Universal criminal jurisdiction in matters of international terrorism : some reflections on status and trends in contemporary international law

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UNIVERSAL CRIMINAL JURISDICTION IN MATTERS OF INTERNATIONAL TERRORISM: SOME REFLECTIONS ON STATUS AND TRENDS IN CONTEMPORARY INTERNATIONAL LAW

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I. INTRODUCTION: THE PHENOMENON OF TERRORISM AND ITS REPRESSION

1. A most acclaimed German writer wrote, more than a century ago: "What wise or stupid thing can man conceive that was not thought in ages passed away?"[1]. Terrorism is indeed nothing new. Movements willing to use means that rely on organised, indiscriminate violence and the methodical mongering of fear to achieve defined ends in the distribution of power between social groups predate by far the establishment of modern nation-states; hence, they also predate the birth of the inter-state law (*ius publicum civitatum*) that today lays an exclusive claim to the title 'international law'.

Most of these movements found their roots in political revolt, social upheaval, or religious protest. As early as the first century of our era, the Jewish sect of the *Sicarii* led a bloody struggle against the Romans in Palestine. Tacitus relates that they engaged in assassinations, set fire to food depots, and sabotaged water distribution systems[2]. The 11th century saw the emergence of the famed *Assassins*,

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[1] Goethe, *Faust*, Part II, Act 2.

[2] See W. Laqueur, *Terrorism* (1977) 7-8; M. Hengel, *Die Zeloten* (1961) 47 *et seq.* =

fuelled by a skilful blend of messianism, politics and violence. Emanating from the *Ismails*, the sect, finally crushed by the Moghols almost two centuries after its inception, was trying to preserve its religious autonomy and traditional way of life against the Seljucs. Militarily inferior but efficiently organised in highly structured, clandestine groups, the *Assassins* littered their path with victims of political killings. Saladin himself only miraculously escaped from two attempts at their redoubtable hands[3].

2. The state-oriented shift in the socio-political centre of gravity occurred much later. The emergence of the state was historically achieved in the wake of religious wars around the unity of a given territory, and arose out of considerable transformations, be they social (fall of the feudal system, secularisation), spiritual (the nationalisation of religion), or economic (monetary reforms, birth of mercantilism, expansion of commerce). In the light of these developments, terrorism reshaped its forms and figures to suit this new model of political organisation. It was used either as a tool in the exercise of state power, or as a means to upset the existing attribution of state powers. In this latter case, it might target the existence of the state order itself, or attack one of its historically coterminous manifestations. From this point on, terrorism can be solely conceived and understood in relation with the state: this is illustrated by *"La Terreur"* wielded during the French Revolution[4], the Anarchist movements' feats at the turn of the century[5], or the more contemporary nationalist or separatist action[6].

These developments have to be seen in the context of the changing conceptions of power. There is especially the noticeable displacement of weight from the individual to the state[7] perceptible since the end of the First World War. Charles De Visscher aptly described[8] how vari-

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The Zealots: Investigations into the Jewish Freedom Movement in the Period from Herod I until 70 A. D. (1989).

[3] Laqueur, *supra*, 8-9; B. Lewis, *The Assassins* (1967) = *Les assassins - terrorisme et politique dans l'Islam médiéval* (1991); M.G.S. Hodgson, *The Order of Assassins* (1955); A.M. Eddé, Les assassins, une secte terroriste, *L'histoire*, 1992, no. 158, 16-23.

[4] G. Walter, *Histoire de la terreur: 1793-1794* (1937); J. Castelnau, *Histoire de la terreur* (1970).

[5] Laqueur, *supra* note 2, 11-12; J. Servier, *Le terrorisme* (4th ed. 1992), 19 *et seq.*; M. Nomad, The Anarchist Tradition, *in* M. Drackovitch (ed.), *The Revolutionary Internationals, 1864-1943* (1966) 57 *et seq.*; R. Gaucher, *Les terroristes* (1965) 106 *et seq.*; D. Apter / J. Joll (eds.), *Anarchism* (1971); D. Guérin, *L'anarchisme* (1965).

[6] Gaucher, *supra*, 161 *et seq.* On the history of terrorism, see also R. Friedlander, The Origins of International Terrorism: A Micro-Legal-Historical Perspective, 6 *Israel YBHR* 1976, 49 *et seq.*

[7] W. Röpke, *Civitas Humana* (1946) 173.

[8] Ch. De Visscher, *Théories et réalités en droit international public* (4th ed. 1970) 33 *et seq.*, 75 *et seq.*, 111 *et seq.*, 116 *et seq.*, 151 *et seq.*, 191 *et seq.*

ous causes prompted an accumulation and concentration of power that was unfettered by the moderating ideas found in the tradition of the Middle Ages. Through the sublimation of the political allegiance of subjects and of politics itself, this concentration subverted the exercise of all public functions from its human ends towards power-oriented security goals. It is only in the light of the profound disruption of the fabric of social organisation; of the heightened politicisation of public order relations at the expense of law and of moral values culminating in irreconcilable ideological clashes; and of the progressive dehumanisation of political designs, that the true place and role of the phenomenon under study can be properly examined. Thus one has to be aware that if terrorist deeds are criminal, they are also political to the highest degree[9]. This proximity to political struggle explains why the suppression of terrorism rested for a long time on extremely decentralised decision-making, as old concepts like the "Belgian clause"[10] or other aspects of extradition law show.

3. Since the 1960s, at which time the proliferation of terrorist acts had reached an alarming level[11], efforts aimed at the repression of terrorism abounded. There are, of course, treaty-based means, which will be examined in the next chapter. But the last decade saw the

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[9] Political motivation is held as a constitutive element by a substantial part of the doctrine: See, e.g., T. Stein, International Measures Against Terrorism and Sanctions by and Against Third States, 30 *Archiv des Völkerrechts* 1992, 40; J.F. Murphy, Defining International Terrorism: A Way out of the Quagmire, 19 *Israel YBHR* 1989, 13 *et seq.*; J.F. Murphy, *State Support of International Terrorism: Legal, Political and Economic Dimensions* (1989) 113; T.M. Franck / B.B. Lockwood, Preliminary Thoughts Towards an International Convention on Terrorism, 68 *AJIL* 1974, 78-80; *Ad hoc Committee on International Terrorism*, Analytical Study by the Secretary General on the Basis of the Observations of States Submitted in Accordance with GA Resolution 3034 (XXVII), UN Official Records, A/AC.160/2 (1973), 6 *et seq.*, notably the statements of France, the Federal Republic of Germany, Italy, the Netherlands and the United Kingdom. For an opposing view, see: K. Skubiszewski, Definition of Terrorism, 19 *Israel YBHR* 1989, 50-51; M. Williams / S.J. Chatterjee, Suggesting Remedies for International Terrorism, Use of Available International Means, 5 *International Relations* 1976, 1072. Other authors explicitly refer to social, religious, racist, nationalistic or philosophical motives: e.g., T. Herzog, *Terrorismus - Versuch einer Definition und Analyse internationaler Uebereinkommen zu seiner Bekämpfung* (1991), 106; E. David, Le terrorisme en droit international, *in* Colloque de l'Université libre de Bruxelles, *Réflexions sur la définition et la répression du terrorisme* (Bruxelles 1974) 113, 125. The International Law Commission has avoided referring to the subjective element in its Draft Code of Crimes against the Peace and Security of Mankind (13th Report of D. Thiam); Report of the ILC on the Work of its 47th Session, UNGAOR, Supplement No. 10 (A/50/10), 57, para. 108.

[10] On this clause, see P. Mertens, L'"introuvable' acte de terrorisme, *in* Colloque de l'Université libre de Bruxelles, *supra* note 9, 27. Other texts on non-extradition for political offences may be found in B. De Schutter, *Bibliography on International Criminal Law* (1972) 123-128.

[11] See *infra*, footnote 16.

opening of a rather more political avenue: through its increasingly frequent presence on the agenda of various international summits (for instance at the G-7), the topic has been addressed through several resolutions or other concerted acts, more flexible in form than treaties. The long list of such policy-generating summits include those of Tokyo (1986), Paris (1987), Venice (1987), Toronto (1988), Paris again (1989), London (1991), Charm el Cheik (1996), Lyon (1996), and the recent ministerial meeting convened in Paris on 30 July 1996, following the explosion aboard TWA Flight 800[12]. One finds there a growing and manifest intent to efficiently combat terrorism and swiftly bring alleged culprits to justice[13].

One cannot appreciate the legal problem of international terrorism and the universal jurisdiction to which it may give rise, without bearing in mind the numerous texts of unequal legal value which these summits and other policy-oriented bodies generate. Before reflecting state practice, these texts indicate the existence of *opinio necessitatis* which indeed may on occasion be termed *opinio iuris*. If in this context essence often precedes existence, international law is nonetheless not indifferent to the former. The constant reformulation of opinion resulting from the activities of political and legal actors gives to this branch of international law a dynamic and sometimes somewhat elusive character. Hence the added interest of assessing the tendencies and general evolution of facts in the final part of this paper. The predominance of the postulate (*opinio necessitatis vel iuris*) over actual legally relevant practice stems ultimately from the essentially political nature of terrorism. Here the divergence between law and politics, which is in many respects unavoidable, is less accentuated than in areas more remote to the action and ultimate ends of power. Outside the context of purely conventional law, these texts and statements of opinion lend to the legal regulation of terrorism a distinctly teleological bent, as is generally the case with the elaboration of legal rules in areas where political considerations prevail over formal and technical ones. These texts and statements of opinion also reveal an increasing dualism between conventional and customary law on terrorism. Around a core of hard law there is a progressive coagulation of soft law. The above leads into a fairly open and broad enquiry, necessary to appreciate the phenomenon in its full actual range. This does not always fit comfortably into traditional legal logic.

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[12] One can find a summary description of the agenda of these summits in *Le Monde*, 31 July 1996, no. 16021, 2. See also, e.g., E. McWhinney, *Aerial Piracy and International Terrorism* (2nd ed. 1987) 163-165.

[13] See the declarations at the last Summit of Paris, *Financial Times*, 31 July 1996, 1; *Le Monde*, 31 July 1996, no. 16021, 1-2; *Neue Zürcher Zeitung*, 31 July 1996, no. 176, 1-2.

4. Countless articles have been written on terrorism, but, to this author's knowledge, none has dealt specifically with the question of how it could have already given rise, *de lege lata*, to universal criminal jurisdiction. Current developments in the practice of countervailing measures against terrorism indicate a higher degree of coordination and constraint in repressive policies. New trends in international law also bear witness to the growing extension of the realm of universal jurisdiction in this field. Given the lack of centralisation of organs responsible for the application and administration of international criminal law, the functions of repression are devolved to domestic judicial systems. There may be no instance better suited to illustrate how domestic law and its institutions can be needed to buttress international law and ensure its full concretisation: whether explained as the exercise of a constitutional delegation ("*dédoublement fonctionnel*")[14], or merely accepted as an empirical element devoid of any deeper juridical justification[15], the fact remains one of the most striking features of contemporary international criminal law.

Our task in the next few pages will be to evaluate the role of universal jurisdiction in matters of international terrorism today. In other words, in international law as it currently stands, can a state claiming no particular link with either the crime, its authors, or its victims, prosecute and eventually condemn a presumed terrorist whose person it has duly seized?

Our method needs however to be well understood. It is not possible here to undertake an in-depth study of the subject. The relevant factors and sources are today both too numerous and diverse. It is thus with a view to commenting on a preliminary classification that this article will proceed. The aim is to ascertain the legal categories, which at different levels of generality, are relevant to questions of universal jurisdiction for terrorism; to analyse the existing texts both with regard to their breadth *ratione personae* and the rules of jurisdiction they institute; to ascertain the direction of the legal and political curve of events, the importance of which has already been stressed; and finally to insist upon the limits of formal legal constructions in an area which is incessantly subject to various *considérations d'opportunité*.

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[14] G. Scelle, *Précis de droit des gens* (vol. I, 1932) 54 *et seq.*; G. Scelle, Règles générales du droit de la paix, 46 *RCADI* 1933-IV, 358-359; G. Scelle, Théorie et pratique de la fonction exécutive en droit international, 55 *RCADI* 1936-I, 91 *et seq.*, especially 99-100; G. Scelle, *Manuel élémentaire de droit international public* (1943), 21-2. See *infra*, footnote 92.

[15] On this point, B. Conforti, Cours général de droit international public, 212 *RCADI* 1988-V, 9 *et seq.*; B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993), 3 *et seq.*

II. The General Framework for Suppression of Terrorism on the International Plane: a Network of Particular Treaties

1. For reasons which will be explained later, the international law regulating the repression of terrorism is mostly treaty-based. Our query must therefore begin with an examination of the legal regime set up by these instruments. No such study can be endeavoured without devoting some attention to the definition of terrorism, a point on which discordant opinions are voiced both in legal writings and in the political arena. A reasonably clear and certain definition of the concept itself is essential to the implementation of a regime of penal sanction and a prerequisite to understanding the scope and application of criminal jurisdiction. Furthermore, a definition in this context can (and indeed must) specifically differ from other definitions of the same phenomenon be it in the sphere or in that of other sciences.

2. The quantitative and qualitative upsurge in terrorist activities noticeable since the end of the 1960s[16] could not be countered efficiently at the international level as long as a global understanding of the phenomenon of terrorism was sought[17]. Such endeavours generated insoluble problems of definition of terrorism or terrorist acts[18], as

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[16] For a chronology of events, see E.F. Mickolus, *Transnational Terrorism - A Chronology of Events, 1968- 1979* (1980). For later developments, one can consult the annual reports of the US State Department, *Patterns of Global Terrorism*, published in *Terrorism, Documents of International and Local Control*, vols. 1-12, New York, 1979-1997 (continuing series). For the instruments of repression, see *ibid.* For municipal legislation, see Y. Alexander/A.S. Nanes (eds.), *Legislative Responses to Terrorism* (1986). A collection of documents can be found in Y. Alexander (ed.), *International Terrorism: Political and Legal Documents* (1992).

[17] Franck/Lockwood, *supra* note 9, 69 *et seq.*, 88; A.V. Lowe / J.R. Young, Suppressing Terrorism under the European Convention: A British Perspective, 25 *NILR* 1978, 306-307; S.A. Williams, International Law and Terrorism: Age-Old Problems, Different Targets, 26 *Canadian YBIL* 1988, 87 *et seq.* *Contra*: L. Gross, International Terrorism and International Criminal Jurisdiction, 67 *AJIL* 1973, 509.

[18] On the definition of terrorism, see, among others: Murphy, Defining International Terrorism, *supra* note 9, 13 *et seq.*; Skubiszewski, *ibid.*; V.S. Mani, International Terrorism: Is a Definition Possible?, 18 *Indian JIL* 1978, 206 *et seq.*; R.R. Baxter, A Sceptical Look at the Concept of Terrorism, 7 *Akron Law Review* 1974, 380 *et seq.*; G. Levitt, Is Terrorism Worth Defining?, 13 *Ohio Northern University LR* 1986, 113 *et seq.*; J. Dugard, International Terrorism: Problems of Definition, 50 *International Affairs* 1974, 67 *et seq.*; G. Guillaume, Terrorisme et droit international, 215 *RCADI* 1989-III, 295 *et seq.*; A.F. Panzera, *Attività terroristiche e diritto internazionale* (1978), 177 *et seq.*; J.F. Prevost, Les aspects nouveaux du terrorisme international, 19 *AFDI* 1973, 587 *et seq.*; G. Guillaume/G. Levasseur, *Terrorisme international* (1977) 62 *et seq.*; Mertens, *supra* note 10, 27 *et seq.*; David, *ibid.*, 109 *et seq.*; P. Wurth, *La répression internationale du terrorisme* [doctoral thesis] (Lausanne 1941) 27 *et seq.*; A. Sottile, Le terrorisme international, 65 *RCADI* 1938-III, 95 *et seq.*; T. Oppermann, Der Beitrag des internationalen Rechts zur Bekämpfung des internationalen Terrorismus, *Essays in Honour of H.J. Schlochauer* (1981), 496 *et seq.*; Franck/Lockwood, *supra* note

the United Nations' efforts in dealing with the tragic events that marred the Munich Olympic Games in 1972 quite plainly illustrate[19]. Obstacles naturally arose out of the political nature of the acts, in an atmosphere saturated with ideological tensions[20], made even more palpably explosive by the coterminous struggle of many movements of national liberation in the wake of decolonisation[21].

Yet other causes contributed to the standstill, be they the multiplicity of violent deeds that extended the common genre and made a single descriptive notion more difficult to achieve[22]; the very relative autonomy of terrorist offences vis-à-vis various crimes already covered under municipal criminal law[23]; the divergence between national and

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9, 72 *et seq.*; Williams/Chatterjee, *supra* note 9, 1071 *et seq.*; Stein, *supra* note 9, 38 *et seq.*; H.H. Han (ed.), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (1993) 9 *et seq.*; R. Thackrah, Terrorism: A Definitional Problem, *in* P. Wilkinson/A.M. Stewart (eds.), *Contemporary Research on Terrorism* (1987) 24 *et seq.*; G. Bouthoul, Definitions of Terrorism, *in* D. Carlton / C. Schaerf (eds.), *International Terrorism and World Security* (1975), 50 *et seq.*; S. Sucharitkul, International Terrorism and the Problem of Jurisdiction, 14 *Syracuse JIL & Commerce* 1987, 142 *et seq.*; Herzog, *supra* note 9, 17 *et seq.*, especially 106-107. See also article 1(1) of the Draft Single Convention on the Legal Control of International Terrorism, ILA, Belgrade Session, 1980, 59th Conference, 497-8, and article 24(2) of the ILC Draft Code of Crimes against the Peace and Security of Mankind, 13th Report of D. Thiam, *supra* note 9, 58 at footnote 45.

[19] See S.M. Finger, International Terrorism and the United Nations, *in* Y. Alexander (ed.), *International Terrorism - National, Regional and Global Perspectives* (1976) 323 *et seq.*; L. Migliorino, International Terrorism in the United Nations Debates, 2 *Italian YBIL* 1976, 102 *et seq.*; Murphy, Defining international terrorism, *supra* note 9, 15 *et seq.*; J.F. Murphy, United Nations Proposals on the Control and Repression of Terrorism, *in* M.C. Bassiouni (ed.), *International Terrorism and Political Crimes* (1975) 493 *et seq.*; Panzera, *supra* note 18, 112 *et seq.*; R. Lagoni, Die Vereinten Nationen und der internationale Terrorismus, 32 *Europa Archiv* 1977, 171 *et seq.*

[20] On various aspects of ideological clashes, see A. Cassese, *International Law in a Divided World* (1986). For the Third World states: M. Sahovic, Influence des États nouveaux sur la conception du droit international, 12 *AFDI* 1966, 30 *et seq.*; T.O. Elias, *New Horizons in International Law* (1979) 159 *et seq.* On the limited effects of ideological division, A. Verdross, Die Wertgrundlagen des Völkerrechts, 4 *Archiv des Völkerrechts* 1953, 129 *et seq.*

[21] See Dugard, *supra* note 18, 75-77; David, *supra* note 9, 109 *et seq.*; L.F.E. Goldie, Profile of a Terrorist: Distinguishing Freedom Fighters from Terrorists, 14 *Syracuse JIL & Commerce* 1987, 141 *et seq.*; L.C. Green, Terrorism and Armed Conflict: The Plea and the Verdict, 19 *Israel YBHR* 1989, 131 *et seq.*

[22] Sottile, *supra* note 18, 95 *et seq.*; G. Fraysse-Druesne, La Convention européenne pour la répression du terrorisme, 82 *RGDIP* 1978, 989 *et seq.* Terrorism covers anarchist acts directed against states, state terrorism, and indiscriminate violence committed in time of war. It can relate to indiscriminate bomb attacks as well as to the killing of a chosen symbolic target, etc.

[23] Mertens, *supra* note 10, 38. On this lack of autonomy of the concept of terrorism, see also J.A. Carillo Salcedo, *Les aspects juridiques du terrorisme international*, Bilan de recherches de la section de langue française, Centre d'étude et de recherche de droit international et de relations internationales, Hague Academy of International Law

international texts dealing in similar matters[24]; the uncertain role assigned to elements of subjective qualification such as intent or motive[25]; or the difficult choice of the initial point of reference, between the nature of the act (means) or its subjective and social ends (self-determination, etc.)[26]. On top of all that lay the necessary determination of criteria that would help define specifically *international* terrorism[27]. It is no wonder that the wealth of uncertainty and hypotheses thus created yielded various approaches to the definition, in academic circles as well as in international conferences[28].

a) Some choose to place the emphasis on a particular element of qualification. This was done in the International Conferences for the harmonisation of penal law that took place from 1927 to 1938, notably in Warsaw (1927), Brussels (1930), Paris (1931), Madrid (1934) and Copenhagen (1935). The criterion retained there was that of the *common danger*[29]. In article 1, paragraph 2 of the Geneva Convention for the Prevention and Punishment of Terrorism, signed under the auspices of the League of Nations on 16 November 1937, terrorism is defined in relation to the criterion of terror (*terreur*). This stance has been denounced by several authors as tautological[30].

1988 (1989) 20.

[24] Fraysse-Druesne, *supra* note 22, 989.

[25] Murphy, *supra* note 9, 22 *et seq.*; Oppermann, *supra* note 18, 499; David, *supra* note 9, 112, 119; Franck/Lockwood, *supra* note 9, 78-80. Pleading against taking into account intention, e.g., Skubiszewski, *supra* note 9, 50-51.

[26] Lowe/Young, *supra* note 17, 306.

[27] Sottile, *supra* note 18, 98-99; Skubiszewski, *supra* note 9, 49-50; Franck/Lockwood, *ibid.*, 78; David, *ibid.*, 127 *et seq.*; Wurth, *supra* note 18, 57 *et seq.*; Guillaume/Levasseur, *supra* note 18, 66-67; Prevost, *ibid.*, 589; Oppermann, *ibid.*, 501-503.

[28] A great number of definitions are listed in A.P. Schmid / A.J. Jongman (eds.), *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (2nd ed. 1988).

[29] Sottile, *supra* note 18, 113-115; Wurth, *ibid.*, 27 *et seq.*; Prevost, *ibid.*, 580-581; Guillaume/Levasseur, *ibid.*, 82-83. See also UN Official Documents, Study by the Secretariat of the United Nations, Doc. A/C.6/418, 2 November 1972, 10 *et seq.*

[30] Sottile, *supra* note 18, 95. On the 1937 Convention see Sottile, *ibid.*, 116 *et seq.*; Wurth, *ibid.*, 48 *et seq.*, 91 *et seq.*; H. Mosler, Die Konferenz zur internationalen Bekämpfung des Terrorismus, 8 *ZaöRV* 1938, 99 *et seq.*; H. Donnedieu de Vabres, La répression internationale du terrorisme: Les Conventions de Genève (16 novembre 1937), 19 *RDILC* 1938, 37 *et seq.*; V. Pella, Les Conventions de Genève pour la prévention et la répression du terrorisme et pour la création de la Cour pénale internationale, 18 *Revue de droit pénal et de criminologie et archives internationales de médecine légale* 1938, 402 *et seq.*; Panzera, *supra* note 18, 22 *et seq.*; Herzog, *supra* note 9, 170 *et seq.* 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, 5 *ZaöRV* 1945, 181 *et seq.* For the official documents: League of Nations, *Actes de la Conférence internationale pour la répression du terrorisme*, Doc. C.94. M. 47 1935 V.

A slightly different view would extract a specific criterion from the fundamental provisions of humanitarian law in times of war. Distinguishing between "absolute terrorism"[31] and "relative terrorism"[32], Eric David suggests a definition that focuses on the violation of humanitarian norms. An action is absolutely prohibited if it uses cruel or barbaric means or targets objectives that are either innocent or militarily insignificant[33]. It is then called an act of absolute terrorism.

Article 5 of the recent 1997 International Convention for the Suppression of Terrorist Bombings has taken up this criterion of terror. It reads as follows:

> "Each State Party shall adopt such measures as may be necessary (...) to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons...".

The Draft Resolution II annexed to the Resolution by which the treaty was adopted makes use of the same criterion in operative paragraph 2; see UN GA Resolution A/52/653, adopted on 25 November 1997, 10, 18. Some authors define the terrorist act through the fear, anxiety or alarm it is meant to instil: see Williams/Chatterjee, *supra* note 9, 1071: "... directed to create fear, panic and/or alarm by means of violence..."; G. Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (1982) 16: "... designed to create extreme anxiety and/or fear..."; Guillaume/Levasseur, *supra* note 18, 62: "emploi intentionnel et systématique de moyens de nature à provoquer la terreur en vue de parvenir à certaines fins". See also J. Waciorski, *Le terrorisme politique* (1939) 113: "méthode d'action délictueuse par laquelle l'agent tend à imposer par la terreur sa domination à la société ou à l'État..."; Wurth, *supra* note 18, 56; I. Blishchenko/N. Shdanov, The Problem of International Criminal Jurisdiction, 14 *Canadian YBIL* 1976, 289.

[31] David, *supra* note 9, 114 *et seq.*, characterised by the use of methods which are absolutely prohibited under the laws of war, such as indiscriminate violence.

[32] *Ibid.*, 118 *et seq.*, distinguished not by the methods used but by the context, the intentions, etc.

[33] *Ibid.*, 125: "Est terroriste tout acte de violence armée qui, commis dans un but politique, social, philosophique, idéologique ou religieux, viole parmi les prescriptions du droit humanitaire celles interdisant l'emploi de moyens cruels et barbares, l'attaque d'objectifs innocents ou l'attaque d'objectifs sans intérêt militaire". On the relationship between the prohibition of terrorism and the laws of war, see: K. Hailbronner, International Terrorism and the Laws of War, 25 *Canadian YBIL* 1982, 169 *et seq.*; C. Greenwood, Terrorism and Humanitarian Law - The Debate over Additional Protocol I, 19 *Israel YBHR* 1989, 187 *et seq.*; H.P. Gasser, Interdiction des actes de terrorisme dans le droit international humanitaire, 68 *Revue internationale de la Croix-Rouge* 1986, 207 *et seq.*; J.J. Paust, Terrorism and the International Law of War, 64 *Military Law Review* 1974, 1 *et seq.*; A.P. Rubin, Terrorism and the Laws of War, 13 *Denver JIL & Policy* 1983, 219 *et seq.*; Guillaume, *supra* note 18, 375 *et seq.*; J.A. Frowein, *Les aspects juridiques du terrorisme international*, Bilan de recherches de la section de langue anglaise, Centre d'étude et de recherche de droit international et de relations internationales, Hague Academy of International Law 1988 (1989) 75-78; J. Paust, *in* A.E. Evans/J.F. Murphy, *Legal Aspects of International Terrorism* (1978) 352-3. W.T. Mallison/S.V. Mallison, The Control of State Terrorism Through the Application of the International Humanitarian Law of Armed Conflict, *in* M.H. Livingston/L.B. Kress/M.G. Wanek (eds.), *International Terrorism in the Contemporary World* (1978) 325 *et seq.*; M. Sassoli, International Humanitarian Law and Terrorism *in* Wilkinson/Stewart, *supra* note 18, 466 *et seq.* For a critical view, see Panzera, *supra* note 18, 180-182.

b) A second doctrinal trend tries to keep various elements in balance, in a complex definition properly so called. The highly articulate description of terrorism given by the International Law Association runs as follows: a terrorist deed

> "is 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, organisations, 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 organisations, 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"[34].

Quite recently, amidst consultations surrounding the Draft Code of Crimes against the Peace and Security of Mankind, Mr. Doudou Thiam, Rapporteur to the International Law Commission, retained the following definition:

> "The following shall constitute an act of international terrorism: undertaking, organising, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such 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"[35].

As article 1 specifies, article 24 only applies so far to acts imputable to organs of the state[36].

On the other hand, a Soviet author suggested this formulation in 1988:

> "International terrorism is the use by a State or an independently acting physical person (...) of violence infringing on the international legal order and aiming at reaching internationally unlawful goals by intimidating persons who are not direct victims of an attack"[37].

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[34] See article 1(1) of the Draft Single Convention on the Legal Control of International Terrorism, ILA, Belgrade Session, 1980, 59th Conference, 497.

[35] Article 24 (2) of the Draft Code, Report of the ILC on the Work of its 47th Session, 13th Report of D. Thiam, UNGAOR, Suppl. No. 10, A/50/10/1995, 58, footnote 45.

[36] On this point, see *ibid.*

[37] U.R. Latypov, On the Definition of International Terrorism (in Russian, with English summary), *Soviet YBIL* 1988, 141. See also article 5 of the Corpus of Principles Relative to the Attitude of States towards International Terrorism, Centre d'étude et

c) A third option consists in giving up attempts to attain a single definition, focusing instead on a flexible approach. Given the extraordinary variety of the acts under scrutiny, it is deemed preferable to indicate the typical elements whose relative presence and weight define the range and provide the measuring tool required to apprehend the phenomenon. By reference to a well-known technique, such authors distinguish between central or nodal aspects (violence, means, etc.), and peripheral ones (intent, etc.)[38].

Other authors merely enumerate the criteria they consider relevant. For Skubiszewski, the terrorist act is characterised 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*)[39]. 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 (transformation in depth of existing power attributions)[40]. Herzog, who recently penned an exhaustive study on the topic, points to the following chain of elements:

i) the threat or carrying out of grievous acts of violence;
ii) by individuals not acting on behalf of a State;
iii) in the pursuit of political ends, widely defined;
iv) with the intent to induce a state of terror;
v) within the frame of a long-term strategy[41].

Qualifying elements most often mentioned are violence, means, victims, terror, and the slightly more controversial aspect of intent. Understood in a synthetic fashion, the proposed definitions do exhibit convergent characteristics and are apt to produce in the field of their convergence what could be termed a "qualified" terrorist act.

d) Lastly, we find those for whom a legal definition of such a multifaceted, wide ranging and intrinsically political phenomenon as terrorism is either impossible or useless. One needs only be reminded here of Baxter's famous words:

> "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose"[42].

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de recherche de droit international et de relations internationales, Hague Academy of International Law 1988 (1989) 17; Guillaume, *supra* note 18, 304, 306.

[38] Greenwood, *supra* note 33, 189.

[39] Skubiszewski, *supra* note 18, 42-49.

[40] Oppermann, *supra* note 18, 496-502.

[41] Herzog, *supra* note 9, 106-107; see also Stein, *supra* note 18, 40.

[42] Baxter, *supra* note 18, 380.

In a similar vein, Franck/Lockwood think that

> "Terrorism is an historically misleading and politically loaded term which invites conceptual and ideological dissonance"[43].

3. International practice is in tune with this scepticism. Given the high level of conceptual uncertainty and the numerous political obstacles that prevented the attainment of a consensus on a suitable all-encompassing definition, a *sectorial* approach with a *regional* bend was favoured. Policy-makers skirted attempts to tackle the subject of international terrorism as a whole: they opted for the conclusion of a series of agreements dealing specifically with the manifestations thereof, where and when the matter lent itself to sufficiently precise regulation and when no significant political disagreement prevailed over the urgency of events. Moreover, regional organisations were given a free rein to try to achieve within their ranks the larger political consensus required for the conclusion of treaties more ambitious in scope. Hence, the goals and the progress of codification efforts were dictated by the pressure of events and the vagaries of political opportunity[44].

In the wake of those efforts, several multilateral instruments were signed: 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)[45]; the UN Convention

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[43] Franck/Lockwood, *supra* note 9, p. 89; see also Mertens, *supra* note 10, 37-8. Levitt, *supra* note 18, 97; R.A. Friedlander, Terrorism, 9 *EPIL* 373; E. Konstantinov, International Terrorism and International Law, 31 *German YBIL* 1988, 297.

[44] On this sectorial approach and the different conventions which arose out of it, see Herzog, *supra* note 9, 169-427; Murphy, *supra* note 18, 18-22; J.F. Murphy, Recent International Legal Developments in Controlling Terrorism, 4 *Chinese YBIL & Affairs* 1984, 99-110; J. Patrnogic/Z. Meriboute, Terrorism and International Law, *Institute of Humanitarian Law, Collection of Publications*, no. 5, 1985, 4-21; Panzera, *supra* note 18, 40-92; Williams, *supra* note 17, 91 *et seq.*; Guillaume/Levasseur, *supra* note 18, 82 *et seq.*; Guillaume, *supra* note 18, 311-323. For a criticism to this nominalistic approach, see Gross, *supra* note 17, 508-511, especially 509.

[45] On these Conventions, see J.M. Breton, Piraterie aérienne et droit international public, 75 *RGDIP* 1971, 392 *et seq.*; G. Guillaume, La Convention de La Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéronefs, 16 *AFDI* 1970, 35 *et seq.*; R.H. Mankievicz, La Convention de Montréal (1971) pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, 17 *AFDI* 1971, 855 *et seq.*; K. Hailbronner, *Luftpiraterie in rechtlicher Sicht* (1972); C. Emmanuelli, Étude des moyens de prévention et de sanction en cas d'action illicite contre l'aviation civile internationale, 77 *RGDIP* 1973, 577 *et seq.*; E. McWhinney, Illegal Diversion of Aircraft and International Law, 138 *RCADI* 1973-I, 261 *et seq.*; E. McWhinney, *Aerial Piracy and International Terrorism* (2nd ed. 1987); W.D. Joyner, *Aerial Hijacking as an International Crime* Proceedings of the Conference held in the Hague in 1974 on Aviation Security

on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted via GA Resolution 3166 (XXVIII) on 14 December 1973[46]; the New York Convention against the Taking of Hostages (17 December 1979)[47]; 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[48]; and the very recent International Convention for the Suppression of Terrorist Bombings adopted via GA Reso-

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(Leyden 1987); B. Cheng, Aviation, Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports, *Essays in Honour of G. Schwarzenberger* (1988) 25 *et seq.*; Y. Alexander / E. Sochor (eds.), *Aerial Piracy and Aviation Security* (1990); Panzera, *supra* note 18, 45 *et seq.*; Guillaume, *supra* note 18, 311 *et seq.*; Herzog, *supra* note 9, 201-283. See also the *Ekanayake* case (1986), Sri Lanka Court of Appeals, 87 *ILR* 296 *et seq.* and the *Yunis (no. 2)* case (1988), US District Court, 82 *ILR* 344 *et seq.*, 347-349, confirmed by the Court of Appeals (88 *ILR* 176 *et seq.*).

[46] On this Convention, see L.M. Blomfield/G.F. Fitzgerald, *Crimes Against Internationally protected Persons: Prevention and Punishment. An Analysis of the UN Convention* (1975); M. Wood, The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 23 *ICLQ* 1974, 791 *et seq.*; F. Przetacznik, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 52 *Revue de droit international, de sciences diplomatiques et politiques* 1974, 208 *et seq.*; A.F. Panzera, La Convenzione sulla prevenzione e la repressione dei reati contro persone che godono di protezione internazionale, 58 *Rivista di diritto internazionale* 1975, 80 *et seq.*; Panzera, *supra* note 18, 77-87; Herzog, *supra* note 9, 319-342; Finger, *supra* note 19, 337 *et seq.*; J.J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention* 1979 (1990); A.C. McWillson, *Hostage-Taking Terrorism: Incident-Response Strategy* (1992).

[47] On this Convention, see R. Rosenstock, The International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism, 10 *Denver JIL & Policy* 1980, 169 *et seq.*; S. Rosenne, The International Convention Against the Taking of Hostages, 10 *Israel YBIL* 1980, 109 *et seq.*; H.G. Kausch, Das internationale Übereinkommen gegen Geiselnahme, 28 *Vereinte Nationen* 1980, 77 *et seq.*; K.W. Platz, Internationale Konvention gegen Geiselnahme, 40 *ZaöRV* 1980, 276 *et seq.*. S. Shubber, The International Convention Against the Taking of Hostages, 52 *BYBIL* 1981, 205 *et seq.*; Herzog, *supra* note 9, 343-374. See also the *Von Dardel v. USSR* case, US District Court (1985), 77 *ILR* 274.

[48] See A. Cassese, *Terrorism, Politics and Law: The* Achille Lauro *Affair* (1989). D. Momtaz, La Convention sur la répression d'actes illicites contre la sécurité de la navigation maritime, 34 *AFDI* 1988, 589 *et seq.*; G. Plant, The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 39 *ICLQ* 1990, 27 *et seq.*; C. Joyner, The 1988 IMO Convention on the Safety of Marine Navigation: Towards a Legal Remedy for Terrorism at Sea, 31 *German YBIL* 1988, 230 *et seq.*; F. Francioni, Maritime Terrorism and International Law: The Rome Convention of 1988, 31 *German YBIL* 1988, 263 *et seq.*; M. Halberstam, Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety, 82 *AJIL* 1988, 269 *et seq.*; N. Ronzitti (ed.), *Maritime Terrorism and International Law* (1990); M. Münchau, *Terrorismus auf See aus völkerrechtlicher Sicht* (1994); Herzog, *supra* note 9, 290-309.

lution A/52/653 on 25 November 1997[49].

On the regional plane, the OAS has sponsored the conclusion of the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that Are of International Significance, signed in Washington on 2 February 1971, that predates the similar UN Convention on Internationally Protected Persons of 1973[50]. Interestingly, this OAS instrument is open to non-American states[51]. Also of significance is the European Convention on the Suppression of Terrorism, signed under the auspices of the Council of Europe, and the Dublin Agreement of 4 December 1979 relative to the application thereof. Article 1 of this European Convention sports a wide-ranging definition of the terrorist acts coming under its purview[52].

Very recently, proposals have emerged aimed at transcending this sectorial approach. Thus, the UN General Assembly considers in paragraph 8 of Resolution II (Measures to Eliminate International Terrorism) reproduced as an annex to Resolution A/52/653, that it is necessary to bear in mind

> "the possibility of considering in the near future the elaboration of a comprehensive convention on international terrorism".

That this constitutes a plan of action to fill the gaps left by the various treaties, was vehemently underlined by the Indian delegate Mr. Rao at the 34th session of the Sixth Commission of the General Assembly[53].

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[49] Annex to Resolution A/52/653, 7 *et seq.*

[50] Supra, text and footnote 46.

[51] Article 9 of the Convention. On this instrument, see R.S. Brach, The Inter-American Convention on the Kidnapping of Diplomats, 10 *Columbia Journal of Transnational Law* 1971, 392 *et seq.*; P. Juillard, Les enlèvements de diplomates, 17 *AFDI* 1971, 223 *et seq.*; F. Przetacznik, Convention on the Special Protection of Officials of Foreign States and International Organizations, 9 *RBDI* 1973, 455 *et seq.*; P.P. Camargo, La protección interamericana de functionarios diplomáticos y consulares contra el terrorismo, 26-7 *REDI* 1973/4, 111 *et seq.*; Panzera, *supra* note 18, 74-77; Herzog, *supra* note 9, 310-328.

[52] On the European Convention, see C. Vallée, La Convention européenne pour la répression du terrorisme, 22 *AFDI* 1976, 756 *et seq.*; L. Migliorino, Iniziative europee nella lotta al terrorismo: la Convenzione del 27 gennaio 1977, 13 *Rivista di diritto internazionale privato e processuale* 1977, 469 *et seq.*; T. Stein, Die Europäische Konvention zur Bekämpfung des Terrorismus, 37 *ZaöRV* 1977, 668 *et seq.*; Fraysse-Druesne, *supra* note 22, 969 *et seq.*; F. Mosconi, La Convenzione europea per la repressione del terrorismo, 62 *Rivista di diritto internazionale* 1979, 303 *et seq.*; Lowe/Young, *supra* note 17, 305 *et seq.*; I. Lacoste, *Die Europäische Terrorismus-Konvention* [doctoral thesis], Freiburg i.B., (1982). H.J. Bartsch, Das europäische Übereinkommen zur Bekämpfung des Terrorismus, 30 *NJW* 1977, 1985 *et seq.*; R. Linke, Das europäische Übereinkommen zur Bekämpfung des Terrorismus vom 27 Jänner 1977, 32 *Österreichische Juristenzeitung* 1977, 232 *et seq.*; Panzera, *supra* note 18, 129-136; Herzog, *supra* note 9, 375-431.

[53] A/C.6/52/SR.34, para. 30.

Excessive optimism is, however, not warranted. During the same session of the Sixth Commission, the Swedish delegate, Mr. Roth, dryly declared his delegation's opposition to all projects of this nature[54]. This merely evidences that which already clear: there exist deep divisions concerning the subject and no resolution of this problem may be envisaged in the near future. Too many obstacles, be they technical or political, block the path that paves the way to a single anti-terrorist convention.

Terrorism is also stigmatised in the works of other international bodies, such as the General Assembly[55] or the Security Council[56], and in the International Law Commission, whose on-going projects include the elaboration of a Draft Code of Crimes Against the Peace and Security of Mankind[57].

4. The fragmentation of legal regimes and the lack of a commonly agreed definition of terrorism show how difficult it is to conceive of a universal jurisdiction over acts of "international terrorism" *tout court*. This is not to say that penal sanction is impossible in this instance. In terms of general international law, which will be dealt with below, one can identify as a terrorist act covered by a regime of international repression any action the characteristics of which can be traced to a *minimal common core* abstracted from the definitions cited above. Such action, sifted through the prism of teleological reduction, can be termed a *qualified* terrorist act. Obviously, this process of successive reduction would yield relatively few instances open to a global repression under general international law, and such a limited array would not meet the needs expressed by the international community of States and by evolving international criminal law.

One should not stop there. For universal jurisdiction can follow the various specific definitions of terrorism within the particular scope and purpose of the aforementioned treaties. The implementation of universal jurisdiction would here be abstracted from the various existing single conventional norms. It would thus follow the trend already discernible in such matters which is to privilege conventional law. One must therefore examine not only the customary regime, but also, albeit briefly, the status of treaties dealing with this subject-

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[54] A/C.6/52/SR. 34, para. 29

[55] Several GA resolutions refer to the problem of terrorism, e.g., the well-known Resolution 2625 (XXV) *Friendly Relations* of 24 October 1970 (reproduced in E. Suy, *Corpus Juris Gentium, A Collection of Basic Texts on Modern International Relations* (1992) 47-48); or Resolution 40/61 of 9 December 1985, 25 *ILM* 1986, 239 *et seq*. For other references, see *infra*, footnote 123.

[56] See *infra*, III.4.2.b.

[57] See *YBILC* 1954-II, 149 *et seq*. B.B. Ferencz, The Draft Code of Offences Against the Peace and Security of Mankind, 75 *AJIL* 1981, 674 *et seq*.

matter. The latter road, being somewhat more narrow, will be explored first.

III. The Problem of Universal Criminal Jurisdiction Applied to Acts of International Terrorism

The usual prerequisite a State needs to satisfy in order to exercise its criminal jurisdiction is the demonstration of a link between itself and either the facts in question, the effects thereof, or the authors of the alleged crime: its involvement is justified according to territoriality, personality, or security (the principle of protection). Yet 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. Crimes like piracy, the slave trade, war crimes and crimes against humanity constitute offences against the international public order (*delicta iuris gentium*)[58]. As such, they infringe upon interests and goods which are common to all members of a given society (*intérêt général*): this common interest and the seriousness of the crimes legitimise the right to engage in repressive prosecution granted to the authorities of any State that manages to apprehend an alleged culprit (*iudex deprehensionis*). This is usually termed "universal jurisdiction"[59].

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[58] On the concept of an international *"ordre public"*, see e.g., H. Mosler, The International Society as a Legal Community, 140 *RCADI* 1974-IV, 33 *et seq.*; A. Gomez-Robledo, Le jus cogens international: sa genèse, sa nature, ses fonctions, 172 *RCADI* 1981-III, 204 *et seq.*; G. Jaenicke, Zur Frage des internationalen ordre public, *Berichte der deutschen Gesellschaft für Völkerrecht* (vol. 7, Karlsruhe 1967) 77 *et seq.*; C.W. Jenks, *The Prospects of International Adjudication* (1964) 457 *et seq.*; H. Rolin, Vers un ordre public réellement international, *Mélanges J. Basdevant* (1960), especially 451 *et seq.*; W. Levi, The International *Ordre Public*, 72 *Revue de droit international, de sciences diplomatiques et politiques* 1994, 55 *et seq.*

[59] On the universal jurisdiction, see particularly the excellent article by K.C. Randall, Universal Jurisdiction under International Law, 66 *Texas LR* 1988, 785 *et seq.* See also R. Higgins, General Course on Public International Law: International Law and the Avoidance, Containment and Resolution of Disputes, 230 *RCADI* 1991-V, 90-100; O. Schachter, International Law in Theory and Practice, 178 *RCADI* 1982-V, 262-265; M. Akehurst, Jurisdiction in International Law, 46 *BYBIL* 1972/3, 160-166; G. Guillaume, La compétence universelle, formes anciennes et nouvelles, *Essays in Honour of G. Levasseur* (1992) 23 *et seq.*; D. Oehler, *Internationales Strafrecht* (2nd ed. 1983) 519-545; D.W. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 53 *BYBIL* 1982, 11-14; F.A. Mann, The Doctrine of Jurisdiction in International Law, 111 *RCADI* 1964-I, 95; L. Oppenheim, *International Law* (9th ed. by R.Y. Jennings/A. Watts, 1992) 469-470; B.H. Oxman, Jurisdiction of States, 10 *EPIL* 281; B. Graefrath, Universal Criminal Jurisdiction and an International Criminal Court, 1 *EJIL* 1990, 67 *et seq.*; 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, 1987) 254-258, para. 404; Harvard Draft, Jurisdic-

A. Universal jurisdiction in conventional law

1. One finds in the aforementioned instruments, with the sole exception of the 1963 Tokyo Convention, a particular type of universal criminal jurisdiction. It is expressed in a twofold obligation, binding the state either to try or to extradite an alleged culprit (*aut dedere, aut persequi*; *aut dedere aut judicare*)[60].

This is best expressed in a formula found in article 7 of the Hague Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft:

> "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"[61].

In this context, the exercise of criminal jurisdiction is subjected *exclusively* to two sufficient conditions: the presence of the alleged culprit on the territory of the state, and that state's unwillingness or incapacity to proceed to the extradition[62]. The states parties to such agreements must adjust their domestic law in a way that allows them to prosecute accordingly[63].

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tion with Respect to Crime, 29 *AJIL* 1935, *Suppl.*, 573-592. See also the detailed analysis by the Australian High Court in the *Polyukhovich v. Commonwealth of Australia et al.* case (1990), 91 *ILR* 40 *et seq.*, 117 *et seq.*

[60] On this rule, see M.C. Bassiouni/E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995). Guillaume, *supra* note 18, 348 *et seq.*, 354 *et seq.*; Centre d'études, *supra* note 23, 39 *et seq.*, 78 *et seq.*; Panzera, *supra* note 18, 145 *et seq.* See e.g., articles 7 of the 1970 Hague and 1971 Montreal Conventions; article 7 of the 1973 UN Convention on Internationally Protected Persons; article 5 of the 1971 OAS Convention; article 8(1) of the 1979 Convention against the Taking of Hostages; article 10(1) of the 1988 Rome Convention on the Safety of Maritime Navigation; and articles 6, 7 of the 1977 European Convention for the Suppression of Terrorism; see also articles 9 and 10 of the 1937 Geneva Convention for the Suppression of Terrorism.

[61] Italics added. For the text of the Convention, see 860 *UNTS* 105 *et seq.* or 10 *ILM* 1971, 133 *et seq.*; the French version may be found in 75 *RGDIP* 1971, 297 *et seq.*

[62] Guillaume, *supra* note 18, 368.

[63] See e.g., article 4(2) of the aforementioned Hague Convention; article 5(2) of the 1971 Montreal Convention; article 3(2) of the 1973 UN Convention on Internationally Protected Persons; article 6 of the 1977 European Convention on the Suppression of Terrorism; article 5(2) of the 1979 Convention against the Taking of Hostages (1979); article 6(4) of the 1988 Rome Convention on the Safety of Maritime Navigation; and articles 6(4) and 8(1) of the 1997 International Convention for the Suppression of Terrorist Bombings. On the *travaux préparatoires* of this last convention, see the Report of the *Ad Hoc* Committee established by GA Resolution 51/210 of 17 December 1996, UNGAOR, 52th Session, Suppl. no. 37 (A/52/37), 55-6 (article 6, then article 5); 58-59 (article 8, then article 7). Guillaume, *supra* note 18, 351-352; Panzera, *supra* note 18, 157-161.

2. This system of repression has generally been interpreted as establishing a regime of universal jurisdiction through conventional means[64]. Some nuance this affirmation by speaking of a "particular" universal jurisdiction, or by terming the jurisdiction "quasi-universal"[65]. The use of such words as "quasi-" or "particular" in reference to a phenomenon usually denotes an *a priori* conception of its form and scope. Here, this *a priori* conception is attached to the very notion of universal jurisdiction. It may indeed be held that universal jurisdiction rests upon norms that are themselves of universal character, that is, on general international law only. Only then could one speak of a jurisdictional basis which is, strictly speaking, universal *ratione personae*,

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[64] Guillaume, *supra* note 18, 350 *et seq.*; Guillaume, *supra* note 56, 33-34; Panzera, *supra* note 18, 160; A. Cassese, The International Community's 'Legal' Response to Terrorism, 38 *ICLQ* 1989, 593. Final Document of the Conference of Syracuse (1973) *in* Bassiouni, *supra* note 19, XIX; B. de Schutter, Problems of Jurisdiction in the International Control and Repression of Terrorism, *in* Bassiouni, *ibid.*, 388; Sucharitkul, *supra* note 18, 171; Y. Dinstein, Terrorism As An International Crime, 19 *Israel YBHR* 1989, 69-70; T. Treves, *La giurisdizione nel diritto penale internazionale* (1973) 287 *et seq.*; H. Labayle, Droit international et lutte contre le terrorisme, 32 *AFDI* 1986, 117; H. Labayle, Sécurité dans les aéroports et progrès de la collaboration internationale contre le terrorisme, 35 *AFDI* 1988, 719-721; Herzog, *supra* note 9, 235-236; Oppenheim, *supra* note 56, 470; G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht* (2nd ed., t. I/1, 1989), 321-322; A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd ed. 1984), 779; Graefrath, *supra* note 56, 87; Akehurst, *supra* note 56, 161; Randall, *supra* note 56, 819; Conseil de l'Europe, *supra* note 56, 16; *Restatement Third of the Foreign Relations Law of the United States*, *supra* note 56, 255-257. 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: Article 4 of the Draft, see *YBILC* 1987-II, Part 1, 3-4; *YBILC* 1993-II, Part 2, 107; Report of the ILC on the Work of its 46th Session, UNGAOR, Suppl. No. 10 (A/49/10), 78. 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 article 316(c) of the German Criminal Code implementing the 1970 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*, European Commission on Human Rights, 100 *ILR* 670-1; or the *Yunis (no. 2)* case (1988), US District Court, 82 *ILR* 348-9, confirmed by the Court of Appeals, 88 *ILR* 176 *et seq.*, 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, para. 54, in the context of the recent international convention on terrorist bombings.

[65] Oxman, *supra* note 56, 281, and Williams, *supra* note 17, 91, for example, hold that this system bears a close resemblance to that of universal jurisdiction, without quite attaining it. A distinction is also introduced by Oehler, *supra* note 56, 532-533, 497 *et seq.*; Higgins, *supra* note 56, 98, expresses it as follows:

> "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...".

attaching to any prosecutable individual anywhere (the classical example being that of piracy *iure gentium*, i.e. for the high seas). But what really counts for universal jurisdiction is not universality *ratione personae*: it is the absence of any specific link required for prosecution by a given state. Thus, 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. It is in fact generally admitted that a multilateral treaty can create to the benefit of its parties such a universal jurisdiction[66].

At first glance, if one does not focus more specifically on the status of third states[67], it would appear 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*)[68]. In other words, the Convention, through its jurisdictional provisions, creates and delimits a unique legal territory between the parties regarding the crime or crimes it seeks to repress[69].

The system of universal jurisdiction provided for by these conventions has other peculiarities. As compared to general international law, the requirements for exercising universal jurisdiction are stricter on the one hand but lighter on the other. In general international law, universal jurisdiction entitles States to prosecute alleged criminals, but does not force them to do so. States are empowered to proceed should they so wish. 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[70]. On the other hand, the rigidity of this obligation is somewhat softened by the alternative option, namely to extradite the alleged culprit to a State able to claim a jurisdictional link. The conven-

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[66] See e.g., Randall, *supra* note 56, 789; Mann, *supra* note 56, 95; Schachter, *supra* note 56, 262; Guillaume, *supra* note 18, 349-350, and the authors quoted in footnote 61.

[67] *Infra*, III, 2.

[68] Cassese, *supra* note 61, 593.

[69] Fraysse-Druesne, *supra* note 22, 986.

[70] See the several treaty provisions cited at footnote 60. See also Guillaume, *supra* note 18, 350-353, 367-71; Randall, *supra* note 56, 821.

tions concerned often favour this option[71].

One can then, for the purposes of the rule *aut dedere aut iudicare*, envision this universal competence as *relative*, *compulsory* and *subsidiary*. In fact, anti-terrorist Conventions have already given rise to several legislative instruments on the domestic plane, instruments that rely clearly on the principle of universal jurisdiction. For instance, article 6*bis* of the Swiss law of 17 March 1982 modifying the *Code pénal*[72], pursuant to the entry into force of the 1977 European Convention on the Suppression of Terrorism[73], incorporates the principle in Swiss law. The same is true for example of article 316(c) of the German Criminal Code adopted in compliance with the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft (1970). Countless municipal law provisions of this type could be listed to the same effect.

3. Rare are the authors that object to this conception of universal jurisdiction. Still, in her General Course on Public International Law, given at The Hague in 1991, Professor Rosalyn Higgins lent her considerable authority to the dissenters. In her view, 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[74]. Hence, such agreements would merely co-ordinate repression on those specific grounds, without creating a separate basis of universal jurisdiction.

This nominalist interpretation resembles that given to article 25 of the UN Charter (on the obligation to accept and carry out the decisions of the Security Council), as advanced by the dissenting judges in the Advisory Opinion given by the International Court of Justice in the *Namibia* case (1971)[75]. If the solution adopted in that context re-

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[71] Guillaume, *supra* note 18, 350, 353, 355 *et seq*. For the 1977 European Convention see, e.g., Fraysse-Druesne, *supra* note 22, 993 *et seq*.

[72] *Recueil officiel des lois fédérales*, 0.353.3.

[73] See the *Feuille fédérale de la Confédération Suisse*, 1982, part II, 11-12; S. Trechsel, *Schweizerisches Strafgesetzbuch* (1989) 27-28. For further examples of legislation in matters of aerial piracy, cf. Oppenheim, *supra* note 56, 479 *et seq*. Several states have introduced the principle of universality on a broader basis through their legislation: see the Northern Ireland Criminal Jurisdiction Act (1975) or the Extra-territorial Criminal Law Jurisdiction Act of the Irish Republic (1976), quoted by Oppenheim, *supra* note 56, 470, footnote 22. See also the UK Suppression of Terrorism Act (1978), 17 *ILM* 1978, 1131-1132. For other material, including the Canadian, Ecuadorian, Ethiopian, German, Norwegian, Rumanian or Swedish laws, see Oehler, *supra* note 56, 527 *et seq.*, keeping in mind that this depicts the state of the law in 1983. The Rumanian law generally submitted "acts of terrorism" to universal jurisdiction.

[74] Higgins, *supra* note 56, 98; Oehler, *supra* note 56, 539.

[75] In particular the Dissenting opinion of Judge Fitzmaurice, *ICJ Reports* 1971, 292-

mains open to controversy, such is not the case in the present one: the relevant conventions clearly establish, apart from any specific grounds they may mention, that the mere custody of an alleged culprit is sufficient to grant jurisdiction to the custodial state[76].

If the specific grounds listed in the agreements were exclusive, the purpose of these instruments, which is to fill any *lacuna* that would result in impunity for a guilty individual, would be defeated[77]. Indeed, their *effet utile* on this point would be next to naught. Their contribution would be limited to render 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[78]. Were the strict interpretation to be retained, the systematic and practical usefulness of this article would also become virtually insignificant: since one finds in almost all domestic legal systems the principles of territoriality, of personality, and of security of the State, requiring the compulsory introduction of such grounds of jurisdiction in national legislation would be meaningless, except in very marginal cases[79]. While such a narrow reading of the agreements would deprive the text of its pertinence, an interpretation that admits the existence of universal jurisdiction explains why the addition of new grounds of jurisdiction is necessary. Indeed, attempts to limit the definition of jurisdiction are unconvincing, whether one favours a literal and practical interpretation, or prefers a teleological and systematic approach.

Practice confirms that the numerous domestic instruments adopted to implement the agreements obviously mean to set up a universal ju-

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294. Compare with E. Jiménez de Aréchaga, International Law in the Past Third of a Century, 159 *RCADI* 1978-I, 119-124; J. Delbrück, Article 25 of the Charter, *in* B. Simma (ed.), *The Charter of the United Nations - A Commentary* (1994) 409 *et seq.* The Court's opinion can be found in *ICJ Reports* 1971, 52-54.

[76] See e.g., article 6 (4) of the 1988 Rome Convention; Joyner, *supra* note 48, 251-252; Francioni, *supra* note 48, 277-278, thinks that the effect of these conventional norms is practically tantamount to the grant of a universal jurisdiction. For the other conventions, see the provisions cited in footnote 60. Supporting the opinion stated here are: Graefrath, *supra* note 56, 87; Akehurst, *supra* note 56, 161-162; Panzera, *supra* note 18, 160; Guillaume, *supra* note 18, 350-352, 368.

[77] This object and purpose is underlined by Francioni, *supra* note 48, 276.

[78] See the provisions cited in footnote 60.

[79] For instance in cases relating to the passive personality principle. On this principle, see Oehler, *supra* note 56, 413-429; Oppenheim, *supra* note 56, 471-472.

risdiction[80]. This was further affirmed, for example, in the California US District Court decision on the *Layton* case (1981)[81].

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 parties. The drafters frequently made explicit as well as implicit references to the principle of universality[82]. Thus, it is not surprising to find that the vast majority of authors and official committees alike consider the rule *aut dedere aut iudicare* to be in itself a ground of jurisdiction, and not a mere cross-reference to the specific links traditionally used in such cases[83].

B. The effect of the treaties on third-party states

In order to better appreciate the scope devolved today to the principle of universality, it is necessary to examine the position of states not party to the anti-terrorist conventions[84]. Do these conventions have any effect on the legal position of third states apart from customary law based on its specific requirements of practice and *opinio iuris*? Can states initiate the prosecution of culprits on the basis of the universality principle without adhering to the instruments that provide for and organise such prosecution? Can their own nationals be prosecuted and submitted to the universal jurisdiction claimed by a state party to such a convention? Doctrinal writings answer these questions in three different ways.

(a) The first is an unqualified negative. According to this view, the rule *pacta tertiis nec nocent nec prosunt* applies strictly[85]. Universality operates only between the parties and their nationals[86], since a generalisation through custom has not yet occurred[87].

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[80] *Supra*, text and footnote 70.

[81] US District Court, Northern District, California, 509 F. Supp. 212 and 645 F. 2d. 681, quoted by Randall, *supra* note 56, 790. The judgment can also be found in B.D. Reams (ed.), *American International Law Cases, 2nd Series, 1979-1986* (vol. 5) 102 *et seq.*, 111, or in 94 *ILR* 83 *et seq.*, 94.

[82] Randall, *supra* note 56, 826, with numerous references at footnote 238.

[83] See the authors referred to in footnote 61.

[84] See the comments by Randall, *supra* note 56, 821-832; Schachter, *supra* note 56, 263-264.

[85] On the rule *pacta tertiis nec nocent nec prosunt*, see P. Cahier, Le problème des effets des traités à l'égard des États tiers, 143 *RCADI* 1974-III, 589 *et seq.*; C. Rozakis, Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law, 35 *ZaöRV* 1975, 1 *et seq.* Other references can be found in Oppenheim, *supra* note 56, 1260.

[86] See, e.g., Oehler, *supra* note 56, 520; Cassese, *supra* note 61, 593-594; De Schutter, *supra* note 61, 388; Dinstein, *supra* note 61, 70.

[87] See Goldie, *supra* note 21, 131; Dinstein, *supra* note 61, 70; Centre d'études, *supra*

(b) The second view holds that the principle *aut dedere aut iudicare* already belongs to general international law[88]. Rather than relying on the rather inconclusive international practice on the subject[89], those who defend this opinion buttress it with proclamations and normative resolutions of variable legal value[90]. They anchor it to a vision of the international community as *civitas maxima*, whose role is to safeguard vital interests common to all its members. In this view, the prevention (and repression) of international criminal activity unquestionably belongs to this category[91]. A slightly different version of this axiomatic reasoning suggests that the duty to try or extradite is inherent by necessary implication to 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 *dédoublement fonctionnel*[92]. Identifying the source of the definition of the offence, be it custom or a universal treaty, would become irrelevant in such a case[93].

(c) The third approach is more subtle, and is also better suited to the existing practice. It argues that the conclusion of a treaty with a general scope bears witness to the recognition by a large part of the in-

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note 23, 39.

[88] See Bassiouni/Wise, *supra* note 60, 20-50.

[89] *Ibid.*, 43 *et seq.*

[90] On UN GA resolutions and on the concept of international (conventional) legislation, *ibid.*, 46-50.

[91] *Ibid.*, 22-24, 26 *et seq.*; E.M. Wise, Extradition, the Hypothesis of a *Civitas Maxima* and the Maxim *Aut Dedere Aut Judicare*, 62 *Revue internationale de droit pénal* 1991, 109 *et seq.* For I. Detter, *The International Legal Order* (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.

[92] The term *'dédoublement fonctionnel'* was constructed by G. Scelle: it means that, absent centralised, 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 decentralised manner such functions at the international level; see G. Scelle, *Précis de droit des gens* (t. I, 1932) 55-7; G. Scelle, Règles générales du droit de la paix, 46 *RCADI* 1933-IV, 358-359; G. Scelle, *Manuel élémentaire de droit international public* (1943) 21-22.

[93] See to that effect M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) 499-508; M.C. Bassiouni, *International Extradition: United States Law and Practice* (2nd ed. 1987) 22-24; M.C. Bassiouni, The Penal Characteristics of Conventional International Criminal Law, 15 *Case Western Reserve JIL* 1983, 34-36; Bassiouni/Wise, *supra* note 57, 21, 24.

ternational community that it is urgent and legitimate to facilitate repression of a particular crime on the basis of universal jurisdiction. The agreement then becomes 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 its content to the status of a new customary rule, other legal effects may nevertheless be attached to the agreement's provisions. In that sense, it could even be considered as having certain effects on states not party to it (*Drittwirkung*). For instance, one could deduce therefrom a type of permissive value, akin to that devolved to certain resolutions of international organisations[94]. Hence, a third-party state using the margin of freedom thereby granted to establish the relevant grounds of criminal jurisdiction would, in this grey zone of uncertainty in legal determination, find support for the exercise of its authority: the benefits reaped for its unilateral claim of jurisdiction would derive from the state's insertion in the fray already set in motion by events and by the growing *opinio*. Conversely, whether or not it is a party to the convention, the state whose national is affected would find the legal effect of its eventual protest significantly diminished. The difference between parties to the convention and non-party states would reside in the fact that the latter, although eventually granted the *faculty* to proceed according to the universality principle given the general inclination to accept this exercise, would be under no *obligation* to do so.

A variation on this theme would see the treaty instituting universal jurisdiction as a declaratory instrument, through which the states of the international community acknowledge the existence of a universal jurisdiction for a given crime. The agreement serves here as a catalyst, instantly crystallising the rule into custom[95]. This new customary rule is, again, only a permissive one, that entitles the states to prosecute but does not require it of them.

The extensive critique of the merits of these doctrinal positions is not warranted here. Suffice it to say that the regulating aspects of a matter so near the core of interests held vital by the international community (*ordre public*) carry, by their very nature, a measure of objectivity (or *erga omnes* character). Thus they tend to escape the rigid constraints imposed by the relativist, bilateral and consensualist principle *pacta tertiis nec nocent nec prosunt*.

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[94] See, e.g., B. Sloan, General Assembly Resolutions Revisited, 58 *BYBIL* 1987, 114-121, or, on the effects of normative resolutions, B. Sloan, *United Nations General Assembly Resolutions in our Changing World* (1991).

[95] On this third approach, see Randall, *supra* note 56, 821-832. An excellent synthesis can be found in Schachter, *supra* note 56, 263. On the concept of 'crystallisation of custom', see E. Jiménez de Aréchaga, *supra* note 75, 16-18.

C. Universal jurisdiction in customary international law

1. Leaving aside the problem of the effects of treaties on third parties to tackle the question directly as a matter of customary law, one must conclude that, in this context, many factors prevent the rapid growth of practice and its consolidation into custom.

a) The first of these factors is the absence of a widely accepted general *definition of terrorist acts* in international law. This problem is reinforced by the ever-evolving shapes taken by terrorism, making the phenomenon both adverse to the reduction into a series of very specific conventional definitions, and difficult to grasp with the somewhat blunt tools of general international law that has grown increasingly dependent upon the written texts. As the highly destructive attacks made against various sites of great import to the universal cultural heritage (for example, the Uffizzi of Florence) in 1993 show, law is at pains to keep pace with the unfolding of events[96].

b) A second factor is the *differences between legal régimes* and the lack of co-ordination that can ensue. They are particularly numerous in the field of international terrorism, whether in the multiplicity of specific instruments or regional policy tools (Council of Europe, OAS, etc.), or in the vast array of domestic legislation. Moreover, since terrorist acts are also committed in spaces not placed under the sovereignty of any one state (the high seas, air space over the high seas or the exclusive economic zones), conventional mechanisms are seen as the only or the best suited way to deal with the regulation and suppression thereof. Hence the further growth of normative pluralism.

c) Among further factors, one can mention the following: the scarcity of instances of practice, given the subsidiarity and the exceptional character of the exercise by a state of such universal jurisdiction; the heavy influence of political or opportunity considerations, that tend to hinder the attainment of legal regularity and coherence; and the increased specificity imparted upon the topic by the complex intermingling of international law requirements and domestic law applications, that diminish the general character of facts susceptible to serve as concrete elements for the establishment of custom.

The result is too often a legal vacuum between, on the one hand, agreements with too specific an object, and on the other, insufficiently defined, sluggishly materialising customary rules. This in turn favours the recourse to conventional means of dealing with the issues, a tendency that further slows down the development of customary law. As an author rightly observed, the recourse to treaties is particularly

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[96] This is particularly true of the sectorial or regional conventional law; see Gross, *supra* note 17, 509.

pronounced where, as he says in the original French version,

> "la pesée directe d'une situation de fait nouvelle s'impose à la réglementation par son effectivité indiscutable, alors que le mouvement trop lent du droit coutumier ne suffit plus aux besoins d'un monde qui se transforme avec une rapidité sans précédent"[97].

Criminal law's particular requirement for legal security contributes towards favouring conventional processes over customary international law.

2. To appreciate the legal situation prevailing in this field, one also has to bear in mind that the subject-matter calls more easily for general statements expressing *opinio iuris* - be it through declarations, resolutions, conventional drafts or treaties - than for consistent and concrete instances of practice. The situation is not unlike that of the law relating to the use of force, as analysed by the ICJ in the *Nicaragua* case[98]: the preponderance of political considerations prevent the picture of actual practice from disclosing the same degree of coherence and legal uniformity than in other branches of international law. Hence, any evolution in this field of law would rely more heavily upon policy-statements and conventional norms than upon actual practice in the classical sense. This, in turn, shows how the evaluation of the conditions for establishing international customary norms is linked to the concrete circumstances prevailing in a particular branch of international law. Given the predominance of the particular over the general element in international legal relations[99], the formation of an international customary rule is more heavily dependent than elsewhere upon the particular shape of the legal or factual environment. This explains the existence of a variable scale of criteria and processes for its creation. Such flexibility imparts international custom with the ability to cement the heterogeneous elements and areas of the legal order in which it operates.

3. Therefore, the present state of international law in the matter of terrorism and universal jurisdiction cannot be usefully described without taking into account its dynamics. More than elsewhere we are witnessing the projection of a will which has assigned itself the role of a creator by a process in which essence precedes existence. The rarity and ambiguities of actual facts make it necessary to take account of a

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[97] de Visscher, *supra* note 8, 298.

[98] *ICJ Reports* 1986, *Merits*, 97 *et seq.*

[99] See, e.g., J.L. Brierly, *The Outlook for International Law* (1944) 39-45; de Visscher, *supra* note 8, 165-166, 421-2; F. Berber, *Lehrbuch des Völkerrechts* (2nd ed., vol. I, 1975) 22 *et seq.*; A. Ross, *A Textbook of International Law* (1947) 58-59; A. Verdross, Abstrakte und konkrete Regelungen im Völkerrecht, 4 *Völkerrecht und Völkerbund* 1937/8, 212 *et seq.*

series of declarations and texts which reveal this will. Only these declarations and texts are capable of offering a unity of view likely to give grounds to the process of generalisation specific to legal norms. True, a dynamic conception is in any case inherent to the notion of custom. And it is also true, as has been said by an eminent lawyer, the role of a jurist is not merely to register facts, but to try to discover the curve along which such facts evolve, and where this curve will eventually lead[100]. In our context, the examination of facts, in the light of the recent trends that help to delineate their curve, reveals a significant strengthening of the notion of universal jurisdiction in the fields of international criminal offences in general[101], and of terrorist acts in particular[102].

Indeed, general law, while it does not yet prescribe any specific measures, has attained the plasma-like state in which it has probably ceased to prevent the exercise of a mere faculty to prosecute terrorists on grounds of the principle of universality[103]. As an alternative path, one could endeavour to show that the *opinio iuris* attached to a rule strictly prohibiting such conduct has disappeared over time. These are but two facets of the same demonstration.

In the analysis of the relevant practice in the area of universal jurisdiction for acts of terrorism, we shall now appraise the several elements already indicated in their movement and direction. Their weight might well not be sufficient for concluding that they provide a firm basis for customary law, but that does not preclude their having some intermediate legal effects.

4. Before we turn to customary international law, a major difficulty arising at the level of general international law must be noted. Universal jurisdiction in general, and for terrorism in particular, is fraught with dangers that are not negligible. If one considers the lack of a uniform and authoritative definition of terrorism in international law in the light of the principle *nulla poena sine lege preavia*, and the conspicuous differences of administration of justice in the various states, the risk of developing normative anarchy and highly dissimilar prosecution and sentencing practices is indeed great. To a certain extent, international law is familiar with this state of affairs: often lacking proper organs for its implementation, it then provides for a *renvoi* to municipal organs. But in a matter such as conferring or rec-

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[100] N. Politis, *Les nouvelles tendances du droit international* (1927) 6.

[101] See Randall, *supra* note 56, 785 *et seq.*; Dahm/Delbrück/Wolfrum, *supra* note 61, 322; Graefrath, *supra* note 56, 72-73, 80 *et seq.*; Schachter, *supra* note 56, 262-265.

[102] See Randall, *supra* note 56, 789-790, 815 *et seq.*; *Restatement Third*, *supra* note 56, 255-257; Schachter, *supra* note 56, 264; Oppenheim, *supra* note 56, 470.

[103] Oehler, *supra* note 56, 538, speaks out against any unilateral assumption of jurisdiction not grounded in a treaty or an established custom.

ognising the power to prosecute crimes in the common interest of nations, one might prefer that municipal law and organs limit their role to the execution of legal norms and demands sufficiently circumscribed by international law.

How then could this be achieved for terrorism, given the uncertainties surrounding the very concept? On the one hand, as has already been said, it seems possible to refer to the several specific acts defined in the anti-terrorist conventions, that form a small but clearly defined *corpus delictorum* in the field of international terrorism; on the other hand, it would be necessary to include those grave acts of indiscriminate or selective violence undertaken for political ends *lato sensu* that satisfy the small core of criteria generally recognised in doctrine and practice as describing the essence of terrorism, acts that have been termed "qualified" terrorist acts in the above pages[104]. Many uncertainties would obviously remain, but their further analysis lies beyond the pale of the present study.

D. New trends in international law and the practice of states towards criminal jurisdiction on acts of international terrorism

1. International law's new orientation towards the extension of the principle of universality is perceptible in practice. The extraordinary growth of this normative *corpus* has often led to the conclusion that a universal jurisdiction existed for all manners of terrorist acts. Many codification projects bear traces of this view.

1. a) In the 1980s, through its work on the Draft Code of Crimes Against the Peace and Security of Mankind[105], the International Law Commission, attempting to circumscribe the field of international criminal offences, included in the list of crimes the type of terrorist activity whose regulation had gained clear State support. This has been thought proper mainly for acts already covered by more specific agreements[106]. Building on ideas proffered in its project of 1954[107], the ILC Rapporteur added in 1995 an article 24 that deals with terrorism

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[104] See *supra* our chapter devoted to the anti-terrorist conventions.

[105] On recent aspects of these drafts, see M.C. Bassiouni, The History of the Draft Code of Crimes Against Peace and Security of Mankind, 27 *Israel LR* 1993, 247 *et seq.*; J. Crawford, The ILC's Draft Statute for an International Criminal Court, 88 *AJIL* 1994, 140 *et seq.*; C. Tomuschat, A System of International Prosecution is Taking Shape, 50 *International Commission of Jurists Review* 1993, 56 *et seq.*; C. Warbrick, Current Developments in International Criminal Law, 44 *ICLQ*, 1995, 466 *et seq.*

[106] *YBILC* 1993-II, Part 2, 106-107; *YBILC* 1994-II, Part 2, 38, 41, Article 20(e) of the Draft.

[107] Article 2(6) of the 1954 Draft, *YBILC* 1954-II, 151.

in general to the extent it is state-sponsored[108]. Undeterred by doubts raised by certain members as to the feasibility and the opportunity of such a course, the ILC had reached for a global understanding of the phenomenon. Since then the Commission has reduced the scope of coverage of the Code in the interest of its rapid adoption and of obtaining support by governments. Thus the general provision dealing with state terrorism seems to have been definitively renounced[109].

In matters of repression, the ILC explored two possible avenues: one is institutional, and leads to the creation of a new adjudicatory body, competent to deal with criminal acts at an international level[110]; in

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[108] Report of the ILC on the Work of its 47th Session, *supra* note 9, 56-59. Article 24 reads:

> "1. An individual who, as an agent or as a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced to..
> 2. The following shall constitute an act of terrorism: undertaking, organising, 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" (*ibid.*, 58, footnote 45).

[109] For details, see the Report of the ILC on the Work of its 48th Session, UNGAOR, Suppl. No. 10 (A/51/10), 12, para. 40.

[110] *YBILC* 1990-II, Part 2, 19 *et seq.*; *YBILC* 1991-II, Part 1, 41 *et seq.*; *YBILC* 1992-II, Part 1, 52 *et seq.*; *YBILC* 1993-II, Part 2, 14 *et seq.*, 100 *et seq.*; *YBILC,* 1994-II, Part 2, 20 *et seq.* In article 20(e) of the Draft Statute for an International Criminal Court presented by the ILC, the jurisdiction of this court will include

> "crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern";

YBILC, 1994-II, Part 2, 38. The Annex mentioned in this text lists as crimes pursuant to treaties as provided for in article 20(e):

> "2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft...;
> 3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation...
> 5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents...
> 6. Hostage-Taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages...
> 8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (...) and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf...";

(*ibid.*, p. 68). See also the Draft of the Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/1997/WG.1/CPR.4, which adds a basis of jurisdiction for offences involving use of firearms, weapons, explosives and dangerous substances. Given the opposition that this draft elicits, it is unlikely that it will succeed. While these drafts do not touch on any competence exercised *uti singuli* by states, they do show the general interest in repression of the crimes that they define, includ-

this context terrorism has been maintained as heading within the competence of an international criminal tribunal. The other avenue, that of article 9, is more decentralised, and proposes the general application of universal jurisdiction, on the basis of the rule *aut dedere aut iudicare*, to all crimes defined in the Draft Code[111]. In this context, as mentioned above, the Commission decided not to keep a specific provision on international terrorism. This is no doubt due to the specific definition of its mission which was essentially to examine crimes linked to the state's activities. Indeed, article 24, quoted earlier, had as its object state-sponsored terrorism. Henceforth, according to the 1996 final draft, terrorism is regulated insofar as it takes the form of crime against UN and associated personnel (article 19) or in the context of war crimes (article 20(f)(iv)). Absent an international instance, or as a complement to such a body, states are vested with the exercise of a compulsory public function. Article 9 of the Draft Code reads:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual".

It has been judiciously pointed out[112] that the field of international criminal offences, expanding apace with the domain of international activities, increasingly pushes the traditional, sovereignty-borne grounds of jurisdiction (territoriality, personality) into a new mode of jurisdiction freed of specific links, with an *erga omnes* scope better suited to protect in an efficient fashion the interests felt vital by the community of States. This is but one of the ways in which the old international law of coexistence is evolving into an international law of cooperation[113].

b) Private initiatives aimed at increasing the network of international texts on the subject take a similar view. In its 59th session, held at Belgrade in 1980, the International Law Association stated, in the Preamble to its Draft Single Convention on the Legal Control of International Terrorism, that terrorism constitutes a common peril for the international community. Article 2, paragraph 3 of this instrument provides for a universal jurisdiction based on the principle *aut dedere aut judicare*[114]. In 1988, the Centre for Studies and Research in

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ing terrorism.

[111] Draft Code, Report of the ILC, *supra* note 108, 51. See also *YBILC* 1987-II, Part 1, 3-4 (article 4). On this level terrorism has been eliminated to the extent it does not partake to war crimes; cf. Art. 20(f)(iv) of the Draft Code, *ibid.*

[112] Graefrath, *supra* note 59, 72 *et seq.*

[113] W. Friedmann, *The Changing Structure of International Law* (1964) 60 *et seq.*; W. Friedmann, General Course in Public International Law, 127 *RCADI* 1969-II, 91 *et seq.*

[114] ILA, 1980, 59th Conference, 497-498.

International Law and International Relations of the Hague Academy of International Law (headed by A. Carillo Salcedo and J. Frowein) concluded, in article 4 of the body of principles proposed, that acts of terrorism targeting international networks of communication (para. 1), or the earth's environment and the common heritage of mankind such as the high seas (para. 2), affect the international community as a whole[115]. Article 5 suggests that states should adopt the principle *aut dedere aut persequi* as a general rule when individuals suspected of terrorist activities against foreign states or nationals are found on their territory[116]. The *Restatement Third* prepared by the American Law Institute acknowledges the existence of a vast universal jurisdiction aimed at offences identified in international agreements, or even at terrorist acts in general[117]. The European Committee on Crime Problems set up by the Council of Europe has also given a wide interpretation to the notion of universal jurisdiction, as found notably in the various anti-terrorist treaties[118]. These clues point to a recent surge in the common juridical conscience of the idea of extending the traditional grounds of jurisdiction.

c) The same pattern of reasoning can be identified in doctrine. In the view of numerous authors, the terrorist is a modern enemy of mankind (*hostis generi humanis*)[119]. Given the trends revealed in practice and the manifestation therein of an increasingly clearer *opinio iuris*, some authors insist that convincing arguments can be proffered to demonstrate that universal jurisdiction already belong to the *corpus* of positive law[120]; others believe that general international law has not yet attained this stage of maturity[121].

2. a) The actual field of international practice, whether manifesting itself through positive acts or meaningful abstentions, is far too vast to be effectively scanned here. A series of instances has sustained unilateral claims to jurisdiction without arousing protests from other

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[115] Centre d'études, *supra* note 23, 16.

[116] *Ibid.*

[117] *Restatement*, *supra* note 59, 254-255.

[118] Conseil de l'Europe, *supra* note 56, 15-16.

[119] See Cassese, *supra* note 61, 606; De Schutter, *supra* note 61, 379; B. De Schutter, Prospective Study of the Mechanisms to Repress Terrorism, *in Colloque*, *supra* note 9, 255; Dinstein, *supra* note 61, 56; Randall, *supra* note 56, 832.

[120] See Schachter, *supra* note 56, 264; Bassiouni/Wise, *supra* note 57, 21; Sucharitkul, *supra* note 18, 171; Detter, *supra* note 88, 175; Dahm/Delbrück/Wolfrum, *supra* note 61, 322, referring to bomb attacks; Oppenheim, *supra* note 56, 470, and footnote 22; C. van den Wijngaert, *The Political Offence Exception to Extradition* (1980) 207, including further references. In a more restrictive sense, see Randall, *supra* note 56, 815 *et seq.*, 837-9, particularly 839.

[121] See De Schutter, *supra* note 61, 388; Dinstein, *supra* note 61, 70; Goldie, *supra* note 21, 131; Higgins, *supra* note 56, 97-99.

States. It is true that their consistency and coherence is hard to gauge. For instance, Japan had already claimed, even before the 1970s and the adoption of the Hague Convention, universal jurisdiction in all matters related to the hijacking of aeroplanes[122]. Moreover, individuals have been found guilty of terrorist acts by domestic courts, even where no specific links were established with the state under the authority of which they were tried: in 1970, Sweden prosecuted a Greek citizen for the hijacking of a Greek flight between Crete and Athens forcibly re-routed to Cairo[123]; in the aforementioned *Layton* case (1981), a foreign national was tried in the United States for terrorist acts committed in Guyana and the federal district court held that states had begun extending universal jurisdiction to

> "crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy"[124].

Various states have extended the powers of repression they can exercise in accordance with their domestic legislation, by having recourse to the principle of universality. Such was the case in the United Kingdom, with laws dealing with the Irish situation[125]. These laws do not seem to have given rise to any formal protest[126].

b) On the institutional plane, norms and decisions were adopted to fight international terrorism more efficiently. Resolution 40/61 of the UN General Assembly (9 December 1985)[127] is a case in point. Coming on the heels of changes already detectable in international society and notably the new flexibility shown by the socialist régimes of Eastern Europe, the Resolution voices a clear and decisive will to combat terrorism. This will is perhaps more acutely expressed in paragraph 8, the aim of which is undoubtedly operational: States shall

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[122] 15 *Japanese Annual of International Law* 1971, 70.

[123] Case quoted by Akehurst, *supra* note 56, 162, footnote 1.

[124] See *supra* note 78.

[125] See *supra* note 70.

[126] Oppenheim, *supra* note 56, 470, footnote 22.

[127] UNGAOR A/RES/40/61 (1985); 25 *ILM* 1986, 239 *et seq.*; for the French text, see Résolutions et décisions adoptées par l'Assemblée générale au cours de sa quarantième Session, Assemblée générale, Documents officiels, Suppl. no. 53 (A/40/53), 322-323. Other normative international texts from international institutions concerning terrorism can be found in R. Friedlander *et al.* (eds.), *Terrorism - Documents of International and Local Control* (vol. I, 1979) 477-9, 485 *et seq.*, (vol. II, 1979) 9 *et seq.*, 563, 599 *et seq.*, (vol. III, 1981) 121 *et seq.*, 559 *et seq.*, (vol. IV, 1984) 121 *et seq.*, 531 *et seq.*, (vol. V, 1990) 283 *et seq.*, (vol. VII, 1995, edited by H.S. Levie) 135 *et seq.*, 223 *et seq.*, 265 *et seq.*, 313; (vol. VIII, 1995, edited by H.S. Levie) 53 *et seq.*, 173 *et seq.*, (vol. IX, 1996, edited by H.S. Levie), 3 *et seq.*, 117 *et seq.*, (vol. X, 1996 edited by H.S. Levie) 3 *et seq.*, 279, 283 *et seq.*, (vol. XI, 1996 edited by H.S. Levie) 87 *et seq.*, 195 *et seq.*, (vol. XII, 1997, edited by H.S. Levie) 25 *et seq.* For recent resolutions, see also 41 *AFDI* 1995, 515-519, 525-527.

> "cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts ..."[128].

The United States representative to the United Nations, Vernon Walters, said that this resolution was "a symbol of the new era"[129].

A decade later, on 17 February 1995, the General Assembly adopted Resolution A/49/60 (Measures to Eliminate International Terrorism), that prescribes the implementation of international and domestic measures of prevention and repression in the field[130]. This Resolution's aim is to fill any potential legal *lacuna* that could prevent effective prosecution. Since then, the UN General Assembly has adopted a series of resolutions in the context of the fight against terrorism. A case in point is Resolution 49/60 of 9 December 1994 and Resolution 50/53 of 11 December 1995. By its Resolution 51/210 of 17 December 1996 (Measures to Eliminate International Terrorism), the General Assembly set up an *ad hoc* Committee with the task

> "to elaborate an international convention for the suppression of terrorist bombings and subsequently an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism"[131].

The work of this Committee led to the adoption of the International Convention for the Suppression of Terrorist Bombings adopted on 25 November 1997[132]. In paragraph 7 of the Draft Resolution II annexed to Resolution A/52/653 adopting the Terrorist Bombing Convention one reads:

> "The General Assembly...
> Recalling that in the Declaration on Measures to Eliminate International Terrorism contained in the Annex to resolution 49/60 the General Assembly encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of *ensuring that there*

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[128] The French text is stronger on that point: States shall "coopérer plus étroitement, notamment en échangeant des informations pertinentes concernant les mesures propres à prévenir et combattre le terrorisme, *en appréhendant et en poursuivant en justice ou en extradant les auteurs de tels actes...*" (italics added).

[129] Quoted by Murphy, *supra* note 18, 19.

[130] Quoted in *Terrorism, Documents*, *supra* note 16, vol. X (1996) 13-19.

[131] Resolution 51/210, para. 9.

[132] See *supra* note 60.

was a comprehensive legal framework covering all aspects of the matter" (italics added).

In operative paragraph 6, the General Assembly calls upon all states

"to enact, as appropriate, domestic legislation necessary to implement the provisions of those Conventions and Protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts...".

In taking these positions, the General Assembly has demonstrated its will to avoid any jurisdictional gaps which could lead to impunity for perpetrators of terrorist acts.

No less significant is the position taken by the Security Council in the *Lockerbie* case, which stirred considerable debate and provoked a revaluation of the institutional balance of powers and functions within the United Nations structure[133]. On 21 December 1988, a bomb struck down a *Pan Am* flight over the Scottish town of Lockerbie, killing all 259 passengers and crew members on board. In November 1991, the authorities of the United Kingdom and United States of America accused two Libyan nationals, allegedly working on behalf of the Libyan government, of the deed and requested, among other measures, the extradition of the two individuals. Libya refused to comply on account of two arguments: firstly, its own Constitution did not permit the extradition of a Libyan citizen; secondly, the terms of the 1971 Montreal Convention[134], applicable in this case, left open the choice between extradition and prosecution to the state under whose custody the alleged culprits were held. After issuing Resolution 731, in which it enjoined Libya to answer fully and effectively the requests formulated by the two permanent members, the Security Council radically altered the situation. By adopting Resolution 748 on 31 March 1992, it chose to

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[133] See J.A. Frowein, Article 39 of the Charter, *in* Simma (ed.), *supra* note 75, 605 *et seq.*, 611-2; M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité* (1994), in particular 32 *et seq.*, 56 *et seq.*, 107 *et seq.*; M. Bedjaoui, Du contrôle de la légalité des actes du Conseil de Sécurité, *Essays in Honour of F. Rigaux* (1993) 69 *et seq.*; T.M. Franck, The Powers of Appreciation: Who is the Ultimate Guardian of United Nations Legality?, 86 *AJIL* 1992, 519 *et seq.*; E. Sciso, Può la Corte internazionale di giustizia rilevare l'invalidità di una decisione del Consiglio di Sicurezza?, 75 *Rivista di diritto internazionale* 1992, 369 *et seq.*; E. McWhinney, The International Court as Emerging Constitutional Court and the Co-ordinate United Nations Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie, 30 *Canadian YBIL* 1992, 261 *et seq.*; T. Stein, Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und dem Internationalen Gerichtshof, 31 *Archiv des Völkerrechts* 1993, 206 *et seq.*; V. Gowland-Debbas, The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 88 *AJIL* 1994, 643 *et seq.*; L. Condorelli, La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite, 77 *Rivista di diritto internazionale* 1994, 897 *et seq.*; J.E. Alvarez, Judging the Security Council, 90 *AJIL* 1996, 1 *et seq.*

[134] *Supra* note 45 and corresponding text.

ignore the fact that the Libyans had just submitted the dispute to the International Court of Justice. This Resolution states that the negative attitude of Libya, namely its failure to demonstrate by concrete action its repudiation of terrorism, is a threat to international peace and security within the meaning of article 39 of the Charter, and paves the way for coercive action open to all members of the Organisation[135].

While this important case does not relate directly to universal jurisdiction, several points useful to our study arise out of it. For one, the intervention of the Security Council clearly shows to what extent terrorism is now deemed to be an attack on essential values of the international legal and political order. The Council has even established, through a far-reaching interpretation of article 39 of the Charter[136], a direct link between the crime and one of the most fundamental values of international *ordre public* in our times, namely peace[137]. Values of this type have always been the very basis of the delegation of a universal jurisdiction enabling states to punish culprits, and it is even said to partake to the category of *ius cogens* norms[138]. Indeed, a breach

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[135] Frowein, *supra* note 127, 611. On the expansion of the Security Council's action and the ensuing widening of the meaning of Article 39's terms, see: T.M. Franck, *Fairness in International Law and Institutions* (1995) 218 *et seq.*; J.A. Frowein, Reactions by not Directly Affected States to Breaches of Public International Law, 248 *RCADI* 1994-IV, 376 *et seq.*; T.M. Franck, The Security Council and 'Threats to the Peace: Some Remarks on Remarkable Recent Developments, *in* R.J. Dupuy (ed.), *Le développement du rôle du Conseil de Sécurité, Colloque de La Haye 1992* (1993) 83 *et seq.*; P.H. Kooijmans, The Enlargement of the Concept of 'Threat to the Peace, *ibid.*, 111 *et seq.* The *Lockerbie* case is still pending before the ICJ, which has already ruled on a request for interim measures: *ICJ Reports* 1992, 3 *et seq.* For a summary of this interim judgment, see 94 *ILR* 479-486. On this order, see J. Chappez, 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, 38 *AFDI* 1992, 468 *et seq.*

[136] On the highly discretionary character of the Security Council's decisions in this matters, see 12 *UNCIO* 502 *et seq.*; *D. Tadic* case (1995), Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, case no. IT-94-1-AR72, paragraphs 28 *et seq.*; B. Conforti, Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression, in Dupuy, *supra* note 129, 51 *et seq.*; M. Bothe, Les limites du pouvoir du Conseil de Sécurité, *ibid.*, 67 *et seq.*; B. Conforti, *Le Nazioni Unite* (5th ed. 1994) 173 *et seq.*; Frowein, *supra* note 127, 607-608.

[137] See H. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 *RCADI* 1952-II, 492; L. Henkin, The Reports on the Death of Article 2(4) Are Greatly Exaggerated, 65 *AJIL* 1971, 544; E. Jiménez de Aréchaga, *supra* note 75, 87. See also A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986); A. Randelzhofer, Article 2(4) of the Charter, *in* Simma (ed.), *supra* note 127, 106 *et seq.*; M. Virally, Article 2(4) de la Charte, *in* J.P. Cot/A. Pellet (eds.), *La Charte des Nations Unies* (2nd ed. 1991) 115 *et seq.*; L.M. Goodrich/E. Hambro/A.P. Simons, *Charter of the United Nations* (3rd ed. 1969) 43 *et seq.*

[138] *YBILC* 1966-II, 247-249. See A. Gomez-Robledo, *supra* note 58, 167 *et seq.* For

of the peace with no justifiable motive is deemed an international crime of the state[139] as well as of the individual[140].

The circumstances of the Security Council's action in the *Lockerbie* case further accentuate the crucial importance given to the protection of the said values, by emphasising the urgency of an effective repression of terrorist activities. The Council has not refrained from invoking Chapter VII of the Charter to intervene, even in the face of treaty rights that contradicted its injunctions[141], not to mention a right not to be compelled to extradite one's own nationals that may already have gained customary status[142]. This urgency is made even more glaring if one considers the impact of the Council's decision, and the way in which it modified unilaterally the legal position of the parties in a pending dispute submitted to the ICJ[143].

In the face of the stand taken by the executive organ of the United Nations in this case, one can surmise that repressive action, grounded in the principle of universality and initiated *uti singuli* in accordance with traditional prosecution mechanisms, would not so easily be termed illicit or illegal. It is, after all, a way to safeguard the very values deemed essential by the Security Council in the *Lockerbie* case, without seriously infringing upon the existing inter-state order.

Detter, *supra* note 88, 175, the sanction of terrorism through universal jurisdiction flows from the *ius cogens* nature of the norm prohibiting it.

[139] In Article 19 of the Draft on the International Responsibility of States, *YBILC* 1976-II, Part 2, 89 *et seq.*

[140] See Oppenheim, *supra* note 56, 505-508, where many references can be found. See also the remarkable study by C.T. Eustathiades, Les sujets du droit international et la responsabilité internationale - Nouvelles tendances, 84 *RCADI* 1953-III, 460 *et seq.*; G. Sperduti, L'individu et le droit international, 90 *RCADI* 1956-II, 766 *et seq.*

[141] E.g., the *aut dedere aut iudicare* provision of the 1971 Montreal Convention. It may well be that, in order to derogate from such treaty rights, the Council would have to rely on articles 103 and 25 of the Charter. On article 103, cf. R. Bernhardt, Article 103 of the Charter, *in* Simma (ed.), *supra* note 127, 1116-1125; E. Sciso, On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties, 38 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 1987, 161 *et seq.*; E. Sciso, *Gli accordi internazionali confliggenti* (1986) 276-297; L. Kopelmanas, *L'Organisation des Nations Unies* (1947) 165-191. On Article 25, see Delbrück, *supra* note 75, 407 *et seq.*

[142] See Oppenheim, *supra* note 56, 955-956; C. Schachor-Landau, Extra Territorial Penal Jurisdiction and Extradition, 29 *ICLQ* 1980, 286 *et seq.* The relationship between article 103 of the Charter and customary international law is not very clear: this provision expressly refers only to treaty law; see Kopelmanas, *supra* note 135, 191-203; Bernhardt, *supra* note 135, 1118; J. Combacau, *Le pouvoir de sanction de l'Organisation des Nations Unies* (1974) 282.

[143] See, in the *Lockerbie* case, the dissenting opinion of Judge Bedjaoui, *ICJ Reports* 1992, 154 *et seq.*, and of Judge *ad hoc* El Kosheri, *ibid.*, 97 *et seq.*, 105-107. See also Bedjaoui, *supra* note 127, 75 *et seq.*, particularly 81 *et seq.*; B. Graefrath, Leave to the Court what Belongs to the Court: The Libyan Case, 4 *EJIL* 1993, 184 *et seq.*

3. Coordinated state action has also occurred to fight terrorism[144]. It has disclosed that the suppression of terrorism is viewed as an objective interest of the communal body, a development that is part of a more general trend in international law. Traditional international law operated on the relativity of juridical situations and the bilateralism of rights and obligations[145]. The legal effects produced often depended upon a complex web of individualised interactions; hence the central part played by auto-interpretation and unilateral acts such as recognition[146]. A tendency towards its progressive objectivisation has recently emerged, through the acknowledgement of the existence of an international public order, of which *ius cogens* norms, *erga omnes* obligations, and international crimes of states are sub-categories[147].

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[144] See G.M. Levitt, Collective Sanctions and Unilateral Action, *in* Alexander/Sochor (eds.), *supra* note 45, 95 *et seq.*; T. Gazzini, Sanctions Against Air Terrorism, *Conflict Studies of the Research Institute for the Study of Conflict and Terrorism*, no. 290 (1996) 11 *et seq.* State action has also focused, albeit on a broader basis than that of terrorism, on guarantees for the sanction of international crimes through the establishment of an international criminal court: see J. Stone/R.K. Woetzel (eds.), *Towards a Feasible International Criminal Court* (1970); B.B. Ferencz, *An International Criminal Court: A Step Towards World Peace*, 2 vol. (1980). On the International Criminal Tribunal for the Former Yugoslavia, see E. David, Le tribunal international pénal pour l'ex-Yougoslavie, 25 *RBDI* 1992, 565 *et seq.*; A. Pellet, Le tribunal criminel international pour l'ex-Yougoslavie: Poudre aux yeux ou avancée décisive?, 98 *RGDIP* 1994, 7 *et seq.*; P. Weckel, L'institution d'un tribunal international pour la répression des crimes de droit humanitaire en Yougoslavie, 39 *AFDI* 1993, 232 *et seq.*; K. Lescure, *Le tribunal pénal international pour l'Ex-Yougoslavie* (1994); D. Shraga/R. Zacklin, The International Criminal Tribunal for the Former Yugoslavia, 5 *EJIL* 1994, 360 *et seq.* On the International Criminal Tribunal for Rwanda, see M. Mubiala, Le tribunal international pour le Rwanda: vraie ou fausse copie du tribunal pénal international pour l'ex-Yougoslavie?, 99 *RGDIP* 1995, 929 *et seq.*; I. Bottigliero, Il rapporto della Commissione di Esperti sul Ruanda et l'istituzione di un tribunale internazionale penale, 49 *Comunità internazionale* 1994, 760 *et seq.*

[145] M. Virally, Panorama du droit international contemporain, 183 *RCADI* 1983-V, 211-212; P. Reuter, Principes de droit international public, 103 *RCADI* 1961-II, 437 *et seq.*; Verdross/Simma, *supra* note 61, 40-41; J. Combacau, Le droit international: Bric-à-brac ou système, 31 *Archives de philosophie du droit* 1986, 97-98.

[146] Virally, *supra* note 139, 52 *et seq.*, 69, 75, 169-170; H. Waldock, General Course on Public International Law, 106 *RCADI* 1962-II, 146.

[147] We follow for the present purposes the conception of international *ius cogens* which has become very largely accepted. It identifies peremptory norms with fundamental values of the international community as a whole (eventually called *ordre public*). This simple equation of *ius cogens* with fundamental values should be critically reviewed. On international *ius cogens* and related notions, see, among others, V. Starace, La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale, 153 *RCADI* 1976-V, 271 *et seq.*; Frowein, *supra* note 129, 353 *et seq.*; C. Annacker, The Legal Regime of *Erga Omnes* Obligations in International Law, 46 *Austrian Journal of Public and International Law* 1994, 131 *et seq.*; P. Picone, Nazioni Unite e obblighi erga omnes, 48 *Comunità internazionale* 1993, 709 *et seq.*; G. Gaja, Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts *in* H. Weiler/A. Cassese/M. Spinedi (eds.), *International*

Thus defined, these notions imply the recognition of a hierarchy of values and of norms in international law. They are grounded in the common idea that there exists obligations or, more generally, norms that are so essential to the values that underlie and sustain the international system that their violation, or even an attempted derogation thereof touches upon the interests of all members of the community. It was rightly argued[148] that this evolution somewhat buttressed revendications of universal jurisdiction for crimes contravening such norms of *ordre public*. Indeed, a violation of this superior legality[149], whether committed by agents of the state or by individuals, concerns all states because of the required objective protection that lies at its core. Since this is precisely where the fundamental justification for the granting of universal jurisdiction lies, one could argue that a universal jurisdictional sanction is one of the natural complements flowing from the emergence of a body of public order norms[150].

This concern appears in the vast doctrinal debate on collective counter-measures against a State accused of shirking its duty to cooperate and suppress international terrorism[151]. One has to admit that it is sustained only by scattered practice. Often quoted in this junction is the 1978 Bonn Declaration on international terrorism adopted by

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Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility (1989) 151 *et seq.*; A.J. Hoogh, The Relationship Between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective, 42 *Austrian Journal of Public and International Law* 1991, 183 *et seq.*; B. Simma, Bilateralism and Community Interest in the Law of State Responsibility, *Essays in Honour of S. Rosenne* (1989) 821 *et seq.*; B. Simma, From Bilateralism to Community Interest in International Law, 250 *RCADI* 1994-VI, 229 *et seq.* Literature on *ius cogens* is so abundant that we shall only mention here three works studying the matter in depth: Gomez-Robledo, *supra* note 132, 17 *et seq.*; S. Kadelbach, *Zwingendes Völkerrecht,* Schriften zum Völkerrecht, vol. 101 (1992); L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* (1988). For a somewhat less enthusiastic view: P. Weil, Le droit international en quête de son identité, 237 *RCADI* 1992-VI, 213 *et seq.* One must also consult the cases of *Barcelona Traction, ICJ Reports* 1970, 32, para. 33 and of *East Timor, ICJ Reports* 1995, 102, para. 29.

148 Randall, *supra* note 56, 830-831. See also Schachter, *supra* note 56, 264; Graefrath, *supra* note 56, 73.

149 A.D. McNair, *The Law of Treaties* (1961) 215.

150 The *ius cogens* character of the norm prohibiting terrorism has been recognised from early on: see, for example, the intervention of P.M. Radoynov (Bulgaria) at the ILA, 1976, 57th Conference, 122.

151 See Centre d'études, *supra* note 23, 34 *et seq.*, 63 *et seq.*, in particular 71-75; Levitt, *supra* note 138, 95 *et seq.*; Guillaume, *supra* note 18, 399 *et seq.*; Y.Z. Blum, State Responses to Acts of Terrorism, 19 *German YBIL* 1976, 223 *et seq.*; J.F. Murphy, State Self-Help and Problems of Public International Law, *in* Evans/Murphy, *supra* note 33, 553 *et seq.*, particularly 565 *et seq.* For a more restrictive view, see Stein, *supra* note 18, 38 *et seq.* See also Frowein, *supra* note 129, 416-422, who provides examples.

states parties to that economic summit[152]. The leaders of the world's seven largest industrialised democratic states announced thereby the imposition of an air traffic boycott against any country refusing to extradite or prosecute the hijackers of an aircraft[153]. A group of experts was set up to study and advise on questions of implementation of the principle enunciated in the Declaration. They submitted the *Guidelines for the Application of the Bonn Declaration*, which were agreed upon in London on 9 May 1979[154].

At the Venice Summit (1980), the participants expressed their satisfaction at the broad support garnered for the principles set out in the Bonn Declaration[155]. At the Ottawa Summit (1981), the principle was strongly reaffirmed and, for the first time, though more weakly, applied. Afghanistan was deemed at fault, for having, according to the Summit members, given refuge to Pakistani hijackers[156]. Finally, the United Kingdom, Germany and France, the only states whose carriers were operating flights to and from Afghanistan, decided to denounce the treaty establishing air traffic with that country. In Tokyo (1986), sanctions were envisaged against Libya, while the Summit members agreed to "make more effective [the Bonn Declaration] in dealing with all forms of terrorism affecting civil aviation"[157]; the formula of the Bonn Declaration was broadened beyond hijacking, to include "all forms of terrorism affecting civil aviation", including sabotage[158].

The implementation of these principles has fallen short of the expectations to which it had given rise. Apart from the Afghanistan case and up to 1997, no other attempt to enforce the principles solemnly proclaimed in the Summit Declarations was set in motion[159].

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[152] Text in 17 *ILM* 1978, 1285. See Frowein, *supra* note 23, 71-75; Levitt, *supra* note 138, 100 *et seq.*; Labayle, *supra* note 64, 134-138; G. Guillaume, Le terrorisme aérien et les sommets des sept pays industrialisés, les Déclarations de Bonn (1978) et de Venise (1987), 171 *Revue française de droit aérien* 1989, 495-501. For a more restrictive view, see Stein, *supra* note 18, 50-53. On the Bonn Declaration in general, see Herzog, *supra* note 9, 266-283; J.J. Busuttil, The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking, 31 *ICLQ*, 1982, 474 *et seq.*

[153] 17 *ILM* 1978, 1285; see Levitt, *supra* note 138, 102.

[154] *Ibid.*, 104.

[155] In the year following the Bonn Declaration, 34 other states expressed their full support for its text, while another 43 indicated approval of its underlying principle; Levitt, *ibid.*, 105, footnote 42.

[156] For the Ottawa Declaration, 20 *ILM* 1981, 956. For an account of the case giving rise to sanctions against Afghanistan, see Levitt, *supra* note 138, 108-112; Gazzini, *supra* note 138, 11.

[157] 25 *ILM* 1986, 1005; Levitt, *supra* note 138, 107.

[158] *Ibid.*

[159] This information was handed directly to the author by the Legal Bureau of the

Collective reactions to terrorism had already been advocated in some resolutions and state proposals issued through the International Civil Aviation Organisation (ICAO)[160]. Recently, other international fora or organisations have taken up the idea of collective efforts in the fight against terrorism. In the Budapest Summit Declaration on Genuine Partnership in a New Area (1994), the members of the Organisation for Security and Cooperation in Europe pledged themselves to take steps to fulfil the requirements of international agreements by which they are bound to prosecute or extradite terrorists[161]. The differences in membership and in purposes of the OSCE has to be borne in mind when comparing that declaration to the policy put forward by the G-7 countries.

Still, it seems that the idea of collective reaction to failure to extradite or prosecute terrorists, albeit in special areas, is gaining ground. This stance cannot fail to influence both general international law and the legal and political perception of the interest inherent in the prosecution of terrorists. It is thus of some significance in the context of jurisdictional aspects as well.

Furthermore, it is probable that prosecution, even if decentralised, would not give rise to the same amount of risk usually linked with unilateral State action. The exercise of criminal jurisdiction is a traditional competence of the state, firmly rooted in the municipal sphere. In that sense, it has international effects only in a derived or secondary sense (as opposed to counter-measures, for instance). It concerns individuals first, before concerning states.

E. The presumption of state freedom and the right to determine unilaterally titles of criminal jurisdiction; the theory of a reasonable link

Lastly, one other problem, rather delicate because of its higher level of abstraction, needs to be addressed here, although in all too brief and sketchy a manner. In the 1927 *Lotus* case, the Permanent Court of International Justice seemingly implied that the definition of grounds of jurisdiction on a state's territory are attributes of state sovereignty and that limits to its freedom can only be found where prohibitive rules of international law rooted in the will of states exist to prevent it. There is no obligation and hence no right, but a mere freedom, if no voluntary commitment has been made. State freedom thus precedes the common law (*in dubio pro libertate*); in a sense it is

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International Civil Aviation Organisation (fax transmission dated 15 August 1997).

[160] See Levitt, *supra* note 138, 98-99.

[161] 34 *ILM* 1995, 782.

primus ente et iure. Freedom comes deontically before Law. Thus, thought through, this would mean that a state could unilaterally set whatever title of jurisdiction it wished with the sole proviso that no other rule of international law is opposed to it. The existence of such an opposing rule would have to be established by ordinary means of proving facts which give rise to conventional or customary rules. The difficulties in doing so have already been revealed in the case of the *Lotus*, as well as in the *Norwegian Fisheries* case (1951)[162]. Thus the State claiming the validity of a title of jurisdiction unilaterally established enjoys moreover a procedural privilege. This is inevitable despite the rule *iura novit curia*, which is difficult to apply in the context of a series of acts and omissions which underlie customary law.

It was because the events in the *Lotus* case had occurred on the high seas, that the Court addressed the important and difficult question of determining if Turkey had to demonstrate an international law title enabling it to extend its jurisdiction to the matter at hand, or if this title was to be considered inherent and corollary to its sovereignty, only susceptible of limitation through prohibitive rules modelled by practice and duly received in the international legal order[163]. The Court, by favouring the freedom of the state construed international law as a limit to rather than a source of jurisdiction[164].

In a famous *dictum*, the Court says:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will (...). Restrictions upon the independence of States cannot therefore be presumed"[165];

in terms of delineating jurisdiction, the Court argues further:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an ex-

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[162] *Fisheries* case, *ICJ Pleadings, Oral Arguments, Documents*, vol. I, 377 *et seq.*, 385 *et seq.*, 400 *et seq.*, 412 *et seq.*, 425 *et seq.*, 443 *et seq.*; vol. II, 304 *et seq.*, 352 *et seq.*, 426 *et seq.*, 457 *et seq.*; vol. III, 282 *et seq.*, 298 *et seq.*, 449 *et seq.*; vol. IV, 32 *et seq.*, 245 *et seq.*, 380 *et seq.*, 420 *et seq.*, 482 *et seq.*, 490 *et seq.*, 507 *et seq.*

[163] A summary of the *Lotus* case can be found in K. Marek (ed.), *A Digest of the Decisions of the International Court* (vol. I, 1974) 342 *et seq.*, or in A.P. Fachiri, *The Permanent Court of International Justice* (2nd ed. 1932) 250-259.

[164] J. Basdevant, Règles générales du droit de la paix, 58 *RCADI* 1936-IV, 594.

[165] PCIJ, series A, no. 10, 18.

> ception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable"[166].

This statement of the Permanent Court has given rise to numerous refutations and criticisms that cannot be reviewed here in detail. Indeed, as a general rule it is indefensible[167]. Authors have criticised its Hegelian inspiration, placing the state above the law and contributing thus to the international anarchy[168]; others claimed the argument was circular, since the point is precisely to determine in a case-by-case fashion where law stops, not to postulate it *a priori*[169]; some found the principle unhelpful, since many instances of concurrent and contradictory claims or actions could not be settled according to it[170]; some found the rule especially dangerous in a system of law still fragmen-

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166 *Ibid.*, 19.

167 On the presumption of residual freedom, see U. Fastenrath, *Lücken im Völkerrecht*, Schriften zum Völkerrecht, vol. 93 (1991) 239 *et seq.*; A. Bleckmann, Die Handlungsfreiheit der Staaten, 29 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 1978, 173 *et seq.*; A. Bleckmann, Die Völkerrechtsordnung als System von Rechtsvermutungen, *Essays in Honour of H.U. Scupin*; N. Achtenberg (ed.), *Öffentliches Recht und Politik* (1983) 407 *et seq.*; H. Lauterpacht, *The Development of International Law by the International Court* (1958) 359 *et seq.*; H. Lauterpacht, Some Observations on the Prohibition of *'non liquet'* and the Completeness of the Law, *Essays in Honour of J.H. W. Verzil* (1958) 196 *et seq.*; J. Stone, *Non Liquet* and the Function of Law in the International Community, 35 *BYBIL* 1959, 124 *et seq.*; J. Stone, *Non Liquet* and the Judicial Function, *in* C. Perelman (ed.), *Le problème des lacunes en droit* (1968) 305 *et seq.* Interesting observations on the 'Lotus-rule' can be found in M. Bourquin, Règles générales du droit de la paix, 35 *RCADI* 1931-I, 101 *et seq.*; F. Castberg, La méthodologie du droit international public, 43 *RCADI* 1933-I, 342 *et seq.*; L. Le Fur, Règles générales du droit de la paix, 54 *RCADI* 1935-IV, 302; Basdevant, *supra* note 164, 593 *et seq.*; G. Salvioli, Les règles générales de la paix, 46 *RCADI* 1933-IV, 21 *et seq.*, 62; J.L Brierly, The *Lotus* Case, *in* J.L. Brierly, *The Basis of Obligation in International Law* (1968) 143-144; G.G. Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 *RCADI* 1957-II, 50 *et seq.*; G.G. Fitzmaurice, The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law, 30 *BYBIL* 1953, 8 *et seq.*; H. Mosler, Völkerrecht als Rechtsordnung, 36 *ZaöRV* 1976, 37 *et seq.*; Verdross/Simma, *supra* note 61, 388.

168 Bourquin, *supra* note 160, 105-107; Brierly, *supra* note 160, 143-144.

169 Verdross/Simma, *supra* note 61, 388.

170 Castberg, *supra* note 160, 344-345; Le Fur, *supra* note 160, 302.

tary[171]. Yet others tried to limit the scope of the rule, either to the territorial or quasi-territorial exercise of jurisdiction allegedly ascribed by the Court, with regard to the status of a ship at sea as akin to a floating portion of the state's territory[172]; to the field of activities not prohibited by international law, but not to those where rules are lacking (*lacunae*)[173]; or to the domains where the level of international cooperation has not reached a high stage[174].

Social life and law in its dynamic aspect are by necessity ultimately founded in an irreducible core of liberty[175]. Thus the *Lotus* rule cannot be held a general rule in the face of a *strictly* defined law, grounded only in conventions and custom[176], and excluding the general principles of law and social necessities which underlie the entire legal order.

Whatever the value of the *Lotus* principle[177], authors have generally tried to blunt its sharp anarchical point. The definition and exercise of extra-territorial jurisdiction always presents an international facet, as the argument goes. Hence, in order to be valid and opposable, the new initiative must conform to the rules, precepts and spirit of international law. To this effect, F.A. Mann devised the theory of "reasonable link", which holds that a jurisdictional title is relative, insofar as its existence and validity depend upon a sufficiently strong connection between the activity endeavoured and the jurisdiction claimed: the link must be stronger for the state wishing to exercise jurisdiction than with any other state voicing a concurrent claim. The theory substitutes a primacy based on the balancing of interests to the equality of titles that stems from sovereignty[178].

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[171] Le Fur, *supra* note 160, 302.

[172] PCIJ, Series A, no. 10, 24. In support of this view, Bourquin, *supra* note 160, 104-105.

[173] Salvioli, *supra* note 160, 21.

[174] Bleckmann, Die Völkerrechtsordnung, *supra* note 160, 407 *et seq.*

[175] See the vivid illustration of this point by C. Cossio, Panorama der ökologischen Rechtslehre *in* A. Kaufmann (ed.), *Die ontologische Begründung des Rechts* (1965) 279.

[176] That is, according to the *Lotus* judgment, in law flowing only from the *will* of States.

[177] Several recent instances bear witness of the contemporary pertinence of the *Lotus rule* and to its use as a basis for legal reasoning. See, e.g., the opinion of the *Avocat Général* Darmon at the Court of Justice of the European Communities (25 May 1988), *Ahlstrom* case, 96 *ILR* 179. See also the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), *ICJ Reports* 1996, paras. 21, 52. The Permanent Court of International Justice had somewhat dampened the residual freedom of the *Lotus* in the *Territorial Jurisdiction of the International Commission of the River Oder* case (1929), PCIJ, Series A, no. 23, 26.

[178] F.A. Mann, *supra* note 59, 44 *et seq.*, 82 *et seq.* with many references; B. Stern, Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit, 32 *AFDI* 1986, 44-45; W. Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Beiträge zum ausländischen öffentlichen Recht und Völ-

If one accepts this theory, the *ratio iuris* it is rooted in could be applied by analogy to the case of universal jurisdiction. One can then start from the very minimal hypothesis of the *Lotus* principle being that of freedom as against specific restrictions by the law writ large[179]. Whereas the state possesses the original freedom to regulate its own jurisdiction and thus to extend unilaterally its titles to universal jurisdiction, these titles will only be valid in international law if the state can demonstrate a "reasonable interest" in their exercise. Hence, the residual freedom of the *Lotus* case would only find justification in international law if it is related to some discipline that has gathered a certain degree of general assent, because it aims to protect interests seen as legitimate. This reasonable interest to prosecute according to universal jurisdiction surely exists for severe acts of terrorism.

A conception of law essentially based on such notions has been used by the German Supreme Federal Court in the *Universal Jurisdiction over Drug Offences* case (1976)[180]. A Dutch national was convicted under the Federal Narcotic Drugs Law for having sold drugs to young Germans travelling to the Netherlands. The trial court based its jurisdiction on article 6(5) of the Federal Criminal Code, under which German criminal law was applicable to the illegal sale of drugs abroad. The accused appealed, claiming *inter alia* that such a jurisdictional basis was contrary to international law. The Federal Supreme Court rejected this argument and held that, in this context, international law rested on a residual rule of freedom:

> "There is in fact no general rule of international law prohibiting the application of the principle of the universality of law in the absence of special provision by international convention"[181].

The Court went on to say that

> "any extension of State criminal jurisdiction to cover offences committed abroad by aliens requires the presence of some factor, connecting the case to the forum, which constitutes a justifiable basis for the exercise of jurisdiction"[182].

Such a connection was found in the present case:

> "It is beyond doubt from the provisions of the Agreement [Single

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kerrecht, vol. 119 (1994) 587 *et seq.*; Schachter, *supra* note 56, 240 *et seq.*, 249 *et seq.*; L. Henkin, International Law: Politics, Values and Functions, 216 *RCADI* 1989-IV, 293 *et seq.*; L. Sarkar, The Proper Law of Crime in International Law, 11 *ILCQ* 1962, 466 *et seq.*; Oppenheim, *supra* note 56, 457-458; *Restatement Third*, *supra* note 56, 244 *et seq.*, para. 403; Bowett, *supra* note 56, 24 *et seq.* See also the Separate opinion of Judge Fitzmaurice in the *Barcelona Traction* case, *ICJ Reports* 1970, 105.

[179] That is, including general principles of law and analogies.

[180] 74 *ILR* 168-169.

[181] *Ibid.*, 169.

[182] *Ibid.*, 168.

> Convention on Narcotic Drugs (1961)] that the signatory States, which include the Netherlands, consider it necessary in the interests of health and the well-being of mankind to promote world-wide international cooperation in the fight against criminality associated with drugs. This aim (...) makes it clear that the reference contained in article 6 (5) StGB to the principle of the universal application of the law is at all events not an arbitrary course adopted by the German criminal authorities"[183].

This exemplifies the dual process of thought previously described: freedom and the justification thereof through the general parameters of both the legal order and the values underlying it. The abstract rule of attribution of jurisdiction based on sovereignty is relevant only towards specific titles that establish and justify it concretely.

IV. CONCLUSION

Given the quite uneven picture brushed by legal texts and instances of practice, asserting that positive international law recognises universal criminal jurisdiction as applicable to terrorist acts generally may be premature. As Charles De Visscher wrote very astutely some thirty years ago, one cannot seize through formal means a matter that remains, by reasons of its nature or of the will of the states, essentially submitted to the imperatives and motives of high politics:

> "La doctrine sert mieux les progrès du droit en signalant les conséquences, parfois franchement antisociales, de la distribution présente du pouvoir qu'en s'abandonnant à une sorte de 'totalitarisme juridique' qui aboutit à masquer derrière des architectures irréelles le désordre présent des rapports internationaux"[184].

Even if one allows for these strict criteria and the contingent considerations of political opportunity that, in this field more than in others, stand against the regulatory function of law, there 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 custom or the several anti-

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[183] *Ibid.*, 168-169. Some delegations represented at the *Ad Hoc* Committee established by the General Assembly in 1996, *supra* note 60, pointed out that the article of the drafted Convention on Terrorist Bombings providing for *aut dedere aut iudicare* "should make clear that States could establish jurisdiction so long as they did not infringe on the sovereign rights of other States"; Summary of the discussions of the *Ad Hoc* Committee,. Reports, *supra* note 60, 56. As in the *Drugs Offences* case, freedom provides a starting point which is tempered by a very general and elastic criterion, allowing an overall assessment in the form of a balancing of interests.

[184] De Visscher, *supra* note 8, 169-170.

terrorist treaties[185]. 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, 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. A relatively uniform and prolonged use of this faculty may, in accordance with recognised rules, result in the emergence of a real customary rule.

It seems thus necessary to distinguish between such a "freedom-granting function" (*fonction libératoire*) and the attributive function (*fonction attributive*) of law, and to recognise in the former an intermediary, permissive juridical stage[186], which might serve as a characteristic step in the process of elaboration of customary norms. This nuanced approach would bring the verdict of current positive law closer to the wisdom of the poet: *"Est modus in rebus, sunt certi denique fines"*[187].

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[185] Of course, the accused must be afforded all due procedural and material guarantees required in criminal matters; see, e.g., Centre d'études, *supra* note 23, 45-49, 86-90. On the anti-terrorist treaties, see above II.3 and III.1, 2.

[186] On these intermediary aspects of legal entitlements, see, e.g., L. Lombardi-Vallauri, *Corso di filosofia del diritto* (1981) 47-48, 131-133. More generally, see W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923); on Hohfeld, cf. J. Stone, *The Province and Function of Law* (1950) 115 *et seq.*; J. Raz, *The Concept of a Legal System* (1970). See also generally the literature on legal logic.

[187] Horace, *Satires*, I, 1, 106.

LES NATIONS UNIES ET LA LUTTE CONTRE LA DÉSERTIFICATION AVEC EXAMEN PARTICULIER DU CAS DE LA RÉGION DE LA MEDITERRANNÉE SEPTENTRIONALE

JOSÉ ROBERTO PÉREZ-SALOM*

LE PROBLÈME DE LA DÉSERTIFICATION

Depuis deux décennies, la désertification a été reconnue comme un grave problème économique et social. Cependant, la complexité du phénomène a créé des difficultés au moment d'élaborer une définition du concept qui soit généralement acceptée. Habituellement, la désertification est entendue comme l'expansion des déserts existants, mais, en réalité, le phénomène comporte la transformation de terres sèches utiles, en terres qui ne sont plus aptes pour l'agriculture ou toute autre utilisation productive. Dans cette perspective, la désertification a été définie comme

> "la dégradation des terres dans les zones arides, semi-arides et subhumides sèches, par suite de facteurs divers, parmi lesquels les variations climatiques et les activités humaines"[1].

Bref, la désertification est une forme d'appauvrissement de l'environnement, qui suppose la réduction ou la perte de la productivité biologique ou économique des sols.

Actuellement, la désertification touche d'une façon directe à 250

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[1] Voir UN Doc. A/AC.241/27 du 12 septembre 1994, Convention internationale sur la lutte contre la désertification dans les pays gravement touchés par la sécheresse et/ou la désertification, en particulier en Afrique (ci-après la Convention) article 1. Déjà en 1977, les Nations Unies avaient défini la désertification comme la diminution ou la destruction du potentiel biologique des terres, qui peut conduire, à la limite, aux conditions désertiques. Voir le Plan d'action pour lutter contre la désertification, *infra* note 8, para. 7.

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