) 13 *Rivista di diritto internazionale privato e processuale*, 469 ff; T Stein, "Die Europäische Konvention zur Bekämpfung des Terrorismus", (1977) 37 *ZaöRV*, 668 ff; G Fraysse-Druesne, "La Convention européenne pour la répression du terrorisme", (1978) 82 *Revue Générale de Droit International Public*, 969 ff; F Mosconi, "La Convenzione europea per la repressione del terrorismo", (1979) 62 *RDI*, 303 ff; AV Lowe and JR Young, "Suppressing Terrorism under the European Convention: A British Perspective", (1978) 25 *Netherlands International Law Review*, 305 ff; I Lacoste, *Die Europäische Terrorismuskonvention* (Zurich, 1982); HJ Bartsch, "Das europäische Übereinkommen zur Bekämpfung des Terrorismus", (1977) 30 *Neue Juristische Woche*, 1985 ff; R Linke, "Das europäische Übereinkommen zur Bekämpfung des Terrorismus vom 27 Jänner 1977", (1977) 32 *Oesterreichische Juristenzeitung*, 232 ff; Panzera, above n 9, 129–136; Herzog, above n 9, 375–431.

²² Its text can be found in (1980) 19 *ILM*, 325 ff. See eg G Gilbert, "The Law and Transnational Terrorism", (1995) 26 *Netherlands Yearbook of International Law*, 19 ff.

European Convention on the Suppression of Terrorism among the Member States of the European Community. Its purpose, amongst others, is to limit the opposability of reservations to the European Convention as among member States of the Community. Next was the Convention on the Suppression of Terrorism of the South Asian Association for Regional Cooperation (Kathmandu, 1986).²³ This treaty focuses on extradition and contains a *aut dedere aut prosequi* clause.²⁴ On 22 April 1998, the Arab League opened to signature the Arab Convention on the Suppression of Terrorism (Cairo, 1998).²⁵ Three more conventions may be mentioned: First, the Convention of the Organization of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1999).²⁶ It contains a sweeping definition of terrorism (Article 1(2)) and concentrates on cooperation to fight terrorism and on extradition; it does not contain an *aut dedere* clause. Second, the Convention of the Organization of African Unity on the Prevention and the Combating of Terrorism (Algiers, 1999).²⁷ In contrast to the previous agreement, this convention contains an *aut dedere aut prosequi* clause.²⁸ Third, the Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (Minsk, 1999).²⁹

Most of these sectoral or regional conventions are concerned only with specific types of terrorist acts and do thus not contain any general definition of terrorism. Their subject matter is defined according to the principle of speciality. However, an adding up of those several definitions leads to a body of law covering a considerable segment of terrorist activities. It may be advantageous for any comprehensive definition of terrorism to operate a *renvoi* (referral) to those texts, while adding a second limb with a more general definition of terrorism, designed to complement those special expressions. In the chain of these sectoral conventions, the first text to express a general definition of terrorism was the Convention for the Suppression of the Financing of Terrorism (1999).³⁰ We should, however,

²³ See the text with a short introductory commentary in H Levie (ed), *Terrorism — Documents of International and Local Control*, vol. 10, (New York, Oceana Publications, 1996), 313 ff. The text is also printed in (1987) 27 *Indian Journal of International Law*, 308 ff.

²⁴ The *aut dedere* clause is in Article 4.

²⁵ See its text at: <<http://www.web.amnesty.org/ai.nsf/recent/IOR510012002?OpenDocument>>.

²⁶ See its text at: <<http://www.oic-un.org/26icfm/c.html>>; on the role of the Islamic conference in combating terrorism, see E Alehabib, "The role of Islamic Conference in Combating Terrorism", (1999/2000) 11 *The Iranian Journal of International Affairs*, 524 ff.

²⁷ See H Boukrif, "Quelques commentaires et observations sur la Convention de l'Organisation de l'Unité Africaine sur la prévention et la lutte contre le terrorisme", (2001) 11 *African Journal of International and Comparative Law*, 753 ff.

²⁸ See Art 6(4). Text of the Convention in Boukrif, *ibid*, 765 ff.

²⁹ It has been deposited with the Secretariat of the Community of Independent States.

³⁰ See Art 2 ((2000) 39 *ILM*, 271). Art 2 first makes a *renvoi* to the treaties mentioned in its annex (the previous sectoral conventions), and then adds in letter (b): "[A terrorist offence for the purposes of this Convention is] any other act intended to cause death or serious bodily

not conclude too hastily that such a definition, contained in a sectoral convention, really embodies an all-purposive definition of terrorist acts. In fact, such definitions are always expressly limited to the specific convention at stake ("for the purposes of this convention..."). They are more functional than general. Thus, in a convention on combating doubtful financial streams, a field where terrorist groups merge into other organised criminality, one may well expect a broad definition of the activities covered. Only then can proper investigations be guaranteed, there being moreover no reason to limit such investigations by a narrow scope of the activities encompassed. The question will present itself under another angle if a convention deals with individual criminal prosecution. Here the principle of the *nullum crimen* poses more stringent conditions and generally the focus is different.

This being said, it is still possible to analyze the various definitions of terrorism which have been envisaged during the 20th century and after 11 September 2001. From a bird's perspective, it can immediately be said that the crime of terrorism has proven too multifaceted and composite to be expressed in a simple definition. Given the extraordinary variety of the acts under scrutiny, it was deemed preferable to indicate the typical elements, which define the range and provide the measuring tool for the phenomenon to be considered. Consequently, all the attempts at definition more or less split up the phenomenon into several elements whose variable, indeed spectral, interaction is thought to flexibly bundle up the diverse forms of expression of political violence. In that sense, all definitions of terrorism are "elementary" definitions: they combine different elements, either cumulatively or alternatively. In particular, some aspects can be envisioned as central, while others are peripheral, their absence not being fatal to the qualification of certain acts as terrorist.³¹

A. Single Element Definitions

There are only a few definitions which focus on a single element. These definitions are concerned with the specific means used by the offenders in order to achieve their political ends. Thus, for example, some authors and some official texts equate terrorist acts with criminal violence using

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".

³¹For such an approach, see in particular C Greenwood, "Terrorism and Humanitarian Law — The debate Over Additional Protocol I", (1989) 19 *Israel Yearbook on Human Rights*, 189.

"indiscriminate means".³² Other texts add to this element the further alternative of the use of "heinous means" ("*moyens odieux*").³³ For the reasons already pointed out, it does not seem that such one-tier definitions are able to adequately deal with the complex phenomenon of terrorist violence. Non-discrimination may well be a distinctive sign of some terrorist actions, but it by no means exhausts the phenomenon. Consider, for example, the killing of carefully selected persons of symbolic value. Furthermore, not all indiscriminate violence must necessarily be terrorist. Apart from the question of State terrorism (eg indiscriminate bombings), there is also the aspect of individuals using random violence for non-political ends. It may then well be doubtful if such a crime must be termed terrorist, or if there is much to be gained by such a qualification. The classical example is the threat or use of indiscriminate means in order to extort money from a targeted company or group; or the use of a bomb killing many people randomly if the ultimate aim is to kill a specific person in order to gain the proceeds of his life-insurance.

Another form of one-tier definition is to define a series of acts of violence which amount to terrorism if the foreign ministry (in the United States the Secretary of State) designates the organisation from which they emanate as a terrorist group. This is the basis of Sections 1182(a)(3) and 1189(a)(1) of the Antiterrorism and Effective Death Penalty Act (1996) in the United States of America.³⁴ This simplified definition rests on a political

³² See eg *T v Secretary of State for the Home Department*, England, Court of Appeal, (1994) 104 ILR, 656 ff, 663, 665: "the use of indiscriminate violence which would or might lead to the deaths of innocent people". See also the SAARC Convention (above n 23), Art 1(e): which defines a terrorist act as the commission of certain acts plus indiscriminate means: "Murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property".

³³ See eg, the Centre d'étude et de recherche de droit international et de relations internationales, Hague Academy of International Law, *Les aspects juridiques du terrorisme international*, 1988 Session (The Hague, Kluwer, 1989), 16: "Les actes terroristes au sens des présents principes sont, entre autres, les agressions ou les menaces contre la vie ou l'intégrité affectant aveuglément des personnes, ou utilisant des méthodes odieuses condamnées par la communauté internationale...".

³⁴ See 8 USC § 1182(a)(3)(B)(ii): "Terrorist activity is defined as any activity which is: unlawful... where it is committed..., and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel or vehicle). (II) The seizing or detaining, and threatening to kill, injure or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or to abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person...or upon the liberty of such a person. (IV) An assassination. (V) the use of any — (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing". For an application of this section, see the *People's Mojahedin*

qualification process with all its selectivity and unilateralism.³⁵ It hardly recommends itself for international relations where there is no comparable authority and where any broad consensus as to the groups to be put in that category is lacking. For this reason the Security Council of the United Nations is equally unsuited to perform any function of this type.

B. Two Element Definitions

There are other definitions which rely essentially on two elements, however combined. Some sources stress the elements of terror (intimidation)/purpose,³⁶ or the elements terror (intimidation)/coercion,³⁷ or specified acts of violence/political purpose,³⁸ or such acts of violence/

Organization of Iran v US Department of State (1999), US Court of Appeals, Columbia, (1999) 38 ILM, 1287 ff.

³⁵Section 1189(a)(1) of the quoted act empowers the Secretary of State to designate a foreign terrorist organization if he finds three things: (1) the organization is a foreign organization; (2) the organization engages in terrorist activity as defined by the applicable provisions; and (3) the terrorist activity of the organization threatens the security of the United States nationals or the national security of the United States.

³⁶See for example M Williams and SJ Chatterjee, "Suggesting Remedies for International Terrorism, Use of Available International Means", (1976) 5 *International Relations*, 1071: "... terrorism may be defined as an act directed to create fear, panic and/or alarm by means of violence or the threat thereof with a view or not to achieving certain purposes, political or otherwise". See also Sottile, above n 9, 96: "... acte criminel perpétre par la terreur, la violence, par une grande intimidation en vue d'atteindre un certain but". See also *Resolution on Measures to Eliminate International Terrorism*, UNGA, Sixth Committee, A/C.6/56/L.22, 19 November 2001, para 2: "... criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes ...".

³⁷See G Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge, Cambridge University Press, 1982), 16: "... the use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and / or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to the political demands of the perpetrators". See also the proposal of the Ivory Coast at the United Nations Ad Hoc Committee Established by GA Resolution 51/210 of 17 December 1996, *Report of the Fifth Session (12-23 February 2001)*, GAOR, 56th Session, Suppl no 37 (A/56/37), Annex III, p. 6: "Terrorism means any act or omission, whoever the author or authors, that is intended to inflict terror, that is, fear, panic or serious and profound anguish, upon one or more natural or legal persons, with a view to coercing such person or persons, in particular the government authorities of a State or an international organization, to take or to refrain from taking some action".

³⁸See ILA, *Report of the Sixty-First Conference*, Paris Session, 1984, p. 314: "... acts of international terrorism include but are not limited to atrocities, wanton killing, hostage taking, hijacking, extortion, or torture committed or threatened to be committed whether in peacetime or in wartime for political purposes ...". At the level of municipal law, see the Immigration Amendment Act of New Zealand, 1978: "(a) any act that involves the taking of human life, or threatening to take human life, or the wilful or reckless endangering of human life, carried out for the purpose of furthering an ideological aim" ((1989) 19 *Israel Yearbook on Human Rights*, 23); the United Kingdom Prevention of Terrorism (Temporary Provisions) Act, 1984: "... the use of violence for political ends, [including] any use of

coercion;³⁹ or such acts of violence/terror (intimidation);⁴⁰ or such acts of violence/creation of a common danger;⁴¹ or the creation of a common

violence for the purpose of putting the public or any section of the public in fear" (*ibid.*, 23–4); US Executive Branch definition during the 1980s: "... premeditated use of violence against noncombatant targets for political purposes..." (*ibid.*, 26; R Oakley, "International Terrorism", (1987) 65 *Foreign Affairs*, 611); United Kingdom Terrorist Act of 20 July 2000, s 1, where terrorism is defined according to the following parameters: use or threat of action including serious violence against a person or damage to property or risk to the health or safety of the public or a section of the public, for the purpose of advancing a political, religious or ideological cause (by intimidating the public or the government).

³⁹ See the US Foreign Intelligence Surveillance Act (FISA) of 1978, s 101(c), 50 USC §1801(c): "International terrorism means activities that — (1) involve violent acts or acts that are dangerous to human life... (2) appear to be intended — (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping ...".

⁴⁰ See eg Articles 1(2) and 2 of the League of Nations Convention against Terrorism of 1937 (above n 9): "... criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, a group of persons or the general public" (Art 2). Art 2 enumerates the *acta re*, eg "any wilful act causing death or grievous bodily harm or loss of liberty" to some specified persons. Art 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999): "Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening harm to them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States". Art 16 of the ILC's *Draft Code on Crimes against the Peace and Security of Mankind*: "... acts against another State directed at persons or property and of such nature as to create a state of terror in the minds of public figures, groups of persons or the general public" (Doc A/45/10, 1990). See also the *Draft Single Convention on the Legal Control of International Terrorism*, International Law Association, 59th Conference, Belgrade, 1980, p 497: "... any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons which is directed against internationally protected persons, organizations, places, transportation or communication systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communication systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States". At the level of municipal law, see eg the French Criminal Code, Art 421(1): "... actes... intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur". At the level of judicial practice, Lord Mustill and Lord Slynn of Hadley endorsed the definition contained in the 1937 League of Nations Convention: see the *T. v Immigration and Secretary of State for the Home Department* case (1996), House of Lords, 107 *ILR*, 575, 576. In doctrine, see eg G Gilbert, "The Law and Transnational Terrorism", (1995) 26 *Netherlands Yearbook of International Law*, 8: "... includes violent crimes committed with the intention of intimidating some government or group within a State".

⁴¹ See eg the *Third Conference for the Unification of Penal Law* held under the auspices of the International Association of Penal Law at Brussels in 1930. Committee V of that Conference defined the act of terrorism as "the deliberate use of means capable of producing a common danger" to commit "an act imperiling life, physical integrity or human health or threatening to destroy substantial property". At the Paris Session of 1931, the following definition was proposed: "Quiconque aura, en vue de terroriser la population, fait usage, contre les personnes ou

danger/indiscrimination of the acts at stake;⁴² or finally acts of violence /purpose of provoking international tension (or destabilizing the internal situation of a State).⁴³ As can be seen in the descriptions given, these elements may merge into one another.

C. Three Tier Definitions

In order better to capture the phenomenon of terrorism, a series of three-tier definitions was proposed. Especially in recent times, such descriptions combining three elements gain more and more ground. Such definitions put forward the elements of acts of violence/terror (intimidation)/political purpose;⁴⁴ or, in a slight variation, acts of violence/terror

les biens, de bombes, mines, machines ou produits explosifs ou incendiaires, armes à feu ou autres engins meurtriers ou destructeurs, ou aura provoqué ou tenté de provoquer, propagé ou tenté de propager une épidémie, une épizootie ou une autre calamité, interrompu ou tenté d'interrompre un service public ou d'utilité publique, sera puni ...". (cf. *Actes de la Conférence internationale pour l'unification du droit pénal*, Paris, 1938, p 49). See VS Mani, "International Terrorism: Is A Definition Possible?", (1978) 18 *Indian Journal of International Law*, 207. See also Sottile, above n 9, 113–15; Wurth, above n 9, 27 ff; I Lacoste, *Die Europäische Terrorismus-Konvention* (Zurich, 1982), 14–16; JF Prevost, "Les aspects nouveaux du terrorisme international", (1973) 19 *Annuaire Français de Droit International*, 580–81; G Guillaume and G Levasseur, *Terrorisme international* (Paris, 1977), 82–83. See also *Official Documents of the United Nations, Study by the Secretariat of the United Nations*, Doc A/C.6/418, 2 November 1972, p 10 ff.

⁴²See the definition proposed by the ILA's Committee on *Legal Problems of Extradition to Terrorist Offences* (Warsaw Session, 1988), draft Art 1: "... acts which create a collective danger to the life, physical integrity or liberty of persons and affect persons foreign to the motives behind them" (ILA, *Report of the 63rd Conference*, p. 1035).

⁴³See the legislation of Belarus, *Report of the Secretary-General ...* (above n 6), 4, para 18, Art 126 of the Criminal Code of Belarus, defines international terrorism as: "organizing the carrying out of explosions, arson or other acts in the territory of a foreign State with a view to causing loss of life or physical injury, destroying or damaging buildings, installations, means of transport, means of communication or other property for the purpose of provoking international tension or hostilities or destabilizing the internal situation in a foreign State, or murdering or causing physical injury to a political or public figure of a foreign State or damaging property belonging to such persons for the same purpose ...".

⁴⁴See eg the *Report of the Secretary-General, Measures to Eliminate International Terrorism, Addendum*, 12 October 2001, A/56/160/Add.1, p 6, para 48, Poland: "... the use of or threat to use violence for political purposes; a method of fighting or reaching specific goals based on intimidation of a society and government by causing human casualties and loss of property, characterized by ruthlessness and violation of moral and legal norms". In legal writings, see Chadwick, above n 9, 2–3: "Terrorist offence includes, but is not limited to, acts of violence or deprivations of freedom which are directed against persons or their property for a political purpose (...). [T]hese acts are intended in the main to spread fear or terror, in order to coerce a change in policy. Thus the instigators of terrorist violence can be an individual, a group, or a government". See also G Guillaume, "Terrorisme et droit international", (1989–III) 215 *Recueil des Cours de l'Académie de Droit International*, 300, who quotes English legislation in the following terms: "Usage de la violence à des fins politiques, y compris tout usage de la violence dans le but de créer la peur dans le public ou une partie du public".

(intimidation)/a specific purpose;⁴⁵ or acts of violence/terror (intimidation)/attack on the political, economic or social order;⁴⁶ sometimes such acts are limited to attacks against civilians.⁴⁷ Finally, there is a combination of factors, which is constantly gaining ground, especially within the United Nations. This equation on terrorism reads as follows: acts of violence/terror (intimidation)/coercion.⁴⁸

⁴⁵In doctrine, see Guillaume, *ibid* 306: "Le terrorisme implique l'usage de la violence dans des conditions de nature à porter atteinte à la vie des personnes ou à leur intégrité physique dans le cadre d'une entreprise ayant pour but de provoquer la terreur en vue de parvenir à certaines fins". C Bassiouni, "International Terrorism", in C Bassiouni (ed), *International Criminal Law*, 2nd edn, vol I, (New York, Transnational, 1999), 777-78 adds to this only the ideological motives: "... an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves, or on behalf of the state".

⁴⁶These elements were already stressed at the beginning of the XXth century under the heading of anarchist violence: see *Conférence pour l'unification du droit pénal*, Madrid, 1933, Art 1 of the Draft Convention. "Celui qui, en vue de détruire toute organisation sociale aura employé un moyen quelconque de nature à terroriser la population, sera puni ..." (*Actes de la Conférence ...* (above n 41), 50). This type of definition has been used equally in more recent legislations of continental European States. They are not any more directed to the aim of destroying "any social order" but more concretely to the attacks upon the specific social and constitutional order of a State. See eg the Portuguese Criminal Code, Art 300, mentioning prejudice to national interests and the fact of altering or disturbing State's institutions ("*visem prejudicar a integridade ou a independência nacionalis, impedir, aqalterar ou subverter o funcionamento das instituições do Estado previstas na Constituição ...*"); Art 571 of the Spanish Criminal Code, alluding to the aim of subverting the constitutional order and altering seriously public peace ("*...cuya finalidad sea la de subvertir el orden constitucional o alterar gravemente la paz pública ...*"); or Articles 270bis, 280, 289bis of the Italian Criminal Code, speaking of subversion to the democratic order of the State ("*eversione dell'ordine democratico*"). On these pieces of legislation, see the Report of the Commission of the EC, *Proposal for a Council Framework Decision on Combating Terrorism*, 19 September 2001, COM(2001)521, 7. In its Report, the European Commission proposes the following definition of terrorism: "Terrorist offences can be defined as offences intentionally committed by an individual or a group against one or more countries, their institutions or people, with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country"; see also p 7, 17 (Art 3 of the Framework Decision).

⁴⁷See eg the definition given by the United States Congress: "... premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents" (quoted by M Reisman, "International Legal Responses to Terrorism", (1999) 22 *Houston Journal of International Law*, 9). See also the definition given in the Convention for the Suppression of the Financing of Terrorism (1999), above n 30.

⁴⁸See eg Art 24(2) of The ILC *Draft on a Code of Offences against the Peace and Security of Mankind*, Report on the Work of its 47th Session, 13th Report of D Thiam, Doc A/50/10, p 56-59, paras 105-11, p 58, above n 40: "The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way". See also the more recent *Report of the Working Group of the United Nations* (*supra*, above n 2), p. 16, informal Article 2: "[if a person] by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a

D. Multi-Dimensional Definitions

In a last group, we may assemble all efforts to describe the notion of terrorism flexibly, by enumerating a series of criteria, which may be relevant in order to catch a phenomenon not reducible to a linear definition. Thus, for Skubiszewski, the terrorist act is characterized by its effect (creation of a common danger; fear), its means (symbolic violence), its victims (indiscriminate number or singled-out prominent figures), and its authors (only individuals, never States *per se*).⁴⁹ Oppermann qualifies the crime according to its philosophy (the end justifies the means), its authors (marginal groups), its victims (common danger, indiscriminate violence), its motives (political, religious, social, or military), and its goals (in depth transformation of existing power attributions).⁵⁰ Herzog points to the following chain of elements: (1) the threat or carrying out of grievous acts of violence; (2) by individuals not acting on behalf of a State; (3) in the pursuit of political ends, widely defined; (4) with the intent of inducing a state of terror; (5) within the frame of a long-term strategy.⁵¹

State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities resulting or likely to result in major economic loss; when the purpose of the conduct, 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 elements of terror and coercion are presented in a disjunction ("or"). See also the definition advances by Panama, in *Report of the Secretary-General, Measures to Eliminate International Terrorism*, 3. July 2001, A/56/160, p. 8, § 64: "... committing, organizing, ordering, financing, encouraging, instigating or tolerating acts of violence directed against persons or their property, creating a state of terror (dread or fear) in the minds of leaders, a group of persons or the general public with a view to compelling them to concede certain advantages or act in a given way...". See also the proposal of South Africa concerning draft Art 2(1) quoted above which largely follows the definition proposed by the Working group: *Report of the Ad Hoc Committee* ... (above n 37), p. 7, no. 5 or Doc. A/AC.252/2001/WP.5. In legal literature, see eg J Paust, "Terrorism and the International Law of War", (1974) 64 *Military Law Review*, 3-4: "... the purposive use of violence or the threat of violence by the perpetrators against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target into behavior or attitudes through intense fear or anxiety in connection with a demanded (political) outcome".

⁴⁹K Skubiszewski, "Definition of Terrorism", (1989) 19 *Israel Yearbook on Human Rights*, 42-49.

⁵⁰T Oppermann, "Der Beitrag des internationalen Rechts zur Bekämpfung des internationalen Terrorismus", *Mélanges H.J Schlochauer* (Berlin / New York, 1981), 496-502.

⁵¹Herzog, above n 9, 106-7. See also Stein, above n 5, 40. For such a "complex" definition, see also A Schmid and AJ Jongman, *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (New Brunswick, Transaction Books, 1988), 28; Lacoste, above n 21, 10 ff, discussing: (1) the means (eg indiscriminate acts); (2) the effects (eg the production of fear); (3) the aims (eg exception for wars of national liberation?); (4) the motives (eg the furthering of social or political causes); and any combination of such elements.

E. Combining the Sectoral Approach with a Global Approach

The most recent tendencies combine the sectoral (or "piecemeal") approach with the global approach. The definition of terrorism is sought by identifying two limbs, one listing the acts covered by the several specific conventions, the other adding a general definition of terrorist acts by having more often than not recourse to the three elements of violent acts/terror/coercion. To the *leges speciales* of the conventions is thus added a *lex generalis* trying to devise the core elements of the terrorist offence beyond the specific subject matter. At the level of definition this merging of the two streams can easily be achieved. More intricate problems may arise when one is dealing with the respective field of application and potential conflicts between a new general convention on international terrorism and the old multiple conventions concluded since 1963.⁵² The two-limb approach just described can be found for example in the European Convention on the Suppression of Terrorism of 1977,⁵³ the Convention for the Suppression of the Financing of Terrorism (1999),⁵⁴ the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999),⁵⁵ and the Draft Comprehensive Convention on International Terrorism of the Working Group of the Sixth Committee of the UN General Assembly.⁵⁶ In view of the preceding discussion, it may be said that some progress has been made towards the definition of a "qualified" terrorist act beyond purely piecemeal descriptions. The point reached is all the more commendable if one takes into account the considerable political obstacles to agreement in such a field. It may well be that the events of 11 September⁵⁷ will serve to catalyze further progress, once the urgency of the matter is fully understood. However, for the moment one can only take note of the absence of a universally agreed definition of terrorist acts to be criminally prosecuted. The events concerning the

⁵² As to this aspect, see the debates at the United Nations: *Report of the Ad Hoc Committee ...* (above n 37), Annex V, para 16 ff.

⁵³ Art 1.

⁵⁴ Art 2. It reads as follows: "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" (see (2000) 39 *ILM*, 271).

⁵⁵ Articles 1(2) and 1(4).

⁵⁶ Informal Articles 2 and 2bis. See the *Report of the Working Group ...* (above n 2), p. 16.

⁵⁷ On these events see the measured and brief analysis of C Tomuschat, "Der 11 September 2001 und seine rechtlichen Konsequenzen", (2001) 28 *EuGRZ*, 535 ff.

International Criminal Court⁵⁸ show quite well the obstacles which are still to be overcome on the path of international jurisdiction. At the moment, the matter of arriving at a general definition of terrorism is in full flux, producing many ideas and moving towards a process to crystallize some core definition of a terrorist act in general. But no such definition is yet identifiable in positive law, a state of affairs which cannot be ignored or discussed away. This has considerable impact on the legal means for the prosecution of terrorist crimes available at the time being in international law. A further point deserves brief attention. It is often claimed that any definition of terrorism which contains the element of "terror" is tautological.⁵⁹ This is not exactly the case. The element at stake would be tautological only if it had no other meaning than terrorism itself, i.e. if it was indissolubly linked to terrorism. But this is not true. The element of "terror" can be replaced by any other word connoting the same idea, as for example fear, anguish, dread, intimidation, etc, adding to it eventually a qualification such as "extreme", "considerable", etc. That course was in fact chosen by the ILC when drafting the Code of Offences against the Peace and Security of Mankind.⁶⁰ If it is thus replaced, the tautology visibly disappears. There remains an element which may be quite open-ended, but this is another problem, if it is one at all.

F. International Element

International law only deals with terrorist acts which affect international relations. In other words, it is concerned in principle only with international terrorism while leaving local terrorist acts to the exclusive control of the territorial State. International terrorism is made up of terrorist acts (however defined) plus an international element.⁶¹ No further proof of any international element is needed in the context of some anti-terrorist conventions, especially those dealing with the safety of civil aviation.

⁵⁸ See *infra*, II. B.

⁵⁹ See already Sottile, above n 9, 95.

⁶⁰ See above n 48.

⁶¹ On that question, see Sottile, above n 9, 98–99; Murphy, above n 5, 16, 27, 32; Skubiszewski, above n 49, 49–50; Mushkat, above n 2, 467 ff; Lacoste, above n 21, 21 ff; Franck and Lockwood, above n 8, 78; Wurth, above n 9, 57 ff; Guillaume and Levasseur, above n 41, 66–67; Prevost, above n 41, 589; Oppermann, above n 50, 501–3; Gilbert, above n 40, 10; Bassiouni, above n 45, 778; E. David, "Le terrorisme en droit international", in *Colloque de l'Université libre de Bruxelles, Réflexions sur la définition et la répression du terrorisme* (Brussels, 1974), 127 ff. See also the Report of the Ad Hoc Committee ... (above n 37), Discussion Paper prepared by the Bureau as a Basis for Discussion in the Working Group of the Sixth Committee at the fifty-sixth Session of the General Assembly, A/56/37, p. 3, Art 3: "This Convention shall not apply where the offence is committed within a single State, the alleged offender is found in the territory of that State and no other State has a basis ... to exercise jurisdiction".

Their subject matter is *eo ipso* international and pertains to international law. It is therefore only for the acts not covered by these conventions (and possibly for States not parties to the conventions) that the question of the international character of the acts involved may arise. This may occur, for instance, when national law provides for prosecution or control of acts of "international terrorism" as does the US Foreign Intelligence Surveillance Act (FISA) of 1978.⁶² The question may also arise at the international level, in three contexts. First, in those conventions the subject matter of which is not *eo ipso* international, the question is regulated by a specific clause, defining the acts considered to be attacks on international interests.⁶³ Second, the question may arise in the case of prosecution of terrorist acts by a State outside the framework of a specific convention. If a State claims a form of universal jurisdiction over a terrorist act, be it in the form of customary universality or of *aut dedere aut judicare* derived by analogy from treaty law,⁶⁴ it may well be that such a jurisdiction can be exercised only if the acts at stake are to be considered acts of international terrorism, as opposed to purely internal terrorism.⁶⁵ Third, the question puts itself in any case to the legislator, since he has to decide which acts constitute a sufficient attack on international interests such as to warrant international control or jurisdiction.

Having thus determined the relevance of the international element we must now turn to its content. Roughly speaking, there is internationality if an act has international consequences in the sense that it affects the duties or rights of more than one State or foreign interests. Hence, there is an international terrorist act when, either: (1) the act or the acts take place in more than one State; (2) the act or the acts take place in a space where no State has exclusive national jurisdiction, eg on the high seas; (3) the perpetrator and victim are citizens of different States; (4) the act or acts affect citizens of more than one State; (5) the acts affect targets having an international status (independently from a specific anti-terrorist convention), eg personnel of international organisations, international communications, transport, postal or other, etc; (6) the effects of the terrorist act are

⁶²Sect. 101(c), 50 U.S.C. § 1801 (c): "(3) [activities that] occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum". See also Murphy, above n 5, 27.

⁶³See eg Art 3 of the Convention for the Suppression of the Financing of Terrorism (1999): "This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis ... to exercise jurisdiction ..." ((2000) 39 ILM, 272). See equally Art 3 of the Convention for the Suppression of Terrorist Bombings (1998), (1998) 37 ILM, 254.

⁶⁴On this question, see below, II.

⁶⁵Apart from the fact that in case of purely internal terrorism further problems may arise under the doctrines of double criminality (at the place of the offence and at the place of the forum) and of the political offence exception.

felt in a third State.⁶⁶ Conversely, the fact that a perpetrator flees in a third State after the act does not entail that the act itself transforms itself into an act of international terrorism. Rather, the extradition process may be set in motion, but this inter-State procedure concerns only the question of physical control of the culprit, not the quality of the act itself.⁶⁷

The elements internationalising a terrorist act just discussed are quite sweeping and pose many questions of delimitation. Thus, for example, the effects-doctrine permits a considerable extension of coverage,⁶⁸ since in the modern interdependent world some effects will easily be felt collaterally to a terrorist offence. There is no means to assign a limited and precise scope to such "effects" which are by their very nature vaguely defined. May one say that simply on account of its gravity an act becomes one of international concern, even if all the victims and other immediate connections of it are exclusively from and in one State?⁶⁹ Does its gravity alone make the act a sort of crime *erga omnes*, since it could be seen as attacking the fundamental values of the international community,⁷⁰ especially because the protection of human rights has become since 1945 increasingly one of the core elements of the international legal order?⁷¹ It could equally be said that such acts by very definition (or legal fiction) have "effects" felt in other States, to the extent that fundamental common interests are infringed. On the other hand, one could limit that statement to terrorist acts committed by indiscriminate means. If a bomb is placed in a public place, it may well be that by chance no foreign national is injured or killed. But the mere fact of the randomness of the attack created a danger that such foreign nationals could have been killed or injured.

⁶⁶One may also mention the recent efforts under the aegis of the United Nations to prepare a comprehensive convention against terrorism. In that context, some definition of terrorism of international concern was felt necessary. Art 3 of the Discussion Paper prepared by the Bureau as a Basis for Discussion in the Working Group of the Sixth Committee at the fifty-sixth Session of the General Assembly, A/56/37, *Report of the Ad Hoc Committee ...* (above n 37), 3, reads as follows: "The Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis ... to exercise jurisdiction [under this Convention] ...".

⁶⁷Compare Gilbert, above n 40, 10. As the present author, Skubiszewski, above n 8, 50. Art 3 of the Discussion Paper quoted in the above note seems to imply that the flight into a third State could trigger the application of norms relative to international terrorism, but as explained this position does not seem legally correct (see in Art 3 the limb "the alleged is found in the territory of that State").

⁶⁸See for instance the *United States v Noriega* case (1990), United States District Court for the Southern District of Florida, 99 ILR, 145 ff.

⁶⁹Compare Mushkat, above n 2, 468, *de lege lata*.

⁷⁰For such statements, see R Kolb, "Universal Criminal Jurisdiction in Matters of International Terrorism: Some reflections on Status and Trends in Contemporary International Law", (1997) 50 *Hellenic Review of International Law*, 70 ff.

⁷¹See eg the decided statement of C Tomaschat, "International Law: Ensuring the Survival of Mankind on the Eve of A New Century, General Course on Public International Law", (1999) 281 *Recueil des Cours de l'Académie de Droit International*, 220 ff.

That potential damage or that risk may be enough to create an international link, eg under the effects-doctrine (constructive effects or effect through risk). The recent events prompting an upsurge in combating international terrorism and an increase of international solidarity in that enterprise may well be taken as having expanded the circle of "internationality" of terrorist acts while narrowing the correspondent circle of purely domestic terrorism. But what gravity of the act is necessary in order to trigger internationalisation is a delicate question which cannot yet be answered with any degree of certainty.

Another question which may be asked is that concerning secessionist violence. To the extent that such violence is directed solely against the interests of the former unitary State, can it be said that these are acts of international terrorism? Quite apart from the highly controversial question of whether movements of national liberation should be covered by the definition of terrorism⁷² (and whether secessionist movements are entitled to such status), it seems that the answer will depend on the internationalisation of the conflict itself, mainly through recognition by foreign States. The applicable law would then be the law of internal (or, if there is foreign involvement, of international) armed conflicts.⁷³

Many other questions could be raised, but we stop here, since the essential elements giving rise to the internationalisation of the terrorist act are fairly clear. It may be simply recalled, in conclusion, that an effect of the growing inter-penetration of the modern world has been the increasing internationalisation of terrorist acts. Today, most terrorist

⁷²See above n 2.

⁷³See, among others, Chadwick, above n 9, 65 ff, 129 ff, 179 ff. As to the question of terrorism in armed conflicts there is ample literature. See eg K Hailbronner, "International Terrorism and the Laws of War", (1982) 25 *CYIL*, 169 ff; C Greenwood, "Terrorism and Humanitarian Law: The Debate Over Additional Protocol I", (1989) 19 *Israel Yearbook on Human Rights*, 187 ff; H-P Gasser, "Interdiction des actes de terrorisme dans le droit international humanitaire", (1986) 68 *Revue internationale de la Croix Rouge*, 207 ff; JJ Paust, "Terrorism and the International Law of War", (1974) 64 *Military Law Review*, 1 ff; AP Rubin, "Terrorism and the Laws of War", (1983) 13 *Denver Journal of International Law and Policy*, 219 ff; Guillaume, above n 44, 375 ff; JA Frowein, in Hague Academy of International Law, 1988, *Les aspects juridiques du terrorisme international* (The Hague/Boston/London, 1989), 75-8; J Paust in AE Evans and JF Murphy (eds), *Legal Aspects of International Terrorism* (Toronto, Lexington Books, 1978), 352-53; WT Mallison and SV Mallison, "The Control of State Terrorism Through the Application of the International Humanitarian Law of Armed Conflict", in MH Livingston, LB Kress and MG Wanek (eds), *International Terrorism in the Contemporary World* (London, Greenwood Press, 1978), 325 ff; M Sassoli, "International Humanitarian Law and Terrorism", in P Wilkinson and AM Stewart, *Contemporary Research on Terrorism* (Aberdeen, Aberdeen University Press, 1987), 466 ff; LC Green, "Terrorism and Armed Conflict", (1989) 19 *Israel Yearbook on Human Rights*, 131 ff; WA Solf, "International Terrorism in Armed Conflict", in HH Han (ed), *Terrorism and Political Violence* (New York, University Press of America, 1993), 317 ff; G Stuby, "Humanitarian International Law and International Terrorism", in H Köckler (ed), *Terrorism and National Liberation* (Frankfurt, 1988), 237 ff. For a critique, see Panzera, above n 9, 180-82. See also Chadwick, above n 9.

strategies are aimed at provoking international concern for their causes, thus wilfully attacking or affecting international interests.

II. THE EXERCISE OF CRIMINAL JURISDICTION OVER INTERNATIONAL TERRORISTS

A. Jurisdiction Exercised by States

Terrorist offences may be prosecuted before domestic courts or at the level of an international criminal tribunal. The latter situation is highly exceptional, since from the Nuremberg Trial up to the *ad hoc* tribunals created by the Security Council in the 1990s in order to deal with the crimes perpetrated in the former Yugoslavia and in Rwanda, there was no international criminal tribunal. In July 2002, the Statute of the International Criminal Court entered into force, and therefore there is now a permanent international court dealing with criminal prosecution at the international level. However, the great mass of crimes will continue to be prosecuted by national courts, since only the State possesses the infrastructure able to deal with the great number of cases arising in situations of armed conflict such as those in former Yugoslavia or in Rwanda. It is thus justified to consider first the jurisdictional bases States possess under international law in the context of the criminal prosecution of terrorist crimes, before reverting to the possibilities in this context of the International Criminal Court.

We will not go into the matter of prosecution of terrorist acts as defined by the numerous pieces of internal legislation of States. This is a matter of internal law only, to the extent that it does not correspond to terrorism as envisaged by international law norms. Conversely, to the extent internal law is necessary for or conflicting with international norms on the suppression of terrorism, either because it implements the latter, or because it claims national jurisdiction for acts of (international) terrorism beyond the provisions of the latter, or because it does not allow implementation of the latter, the problem touches on international law and must thus be addressed.

B. The National Suppression of Terrorist Acts under the Conventional Systems

1. *The Rules Contained in the Conventions*

The several anti-terrorist Conventions concluded on the global level after 1963 are all based on a similar jurisdictional system, with only slight

variations due to experience of shortcomings and emergent political consensus. These conventions provide a series of jurisdictional titles for all the States parties. These titles fall in two categories: (1) a series of specific titles, eg territoriality, personality, State of registration of an air carrier, etc., for which the State is either obliged or allowed to establish jurisdiction; (2) a general clause providing that in all cases where the offender is found in the territory of one State party, it shall in any case exercise jurisdiction if it does not extradite the offender to a more convenient forum (*aut dedere, aut iudicare* or more accurately, *aut dedere, aut prosequi*).⁷⁴ Articles 6 and 8 of the recent International Convention for the Suppression of Terrorist Bombings (1998) may serve as an illustration:⁷⁵

“Article 6.

1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
 - (a) The offence is committed in the territory of that State; or
 - (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
 - (c) The offence is committed by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence when:
 - (a) The offence is committed against a national of that State; or
 - (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
 - (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
 - (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act, or
 - (e) The offence is committed on board an aircraft which is operated by the Government of that State.

⁷⁴For a precise analysis of these conventional systems, see M Henzelin, *Le principe de l'universalité en droit pénal international*, (Geneva, Helbing & Lichtenhahn/Bruylant, 2000), 294 ff. These conventions suffer from a number of problems, such as: (1) the insufficiency of the numbers of ratification or accession for the conventions to fulfill their purpose to close down any safe havens; (2) the insufficient application of the treaties; (3) the existence of too many loopholes, eg with the political offence exception or with a too loose duty to search for and to arrest the suspects (on these points see below, § 15 and § 16). See eg A Cassese, “The International Community’s Legal response to Terrorism”, (1989) 38 *International and Comparative Law Quarterly*, 593–5.

⁷⁵See (1998) 37 *ILM*, 254–6.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article."

"Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. ..."

Under the heading of special jurisdictional titles are thus listed the principles of territoriality, registration, active personality; then passive personality, State security and some other minor bases. The whole scheme is supplemented by the residual clause of *aut dedere aut prosequi*. The special titles slightly vary in the different conventions, according to their subject matters. A convention on terrorist bombings, by its very subject matter, is likely to have a large jurisdictional reach. Conversely, a convention against acts of violence directed at certain defined persons has a narrower jurisdictional ambit. One must note, moreover, that all these conventions contain a clause whereby they do not purport to exclude any criminal jurisdiction exercised in accordance with national law.⁷⁶ Thus, to the extent that there are further jurisdictional titles provided for in the national criminal codes, and that these titles are not contrary to international law, a prosecution may be based on them quite independently of the specific provisions of the convention at stake. In legal terms, the titles provided for in the conventions are not exclusive, but complementary to those of national law. There is a difference to the extent that the convention obliges a State to exercise jurisdiction under some titles. Then jurisdiction becomes mandatory, whereas the jurisdiction based on municipal law is optional. The municipal titles correspond to those listed in Article 6(2) of the Convention on Terrorist Bombings, which are expressly termed as being optional ("may also establish jurisdiction"). One may add that the two-tier approach distinguishing at the level of the conventions between mandatory and optional titles is a new technique. In the older conventions, such as the Montreal Convention for the

⁷⁶See eg Art 6(5) of the Convention against Terrorist Bombings.

Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), there were only mandatory titles.⁷⁷

It does not seem warranted at this stage to discuss the specific titles of jurisdiction. Territoriality, personality, active and passive⁷⁸, State security or other special links are well-known principles of criminal jurisdiction which do not prompt any particular problems in the context of terrorism.⁷⁹ Conversely, the principle *aut dedere aut prosequi* requires more detailed discussion. It is a title specific to international crimes, which has been popularised precisely through the anti-terrorist conventions.

2. *Aut Dedere Aut Prosequi* = Conventional Universal Jurisdiction?

The first question to be raised as to the character of the *aut dedere* principle is whether we can envision it as a type of conventional universal jurisdiction. Universal jurisdiction⁸⁰ allows every State to exercise its

⁷⁷ See Art 5 of the Convention.

⁷⁸ This title has been traditionally somewhat controversial, in particular since the anglo-saxon legal orders did not endorse it. However, the criminal codes of many States contain that principle, allowing them to prosecute persons having committed crimes against their nationals abroad. See generally L Oppenheim in R Jennings and A Watts, *International Law*, 9th edn (London, 1992), 471–72. As for a State applying the principle, see Art 5(1) of the Swiss Criminal Code: “Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit contre un Suisse, pourvu que l'acte soit réprimé aussi dans l'Etat où il a été commis, si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger, ou s'il est extradé à la Confédération à raison de cette infraction”. For judicial practice on this principle in Switzerland, see eg Arrêts du Tribunal Fédéral (ATF), 108 *Recueil officiel*, part IV, 147 ff; ATF 119 IV, 117 ff; ATF 121 IV, 148 ff. For jurisprudence in general, see the cases quoted in Oppenheim, *ibid*.

⁷⁹ See generally Oppenheim, *ibid*, 456 ff, with numerous references.

⁸⁰ Universal jurisdiction thus touches closely on the categories of an international public order, of rights *erga omnes* and of *ius cogens* understood as a series of fundamental norms embodying the essential values of the contemporary international community. On the international public order, see H Mosler, “The International Society as a Legal Community, General Course of Public International Law”, (1974–IV) 140 *R.C.A.D.I.*, 33–36; H Mosler, “Der Gemeinschaftliche ordre public in den europäischen Staatengruppen”, (1968) 21 *Revista española de derecho internacional*, 523 ff; G Jaenicke, “International Public Order”, 7 *EPIL*, 314–18; G Jaenicke, “Zur Frage des internationalen ordre public”, (1967) 7 *Berichte der deutschen Gesellschaft für Völkerrecht*, Karlsruhe, 85–96; G Schwarzenberger, “The Problem of International Public Policy”, (1965) 18 *Current Legal Problems*, 191 ff (the author rejects the notion); H Rolin, “Vers un ordre public réellement international”, *Mélanges J. Basdevant* (Paris, 1960), 441 ff, 451 ff; W Levi, “The International Ordre Public”, (1994) 72 *Revue de droit international, de sciences diplomatiques et politiques*, 55 ff. On obligations *erga omnes*, see amongst others M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Oxford University Press, 1997); A De Hoogh, *Obligations Erga Omnes and International Crimes* (The Hague, Kluwer, 1996). See also the synthesis in R Kolb, *Théorie du ius cogens international* (Paris, 2001). Thus, under universal jurisdiction certain crimes are deemed to affect the interests of the international community as a whole in so serious a manner as to warrant an exception to the requirement of a specific link in order to be allowed to prosecute them. Crimes like piracy, the slave trade, war crimes and crimes against humanity constitute offences against the international public order (*delicta iuris gentium*). They infringe upon interests which are common to all members of a given society: this common interest and the seriousness of the crimes legitimize the right of any State that manages to apprehend an alleged culprit to prosecute them. (Note continues overleaf.)

criminal jurisdiction over a number of offences which constitute, in the main, international crimes of concern to the entire international community. This prosecution shall take place regardless of any specific link to the crime or the offender, provided the alleged author is in the custody of that State. Thus, universal jurisdiction is normally based on the idea of a *iudex deprehensionis*: the State who puts its hands on the criminal should be able to try him. This holds particularly true in the context of terrorist offences as defined by the conventions. The legal aim of this title is to ensure that for certain acts there be no safe havens and that the probability of prosecution is raised to a maximum. This in turn rests on the nature of the crimes, namely their particular gravity and the common concern they arouse.

Ordinary universal jurisdiction is rooted in customary international law. It is under that law that the principle evolved, when it began to be applied to pirates.⁸¹ Consequently, at its beginnings, universal jurisdiction was universal also as to its spatial scope of application, it being devised for crimes addressed by general custom, binding all States. On the other hand universal jurisdiction under customary law was only permissive: it allowed any State to start prosecution if it so wished, but it did not compel it to do so. Classical universal jurisdiction under customary

On universal jurisdiction, see M Henzelin, *Le principe de l'universalité en droit pénal international* (Basel/Brussels, 2000); KC Randall, "Universal Jurisdiction under International Law", (1988) 66 *Texas Law Review*, 785 ff; L Benavides, "The Universal Jurisdiction Principle: Nature and Scope", (2001) 1 *Anuario Mexicano de derecho internacional*, 19 ff (with many references); B Stern, "A propos de la compétence universelle...", *Essays in Honor of M. Bedjaoui* (The Hague, 1999), 735 ff; C Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", (2001) 42 *Virginia Journal of International Law*, 81 ff. See equally R Higgins, "General Course on Public International Law: International Law and the Avoidance, Containment and Resolution of Disputes", (1991-V) 230 *Recueil des Cours de l'Académie de Droit International*, 90-100; O Schachter, "International Law in Theory and Practice", (1982-V) 178 *Recueil des Cours de l'Académie de Droit International*, 262-65; M Akehurst, "Jurisdiction in International Law", (1972/3) 46 *British Yearbook of International Law*, 160-166; G Guillaume, "La compétence universelle, formes anciennes et nouvelles", *Essays in Honor of G Levasseur* (Paris, 1992), p 23 ff. D Oehler, *Internationales Strafrecht*, 2nd edn (Cologne, 1983), 519-45; DW Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", (1982) 53 *British Yearbook of International Law*, 11-14; FA Mann, "The Doctrine of Jurisdiction in International Law", vol 111, 1964-I, 95; L Oppenheim in RY Jennings and A Watts (eds), *International Law*, 9th edn (London, Longman, 1992), 469-70; BH Oxman, "Jurisdiction of States", (1984) 10 *EPIL*, 281; B Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", (1990) 1 *JEDI*, 67 ff; *Conseil de l'Europe, Comité européen pour les problèmes criminels, Compétence extraterritoriale en matière pénale* (Strasbourg, 1990), 15-16; The American Law Institute (ed), *The Foreign Relations Law of the United States, Restatement of the Law Third*, vol I (St Paul, 1987), 254-58, para 404; Harvard Draft, "Jurisdiction with Respect to Crime", (1935) 29 *American Journal of International Law*, Supp., 573-92. See also the detailed analysis by the Australian High Court in *Polyukhovich v Commonwealth of Australia and Another*, (1990) 91 *ILR*, 40 ff, 117 ff.

⁸¹ See Oppenheim, above n 78, 746. Henzelin, above n 80, 269 ff; Benavides, above n 80, 42 ff.

international law was thus both general *ratione personae* and optional *ratione materiae*.

Some authors limit the ambit of universal jurisdiction to the traditional customary principle.⁸² They would at maximum concede that a mandatory jurisdiction under customary law (eg for grave breaches to the Geneva Conventions of 1949) could also be covered. They refuse, however, to consider that a convention could create a true universal jurisdiction, and in particular, they do not consider that the principle *aut dedere aut prosequi* could be considered as a form of universal jurisdiction.⁸³ At most, some of them view the principle of *aut dedere* as a quasi-universal jurisdiction,⁸⁴ but keep it neatly distinct from it. Conversely, other authors hold that *aut dedere* is a conventional universal jurisdiction principle.⁸⁵

⁸² See eg Higgins, above n 80, 98; Benavides, above n 80, 32 ff, 40.

⁸³ Higgins, *ibid.*: "In so far as this provides for the jurisdiction of all parties to the Convention ... it is perhaps understandable that it is spoken of as universal jurisdiction. But it is still not really universal jurisdiction *stricto sensu*, because in any given case only a small number of contracting parties would be able to exercise jurisdiction...". See also MN Shaw, *International Law*, 3rd ed. (Cambridge, Cambridge University Press, 1991), 414.

⁸⁴ Oxman, above n 80, 281; Henzelin, above n 80, 302, 317 ("*système d'obligation répressive quasi-universelle*"); SA Williams, "International Law and Terrorism: Age-Old Problems, Different Targets", (1988) 26 *CYIL*, 91, for example, hold that this system bears a close resemblance to that of universal jurisdiction, without quite attaining it. See also A Cassese, "The International Community's Legal Response to Terrorism", (1989) 38 *International and Comparative Law Quarterly*, 593. A distinction is also introduced by Oehler, above n 80, 532-33, 497 ff.

⁸⁵ Guillaume, above n 44, 350 ff; Guillaume, above n 80, 33-34; D Freestone, "International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction", in R Higgins and M Flory (eds), *Terrorism and International Law* (Routledge, London, 1997), 50; G De La Pradelle, "La compétence universelle", in H Ascensio, E Decaux and A Pellet (eds), *Droit international pénal* (Paris, 2000), 908; LS Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (The Hague, 1992), 102; Stern, above n 80, 739; Bassiouni, above n 80, 82, 125 ff; Kolb, above n 70, 58 ff; Panzera, above n 9, 160; A Cassese, "The International Community's 'Legal' Response to Terrorism", (1989) 38 *International and Comparative Law Quarterly*, 593; Final Document of the Conference of Syracuse (1973), in MC Bassiouni (ed), *International Terrorism and Political Crimes* (Springfield, 1975), XIX; O Schachter, "General Course on Public International Law", (1982-V) 178 *Recueil des Cours de l'Académie de Droit International*, 262-63; B de Schutter, "Problems of Jurisdiction in the International Control and Repression of Terrorism", in Bassiouni (ed), above, 388; S Sucharitkul, "International Terrorism and the Problem of Jurisdiction", (1987) 14 *Syracuse Journal of International Law and Commerce*, 171; Y Dinstein, "Terrorism As An International Crime", (1989) 19 *Israel Yearbook on Human Rights*, 69-70; T Treves, *La giurisdizione nel diritto penale internazionale* (Padova, 1973), 287 ff; H Labayle, "Droit international et lutte contre le terrorisme", (1986) 32 *Annuaire Français de Droit International*, 117; H Labayle, "Sécurité dans les aéroports et progrès de la collaboration internationale contre le terrorisme", (1988) 35 *Annuaire Français de Droit International*, 719-21; Herzog, above n 9, 235-36; Oppenheim, above n 78, 470; G Dahm and J Delbrück and R Wolfrum, *Völkerrecht*, 2nd edn, t. 1/1 (Berlin, 1989), 321-22; A Verdross and B Simma, *Universelles Völkerrecht*, 3rd edn (Berlin, 1984), 779; Graefrath, above n 80, 87; Akehurst, above n 80, 161; Randall, above n 80, 819; *Conseil de l'Europe* ... (above n 80), 16; *Restatement Third of the Foreign Relations Law of the United States* (above n 80) 255-57. In its recent work on a *Draft Code of Crimes against the Peace and Security of Mankind*, the ILC clearly assimilated the rule *aut dedere aut iudicare* to universal jurisdiction: Art 4 of the Draft, see *Yb.ILC 1987-II*, part 1, 3-4; *Yb.ILC 1993-II*, part 2, 107; *Report of*

Thus, Guillaume writes that the conventions embodying the principle create a system of mandatory but subsidiary universal jurisdiction.⁸⁶ In contrast to the customary principle this jurisdiction must be exercised by the State; on the other hand, it is softened by the alternative of extraditing.

The core of the matter is, as often, a problem of definition. Nobody contests that there are differences between the *aut dedere* principle and the classical universal jurisdiction principle. The differences stressed are: (1) *aut dedere* is not universal but limited to the parties to the Convention;⁸⁷ (2) universal jurisdiction is a right, an entitlement, whereas *aut dedere* is a duty; (3) universal jurisdiction is a title to try, *aut dedere* is an alternative of either trying or extraditing; (4) universal jurisdiction applies only to a limited number of international crimes on account of their particular gravity, whereas *aut dedere* is contemplated in a number of conventions for a larger category of crimes.⁸⁸ All these differences may be acknowledged. They may justify putting the *aut dedere* principle in a separate category, as they can construe it as a special category of conventional universal jurisdiction, a sort of modified, albeit closely related principle (special universal jurisdiction). All depends on the essential criterion which is used to distinguish universal jurisdiction from other types of prosecution titles. If that criterion is seen in its generality *ratione personae*, ie that it applies to all States by virtue of a general custom (on account of the nature of the

*the ILC on the Work of its 46th Session, Official Records of the General Assembly of the United Nations, Suppl No 10 (A/49/10), p 78. (For a criticism of this equation, see Benavides, above n 80, 35). The decision of the Bavarian Supreme Court in the Antonin L c Federal Republic of Germany case (1979) 80 ILR, 679 establishes a linkage with domestic law (universal jurisdiction under Art 316(c) of the German Criminal Code implementing the Hague Convention of 1970 on hijacking of aircraft and its relation to the laws on asylum). On the equivalence between universal jurisdiction and the *aut dedere aut iudicare* rule, see, in the Aylor case (1994), the legal opinion of the *Commissaire du gouvernement français*, *Commission européenne des droits de l'homme*, 100 ILR, 670–1, or the *Yunis (no 2) case* (1988), United States District Court, 82 ILR, 348–49 [confirmed by the Court of Appeals, 88 ILR, 176 ff, 181]. See also the Statement of the Delegate of Sri Lanka, Mr Perera, at the Sixth Commission of the United Nations, 27th session, 2 December 1997, Doc. A/C.6/52/SR. 27, § 54, in the context of the recent international convention on terrorist bombings. See also the statement of Switzerland in the Report of the Secretary-General of the United Nations, Measures to Eliminate International Terrorism, 3 July 2001, Doc. A/56/160, p. 13, § 100.*

⁸⁶ See Guillaume, above n 44, 350 ff.

⁸⁷ See eg Higgins, above n 80.

⁸⁸ For the most decided criticism of any confusion, see Benavides, above n 80, 32 ff. As to this last element, namely that universal jurisdiction applies only to some international crimes, one may mention that even under classical international law it was not always accepted. Rather, there were some authors equating the existence of an international crime with the existence of universal jurisdiction. See eg P Fiore, *Il diritto internazionale codificato*, 2nd edn (Turin, 1898), 143, Art 240: “*Apparterrà alla sovranità di ciascuno Stato la giurisdizione penale rispetto ad uno, che sia imputato di avere commesso un fatto qualificato reato secondo il diritto internazionale*”. Art 241 shows that he had in mind not only the most egregious crimes, since he mentions, *inter alia*, the damaging of submarine telegraphic cables.

crime which must be an offence against the most fundamental values of the international community), then *aut dedere* is indeed no universal jurisdiction. However, nothing forces us to limit the scope of universality in that way. We may see its essential criterion not in universality *ratione personae* or any other specificities in conventional law, but the *absence of any requirement that there be a specific link in order to be allowed to prosecute*.⁸⁹ Then, there is no reason to deny that universal jurisdiction could operate only between the parties to a given agreement. The jurisdiction indeed remains universal, in that it casts away the usual requirement of a specific link between State and individual before allowing the former to prosecute the latter for the commission of acts defined in the agreement. Hence, the difference between a customary universal jurisdiction and a conventional one is merely one of range of application: one is valid *erga omnes*, the other (possibly)⁹⁰ only *inter partes*, but in both cases the essential mechanism of universality remains the same. This last interpretation, which makes all due allowance for the differences between *aut dedere* and classical customary universality seems to be preferable in that it goes much more to the core of the matter than to factual aspects such as the number of States involved.

It may be said in sum that *aut dedere aut prosequi* is a universal jurisdiction which is *relative, compulsory and subsidiary*. As to relativity, it can be seen that the universal jurisdiction established by anti-terrorist conventions has a double relative effect: one in terms of the parties to the agreements (*ratione personae*), and one in terms of the object and purposes thereof (*ratione materiae*).⁹¹ As to compulsoriness, the conventions against terrorism invariably transform this mere faculty into an obligation for the State that holds a suspect. Criminal proceedings must be initiated and carried out against the individual by judicial authorities competent to deal with the case.⁹² Finally, as to subsidiarity, the rigidity of the obligation

⁸⁹ As is correctly said by De La Pradelle, above n 85, 905: "*La compétence pénale d'une juridiction nationale est dite 'universelle' quand elle s'étend, en principe, à des faits commis n'importe où dans le monde et par n'importe qui; lorsque, par conséquent, un tribunal que ne désigne aucun des critères ordinairement retenus — ni la nationalité d'une victime ou d'un auteur présumé, ni la localisation d'un élément constitutif d'infraction, ni l'atteinte portée aux intérêts fondamentaux de l'Etat — peut, cependant, connaître d'actes accomplis par des étrangers, à l'étranger ou dans un espace échappant à toute souveraineté*".

⁹⁰ See below, III.

⁹¹ Cassese, above n 84, 593.

⁹² See the several treaty provisions, eg Art 4(2) of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Art 5(2) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Art 3(2) of the United Nations Convention on Internationally Protected Persons (1973), Art 6 of the European Convention on the Suppression of Terrorism (1977), Art 5(2) of the Convention against the Taking of Hostages (1979), Art 6(4) of the Rome Convention on the Safety of Maritime Navigation (1988), and Articles 6(4) and 8(1) of the International Convention for the Suppression of Terrorist Bombings (1997). See also Guillaume, above n 44, 350-353, 367-71; Randall, above n 80, 821.

to try is softened by the alternative option, namely to extradite the alleged culprit to a State able to claim a jurisdictional link. The conventions concerned often favour this option under the *forum conveniens* doctrine.⁹³ Having thus qualified the "conventional universality" of *aut dedere*, all the similarities and also all the differences with traditional universality under customary international law are put in a clear perspective.

3. *Relationship of the Aut Dedere Principle to the Specific Titles of Jurisdiction Contained in the Conventions*

A further question refers to the precise link of the *aut dedere* principle with the several special titles of jurisdiction mentioned in the conventions, eg territoriality or personality. It has been said by authoritative authors⁹⁴ that the provision that imposes a duty to prosecute or extradite is not normative in itself, but merely constitutes a *renvoi* to the specific grounds of jurisdiction be they territorial, personal (nationality or flag) or otherwise based, invariably listed in the conventions. Hence, such agreements would merely coordinate repression on those specific grounds, without creating a separate basis of universal jurisdiction.

This restrictive interpretation is not convincing. If such an interpretation were accepted, the separate articles dealing with the obligation to exercise jurisdiction in any case where there is no extradition⁹⁵ would be without any *effet utile*. It would have been sufficient to say that a State must exercise its jurisdiction under the specific titles unless it extradites. However, the relevant articles invariably dispose that a contracting State shall be obliged, *without exception whatsoever*, to prosecute if it does not extradite. This is not the same thing as saying that jurisdiction under the specific titles must compulsorily be exercised. A teleological perspective

⁹³Guillaume, above n 44, 350, 353, 355 ff. For the European Convention (1977), see eg, G Fraysse-Druesne, "La Convention européenne pour la répression du terrorisme", (1978) 82 *Revue Générale de Droit International Public*, 993 ff.

⁹⁴Higgins, above n 80, 98; Oehler, above n 80, 539.

⁹⁵See eg Art 7 of the Montreal Convention (1971): "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...". In the Convention of Terrorist Bombings (1998), this clear clause was somewhat complicated by the insertion of a sentence which could lend arguments to the opposers: "in cases to which article 6 applies" (see the relevant text above, para 8). However, on closer inspection, no substantive difference can be found. This sentence operates a *renvoi* to Art 6(1) but also to 6(4), ie to the specific ground of jurisdiction and also to the *aut dedere*-ground. Art 6(4) asks any State party to take all necessary measures to establish its jurisdiction over the offences set forth in Art 2 in cases where the alleged offender is present in its territory and it does not extradite him. Consequently, the new *renvoi* in Art 8 must be taken to mean that *as already stated* in Art 6, the States parties must establish jurisdiction over the crimes envisioned by the convention for any case where the offender is found on their territory and is not extradited.

confirms this reading. If the specific grounds listed in the agreements were exclusive, the purpose of these instruments, which is to fill any *lacuna* or safe haven that would result in impunity for a guilty individual, would be defeated.⁹⁶ The contribution of these treaties would be limited to rendering prosecution on the basis of specific grounds of jurisdiction compulsory rather than facultative. Unfortunately, the traditional, specific mechanisms do not suffice to ensure punishment. This is precisely the problem that the conclusion of the agreements was intended to correct.

Moreover, an article common to the various conventions provides for the establishment in domestic systems of grounds of jurisdiction allowing in any case the prosecution of a suspect held in custody.⁹⁷ Were the strict interpretation to be retained, the systematic and practical use of this article would also become virtually insignificant: since one finds in almost all domestic legal systems the principles of territoriality, personality, and security of the State, requiring the compulsory introduction of such grounds of jurisdiction in national legislation would be meaningless, except in very marginal cases.⁹⁸ While such a narrow reading of the agreements would deprive the text of much of its pertinence, an interpretation that admits the existence of universal jurisdiction explains why the addition of new grounds of jurisdiction is necessary.

This conclusion is also warranted by the examination of the various *travaux préparatoires*, which show the larger interpretation to be most in accordance with the will of the contracting parties. The drafters frequently made explicit as well as implicit references to the principle of universality.⁹⁹ Thus, it is not surprising to find that the vast majority of authors and official committees alike consider the rule *aut dedere aut prosecute* to be in itself a ground of jurisdiction, and not a mere cross-reference to the specific links traditionally used in such cases.¹⁰⁰

In sum, it may be said that the conventions establish a true two-tier system of jurisdiction. One limb is erected on a series of specific titles of jurisdiction, either mandatory or optional, which the States must ensure (or may retain) for prosecuting the persons suspected of having committed a crime within the scope of the convention. Another limb is the jurisdiction based on the *aut dedere* principle, which obliges States to establish in their internal law a right to prosecute also in cases without any specific link to the forum any person charged with such acts, to the extent that no extradition takes place. Thus, the States are obliged, by virtue of the

⁹⁶This object and purpose is underlined by F Francioni, "Maritime Terrorism and International Law: The Rome Convention of 1988", (1988) 31 *GYIL*, 276.

⁹⁷See the provisions cited in above n 92.

⁹⁸See for instance in cases relating to the passive personality principle. On this principle, see Oehler, above n 80, 413-29; Oppenheim, above n 80, 471-72.

⁹⁹Randall, above n 80, 826, with numerous references at above n 238.

¹⁰⁰See the authors referred to above n 80.

conventions, to amend their internal law so that they may prosecute under universal jurisdiction the crimes defined in those conventions. The ultimate basis of jurisdiction in such cases is the presence of the alleged culprit on the territory of the prosecuting State.

4. *Nature of the Duty to Establish the Necessary Criminal Jurisdiction in Municipal Law: Absolute Duty or Duty to Use Best Endeavours?*

The next aspect to be discussed relates to the question if there is a strict duty of the States parties to provide the necessary criminal jurisdictional titles in their internal law or if there is only an obligation to use best endeavours. The answer to this question is two-fold. At the universal level of the conventions concluded under the aegis of the United Nations, there is a strict obligation to extend the national criminal jurisdiction to the contemplated crimes. The relevant clauses read: "Each State shall take such measures as may be necessary to establish its jurisdiction over the offences mentioned ...".¹⁰¹ The terms of that provision are mandatory as the use of the word "shall" shows. The term "as may be necessary" related to the means by which the obligation is fulfilled. On this point, the conventions respect the constitutional autonomy of the various States. Thus, in some of them a piece of legislation may be necessary in order to make punishable the contemplated acts, whereas in others a decree or an enactment of administrative rules possibly suffices. One can say that the conventions through the words "as may be necessary" insist on the fact that the obligation posed is one of result rather than of means. However, it is clearly a mandatory obligation, as to the result to be achieved.

The same cannot be said of some regional conventions, which, strangely enough if one thinks of the potentially greater solidarities at the regional level, contain only an obligation to use "(best) endeavours" to extend their national criminal jurisdiction to the acts at stake. Thus, Article 8 of the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and related Extortion that are of International Significance (1971) reads as follows: "[Contracting States have the obligation] to endeavour to have the criminal acts contemplated in this Convention included in their penal laws, if not already so included". This clause seems to be unique. It is not repeated elsewhere, notably not in the European Convention on the Suppression of Terrorism of 1977, which is aligned with the universal conventions.¹⁰² It seems that

¹⁰¹ See eg Art 5 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Art 6 of the Convention on the Suppression of Terrorist Bombings (1998), etc.

¹⁰² See Art 6: "Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in article 1 ...". No such clause at all is found in other treaties, eg the SAARC Convention on the Suppression of Terrorism of 1987.

the specific tradition of the American States, particularly attentive as to the protection of their internal affairs, has prompted this deviation from the mainstream. In the context of the best endeavours clause, the yardstick for its interpretation can be only the principle of good faith.¹⁰³ Its concrete reach is to be determined according to the socio-political environment, as it evolves. To the extent that events, declarations and perceptions bear witness as to an evolution towards a more strongly felt solidarity in matters of terrorism, the result can only be that the best endeavours clause will be strengthened and the interpretation of what it demands will become more exacting. The legal standard¹⁰⁴ of "(best) endeavours" requires an understanding in the light of social background; only therefrom can its concrete and specific content be identified.

5. *The Obligation to Try or to Extradite: True Alternative or Priority of One Element over the Other?*

At the universal level, and more generally speaking at the only exception of the European Convention and its follow-up texts, the obligation seems at first sight to be a true alternative: either the State tries or extradites, at its choice. As to the result considered in synthesis, this reading is certainly correct. However, from one point of view, one may find that the whole system leans toward the "*prosequi*" limb more than to the "*dedere*" limb, in other words that there is some imbalance. The reason for this is that there is in any case a subsidiary obligation to prosecute, whereas there is no obligation at all to extradite.¹⁰⁵ That means that prosecution must in any case take place, subject only to the possibility of setting it aside if extradition happens to take place. Practically speaking, prosecution must start immediately, or within a reasonable time period it then being able to be stopped if there is extradition (or eventually not to start if extradition is granted immediately). In order to determine if extradition may take place, it will, however, often be necessary that some prosecutorial acts have been performed. This interpretation seems to be confirmed by the aim of these conventions, which is to make sure that the chances to see the alleged culprits prosecuted and tried are raised to a maximum. Extradition is only a device for trial, it has no value in itself except to guarantee the most convenient forum.

On a slightly different reading, one might say that the extradition limb is theoretically and practically dominant. The theoretical reason is precisely to ensure the prosecution at the most convenient place, notably

¹⁰³ On this principle, see R Kolb, *La bonne foi en droit international public* (Paris, 2000).

¹⁰⁴ On the concept of legal standards, see the explanations in Kolb, *ibid*, 134 ff., with many references.

¹⁰⁵ This is the system of the conventions, independently from other bilateral or multilateral extradition treaties.

where the crime was committed (*forum conveniens*). The practical reason is that a State not otherwise linked with the offence will have some difficulty in prosecuting without the legal aid of other States concerned. Thus, from a practical perspective, it will seek first for extradition to a more convenient forum. Both ways of looking at the relationship of the two limbs are correct. They grasp the phenomenon under different but complementary perspectives.

Furthermore one understands that in regard to the aims only extradition for trial (i.e. extradition proper) suffices to satisfy the conventional requirement. An expulsion is not covered, since it would defeat the object and purpose of the convention, which is to assure that prosecution takes place.

As the preceding explanations have shown, the conventions establish an original obligation to prosecute, unless extradition takes place. In particular, this means that prosecution is not dependent on the existence of a request to extradite that was not acted upon (*primo dedere secundo prosequi*). However, a State may on its own initiative take up contacts with other interested States in order to see if an extradition is possible, desired or otherwise recommended. Its primary obligation to prosecute does not mean that it is precluded to actively seek extradition.¹⁰⁶

At the European level, the priorities are reversed. In fact, the European Convention on the Suppression of Terrorism (1977) is in the first place an extradition treaty. Thus, it privileges extradition over prosecution. The obligation to prosecute is here limited to cases where an extradition is requested but not granted.¹⁰⁷ The situation is further complicated by a rule of double jurisdiction: the request for extradition must emanate from a State party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State. Put simply: if the request for extradition is based on the principle of passive personality, that title must exist at the level of both municipal laws, that of the requesting State and that of the requested State. The European Convention thus establishes a system of *primo dedere secundo prosequi*. And extradition can be refused if it is not based on the stringent conditions laid down in Article 6 of the Convention. If such refusal takes place, there is a subsidiary obligation to prosecute. This obligation is formulated in Article 7. The whole system, contrary to the other conventions, is not, however, watertight. Its

¹⁰⁶See Henzelin, above n 80, 298 ff.

¹⁰⁷See Art 6 of the Convention: "1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State". See also Henzelin, above n 80, 318 ff. As to the European system, see also Freestone, above n 85, 55 ff.

purpose cannot be said to guarantee prosecution in any case where the offender is apprehended on the territory of a State party, since in the absence of a request of extradition, there is no obligation whatsoever to prosecute. It is true that optional prosecution according to the existing jurisdictional titles of municipal law is still possible in such cases. But there is no precise obligation. Such a system, which remains behind the achievements of the global community, is more than strange within a regional community, which misses no occasion to stress its bonds of solidarity.

Extradition in the sense of the conventions is the delivery of a person to another State in order that this State exercises criminal jurisdiction. The terminology used to describe this procedure is not material. The surrender of an alleged culprit to an international tribunal, to the extent that it has jurisdiction over the acts, is also such a procedure, even if there is technically no "extradition". This is to be understood in the sense that the handing over must be for the purpose of prosecution and trial elsewhere. A more delicate question, which could arise in the future, is if the obligation under the convention is satisfied in the following case. A person is delivered to an international tribunal, eg the International Criminal Court, which has no jurisdiction over terrorist crimes as such, but which could try the culprit for other crimes, even more grave in nature (eg crimes against humanity). If the terrorist acts in question, because of their magnitude, fall into such a category, there is no legal difficulty in establishing jurisdiction. In view of the gravity of the crimes, it may well be that the delivery of a terrorist suspect to the Court fulfils the conventional requirement to prosecute suspects, at least as to their spirit: i.e. the alleged culprit will be tried. But he will not be tried for the terrorist acts envisaged in the convention.

Another question arises. The conventions envisage extradition without specifying if this means only extradition to another State party or extradition to any State whatsoever. The fact that the aim of the conventions is to ensure prosecution and that the aim of extradition is to ensure prosecution at the most convenient forum, warrants the interpretation that extradition to any relevant State is allowed.¹⁰⁸ The conventions do not establish a closed system of extradition, aiming only at extraditions *inter partes*. They envisage extradition *tout court*, as an effective means of suppression; that is not linked to the status of a State as a party to the convention. Moreover, by the rules of treaty construction it would have to be expected that the parties, had they intended such a restriction on the scope of extradition, should have expressed it so in the text. Not having qualified the mechanism of extradition in any manner, it is hard to read into the text such a limitation. In a word, such important limitations cannot be presumed in

¹⁰⁸In the same sense Henzelin, above n 80, 304.

the absence of clear language, or at least intent made explicit in the phase of preparatory work.

Finally it may be noted that the conventions also seek to promote extradition by providing new bases for its performance. Thus, the conventions provide that the offences they list shall be deemed to be included as extraditable offences in already existing extradition treaties.¹⁰⁹ By this technique, the conventions modify older extradition treaties within their scope of application, by way of the *lex posterior* rule. Moreover, the conventions stipulate that they may in themselves be taken as an extradition title if an extradition treaty is absent between the concerned States and this absence would otherwise preclude extradition: "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 offences".¹¹⁰ Note that this provision is only optional, not obligatory.

6. Conventional Universal Jurisdiction as Mandatory Jurisdiction

Under customary international law, there is hardly any case in which the principle of universality *must* be exercised by the State holding the offender. An exception may exist for grave breaches of the Geneva Conventions, since under the Conventions jurisdiction is mandatory and it could be argued that by the practically universal ratification of (or accession to) these conventions, the mandatory jurisdiction over grave breaches has become part of customary international law. Apart from this peculiar case, customary universal jurisdiction is optional: international law allows prosecution by any State for the crimes defined under customary law. It does not, however, oblige those States to prosecute. In legal terms, customary universality is predicated on a faculty, not an obligation.¹¹¹ Conventional universality may also be optional. One may mention Article 5 of the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).¹¹² In the other conventions, universality, in the form of the *aut dedere* principle, is mandatory. It is an obligation not a faculty. This holds true for all universal and most regional anti-terrorist conventions. The precise extent of that obligation still has to be analysed.

¹⁰⁹ See eg Art 8(1) of the Montreal Convention (1971) or Art 11(1) of the Convention on Terrorist Financing. In the United Nations Draft Convention on Terrorism (2001), see Art 17(1) (see *Report of the Working Group ...* (above n 2), 13).

¹¹⁰ See eg Art 8(2) of the Montreal Convention (1971) or Art 11(2) of the Convention on Terrorist Financing. In the United Nations Draft Convention on Terrorism (2001), see Art 17(2) (see *Report of the Working Group ...* (above n 2), 13).

¹¹¹ See on this point Stern, above n 80, 737 ff; De La Pradelle, above n 85, 912 ff.

¹¹² See 1015 UNTS 246.

More precisely, is there simply a formal duty to prosecute or also an obligation to carry out that duty effectively? Can prosecution be prevented or stopped according to rules of internal law, eg by virtue of the opportunity principle?

It should be stressed again that the obligation to prosecute is subsidiary in the sense that it is subject to the absence of extradition. The legal fact of extradition extinguishes that duty.

7. *Duty to Prosecute "in the same Manner as in the Case of any Ordinary Offence of a Serious Nature under Municipal Law"*

The several universal and regional conventions contain a clause whereby the prosecution, if extradition is refused or does not take place, shall be conducted according to the standards of municipal law. This clause reads more or less invariably as follows: "The 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".¹¹³ The clause amounts to a species of "national treatment" standard as opposed to an international minimum standard, if the analogy may be taken that far.¹¹⁴

This aspect of the law may hamper the effective application of the conventions and especially the fulfilment of their primary aim, which is to ensure that prosecution should take place. It is beyond doubt that the clause is a major drawback in the system, since a frequent problem in the field of anti-terrorist action is that even when there are bases of jurisdiction, States often display great reluctance to exercise their right of prosecution. The reasons for this state of affairs are political. In particular, many States fear the political implications of such proceedings or shy away from them because they expect to become the target of terrorist "reprisals". The clause at hand gives them the legal tool in order to comply with the conventional obligation to prosecute. It is obvious that the clause greatly weakens the incisiveness of the obligations. It may be going too far to say that the obligation thus transforms itself into a soft-law duty. However, if one considers the links between the executive branch and the prosecuting organs in many States, the result may not be too far from such a soft duty. Even abuse of the clause may be difficult to claim if the internal practice usually follows such patterns, whereby the executive intervenes in matters of the judiciary.

¹¹³See eg Art 7 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Art 8(1) of the Convention on the Suppression of Terrorist Bombings (1998), the term "serious nature" being here replaced by the term "grave nature" which does not entail any substantive difference. At the regional level, see eg Art 7 of the European Convention on the Suppression of Terrorism (1977).

¹¹⁴As to this question of the law of State responsibility for damages suffered by foreigners on its territory, see eg the synthesis in DF Vagts, "Minimum Standard", (1985) 8 *EPIL*, 382-5.

Conversely, it could be argued that with the ratification of, or accession to, the conventions, and the undertakings thus assumed towards the other States parties, the reach of the "national treatment clause" has been somewhat modified. In other words, it could be said that there is a prevailing duty to investigate the case in good faith according to a minimum standard of diligence. If a prosecution is interfered with or stopped by the political organs for reasons unconnected to the file of the accused, the object and purpose of the conventions would may be circumvented,¹¹⁵ amounting to a breach of the State's obligations under international law.

Sometimes the problem is that no reasonable prosecution can be expected by the State holding the alleged culprit since it holds a protective hand over him. That was the problem encountered (or at least denounced) by the Western States in the *Lockerbie* case, in which Libya insisted on its right to prosecute the alleged perpetrators of the Panam flight bombed when flying over the locality of Lockerbie.¹¹⁶ In such cases, the problem is to determine which are the most appropriate remedies. It may be asked, for instance, if it is possible to presume *a priori* that no serious prosecution will take place and hence to take preventive action to secure extradition or surrender of the persons involved. Alternatively — and there are some good arguments for it — the State of custody must first be given a chance to show that it will seriously prosecute, according to the general presumption in international law of the good faith of a State until the contrary is proven.¹¹⁷ Moreover, what action could be taken, either preventively or after failure to adequately prosecute? In the *Lockerbie* case the Western States were sure to have the backing of the Security Council, which could impose on Libya an obligation to extradite under Chapter VII of the Charter of the United Nations; in fact the Council did so.¹¹⁸ It may be questioned whether this is an adequate or even practicable way to solve future cases of the same type. Finally, it may be asked who or which body appraises if the prosecution was carried out by the State of custody seriously. A lenient penalty or even the dismissal

¹¹⁵ Violation of the object and purpose of a treaty may be a ground of breach of the treaty. See R Kolb, *La bonne foi en droit international public* (Paris, 2000), 283 ff. In judicial practice, see notably the *Military and paramilitary activities in and against Nicaragua* (Merits), ICJ Rep 1986, 135 ff.

¹¹⁶ As to this case in our context, see eg Gilbert, above n 40, 24–25. See also J Chappetz, "Questions d'interprétation et d'application de la Convention de Montréal de 1971 résultant de l'incident de Lockerbie. Mesures conservatoires, Ordonnance du 14 avril 1992", (1992) 38 *Annuaire Français de Droit International*, 468 ff. See also A Aust, "Lockerbie: The Other Case", (2000) 49 *International and Comparative Law Quarterly*, 278 ff. On the action of the Security Council in relation to the *aut dedere* principle, see M Plachta, "The Lockerbie case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*", (2001) 12 *European Journal of International Law*, 125 ff.

¹¹⁷ See eg the *Certain German Interests in Polish Upper Silesia* case (1926), PCIJ, ser A, no 7, p 30. See generally Kolb, above n 115, 124–27.

¹¹⁸ See Resolution 748 of 1992.

of the proceedings cannot necessarily be seen as proof of lack of good faith. At most, such events may be the cause for further investigation. But who can or should be in a position to judge such facts objectively?

The precise scope of the mentioned "national treatment clause" must be clarified in three ways.

First, it is not automatically incompatible with the conventions to handle a case arising under their regimes according to the principle of opportunity of prosecution. Some degree of discretion may be left to the prosecutor to decide if the case should be pursued or not if the criteria he uses in this regard also apply to comparable municipal crimes. The point would be to know how the discretion has been exercised, i.e. if there are cogent or at least understandable reasons for abandoning prosecution. It needs not be stressed that the appraisal of such discretion by third States is a most difficult undertaking. Probably only cases of the most egregious abuses could give rise to international claims.

Second, proceedings may *a fortiori* be dismissed if it appears that the alleged culprit is innocent or otherwise not punishable. The obligation of the State is not to try, but to submit the case to the competent authorities in view of prosecution. That is the reason why it is preferable to speak of *aut dedere aut prosequi* rather than using the more frequently encountered version of *aut dedere aut iudicare*. If on the face of the proceedings it proves impossible to continue the prosecution of the alleged culprit because of some obstacle of municipal law (eg an amnesty law), is there a newly emerging duty under customary law to extradite the person concerned? It seems that the point has not been raised up to now. It can be argued that such an obligation, dormant pending prosecution, arises once prosecution is barred for reasons other than proof of innocence. This would be consistent with the aim of the conventions, which is to assure widest possible prosecution. More delicate still is the question if such a duty arises also if a prescription or time bar prevents prosecution in a particular State. An affirmative answer is possible, but it could also be argued that in such a case there is no punishable crime any more in the prosecuting State, this being a bar to extradition. And finally it could be asked if a duty of extradition may arise anew if a tribunal dismissed the claim of the accused on some formal grounds. True, the principle *ne bis in idem* does not apply directly to proceedings in two different States.¹¹⁹ But it seems difficult to impose a duty of extraditing after such a judicial procedure, in the absence of any clear wording in the conventional texts.

¹¹⁹ See the jurisprudence of the United Nations Committee on Human Rights, *AP v Italy* (1988), *Communication no 204/1986*, para 7.3: "[A]rticle 14(7)... does not guarantee *ne bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State". See also M Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Kehl/Strasbourg, 1993), 272-73.

Third, it may be asked to what extent pardon or any type of amnesty after conviction is compatible with the conventions. The letter of the conventions, which reserves the whole prosecution phase to internal law, covers such pardons or amnesties. This is so because internal law continues to be applicable after conviction. On the other hand, it is apparent that the device of pardon can be used to play havoc with the conventional obligations: a State seems to respect the relevant convention by convicting, but soon after doing so, it empties the obligation to prosecute of all content by exercising its right to grant amnesty. The granting of amnesties for international crimes has been denounced in legal doctrine as being incompatible with the conventions.¹²⁰ It could be argued that such acts would be contrary to good faith. If, however, the pardon or amnesty is granted after a long period of time (or even after a shorter period but because of good reasons), it may still be compatible with the conventions. There is no clause in the conventions which expressly takes away from States their sovereign right to grant pardon or amnesty. However, when prosecution of a terrorist suspect takes place by (indirect) application of an international convention, the prosecuting State acts not only for itself but also on behalf of the other States parties. It thus loses the right to grant pardon or amnesty as a means of circumventing the convention, since by that conduct it affects the legal interests of the other States parties. The line between a legitimate and an illegitimate use of pardon or amnesty may be thin in some cases. It may be added that the Rome Statute of the International Criminal Court (1998) provides in Article 110(1) that "the State of enforcement shall not release the person before expiry of the sentence pronounced by the Court". Paragraph 2 adds that "the Court alone shall have the right to decide any reduction of sentence ...". The reasons for such regulation is precisely to forestall actions taken by States parties in bad faith and more generally to prevent inequalities in the length sentences as a result of political influences in the States of enforcement.

Finally, it may be asked to what extent the States having become parties to the conventions assumed a duty to guarantee the effective application of their obligations thereof.¹²¹ It is clearly not sufficient for States to formally submit a case for prosecution to the competent authorities if there is no real intent to carry out that prosecution. Following this line of thinking, it has been argued that the obligation is to handle the case in good faith without seeking to circumvent the obligations under the conventions; no specific guarantee as to effectiveness is spelled out in the conventions or is otherwise incumbent on the States parties.¹²² It seems that a somewhat more far-reaching interpretation can be given. As it was

¹²⁰ See JA Frowein in *Centre d'étude*, above n 33, 84.

¹²¹ See generally Henzelin, above n 80, 304–6.

¹²² *Ibid.*

explained, States undertake to act in good faith, ie in a manner not frustrating the object and purpose of the conventions. Moreover, they undertake the obligation to prosecute (or to extradite) to the maximum possible extent. This duty may provoke international claims that States parties are acting contrary to the object and purpose of the conventions or are failing to fulfil the criterion of effectiveness where municipal law hampers a prosecution. In other words, the *renvoi* to internal law could be construed as a *renvoi* to the ordinary and reasonable rules governing prosecution. Therefore extraordinary and excessive limitations to prosecution under domestic law would be deemed incompatible with the State's treaty obligations. Consequently, effectiveness would be measured according to: (1) the general prohibition of defeating the object and purpose of the convention under the principle of good faith; and (2) the prohibition of excessive municipal law impediments. In the latter case, if a State wants to become a party to the convention, it would have to modify its internal law or enter a valid reservation.

8. The Faculty of Qualifying a Terrorist Act as a Political Offence

Most States reserve to their courts or to the executive the right to decide whether a person requested for extradition is a political offender and, if they so find, to refuse extradition. This is part of a long-standing tradition, in particular in anglo-saxon States, but also elsewhere. The idea that terrorist acts should not be covered by the privilege of the political offence exception has since the XIXth century led to the inclusion of so-called Belgian clauses¹²³ into a series of treaties of extradition. Their aim was to exclude certain terrorist acts from the the political offence exception. A person whose act threatens not only the political system of a State but also the interests of the entire international community should *a fortiori* not qualify for an exemption from extradition. Thus, in principle, the acts listed in the terrorist conventions should not be regarded as political offences. However, the long-standing tradition in several States of allowing the State authorities to decide whether to grant perpetrators the status of a political offender remained. Consequently, since the 1937 League of Nations Convention, when such a clause was debated but not adopted,¹²⁴

¹²³This clause owes its name to a modification of the Belgian law on extradition operated in 1856. Its purpose was to deny the status of political offence to acts of violence perpetrated against the person of a foreign head of government or of State or against members of his their family. It had been a consequence of a request for extradition submitted by France against two French anarchists having fled to Belgium after having attempted at the life of Napoléon III. On this clause, see G Wailliez, *L'infraction politique en droit positif belge* (Brussels, 1970), 225.

¹²⁴See J Dugard, "International Terrorism: Problems of Definition", (1974) 50 *International Affairs*, 77-78.

the several anti-terrorist conventions make allowance for political offence qualification. The relevant articles operate a *renvoi* to municipal law, thereby implicitly recognising the availability of the political offence doctrine. Thus, for instance, Article 8 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) provides that any extradition is subject to the extradition treaties among the States concerned (these treaties including normally the political offence reservation) or, if extradition takes place outside such a treaty, that it is subject to the "conditions provided by the law of the requested State" (which again contains that limitation).

One might have thought that at the regional level, where solidarities are more strongly felt, the political offence exception would have become less prevalent. The European Convention on the Suppression of Terrorism of 1977 shows that this is not necessarily the case. Although Article 1 provides that "for the purposes of extradition between contracting States, none of the following offences shall be regarded as a political offence...", Article 13 allows reservations, and it explicitly allows States to "declare that [a State] reserves the right to refuse extradition in respect of any offence mentioned in article 1 which it considers a political offence".¹²⁵ Consequently, the restrictions to the political offence exception listed in Article 1 can be effectively nullified by Article 13. To some extent, this avenue has been narrowed by the Dublin Agreement of the member States of the EC concerning the application of the European Convention of 1977 (1980).¹²⁶ Further progress will be made when extradition procedures will be abolished within the EC and replaced by a form of simplified delivery. Developments in that sense are under way.¹²⁷

On the universal level signs of a tightening of the political offence exception have also become apparent. This may reflect the increased perception that terrorism constitutes a common scourge. In parallel, it means that its highly political character is diminishing in favour of a more technical conception which considers only the need to suppress such acts of violence and not the whole context of causes and justifications for terrorist activity. It was the Convention for the Suppression of Terrorist Bombings (1998) which first included the following clause: "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...".¹²⁸ Moreover, in order to close any loophole, the Convention adds in Article 9(5) that the provisions of all extradition treaties (or other arrangements) incompatible

¹²⁵ On the whole question within European Law, see Gilbert, above n 40, 14 ff.

¹²⁶ *Ibid.*, 19.

¹²⁷ See the Commission's Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, Doc. COM(2001) 522 final/2, 25 September 2001.

¹²⁸ Art 11. See (1988) 37 *ILM*, 257.

with regard to offences set forth in Article 2 shall be deemed to be modified as between the States parties to the extent that they are incompatible with the Convention. Thus the Convention with its exclusion of the political offence exception takes precedence over any political offence exception clause contained in previous extradition treaties. Finally, Article 9(1) obliges States parties to include such offences as extraditable offences in any extradition treaty subsequently concluded. Similar clauses are to be found in the later Convention on the Suppression of the Financing of Terrorism (1999)¹²⁹ and in more recent regional Conventions, eg the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999).¹³⁰ A similar provision is included in the Draft Convention of the United Nations on International Terrorism (2001). Article 14 of that Draft¹³¹ provides that none of the listed offences may be considered as political offences for the purpose of extradition.

To this it may be added that State practice is equally moving towards such a restriction, at least in the practice of Western States.¹³² In particular, domestic courts have followed suit. In the United States, the courts in the cases of *Eain v Wilkes* (1981)¹³³ and *Quinn v Robinson* (1989)¹³⁴ opened the way for this evolution. The political offence clause was interpreted to exclude acts of terrorism, particularly where they involved indiscriminate bombings of civilian targets. In *T v Immigration Officer and Secretary of State for the Home Department* (1996),¹³⁵ the English House of Lords interpreted the terms of Article 1(F) of the Convention Relating to the Status of Refugees (1951), ie "serious non-political crime", as excluding acts of terrorism, namely acts of indiscriminate killing. In the Netherlands, the State Secretary of Justice sent a letter to the Parliament on the application of the Refugees Convention. In this letter dated 28 November 1997, he explained that hijacking, assaults upon diplomats, kidnapping, hostage-taking, bomb attacks and letter bombs will not be considered political crimes in the context of Article 1F. He added that, furthermore: "[I]n interpreting the concept serious non-political crime, I will take into account the recent developments in the field of suppression of terrorism in the various international fora ...".¹³⁶

It is too early to see in this evolution a growing obsolescence of the political offence exception in the context of terrorist acts. It is difficult to

¹²⁹ See Articles 14 and 11: (2000) 39 *ILM*, 275–6.

¹³⁰ See Art 1(4)(c). See the text in: <http://www.oic_un.org/26icfm/c.html>.

¹³¹ See *Report of the Working Group*, above n 2, 12.

¹³² See eg J Dugard, "Terrorism and International Law: Consensus at Last?" in *Essays in Honor of M Bedjaoui* (The Hague, 1999), 168–70.

¹³³ 641 F 2d 504 (7th Cir 1981), 520.

¹³⁴ 783 F 2d 776 (9th Cir 1989), 805–6.

¹³⁵ 107 *ILR*, 552 ff.

¹³⁶ (1999) 30 *Netherlands Yearbook of International Law*, 178 ff, 185.

retroactively read into the earlier conventions an abrogation of the political offence exception in the light of the new tendencies. But a slight change of perspective may shed a different light on the matter. Such an interpretation could be adopted in the more recent conventions which list the acts contained in the previous ones as not falling into the category of political offences.¹³⁷ A modification of the old conventions by the *lex posterior* rule could then be assumed, particularly because the older conventions do not contain any explicit clause reserving the political offence qualification. However, this modification would be *inter partes* and could not be automatically taken as extending to all the States parties. As for third States, a general *opinio iuris* would have to be shown. The new tendencies could, however, be considered as exerting a general pressure to interpret those acts listed in older conventions as being exempt from the political offence exception.

To the foregoing it may be added that a State may always refuse extradition on the grounds that it appears that the person whose extradition is requested would face torture or other inhumane treatment in the State seeking his extradition, or if it appears that extradition is sought only to persecute him on account of his race, religion, nationality or political opinion.¹³⁸

9. *The Presence of the Alleged Offender in the Territory of the State*

In order that a State party be subject to the obligation of *aut dedere aut prosequi*, all the conventions invariably require that the alleged offender must be present in its territory. This requirement shows that the *aut dedere* principle is based on the idea of a *iudex deprehensionis*. In *absentia* proceedings are ruled out. To the extent that municipal law is unchanged by the conventions and to the extent that such a requirement is not reflective of customary law, it can still be argued that under other bases of jurisdiction the prosecution of such acts may be also undertaken in cases where the offender is absent from a territory. But under the convention regime this is not possible, and to the best of this author's knowledge, no State yet has passed legislation empowering it

¹³⁷ See eg Art 2(1)(a) of the Convention for the Suppression of the Financing of Terrorism (2000), (2000) 39 *ILM*, 271. That provision operates a *renvoi* to all the main anti-terrorist treaties.

¹³⁸ See generally DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London/Dublin/Edinburgh, Butterworths, 1995), 73 ff; Nowak, above n 119, 136-7. See also the article by the present author "La jurisprudence internationale en matière de torture et de traitements inhumains ou dégradants", (2003) *Revue universelle des droits de l'homme* (forthcoming). As for conventional clauses, see eg Art 8(2) of the European Convention on the Suppression of Terrorism (1977).

to institute *in absentia* proceedings for a person suspected of terrorist acts prohibited by the conventions.¹³⁹

A further problem is to define the precise scope of the obligations of the States parties in regards to this requirement. If the authorities happen to stumble upon an alleged offender, it stands to reason that they must arrest him and initiate prosecution. But such situations form only part of the matter. It has been argued by many commentators that in order to fulfil the conventional requirement, a State party is obliged to make investigations into the whereabouts of alleged offenders, eg if private persons make a report to the police, or otherwise institute proceedings.¹⁴⁰ It is argued that it is only by such a duty that the obligation to suppress terrorist acts could be fulfilled. No other actor but the State has the means of carrying out such investigations. The duty to investigate would thus be thus incumbent on States party to anti-terrorist conventions. This argument produces the further question as to the scope of that duty on the part of the State. If a duty to actively search for terrorist suspects can be inferred, it would seem excessively onerous to assume that States must take all necessary (and presumably legal) measures in order to secure the presence of the alleged culprits in their territory. States may take such measures,¹⁴¹ but they are not obliged to do so under the conventions. This interpretation is affirmed by the more recent anti-terrorist conventions. Thus, the Convention on the Suppression of Terrorist Bombings (1998),¹⁴² the Convention for the Suppression of Terrorist Financing (1999),¹⁴³ and the United Nations Draft Convention on International Terrorism (2001)¹⁴⁴ all contain a clause which reads as follows: "Upon receiving information that a person who has committed or is alleged to have committed an offence as set forth in article [x] may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information". This clause may be interpreted as providing an obligation to search for alleged offenders, since otherwise the said investigation would lose much of its value. No further positive duties seem to arise under the conventions. The question can be asked if this more extensive duty may have become

¹³⁹The Belgian Legislation of 1993 does not contain any condition of presence in the territory for prosecuting war crimes, crimes against humanity and genocide; terrorism is however not covered. On the Belgian Legislation, see A Andries, C Van Den Wijngaert, E David and J Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", (1994) 11 *Revue de droit pénal et de criminologie*, 1114 ff.

¹⁴⁰On this question, see eg B Stern, "A propos de la compétence universelle...", *Essays in Honor of M. Bedjaoui* (The Hague/London/Boston, 1999), 747 ff.

¹⁴¹See Stern, *ibid*, 748.

¹⁴²Art 7(1).

¹⁴³Art 9(1).

¹⁴⁴Art 10(1).

incorporated into the older conventions by reason of recent practice and agreements. If so, this would constitute an informal modification of the former conventions. The answer to this question is uncertain, but it does seem possible to argue that such an implied treaty modification has taken place.

A further point relates to the question of what happens if the alleged offender is not any more on the territory of the prosecuting State. Consider the situation where the suspect is in the territory at the moment the prosecution is launched, but later, because of some reason, eg flight, does not any more find himself in that territory. Must the prosecution be stopped? It has been suggested¹⁴⁵ that the answer depends on municipal law: if such discontinuance is necessary for comparable common crimes under domestic law, then the State may stop the prosecution without violating the convention by applying its internal law to which the conventions refer. This means that a State may also continue the prosecution without violating the convention, to the extent its internal law allows it to do so (which is normally the case). If this interpretation is correct, the rule as to the required presence of the alleged offender in the territory of the prosecuting State must be read to mean that the offender must definitely be present in the territory at the beginning of the proceedings, but that later default of this requirement does not vitiate proceedings already started. This is comparable to the judicial rule of the *forum perpetuum*.¹⁴⁶

10. *The Problem of Incongruent Offences under the Conventions and Municipal Law*

There is a further problem which will be dealt with only briefly. The conventions oblige States parties to adopt in their internal law legislation

¹⁴⁵See Henzelin, above n 80, 306.

¹⁴⁶A rule recently reaffirmed by the International Court of Justice in the *Lockerbie (Preliminary Objections)* case, Judgment of 27 February 1998, ICJ Reports 1998, 9 ff, paras 37–38: “37. In the present case, the United Kingdom has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

38. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established (See *Nottebohm*, Preliminary Objection, Judgment, ICJ Reports 1953, p 122; *Right of Passage over Indian Territory*, Preliminary Objections, Judgment, ICJ Reports 1957, p 142).”

necessary to suppress the acts listed in the conventions. If the States incorporate into their internal law the list of acts under the conventions as such, there would be a perfect congruence between the conventions and internal law. Obviously the interpretations given to the same terms contained in the conventions may differ from State to State, but this is another problem. Sometimes, however, States do not incorporate the crimes in the conventions precisely as they figure in the conventions. While States parties may not fail to suppress all the acts listed in the conventions, they may add to the list of acts in the conventions, either by broadening their definitions, or by providing for the possibility to prosecute further acts not listed in the conventions. To the extent that the conventions do not "exclude any criminal jurisdiction exercised in accordance with national law",¹⁴⁷ there may be no legal difficulty with such a course. It should nonetheless be stressed that for the acts listed in the conventions, there exists *ipso facto* an international title for prosecution at the national level, at least *inter partes*. For acts other than those listed in the conventions, the State must show that national prosecution is allowed under international law, more precisely, under general international law or under some specific title as against the other State(s) involved.

In some cases there may be delicate problems when acts are to be prosecuted by national authorities pursuant to a piece of domestic legislation which goes beyond what is customarily the recognised scope of the universality principle. For example, the Belgian legislation of 1993 provides for prosecution of grave breaches of the Geneva Conventions of 1949 in the context of non-international armed conflicts. It is commonly understood that international law does not go that far. Universality is recognised only for grave breaches committed in the course of an international armed conflict. The problems that may arise in such cases are numerous and cannot be addressed here.¹⁴⁸

C. The National Suppression of Terrorist Acts under Customary International Law

At the level of customary international law, we must immediately distinguish two sets of situations: (1) the definitions of terrorist acts under the conventions whose status in general international law may be the object of enquiry; (2) the crime of terrorism as such (however defined), which may

¹⁴⁷See eg Art 5(3) of the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), or Art 6(5) of the Convention on the Suppression of Terrorist Bombings (1998).

¹⁴⁸See the reflections of Stern, above n 140, 741 ff.

give rise to national prosecutions, especially under universal jurisdiction. Both aspects have to be analysed separately.

1. *Universal Jurisdiction under General International Law for Terrorist Offences as Defined in the Conventions*

What is the status of the various universal anti-terrorist conventions under customary international law? Can they have some normative effects on States not party to them even outside the realm of customary law? In other words: can States initiate the prosecution of suspects on the basis of the universality principle without being party to the instruments that provide for and organise such prosecution? Can their own nationals be prosecuted under universal jurisdiction by a State party to such a convention? Legal commentators answer these questions in three different ways.

The first possible answer is that the anti-terrorist conventions set rules and principles which are strictly conventional and thus only valid *inter partes*. Consequently, the principle *aut dedere aut prosequi* binds only States party to the conventions.¹⁴⁹ It has not yet become customary.¹⁵⁰ There is thus no *erga omnes* universality (*aut dedere*) for terrorist offences as defined by the conventions.¹⁵¹ This view entails two consequences: (1) the *aut dedere aut prosequi* obligation *must* be exercised only by States parties, third States having no obligation to apply it; but also, (2) the *aut dedere aut prosequi* rule *may* be exercised only by States parties, third States having no title to do so under general international law (but they may have a particular title if there is a delegation of jurisdiction by a State holding jurisdiction). As can be seen, proposition (2) goes very much beyond proposition (1) and is not self-evident. According to both scenarios, a third State has neither the duty, nor the faculty to exercise universality over the offences listed in the conventions. Some authors of this group have recently somewhat softened their position, albeit maintaining that the *aut dedere* principle remains for the time being only conventional. Higgins,¹⁵² for example, is of the view that for the moment the principle is only treaty-based, but that it will soon be possible to ask, as ratification of the anti-terrorist treaties augments, if it does not also apply customarily.

¹⁴⁹ See eg Oehler, above n 80, 520; Cassese, above n 85, 593–4; De Schutter, above n 85, 388; Dinstein, above n 85, 70; Higgins, above n 80, 98; L Migliorino, “La Dichiarazione delle Nazioni Unite sulle misure per eliminare il terrorismo internazionale”, (1995) 78 *Rivista di diritto internazionale*, 970.

¹⁵⁰ See LFE Goldie, “Profile of a Terrorist: Distinguishing Freedom Fighters from Terrorists”, (1987) 14 *Syracuse Journal of International Law and Commerce*, 141 ff, p. 131; Dinstein, above n 85, 70; *Centre d'étude et de recherche*, above n 33, 39; Migliorino, above n 149, 970; Henzlin, above n 80, 306, according to whom it is specifically the *opinio iuris* that is lacking.

¹⁵¹ See eg Benavides, above n 80, 59–61.

¹⁵² See Higgins, above n 4, 26.

A second view holds that the principle *aut dedere aut iudicare* already belongs to general international law. This may be argued in several ways. One school of thought¹⁵³ is that one needs only to look at State practice and *opinio iuris*. There is the series of treaties which invariably reproduce the same principles, thus showing that there is a general conviction in their suitability or even necessity. There may also be sufficient practice in the form of statements and recommendations at the international level as well as judicial decisions by national courts affirming the principle. Proponents of another school of thought examine the matter on a more axiomatic level. They anchor the customary status of the *aut dedere* principle to a vision of the international community as *civitas maxima* whose role is to safeguard vital interests common to all its members. The prevention and suppression of international crimes is unquestionably a vital need of the international community.¹⁵⁴ A slightly different version of this axiomatic reasoning suggests that the duty to try or extradite is inherent in the concept of an international criminal act (*delictum iuris gentium*). Given that acts that violate the international public order are contrary to an essential aspect of the international rule of law, and that they cannot be punished by non-existent international organs dedicated to this purpose, international law would make their repression (through trial or extradition) incumbent upon each State, through some form of compulsory *dédoulement fonctionnel*.¹⁵⁵ Identifying the source defining the offence, be it custom or a multilateral treaty, would be irrelevant in such a case.¹⁵⁶

¹⁵³See eg Freestone, above n 85, 60, at least for the conventions having secured a substantial degree of ratifications or accessions: "Indeed, in relation to the core of offences which are covered by those multilateral conventions which have achieved wide adherence – such as hijacking and hostage-taking — it might be argued that this general pattern of treaty practice ... suggests that ... a wider core of terrorist offences are subject to jurisdiction according to this principle [*aut dedere aut prosequi*] under customary international law."

¹⁵⁴MC Bassiouni and EM Wise, *Aut dedere aut iudicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht, Martinus Nijhoff Publishers, 1995), 22–24, 26 ff; EM Wise, "Extradition, the Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Iudicare", (1991) 62 *Revue internationale de droit pénal*, 109 ff. For I Detter, *The International Legal Order* (Aldershot, Dartmouth, 1994), 175, the application of universal jurisdiction to the repression of terrorism is inherent to the prohibitive rule, given the norm's *ius cogens* character.

¹⁵⁵The term "*dédoulement fonctionnel*" was coined by Scelle. It means that, absent centralized, regular and compulsory organs exercising legislative, executive and judiciary functions on the global plane, State organs that act according to powers they hold through their domestic constitutional regime are also acting on behalf of the international community, filling in a decentralized manner such functions at the international level. See G Scelle, *Précis de droit des gens*, t. I (Paris, 1932), 55–57.

¹⁵⁶See to that effect MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht/Boston, 1992), 499–508; MC Bassiouni, *International Extradition: United States Law and Practice*, 2nd edn (London, 1987), 22–24; MC Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", (1983) 15 *Case Western Reserve Journal of International Law*, 34–36; Bassiouni and Wise, above n 154, 21, 24.

A third position is¹⁵⁷ that the conclusion of a series of substantially similar treaties to respond to the diverse expressions of international terrorism is evidence of the recognition by a large part of the international community that it is urgent and legitimate to facilitate repression of a particular crime on the basis of universal jurisdiction. The conventions are construed as the expression of the general interest in sanctioning a category of offences deemed especially serious by the international community. While this does not suffice *per se* to raise their content to a customary status, other legal effects may nevertheless be attached to the conventional provisions. For instance, one could deduce therefrom a type of permissive value, akin to that of certain resolutions of international organisations. Hence, a third-party State could justify its use of criminal jurisdiction by relying on the growing *opinio* evidenced by the multitude of conventions. The difference between parties to the conventions and non-party States would reside in the fact that the latter, although arguably possessing the *faculty* to proceed according to the universality principle given the increasing acceptance of this exercise, would be under no *obligation* to do so.

A variation on this theme would be the view that the treaties institute universal jurisdiction as declaratory instruments, through which the international community acknowledges the existence of universal jurisdiction for a given crime. The agreement serves here as a catalyst, instantly crystallising the rule into custom. However, this new customary rule is not identical with the conventional rule: it is again only permissive, ie it entitles the third States to prosecute but does not require them to do so. Recent trends seem to reinforce this argument, although States continue to waver between the concept of strict privity of contract inherent in treaty-making and broad acceptance of the duty to prosecute or extradite as an established rule of customary law. There is a number of recommendations, declarations of international political organs (General Assembly or Security Council) and of States (political summits), judicial precedents (especially as to hijacking of air carriers), ILC texts, doctrinal opinion, and

¹⁵⁷On this third approach, see Randall, above n 80, 821–832. An excellent synthesis can be found in Schachter, above n 80, 263: “May States confer jurisdiction on themselves by agreement? Two possible answers may be given. The first explanation is that a necessary implication (or assumption) is that the community of States recognize that universal jurisdiction exists for the crime in question and consequently States may oblige themselves to exercise it. It follows from this that while non-parties have no such obligation they have the same right (or options) as a party to exercise jurisdiction. It should be noted that this is an inference from the adoption of a general multilateral treaty through the processes of international organization. ... It is not based on State practice as such. ... If a non-party asserts the right to try and punish an offender under one of the treaties in question as an ‘international criminal’ without any jurisdictional link other than the universality principle, and no protests are made by other States (for example, the offender’s national State or the State where the crime occurred) the exercise of jurisdiction would constitute significant precedent for the universality principle”.

so forth, which stress the importance of the effective fight against terrorism or which link the principle of universality to the suppression of terrorist acts, without any significant dissent.¹⁵⁸ It can thus be concluded that the practice of States, evidenced by the large number of conventions — now reinforced by the efforts of the United Nations to draft a comprehensive convention against terrorism, based upon a sweeping *aut dedere* principle for all terrorist acts — together with the diffuse non-treaty related practice previously mentioned, has the effect of potentially legitimising a claim of universality by a non-party State to suppress a terrorist offence defined in an anti-terrorist convention. Such a claim of universal jurisdiction might even be seen today as an exercise of an international public order function. It is unlikely that any protest to such State action would ensue (except in highly politicised contexts), and if it did occur, it probably would have little force. Consequently, it seems that at least under international law the barriers for the exercise of such jurisdiction have largely been removed, whereas a positive customary title allowing prosecution for terrorist crimes has not yet been firmly established. What was written by the present author some years ago may thus apply *a fortiori* today, when the events of the 11 September 2001 have considerably reinforced the collective conscience and willingness to fight international terrorism:

[T]here is no heresy in affirming that current international law acknowledges the unilateral *faculty* to claim the privilege of exercising universal jurisdiction for qualified terrorist acts as defined by ... the several anti-terrorist treaties. The strength of the new trends that have emerged in international society can be construed at least as having removed the justification (or the *opinio iuris*) of the alleged prohibitive rule, if it even existed at all. Whether the potential customary rule granting universal jurisdiction for the prosecution of terrorists has positively crystallised or merely remains *in statu nascendi* might not affect the heart of our problem. Suffice it to say that, in all probability, a State's claim to exercise universal jurisdiction in a case related to our topic *would not arouse any protest* in principle on the part of other interested States. Instead of granting a jurisdictional title through custom, the growth of a sufficiently general legal conviction may have reoriented the law towards the recognition of the power (*faculté*) to engage in a repressive endeavour based on titles of municipal law. This would be an intermediary stage between a mere freedom, based on an abstract, negative presumption [that of the *Lotus* case], and an established custom based upon a series of concrete, positive acts. The difference between this stage and a general presumption of freedom lies in its justification, which in the former case is buttressed by additional considerations provided by circumstantial factors. The freedom is not here negatively presumed, but positively conferred.

¹⁵⁸On this trends, see R Kolb, "Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law", (1997) 50 *Hellenic Review of International Law*, 70 ff.

A relatively uniform and prolonged use of this faculty may, in accordance with recognised rules, result in the emergence of a real customary rule.¹⁵⁹

2. *Universal Jurisdiction under Customary International Law for Terrorist Offences in General*

The greatest obstacle in the way of recognising universal jurisdiction (or the *aut dedere* principle) over terrorist acts in general is the lack of any universally accepted definition of terrorism. The multiplicity of definitions makes it extremely difficult to identify a sufficiently accepted core definition of the terrorist crime as such. One of the minimum conditions for recognising the capacity of States to prosecute international crimes under the title of universal jurisdiction is that the crime is properly defined: *Nullum crimen sine lege*, but also *nulla iurisdictio sine crimine*. Moreover, that definition must be accepted at the international level, since the crime envisaged should be international in nature and not merely criminalised at the national level. This absence of an agreed definition is the principal reason that many authors simply refute the suggestion that there is any universal jurisdiction over terrorism in customary international law as it stands today.¹⁶⁰ Others acknowledge a growing tendency towards universality for the crime of terrorism in general, but maintain that such a tendency probably falls short of a customary rule,¹⁶¹ presumably once more because of absence of any commonly agreed definition of terrorism. Another view is that universality is desirable *de lege ferenda* and States are and should be working towards the establishment and acceptance of such a principle.¹⁶² Conversely, certain commentators hold that international terrorism as such is already subject to universality, since the offences involved are directed against the whole international community.¹⁶³ In this respect, the recent efforts of the United Nations Working Group to draft a comprehensive convention on international terrorism which is precisely based on the *aut dedere* universality principle, may be seen as a

¹⁵⁹ *Ibid.*, 87–8.

¹⁶⁰ See eg Chadwick, above n 9, 106; Freestone, above n 85, 60. See as to the result also Higgins, above n 4, 24, 28.

¹⁶¹ See eg Randall, above n 80, 789–90, 815 ff. *Restatement Third*, above n 80, 255–7; Schachter, above n 80, 264 (a good case can be made for the customary status); Oppenheim, above n 78, 470.

¹⁶² See eg the Principles adopted in the final Report of the *Centre d'étude*, above n 33, 16: "Les Etats devraient accepter le principe *aut dedere aut prosequi* comme règle générale lorsque des personnes présumées coupables d'actes terroristes contre des Etats ou des ressortissants étrangers sont découverts sur leur territoire". For Reisman, above n 47, 56, the universality principle is "desirable".

¹⁶³ See eg Sucharitkul, above n 85, 171; Bassiouni and Wise, above n 154, 31 ff. See also the Draft Single Convention on the Legal Control of International Terrorism of the ILA (1980), Art 2(3), I.L.A., Proceedings of the 59th Conference, Belgrade, 1980, 498 (*aut dedere aut prosequi*).

further step in the direction of establishing that principle under customary international law.¹⁶⁴ However, this position has still to be widely accepted. Moreover, the UN comprehensive convention itself will have only the scope of a treaty. It will be instructive to note the degree of consensus on such issues during the process of elaboration of the draft convention in order to gain some measure of the customary status of such rules. At the time of writing, it is too early to judge.

As to the definition of terrorism, which remains the major stumbling block in the way of universality, it will be possible to use the definition adopted in the United Nations draft comprehensive convention to the extent that it secures widespread ratification. Notwithstanding this convention, it could be argued that there is already some convergence in modern international law on a two-tier definition of terrorism, one limb covering the acts listed in the several anti-terror conventions, the other being centered on three elements: certain violent acts/terror (intimidation)/coercion.¹⁶⁵ However, there are still too many uncertainties in these definitions to make any assured statement. Perhaps the most one can say is that a State exercising universality for an egregious act of international terrorism, falling squarely under a recognised form of terrorism in the conventions, might not face today a significant protest for its unilateral assertion of jurisdiction. Thus, the positions outlined above on the recognition of the customary status of the conventional crimes under general international law may be argued, but not *a fortiori*, only tentatively and *a minori*, and, to put it bluntly, with some optimism which might not prove well-founded.

Some authors, faced with the absence of any clearly defined and accepted international crime of terrorism, hold that only some specific terrorist crimes give rise to universality under customary international law. For Freestone,¹⁶⁶ it is only the crime of aerial hijacking which unquestionably possesses that status, this being the result of the very large number of ratifications and accessions to the relevant conventions. Other authors argue that there is universality for hostage-taking¹⁶⁷ or for terrorist bombings,¹⁶⁸ presumably within the scope of the definitions of the crimes in the conventions. If a single terrorist offence has achieved the status of universality under general international law, it would be

¹⁶⁴ See Article 11 of the Draft Convention: *Report of the Working Group*, above n 2, 11.

¹⁶⁵ On the question of definition of terrorism, see above, I.

¹⁶⁶ Freestone, above n 85, 60. See also JN Douglas, *Aerial Hijacking as an International Crime* (New York, Oceana Publishers, 1974), 182 ff.

¹⁶⁷ F Malekian, *International Criminal Law*, vol II (Uppsala, Almqvist & Wiksell 1991), 1 ff.

¹⁶⁸ G Dahm, J Delbrück and R Wolfrum, *Völkerrecht*, vol I/1, 2nd edn (Berlin/New York, 1989), 321–22, presumably also under customary international law.

aerial hijacking. This crime has given rise to the clearest judicial practice¹⁶⁹ and to the most widely ratified international conventions.

There is another way by which customary universal jurisdiction can be exercised in regard to terrorist offences. If a terrorist offence fulfils all the elements of another international crime which is subject to universality under customary international law, then the terrorist acts will be subject to universality under that parallel heading.¹⁷⁰ Thus, for instance, if a terrorist attack, by reason of its magnitude, amounts to a crime against humanity,¹⁷¹ then it will be subject to universality, since crimes against humanity may be covered by universal jurisdiction. This could provide a way for the International Criminal Court to judge some terrorist offences, since the Statute of the Court does not grant any specific jurisdiction for acts of terrorism.

It may be useful, at the end of this section, to briefly point out the major drawbacks of universality in international law. The most conspicuous problem is that universality potentially gives rise to conflicting claims of jurisdiction and that the standards of prosecution and length of sentences vary from State to State. This puts in danger the fair trial to which the accused is entitled.¹⁷² Moreover, the objectivity of municipal courts is not always guaranteed. Universal jurisdiction may also augment tensions between States, which may substantially disagree over a specific prosecution. This issue leads us directly to the question of prosecution of crimes of international terrorism by international tribunals, in particular the International Criminal Court.

3. *Jurisdiction Exercised by the International Criminal Court*¹⁷³

On 1 July 2002, the Rome Statute on the International Criminal Court¹⁷⁴ (ICC) entered into force. The ICC does not have jurisdiction to try persons

¹⁶⁹See Kolb, above n 158, 74. See also the *US v Yunis* case (1988), United States District Court of Columbia Circuit, 82 *ILR*, 344 ff, particularly 348–49, and the judgment of the Court of Appeals (1991) 30 *ILM*, 403.

¹⁷⁰See Higgins, above n 4, 28.

¹⁷¹It has for example been said that the attacks of the 11 September 2001 in the United States constituted because of their magnitude crimes against humanity. See N Schrijver, "Responding to International Terrorism: Moving the Frontiers of International Law for Enduring Freedom", (2001) 48 *NILR*, 287 ff.

¹⁷²See eg Oxman, above n 80, 281; Graefrath, above n 80, 85; Bassiouni, above n 80, 82.

¹⁷³On the jurisdiction of the ICC in matter of terrorist crimes, see the unpublished paper of J Sulzer, "Réflexion sur la compétence de la Cour pénale internationale pour juger certains actes constitutifs du crime de terrorisme", (on file with author). On the question of advantages and disadvantages to have the crime of terrorism subjected to the jurisdiction of the Court, see S Oeter, "Terrorismus — Ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit", (2001) 76 *Die Friedenswarte*, 12 ff, 27 ff.

¹⁷⁴See Doc A/CONF.183/9, 17 July 1998.

suspected of terrorist crimes as such. Several proposals to add terrorism to the list of punishable offences were defeated at the 1998 Rome Conference. At the beginning of the Conference, the draft convention contained the offence of terrorism¹⁷⁵ along the lines of the definition proffered by the ILC in its 1995 Draft Code on Offences against the Peace and Security of Mankind.¹⁷⁶ The Netherlands backed this proposal.¹⁷⁷ In the face of the resistance of many States to such an inclusion, mainly because of fears of opening a Pandora's Box on the definition of the crime, the status of movements of national liberation, or the question of State terrorism, some States attempted to indirectly include the crime of terrorism by listing it under acts amounting to crimes against humanity.¹⁷⁸ Terrorism would be punishable if it fulfilled the constitutive elements of that crime. This proposal was equally dismissed. On 14 July, the same States who had sponsored that proposal¹⁷⁹ deployed a last effort to salvage the inclusion of terrorism. They proposed that the same approach be taken for terrorism as for the crime of aggression. A reference to terrorism could then have been included in Article 5 of the Statute, leaving the elaboration of

¹⁷⁵See Doc. A/CONF.183/2/Add.1, 14 April 1998. The French version reads:

"Aux fins du présent Statut, on entend par 'crime de terrorisme':

- 1) *Le fait d'entreprendre, d'organiser, de commanditer, d'ordonner, de faciliter, de financer, d'encourager ou de tolérer des actes de violence dirigés contre des ressortissants ou des biens d'un autre État et de nature à provoquer la terreur, la peur ou l'insécurité parmi les dirigeants, des groupes de personnes, le public ou des populations, quels que soient les considérations et les objectifs d'ordre politique, philosophique, idéologique, racial, ethnique, religieux ou autre qui pourraient être invoqués pour les justifier;*
- 2) *Toute infraction définie dans les conventions ci-après:*
 - a) *Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile;*
 - b) *Convention pour la répression de la capture illicite d'aéronefs;*
 - c) *Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques;*
 - d) *Convention internationale contre la prise d'otages;*
 - e) *Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime;*
 - f) *Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental.*
- 3) *Le fait d'utiliser des armes à feu ou d'autres armes, des explosifs ou des substances dangereuses pour commettre des actes de violence aveugle qui font des morts ou des blessés graves, soit isolément soit dans des groupes de personnes ou des populations, ou qui causent des dommages matériels importants."*

¹⁷⁶See Articles 20 and 24(2) of the Draft Code, *Report of the ILC to the General Assembly of the United Nations*, A/49/10, para 91 and A/50/10, 58, above n 40.

¹⁷⁷On the Dutch proposals, see MC Bassiouni, *The Statute of the International Criminal Court, A Documentary History* (New York, Transnational, 1998), 234-5.

¹⁷⁸See the proposal of India, Sri Lanka, Algeria and Turkey in A/CONF.183/C.1/L.27/Corr.1.

¹⁷⁹See above n 177.

its precise definition to later stages, i.e. to a revision conference. However, even that proposal was defeated. Thus, the only result reached at the Rome Conference was that in Resolution E, sponsored by Turkey and integrated into the Final Act of the Statute, a later inclusion of the crime in the list of punishable offences is recommended.¹⁸⁰

After the events of 11 September 2001, Turkey immediately seized the opportunity to insist again upon such an inclusion.¹⁸¹ Moreover, the Parliamentary Assembly of the Council of Europe adopted two resolutions by which it requests that the Statute of the ICC be revised in order to insert in the list of the punishable offences the crime of terrorism.¹⁸² For

¹⁸⁰The text of this Resolution is the following (it can be consulted on <<http://www.un.org/law/icc/statute/finalfra.htm>>): "The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Recognizing that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community,

Recognizing that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,

Deeply alarmed at the persistence of these scourges, which pose serious threats to international peace and security,

Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,

Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".

¹⁸¹See Sulzer, above n 173, 2-3: "Suite aux événements du 11 septembre à New York, la Turquie a été la seule délégation à recommander l'insertion du crime de terrorisme dans la compétence de la CPI en proposant une: «approche pragmatique [en vue] d'examiner la question dans le cadre des délibérations en cours de la Commission préparatoire» ou «organiser une conférence internationale ayant précisément pour mandat de revoir la question de la juridiction de la Cour afin que les crimes de terrorisme constituent une catégorie distincte de crimes, à côté de ceux qui sont déjà énumérés dans le Statut». Ces propositions n'ont été reprises par aucune délégation".

¹⁸²See Sulzer, above n 173, 3: "Plus préoccupant, lors de la dernière Assemblée parlementaire du Conseil de l'Europe, une recommandation et une résolution intitulées «Les démocraties face au terrorisme» ont été adoptées allant dans le sens d'une révision du Statut de la CPI pour inclure les actes de terrorisme.

Selon la Recommandation 1534 (2001)[1]

«[...]4. L'Assemblée estime que la nouvelle Cour pénale internationale est l'institution propre à juger les actes relevant du terrorisme international.[...]»

[...]5. L'Assemblée prie instamment le Comité des Ministres: [...]

[...]xi. d'étudier d'urgence la possibilité d'amender et d'élargir le Statut de Rome, pour que figure, parmi les attributions de la Cour pénale internationale, l'aptitude à juger les actes relevant du terrorisme international [...]

Selon la Résolution 1258 (2001)[1]

«[...]5. L'Assemblée estime que la nouvelle Cour pénale internationale est l'institution propre à juger les actes terroristes.[...]»

[...]17. L'Assemblée appelle les Etats membres du Conseil de l'Europe à:

[...]jix. étudier d'urgence la possibilité d'amender et d'élargir le Statut de Rome, pour que figure, parmi les attributions de la Cour pénale internationale, l'aptitude à juger les actes relevant du terrorisme international; [...]"

the time being, things have not progressed, and are not likely to do so in the near future. This course, preserving for the moment the integrity of the Statute, is to be welcomed. The Court must now be able to work on a secured Statute, not opened up for a possibly indeterminate number of modifications. The revision conference, which will take place in 2009, will be able to appraise the situation and possibly add a new crime of terrorism to the punishable offences. If a comprehensive United Nations Convention on Terrorism is by that time adopted, States will also be able to take advantage of the legitimacy which it will carry and any agreed definition of the crime of terrorism within the text.

In conclusion, it may be said that the law in relation to the criminal prosecution of international terrorists is at once richly articulated and in ongoing evolution. The anti-terrorist conventions (with their complex blend of customary international law together with treaty rules) provide for a great variety of jurisdictional titles, the most salient and multifaceted of which is the *aut dedere aut prosequi* principle, constituting a form of universality. The relationship between international and internal law is particularly close in this matter, creating a multitude of legal problems. On the other hand, the law is quickly developing in this field. The events of 11 September 2001 bolstered the already felt need to better combat terrorism. It is not difficult to foresee that a further broadening of the law is forthcoming, possibly with a general convention on the suppression of terrorism. If that happens, a milestone will indeed have been reached, the piecemeal approach of specific conventions, which up to now so conspicuously characterised this branch of law, being finally overcome. One may thus follow the events of the next months and years with studious attention. But too much should not be expected.

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