UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW, ARTS AND SOCIAL SCIENCES

School of Law

Terrorism and International Law: a Study of the Terrorist Phenomenon, the Difficulties surrounding its Definition and the Options available for Progress

by

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ABSTRACT

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TERRORISM AND INTERNATIONAL LAW: A STUDY OF THE TERRORIST PHENOMENON, THE DIFFICULTIES SURROUNDING ITS DEFINITION AND THE OPTIONS AVAILABLE FOR PROGRESS

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The study examines the reasons which prevent agreement being reached on a definition of acts of international terrorism. The conundrum of the terrorist phenomenon raises a series of questions, not least the perceived need to define the crime comprehensively, rather than in a piecemeal, reactive fashion.

The research focuses first on the origins and growth of international terrorism, with the aim of locating the present impasse within its historical context and identifying the roots from which it developed. A study of the changing crime patterns follows, examining firstly, changes in the criminal intent over time as revealed by specific attacks and secondly, the adaptability and versatility of terrorists in altering their *modus operandi* to circumvent measures aimed at suppressing their activities. The profiles of some terrorist leaders past and present are then scrutinised, with the aim of identifying any significant changes in their abilities and backgrounds.

Unique features of the newly established International Criminal Court are studied, absent its jurisdiction over acts of international terrorism. The viability of mounting prosecutions for acts of terrorism under the auspices of any of the crimes over which the new Court does have jurisdiction are also explored.

An analysis of possible options for making progress in the light of the results of the research work follows, with the incomplete draft comprehensive convention on terrorism being the subject of a detailed examination in this context.

The study concludes with an assessment of the effectiveness of current and potential legislative initiatives aimed at addressing the increasing threat to world peace posed by terrorism.

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LIST OF ABBREVIATIONS

CBRN	Chemical, biological, radiological and nuclear (material)
CCTV	Closed circuit television
FBI	Federal Bureau of Investigation
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
ILC	International Law Commission
IMO	International Maritime Organisation
IMT	International Military Tribunal
IRA	Irish Republican Army
NGO	Non-governmental Organisation
OAU	Organization of African Unity
OIC	Organization of the Islamic Conference
PCIJ	Permanent Court of International Justice
PFLP	Palestinian Front for the Liberation of Palestine
PLO	Palestine Liberation Organisation
RAF	Red Army Faction
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
WMD	Weapons of mass destruction
UK	United Kingdom
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series
US	United States of America
USSR	Union of Soviet Socialist Republics
VLCC	Very Large Crude Carriers

CHAPTER ONE

Introduction

1 Preliminary Remarks

The dissertation studies the terrorist phenomenon in relation to the difficulties which continue to bedevil the best endeavours of international lawyers comprehensively to define acts of international terrorism in a format which is acceptable to States.[1] Set against the background of world peace and security, international terrorism has been causing increasing concern, particularly since the Lockerbie airliner bombing in 1988,[2] and is now viewed as a real and present threat to the safety and well-being of the global community.[3] The continued lack of progress with regard to putting in place comprehensive measures to combat the crime has reached the pinnacle of the agenda of the United Nations (UN) and prompted this investigation into the obstacles which stand in its way.

International criminal law is a relatively new discipline,[4] but as with all international law, progress with regard to codification is made on the basis of consensus, in which diplomacy plays a crucial role.[5] Arriving at a consensus on definitions of offences which carry with them deprivation of liberty, potentially for a maximum term of thirty years imprisonment,[6] or even for life in certain circumstances,[7] is therefore bound to be difficult. This degree of difficulty will be governed by the level to which a particular issue affects individual States. When embarking on a study of the terrorist phenomenon it is important that the unique way in which international law is formulated is borne in mind.

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[1]UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2 December 2004, UN Doc A/59/565, Part VI, B, para 157.
[2]On 21 December 1988 Pan Am Flight 103 was blown up over Lockerbie, killing all those aboard the airliner and 11 people on the ground, a total of 270 souls.
[3]SC Res 1368 (2001), 12 September 2001, UN Doc S/RES/1368 (2001) para 1.
[4]De Than and Shorts *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) 13, para 1-023.
[5]Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331, in force 27 January 1980) Article 2(1)(a).
[6]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 77(1)(a).
[7]*Ibid*, Article 77(1)(b).

Efforts by the UN in the past to make progress in establishing measures to combat the escalation in acts of international terrorism have had only partial success, for example the three conventions aimed at suppressing aerial hijacking,[8] and this has played a part in the frustration of politicians when dealing with perceived threats.[9] The impact of the political factor therefore weighs heavily in the balance during efforts to combat international terrorism, never more so than during the deliberations which preceded the decisions taken in response to the simultaneous terrorist attacks on New York and Washington on 11 September 2001 (hereinafter referred to as 9/11).[10] It might have been predicted that this single act would be sufficient to reignite the deliberations of both diplomats and lawyers engaged in attempts to reach a consensus on a comprehensive definition of acts of terrorism, rather than the piecemeal approach which had been the norm in the past.[11] This has proved not to be the case, despite the continued severity of the attacks which are being perpetrated across the globe.[12]

Criminals, by the very nature of their acts, pay no heed to the rule of law, but the deeds of international terrorists at the very least disrupt the normal state of society and have the potential to endanger the lives and welfare of citizens anywhere in the world. It is therefore vital that efforts should continue in the search to find a comprehensive definition of international terrorism which will gain a consensus and lead to the adoption by the UN of measures to bring suspected perpetrators to justice, as part of a wider campaign to alleviate this criminality by addressing the underlying causes from which terrorism springs.[13] The study sets out to investigate why it is that

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[8]Convention on Offences and Certain Other Acts Committed on Board Aircraft, (Tokyo, 14 September 1963, 704 UNTS 219, in force 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1979, 860 UNTS 105, in force 14 October 1971); and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973).

[9]See, for example, the State of the Union Speech by the United States' President, 20 September 2001: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime' (at http://www.whitehouse.gov/news/releases/2001/09/200109208.html).

[10]*Ibid*; Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 2.

[11]For example, see above, n 8.

[12]For example, the Bali nightclub bombings on 12 October 2002 and the Madrid train bombings on 11 March 2004.

[13]GA Res 44/29, 'Measures to prevent international terrorism', 4 December 1989, UN Doc A/RES/49/29 (1989).

this consensus has proved to be so elusive, by seeking the answers to a number of salient questions.

Why is it that no comprehensive definition of what constitutes acts of international terrorism has been drawn up to the satisfaction and subsequent agreement of the UN? In turn, this begs further questions. For example, why are the existing measures inadequate? Over decades since the birth of the UN, agreement has been reached by its members with regard to implementing provisions to combat specific acts of international terrorism, but none has had the desired effect of inhibiting further attacks from being launched, nor in deterring other disaffected persons from joining the ranks of those who perpetrate them. If terrorists remain undeterred from reoffending, could it be that some of the more dedicated of their number have made tactical changes in the way they operate in order to circumvent the measures which have been implemented? What efforts have been made to keep abreast of the terrorist threat in the light of those changes? If efforts have been made, they have manifestly not been effective, which raises even more questions as to how the situation might be remedied and what opportunities exist for up-dating and enhancing international criminal law in this area.

In order to address these questions, the research focuses on four areas: the historical background to the crime; the identification of changes in the patterns of crime as and when they have emerged; the framework of the new International Criminal Court (ICC)[14] and the limits placed on its jurisdiction; and finally, the existence of any viable options for making substantive progress on the issue. The final chapter seeks to draw conclusions from the answers to the questions which have been posed as to the distinguishing features of the crime and hence to identify those building blocks which are essential for the construction of an effective, comprehensive and acceptable definition of the crime. By this means, it may be possible to make progress in aligning the offence within, but separate from, other defined crimes falling within the category of very serious international wrongful acts, which threaten the peace and security of the world.[15]

[14]Statute of the International Criminal Court, Rome 17 July 1998, 2187 UNTS 90, in force 1 July 2002.
[15]For example, aggression, genocide, crimes against humanity, and war crimes.

2 Overview of the Chapters

2.1 The Origins and Growth of Terrorism (Chapter 2)

Nations have, from time immemorial, recognised that there are some crimes which are regarded as violating the principles of law and justice over which all nations have jurisdiction (*jure gentium*). Piracy is one of the earliest crimes to be recognised as heinous and detrimental to all nations and because the description of piracy *jure gentium* bears similarities to acts of terrorism, piracy has been selected as the point of departure for exploring the origins and growth of terrorism.

Chapter Two charts the progress of codification of international law in this area and the effectiveness or otherwise of the specificity of measures set in place in response to terrorist outrages. Attention also focuses on one of the complexities to be borne in mind with regard to isolating terrorist criminality from other international offences which emerged in the second half of the last century, namely where to draw the line between terrorism and legitimate struggles for national liberation from alien domination, *i.e.*, self-determination, one of the underlying causes which generate terrorism. Whilst the causes which spawn terrorism are outside the remit of this study, the fact remains that terrorism as a crime will never be eradicated and efforts to deter or suppress it may not have a significant impact unless and until the causes are identified and addressed. Therefore research into the causes, remedies and preventative measures should continue contemporaneously if progress is to be achieved.

The part played by States in sponsoring or supporting terrorism, which is contrary to the principles spelled out by the UN,[16] is also investigated, since this aspect can significantly influence the rate of progress with regard to codification. Overt and covert support for terrorists among States is not new.[17] However, latterly it is becoming evident that some international terrorists, are less reliant on State support

[16]GA Res 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', 24 October 1970, UN Doc A/RES/2625 (XXV), Annex, 1, the first principle, para 10.

[17]See, for example, Former Syrian Ambassador to the German Democratic Republic, (1997) 121 ILR 595, in which the ambassador in question was accused of complicity in murder by allowing explosives to be transferred from his embassy to a terrorist group; see also accusations made by Israel in defence of the Israeli air strike against Syria, UN Press Release, 5 October 2003, UN Doc SC.7887.

for the means to carry out their wrongful acts.[18] In this regard, the study seeks to identify any stages when terrorists began to pursue their own agenda independently of State involvement on some occasions,[19] whilst continuing to mount attacks with the covert connivance of rogue States on others.[20] Anonymity and lack of ownership have also become a feature of some of the worst atrocities during the last century, for example the Air India bombing on 23 June 1985 in which all 329 on board were killed and both Sikh and Kashmiri terrorists were blamed for the attack. Such incidents make positive identification of the perpetrators and any covert support they may have had, together with their underlying motivation, even more difficult.

As the international community attempts to counter the ever increasing threat to world peace which terrorism poses, the adverse effects of some counter-terrorism measures put in place by States has caused concern with regard to the potential for human rights to be eroded. The vital role played by the UN Special Rapporteur on the promotion and protection of human rights in the twenty-first century, although tangential to the definitional issue, is therefore briefly discussed.

Attention is also paid in this chapter to factors which may well have a bearing on the increase in terrorist activity on the international scene, such as technological advances in modes of travel, together with scientific discoveries which have enhanced the range and efficacy of weaponry to which terrorists have gained access. As the range of their attacks increases, it would hardly be surprising if the effects did not impact on increasing numbers of States.

By commencing with an historical survey of the phenomenon, it is envisaged that a wide perspective of the origins and growth of terrorism will be gained, from which it may be possible not only to identify the essential features of the phenomenon, but also to mark the point in time when those features underwent change. This would assist in completion of the second task selected for study, *i.e.*, identifying when and how

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[18]Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 50.

[19]For example, the bombings of the US Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on 7 August 1998.

[20]For example, the refusal by Libya to extradite the suspects implicated in the bombing of Pan Am, flight 103 over Lockerbie on 21 December 1988; see SC Res 748 (1992), 31 March 1992, UN Doc S/RES/748 (1992), Preamble, para 1.

changes in the terrorist crime patterns have emerged and metamorphosed into the latest *modus operandi* currently employed in the attacks.

2.2 Changes in Terrorist Crime Patterns (Chapter 3)

In order to define international terrorism succinctly, the intentions and the motivation of the perpetrators are essential ingredients which should enable a distinction to be drawn between terrorist acts perpetrated in the international arena and the rest. If the definition is to be comprehensive, these are the features which are more likely to define the criminal act, rather than the methods used to achieve it. Studying how and at what stage any changes in the patterns of the crime became evident is the subject matter under scrutiny in Chapter Three.

Numerous attempts to construct a comprehensive definition of acts of international terrorism have been made in the past, but failed.[21] Some high profile incidents have been selected for analysis, which will take a number of factors into account: for example the political environment, the aim of the attack, the methods used to carry it out and the identities of the States targeted and victimised. By this means, any distinctive features which are identified may reveal the intentions and motivation of the terrorists. Such features will be central in deciding whether the criminal act impacts on the international community to the extent that it falls within the category of an act of international terrorism.

It is not merely a question of identifying such an act as a murder, a kidnap or even indiscriminate or targeted bombings, nor indeed, of establishing the immediate intention, such as the assassination of a particular, high profile person. All these offences have been committed in the cause of struggles for self-determination or in casting off 'alien domination' by another State. Rather, it is the identification of what could be termed an ulterior motive which might distinguish the crime from being solely within the remit of national and/or regional jurisdictions.

The principal question which needs to be addressed in this chapter, therefore, is what is it that makes these crimes different? Comparing and contrasting similar crimes with a view to identifying any important differences in the criminal intent and the

[21] See, for example, 'Report of the Ad Hoc Committee on International Terrorism', 11 August 1973, Supplement No 28, UN Doc A/9029, Section V, Concluding Statement, para 69.

modus operandi might provide markers as the points to prove when constructing the elements of the crime. This exercise will form a central part of the work. Two similar acts of murder, for example, studied in depth should - it will be argued - reveal differences in the patterns of the two attacks, enabling a case to be made or refuted for inclusion within the definition of an act of international terrorism.

Examining the profiles of suspected terrorists, together with those who have claimed responsibility for some of the attacks could also assist in the identification of other features which would need to be incorporated in the text of a comprehensive definition. In this regard, and in the current climate, it might be the case that a person conspiring to commit murder and damage on a global scale would be of a different calibre from that of their predecessors or contemporaries in the field. In contrast, a different perspective is adopted for focussing on the fourth area of study, namely pertinent provisions contained in the Rome Statute.[22]

2.3 Terrorism and the International Criminal Court (Chapter 4)

At the present time, the jurisdiction of the ICC does not extend to acts of international terrorism, hence the reasons why they were omitted warrant investigation. There would appear to be no reason why the jurisdiction which has been granted to the Court over the crimes of genocide, crimes against humanity, war crimes and potentially aggression could not equally well be applied to acts of international terrorism once defined. Few would argue that terrorism now fits the criterion as one of the "most serious crimes of concern to the international community as a whole".[23]

Chapter Four seeks to find out, *inter alia*, why there seems to have been considerable opposition to the inclusion of terrorism in this list. Indeed, rather than an omission, it appears that terrorism was deliberately excluded from the jurisdiction of the Court, due to the strength of that opposition.[24] For this reason alone, therefore, the way in which referrals to the Court have been set up under the 1998 Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute) merits study from the perspective of their potential application to terrorist criminality.

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[22]Above, n 14.
[23]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 5, para 1.
[24]Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 125.

There are other provisions contained in the Rome Statute which are pertinent to the complexities of the definitional issue. For example, the unique features of this Court, such as the principle of complementarity and the inclusion of a role for the Security Council, may have advantages - or equally disadvantages - when applied to suspected terrorists in certain circumstances.

An analysis of the definitions of the core crimes over which the Court does have jurisdiction is also considered to be apposite, because arguments have been put forward proposing that any one of these jurisdictional offences could be commandeered as a vehicle for the prosecution of alleged terrorists.[25] The potential benefits and pitfalls of adopting such a course will need to be taken into account, together with the option of extending the jurisdiction of the Court to include acts of terrorism. A comparison as between any identifiable, essential features of terrorism and the key components incorporated into the definitions of the core crimes, might assist in the elimination of any of the latter which are inapplicable to the former, or conversely might have some resonance with it. This exercise, once completed, would bring the argument full circle, because if the jurisdiction is to be extended, then a definition of the offence has to be agreed as the essential first step.

If extending the jurisdiction of the new Court to include the crime ever finds favour among the international community, the definition of the offence may well differ in format from that currently being drafted for the proposed comprehensive convention on international terrorism, in order to conform to the format and standards adopted in shaping the definitions of the existing three core crimes.

The enhanced access to justice which the existence of this Court could offer brings the problems associated with defining the crime into sharp focus once more. Any possibilities for making progress, or obstacles standing in its path, which come to light as a result of the research into this and the other three areas upon which the study focuses, form the subject matter of the penultimate chapter of the dissertation.

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[25] See, for example, Prouxl, 'Rethinking the Jurisdiction of the International Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) 19 *American University International Law Rev* 1009.

2.4 The Possibilities for Progress (Chapter 5)

The fifth chapter seeks to identify any possibilities for making progress in the future, bearing in mind the difficulties which have prevented this in the past and in the light of changing attitudes triggered by some of the worst atrocities which have been perpetrated since the turn of the millennium, with the 9/11 attack being the prime example.

This attack - arguably the most audacious terrorist atrocity yet to be perpetrated - was unprecedented in the history of the UN and neither existing conventions nor the UN Charter cater adequately for such an outrage. The paucity of legal measures to address terrorism of this magnitude inevitably tempts politicians to stray from the provisions of international criminal law towards the use of military force, governed by international humanitarian law (IHL) to pursue the perpetrators. Whether or not the existence of a comprehensive definition would have resulted in a different response to the tragic events of 9/11 will never be known, but the possibility that completion of a comprehensive convention on international terrorism would open the path to progress is one of the options for discussion in this chapter.

The reactive approach is evident in the majority of conventions drawn up to deter and prevent terrorist outrages, for example to combat the spate of aerial hijackings which started in 1960 and peaked in 1970,[26] resulting in the establishment of three conventions being drawn up in the space of five years.[27] These treaties demonstrate that a pattern of attack, reaction and further, modified attack using different tactics tends to emerge. Despite the seriousness of the threat posed, it seems that there remains a lack of political will which is preventing a meeting of minds over the issue of comprehensive measures to address acts of international terrorism. This reluctance to compromise in turn hinders the efforts of lawyers tasked with honing draft definitions to counter the ingenuity of the terrorists using a proactive approach.

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[26] Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications, 1974) 160 *et seq.*

[27] Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963, 704 UNTS 219, in force 4 December 1969); the Convention for the Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971; and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973).

draft definitions to counter the ingenuity of the terrorists using a proactive approach. Until comparatively recently[28] there has been little evidence of such an approach being adopted.[29] The possibility that the reactive approach might nevertheless remain a viable option, based on the results of this study, will nevertheless be given consideration.

The establishment of the ICC offers one potential option in the form of an additional, new route to justice, but only if the perennial difficulties regarding agreement on a definition of the crime can be overcome. Similarly, the advantages and disadvantages of *ad hoc* tribunals as an alternative to prosecutions in national courts is worthy of consideration and forms an integral part of the discussion regarding jurisdictional matters in this chapter. However, definitions of the criminality over which an *ad hoc* tribunal would have jurisdiction would inevitably be reactive, narrowly defined and hence specific.

Chapter Five seeks to take the long view, by referring back to the initial recognition of the phenomenon in 1937 and the attempts made at that time to define the crime and establish a permanent international criminal court. Leapfrogging the intervening years and considering the latest state of affairs in this context, it may be that substantive progress with regard to the contribution which legislative measures have made towards suppressing acts of international terrorism, will be viewed as minimal. This would be in stark contrast to any crime pattern changes identified in the third chapter with regard to the ambitions and capabilities of the terrorists and in relation to the landmark establishment of the ICC, as explored in the fourth chapter.

2.5 Conclusions (Chapter 6)

The project culminates with an assessment of the extent to which the questions posed at the outset have been satisfactorily addressed and the extent to which it is possible to suggest some key features of the crime for inclusion in a definition of acts of international terrorism - whether comprehensive in terms of a multilateral convention, and/or in anticipation of an extension to the jurisdiction of the ICC.

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[28] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002).

[29] *Ibid.*

The question as to whether the main obstacle to progress on the definitional issue lies within the realm of political sensitivities is addressed in the light of the level of threat which exists at the time this work is completed. Attention will be drawn to the nexus between the ferocity of the attacks and the level of cooperation of States whose representatives are engaged in the drafting process. The likelihood that success in attaining a consensus on a comprehensive definition would result in a diminution of the terrorist threat will be assessed, but should these latest efforts to conclude a comprehensive convention end in failure, the consequence is more likely to be a continuance of the stalemate which currently exists with regard to codification in this area of the international criminal law.

Finally the conclusions drawn from the responses to the initial questions posed will be recorded and essential features of the crime which may emerge as the study proceeds, in terms of motivation and intention, will be compared with the first definition of acts of international terrorism which was accepted by the Plenipotentiaries at Geneva on 16 November 1937. That earlier definition will be revisited in the light of recent attempts to find an acceptable text and it will be interesting to see whether much has changed in the intervening years.

3 Research Methodology

The subject matter selected for this project is, of necessity. It is anticipated that due to the rapidity at which events are occurring in this field, together with world reaction to them, recourse to the internet will provide an essential means of accessing information which may not always be available *via* other means. It is also the case that international terrorism has risen to the top of the agenda in recent years, concentrating the minds of many criminologists and as a result, particularly since the terrorist attacks on the homeland of the United States of America (US), there is no lack of literature upon which to draw.

The phenomenon of terrorism is constantly manifesting itself in different forms and whether this work will reveal any critical changes in the motivation of twenty-first century terrorists, resulting in a major shift in the political will to agree on a definition of the essence of the crime, remains to be seen.

CHAPTER TWO

The Origins and Growth of Terrorism

INTRODUCTION

The rule of law has been a central thread woven within the fabric of organised societal living throughout history, upholding justice and stability and acting as a bastion against chaos, anarchy and criminality. These patterns have been replicated as communities began to interact in the international arena, developing rules of acceptable behaviour, particularly in the area of conduct on the high seas over which universality of jurisdiction was a widely recognised principle,[1] in tandem with the development of civilisation. It is hardly surprising, therefore, that conduct on the high seas,[2] together with relationships between nations in times of war,[3] were among the first recognised issues.[4] The genesis of the present-day international system, however, began about four hundred years ago.[5] The phenomenon of terrorism came to prominence at the time of the French Revolution in 1789-99.[6] Although many of the heinous crimes perpetrated over the centuries were characteristically terrorist,[7] some pale into insignificance in comparison with those committed by contemporary terrorists.[8]

The revolution in communications and modes of travel around the globe which began in the mid nineteenth century and accelerated at the turn of the millennium continues apace, reverberating on all aspects of contemporary existence, not least in respect of

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[1]Harris, *Cases and Materials on International Law* (sixth edition) (London: Sweet & Maxwell, 2004) 266.

[2]Shaw, *International Law* (fifth edition) (Cambridge: Cambridge University Press, 2003) 542.

[3]Hillier, *Principles of Public International Law* (second edition) (London: Cavendish Publishing Ltd, 1999) 1.

[4]*Ibid.*

[5]Roberts and Guelff, (eds) *Documents on the Laws of War* (third edition) (Oxford: Oxford University Press, 2000) 4; Dunant, *A Memory of Solferino* (Switzerland: private publication, 1862) available at http://www.onlinebooks.library.upenn.edu/webbin/book/search?author=Dunant+.

[6]Burke, *Further Reflections on the Revolution in France*, Ritchie, (ed) (Indianapolis: Liberty Fund Inc, 1992) 83; Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 537-8.

[7]For example, the trial of Peter von Hagenbach in 1474 for the perpetration of atrocities committed during the occupation of Breisach; McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) 60 *Albany Law Rev* 681, 690.

[8]For example, the kidnapping of Kenneth Bigley on 16 September 2004 and his subsequent televised beheading on 7 October 2004.

criminality in general and terrorism in particular. Prior to that era the notion of an interactive global society of nations co-habiting within an international legal construct had not arisen.[9]

As society has adapted to the raft of technological discoveries of the twentieth century, so too has the criminal fraternity, adopting new characteristics and commandeering every conceivable modern invention to 'enhance' their criminal activities and evade detection. The territorial integrity of States has also been degraded as borders have become vulnerable to penetration by international criminals. Public international law as well, has undergone some major developments, starting in the mid nineteenth century with the process of codifying the laws of war,[10] then with the recognition of human rights as a major branch of international law in its own right in 1948[11] and the identification of international criminal law as a discrete discipline.[12]

The end of World War II in 1945 marked a watershed in international law, due in no small measure to the emergence of movements striving for self-determination in the wake of the demise of colonialism, the rise in terrorist activity and the spread of its influence on world affairs as the aims of terrorists have become increasingly ambitious. Burgeoning counter-terrorism measures began to impact adversely on human rights issues at the turn of the millennium, which has tangentially influenced the efforts aimed at resolving the problems surrounding the definitional issue. The survey therefore divides naturally into three parts, commencing with the perspective prior to the end of World War II (Part One).

The measures set in place in attempting to address and suppress each new manifestation of terrorism as it arose provide the focus for Part Two. In tandem with this legislation, the endeavours of the UN to safeguard the right of peoples to strive for self-determination, whilst at the same time attempting to distinguish the motivation of terrorist organisations from such struggles are charted.

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[9]Shaw, *op cit*, n 2, 15.

[10]Roberts and Guelff, *op cit*, n 5; Dunant, *A Memory of Solferino* (Switzerland: private publication, 1862) available at http://www.onlinebooks.library.upenn.edu/webbin/book/search?author=Dunant+.

[11]Universal Declaration of Human Rights (New York, concluded 10 December 1948, GA Res 217A(III), UN Doc A/810 at 71 (1948).

[12]De Than and Shorts *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) 13, para 1-023.

The change in the perspective of terrorism from 2000 to the present day has triggered a redoubling of the efforts to define terrorism comprehensively, which provides the central focus for Part Three. Whilst not central to the theme of the study, attention is also paid in this final part to the issues which have become irrevocably intertwined with the terrorist phenomenon, namely the issues of self-determination and the erosion of human rights as a consequence of mandatory counter-terrorism measures.

Terrorism has been compared with the international crime of piracy,[13] even to the extent that Burgess considers it to be "a clear and powerful precedent".[14] Piracy has therefore been chosen as the point of departure for the first part of the study.

PART ONE the Perspective Prior to 1945

Introduction

Criminal law habitually follows, rather than pre-empts acts of criminality, mainly due to one of the characteristics of the criminal mind, which has always demonstrated the ability - wittingly or unwittingly - to seize advantages presented by situations and changing circumstances. Given the long history of the freedom of the high seas,[15] it is hardly surprising that the oceans of the world continue to be exploited by pirates to this day.[16] The number of attacks in the seventeenth century was a particular concern, judging by the many alleged pirates who appeared at the Old Bailey at that time.[17] The detrimental effect which piratical attacks had on trade, together with the vulnerability of passengers and crew, not only to robbery, but also to physical violence, made piracy a

[13]See, for example, Burgess, 'The Dread Pirate Bin Laden How Thinking of Terrorists as Pirates can Help Win the War on Terror' (July/August 2005) *Legal Affairs* 32; Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law J* 183; Vallar 'Piracy *versus* Terrorism', in Vallar (ed) *Pirates and Privateers the History of Maritime Piracy* 1 July 2006 available at http://www.cindyvallar.com/trerrorism.html.

[14]*Ibid*, 33.

[15]Jennings and Watts, *Oppenheim's International Law* (ninth edition) Vol 1 (London: Longman, 1996) 726, para 284; see also, Convention of the Law of the Sea, (Montego Bay Jamaica, 20 December 1982, 1833 UNTS 3, in force 16 November 1994) Article 89.

[16]International Maritime Organisation, 'Reports on Acts of Piracy and Armed Robbery Against Ships' IMO Soc MSC.4/Circ.82, 3 March 2006; House of Commons Transport Committee, 'Piracy Eighth Report of Session 2005-06' (London: The Stationery Office, 2006); Webster 'Romantic Gloss Blinds Public to Evil of Piracy' *The Times* 7 July 2006, 27.

[17]See, *e.g.*, Trial No 392, Joseph Dawson *et al*, on 19 October 1696, Howell (ed) *State Trials 1163-1820*, Vol 13 (London: Longman, Hurst, Rees, Orme and Browne, 1812) col 451 *et seq*; Trial No 393, Thomas Vaughan on 6 November 1696, *ibid*, col 485 *et seq*.

threat to every sea-faring nation throughout the world.[18]

2.1.1 The Zenith of Piracy

Under customary international law a pirate was regarded as an *hostis humani generis* - an enemy of mankind - and as such could be arrested if found committing the international crime of piracy *jure gentium* on the high seas, where jurisdiction is exercisable on a universal basis, being outside the control of any State.[19] Piracy was defined as robbery for self enrichment under customary international law[20] and it is interesting to note that private ends not only remained the motivation when the law was codified in 1958,[21] but is still the single identifying feature of the crime under international law.

The level of threat which piracy posed in its heyday to trade and travellers is comparable to that presented to the international community by acts of international terrorism to-day. A feature common to both crimes is the launching of unprovoked, seemingly random attacks upon citizens going about their daily lives, but the feature which distinguishes the one from the other is the motivation. In the sixteenth century, pirates were identified as "robbers of the sea",[22] which clearly indicated that the motive for the crime was solely for private gain. The identification of this motive was key to the prosecution case in trials for felony ad piracy in the late seventeenth century[23] and remains the position under, for example, current United Kingdom (UK) legislation, as well as international legislation.[24] Where terrorism is concerned, however, the driving force behind the attacks is completely the contrary. Internationally, terrorism is denounced as being motivated by considerations of a "political, religious, philosophical,

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[18]See, for example, An Act for the More Effectual Suppression of Piracy 1698 11 Gul II c7, Preamble; Smith, *The Atrocities of the Pirates* (London: Prion, 1997) 36 *et seq.*

[19]*Op cit*, Jennings and Watts, n 15, 746; see also, Hillier, *Principles of Public International Law* (second edition) (London: Cavendish Publishing Limited, 1999) 135.

[20]Hawkins, *A Treatise of the Pleas of the Crown* (seventh edition) Leach (ed) Vol 1 (London: G G and J Robinson, 1795) 267.

[21]Convention on the High Seas (Geneva, 29 April 1958, 450 UNTS 11, in force 30 September 1962) Article 15(a).

[22]An Acte Concerning Pirates and Robbers of the Sea 1535-6 27 Hen VIII c4.

[23]See, for example, the Trial of Joseph Dawson *et al*, *op cit*, above, n 17, cols 454-5.

[24]See, for example, the identical definitions of piracy in the Merchant Shipping and Maritime Security Act 1997 45 ER c28 (19 March 1997) Article 101 and the Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982, 1822 UNTS 3, in force 16 November 1994) Article 101.

ideological, racial, ethnic, or any other nature".[25]

Despite this clear statement the motivation may not always be so clear cut in all instances. According to a recent wide ranging House of Commons report on piracy,[26] it has been suggested that "terrorist groups have come to view piracy as a potentially rich source of funding".[27] It therefore follows that in such instances, an additional incentive behind the attacks may be one of private gain, albeit that an ulterior motive may be connected to the expenses of the logistics involved in mounting attacks in support of a wider cause.

There is also another facet to piracy which gained much prominence in the seventeenth century, concerning the practice of privateering during hostilities between nations, when pirates were 'hired' by one side to carry out what amounted to guerrilla warfare on the ships of its adversaries. This gave rise to legislation aimed at its encouragement during hostile relations between France and England in 1692.[28] Interestingly, Burgess draws an analogy between privateering of earlier times and modern day State-sponsored terrorism.[29] On this premise, private gain may well be the aim of the State-sponsored terrorist. However, seeking private gain would not necessarily rule out the prime motivational feature of terrorism if the cause of the sponsor coincides with that of the hired hand.

Legislation passed in the sixteenth century, aimed at suppressing piracy,[30] seemed to have little effect, mainly due to the fact that apprehension of the offenders remained the obstacle. Pirates seemed to be able to roam the high seas unchecked, committing acts of plunder, theft and even murder, undeterred by the serious consequences which could

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[25]GA Res 60/43, 6 January 2006, UN Doc A/RES/60/43 (2006) para 2.

[26]House of Commons Transport Committee, 'Piracy Eighth Report of Session 2005-06', HC 1026 (London: The Stationery Office Limited, 2006).

[27]*Ibid*, 26, para 84.

[28]For example, the Act for Continuing the Acts for Prohibiting all Trade and Commerce with France and for the Encouragement of Privateers 1692, 4 Gul & Mar c25.

[29]*Op cit*, n 13, 34.

[30]For example, An Act Whereby Divers Offences* be Made High Treason, and Taking Away all Sanctuaries for All Maner of High Treason 1534 26 Hen VIII c13; an Acte Concerning Pirates and Robbers of the Sea 1535-6 27 Hen VIII c4; an Acte for the Punishment of Pirates and Robbers of the See 1536 28° Hen VIII c15. A Table of Relevant United Kingdom Statutes is shown at Appendix I.

*Piracy was on such offence.

follow capture and escaping undetected to profit from their crimes.[31] Terrorists appear to be equally adept at evading capture, but the effects of their attacks may well be felt far beyond those in the immediate vicinity of the violence.

The zenith of piracy came to a close during the early years of the eighteenth century due to changes in the law under an Act passed at the end of the seventeenth century[32] and several high profile trials.[33] However, this crime has not been eradicated - indeed, it has re-emerged in recent years as a cause of great concern to shipping.[34] Due to the extreme violence which is used in contemporary piratical attacks, it is becoming increasingly difficult to distinguish between piracy *jure gentium* and acts of terrorism perpetrated on the high seas, because the *modus operandi* can be similar, if not identical.[35] For example, the suicide bomb attack on the *USS Cole* off Aden on 12 October 2000 has been likened to the tanker blast which severely damaged the hull of the French vessel the Very Large Crude Carrier (VLCC) *Limburg* on 6 October 2002.[36] Nevertheless, the definition of piracy in its original and strict sense is "every unauthorised act of violence committed on a private vessel on the high seas against another vessel with intent to plunder".[37] Au contraire, the stage has not yet been reached where an acceptable definition of what is involved in the commission of acts of international terrorism has been agreed.

Piracy and terrorism, in company with most very serious crimes, are unlikely ever to be eradicated by legal provisions alone, since the causes must be addressed. In the case of piracy *jure gentium*, there is evidence to suggest that prosecutions for piracy *jure gentium* are not keeping pace with the rise in frequency and ferocity of the attacks,[38]

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[31]Cordingly, *Life Among the Pirates The Romance and the Reality* (London: Warner Books, 1996) Chapter 8.

[32]An Act for the More Effectual Suppression of Piracy, 1698 11 Gul III c7, section 1.

[33]For example, the difficulty faced by Captain Kidd, tried at the Old Bailey on 8 May 1701, reported in Howell (ed) *State Trials 1163-1820*, Vol 14 (London: Longman, Hurst, Rees, Orme and Browne, 1812) Trial No 416, col 127.

[34]See, *e.g.*, International Maritime Organisation, Reports on Acts of Piracy and Armed Robbery Against Ships, Third Quarterly Report (July to September 2005), MSC.4/Circ.76, Annex 1.

[35]Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982, 1833 UNTS 3, in force 16 November 1994) Article 101.

[36]*Op cit*, n 26, para 81.

[37]Jennings and Watts, *op cit*, n 15, 746, para 299.

[38]International Maritime Organisation, Reports on Acts of Piracy and Armed Robbery Against Ships - January 2006, MSC.4/Circ.82, issued 3 March 2006.

due in part to the municipal law of the State where the arrest is made being inadequate to enable prosecution.[39] In the longer term, only successful prosecutions resulting from fair trials are likely to act as a deterrent, as was the case at the end of the seventeenth century and as may be the case with regard to acts of international terrorism if and when an acceptable definition of the crime enables States who endorse it to learn the lessons of piracy and address any inadequacies in their domestic laws in this area. Whilst the characteristics of piracy *jure gentium* have not altered over time, in the case of terrorism it is possible to discern distinct stages in its emergence on the global landscape.

2.1.2 The Germination of Terrorism

Throughout history, it can fairly be said that escalation in the damage which man can inflict on his fellows has direct correlations with the development of more sophisticated weaponry and the distance from which the ammunition can be delivered, thus decreasing the risk of discovery and capture. The development of both submarines and aircraft for military purposes during the early years of the twentieth century coincided with the prosecution of world War I and with regard to submarines, the conflict exposed the unintended consequences which can follow when the law is misquoted.

Early in 1915, there had been four high profile incidents involving submarines, culminating in the sinking of the British passenger liner the *Lusitania* on 7 May, with the loss of 1198 souls, of whom 124 were citizens of the US. One of the survivors made a prescient comment in the aftermath of the attack:-

> It was freely stated and generally believed that a special effort was to be made to sink the great Cunarder [the *Lusitania*] so as to inspire the world with *terror* (emphasis added).[40]

This was one of the first occasions in the twentieth century when the perception of a new phenomenon in criminality was recorded.

Theodore Roosevelt, former President of the United States of America (US), however, declared the attack to be "piracy on a vaster scale of murder than old-time pirates ever

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[39]Wiswall Jr, 'Piracy Comite Maritime International Tackles Blackbeard' *The Maritime Advocate.com*, para 17, at http://www.maritimeadvocatecom/i19_pira.phi; see also Sakhuja, 'Maritime Legal Conundrum' *Institute of Peace & Conflict Studies India*, Article 1778, 29 June 2005.

[40]Thomas, *This Was My World* (London: Macmillan, 1933) 241.

practiced".[41] That a crime had been committed was not in dispute, but the submarinerswere not pirates motivated by private gain. Rather, they were combatants in a war and could more appropriately have been accused of having violated the laws of war.

Such wartime tragedies led not only to errors being introduced in treaties which aimed to up-date the laws of war to take account of the advances of weaponry, such as the 1922 Washington Naval Treaty,[42] but also to major research being undertaken into the viability of further codification of international law.

2.1.2.1 The Harvard Research in International Law

The Harvard Law School commenced extensive research into the viability of extending codification in international law in 1927 and as Harris points out,[43] their work did not result in a binding treaty, but its main value lies in the "thorough study of state practice that preceded it".[44] The 1932 Harvard Draft Convention on Piracy[45] contained 19 Articles, which comprehensively covered the issues, including, *inter alia*, what constitutes a pirate ship (Article 4), jurisdictional matters (Article 6) and pursuit and seizure limitations (Articles 7-12). However, for purposes of this study, it is Article 3, which not only defines piratical acts, but also takes into account air piracy, which is of interest, *viz*:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1 Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

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[41] Roosevelt, *Theodore Roosevelt: The Man as I Knew Him* (New York: Dodd, Mead & Company, 1967) 170.

[42] 1922 Washington Treaty on Submarines and Noxious Gases (6 February 1922, 25 LNTS 202, never entered into force).

[43] Harris, *op cit*, n 1, 266.

[44] *Ibid.*

[45] 'Harvard Research in International Law, Part IV – Piracy', in Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications Inc, 1974) Annex B.

2 Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3 Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

The exactitude and inclusiveness of this definition demonstrates the depth of research which was undertaken, fully to explore all the potential circumstances which could feature in acts of piracy, including attack from the air. The Harvard researchers had taken into account the latent danger arising from criminal use of aircraft, following the introduction of air strikes by the military during World War I. As a result, their proactive definition served not only as a source of reference to which the judiciary resorted,[46] but also as the bedrock and starting point for future research into the intricacies of the crime, in particular the work undertaken by the International Law Commission (ILC)[47] after World War II. Ironically, despite all the plaudits and the undoubted value of the text as a reference point (see Appendix II), none of the contents of the 1935 Harvard Draft Convention ever reached treaty status, but it continues to be a valuable reference source for international lawyers.[48]

The inclusion in the above definition of acts of violence which lead to the imprisonment or killing of a person could equally be applied to some terrorist criminality. However, the similarity ends there, because of the dichotomy in motivation: the desire of the terrorist being to bring about political/ideological/religious change by duress or coercion.

2.1.3 The Recognition of Terrorism

It is widely accepted that the assassination of Archduke Ferdinand of Austria and his wife at Sarajevo on 28 June 1914 was a defining moment in the events leading up to the declaration of World War I. Similarly, the assassination of King Alexander I of Yugoslavia, together with the French statesman Louis Barthou, in Marseilles on 9 October 1934, triggered the first denunciation of a terrorist outrage in the twentieth

[46]See, for example, the report of the Privy Council on *In re* Piracy Jure Gentium [1932] AC 586, 599.
[47]Morton, *The International Law Commission of the United Nations* (South Carolina: South Carolina University Press, 2000) 35-36.
[48]See, for example, Carnegie Endowment for International Peace, 'Harvard Draft Research on Piracy' (1927) 16 *Yearbook of the Carnegie Endowment for International Peace* 69; Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications Inc, 1974) 66.

century. The perpetrator was a member of the Macedonian Revolutionary Organisation and in the subsequent diplomatic incident between Yugoslavia and Hungary, the Yugoslav Government was the first to alert a wider audience to what they perceived to be terrorist activity and to call for measures to counter it.

Despite the incident having been described as terrorism, it was hardly terrorism on an international scale, but rather - at most - regional in nature, because the assassin (Macedonian by birth and a Bulgarian citizen) sought to enhance the cause of freeing Macedonia from Yugoslavia. There was no risk to the safety and security of other nations because they were not involved in the affairs of either State and nothing would be gained by terrorising their nationals. The significance of the incident lay in the recognition that criminal acts had been directed against persons for a political objective. It would therefore be of advantage to all States to prevent its replication elsewhere in the world, a realisation which marks an important first milestone in the history of attempts by the international community to suppress what had now been recognised as terrorist acts.

When the incident was finally resolved, the Council of the League of Nations unanimously adopted a Resolution which included a provision for a Committee of Experts to consider how best to deal with the suppression of terrorism.[49] This was an interesting development, but was not the first time such a concept had been mooted.[50]

In 1872 Gustv Moynier had drafted a treaty under the auspices of the newly founded Red Cross movement, following the atrocities committed on both sides of the Franco-Prussian war of 1870-71.[51] The document addresses issues of jurisdiction, but crucially does not define violations and penalties. It has to be borne in mind that Moynier was taking the next step in the advancement of the principles of the Geneva

[49]Adoption of Document C.543.1934.VII, 10 December 1934, *Official Journal of the League of Nations 1934*, proposal IV, 1760; see also, Morton, *op cit*, n 47, 57; and Pella, 'Towards an International Criminal Court' (1950) *American J International Law* 37, 39 and fn 6.

[50]Moynier, *Commentary on 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, cited in Hall, 'The First Proposal for a Permanent International Criminal Court', 1998 No 322 *International Review of the Red Cross* 57.

[51]Moynier, 'Note sur la creation d'une institution judiciaire internationale proper a prevenir et a reprimer les infractions a la Convention de Geneve' (1872) *Bulletin international des Societes de secours aux militaries blesses*, Comite international, No 11 (avril) 122.

Conventions of 1864[52] and 1868,[53] which did not cover the imposition of criminal liability.[54] He therefore suggested that this area should be dealt with as a separate instrument to be drafted by those qualified in this field.[55] The draft treaty was ahead of its time and therefore it is hardly surprising that it foundered through lack of support from the lawyers.[56]

In 1934, when the Committee of Experts was set up,[57] the enormity of the task which its members were to face was initially underestimated by the Council, with the French having drawn up a draft convention during the weekend prior to adoption of the resolution and the President of the Council closing the meeting with the following understatement:

> The League has done its duty. The road to peace is open. It remains only to follow it.[58]

2.1.3.1 Committee for the International Repression of Terrorism

The Committee for the International Repression of Terrorism which was set up by the Committee of Experts began work early in 1935.[59] Significantly, it was immediately recognised by some Committee members that in order for any legislation to succeed, it would be necessary to establish an international criminal court in tandem with the codification of measures to prevent and punish terrorism.[60] However, this proved to be

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[52] 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, reproduced in Schindler and Toman (eds) *The Laws of Armed Conflicts a Collection of Conventions, Resolutions and Other Documents* (fourth edition) (Leiden: Martinus Nijhoff, 2004) 365-368.

[53] Additional Articles Relating to the Condition of the Wounded in War, Geneva, 20 October 1868, *ibid*, 359-372.

[54] See 1872 Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention, Article 5, para 2, presented to the meeting of the International Committee of the Red Cross held on 3 January 1872. The text of this document is reproduced at Appendix III. See also above, n 51, 129.

[55] Hall, 'The first Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57, 61-61.

[56] *Ibid*, 64.

[57] *Op cit*, n 49.

[58] *Ibid*, closing remarks by M de Vasconcellos, 1760.

[59] League of Nations Document C.184.M.102.1935.V.; see also International Repression of Terrorism: Result of the Work of the Committee of Experts, Minutes of the Tenth Meeting of the Council of the League of Nations, 23 January 1936, *Official Journal of the League of Nations 1936*, 119.

[60] League of Nations Document C.60.1936.V., 1; see also International Repression of Terrorism: Result of the Work of the Committee of Experts, Minutes of the Tenth Meeting of the Council of the League of Nations, 23 January 1936, *Official Journal of the League of Nations*, 119, para 3.

a contentious issue and as a compromise the draft Convention for the Creation of an International Criminal Court was drawn up as a separate instrument, thus creating two treaties. In this manner, States could accept one, without necessarily being committed to endorsing both[61] and the two drafts were completed within two years. The sense of urgency was further emphasised by a decision to shorten the formal procedures usually followed when finalising conventions, so that a Diplomatic Conference would not be unduly delayed. As a result, the Plenipotentiaries convened on 16 November 1937.

2.1.3.2 1937 Convention for the Prevention and Punishment of Terrorism[62]

The final report compiled by the Committee of Experts was comprehensive, covering not just the immediate concerns of how to deal with the new phenomenon, but also how to co-operate internationally when dealing with the pursuit, apprehension and prosecution of those who perpetrated terrorist attacks. The early recognition that measures put in place internationally to confront terrorism would be emasculated unless there was some form of international jurisdiction, administered internationally, as an alternative to prosecution by national courts when circumstances conspired against the latter was significant. The first priority was to identify an internationally acceptable definition of the crime and agreement was reached upon the following wording:

> [T]he expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.[63]

It can be seen that the definition was succinctly phrased - the acts must be directed at a State, but the indiscriminate nature of the attacks would in all probability injure civilians. However, the concept of collateral damage had not been recognised in 1937, hence injury to those on the periphery of attacks was not included. Nor does the definition cover the situation where the acts are *directed* at the general public, for whatever reason. It could be argued that a defendant could claim never to have thought

[61] *Ibid*; see also Committee for the International Repression of Terrorism, Report to the Council Adopted by the Committee, 15 January 1936, League of Nations Document C.36(1).1936.V.

[62] 1937 Convention for the Prevention and Punishment of Terrorism (Geneva 16 November 1937, League of Nations Doc C.546(1).M.383(1).1937.V., never entered into force). The text of the document is reproduced at Appendix IV.

[63] Article 1, para 2.

about - let alone intended - to cause such a result and it might be difficult to prove the opposite. By pronouncing that the criminal acts must be directed against a State, the derivative offence of piracy *jure gentium* can be pared away, because of the missing element of private gain.

The list of offences caught by the definition are set out in five paragraphs in Article 2, which is aimed at achieving uniformity of the relevant criminality within each participating State. The uniformity theme continues in Article 3, which criminalises participation and/or complicity in any of the identified crimes. Taken together, Articles 1 and 2 ensure that there would be no hiding place to which a terrorist fugitive could flee in an attempt to escape justice, if apprehended on the territory of any of the signatories to the Convention.

Article 4 decrees that no distinction may be made by one State if the offence is committed in another State, where both are State Parties. The theme of complementarity is continued under Article 5, which stipulates that if the principle of taking foreign preconvictions for equivalent offences under national laws is taken into account, the same should apply in order to establish "habitual criminality"[64] with regard to acts of international terrorism: further, they should also be included when deciding on the appropriate punishment to be meted out to the guilty.[65] One can discern the element of human rights which underpins Article 6, wherein it is demanded that foreign defendants must be accorded the same rights as national defendants in municipal courts.

Extradition is the subject of much attention, with three Articles devoted to it, to cover all eventualities, from countries where extradition treaties are the norm,[66] to those which do not recognise the principle[67] and including circumstances where extradition cannot be granted. In such cases and provided certain conditions are fulfilled, a duty to prosecute is placed on the participating State which has custody of the alleged perpetrator(s).[68] Another important *caveat* in connection with human rights is the stipulation under Article 10 that where a foreign defendant is convicted under the

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[64]Para 1.
[65]Para 2.
[66]Article 7.
[67]Article 8.
[68]Article 9.

national laws of a participating State unaffected by the crime, the punishment inflicted must not exceed the maximum sentence permissible for the offence under the laws of the victim State Party.

The draft Convention also addresses deterrence,[69] prohibition of weaponry and trading in arms,[70] together with the manufacture of false documents.[71] Additional provisions are made with regard to liaison between law enforcement agencies, such as the police and the judiciary[72] and most importantly, the principle that domestic law takes precedence over international law had to be upheld, unless this could mean that the terrorist acts would go unpunished.[73] The last of the substantive Articles (Article 20) deals with dispute resolution, setting out the various avenues which can be explored to reach satisfactory conclusions.

The Committee members had covered all the eventualities comprehensively, insofar as the challenges posed by terrorism and the pitfalls which were evident at that time were concerned. It was an enlightened document and provided a benchmark against which later researchers could gauge their own efforts. Plenipotentiaries from twenty-four States, which included France, India, and the Union of Socialist Soviet Republics (USSR) were in attendance on 16 November 1937 and signed the Convention,[74] but India was alone in ratifying the treaty.[75] One suggestion for the dearth of ratifications centred on the breadth of the definition of terrorism;[76] the reason given for the UK not ratifying the treaty concerned potential difficulties anticipated over drafting domestic legislation. Another factor which may have presented difficulty for some of the signatories was their colonial possessions and a reluctance to assume obligations over

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[69]Article 11.
[70]Article 12.
[71]Article 13.
[72]Articles 14, 15 and 16 respectively.
[73]Article 18.
[74]*Op cit*, n 62, 10-12.
[75]MacPherson, 'Building an International Criminal Court for the 21st Century' (1998) 13 *Connecticut J International Law* 1, 7; see also, Franck and Lockwood, Jr, 'Preliminary Thoughts Towards an International Convention on Terrorism' (1974) 68 *American J International Law* 69, 70; Pella, 'Towards an International Criminal Court' 1950) 44 *American J International Law* 37, 38.
[76]Dugard, 'Toward the Definition of International Terrorism' *Proceedings American Society International Law* (1973) 67 *American J International Law* 94; see also, Franck and Lockwood, Jr, 'Preliminary Thoughts Towards an International Convention on Terrorism' (1974) 68 *American J International Law* 69, 70.

them, as borne out by the reservations lodged by France and the USSR.[77] It has also been pointed out that the difficulties which had been experienced in arriving at a consensus on a definition was another reason why this convention was never adopted.[78] However, the principal reason for its failure was the events leading up to the outbreak of World War II.[79] Many decades were to pass before the issue of terrorism was to resurface, but according to Morton, later attempts at defining acts of international terrorism have been "rooted" in the 1937 Convention.[80]

2.1.3.3 1937 Convention for the Creation of an International Criminal Court[81]

The significance of this draft Convention has more to do with its existence, which marked the first attempt to create a permanent international criminal court, rather than its content. The defining purpose of the 1937 draft is set out in Article 1, namely to establish an arena for the trials of those accused of terrorist offences as delineated under its companion convention.

The members appeared to have foreseen the difficulties which might arise over prosecution in circumstances where the State which had custody of the accused for whatever reason, might prefer to commit the prisoner for trial to the court.[82] Similarly, potential problems regarding extradition could be avoided by taking advantage of the option which having a permanent international criminal court would offer, provided the requesting State and the custodial State were both Parties to the Convention.[83]

Articles 5-13 are devoted to the construction of the judiciary, and the election of the President and Vice-President, but no role was envisaged for a Prosecutor. Instead the

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[77] *Op cit*, n 62, 11-12.

[78] Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 19.

[79] O'Connor, 'The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court' (1999) 27*Hofstra Law Rev* 927, 939; see also, MacPherson, 'Building an International Criminal Court for the 21st Century' (1998) 13 *Connecticut J International Law* 1, 7; Franck and Lockwood, Jr, 'Preliminary Thoughts Towards an International Convention on Terrorism' (1974) 68 *American J International Law* 69, 70; Pella, 'Towards an International Criminal Court' (1950) 44 *American J International Law* 37, 38; Saul, 'The Legal Response of the League of Nations to Terrorism' (2006) 4 *J International Criminal Justice* 78, 82.

[80] Morton, *op cit*, n 47, 21-22.

[81] 1937 Convention for the Creation of an International Criminal Court (Geneva, 16 November 1937, League of Nations Doc C.547(1).M.384(1).1937.V., never entered into force).

[82] *Ibid*, Article 2, para 1.

[83] *Ibid*, para 2.

State which committed the accused person to the Court would conduct the prosecution, unless - in order of priority - the victimised State or the State on whose territory the offence was committed wished to take on this responsibility.[84]

Interestingly the Committee envisaged a role for individuals (as opposed to States) who were the victims of terrorist acts. Under Article 26, provided the Court gave permission, a *partie civile* could take part in the proceedings at the point where damages were being assessed.[85] The inclusion of a role for the victim in the court process was innovative and carried forward sixty-one years later, when it was expanded and included in the draft convention for a permanent international criminal court during the Rome Conference, as outlined by Schabas.[86]

The document had taken less than two and a half years to produce, and dove-tailed expertly with its companion convention, which contained the crucial definition of the crime over which it was to have jurisdiction. The decision to create two conventions which were linked, whilst being independent, was inspirational. It is doubtful whether either convention could have been agreed to the satisfaction of the League within such a short time scale if this procedure had not been followed.

The final document for establishing an international criminal court was less well supported than the draft of its companion convention, receiving only thirteen signatures.[87] The convention to create an international criminal court foundered mainly due to the increasingly serious political problems which presaged the outbreak of World War II,[88] but whereas one of the concerns with the convention to prevent and punish terrorism was the concept of the criminal responsibility solely of the individual, the difficulty with regard to the establishment of an international criminal court was the prospect of the abandonment of the principle of State Sovereignty.[89] It has also been pointed out that the jurisdiction of the court would be limited to the crime of terrorism.

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[84] *Ibid*, Article 25, para 3.
[85] *Ibid*, Article 26, para 2.
[86] Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) 147-8.
[87] MacPherson, *op cit*, n 75; Pella, 'Towards an International Criminal Court' (1950) 44 *American J International Law* 37, 38.
[88] O'Connor, *op cit*, n 79.
[89] Pella, 'Towards an International Criminal Court' (1950) 44 *American J International Law* 37, 38.

There is a certain irony in the fact that when the ICC was finally established, terrorism was one of two very serious offences over which the new Court does not have jurisdiction. Nevertheless, the 1937 draft contained useful guidelines which could be followed when the time was right for revisiting the proposal to establish an international criminal court.[90]

Conclusion

In relation to international criminal law, the decade of the 1930s was seminal, because it marked the zenith of the work of the League of Nations after World War I, together with the research carried out by many academics, beginning with that of the Harvard Group and drawing to a close with the signing of the two draft Conventions discussed above. Shortly thereafter, in 1938, Hudson recorded his support for the concept of an international criminal court in the following terms:-

> Whether the convention should be brought into force or not, whether if it is brought into force the court as therein envisaged be created or not, certain ideas underlying the convention will certainly attract interest in the future and they ma y have influence in the further development of international legislation.[91]

Commenting in 1950, Pella considered that the provisions of the draft convention to establish an international criminal court "would be a useful working document in connection with the drafting of the constitution of a international criminal court".[92]

Had World War II not intervened, both draft conventions might have entered into force eventually, but by the end of that conflict, the balance of power had shifted. Views on the right to self determination and the policy of colonisation were consequently affected, placing codification of international law in the post-war era within a changed framework with a different perspective. Nevertheless, the concept of such a court and the basic definition which had been agreed upon in 1937 together provided an important landmark on the road to a recognition of international criminal law as a separate discipline within international public law and of the feasibility of distinguishing between certain national terrorist crimes and acts of terrorism which impact upon the wider world.

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[90] *Ibid.*
[91] Hudson, 'The Proposed International Criminal Court' (1938) 32 *American J International Law*, 554.
[92] *Op cit*, n 89.

PART TWO The Perspective Post 1945

Introduction

In the aftermath of the Second World War and the revelation of atrocities which had been perpetrated during the conflict, came the realisation that the existing international institutions were inadequate to deal with the consequences and restore peace. Despite some successes, most notably the creation of the Permanent Court of International Justice (PCIJ) in 1920,[93] the League of Nations is generally regarded as having failed in its primary task of achieving and maintaining international peace and security.

The UN came into being against this background, established by Charter in 1945,[94] with the same overarching purpose as its predecessor, in the hope and expectation that the experience of a second global conflict within fifty years might inspire the collective efforts of all the nations who signed up to it.[95] With the Charter came reaffirmation of the fundamental human rights of every person,[96] together with respect for the principle of equal rights and self-determination of peoples.[97] That same year the International Court of Justice (ICJ) was established by Statute,[98] to succeed the PCIJ at The Hague. Provision was also made in the UN Charter for existing and potential specialised organisations, originally funded by intergovernmental agencies, to become specialised agencies linked to the UN by special agreements.[99]

In the area of international criminal law, the seminal event of 1945 was the establishment by Charter of the International Military Tribunal (IMT),[100] sited at

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[93] 1920 Statute of the Permanent Court of International Justice (Geneva, 16 December 1920, 6 LNTS 379, 390, in force 20 August 1921).

[94] Charter of the United Nations (San Francisco, 26 June 1945, TS 993, in force 24 October 1945) Chapter 1, Purposes and Principles, Article 1, para 1.

[95] *Ibid.*

[96] *Ibid*, Preamble, para 1.

[97] *Ibid*, Article 1(2); see also GA Res 1514 (XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples', 14 December 1960, UN Doc A/RES/1514 (XV), para 2; GA Res 2105 (XX), 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', 20 December 1965, UN Doc A/RES/2105 (XX), para 10.

[98] Statute of the International Court of Justice (San Francisco, 26 June 1945, TS 993, in force 24 October 1945).

[99] Above, n 94, Articles 57 and 63.

[100] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945, 82 UNTS 279, in force 8 August 1945).

Nuremberg, where those accused of committing war crimes, crimes of aggression and crimes against humanity were to be tried. The basis for prosecuting war criminals had been set out two years earlier at the Moscow Conference in October 1943,[101] which closed with a four-nations Declaration by the governments of the US, the UK, the USSR and China and was signed by President Roosevelt, the British Prime Minister Winston Churchill and Premier Stalin. Their determination to bring those accused of war crimes to justice was spelt out in the penultimate paragraph of the Declaration, *viz*:

> Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.[102]

The London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (hereinafter referred to as the London Agreement) was drawn up on 8 August 1945,[103] signed by representatives of the four allied powers, namely the UK, the US, France and the USSR and came into force the same day. The trials commenced the following November, when twenty-two persons were arraigned before the IMT,[104] signalling that for the first time, individuals were to be held to account for their alleged infringements of IHL and crimes against humanity.

The concept of individual responsibility for war crimes had been recognised in the 1919 Versailles Peace Treaty with Germany,[105] which was drawn up following the Armistice which ended World War I,[106] but had never before been tested in the international arena. The principle of individual responsibility was the first - and arguable the most important - of the seven affirmed in the Charter of the International Nuremberg Tribunals (hereinafter referred to as the Charter) attached to the London Agreement.

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[101] Joint Four-Nation Declaration, Moscow Conference October 1943, available at http://www.ibiblio.org/pha/policy/1943/431000a.html; de Than and Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) 273.

[102] *Ibid*, Statement on Atrocities, penultimate para.

[103] *Op cit*, n 100, Article 6(a)-(c).

[104] de Than and Shorts, *op cit*, n 12, 273.

[105] Treaty of Versailles (Versailles, 28 June 1919, 13 AJIL Supp 151, 385 (1919), in force 10 January 1920) Article 228; Shaw, (fifth edition) *International Law* (Cambridge: Cambridge University Press) 2003, 234.

[106] '10 November 1918 The Armistice Demands' were set up by the Allied powers for the Armistice and accepted the following day, effective from 11.00 a.m. (Information contained in the World War I Document Archive, available at http//net.lib.byu.edu/~rdh7/wwi/1918/prearmistice.html.

2.2.1 The Nuremberg Principles

The Nuremberg Principles (reproduced at Appendix V) were drawn up in order to try those accused of committing war crimes, crimes of aggression and crimes against humanity. The defendants were charged with one or more of the crimes set out in Article 6 of the Charter as crimes against peace [Article 6(a)], war crimes [Article 6(b)] and crimes against humanity [Article 6(c)]. Defences, as Saul observes,[107] were not recognised at Nuremberg, but this was not for want of trying.

On behalf of the defendants, it was submitted that there can be no punishment of crime without a pre-existing law. However, this was rebutted on grounds that the rule against *ex post facto* punishment is not a limitation of sovereignty, but a general principle of justice. In circumstances where the perpetrator knows he is doing wrong, "it would unjust if his wrong were allowed to go unpunished."[108] The second line of defence concerned international law vis-à-vis the actions of sovereign States. It was argued that international law did not provide punishment for individuals and those who acted on behalf of States were protected by the doctrine of State immunity.[109] The judges were not swayed by this argument either and in his summing up, Sir Hartley Shawcross dismissed the submission in a ground-breaking statement, which shifted the focus of responsibility from States to individuals under international law, *viz*:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[110]

This statement has been the bedrock of all international criminal liability since it was first uttered in 1946.

The Nuremberg Principles were unanimously affirmed by the General Assembly of the UN[111] They represent an important milestone along the path of legal history with

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[107]Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 94.
[108]Egbert, 'International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 *American J International Law* 172, 217.
[109]*Ibid*, 220.
[110]The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany", Part 2, 3-14 December 1945, published under the authority of the Attorney-General (London: HMSO, 1946) 56.
[111]GA Res 95 (I), 'Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal', 11 December 1946, UN Doc A/RES/95 (I).

regard not only to the development of IHL and recognition of crimes against humanity *per se*, but also towards acceptance of international criminal law as a discipline in its own right. Interestingly, the rule against *ex post facto* punishment which was swept aside by the IMT,[112] has been raised by lawyers seeking to utilise provisions in specific conventions ratified prior to the 9/11 attacks on the US homeland in relation to potential prosecutions of those responsible for the onslaught.[113] In the fast moving world of terrorist activity around the turn of the millennium, the weakness of reactive treaties which have limited scope has been exposed in relation to this rule. The one exception is the case of piracy, which, as already noted in Part One of this chapter (see *supra*, section 2.1.1, pp15-18), most closely resembles acts of international terrorism. Piracy also preceded acts of terrorism in being the first to be codified in this area of international criminality in the last half of the twenty-first century.[114]

2.2.2 The Codification of Piracy

It must be borne in mind that individual responsibility may only be invoked for violations which are defined in international instruments as crimes under international law,[115] which applies, *inter alia*, to piracy *jure gentium*. The central feature of this international crime is the motivation, *i.e.*, it must be committed for private ends.[116] This is the element which divorces it from acts of international terrorism. The crime was included in the first codification of the law of the sea, which was drafted at the initial UN Conference on the Law of the Sea, held at Geneva in 1958,[117] the definition being based on the Harvard research proposals (see *supra*, section 2.1.2.1, pp19-20).

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[112]Egbert, *op cit*, n 108.

[113]See, *e.g.*, Duffy, *op cit*, n 78, 92-93; Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 6; Trahan, 'Trying a bin Laden and Others: Evaluating the Options for Terrorist Trials' (2002) 24 *Houston J International Law* 475; Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) *Criminal Law Rev*, 311.

[114]1958 Geneva Convention on the High Seas (Geneva, 29 April 1958, 450 UNTS 11, in force 30 September 1962), Article 15.

[115]Advisory opinion of the Inter-American Court of Human Rights in the *Reintroduction of the Death Penalty in the Peruvian Constitution* case (1995) 16 *Human Rights Law J* 9, 14; Shaw, *op cit*, n 2, 234.

[116]1958 Geneva Convention on the High Seas (Geneva, 29 April 1958, 450 UNTS 11, in force 30 September 1962), Article 15(1). See also, Harvard Research Draft Convention on Piracy, in (1932) 26 Supplement, *American J International Law* 764, 768; Shaw, *op cit*, n 2, 549; Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications Inc, 1974) 75-78.

[117]UN Conference on the Law of the Sea, Geneva, 24 February-27 April 1958, *Official Records of the UN General Assembly*, Vols I-VII, UN Doc A/CONF 13/37-43.

The comprehensive definition of the offence is contained in the 1958 Geneva Convention on the High Seas[118] and reads as follows:

> Piracy consists of any of the following acts:
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[119]

Significantly, the drafters saw fit to deal with aerial piracy within the definition for piracy on the high seas and according to Joyner,[120] the 1958 Geneva Convention on the High Seas "was obsolete by the time it came into force in 1962".[121] She is critical of the drafting of the definition as being fit for purpose with regard to piracy *jure gentium*, but inadequate with regard to air piracy, based on the fact that the former was seemingly anachronistic, whereas the latter was "replete with current incidents".[122]

2.2.3 Countering Aerial Terrorism

In the wake of World War II military aircraft were rapidly superseded by civilian airliners. Those seeking refuge in a foreign country soon took advantage of the opportunity which air travel offered of being able to 'appear' on the soil of another country - a *de facto* immigrant. The hazard of crossing borders was eliminated and the State in which the refugee might land was, in effect, faced with a *fait accompli*. It was therefore hardly surprising that many of the aerial hijackings which took place in the

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[118] 1958 Geneva Convention on the High Seas Geneva, 29 April 1958, 450 UNTS 11, in force 30 September 1962).
[119] *Ibid.*
[120] Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications Inc, 1974) 248.
[121] *Ibid.*
[122] *Ibid*, 246.

1950s were carried out in order to obtain political asylum.[123]

The nature of these hijackings raised three issues. Firstly, the use of force to some degree which was necessary to coerce the pilot to change course and destination, introducing an element of high risk to all those on board the aircraft. It was unlikely that desperate refugees would have considered whether the fuel would be sufficient for the alteration in route, let alone the danger posed to all on board the aircraft if it were damaged in mid flight. Secondly, there was the matter of political asylum: whilst States have the right to grant asylum, as Malanczuk points out, an individual has no right to demand it.[124] Hijacking aircraft in order to gain asylum from persecution also conflicts with paragraph 2 of Article 14, Universal Declaration of Human Rights (UDHR), which specifically rules out invocation of these rights in cases of prosecution relating to any criminal acts.[125] Thirdly, with regard to extradition, there is no international rule which prevents States from extraditing an alleged offender even if no formal relevant extradition treaty exists.[126] These matters were first addressed at Tokyo in 1963.

2.2.3.1 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention)[127]

The purpose of the Tokyo Convention was to deal with difficulties regarding jurisdiction, which had arisen due to the fact that aircraft overflew the territories of States and the process of taking off and landing would impinge upon the sovereignty of more than one State, so that a minimum of three State jurisdictions could be involved. It was therefore paramount to attain continuity of jurisdiction over criminal acts which were committed in flight. This was achieved by identifying flight as "...from the moment when power is applied for the purpose of take-off until the moment when the

[123]Shaw, *op cit*, n 2, 4. The hijacking of a Boeing 727 in February 2000 by nine Afghans seeking asylum from the Taliban regime has replicated this situation: the Home Secretary is seeking to overturn the High Court ruling made by Mr Justice Sullivan on 10 May 2006 that the nine could remain until it was safe for them to return home.

[124]Malanczuk (ed) *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997) (seventh revised edition) 117.

[125]Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, UN Doc A/810, 71 (1948) Article 14, para 2.

[126]Above, n 124.

[127]Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963 704 UNTS 219, in force 4 December 1969).

landing run ends" [Article 1 (paragraph 3)].

The co-operation of contracting parties is the key to the success of this treaty, since it is axiomatic that a high level of State interaction is required when coping with potentially critical incidents. This was achieved by adopting the flag State regime governing shipping, so that the State of registration of the aircraft was deemed to be competent to exercise jurisdiction, whilst State Parties also retained jurisdiction for any breaches of their national laws (Article 3). The latter can only override the former when incidents also impact upon a State Party other than the one where the aircraft is registered (Article 4).

Setting aside the threat from terrorism, situations which are not necessarily criminal acts, but which potentially could jeopardise the safety of the aircraft and/or those on board, or might disrupt good order and discipline on board are set out in Article 1(b). The role and responsibilities of the aircraft commander are delineated in Articles 6-10.

The substantive weakness in this Convention lies in the measures relating to extradition, since although the principle of *aut dedere aut judicare* was adopted under Article 16, the second paragraph of this Article records that there is no obligation on States to grant extradition. Taken as a whole - and in the light of Article 13, which deals with processing the offender - if the perpetrator is not expelled by the State where s/he lands,[128] nor extradited nor prosecuted,[129] Joyner observes that there is a distinct possibility that the culprit will escape justice.[130]

Deficiencies in the Tokyo Convention soon became apparent and coupled with the subsequent escalation in aerial hijacking, it was evident that further measures were needed. The Tokyo Convention was only the first in a series of reactive conventions which followed, as terrorists became adept at exploiting gaps in the legislation and the legislators struggled to keep abreast of the situation.

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[128] *Ibid*, Article 14, para 2.
[129] *Ibid*, Articles 13-15.
[130] Joyner, *op cit*, n 120, 140.

2.2.3.2 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Hijacking Convention)[131]

The International Civil Aviation Organisation (ICAO) began work on a follow-up convention in February 1969, using the Tokyo Convention as a guide and the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft was the outcome. The essence of the Tokyo Convention was included in Article 9 of the Hague Convention, but importantly, definitions of actual offences which could be committed on board an aircraft in flight are set out in Article 1. These include use or threat of unlawful force or intimidation in the course of seizing or exercising control of the aircraft, to attempts, or aiding and abetting the commission of these offences. Article 2 calls upon contracting parties to put in place severe penalties for those found guilty, whilst Article 4 stipulates the circumstances in which each State Party must take the necessary measures to establish their jurisdiction over the offence. These concern, respectively, (a) the origin of registration of the aircraft; (b) where it lands (provided the alleged offender is still on board); and (c) the position regarding leased aircraft - all of which are delineated in relation to the business/residence of the lessee within the State where the offence is committed. Paragraph 2 of this Article stipulates that if the offender is present in the territory of a State Party and extradition to any of the other States involved will not be granted, then that State must exercise its jurisdiction. The third paragraph confirms that the national criminal law of State Parties is not excluded by the Convention.

Extradition matters are dealt with in Articles 7 (*aut dedere aut judicare*) and 8 (dealing with existing and future extradition treaties), wherein it is deemed the new offence will be included as an extraditable offence. Jennings and Watts draw attention to a further provision contained in Article 8, whereby for purposes of extradition between contracting States, the offence shall be treated as it if had occurred in the territories of any of the States required to establish their jurisdiction as set out in Article 4.[132] Thus the loophole in the extradition procedures of the Tokyo Convention were effectively closed.

[131]Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971).
[132]Jennings and Watts, *op cit*, n 15, 483

The Hague Convention was concluded on 16 December 1970, but earlier that year work had begun on an additional convention in response to a worrying new trend in terrorism concerning acts of sabotage being perpetrated against aircraft. The final impetus came in the September, with the *Dawson's Field Incident* in which three passengers airlines were hijacked and blown up at a remote air strip in the Jordanian desert. The hijack was perpetrated by members of the Palestine Liberation Organization (PLO), in part to gain publicity for their struggle for self-determination. It may not be a coincidence that the UN General Assembly issued a Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations a month after this incident.[133]

2.2.3.3 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention)[134]

The Montreal Convention followed the pattern set out in the Hague Convention, but the offences were strictly confined to acts of sabotage likely to endanger the safety of the aircraft. The definition set out in Article 1 makes no mention of any motivation which might lie behind such acts, leaving the definition broad, but it also covers attempts and the role of accomplices. Article 3 calls for severe penalties to be imposed on those convicted, whilst issues of jurisdiction over the offence are addressed in Article 5.

Extradition procedures (Articles 7 and 8) are dealt with in like vein to those set out in the Hague Convention, thus establishing a standard procedure which has been followed ever since in this area of international law.

Between acceptance and the entering into force of the Montreal Convention on the 26 January 1973, one of the most shocking terrorist attacks in the second half of the twentieth century was launched at the Munich Olympics on 5 September 1972.[135] It culminated in a fierce gun battle at Munich airport during an abortive attempt to rescue

[133]GA Res 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', 24 October 1970, UN Doc A/RES/2625 (XXV), Annex, preambular para 13; see also GA Res 2734 (XXV), 'Declaration on the Strengthening of Security', 16 December 1970, UN Doc A/RES/2734 (XXV), para 2.

[134]Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973).

[135]Burne, (ed) 'Israeli Olympic Compound is Stormed', *The Chronicle of the Twentieth Century the ultimate record of our times* (second edition) (London: Dorling Kindersley Ltd, 1995) 1050.

the Jewish athletes who had been taken hostage (see *infra*, Chapter 3, section 3.1.2, pp78-80). The onslaught prompted the UN General Assembly to address this increase in terrorist violence, which appeared to be driven in part by the increasing frustration of those engaged in ineffective struggles for self-determination. [136]

A series of terrorist attacks involving lethal violence at international airports followed, such as the simultaneous attacks at Rome and Vienna on 27 December 1985, in which eighteen people were killed and a further one hundred and twenty were injured.[137] Therefore by 1988, even the Montreal Convention was found wanting and in need of some amendment, which took the form of a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.[138]

These events amply illustrated that terrorists were adept at exploiting weaknesses in measures put in place to counter aerial terrorism. However, their criminality was not confined to aerial terrorism. During the 1960s, there was a spate of hijacking attacks on the high seas, which at the time were viewed as piracy within the first codification of the law of the sea (see *supra*, section 2.2.2, pp32-33). Indeed, even in the early 1980s, the piracy definition was included verbatim as Article 101 of the 1982 Convention on the Law of the Sea (UNCLOS).[139] However, three years later, an attack on the cruise liner the *Achille Lauro* revealed inadequacies in this Convention also and it was evident that more needed to be done in attempting to suppress terrorist attacks on the high seas.

2.2.4 Countering Terrorism on the High Seas

The *Achille Lauro Incident* began on 7 October 1985.[140] Terrorists seized over four hundred hostages aboard the cruise liner *Achille Lauro*, in a bid to obtain the release of

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[136]GA Res 3034 (XXVII), 'Measures to prevent International terrorism', 18 December 1972, UN Doc A/RES/3034 (XXVII), para 3; GA Res 31/102, 15 December 1976, UN Doc A/RES/31/102, para 3. See also Halberstam, 'The Evolution of the United Nations Position on Terrorism: from Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed' (2003) 41 *Columbia J Transnational Law* 573, 575-577.

[137]Lewis, "In Vienna, Panic in Middle of Shooting and Grenades", *The New York Times*, World News, Saturday 28 December 1985, 4; see also, the statement by the President of the Security Council, 30 December1985, reference the attacks at Rome and Vienna airports, UN Doc S/17702; reported in Vol 39 *Yearbook of the United Nations*, (London: Martinus Nijhoff Publishers, 1985), 292.

[138]Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24 February 1988, 27 ILM 627, in force 6 August 1989).

[139]Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982, 1833 UNTS 3, in force 16 November 1994).

[140]Harris, *op cit*, n 1, 603-4.

fifty Palestinians imprisoned in Israeli jails. When negotiations failed, the kidnappers shot dead Leon Klinghoffer (an American Jew) who was partially paralysed and a wheelchair user, tossing his body overboard. Despite this act of depravity, the demands of the terrorists were not met and the incident ended with their capture two days later.[141] However, this single incident focused attention on existing legislation as to whether it was sufficiently robust and whether the existing definition of marine piracy should be revisited.[142] There had been an increase in the number of such attacks, which the International Maritime Organisation (IMO) had noted with concern,[143] but this incident was the catalyst which led to the preparation of a further convention[144] in response to the increasing severity of hijacking attacks on shipping, which also seized the attention of the UN.[145]

2.2.4.1 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)[146]

This Convention created a number of new offences, such as the seizure or exercise of control over a ship by any form of intimidation and violence against a person on board a ship.[147] Hayashi[148] notes that the inclusion of Article 3(1g) in the definition of offences, which concerns the injuring or killing of any person in connection with the commission or attempted commission of any of the offences delineated in Article 3, was controversial at the PrepCom,[149] but ultimately the decision to retain it was

[141]McGinley, 'The Achille Lauro Affair - Implications for International Law' (1985) 52 *Tennessee Law Rev* 691, 691-3.

[142]Halberstam 'Terrorism on the High Seas: the Achille Lauro, Piracy and the MO Convention on Maritime Safety' (1988) 82 *American J International Law* 269; see also Constantinople, Notes 'Towards a New Definition of Piracy: The Achille Lauro Incident' (1986) 26 *Virginia J International Law* 723; and McGinley, above, n 141, 691.

[143]IMO Assembly Res A 584 (14), 'Measures to Prevent Unlawful Acts which Threaten the Safety of Ships and the Security of their Passengers and Crews', 20 November 1985; see also Jennings and Watts, *op cit*, n 15, 755.

[144]Above, n 142, 269.

[145]GA Res 40/61,'Measures to prevent international terrorism', 9 December 1985, UN Doc A/RES/40/61 (1985).

[146]Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation (Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992).

[147]*Ibid*, Article 3(1)(a) and (b).

[148]Hayashi 'The 1988 IMO Convention on the Suppression of Maritime Terrorism' in Han (ed) *Terrorism & Political Violence: Limits & Possibilities of Legal Control* (London: Oceana Publications Inc, (1993) 225.

[149]*Ibid*, 238, fn 20.

probably due to the wanton killing of Mr Klinghoffer on the *Achille Lauro*.[150]

Jurisdiction with regard to the new offences extends beyond the territorial sea limits (Article 4) and Article 10 stipulates that the principle of *aut dedere aut judicare* applies to the treaty "without exception whatsoever", so that the alleged offender would be denied the opportunity to claim political asylum.

The IMO was acutely aware that fixed platforms engaged in drilling for oil could also be a target for terrorists and a Protocol covering the same issues in relation to their safety was adopted contemporaneously.[151] The 1988 Convention was drawn up in response to the acceleration of piratical attacks on shipping, but it should be noted that the parallel Protocol was a proactive measure, since no fixed platforms accommodating drilling rigs had actually been subjected to attack.

Jennings and Watts draw attention to the fact that the seizure or exercise of control of a ship by force "need not amount in all circumstances, to piracy",[152] which demonstrates an acknowledgement that a distinction is emerging between piracy *jure gentium* and similar, but not identical, acts of violence being perpetrated on the high seas. What is also clear is that the piecemeal approach to preventing and suppressing acts of international terrorism had been demonstrably ineffectual. The massacre of ten Jewish athletes and their Israeli wrestling coach, Moshe Weinberg, at the Munich Olympics was terrorist violence of a hitherto unparalleled order (see *infra*, section 3.1.2, pp78-80). This single atrocity inflamed an already unstable situation in the Middle East and was the catalyst which brought international terrorism to the fore on the agenda of the UN.

2.2.5 The Role of the United Nations

In December 1972 the UN General Assembly adopted Resolution 3034 (XXVII),[153] inviting all States to submit concrete proposals for finding an effective solution to the terrorist problem to the Secretary-General by 10 April 1973.[154] This resulted in a shift

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[150] *Ibid*; see also, Halberstam, *op cit*, n 142, 292.

[151] Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental shelf, an amendment to the SUA Convention, (10 March 1988, 1678 UNTS 221, in force 1 March 1992).

[152] Jennings and Watts, *op cit*, n 15, 743.

[153] GA Res 3034 (XXVII), 'Measures to Prevent International Terrorism', 18 December 1972, UN Doc A/RES/3034 (XXVII).

[154] *Ibid*, para 7.

in approach towards considering the terrorist problem proactively, whilst at the same time still championing the principle of self-determination and stressing the need to seek solutions to the underlying causes of the violence.[155]

2.2.5.1 Draft Proposals for a UN Convention to Prevent International Terrorism

The Ad Hoc Committee which had been set up under Resolution 3034[156] met in the summer of 1973.[157] Not since 1937, when the terrorist assassinations in Marseilles had led to the first Convention for the Prevention and Punishment of Terrorism[158] had the problem been viewed in this way. The enormity of the task became apparent at the outset whilst setting the agenda, but eventually three issues were identified as being paramount, namely (i) defining acts of international terrorism, (ii) identifying the underlying causes which led to it, and (iii) instigating measures for its prevention.

The members could not agree on any of the items, due to fundamental disagreement as to the order of priority over their work, with the result that their subsequent Report contained seven proposals for a definition, two main causes of the problem (individual and political terrorism) and separate contributions from the Non-aligned Group of States (Greece, Nigeria, the UK and the US) regarding measures for the prevention of terrorism.[159] The Ad Hoc Committee continued its deliberations over the years, but a comment by M Jeannel of France during the debate at the UN General Assembly about its 1975 Report, succinctly summed up the position as "a dialogue of the deaf".[160]

It was apparent that the scales were not yet sufficiently balanced as between the atrocities being perpetrated on the one hand and the necessity for determined and united action to defeat terrorism on the other, which might engender a spirit of co-operation

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[155] *Ibid*, preambular para 2; GA Res 32/147, 'Measures to prevent international terrorism', 16 December 1977, Un Doc A/RES/32.147 (1977), paras 2-3. See also Verwey, (1981) 'The International Hostages Convention and National Liberation Movements' 75 *American J International* Law 69.

[156] *Ibid*, para 9.

[157] 'Observations of States submitted in accordance with GA Res 3034 (XXVII)', Ad Hoc Committee on International Terrorism, 16 July-10 August 1973, UN Doc A/AC.160/1, 16 May 1973.

[158] 1937 Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937 League of Nations Doc C.546(1).M.383(1).1937.V., never entered into force).

[159] Report of the Ad Hoc Committee on International Terrorism, *Official Records of the UN General Assembly*, Twenty-eighth session, Supplement No 28 (A9029) 1973, Annex 'Draft Proposals and Suggestions submitted to the Three Sub-Committees of the Whole', Part C, 25-34.

[160] *Official Records of the UN General Assembly*, Thirtieth session, Sixth Committee, 1581st meeting, 4 December 1975, 286, para 36; see also Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 539.

among those States most embroiled in the problem. In the meantime, progress - if any were to be made - would only be achieved by countering each new manifestation as it erupted, by continuing the piecemeal approach with regard to preventive measures.

2.2.6 Countering Terrorism on Land

Despite the universally accepted international rules governing diplomatic immunity, set out in the 1961 Vienna Convention on Diplomatic Relations,[161] Count von Spreti, the West German Ambassador to Guatemala, was kidnapped and subsequently murdered by extreme left-wing guerrillas on 5 April 1970. His killing resulted in further measures being draw up in an effort to enhance the security of diplomats and other persons who had internationally high profiles.

2.2.6.1 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents[162]

The Convention sets out to deal collectively with the crimes of murder, kidnapping or attack, whether actual, attempted or threatened, so that a new offence of direct involvement or complicity in them is created, which can be directed at persons, official premises, private accommodation or means of transport of diplomatic agents and other internationally protected persons (Article 2).

Each State Party must ensure that the offences are made punishable by appropriate penalties (Article 2, para 2) and has obligations to establish jurisdiction over these offences, whether committed in the territory of that State or on board a ship or aircraft registered in that State (Article 3). The States Parties have further obligations to take alleged offenders into custody, to prosecute or extradite them (Article 6), and to co-operate in preventive measures and exchange of information and evidence needed with regard to criminal proceedings (Article 10). The treaty came into force in 1977, by which time members of the general public had also been taken hostage by terrorists and more needed to be done to protect them.

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[161]Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961, 500 UNTS 95, in force 24 April 1964).

[162]United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977).

2.2.6.2 1979 International Convention Against the Taking of Hostages[163]

The Hostages Convention was in its final draft stage when the US Embassy in Teheran was seized on 4 November 1979. The length of the ensuing siege and confinement of the diplomatic staff could not have been foreseen, but the sheer audacity of the event in total disregard for international rules regarding diplomatic immunity, gave added impetus to the completion of the treaty, which was adopted by the UN General Assembly on 17 December 1979 without a vote.[164] At the same time, the UN General Assembly again addressed the issue of preventative measures to combat terrorism, whilst also reaffirming the right of all peoples to self-determination.[165]

A newly defined offence of direct involvement or complicity in the seizure or detention of and threats to kill, injure or continue to detain a hostage was introduced in Article 1. In other respects this convention followed the pattern of earlier treaties with regard to appropriate penalties for the guilty (Article 2), but Article 3 is concerned with the well-being of the hostages whilst imprisoned, to secure their release and then to facilitate their departure. The standard articles regarding custody of alleged offenders and co-operation with other State Parties in the matter of criminal proceedings are all incorporated in the text.

Once again, the Convention was reactive, having been drafted in response to the escalation in hostage taking during the 1970s. However, a shift towards proactive legislation followed at the end of the decade, when other issues surrounding terrorist attacks became a matter of concern.

2.2.7 The Logistical Approach to Countering Terrorism

Whilst terrorists appeared to have no difficulty in obtaining conventional weaponry, it was crucial that nuclear material did not fall into their hands, but it appeared to be as impractical to ban its use entirely as it had been difficult to identify a comprehensive definition of international terrorism. Hence safeguarding its security in transit and

[163]International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983).

[164]GA Res 34/146, 'International Convention Against the Taking of Hostages', 17 December 1979, UN Doc A/RES/34/146 (1979).

[165]GA Res 34/145, 'Measures to prevent international terrorism', 17 December 1979, UN Doc A/RES/34/145 (1979), preambular paras 4-5.

whilst in storage was of paramount importance, due to the increasing audacity of the terrorists.

2.2.7.1 Measures to Safeguard Armaments

In drawing up measures to upgrade and protect the security of such material, there was no need to define a terrorist attack *per se* and therefore the complexities surrounding the issue of definition did not arise. However, guarding against sensitive material falling into the wrong hands should have the effect of assisting in preventing an escalation in the severity of terrorist attacks.

The 1980 Convention on the Physical Protection of Nuclear Material[166] came into force in February 1987, which defined the departure and destination limits of international transit in Article 1, together with the necessary requisite standards. Emphasis was also laid on the importance of cooperation between States Parties over all aspects of the transportation of the material.

Four years later the Convention on the Marking of Plastic Explosives for the Purpose of Detection was completed.[167] In addition to marking explosives, the treaty also covered the destruction of unmarked stocks no longer required by the military and established an International Explosives Technical Commission for monitoring the procedures (Article V). Such measures might not deter the terrorists from using such material, but it should assist in tracking down the perpetrators and bringing them to justice. Six years later, the escalation in indiscriminate use of conventional explosives by terrorists was addressed.

2.2.7.2 Measures to Deter the Use of Explosives

The 1997 International Convention for the Suppression of Terrorist Bombings[168] defined an offence of being involved in the detonation of a bomb in a public place with intent to cause death or serious bodily injury or to destroy public property (Article 2).

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[166]Convention on the Physical Protection of Nuclear Materials (Vienna, 3 March 1980, 1456 UNTS 101, in force 8 February 1987).

[167]Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991, 30 ILM 721, in force 21 June 1998).

[168]International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001).

All the standard clauses regarding attempts and conspiracies were included and importantly from the international perspective, Article 3 stipulates that the Convention does not apply in situations where an explosion is totally contained within one State, both with respect to location and nationality of offenders and victims.

2.2.7.3 Measures to Deny Access to Funds

In the last decade of the twentieth century there was a significant increase in the number of terrorist attacks which involved the use of sophisticated weaponry, which prompted the UN General Assembly to extend the mandate of the Ad Hoc Committee further, to include the elaboration of a draft international convention for the suppression of terrorist financing.[169] The 1999 International Convention for the Suppression of the Financing of Terrorism[170] sought to address this issue.

The measures contained in the treaty concern the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds (Article 2), whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out a raft of offences listed in the annex . Of note is the defined intention to "intimidate a population", together with the phrase "which are perpetuated to compel a government or an international organisation to do or to abstain from doing any act" [Article 2(1)(b)].[171] The intention to intimidate people randomly, together with and linked to, the element of duress are emerging as recurring, identifiable elements which are central to the perpetration of acts of international terrorism.[172]

Terrorists disregard the law, so their activities will not be suppressed by the existence of international laws which proscribe their criminality unless their sources of support, principally financial, are diminished. Therefore the more extensive the withdrawal of funds by States, the greater will be the impact on their criminality.

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[169]GA Res 53/108, 'Measures to eliminate international terrorism', 26 January 1999, UN Doc A/RES/53/108 (1999), para 11.

[170]International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002).

[171]*Ibid*, Article 2(1)(b)].

[172]See, for example, Article 1(1), International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983); Article 2(b)(iii), International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force).

2.2.8 The Holistic Approach to Countering Terrorism

In 1987 a further initiative aimed at alleviating the terrorist problem had been launched, with the decision to convene an international conference to define terrorism and at the same time attempt to differentiate it from struggles for national liberation.[173] In the mid 1990s, however, the UN was moved to revitalise its efforts with the aim of securing an all encompassing legal framework to repress and counter the terrorist threat. The concern had arisen in part because of evidence that increasingly links were being forged between terrorist groups and serious organised criminal gangs which rebounded adversely on human rights.[174]

The first significant document to be adopted was the Declaration on Measures to Eliminate International Terrorism, (hereinafter referred to as the Declaration), which was annexed to UN General Assembly resolution 49/60.[175] This was effectively a wake-up call to the member States, alerting them to the "imperative need to strengthen international cooperation between States",[176] which Duffy described as "something of a breakthrough".[177] The criminality which was to be targeted was clearly set out, *viz*:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes ... whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature.[178]

The Declaration was reaffirmed a year later[179] in a resolution which, significantly, also drew attention to the role of the Security Council in addressing threats to global security.[180] Six days later a Supplement to the 1994 Declaration was approved[181]

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[173]GA Res 42/159, 'Measures to prevent international terrorism', 7 December 1987, UN Doc A/RES/42/159 (1987).
[174]GA Res 48/122, 'Human rights and terrorism', 14 February 1994, UN Doc A/RES/48/122 (1994), preambular paras 7-8.
[175]GA Res 49/60, 'Measures to eliminate international terrorism', 9 December 1994, UN Doc GA/RES/49/60 (1994).
[176]*Ibid*, Annex, preambular para 10.
[177]Duffy, *op cit*, n 78, 19.
[178]Above, n 175, para 3.
[179]A Res 50/53, 'Measures to eliminate terrorism', 11 December 1995, UN Doc A/RES/50/53 (1995), para 3.
[180]*Ibid*, para 7; see, for example, SC Res 1269, 19 October 1999, UN Doc S/RES/1269 (199), para 5.
[181]Res 51/210, 'Measures to eliminate terrorism', 17 December 1996, Un Doc A/RES/51/210 (1996), para 8.

which, *inter alia*, advised States not to regard as political, terrorist offences which threatened the safety and security of persons under any circumstances.[182] The overall concern expressed in the Supplement was that terrorists, once apprehended, should not escape prosecution, whilst at the same time, international standards of human rights had to be upheld.[183]

Both the Declaration and the Supplement reveal a change in the approach adopted by the UN General Assembly. The necessity to take firm action to address the threat from international terrorism was overtaking the perceived need constantly to remind States of their responsibility to uphold the founding principle of self-determination - a prompting which was absent from both the Declaration and the Supplement.

Conclusion

It could be argued that linking the added dimension of coercion with the intimidation factor in contemporary acts of international terrorism more accurately describes what is generally understood by the term. As the century drew to a close, this recognition, combined with the knowledge that terrorists are not concerned about the basic human right to life, began to raise concerns about the potential disasters which might follow should such criminals acquire nuclear material.

PART THREE The Perspective 2000-06

Introduction

Attempting to strike a balance between rigorous measures to suppress international terrorism whilst continuing to ring fence the right to crusade for self-determination and protect human rights became an ever more difficult task at the turn of the century, with a consequential increase in the work load of the UN Commission on Human Rights vis-à-vis this particular area of the law.

2.3.1 Distinguishing Terrorism from Struggles for Self-determination

The former UN Sub-Commission Special Rapporteur on terrorism and human rights noted in her initial review of the phenomenon[184] that there was an inevitable link

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[182] *Ibid*, Annex, para 6.
[183] *Ibid*, para 3.
[184] Koufa, 'Terrorism and human rights', Working Paper, 26 June 1997, UN Doc E/CN.4/Sub.2/1997/28.

between terrorism and human rights violations,[185] and drew attention, *inter alia*, to the wide-ranging views and complex issues which have prevented the identification of a comprehensive definition of the phenomenon from being agreed.[186] Having considered the definitional problem in some depth, she identified violations of human rights, humanitarian law and basic tenets of the UN Charter as major drivers of terrorism.[187] Consequently, she argues that observance of these inalienable rights will alleviate the terrorism problem.[188]

In her second Progress Report,[189] the Special Rapporteur reviewed recent international counter-terrorism measures.[190] She pinpointed not only the restoration of the Ad Hoc Committee established pursuant to GA resolution 51/210,[191] but also Security Council resolution 1373[192] as comprising key developments within the UN system[193] and drew attention to prescient remarks made by Mary Robinson, the UN High Commissioner for Human Rights, regarding the potential for instigating excessively stringent counter-terrorism measures.[194] Ms Koufa compiled an additional progress report in 2003,[195] in which she delved further into the definitional issue, examining, *inter alia*, the roles of sub-State and non-State actors.[196] She also placed the quest for a definition within a

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[185] *Ibid*, para 4(e).

[186] *Ibid*, para 17; Murphy, 'Defining international terrorism: a way out of the quagmire', (1989) 19 *Israel Yearbook on Human Rights*, 13; Laqueur, 'Reflections on terrorism', (1986) 54 *Foreign Affairs*, 86, 88. See also Koufa, 'Terrorism and human rights', Preliminary Report, 7 June 1999, UN Doc E/CN.4/Sub.2/1999/27, para 16, wherein she drew attention, *inter alia*, to the effect which the 1993 World Conference on Human Rights had on drawing attention to the broader international implications of the link between terrorism and human rights.

[187] Koufa, 'Terrorism and human rights', Progress Report, 27 June 2001, UN Doc E/CN.4/Sub.2/2001/31, para 130. See also Keilsgard, (2006) 36 *California Western International Law J* 249, 259; Saul, *op cit*, fn 107, 28.

[188] *Ibid*, para 131.

[189] Koufa, 'Other human rights issues: terrorism and human rights', Second Progress Report, 17 July 2002, UN Doc E/CN.4/Sub.2/2002/35.

[190] *Ibid*, I, A, para 21; GA Res 56/1, 'Condemnation of terrorist attacks in the United States of America', 18 September 2001, UN Doc A/RES/56/1 (2001), para 4; SC Res 1368 (2001), 12 September 2001, UN Doc S/RES/1368 (2001), para 4; SC Res 1269 (1999), 19 October 1999, UN Doc S/RES/1269 (1999), para 4.

[191] *Ibid*, para 22; GA Res 51/210, 'Measures to eliminate international terrorism', 17 December 1996, UN Doc A/RES/51/210 (1996).

[192] *Ibid*; SC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001).

[193] *Ibid.*

[194] 'Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights', UN Doc E/CN.4/2002/18, para 31.

[195] Koufa, 'Terrorism and human rights', additional Progress Report, 8 August 2003, UN Doc E/CN.4/Sub.2/2003/WP.1.

[196] *Ibid*, I, B.

legal perspective and warned of the danger that over zealous legal definitions of terrorism could lead to the "criminalization of legal and/or lawful behaviour under international law"[197] and hence impinge disproportionately on the application of fundamental rights and freedoms.[198]

The Special Rapporteur highlighted the conclusion drawn by the Security Council in the aftermath of the 9/11 onslaught that the attacks "like any act of international terrorism [constituted] a threat to international peace and security"[199] and in her final report[200] drew attention to the deleterious effect which linking counter-terrorism to a "war on terrorism" has had on the issue of self-determination, particularly with regard to IHL.[201]

Her research led her to define the principle of self-determination as:

> the individual and collective right of a people to determine their political status and to pursue freely their economic, social and cultural development[202]

and to categorise those who qualified for this right as having a history of self-rule or independence in a specific territory, "a distinct culture, and a will and capacity to regain self-governance".[203]

The Special Rapporteur concluded that the issue of self-determination in relation to armed conflict remained one of considerable controversy[204] and therefore recommended that any review of situations involving armed violence should be conducted within the framework of IHL and should be carried out impartially and periodically.[205]

The research carried out by the Special Rapporteur, spanning seven years, serves as a compelling testimony to the need to define terrorism comprehensively because of the

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[197] *Ibid*, para 73.

[198] *Ibid.* See also Koufa, 'Terrorism and human rights', Working Paper, 11 August 2004, UN Doc E/CN.4/sub.2/2004/47, in which she prepared a preliminary framework draft of principles and guidelines concerning human rights and terrorism for he consideration of the Sub-Commission and the Commission for possible future action.

[199] Koufa, *op cit*, n 189, para 21; SC Res 1368 (2001), 12 September 2001, UN Doc S/RES/1368 (2001), para 4.

[200] Koufa, 'Specific human rights issues: new priorities, in particular terrorism and counter-terrorism', 25 June 2004, UN Doc E/CN.4/Sub.2/2004/40.

[201] *Ibid*, para 72; Duffy, *op cit*, fn 78, 350.

[202] *Ibid*, para 29.

[203] *Ibid.*

[204] *Ibid*, para 32; Cassese, *Self-determination of Peoples* (Cambridge: Cambridge University Press, 1995) 153 and 198.

[205] Above, n 201.

centrality of the issue to the threat which the phenomenon poses, not only to world peace, but also to the preservation and promotion of human rights, the principle of self-determination and crucially, to the maintenance of the rule of law.

2.3.2 The Promotion and Protection of Human Rights Post 9/11

In keeping with their mandate, the Security Council continues to drive the agenda with regard to counter-terrorism since establishing its Counter-Terrorism Committee (CTC) to monitor implementation of the measures set out in Security Council resolution 1373 in the wake of the 9/11 attacks.[206]

2.3.2.1 Characterisation of Targeted Terrorist Criminality

In October 2004, with no sign of abatement in the terrorist attacks worldwide and the complete disregard for human rights associated with terrorist acts, the Security Council called upon States to redouble their united counter-terrorism efforts.[207] In this regard, SC resolution 1566 contains, *inter alia*, a description of the type of acts which States must suppress, or if perpetrated, ensure that those responsible are punished "by penalties consistent with their grave nature",[208] *viz*:

> Criminal acts, including against civilians, committed with intent to cause death or serious bodily injury, or taking hostages[209]

The specified acts had to be accompanied by an intention to

> provoke a state of terror in the general public or in a group of persons or particular persons, to intimidate a population or compel a government or an international organization to do or to abstain from doing any act[210]

as defined in international conventions and protocols relating to terrorism. Interestingly, this description not only contained all the essential elements characteristic of the phenomenon, but continued by drawing attention to the fact that these elements had been included within all the measures thus far approved by the UN in combating international terrorism.[211]

Of greater significance, however, is the ensuing categoric denunciation of any justifi-

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[206] SC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001), para 6.
[207] SC Res 1566 (2004), 8 October 2004, UN Doc S/RES/1566 (2004), para 2.
[208] *Ibid*, para 3.
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*

cation for this criminality on grounds of a "political, philosophical, ideological, racial, ethnic, religious *or other similar nature*"[212] (emphasis added), thereby authoritatively widening the divide between the terrorist and the freedom fighter seeking self-determination for his/her country. Conversely, this divide would arguably be removed if agreement on a comprehensive definition of terrorism could be reached.[213]

The resolution is couched in somewhat forceful tones, as would be expected with edicts emanating from the UN Security Council, but it is important to highlight the caveat contained in the preamble to the document, to the effect that any measures introduced by member States must be in conformity with international human rights, with specific reference also being made to humanitarian and refugee law.[214]

2.3.2.2 The Trigger-offence Approach to International Terrorism

In his first report to the UN Commission on Human Rights with regard to the protection of human rights while countering terrorism,[215] the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism[216] stated that the issue of how governments and relevant UN bodies define the terrorist phenomenon was core to his mandate.[217] Since the existing international legislation on terrorism was imprecise,[218] he regarded it as crucial to ensure that the term terrorism was not used inappropriately, since not all actions in all cases would constitute terrorism.[219]

He identified the text of paragraph 3 of Security Council resolution 1566[220] as central in

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[212] *Ibid.*

[213] *Op cit*, Koufa, fn 200, para 39; Rona (2003) 27 *Fletcher Forum World Affairs* 55, 60-61.

[214] *Op cit*, fn 207, preambular para 6. See also Cassesse, 'Terrorism and Human Rights' (1982) 31 *American University Law Rev* 945, 958; Bianchi, 'Assessing the Effectiveness of the Security Council's Anti-terrorism Measures: the Quest for Legitimacy and Cohesion' (2006) 17 *European J International Law* 881; Kessing, 'Terrorism and Human Rights', in Lagoutta, Sano and Scharff Smith (eds) *Human Rights in Turmoil* (Leiden: Martinus Nijhoff, 2007) 133, 135; Rosand, 'Security Council Resolution 1373, the Counter-terrorism Committee, and the Fight against Terrorism' (2003) 97 *American J International Law*, 333, 340.

[215] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc A/CN.4/2006/98, 28 December 2005.

[216] Professor Martin Scheinin was appointed Special Rapporteur of the UN Commission on Human Rights on the promotion and protection of human rights while countering terrorism in August 2005, pursuant to UN Commission Resolution 2005/80.

[217] Above, n 215, para 26.

[218] *Ibid*, para 36.

[219] *Ibid*, para 35.

[220] *Ibid*, para 37; SC Res 1566 (2004), 8 October 2004, UN Doc S/RES/1566 (2004), para 3.

providing clarification of the problem,[221] because careful analysis revealed that it contained a "trigger-offence approach"[222] in the form of a series of three inter-related cumulative conditions.[223] The first step [(a)][224] was to identify "acts committed with the intention of causing death or serious bodily injury, or the taking of hostages";[225] step 2 [(b)][226] concerned the purpose, which was [to provoke] a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from doing any act".[227] When the criteria contain both steps (a) and (b) are met, the third criterion reveals the trigger-offence, *i.e.*, the acts constitute "offences within the scope of and as defined in the international conventions and protocols relating to terrorism".[228]

The Special Rapporteur concluded that this three-stage approach provided a safety net by way of a threshold to prevent criminal conduct other than conduct of a terrorist nature being caught.[229] However, he also observed that the absence of a universal, comprehensive and precise definition of terrorism created problems with regard to safeguarding human rights while combating terrorism.[230]

His identification of this sieve to distinguish terrorism from other, yet similar, criminal behaviour is important, not only for providing a guideline when assessing whether national and/or international counter-terrorism measures conform to human rights law, but also for its endorsement of the essential elements which constitute acts of international terrorism. His analysis also removes much of the imprecision which he pinpointed regarding attempts to define terrorism in a comprehensive fashion,[231] which can only serve to aid the deliberations of the Ad Hoc Committee as they strive to achieve this elusive goal. Further, since in his work Professor Scheinin is seeking to

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[221] *Ibid.*
[222] Above, n 215, para 38.
[223] *Ibid*, para 37.
[224] *Ibid*, para 50.
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*
[229] Above, n 222.
[230] Above, n 224.
[231] Above n 215, para 36.

sustain proportionality in the implementation of counter-terrorism measures by States,[232] the apprehension which some of the Ad Hoc Committee members have expressed, particularly in relation to the wording of draft article 18 (see *infra*, pp67-69), may be assuaged.

2.3.3 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[233]

With the turn of the century, work had yet to begin on the draft of a comprehensive convention dealing with international terrorism. Work on the draft convention for the suppression of acts of nuclear terrorism had commenced on 18 February 1998, when the Russian delegation presented the first draft for consideration,[234] but the final text was not completed for approval by the UN General Assembly until the Spring of 2005.

The Convention was adopted by the UN General Assembly on 15 April 2005, without a vote.[235] It was created to help eliminate the threat of a nuclear terrorist attack and represents the first significant step in the proactive approach and demonstrates what can be achieved when nations face a common threat and unite in the common purpose of addressing it. However, it could be argued that the treaty still adheres to the piecemeal approach in addressing a single facet of terrorism. Use of toxic chemicals, or an attack using biological substances would also have the potential for inflicting mass destruction. What is now required is an holistic approach to acts of international terrorism, but this can only be achieved if a comprehensive definition is identified to which all nations can subscribe. Although, as has been recorded earlier in this study, the idea was initially proposed and then set aside in the 1970s (see, *supra*, pp40-42), the escalation in terrorist ferocity worldwide in the early 1990s prompted the UN to return to the issue.[236]

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[232] *Ibid*, para 73; see also Human Rights Commission Resolution 2005/80, 'Protection of human rights and fundamental freedoms while countering terrorism', 21 April 2005, para 14(c); Duffy, *op cit*, n 78, 375.

[233] International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force).

[234] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Second session (17-27 February 1998), UN Doc A/53/37, Supplement 37, Chapter I Introduction, para 8 and Annex I.

[235] GA Res 59/290, 'International Convention for the Suppression of Acts of Nuclear Terrorism', 15 April 2005, UN Doc A/RES/59/290 (2005).

[236] 1994 Declaration on measures to eliminate international terrorism, UN General Assembly Resolution 34/146, Annex.

The different approaches to countering international terrorism which these conventions demonstrate, reveal a determined effort to cut off avenues previously open to those who committed some of the worst terrorist acts in recent years. The complicated issue of defining terrorism in a comprehensive manner has still not been resolved (see *infra*, pp68-69), but these measures reveal a seismic shift to legislate proactively to suppress this criminality.

2.3.4 Countering Terrorism Comprehensively

The UN General Assembly resolution 51/210 of 17 December 1996[237] set up an Ad Hoc Committee (hereinafter referred to as the Ad Hoc Committee), tasked initially to elaborate conventions aimed at suppressing three areas of international terrorism. The resolution placed these areas in a specific order of priority, *viz* terrorist bombings, acts of nuclear terrorism and thirdly - the area most likely to cause the greatest difficulty - a comprehensive legal framework of conventions dealing with international terrorism.[238] The first and second tasks were completed in 1997 and 1999 respectively, together with additional work on a draft convention aimed at cutting off terrorist funding (see *supra*, p45). However, predictably, the draft of a comprehensive convention on international terrorism is taking much longer to finalise.

2.3.4.1 Draft Comprehensive Convention on International Terrorism*

Successful completion of the 1997 Convention for the Suppression of Terrorist Bombings[239] and the 1999 Convention for the Suppression of the Financing of Terrorism[240] meant that the structure of many standard clauses reflected the current concerns with regard, for example, to the fair treatment of prisoners[241] and the importance of maximum levels of collaboration between States Parties with reference

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*The latest text of the draft comprehensive convention on international terrorism is reproduced at Appendix VI.

[237] GA Res 51/210, 'Measures to eliminate international terrorism' 17 December 1996, UN Doc A/RES/51/210 (1996).

[238] *Ibid*, para 9.

[239] International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001).

[240] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002).

[241] Above, n 239, Article 14; above n 240, Article 17.

to, *inter alia*, investigative procedures.[242] However, when the Committee members turned their attention to the formulation of a draft comprehensive convention on terrorism in 2001,[243] the focus of their deliberations automatically widened considerably *mutatis mutandis* their terms of reference.

The draft convention aims to complete the closure of the loophole in international criminal law with regard to terrorism, which has been narrowing over the years as a result of the acceptance by the UN General Assembly of thirteen conventions addressing specific features of international terrorism, *viz*:

1963 Convention on Offences and Certain other Acts committed on Board Aircraft (Tokyo, 14 September 1963, 704 UNTS 219, in force 4 December 1969)

1970 Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971)

1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973)

1973 United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977)

1979 International Convention Against the Taking of Hostages (new York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983)

1980 Convention on the Physical Protection of Nuclear Material (Vienna, 3 March, 1980, 1456 UNTS 101, in force 8 February 1987)

1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation (Montreal, 24 February 1988, 27 ILM 627 (1988), in force 6 August 1989)

1988 Convention for the Suppression of Unlawful acts Against the Safety of Maritime Navigation (Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992)

1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988, 1678 UNTS 304, in force 1 March 1992)

1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991, 30 ILM 721 (1991), in force 21 June 1998)

1997 International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001)

1999 International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002)

[242] Above, n 239, Article 10; above, n 240, Article 12; see also UN Doc A/C.6/55/L.2, para 2, Annex IV 'Informal summary of the general discussion in the Working Group, prepared by the Chairman' (19 October 2000).

[243] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Fifth session (12-23 February 2001), UN Doc A/56/37, I, para 7.

2005 International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005, UN Doc A/RES/59/290 (2005), not yet in force)

By the addition of a comprehensive convention, the ultimate aim of the UN General Assembly is to eliminate terrorism[244] - a laudable aim, but one which it might be argued is unlikely ever to be achieved. However, obtaining agreement on the document should have an impact on lessening the number and ferocity of terrorist attacks. Duffy notes that the gap in international law which might be filled by the text of the draft may not relate to the identification of the offence, but rather to the "lack of a comprehensive framework for international co-operation".[245]

The draft wording places much emphasis on the enhancement of interaction between signatories with respect to co-operation over extradition requests and a ban on the use of the political defence to block them. In addition, the call to increase cooperation with regard to exchange of information and assistance in relation to investigative procedures where appropriate, all within the context of an all-inclusive document addressing this criminality should indeed underscore the developments which have been introduced over time under the thirteen earlier conventions listed above. Further, aligning the various domestic legislative measures in this area should go some way to safeguarding the human rights of detainees/those convicted of terrorist offences in the international arena.

The original draft had been submitted by India in 1996,[246] but it was a revised version which India presented to the Ad Hoc Committee on 28 August 2000.[247] On 25 September of that year, the Sixth (Legal) Committee established a Working Group to commence work on the revised draft.[248] The amended texts of draft articles 3 to 17bis and 20-27 were submitted to the Committee at their Sixth session,[249] together with texts where areas of disagreement remained, namely in the preamble and draft article 1,[250]

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[244]GA Res 51/210, 'Measures to eliminate international terrorism', 17 December 1996, UN Doc A/RES/51/210 (1996), Preamble, penultimate para.
[245]Duffy, *op cit*, n 78, 44.
[246]UN Doc A/C.6/51/6, 'Measures to eliminate international terrorism', 11 November 1996.
[247]UN Doc A/C.6/55/1, 'Draft comprehensive convention on international terrorism', 28 August 2000.
[248]*Ibid.*
[249]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annex III.
[250]*Ibid*, Annex I.

draft articles 2 and 2bis,[251] and draft article 18.[252] Little progress has been made on these outstanding areas, with the Chairman of the Working Group reporting to the Committee in March 2006[253] that his Report issued in October 2005,[254] "still represents a fair and recent account of the broad views of delegates on the various points under discussion".[255] The three outstanding issues relate, respectively, to a proposal regarding a new preambular paragraph (reaffirming the right to self-determination),[256] the wording of draft article 18 (armed conflict)[257] and the inclusion of an additional paragraph to draft article 2 (the definition of the offence).[258]

The latest version of the draft convention is the text contained in the proceedings of the sixth session of the Committee.[259] Before scrutinising the areas where dissention remains, the draft articles on which agreement appears to have been reached are worthy of scrutiny, particularly because in addition to building on the apposite parts of the text of previous terrorist conventions, the Working Group has been mindful of current events which continue to inform the debate on codification.[260]

(a) Preamble and draft article 1

The preamble[261] recalls the existing international treaties relating to the various aspects of international terrorism, from the 1963 Tokyo Convention,[262] up to and including the International Convention for the Suppression of the Financing of Terrorism[263] and

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[251] *Ibid*, Annex II.
[252] *Ibid*, annex IV
[253] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February-3 March 2006) UN Doc A/61/37, Supplement 37, Annex I A.
[254] 'Report of the Working Group on measures to eliminate international terrorism'. 14 October 2005, UN Doc A/C.6/6)/L.6.
[255] Above, n 253, Annex I, A, para 2.
[256] Above, n 254, Annex A, paras 2-8.
[257] *Ibid*, paras 9-17.
[258] *Ibid*, paras 18-23.
[259] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annexes I-IV.
[260] For example, with regard to refoulement, collaboration between States and law enforcement agencies; see also, SC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001).
[261] Above, n 259, Annex I.
[262] Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963 704 UNTS 219, in force 4 December 1969).
[263] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002).

rehearses the General Assembly resolutions aimed at addressing the situation,[264] expresses concern at the worldwide escalation of terrorist attacks and reaffirms unequivocal condemnation of all acts of international terrorism,[265] recognizing that such acts not only violate the purposes and principles of the UN, but also threaten world peace and security and jeopardise international relationships and human rights.[266]

There is also recognition that States Parties have a duty to bring to justice those who have participated in such acts.[267] At this stage, there was no mention of 'alien domination' or 'struggles for self-determination' - the two phrases which encapsulate the difficulty which lies at the core of the definitional problem and which defeated the earlier attempts to make progress on defining the crime in 1973 (see *supra*, p41). Their omission is to be welcomed. One of the problems in attempting to define international terrorism comprehensively is the necessity to remove all the 'excuses' which are used to decriminalise acts which are manifestly criminal, therefore 'airbrushing' the spectre of the 'freedom fighter' should assist the process.

There are three paragraphs which are specific to the suppression of international terrorism. In paragraph 8, reference is made to State support for acts of international terrorism:

> *Convinced* that the suppression of acts of international terrorism, including those which are committed or supported by States, directly or indirectly, is an essential element in the maintenance of international peace and security and the sovereignty and territorial integrity of States,

Paragraph 10 highlights the imperative of respecting human rights and international humanitarian law whilst combating terrorism and paragraph 11 identifies the need for the convention. These three paragraphs taken together set the tone of the draft convention as one of total condemnation, not only of those who in any way support acts of international terrorism, but equally of those who renege against the standards

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[264]GA Res 49/60, 'Measures to eliminate international terrorism', 9 December 1994, UN Doc A/RES/49/60 (1994) Annex 'Declaration on measures to eliminate international terrorism'; and GA Res 51/210, 'Measures to eliminate international terrorism', 17 December 1996, UN Doc A/RES/51/210 (1999) Annex 'Declaration to supplement the 1994 Declaration on measures to eliminate international terrorism.

[265]*Ibid*, paras 4 and 5 respectively.

[266]*Ibid*, para 6.

[267]*Ibid*, para 7

which international law strives to uphold.

Paragraph (9), reflects current concerns regarding refugee status vis-à-vis terrorist suspects, and the politically sensitive issue of refoulement:

> *Noting* that the Convention relating to the Status of Refugees signed at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 do not provide a basis for the protection of perpetrators of terrorist acts, and stressing the importance of the full compliance by the parties to those instruments with the obligations embodied therein, including, in particular, the principle of non-refoulement.

The final paragraph of the preamble refers to the resolve of those States which sign up to the treaty to adhere to its provisions in order to ensure that perpetrators of terrorist acts are brought to justice.

Taken together, the preamble sets out the perspective of acts of international terrorism from the reactive nature of earlier conventions to the more proactive approach which has begun to emerge during the early years of the twenty-first century; it is as significant by its omissions - the absence the freedom fighter - as it is for the inclusion of condemnation of any State which supports terrorist tactics. It is therefore more than a little disheartening to note that a proposal for a new preambular paragraph has since been put forward, viz:

> Reaffirming that in accordance with the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, all peoples have the right to self-determination, freedom and independence, and that those peoples that have been forcibly deprived of its exercise have the right to *struggle to that end*, in conformity with the relevant principles of the Charter and of the above-mentioned Declaration,[268] (emphasis added)

There does not appear to have been any progress on this proposal, nor on another, shorter one submitted by Argentina on 28 February 2006:

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[268] 'Measures to eliminate international terrorism', Report of the Working Group, UN Doc A/C.6/60/L.6, 14 October 2005, Annex A, para 2.

> *Reaffirming* the right to self-determination of peoples in accordance with the Charter of the United Nations, he Declaration on the Granting of Independence to Colonial Countries and Peoples and he Declaration on Principles of International law concerning Friendly relations and Cooperation among States in accordance with the Charter of the United Nations,[269]

And unless such submissions are rejected, negotiations on the whole draft could be placed in jeopardy. In his summing up of the position on this and other issues reported at the ninth session of the Committee,[270] the Vice-Chairman stated that delegations must focus on the outstanding issues, in order to avoid "re-opening matters that have already been sufficiently discussed".[271] He alluded to the traditional rules of multilateral law-making negotiations, wherein "nothing is agreed until everything is agreed"[272] to emphasise the point. In the light of the above two proposals, his advice does not appear to have been followed.

There had been much discussion as to whether the draft comprehensive convention should replaced the twelve terrorist conventions already in force, or should be complementary to them and seek to close any loopholes within them.[273] The delegations appear to have agreed on preserving the conventions which have already been adopted, with the Vice-Chairman remarking that the comprehensive convention must preserve and build on the existing instruments and the common elements of those which have already been incorporated in the present draft, whilst respecting their "separate and independent character".[274]

The draft of article 1,[275] sets out the meanings of key phrases which appear in the latest version of the draft definition, viz: "State or government facility" (paragraph 1),

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[269]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February-3 March 2006) UN Doc A/61/37, Supplement 37, Annex II.

[270]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Ninth session (28 March-1 April 2005), UN Doc A/60/37, Supplement 37, Annex II, B, paras 29-3.

[271]*Ibid*, para 35.

[272]*Ibid.*

[273]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Fifth session (12-23 February 2001), UN Doc A/56/37, Supplement 37, Annex V, C, paras 16-21.

[274]Above, n 270, Annex II, para 33.

[275]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annex I, 4-5.

"Military forces of a State (paragraph 2), "Infrastructure facility" (paragraph 3), "Place of public use" (paragraph 4) and "Public transportation system" (paragraph 5).[276] The list has not been amended in any way since India submitted the second version of their draft convention in August 2000.[277] Significantly, there is no mention of the word terrorism, nor of the phrase "acts of international terrorism".

The concept of terrorism is well understood, but the meaning of the word and phrases which allude to it continue to defy definition. Consequently, the word is often used as a label to describe some event which on closer examination may not be due to terrorism, but to some other cause, for example harassment or intimidation.[278] Black's Law Dictionary defines terrorism as "the use or threat of violence to intimidate or cause panic especially as a means of affecting political conduct".[279] If this statement were to be curtailed after the word "panic", it would adequately fulfil the requirement for the purposes of draft article 1 and leaving the way clear for the key elements of the definition of the offence itself to be set out in draft article 2.

(b) Informal texts of articles 2 and 2 bis

The latest draft of the offences has not altered in format from the informal text which was included as Annex II of the Report of the Committee following their sixth session which took place early in 2002,[280] although discussions have continued during the subsequent four years.[281] The text of article 2 is as follows:

Article 2 (informal text prepared by the Coordinator)

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

    (a) Death or serious bodily injury to any person; or

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[276] *Ibid.*

[277] UN Doc A/C.6/55/6, 'Measures to eliminate terrorism', 28 August 2000, paras 2-3.

[278] Colvin and Moussa, "Men in Black Terrorise Iraq's Women", *Sunday Times*, 4 June 2006, 22.

[279] Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (eighth edition) (London: Sweet & Maxwell, 2004), 1512; see also Tiefenbrun, 'A Semiotic Approach to a Legal Definition of Terrorism' (2003) 9 *ILSA J International and Comparative Law* 357, 360.

[280] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annex II.

[281] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Tenth session of the Ad Hoc Committee (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, A.

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility, or the environment; or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,

When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

4. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1, 2, or 3 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2, or 3 of this article; or

(c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

The first paragraph of draft article 2 would be improved by replacement of the phrase "unlawfully and intentionally" with the one word 'wilfully', which adequately conveys the deliberate nature of the act. Attention to detail in the choice of vocabulary is particularly important when a text is to be published in six official languages.[282]

The offences against the person in paragraph 1(a) could also be improved by the addition of a reference to loss of liberty. Notwithstanding the existence of the 1979 International Convention Against the Taking of Hostages,[283] there could be circumstances when civilians are deprived of their liberty, but not killed or seriously injured, for example where any person is used as a human shield, but is later released

[282]The six authentic languages of the text, as listed in draft article 27 are Arabic, Chinese, English, French, Russian and Spanish.

[283]International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983).

unharmed. If the draft convention is to cover all known and potential eventualities, care must be taken to fill any gaps, rather than leave loopholes which might be revealed between this draft and existing, specific conventions.[284]

Inclusion of the environment in the list of targets in paragraphs 1(b) and (c) which might suffer damage at the hands of offenders is innovative. By contrast, the reference to major economic loss has not been quantified in draft article 1. Does 'major' refer to damage as extensive as that inflicted, for example, on the World Trade Centre in 2001, but not that caused when it was bombed in 1993? Damage which might be considered as 'major' when suffered by one State Party might occupy a much lower place on a scale of one to ten in the case of another, for example Angola vis-à-vis China. This could be clarified by setting out the meaning of the phrase in draft article 1.

The final sentence of paragraph 1, concerning the purpose of the conduct, repeats the wording which concludes the text of Article 2(b) of the International Convention for the Suppression of the Financing of Terrorism.[285] The element of compulsion is fundamental to the motivation which spurs terrorists on to commit this very serious criminality, without which any definition of acts of international terrorism would be incomplete. This is not overstating the case, because it is the declared aim of the Al-Qaeda terrorist organization, for example, to replace democracy with theocracy in those States which it openly opposes.[286]

In addition to individual culpability, recognition of the potential involvement in terrorist criminality of "a group of persons acting with a common purpose" in paragraph 4(c), which has become apparent in recent years - for example in the Madrid train bombings[287] - follows introduction of the phrase in the International Convention for the

[284]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Fourth session (14-18 February 2000), UN Doc A/55/37, Supplement 37, Chapter III 'Summary of the General Debate', B, para 22.

[285]International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002) Article 2(b).

[286]Launch of the World Islamic Front for the Jihad Against the Jews and the Crusaders, 26 May 1998, cited in Gunaratna, *Inside Al Qaeda Global Network of Terror* (London: Hurst & Company, 2002, 47; see also, Bergen, *Holy War Inc Inside the Secret World of Osama bin Laden* (London: Weidenfeld & Nicolson, 2001) 105.

[287]Keeley, "Madrid Bomb Charges" *The Times*, 12 April 2006, 43.

Suppression of Acts of Nuclear Terrorism.[288]

Paragraph 4 is a considerable improvement on previous terrorist conventions. As pointed out by the Chairman of the Committee,[289] the range of offences has been extended to include threats and preparatory acts, which are not covered in some of the conventions covering specific terrorist criminality.[290]

Article 2 bis

Where this Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both treaties, the provisions of the latter shall prevail.

This draft article had been proposed in order to clarify the legal regime applicable should there be an occasion when a sectoral multilateral anti-terrorism convention clashed with the comprehensive convention.[291] There was a certain amount of ambivalence as to the inclusion of this draft article; amendments to the draft text could be made if it was decided that it should be retained.[292] Although no final decision has yet been reached on the matter, the Vice-Chairman counselled that "we must respect the separate and independent character of the legal regimes established by [the previous twelve conventions on terrorism]".[293] All twelve terrorist conventions are products of much preparation and discussion and in view of the unpredictability of terrorists it would be imprudent to cast aside existing treaties which address particular forms of the criminality to which terrorists might return in the future. Equally, international criminal law aims to protect society by bringing alleged perpetrators to justice and, in the particular area of terrorism, to prevent further acts of international terrorism from being perpetrated.

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[288]International Convention for the Suppression of Acts of Nuclear Terrorism, (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force) Article 2(4)(c).

[289]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Fifth session of the Ad Hoc Committee (12-23 February 2001), UN Doc A/56/37, Supplement 37, Annex V, C, para 21.

[290]See, for example, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973).

[291]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Ninth session of the Ad Hoc Committee (28 March-1 April 2005), UN Doc A/60/37, Supplement 37, Annex II, B, para 22.

[292]*Ibid*, para 23.

[293]*Ibid*, para 33.

(c) Text of articles 3-17 bis and 20-27 (prepared by the Friends of the Chairman)

Many of the draft articles contained in the text[294] are also standard: the exclusion from the draft convention of offences committed and contained within a single State (draft article 3); similarly, the requirement for States Parties to establish as criminal, those offences (once defined and which are delineated in draft article 2) under their domestic law [draft article 4(a)], with commensurate penalties [draft article 4(b)].

Draft articles 4 (adoption of measures to establish commensurate offences and punishment in domestic law); 5 (the exclusion of political, philosophical, ideological, racial, ethnic, religious or other similar motivations as a defence); and 6 (establishing jurisdiction) also follow standard formats.[295]

The text of draft article 7 addresses refugees vis-à-vis suspected terrorists, within the context of international human rights law and enjoins States Parties to bar such persons from refugee status.[296] Text on this specific point has not featured in previous terrorist conventions, but reflects the problems of recognising the genuine refugee from a terrorist, which has been causing concern recently.[297] Draft article 8 contains details of the preventive measures which States Parties should adopt in their national legislation, in order to counter the terrorist threat. These include, *inter alia*, measures to deter those who encourage the commission of terrorist offences (once defined), cooperation with other States Parties in the exchange of intelligence and in particular, "measures to prohibit the establishment and operation of installations and training camps for the commission of offences set forth in draft article 2",[298] which have been recognised as

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[294] *Op cit*, n 280, Annex III.

[295] See, for example, International Convention for the Suppression of Nuclear Terrorism (New York, 14 September 2005 UN Doc A/RES/59/290 (2005), 606 UNTS 267, not yet in force) Article 9.

[296] Permissible under Article 1F, Convention Relating to the Status of Refugees (Geneva, 28 July 1951 189 UNTS 150, in force 22 April 1954); as extended by the Protocol Relating to the Status of Refugees, (New York, 31 January 1967, in force 4 October 1967; see also SC Res 1373 (2001) 28 September 2001, UN Doc S/RES/1373 (2001), para 3(g).

[297] See, for example, 'In the Name of Counter-Terrorism: Human Rights Abuses Worldwide', Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, 25 March 2003, 22; and Kerwin, 'The Use and Misuse of 'National Security' Rationale in Crafting US Refugee and Immigration Policies', (2005) 17 *International Journal Refugee Law* 749, 756.

[298] Above n 280, Appendix III, draft article 8, para 1(b).

recruitment opportunities for international terrorist organisations.[299]

Draft article 9 imposes sanctions on a person who has managerial responsibilities in relation to legal entities and who commits a terrorist act (as will be defined in draft article 2). This article is to be a new departure. Legal entities located within the territory of a State Party are to be held liable when "a person responsible for (their) management or control" has committed an offence (once defined) in article 2 [draft article 9(1)]. Paragraph 2 states that such liability is incurred without prejudice to the criminal liability of individuals having committed the offences. The liability may be criminal, civil or administrative and "effective, proportionate and dissuasive criminal, or administrative sanctions" may be imposed (paragraph 3).

Draft article 10, concerning procedures to be followed in investigations, the care and custody of prisoners, together with their entitlements, follows a standard format developed in earlier conventions.[300] Similarly, draft article 11, contains the *aut dedere aut judicare* principle and corresponds in every particular with Article 10 of the Convention for the Suppressing of the Financing of Terrorism.[301] The text of draft article 12 (persons in custody guaranteed, *inter alia*, fair treatment), whilst replicating the wording of preceding conventions concerned with terrorist suspects,[302] has a reference to the Standard Minimum Rules for the Treatment of Prisoners.[303] Draft article 13, paragraphs 1 and 2 (cooperation and assistance between States Parties with regard to investigations or criminal or extradition proceedings) is also identical to companion clauses in earlier conventions.[304] However, draft article 13 has an additional, third paragraph, viz:

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[299]Forest, "Training Camps and Other Centers of Learning", in Forest (ed) *Teaching Terror Strategic and Tactical Learning in the Terrorist World* (Colorado: Roman & Lttlefield Inc, 2006), Chapter 4; see also, Winnettt and Leppard, "Leaked No 10 Dossier Reveals Al-Qaeda's British Recruits" *The Sunday Times*, 10 July 2005, 4.

[300]See, for example, International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999 UN Doc A/RES/54/109, in force 10 April 2002) Article 9.

[301]*Ibid*, Article 10.

[302]See, for example, International Convention for the Suppression of Nuclear Terrorism (New York, 14 September 2005 UN Doc A/RES/59/290, not yet in force), Article 12; above, n 234 Article 17.

[303]Standard Minimum Rules for the Treatment of Prisoners adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its 663 C (XXIV) 31 July 1957 and 2076 (LXII) 13 May 1977.

[304]See, for example, International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UNDoc A/RES/52/164, in force 23 May 2001) Article 10; above, n 189, Article 14.

> Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 9.

This new paragraph reinforces the importance of communication between States Parties, as stated in draft article 8(2). Draft article 14 is the standard clause which excludes a political motive being used to prevent extradition in connection with the offences (once defined) in article 2, whilst draft article 15 contains the standard clause regarding requests for extradition where the requested State has substantial grounds for believing that the request is for the purpose of prosecuting or punishing a person on account of their race, religion, nationality, ethnic origin or political opinion.

The procedures set out for the transfer of prisoners, their welfare and return are contained in draft article 16 and is a replication of standard clauses.[305] Mechanisms to ensure compatibility and conformity with regard to extradition treaties are set out in draft article 17 and there is a draft article 17 bis - the standard clause with reference to communicating the final outcome of proceedings to the UN Secretary-General for onward transmission to the other States parties. The remaining draft articles (20-27) govern the administration of the convention, once it has entered into force.

(d) Draft article 18

Problems with regard to the text of this article have yet to be resolved. There are presently two versions of the draft article, one by the Coordinator of the Working Party and the other proposed by the Member States of the Organization of the Islamic Conference (OIC). The wording is identical, with the exception of paragraphs 2 and 3: Draft article 18 (texts drawn up by the Coordinator):[306]

> 1 Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law

[305] *Ibid*, Article 13; above, n 297 Article 16.

[306] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Sixth session of the Ad Hoc Committee (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annex IV.

2 The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

3 The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

4 Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.

Variation proposed by the OIC Member States[307]

2 The activities of the parties during an armed conflict, including situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

3 The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law are not governed by this Convention.

It was realised at the outset of the work on the draft comprehensive convention that terrorism had to be distinguished from struggles for self-determination, alien domination and foreign occupation[308] - the perennial stumbling block over which the attempts to define terrorism in the 1970s had foundered[309] - and therefore the inability to agree on the text of draft article 18 demonstrates the circularity of this issue. Two views of the problem with the text can be identified. Firstly, that paragraph 2 of the Coordinator's text (version 1), reflects both the language and the substance of similar clauses in the 1997 International Convention for the Suppression of Terrorist Bombings,[310] and secondly, the contrasting view that use of the term "parties" in the OIC text (version 2) was well defined and tacit under IHL with authority for this stance being cited as "the Hague Regulations respecting the Laws and Customs of War on Land and the 1949 Geneva Conventions".[311]

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[307] *Ibid.*

[308] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Fourth session of the Ad Hoc Committee (14-18 February 2000), UN Doc A/55/37, Supplement 37, Chapter III 'Summary of the general debate', para 16.

[309] Thirty-second session of the UN Sixth (Legal) Committee, sixty-eighth meeting (9 December 1977), UN Doc A/C.6/32/SR.68, paras 23-24.

[310] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Eighth session of the Ad Hoc Committee (28 June-2 July 2004) UN Doc A/59/37, Supplement 37, Annex II 'Reports of the coordinators on the results of the informal bilateral Consultations', para 4.

[311] *Ibid*, para 6.

Several delegations have suggested two routes which could be followed in order to obtain agreement on draft article 18. The disparity could be removed by "defining the concept of 'parties' in the draft convention",[312] or alternatively, by introducing a new clause to draft article 2(1) which details the circumstances in which leading military commanders would commit crimes within the scope of the draft comprehensive convention.[313]

The entire initiative will therefore stand or fall over draft article 18,[314] repeating history in the process. However, acts of international terrorism have not only impacted on the entire globe since the 1970s, they have also escalated in ferocity and occurrence to such an extent that they present a real and present threat to the peace and security of the world.[315] There has to be the political will to approve of any compromise on which the delegations are able to agree. World leaders have to weigh up the costs/benefits which are likely to accrue from their decision.

The Secretary-General is not alone in foreseeing the perils of failure. His initiative aimed at encouraging the Committee to succeed,[316] whilst at the same time proposing alternative courses for making progress with regard to suppressing terrorism should the delegations fail,[317] has been matched by the conclusion drawn in the Report of the High-level Panel on Threats, Challenges and Change,[318] to the effect that "[a]chieving a comprehensive convention on terrorism, including a clear definition, is a political imperative".[319] Perhaps the Vice-Chairman of the Committee should have the last word on the subject at the present time:

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[312] *Ibid*, para 12; see also Conte, *Security in the 21st Century The United Nations, Afghanistan and Iraq* (Aldershot: Ashgate Publishing Limited, 2005) 19.

[313] *Ibid.*

[314] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Tenth session of the Ad Hoc Committee (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, 'Informal summaries by the Chairman on the results of the informal consultations and informal contacts on the draft comprehensive convention on international terrorism and on the question of convening a high-level conference', A, para 2.

[315] GA Res 60/43, 'Measures to eliminate international terrorism', 6 January 2006, UN Doc A/RES/60/43 (2006) preambular para 6.

[316] Report of the UN Secretary-General, 'In Larger Freedom Towards Development, Security and Human Rights for All', Part III, 'Freedom from Fear', A, 'A Vision of Collective Security', para 84, available at http://www.un.org/largefreedom/contents.htm.

[317] *Ibid*, B, 'Preventing catastrophic terrorism', paras 87-94.

[318] Report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc A/59/565, VI, Terrorism, 45-49.

[319] *Ibid*, 48.

> While we all acknowledge that draft article 2 is part of a broader package, still in negotiation, there is growing support for the provisions contained in it. Moreover, current draft article 2 uses more precise technical legal language, more suitable for a criminal law instrument than the language used in the report of the High-level Panel.[320]

Conclusion

Progress on the codification of measures to eliminate international terrorism[321] since the year 2000 has been mixed. From one perspective, completion of the International Convention for the Suppression of Acts of Nuclear Terrorism[322] is a major achievement. It has demonstrated a change of approach by addressing the subject matter proactively, no doubt assisted by an awareness of the terrible consequences which might follow, should nuclear material get into the hands of terrorists.[323]

However, where acts of international terrorism involving conventional weaponry is concerned, the risk does not appear to resonate with the delegates to the same degree. Those engaged on the task have shown their willingness to cooperate in order to succeed and since acts of terrorism are condemned outright as wholly unacceptable under any circumstances whatsoever,[324] as is the case in this instance,[325] it is axiomatic that final agreement must be outwith the remit of the delegates.

The proposal to request a high-level conference under the auspices of the UN, as

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[320]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Ninth session of the Ad Hoc Committee (28 March-1 April 2005), UN Doc A/60/37, Supplement 37, Annex II, B, 'Draft comprehensive convention on international terrorism', para 31.

[321]GA Res 51/210, 'Measures to eliminate international terrorism', 17 December 1996, UN Doc A/RES/51/210 (1999).

[322]International Convention for the Suppression of Nuclear Terrorism (New York, 14 September 2005 UN Doc A/RES/59/290 (2005), not yet in force).

[323]O'Neill "Dirty Bomb' Mastermind Plotted Wave of Atrocities" *The Times* Friday 13 October 2006, 11-2; Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 262; see also, Burke, *Al-Qaeda Casing a Shadow of Terror* (London: I B Tauris, 2003) 187.

[324]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Ninth session of the Ad Hoc Committee (28 March-1 April 2005), UN Doc A/60/37, Supplement 37, Annex I, 'Informal summary, prepared by the Chairman, of the general discussion at the plenary meeting held on 28 March 2005', para 1.

[325]*Ibid.*

mandated by the General Assembly,[326] and the suggestion that such a conference would "facilitate finding solutions to the outstanding issues"[327] seems to add weight to the conclusion that any further compromise lies in the hands of diplomats, rather than in those of their appointed delegates around the conference table. It is ironic that ostensibly the main sticking point is deciding which individuals and/or groups should be exempt from the provisions of the draft. It is not the actual definition of the offence which is the cause of the hiatus.

CONCLUSION

It can be seen that all the efforts to suppress international terrorism have thus far been reactive and specific, responding to each different *modus operandi* as it arose. For example, smuggling bombs on board aircraft, timed to explode in mid flight,[328] elicited the new tactic of terrorist in the guise of passenger with explosives secreted about his person,[329] as a mean of overcoming increased airport security.[330] The 9/11 attacks added a spur to the efforts to achieve a comprehensive definition of acts of international terrorism, one of the reasons cited being the requirement to close the gaps revealed in existing terrorist conventions.[331] Plant describes the multilateral conventions which target similar types of international terrorist acts as "the precedents".[332] He quotes the Hague and Montreal Conventions as being the 'aviation precedents' for later

[326]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Tenth session of the Ad Hoc Committee (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, 'Informal summaries by the Chairman on the results of the informal consultations and informal contacts on the draft comprehensive convention on international terrorism and on the question of convening a high-level conference', B, para 1.

[327]*Ibid*, para 5.

[328]For example, Pan Am flight 103, blown up over Lockerbie on 21 December 1988, by a bomb smuggled on board the airliner at Frankfurt airport at the commencement of a scheduled flight to New York.

[329]For example, the incident which took place on American Airlines Flight 63 on 22 December 2001, involving Richard Reid, who had plastic explosives hidden in the lining of this shoe.

[330]Sandler and Enders, 'An Economic Perspective on Transnational Terrorism' (2003) University of Alabama, Economics, Finance and Legal Studies Working Paper Series 1, 15, available at http://www.cba.ua.edu.

[331]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Fifth session of the Ad Hoc Committee (12-23 February 2001), UN Doc A/56/37, Supplement 37, Annex V, 'Informal summary of the general exchange of views, prepared by the Chairman', C, para 21.

[332]Plant, 'Legal Aspects of Terrorism at Sea', in Higgins and Flory (eds) *Terrorism and International Law* (London: Routledge, 1997) 71.

conventions, such as the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.[333]

One of the consequences of the escalation in violence inflicted on society in the name of self-determination has been the damaging effect which it has had on human rights in the cause of counter-terrorism.[334] The perennial difficulty of distinguishing the terrorist from the freedom fighter has not yet been satisfactorily resolved, although the painstaking study carried out by the former Sub-Commission Special Rapporteur on counter-terrorism,[335] as part of her mandate, has thrown further light on the issue (see *supra*, section 2.3.1, pp47-50)

The detailed analysis of the essential elements which feature in acts of international terrorism, undertaken by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism,[336] has also enlightened the search for a precise definition of the phenomenon (see, *supra*, section 2.3.2.2, pp51-53). Nevertheless, whilst the difficulties associated with self-determination and the curtailment of human rights are of paramount importance in relation to counter-terrorism *per se*, and do impinge upon the definitional problem, both issues are peripheral to the particular area of research which has been undertaken in the present study.

The study has revealed that there is a nexus between the extent and severity of the attacks and the level of co-operation among those attempting to draft measures to deter further attacks. It was only when the effects of some of the outrages began to impact upon the wider world that the level of cooperation required o reach a consensus on a

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[333] *Ibid.*

[334] Jenkins, *Unconquerable Nation: Knowing our Enemy Strengthening Ourselves* (Santa Monica: RAND Corporation, 2006) 169; Rosen, 'A Cautionary Tale for a New Age of Surveillance' in Griset and Mahan (eds) *Terrorism in Perspective* (London: Sage Publications, 2003) 310; Starmer, 'Setting the Record Straight: Human Rights in an Era of International Terrorism' (2007) 2 *European Human Rights Law Rev* 123; Talmon, 'The Security Council as world Legislature' (2005) 99 *American J International Law* 175, 192; Wilkinson, *Terrorism and the Liberal State* (London: the Macmillan Press Ltd, 1977) 122.

[335] Koufa, 'Specific human rights issues: new priorities, in particular terrorism and counter-terrorism', 25 June 2004, UN Doc E/CN.4/Sun.2/2004/40, I, B, 2(a), paras 2834; Akzin, 'Overviews' in Tavin and Alexander (eds) *Terrorists or Freedom Fighters* (Fairfax, Virginia: Hero Books, 1986) 3; Conte, *Security in the 21st Century The United Nations, Afghanistan and Iraq* (Aldershot: Ashgate Publishing Limited, 2005) 12; Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) 4; Hoffman, *Inside Terrorism* (revised and expanded edition) (New York: Columbia University Press, 2006) 15.

[336] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc A/CN.4/2006/98, 28 December 2005, paras 35-41.

comprehensive definition of the crime started to materialise. The comparative ease with which piracy was defined for international purposes is in stark contrast to the difficulties which have beset the identification of international terrorism, despite the similarities between the two. The key difference lies in the motiviation: the element of private gain must be present for piracy *jure gentium* to have been committed, whereas private gain is alien to the perpetrator of terrorist acts in the international arena. The motivation of terrorists is increasingly focusing on coercion to change the fundamental way in which States of which they disapprove are governed and to do so by endangering the lives and well being of their nationals.

The latest attempt to define acts of international terrorism may end in failure, although the present positive mood of those tasked with finding a resolution means that it might yet succeed,[337] since the will to achieve the desired objective gains strength exponentially with the rise in terrorist atrocities. Twenty-first century terrorists are fanatics, placing no store on their own survival. No amount of legislation, whether national, regional or international is going to deter them.[338] At best it may make it more difficult for them to mount atrocities on the scale of 9/11, thereby thwarting their strategic ambitions.

International terrorists have demonstrated their ability to change tactics, not only to take advantage of the latest technology,[339] but also in the face of opposition and enhanced security measures. In attempting to keep international criminal law abreast of the latest developments in this area, it is important to chart changing crime patterns and the profiles of those who come to come to world attention, as a means of increasing understanding of the phenomenon and thereby enhancing the possibilities for pinpointing the key elements of the criminality which must be included in a generic definition of the crime.

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[337]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Eleventh session of the Ad Hoc Committee (5, 6 and 15 February 2007), UN Doc A/62/37, Supplement 37, Annex , 'Informal summaries by the Chairman on the exchange of views in plenary meeting and on the results of the contacts on the draft comprehensive convention on international terrorism and on the question of convening a high-level conference', B, para 9.

[338]McGinley, 'The Achille Lauro Affair - Implications for International Law' 52 (1985) *Tennessee Law Rev* 691, 727.

[339]Laqueur, *The New Terrorism Fanaticism and the Arms of Mass Destruction* (Oxford: Oxford University Press, 1999) 78.

CHAPTER THREE

Changes in Terrorist Crime Patterns: shaping the structure of a comprehensive definition of terrorism

INTRODUCTION

The survey of the origins and growth of terrorism carried out in the previous chapter has revealed that acts of terrorism have been motivated with increasingly ambitious goals in mind,[1] using a myriad of methods,[2] by perpetrators ranging from freedom fighters and insurgents to fanatics.[3] To confound the problem, succeeding leaders of terrorist organisations have, by the nature of their attacks, demonstrated their increasing adaptability, mental agility, acumen and sophistication in overcoming security measures set in place to counter their activities.[4] The clandestine nature of terrorist operations in particular, together with the element of surprise achieved by the apparently random nature of target selection, methods, and locations[5] all add to the difficulties encountered when attempting to construct comprehensively a definition of the crime, which contains the essential elements and characteristics which might attend any potential manifestation.

One route to identifying the key features which need to be included in a generic definition of the offending behaviour is to analyse the changes in crime patterns which have come to light following terrorist outrages. This part of the study therefore sought to identify stages when significant variations and adaptations in *modi operandi* were introduced, together with any trends which have become evident in the underlying motivation driving the attacks and the changing characteristics, profiles and intentions of both the leadership figures and the perpetrators of the attacks.[6]

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[1]Hoffman, 'Terrorism Trends and Prospects', in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini, *Countering the New Terrorism* (California: Rand Corporation, 1999) 7, 15.
[2]*Ibid* 12.
[3]*Ibid* 9.
[4]Hoffman, "Islam and the West: Searching for Common Ground The Terrorist Threat and the Counter-Terrorism Effort", Testimony presented to the US Senate Foreign Relations Committee, 18 July 2006.
[5]Sandler and Enders, 'An Economic Perspective on Transnational Terrorism', (2004) 20 *European J Political Economy* 301, 302.
[6]*Ibid*, 306.

Some general observations are worthy of note at the outset. A criminal is not necessarily a terrorist, but a terrorist is always a criminal. Secondly, with the exception of the convicted motorist,[7] the criminal is always motivated by the desire for self-enrichment, *i.e.*, private gain, revenge, or mental illness. However, this is not the case in relation to the terrorist, who is driven by political, religious or ideological extremism and whose criminal acts are intended or calculated to create a state of terror in the targeted persons, usually civilians.[8] Even those criminals engaged in very serious criminality are unlikely to employ the terrorist tactic of *targeting* members of the general public randomly in their conspiracies, although bystanders witnessing the crime, or impeding the perpetrators, may not only experience a degree of fear, but suffer injuries during the commission of the crime.[9]

A distinction can also be drawn between a guerrilla and a terrorist. Guerrillas take part in irregular fighting, especially against larger forces, within their domestic State,[10] whereas international terrorists will attack targets in any State, the selected location being linked to global objectives.[11] Terrorists commit crimes across the whole range of criminality in the pursuit of their aims, which is one of the reasons why distinguishing them from insurgents, saboteurs and freedom fighters is such a sensitive issue when agreement is sought on a definition which seek to address acts of international terrorism in a comprehensive fashion.[12] Studying the changes in crime patterns, therefore, may throw some light on this complex problem.

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[7]Drivers who offend against road traffic laws do so not for self-enrichment, but rather due to a lack of consideration for other road users.

[8]For example, the attack on tourists at the Hatshepsut Temple near Luxor, which killed 62 people and injured 26 more; see also, Townshend, 'The Culture of Paramilitarism in Ireland', in Crenshaw (ed) *Terrorism in Context*, (Pennsylvania: Pennsylvania State University Press, 1995) 316.

[9]For example, the drive-by gang related shooting incident at a Birmingham nightclub on New Year's Eve, 2003, which killed two teenage girls caught in the hail of bullets.

[10]See, for example, Cerny, 'France: Non-Terrorism and the Politics of Repressive Tolerance', in Lodge (ed) *Terrorism: a Challenge to the State* (Oxford: Martin Robertson, 1981), 103; Scalabrino, 'Fighting Against International Terrorism: the Latin American Terrorism', in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 170.

[11]For example, the attack on the *USS Cole*, off the Yemeni coast on 12 December 2000; and the major simultaneous detonation of three car bombs inside three western housing compounds in Riyadh on 12 May 2003.

[12]See, for example, Soll, 'Terrorism: the Known Element No One Can Define' (2004) 11 *Willamette J International Law and Dispute Resolution* 123, 132; Arens, 'Terrorists or Freedom Fighters', in Tavin and Alexander (eds) *Terrorists or Freedom Fighters* (Fairfax, Va: Hero Books, 1986) 12-17.

In order to carry out this task, three core areas were selected for scrutiny, namely the criminal intent of the perpetrator(s), the various methods adopted in the commission of the crime and the profile of some of the offenders, together with those of some conspirators who have been implicated in planning attacks. In each of these core areas, high profile terrorist incidents have been selected for analysis.

3.1 Changing Aspirations of the Terrorists' Criminal Intent

Introduction

Terrorism did not begin to cause international concern after the end of World War II until the 1960s, when the Popular Front for the Liberation of Palestine (PFLP) began a campaign of hijacking airliners;[13] the US Ambassador to Guatemala was assassinated;[14] the US Ambassador to Japan suffered a knife attack[15] and the US Ambassador to Brazil was kidnapped by a Marxist Revolutionary group.[16] Aircraft hijackings for this decade were also committed by asylum seekers, fugitives, or by the mentally ill, involving the commission, or attempted commission of serious crimes,[17] but which were not acts of terrorism *per se*. However, in 1970 there was a significant change in approach, revealing a shift in the intention and ambitions of those involved in terrorism, with the first of two high profile incidents mounted in an attempt to obtain the release of imprisoned terrorists.

3.1.1 The *Dawson's Field Incident*

On 6 September1970, four jet aircraft, en route for New York from different European cities, were simultaneously subjected to hijack attempts by members of the PFLP. The terrorists succeeded in the case of three of the planes which were operated by, respectively, Pan Am, Swissair and Trans World Airlines. The first two planes were forced to land at a Second World War airfield in the Jordanian desert and were eventually blown up. The third plane was diverted to Cairo, but was also destroyed.

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[13]Gunaratna, *Inside Al Qaeda Global Network of Terror* (London: Hurst & Co, 2002) 11; *e.g.*, three male Arabs hijacked an El Al Boeing 707 bound for Tel Aviv and diverted it to Algiers on 23 July 1968.
[14]John G Mein was murdered on 28 August 1968 by a rebel faction in Guatemala City.
[15]The attack on Ambassador Meyer took place on 30 July 1969 and was perpetrated by a Japanese national.
[16]On 3 September 1969 Ambassador Elbrick was kidnapped by the Marxist revolutionary group MR-8.
[17]Evans and Murphy, *Legal Aspects of International Terrorism* (Lexington, Ma: D C Hurst and Company, 1978), Appendix 1C: Domestic and Foreign Aircraft Hijackings, 1 January 1960-31 July 1977, 68-88.

Security guards aboard the fourth plane, operated by El Al, overcame the two hijackers, killing one and getting the plane diverted to Heathrow, where the surviving terrorist (Leila Khaled) was taken into custody. No other lives were lost during the incident. It transpired that the hijackers intended to obtain the release of fellow members of their organisation who were imprisoned in various countries.[18] All those on board the three hijacked planes were released unharmed. Leila Khaled was detained, but later released as part of a prisoner exchange for Palestinians imprisoned in West Germany, Switzerland and Britain. However, the Israeli authorities refused to negotiate with the hijackers.

The selection of the planes was not random. The States in which the planes were registered either had influence which could be brought to bear on the outcome, or held the prisoners in their jails. The motivation behind the audacious simultaneous hijackings was to create publicity for the Palestinian cause, according to revelations made by Leila Khaled in the years following her release.[19] They were armed and the presumption must be that they were prepared to kill or incapacitate any person on board the aircraft who stood in their way. The terrorists partially succeeded in their objective, since all the prisoners - with the exception of those held in Israeli jails - were freed. Whether or not the destruction of the aircraft was part of the original plan is open to question, due to the successful intervention of the El Al security guards, which slightly redressed the balance in favour of the authorities of those States placed under duress. However, Khaled maintains that none of the hijackers were prepared to compromise[20] and therefore the presumption must be that if destroying the aircraft had not resulted in their demands being met, they would indeed have harmed their hostages.

The plan was audacious and innovative and clearly demonstrated the extent of their criminal intent. It was one of the first occasions when gaining maximum publicity was central to the plan, in tandem with freeing fellow members of the PFLP. The scale of the incident was intended to convince the targeted States of the sincerity of

[18] Interview given by Leila Khaled to UK Confidential, "The Guerrilla's story", *BBC Leviathan Series*, 1 January 2001, following release of documents by the Public Records Office in accordance with the thirty years rule, available at http://news.bbc.co.uk/1/hi/in_depth/uk/2000/uk_confidential/1090986.stm.

[19] *Ibid.*

[20] *Ibid.*

their demands and the numbers of hostages at their disposal for use as bargaining chips further ratcheted up the pressure which they were able to exert upon the targeted authorities because of the diverse nationalities of those likely to be on board the airliners.

The *Dawson's Field Incident* can be viewed as a turning point in terrorist tactics[21] because firstly, it demonstrated how the media could be harnessed to publicise terrorist causes, which in this case was the prime motive for the operation.[22] Secondly, the action enabled terrorists, whose cause was regional, to do acts which brought duress on States not directly involved in the conflict to exert pressure to bear on other States which were so involved, in order that their demands should be met. Thirdly, it represented a departure from the hijacking patterns of the 1960s; the planes were not 'commandeered' in order transport fugitives/asylum seekers to a country of refuge, but seized as valuable property, the loss of which could be costly to the airlines, together with the passengers, who were not free to continue their journeys once the diverted planes had landed, but were taken hostage and as a consequence were exposed to more serious risks with regard to their safety and well-being.

Whilst it was fortunate that at the end of the incident none of the hostages had been harmed, it was unfortunate that the ringleaders succeeded because, as Khaled herself observed, their success encouraged the PFLP to continue their struggle using similar tactics.[23] This was borne out by the appalling events which unfolded *via* the media during the Munich Olympics in 1972.[24]

3.1.2 The *Munich Olympic Massacre*

On 5 September 1972, eight members of the Black September Organisation [the name used at that time by the Fatah, the military wing of the Palestine Liberation Organisation (PLO)] stormed into the Munich Olympic Village and seized eleven Israeli athletes. The terrorists demanded the release of two hundred and forty-one prisoners, which included Andreas Baader and Ulrike Meinhof, founder members and leaders of the Baader-Meinhof gang. The West German authorities mounted an inept attempt to

[21]Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications, 1974) 169.
[22]Above, n 18.
[23]*Ibid.*
[24]Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006) 73.

rescue the hostages, which led to the murder of all nine of them at the hands of the terrorists (two of their number having been murdered during the kidnapping), two of the terrorists and a police officer in a gun battle at the military airport in Munich.

The combination of an attack executed on West German territory by Palestinian terrorists, targeting nationals of the State of Israel, placed the incident within the area of international criminal law. These actions were deliberate, calculated killings, leaving no doubt as to the intentions of the terrorists not to allow their hostages to go free if their plot failed.

The event has been described as "one of the most successful terrorist attacks in history".[25] There is no doubt that one of the major consequences of the atrocity was the impact which the media images of the tragedy had on the global community as it unfolded on their television screens.[26] In the opinion of Reeve, not only did it focus the world spotlight on the Palestinian crimes, but it also "helped to persuade the world that the Palestinian struggle needed to be taken seriously".[27] It cannot have escaped the attention of the conspirators that media coverage of the 1972 Olympics meant that negotiations for the release of the hostages could not be conducted in secret, adding to the pressure on the authorities to bring the incident to a speedy end.

The audacity of the terrorists at Munich may have encouraged another combination of PFLP terrorists and members of the Baader-Meinhof group to commit the high profile hijacking of an Air France airbus shortly after take off from Athens airport, en route for Tel Aviv on 27 June 1976, which led to the *Entebbe Raid* by Israeli commando troops to rescue the hostages.[28] The terrorists had demanded the release of fifty-three convicted terrorists, most of whom were in Israeli jails, or the passengers would be systematically executed, commencing with the Jews. As with the *Munich Olympic Massacre*, the attack failed in its objective, but it demonstrated that Palestinian terrorists remained wedded to their principal cause, *i.e.*, to regain territory which had

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[25]Reeve, *One Day in September* (London: Faber and Faber Ltd, 2000) 294.
[26]*Ibid*, 295; see also, Carlton, 'The Future of Political Substate Violence' in Alexander, Carlton and Wilkinson (eds) *Terrorism: Theory and Practice* (Boulder, Colorado: Westview Press, 1979) 211.
[27]Above, n 25, 294; see also, Griset and Mahan, 'Reporting Terrorism', in Griset and Mahan, *Terrorism in Perspective* (London: Sage Publications, 2003, 131.
[28]Boyle, 'The Entebbe Hostage Crisis' in Han (ed) *Terrorism & Political Violence: Limits & Possibilities of Legal Control* (London: Oceana Publications, 1993) 278-279.

become part of the State of Israel.[29] In pursuit of their aspirations for self-determination, however, the terrorists were crossing the threshold of international law, by embroiling the sovereign interests of States other than Israel in their demands. The aspirations of Al Qaeda and other terrorist organisations whose political, Islamist objectives are in tune with their own,[30] are of a different order.

3.1.3 The East African US Embassies Bombings 1998

Fundamentalist Islamic extremist terrorists launched two attacks on the same day, 7 August 1998, on US embassies in East Africa located in Nairobi, Kenya and Dar es Salaam, Tanzania. Bombs were placed in trucks which were abandoned outside the rear and front entrances respectively of the two embassies. No warnings were given and no demands were made, the message being implicit in the acts and the horrendous aftermath. In all, more than two hundred and twenty people lost their lives, of whom only thirteen were US citizens, and in excess of four thousand victims were wounded,[31] only seven of whom were US citizens. The rest of the casualties were foreign military personnel, and Kenyan and Tanzanian citizens. Despite the imbalance in the nationalities of the victims, the unspoken message was clear - the perpetrators wanted to remove the American presence from East Africa, not only by creating a climate of fear among populations living and working near American interests in the region, but also by endeavouring to manipulate public opinion in the US to clamour for a change in the foreign policy of their Administration. Within a few days the US Federal Bureau of Investigation (FBI) accused the Al-Qaeda terrorist organisation, headed by Osama bin Laden, of being responsible for the outrage at the Kenyan embassy.[32]

By targeting the diplomatic icons of American influence in this way, the terrorists aimed to cause massive destruction and considerable loss of life. Both planners and perpetrators were seemingly reckless as to the risk to life and limb of civilians who might not be US citizens and in whose supposed interests they had acted. As with the *Dawson's Field Incident*, the publicity which was gained by Al Qaeda from the

[29]Freedman, 'Soviet Policy Toward International Terrorism' in Alexander (ed) *International Terrorism National, Regional, and Global Perspectives* (London: Praeger Publishers, 1976) 115.
[30]Burke, *Al-Qaeda: Casting a Shadow of Terror* (London: I B Taurus, 2003) 152.
[31]Statistics reported in Wikipedia, available at http://en.wkipedia.org/wiki/1998_U.S_embassy_bombings.
[32]Grunwald, "Complaint Links Bin Laden to Bombing" *Washington Post* August 29 1998, A01.

outrage drew attention to the message which Osama bin Laden had already broadcast to the world.[33] Members of Al-Qaeda are driven by extreme religious fanaticism. They place no value on human life, whether it be the lives of those caught up in their deeds or, which is even more dangerous for the well-being of society, their own lives. Martyrdom motivates many of those who become radicalised in pursuit of their cause upon membership.[34] It is a distinctive feature of the organisation, but is not unique to it. In the past, members of the PLO were not afraid to risk their lives in their cause.[35] However, attempting to influence the foreign policies of States represents a significantly more ambitious aim than negotiating for the release of terrorists from prison.

3.1.4 The Attacks on the US Homeland 2001

Television and radio reporting of global catastrophes as they unfold are the ultimate means of gripping the attention of the world. Whether by design or happenstance, the 9/11 attack on the Twin Towers is etched on the memories, not only of those who were caught up in the mayhem, but also of those who saw the images on television screens or listened to the harrowing mobile 'phone calls from those trapped in the buildings. Not only was this a significant advance from the media coverage of the destruction of the airliners in the *Dawson's Field Incident*, the televised scenes relayed during the *Munich Olympic Massacre*, and the shock of the synchronised truck bomb attacks on the US Embassies in East Africa, but 9/11 has implications for international law, because it has introduced a formidable non-state actor into the realms of international humanitarian and criminal law[36] and transcended many of the provisions contained in specific terrorist conventions within international criminal law.[37]

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[33] *A Declaration of War Against the Americans Occupying the Land of the Two Holy Places: a Message from Osama bin Muhammed bin Laden unto his Muslim Brethren all over the World Generally and Toward the Muslims of the Arabian Peninsular in Particular* 23 August 1996, cited in Rashid, *Taliban the Story of the Afghan Warlords* (revised edition) (London: Pan Books, 2001) 133; see also, Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 192.

[34] Robertson, *Crimes Against Humanity the Struggle for Global Justice* (second edition) (London: Penguin Books, 2002) 479; see also, Hoffman, ' Lessons of 9/11', Testimony CT-201 (Santa Monica, CA: Rand, (2002) 9.

[35] Freedman, *op cit*, n 29, 120.

[36] Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 2.

[37] For example, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 14118, in force 26 January, 1973.

The destruction of the Twin Towers and the damage to the Pentagon, two targets which represented the economic power and military might of the Western world, together with the third, inchoate attack on an unidentified target, which Gunaratna suggests was the White House,[38] was a strategic strike aimed at democracy because of the symbolic significance of the sites.[39]

Irrespective of the actual methods used to bring about such destruction, or the ability of those responsible for planning, organising and funding such a militaristic operation, this notorious onslaught had consequences which may, or may not, have constituted a hidden agenda on the part of Al Qaeda, namely the adverse affect it had on the US economy in the days which followed.[40] No demands were made, but on this occasion the aim was to demoralise and create a sense of vulnerability in members of the public throughout the country. Quite apart from the carnage and destruction, for the very first time, this was an attack upon the democratic governance of the US by a non-State actor. Until 9/11, the perception of terrorism could be contained within its most distinctive feature - creating a sense of terror in the citizenry - but since 9/11, this perception has gained an added dimension, which is causing damage to the economy of the targeted State. This aspect of contemporary terrorism is likely to feature on future occasions if terrorists manage to penetrate the territorial borders of the targeted State and therefore should be adequately reflected in the comprehensive definition of international terrorism before the drafting process is completed.

The 9/11 attacks revealed the true extent of the aspirations of Al Qaeda, but there are other terrorist groups who share their hatred of non Muslims and pose similar threats to society, as the 2002 Bali bombing demonstrated.

3.1.5 The 2002 Bali Bombings

According to one of the terrorists, Ali Imron, who was given a life sentence for his part in the attacks, Bali was selected because it was a favourite venue for American

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[38]Gunaratna, *op cit,* n 13, 50.

[39]*Ibid.*

[40]Hoffman, 'Al Qaeda, Trends in Terrorism and Future Potentialities: an Assessment' paper presented at the RAND Center for Middle East Public Policy and Geneva Centre for Security Policy Third Annual Conference, 'The Middle East After Afghanistan and Iraq', Geneva, Switzerland, 5 May 2003, P-8078 (Santa Monica: RAND, 2003), 11.

tourists.[41] On 12 October 2002, a minivan containing a bomb was driven to the Sari Club in Legian Street , Kuta, Bali, where it exploded in the early hours of the morning. Altogether three targets were attacked in Legian street, causing two hundred and two fatalities. Those who were brought to justice were not members of Al Qaeda, but of another Islamic terrorist group called Jemaah Islamiyyah which aimed to set up a pan-South East Asian Muslim organisation.[42]

The intention of the bombers, by their own admissions, seems to have been to kill Americans and Christians.[43] The motivation did not appear to extend as far as bringing down entire States, let alone Western democracy, but it may be that the perpetrators were influenced by the 9/11 attacks and the notoriety of the Al Qaeda organisation.[44]

Apart from these changes in the overarching motivation which drives international terrorists and the intentions which underpin the individual manifestations, the methods which are being used have been supplemented over recent decades by technological advances and the greater expertise of those who seek to take advantage of them.

Conclusion

In the past, single attacks on targeted individuals and assassinations of leading government officials may have drawn attention to a terrorist cause, but such attacks were not followed up by any demands and the message was implicit in the deed. In the *Dawson's Field Incident*, not only were demands made, but they were met and prisoners were freed[45] as a result of pressure being brought to bear on the victim States whilst the global community watched events unfold.

There had also been four aircraft hijackings in 1972 - aimed at obtaining the release of imprisoned terrorists[46] - and an attack on passengers at the baggage claim area of Tel

[41]Remarks made by Ali Imron, quoted on *BBC News* Thusday 2 October 2003 available at http://news.bbc.co.uk/2/hi/asia-pacific/3157478.stm.
[42]Gunaratna, *op cit*, n 13, 186.
[43]Remarks made by Amrozi bin Nurhasyim, quoted on *BBC News* (World Edition) Friday 1 August 2003, available at http://news.bbc.co.uk.
[44]According to Ali Imron, the Bali attacks were originally planned for 11 September, to mark the first anniversary of the terror attacks on the US, remarks reported by the *BBC News* Thursday 2 October 2003, available at http://news.bbc.co.uk/2/hi/asia-pacific/3157478.stm.
[45]Evans and Murphy, *op cit*, n 17, 99.
[46]*Ibid*, 113, 119.

Aviv (Lod) airport in May, by members of the Japanese Red Army,[47] which was apparently motiveless.[48] However, it was the *Munich Olympic Massacre Incident* which was the catalyst for raising concerns in the UN General Assembly,[49] resulting in the setting up of the first Ad hoc Committee to consider, *inter alia*, operational measures to combat it.[50]

The 9/11 atrocity not only reinvigorated support for pending conventions,[51] but it has also inspired members of other fanatical Islamist organisations to place bombs in popular tourist venues with the aim of harming Americans in particular and Christians in general.[52] As a result of the more ambitious terrorist aspirations, another core element has been identified, which builds upon the primary element defined in the 1937 Convention on the Suppression and Punishment of Terrorism, which was:

> criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.[53]

This element must now be supplemented with a further component which is core to identifying a generic definition of international terrorism, viz:

> [T]he intention to compel a government or international organization or certain individuals to do or to refrain from doing any act.[54]

As can be seen from the attacks discussed above, terrorist goals have become more ambitious since the 1970s, with terrorists detonating more lethal explosive devices in devastating attacks[55] which heightened the threat to international security,[56] not least

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[47]On 29 May 1972, three Japanese gunmen drew automatic guns and hand grenades from their luggage and opened fire on people in the baggage claim area of Lod airport, killing twenty-six people and injuring 80 others.

[48]Evans and Murphy, *op cit*, n 17, 6.

[49]McWhinney, *Aerial Piracy and International Terrorism the Illegal Diversion of Aircraft and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1987) 138.

[50]*Ibid*; see also Duffy, *op cit*, n 36, 19, fn 6.

[51]SC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001), para 3.

[52]Above, n 43.

[53]1937 Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937 League of Nations doc C.546(1).M.383(1).1937.V., never entered into force) Article 1(2).

[54]See, for example, Article 2(1)(iii) of the International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force).

[55]Bergen, *Holy War Inc Inside the Secret World of Osama bin Laden* (London: Wiedenfeld and Nicolson, 2001) 28; Hoffman, *Lessons of 9/11* Testimony CT-201 (Santa Monica CA: Rand, 2002) 3.

[56]Lesser, 'Countering the New Terrorism: Implications for Strategy' in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini *Countering the New Terrorism* (Santa Monica, CA: Rand Corporation, 1999) 96-97.

because the perpetrators have expertise in weapons technology and state-of-the-art communications[57] and constantly vary their tactics.

3.2 Innovations in *modus operandi*

Introduction

Towards the end of the millennium, variations in the way in which some crimes were perpetrated can be identified, but the element of surprise which is central to generating terror among members of the public remains a constant, therefore no warnings of impending attacks are issued, in contrast to, for example, the Irish Republican Army (IRA).[58] The way in which hostages are treated has, however, undergone radical change during the past decade.

3.2.1 Tactical Changes in the Treatment of Hostages

The selection of hostages kidnapped in isolation, as opposed to 'en masse' due to their location - being in the wrong place at the wrong time[59] - has become more noticeable since 2001. Individuals were abducted because of their diplomatic, political, or other high profile significance, for example in the case of the abduction of Daniel Pearl on 23 January 2002 in Karachi, Pakistan. Pearl was an American Jew, but was selected not only for his nationality and his faith, but also for his credentials as a well-known *Wall Street* journalist.[60] Rather than taking several people hostage who represented a specific category, as was the case in the *Iran Hostage Crisis*,[61] Pearl was targeted for his high profile links to the US media *via* one of their leading newspapers.

No ransom or other demand was made in his case, which begs the question as to whether this qualifies as a hostage situation at all. It seems he was abducted for the purpose of being executed:[62] He was not a political or religious leader and therefore he was not assassinated for the conventional reasons associated with this particular

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[57]Bergen, *op cit*, n 55, 30.

[58]For example, three warnings had been received half an hour before the bombs exploded in Omagh, Co Tyrone on Saturday 15 August 1998; Sharrock, "Omagh Families See Bomb Suspect in Court at Last", *The Times* 26 September 2006, 13.

[59]For example, in the case of the hijacking of a Trans-World Airlines flight en route to Rome from Athens: the 8 crew members and 145 passengers were held for 17 days.

[60]Daniel Pearl was chief of the South Asia bureau of the *Wall Street Journal*.

[61]Iranian radicals seized the US Embassy in Tehran on 4 November 1979, taking 66 American diplomats hostage during a siege which lasted 15 months.

[62]Pearl was murdered within one month of being abducted.

crime. The decision to end his life by cutting his throat was not only extremely brutal, it was also a departure from the norm of putting a bullet through the head of the victim. This mode of execution may have been adopted because it transpired that part of the plan was to videotape the murder and send the tape to the Pakistani authorities.[63] Presumably this departure from the norm with regard to the treatment of hostages was viewed by the terrorists as a more effective way of creating terror in the minds of those Americans who saw the screening of the video.

The footnote to the Daniel Pearl abduction is the extent to which this kind of kidnapping has been followed on many occasions since,[64] but in later instances, demands - albeit of a more audacious kind, akin to blackmail - have been reintroduced in attempts directly to force governments to alter some of their foreign policy decisions, as occurred in the case of the Filipino hostage, Angelo De La Cruz.[65] Mr Cruz was freed unharmed in July 2004, following the capitulation of the Philippines Government in agreeing to withdraw their troops from the UN Assistance Mission for Iraq (UNAMI), to meet the demands of his kidnappers.[66]

The Pearl and Cruz hostage situations illustrate how the terrorist has adapted the 'standard' pattern of this crime in different ways. It is therefore important to recognise that no two hostage situations can any longer be presumed to follow the same pattern, particularly if one accepts the argument that Pearl was not a hostage in the strict sense of the word.

Manipulation of the media in order to place demands on governments publicly, rather than negotiating privately for the release of the hostage, represents another slant on the use of publicity by terrorists. Traditionally, the offence of kidnapping for ransom involves targeting a specific individual,[67] but hostage taking by terrorists in the past has been associated with capturing more than one individual, usually selected by

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[63]The videotape was received by the Pakistani government on 21 February 2002, which indicated that David Pearl had been killed.

[64]For example, in 2004, Nicholas Berg (a US businessman) was abducted on 9 April and his decapitated body was found on 8 May 2004; Kenneth Bigley was abducted on 16 September 2004 and his decapitation on 7 October. was also videoed.

[65]The news of the abduction of Angelo De La Cruz was announced in a video released by the Al-Jazeera news agency on Wednesday 9 July 2004.

[66]Hookway and Solomon, "Philippines' Decision on Iraq Draws Criticism", *Asian Wall Street Journal* 15 July 2004, A1.

[67]Patty Hearst, a millionaires, was kidnapped in 1974 by a group calling itself the Symbionese Liberation Army.

nationality or location, as was the case in the abduction of Western tourists in the Yemen in 1998,[68] or the random imprisonment of airline or cruise liner passengers and crews caught up in hijack situations.[69] These variations should be borne in mind when the exhaustive list of crimes which potentially could be perpetrated in furtherance of a terrorist aim is compiled, in connection with a generic definition of international terrorism.[70]

New ways of carrying out some of the other crimes which have become standard in the arsenal of international terrorists have also emerged, particularly with regard to the use of bombs.

3.2.2 Adaptations in the Use of Explosives

Improved security measures, for example metal detectors and embassy fortifications,[71] frustrated many of the stock-in-trade attacks of the terrorists who chose this *mo*. The car or truck bomb parked in strategic locations has been used to considerable effect in causing maximum property damage and collateral civilian deaths and injuries, as happened in the case of the first attack on the Twin Towers in New York.[72]

3.2.2.1 The World Trade Centre Bombing 1993

The lack of sufficient security enabled Ramzi Yousef and his co-conspirators to plant a car bomb in an underground garage beneath the World Trade Centre on 26 February 1993, using explosives made from commercially available materials.[73] Nonetheless, it is generally believed that this terrorist act marked the point at which significant

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[68]For example, 12 Britons, 2 Americans and 2 Australians were kidnapped in one incident in Abyan, Yemen on December 28 1998.

[69]For example in the case of the *Achille Lauro* cruise liner which was hijacked in the Mediterranean Sea on 7 October 1985, involving more than 700 hostages.

[70]See, for example, UN Doc A/C.6/56/L.9, Annex IV, para 4, 'Informal summary of the general discussion in the working group, prepared by the Chairman of the Ad Hoc Committee of the Sixth Committee on 'Measures to Eliminate International Terrorism' (29 October 2001).

[71]Sandler, 'An Economic Perspective on Transnational Terrorism' (2004) 20 *European J Political Economy* 301; see also Lesser, 'Changing Terrorism in a Changing World', in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini *Countering the New Terrorism* (Santa Monica, CA: Rand Corporation, 1999) 1.

[72]The World Trade Centre was badly damaged by a car bomb on 26 February 1993, which killed 6 people and injured 1,000 more.

[73]Hoffman, *op cit*, n 1, 23.

international terrorist acts penetrated the US borders,[74] not least because, according to Hoffman, the terrorists "deliberately attempted to topple one of the twin towers onto the other".[75] On that day there were six fatalities, very many casualties and extensive damage, but the ring leaders in the conspiracy were eventually brought to justice,[76] culminating in the capture of Yousef in Pakistan in 1995.[77]

Terrorising the public by planting bombs near strategic sites continued to be deployed as the chosen *mo* until terrorists found a way of undermining the effectiveness of closed circuit television (CCTV), which potentially could alert the security forces to an abandoned vehicle in a sensitive location and result in the apprehension of suspects. Investigations resulting in successful prosecutions, as in this case and foiled plots[78] have been facilitated by advances in forensic science techniques.[79] As a consequence, terrorists resorted to the use of suicide bombers.

3.2.2.2 Suicide Bombings

The introduction of the suicide bomber has proved to be a devastating innovation. This *mo* has emasculated efforts to reassure the public in general, because the bomber can strike at will, not always aiming for obvious targets and able to time the explosion for a moment of his/her choosing.[80] The characteristics of the suicide bomber are unique;[81] s/he can change the intended venue at the last minute to evade any unexpected obstacles or security measures standing in the way and execute an equally devastating blast in another location.[82] Investigations might reveal the identity of the perpetrator, but this will not discourage potential suicide bombers from committing

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[74]Lesser, 'Countering the New Terrorism: Implications for Strategy', in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini *Countering the New Terrorism* (Santa Monica, CA: Rand Corporation, 1999) 85, 88.

[75] Hoffman, *op cit*, n 1, 17.

[76]In October 1995, Ramzi Yousef, Sheik Omar Abdel-Rahman, El Sayyid Nosair and Mahmud Abouhalima were among ten men convicted for their part in the bombing.

[77]Bergen, *op cit*, n 55, 38.

[78]For example, a plot to assassinate Pope John Paul II was foiled after experts decrypted the hard drive on a computer left behind by Ramzi Yousef before he was captured, as chronicled by Bergen, above n 55, 151

[79]*Ibid.*

[80]Hoffman, 'The Logic of Suicide Terrorism', (2003) 4 *The Atlantic Monthly*, available at www.theatlantic.com/doc/200306/hoffman, para 11.

[81]Gross, 'The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects' (2004) 22 *Wisconsin International Law J* 597, 709.

[82]Above, n 80, 4.

further outrages, because it is alleged that they have been brainwashed by the leadership of the particular terrorist organisation to which they have been recruited.[83]

Suicide bombings first gained prominence in 2000, with the targeting of the *USS Cole*, a naval destroyer which represented US influence in the Yemen.[84] The massive explosion caused the death of seventeen sailors, injured a further thirty-nine and resulted in extensive damage to the vessel. Since both the ship and the crew emanated from the US, there can be no doubt that the US was the intended target by association It was, in the words of Bergen, "an enormous shock to the Pentagon".[85]

It can be argued that suicide bombers only succeed to the extent that they generate terror and cause panic and mayhem; their actions do not appear to advance their cause(s). This is borne out by the resolute implacability of the Israeli Government in the face of frequent suicidal onslaughts in Jerusalem.[86] On the other hand, where the suicide bomber selects targets which also have a detrimental effect on the interests of governments or non-governmental organisations (NGOs) in the international arena, the consequences can be more serious.

This was the case with the nine suicide bombers who attacked three residential compounds for foreign workers in Riyadh, Saudi Arabia on 12 May 2003. In that assault, citizens from the US, the UK, Ireland and the Philippines were killed and the increasing vulnerability of foreign nationals to terrorist attacks whilst working in Saudi Arabia was exposed, sowing seeds of doubt in the minds of those whose operatives work on mutually beneficial contracts in that territory as to the wisdom of continuing their operations. Should these employees decide to leave and/or their employers close down their enterprises, the longer term aim of the terrorists to undermine Western interests abroad will have been advanced.

The principal features of this *mo* are that it is cheap, yet at the same time it is effective

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[83]Gross, *op cit*, n 81, 710.

[84]The *USS Cole* was rammed by a small powerboat loaded with explosives off the harbour at Aden on 12 October 2000.

[85]Bergen, *op cit*, n 55, 183.

[86]A suicide bomber triggered his explosives inside a bus in Jerusalem on 19 August 2003, killing 20 people and injuring over 100 others.

and uncomplicated,[87] guaranteeing media coverage,[88] which has been shown to be one of the prime motivations in terrorist activity.[89] Gross considers that the characteristics of the suicide bomber "vest [suicide terrorism] with greater gravity" compared with other types of terrorist acts[90] and further, that none of the existing definitions address this facet.[91] By arguing, persuasively, that suicide terrorism is especially complex, it is implicit that he would also argue that it requires a specific definition, although the thrust of his article on this occasion is that despite the threat posed to the liberal State by suicide terrorism, it does not permit democratic States to deviate from their fundamental values.[92]

From the point of view of a generic definition which aims to encompass known and potential terrorist challenges, the actual commission of the offence is irrelevant. Any prosecution would relate to attempts, conspiracies or inchoate wrongful acts in circumstances where the bomber survives. Research tends to identify the leadership of terrorist organisations as being closely involved with the radicalisation and training of suicide bombers,[93] in which case evidence gathering may take longer because *a priori* such suspects are physically distanced from the crime. It follows that the temptation to legislate under national legislation for further restrictions on civil liberties would be greater, due to political exigencies.[94] A specific convention drafted to deal with those suspected of being implicated in suicide bombings might, as a result, be translated into national laws within which the provisions for detention during the investigative procedures permit harsher restrictions upon civil liberties than would be the case if this criminality was considered within a comprehensive definition where such limitations would be viewed from a wider, more balanced, perspective.

The global community is currently experiencing an increase in the use of suicide bombers. This very dangerous escalation in terrorist activity has introduced an

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[87]Hoffman, *op cit*, n 73, 23-24.
[88]*Ibid*, 13.
[89]*Ibid.*
[90]Gross, *op cit*, n 81.
[91]*Ibid*, 601-4.
[92]*Ibid*, 600.
[93]Hoffman, *op cit*, n 80; see also, Gross, *op cit*, n 81, 710.
[94]Kennedy, 'Legal Conundrums in our Brave New World' *The Hamlyn Lectures* (London: Sweet & Maxwell, 2004) 1.

extremely high risk of mortality to those within the danger zone which at present the security forces seem powerless to prevent it. It is aimed at killing the greatest number of those targeted. It mirrors the pattern of the truck and car bombs, which are not followed by any demands, but rely on creating such terror in the citizenry that they themselves will put the pressure on their own governments to change policies and succumb to the unspoken message which is inherent in the outrage.

By definition, a suicide bomber who succeeds in his/her mission cannot be prosecuted and only alleged conspirators could be arraigned. It could therefore be argued that suicide bombings should be defined as a distinct offence, within the overall umbrella of acts of international terrorism, particularly in relation to attempts and conspiracies to commit it. This would entail inclusion of a further element to the intention, which takes into account a situation where the coercion emanates indirectly *via* manipulation of a terrified community/population.

3.2.2.3 Introduction of Mobile 'Phone Technology

Investigations into the Madrid train bombings on 11 March 2004 uncovered a new technique - use of the mobile 'phone to trigger the explosions, giving the terrorist time to put unlimited distance between planting the bomb and triggering the explosion. However, taking advantage of the latest technology not only assists the terrorist, it can also aid the authorities. The *mo* deployed in the Madrid bombings reinforces the salutary lesson of 9/11 that the ingenuity of the terrorist should not be underestimated.

3.2.2.4 Converting Aircraft into Missiles: the 9/11 Attack

With the attack on the Twin Towers of the World Trade Centre in 2001, the terrorists crossed the Rubicon. Nearly all of the offences which were committed, taken separately, were already codified under international law.[95] Four airliners were hijacked and the crews and passengers imprisoned as a result did not form any part of the plan, but were expendable, the intention being that they should all die, along with the hijackers, as the aircraft crashed into their targets. The overall intention of the

[95]For example, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973); International Convention Against the Taking of Hostages (New York, 18 December 1989, 1316 UNTS 205, in force 3 June 1983).

attacks was threefold: to demolish one of the icons of Western democracy (the World Trade Centre), to destroy or severely damage the Pentagon, which represented the military might of the most powerful nation in the world, and to destroy one of the nerve centres of the US Government. Conjecture has it that the target in respect of the third, foiled attempt, was either a nuclear facility or the White House itself.[96]

It transpired that the operation had been carefully planned over many months,[97] with vast sums being spent on training.[98] Selecting flights which were close to the targets, in order to preserve maximum fuel levels was ingenious, overcoming the long-standing difficulty of persuading pilots to change course by eradicating the need for their services was masterful, but embedding the terrorists selected to carry out the attack within the US many months in advance of the attack, without the authorities realising that their territorial boundaries had been comprehensively breached, has exposed the vulnerability of every State, wherever geographically located, to attack from anonymous terrorists.

In relation to the definitional issue, this attack highlights certain features which have not previously been considered for inclusion. The intention to strike at the heart of Western democracy is more ambitious that any previous attempts to influence the foreign, or indeed any, policies of States to do or refrain from doing any act and this phrase is becoming standard in the more recent conventions[99] and has been included in Article 2(1) of the most recent version of the draft comprehensive convention on international terrorism.[100] Similarly, the conventions aimed at suppressing aerial/marine hijackings[101] may require amendment to include the intention to commandeer airplane(s) or ships for use as missiles in a terrorist attack.

There is another aspect which this single act brings into sharp relief. The strategic

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[96]Gunaratna, *op cit*, n 13, 50.
[97]*Ibid*, 105.
[98]*Ibid*, 106.
[99]See, for example, International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 19991 UN Doc A/Res/54/109 (1999), in force 10 April 2002) Article 2(1)(b); International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, A/RES/59/290 (2005), not yet in force) Article 2(1)(b)(iii).
[100]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Annex II.
[101]For example, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988, IMO Doc SUA/CONF/15/Rev.1, in force 1 March 1992).

planning would have been beyond the capabilities of most international terrorists who have been identified as being implicated in many of the outrages discussed in this chapter.

Conclusion

The innovations in *mos* which have been identified can be summarised as follows:-

- hostages are more at risk of being killed than set free and tend to be targeted on an individual basis for their credentials, rather than en masse as a specific category;

  executions, videoed and used as an extreme form of blackmail have become a standard tactic;

- demands are not always made, but when this practice is followed, they are political in nature, designed primarily to coerce a change in the foreign policies of States;[102]

- introduction of the suicide bomber in various guises, targeting civilians and internationally sensitive establishments;

- use of mobile 'phone technology as a variant on the standard timing device to trigger explosives;

- infiltration of the targeted State and the introduction of pilot-trained terrorists, thus revolutionising aerial hijacking tactics;

- extension of the target sphere to include a global propensity;

- the capability comprehensively to infiltrate territorial boundaries; and

- the adoption of a professional and militaristic style of attack.

Any definition which aims to embrace comprehensively and proactively, potential acts of international terrorism must also take account of these changes, for example by ensuring that the element of coercion in relation to governmental and/or organisational policies which has been introduced in recent international conventions addressing acts of terrorism,[103] is retained. Further, that the offender profile of those who have the ability to plan and control their 'agents' is also taken into account.

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[102]See, for example, the statement by Mr Straw, the Foreign Secretary, to the House of Commons in relation to the murder of Kenneth Bigley, Hansard Debates for 12 October 2004 (London: The Stationery Office, 2004) col 151; the speech by the Director General of the Security Service, Dame Eliza Manningham-Buller, at the Ridderzaal, Binnenhof, The Hague, Netherlands, 1 September 2005, available at http://www.mi5.gov.uk/output/Page387.html.

[103]See, for example, International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999l UN Doc A/Res/54/109, in force 10 April 2002) Article 2(1)(b); International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, A/RES/59/290 (2005), not yet in force) Article 2(1)(b)(iii).

3.3 Changes in Offender Profiles

Introduction

Over time, terrorist organisations come to prominence, wax and wane, for example the Red Army Faction (RAF),[104] to be supplanted, or taken over and 'repackaged' by other groups with different agenda and modes of operation.[105] Similarly, the leadership of terrorist groups becomes more professional as contemporary leaders gain from the experience of those whom they succeed.[106] The added advantage which many of these leaders possess lies in their *curricula vitae*.

They are well - if not highly - educated, with considerable knowledge of state-of-the-art technology. Together with their undoubted leadership qualities and their warped religious ideologies, contemporary terrorist ringleaders are a breed apart from their predecessors, a combination which makes them formidable non-State opponents to those with responsibilities for government in States run on democratic lines. In the 1990s, non-State actors came to prominence, the leading example being Osama bin Laden,[107] who had made no secret of his determination to bring down, *inter alia*, the US,[108] therefore raising issues regarding the responsibility of non-State actors under international law.[109]

Some terrorists have gained notoriety in the past for being linked to particular attacks, rather than in relation to their position in the hierarchy of most wanted terrorists;[110] whilst the crimes of others will remain etched on the annals of international

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[104]The RAF emerged in the 1980s, but declined in the 1990s. See Hoffmann, *op cit*, n 1, 25-26.

[105]For example, changes in the command structure of the Palestinian Liberation Organization in 1990s. See, for example, Lustick, 'Terrorism in the Arab-Israeli Conflict: Targets and Audiences' in Crenshaw (ed) *Terrorism in Context* (Pennsylvania: Pennsylvania State University Press, 1995) 549.

[106]Hoffman, *op cit*, n 1, 25.

[107]Bergen, *op cit*, n 55, 96; see also, Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 172.

[108]Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 262.

[109]Duffy, *op cit*, n 36, 61; see also, Arquilla, Ronfeld and Zanini, "Networks, Netwar, and Information-age Terrorism, in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini *Countering the New Terrorism* (Santa Monica, CA: Rand Corporation, 1999) 45.

[110]For example, the role played by Leila Khaled in the *Dawson's Field Incident* in September 1970.

criminality.[111] In addition to this mix, there are the "amateurs"[112] whom Hoffmann considers to be as dangerous as those who rank higher in the pecking order[113] because terrorism expertise is accessible via the internet and instruction manuals.[114]

The volatility of terrorism and the increasing sophistication of their leaders,[115] combined with the disparate mentalities and skills of those who commit the terrorist acts, makes the task of predicting future trends and attempting to cater for any and every possibility with regard to choice of *mo* and selection of weaponry a daunting prospect. However, studying the profiles of contemporary, known, terrorists may assist in correlating their attributes with the core elements which must be included in the definition, if it is to be adequate for the purpose of a comprehensive convention on international terrorism. One infamous contemporary terrorist who was initially recruited by Al Qaeda,[116] but who aspired to commit terrorist attacks independently, is the convicted felon Ramzi Yousef. His profile is interesting, because it differs in some respects from those of his peers.

3.3.1 Ramzi Yousef

Yousef was born on 27 April 1968 in Kuwait,[117] where he spent his early years, before studying computer-aided electrical engineering and micro-electronics at West Glamorgan Institute of Higher Education.[118] He was a radical Islamist, but did not practice the tenets of his religion seriously and he had a pathological loathing for all things American and has been described as a "playboy terrorist".[119]

He spent some time in training camps learning bomb-making skills and teaching electronics[120] and was recruited by the Al Qaeda organisation, which selected and trained him specifically for the plot to bomb the World Trade Centre in 1993.[121]

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[111]For example, Abu-Musab al-Zarqawi, who instigated, or may have carried out, the beheading of Kenneth Bigley in early October 2004.
[112]Hoffaman, *op cit*, n 1, 20.
[113]*Ibid*, 20-21.
[114]*Ibid*, 20; see also, Reeve, *op cit*, n 108, 89.
[115]See, for example, Lord Lloyd of Berwick, 6 April 2000, Vol 406, Lords Hansard (London: The Stationery Office, 2000) col 1481.
[116]Gunaratna, *op cit*, n 13, 6.
[117]Reeve, *op cit*, n 108, 112.
[118]*Ibid*, 116-117.
[119]Burke, *Al Qaeda: Casting a Shadow of Terror* (London: I B Taurus & Co Ltd, 2003) 25.
[120]Above, n 117, 120.
[121]Above, n 116, 6.

He directed the planning of the Bojinka plot. This was a major plan, funded by Al Qaeda,[122] and aimed at inflicting mayhem on icons of the West.[123] This would be achieved by, for example, operations to assassinate key political figures, which included Pope John Paul II, President Clinton, President Ramos of the Philippines, together with members of his government and bomb airliners in flight and property on the ground.[124] His terrorist crimes ended in1997 when he was convicted in the US for his role in the 1993 World Trade Centre bombing.[125]

His terrorist career reveals that Yousef presented an extremely high risk to members of the public in locations targeted by Al Qaeda, which sponsored his schemes,[126] regarding him as "a model terrorist".[127] The motivation for the *Bojinka* plot was to spread "panic and revulsion around the entire globe",[128] which taken together with the part of the plot which aimed to assassinate leading political figures and Heads of State, fits the primary element of acts of international terrorism, *i.e.*, intentionally causing death, grievous bodily harm or loss of liberty to Heads of States or those delegated with their authority, which was first identified in 1937.[129] However, Yousef did not appear to be concerned with persuading or coercing governments to change their policies and his profile therefore differs from those of other international terrorists, nor did he appear to be willing to die for his cause, taking every opportunity to evade capture.[130]

3.3.2 Richard Reid

Apart from being a self-confessed Islamic fundamentalist and enemy of the US,[131] the profile of Richard Reid could not be more different from that of Ramzi Yousef. Reid is a British national who was a 'foot soldier' in the Al Qaeda organisation - an apt

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[122] *Ibid*, 175.
[123] Bergen, *op cit*, n 55, 38-39.
[124] Gunaratna, *op cit*, n 13, 175.
[125] Yousef was found guilty in the Manhattan Federal Court on 12 February 1997 and sentenced to 220 years in prison.
[126] Above, n 116.
[127] Above, n 116, 179.
[128] Reeve, *op cit*, n 108, 77.
[129] 1937 Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937 League of Nations Doc C.546(1).M.383(1).1937.V., never entered into force), Article 1(2).
[130] Above, n 128, 98.
[131] Statement made by Reid on 30 January 2003, upon conviction for acts of terrorism at a Federal Court in Boston, Massachusetts.

description of the terrorist who is famous for being dubbed the shoe bomber,[132] because of his attempt to blow up American Airlines Paris-Miami flight AA63 on 22 December 2001 by setting light to his shoe laces. He travelled extensively between Europe, Israel, Egypt and Afghanistan, with the aid of two British passports which he obtained by exploiting the European Union rules on freedom of movement.[133]

The explosives planted in his shoes, had he succeeded in detonating them on board flight AA63, would have brought the airliner down and demonstrates that the deeds of terrorists possessing varying degrees of skills and intelligence, when controlled by handlers of the calibre of the Al Qaeda leadership, has the potential to trigger terrorist attacks of considerable magnitude.

In comparing the profiles of Yousef and Reid, two distinguishing features stand out. Firstly, the wily mentality of the former, in contrast to the candid mindset exhibited by Reid, for example, in declaring his affiliation to Al Qaeda on being found guilty on terrorism charges at a Federal Court in Boston Massachusetts on 30 January 2003 (see *supra*, n 131) and secondly, Reid was prepared to die for the cause, whereas Yousef was intent on evading capture.[134] A combination of the dedication of Reid with the intelligence and expertise exhibited by Yousef, would be a dangerous cocktail - such a combination could lead to terrorist attacks akin in order of magnitude to those of 9/11.

3.3.3 Muhammad Atta, Ringleader of the 9/11 Attacks

Atta was the son of an Egyptian lawyer who was educated to doctoral level, completing a thesis in the area of architecture and urban planning at Hamburg Technical University in 1999.[135] Like Yousef, Atta was a radical Islamist, but unlike Yousef he practiced his religion.[136] and had no previous terrorist record.[137] He was appointed overall operational commander of the attack by Al Qaeda for his "unswerving commitment, industry and honesty"[138] All of those involved in the actual commission of the 9/11 plot had prepared assiduously for the task[139] and

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[132]Above, n 13, 127.
[133]*Ibid.*
[134]Reeve, *op cit*, n 108, 98
[135]Gunaratna, *op cit*, n 13, 105
[136]Burke, *op cit*, n 30, 25.
[137]Above, n 135, 108.
[138]*Ibid*, 105.
[139]*Ibid*, 107-8.

maintained the utmost secrecy whilst doing so.[140] There remains the question of the leadership which funds, controls and assigns which of their operatives are to be part of, or in charge of the major attacks masterminded by those at the apex of the organizations.

3.3.4 The Professional Cadre of Al Qaeda

3.3.4.1 Osama bin Laden

Osama bin Laden, a Saudi by birth, was expelled from his homeland in 1991 because of his political activities[141] and in 1994, his Saudi citizenship was revoked.[142] He is portrayed variously as an "entrepreneur",[143] "an opportunist, a businessman at heart,"[144] as having an "extremely duplicitous nature"[145] and one who is "not an original thinker.[146] All of which seems to endorse his key skill as an instigator and a facilitator.[147]

Bin Laden formed the Al Qaeda organization out of the group of Afghan Arabs who had fought under his leadership in the war in Afghanistan which ended in 1989.[148] By 1999 the organization was credited with having between four and five thousand members under the leadership of bin Laden.[149] By earlier standards,[150] this is a vast terrorist organization - commanded by a radicalised Islamist fanatical non-State actor, who has vowed to "attack the West".[151] He has been implicated in nearly all of the worst outrages perpetrated since the early 1990s,[152] and has claimed ownership of the horrendous attacks launched on 9/11.[153] Even before 9/11 bin Laden was being

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[140] *Ibid*, 107; see also, Bergen, *op cit*, n 55, 39-40.
[141] Reeve, *op cit*, n 108, 172; see also Burke, *op* cit, n 30, 129; Bergen, *op cit*, n 55, 85.
[142] *Ibid.*
[143] Arquilla, Ronfeld and Zanini, 'Networks, Netwar, and Information-age Terrorism' in Lesser, Hoffman, Arquilla, Ronfeldt and Zanini *Countering the New Terrorism* (Santa Monica, CA: Rand Corporation, 1999) 39, 61; Gunaratna, *op cit*, 13, 23.
[144] Gunaratna, *op cit,* n 13, 23.
[145] *Ibid.*
[146] *Ibid.*
[147] Burke, *op cit*, n 30, 129.
[148] *Ibid*, 8. See also above, n 143, 58; Bergen, *op cit*, n 55, 64.
[149] Colvin, Grey, Campbell and Allen-Mills, "Clinton gambles all on revenge", *Sunday Times* 23 August 1998, 10.
[150] Hoffman, *op cit*, n 1, 10.
[151] Above, n 141, 262. See also Bergen, *op cit*, n 55, 104; Gunaratna, *op cit*, 13, 45.
[152] Above, n 143, 61; see also, Reeve, *op cit*, n 108, 187.
[153] Above, n 144, 111.

credited with having obtained quantities of deadly poisons[154] and is also suspected of having acquired "code-protected nuclear suitcase bombs".[155]

The profile which emerges from the studies carried out by many researchers,[156] portrays a man who combines undoubted skills and attributes which have been over-shadowed by his extreme fanaticism and warped interpretation of the tenets of the religion of Islam.[157] He has turned the loss of his base in Afghanistan into an advantage, because without a geographical location, he has become adept at exploiting state-of-the-art communications and weapons technology, together with a consummate skill in manipulation of the media to preach his brand of Islamic fundamentalism.[158] No amount of legislation aimed at preventing, or suppressing acts of international terrorism is likely to deter him from his malevolent intentions,[159] which makes the threat which he poses to world peace on a par with, or even exceeding the dangers faced by the peoples of the world in 1939. However, efforts to agree on a comprehensive convention on international terrorism are key to ensuring that should bin Laden be apprehended, he will be accorded a fair trial. In this respect, the drafters should consider carefully the conspiratorial aspects of the crime because this is the element of the offence which would seem most applicable to his deeds and those of some of his co-conspirators, for example his mentor, Ayman Al-Zawahiri.[160]

3.3.4.2 Ayman Al-Zawahiri

Al-Zawahiri was born 19 June 1951 in Cairo[161] and has an impressive *curriculum vitae*, having graduated from medical school in 1974, followed four years later with a Master's Degree in surgical medicine,[162] which he put to good use by working with the International Red Crescent Movement in Peshawar and also in Afghanistan, tending wounded mujahideen.[163] His upbringing is replicated in the backgrounds of

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[154]Reeve, *op cit*, n 108, 262.
[155]*Ibid*; see also, Gunaratna, *op cit*, n 13, 48-49.
[156]See, for example, Gunaratna, *op cit*, 13, 23; Bergen, *op cit*, n 55, 85; Burke, *op cit*, n 30, 129.
[157]See, for example, Bergen, *op cit*, n 55, 21; Gunaratna, above, n 155, 28.
[158]*Ibid*, 30; see also Hoffman, 'Lessons of 9/11' Testimony submitted for the Committee Record to the United States Joint September 11, 2001 Inquiry Staff of the House and Senate Select Committees on Intelligence on October 8, 2002, CT-201 (Santa Monica: RAND, 2002) 11.
[159]See, for example, Reeve, above, n 154, 194.
[160]*Ibid.*
[161]*Ibid*, 136.
[162]*Ibid*, 166; Burke, *op cit*, n 30, 138.
[163]Burke, *op cit*, n 30, 68. See also, Reeve, above, n 154, 166.

many radical political Islamists[164] - his parents were middle class professional people and the family had unrealistically great expectations.[165]

He is an Islamist fundamentalist[166] and has been described as very intelligent, articulate,[167] a very clever surgeon[168] (he has been personal physician to bin Laden since 1996)[169] and is also characterised as being manipulative.[170] He has had a profound influence on bin Laden's thinking and radicalisation,[171] which accords with his position as trusted lieutenant and senior adviser to the man[172] and the accusation that he has been most instrumental in bin Laden's embrace of violence.[173] He was head of the Egyptian Islamic Jihad organisation,[174] which merged with Al Qaeda;[175] and together with others, he and bin Laden have since formed a broad coalition against the West and regimes they despise, which has the title International Islamic Front for Jihad Against the Jews and the Crusaders.[176]

Al-Zawahiri was found guilty of being part of the plot to assassinate President Sadat on 6 October 1981,[177] since when he has been indicted for other terrorist crimes *in absentia* by a Cairo court, which found him guilty and sentenced him to death on 3 February 1999.[178] Like bin Laden, he remains at large.

If Al-Zawahiri is ever apprehended and depending on where in the world he is caught, there is potential for jurisdictional and extradition difficulties because of the death sentence pronounced on him by the Egyptian Court.[179]

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[164]For example, Muhammad Atta, was the son of an Egyptian lawyer and Omar Sheik (who abducted and murdered Danial Pearl), was the son of a relatively wealthy, self-made immigrant to the UK from Pakistan.
[165]Burke, *op cit*, n 30, 136-7.
[166]Reeve, *op cit*, n 108, 166.
[167]Bergen, *op cit*, n 55, 221.
[168]*Ibid*, 222.
[169]Gunaratna, *op cit*, n 13, 26.
[170]Burke, above, no 165, 136.
[171]*Ibid*; see also, Bergen, above, n 167, 220.
[172]Bergen, above, n 167, 110.
[173]*Ibid*, 222.
[174]Reeve, above, n 166, 166; see also, Gunaratna, above, n 169, 97.
[175]Above, n 167, 64.
[176]Reeve, above, n 166, 194; see also, Gunaratna, above, n 169, 194.
[177]Burke, above, n 165, 138; see also, Reeve, above, n 166, 166 166; Bergen, above, n 167, 219.
[178]Bergen, above, n 167, 223 and fn 53.
[179]*Ibid.*

Conclusion

The selected profiles illustrate the range of backgrounds, abilities, skills and leadership capabilities which contemporary international terrorists possess, which places them in a class above those who preceded them. Their common fanatical dedication to the cause of radical Islamist fundamentalism to the exclusion of all else, their ownership of some very terrible crimes and threats to commit many more, have been instrumental in driving international terrorism to the top of the list of threats to world peace, particularly since 9/11.[180] What is equally concerning is the realisation that there are others who would replace them if they were to die in the commission of their crimes, or be captured.[181] However, this should not deter the international community from seeking legitimate ways of curbing their criminal activity.

The introduction of the non-State terrorist presents somewhat of a conundrum to the relatively new discipline of international criminal law, as pointed out by Duffy,[182] because international law in general has developed within the framework of the acknowledged sovereignty of States and the practicalities of enforcement.[183] The problem is now being compounded by evidence which confirms that many of the suicide bombers do have *bone fide* nationalities,[184] such as the three British nationals who perpetrated the carnage on London Transport on 7 July 2005 (hereinafter referred to as 7/7), but suggests that they were aided and abetted - if not brainwashed - into terminating their own lives and those of their innocent victims.[185] Al-Zawahiri has even laid claim to responsibility for the 7/7 attacks in the martyrdom video made

[180]GA Res 60/43, 'Measures to eliminate international terrorism', 6 January 2006, UN Doc A/RES/60/43 (2006). See also, the House of Commons debate on Iraq and Weapons of Mass Destruction, 24 September 2002, (London: The Stationery Office, 2002) cols 128-129.

[181]Hoffman, 'Al Qaeda, Trends in Terrorism, and Future Potentialities: an Assessment', Paper presented at the RAND Center for Middle East Public Policy and Geneva Center for Security Policy Third Annual Conference "The Middle East After Afghanistan and Iraq" Geneva, Switzerland, 5 May 2003, 8; Bergen, *op cit*, n 55, 253; Gunaratna, *op cit*, n 13, 53.

[182]Duffy, *op cit*, n 36, 68.

[183]*Ibid*, 69.

[184]For example, the three suicide bombers who committed the atrocities on London transport on 7 July 2006 were British nationals.

[185]Hoffman, *op cit*, n 4, 11; McGrory and Hussain, "Bombers 'Met Chief Plotter' in Karachi" *The Times* 19 July 2005, 8-9.

by Shahzad Tanweer,[186] which was released on 19 September 2005. In what was purported to be a supportive role,[187] Al-Zawahiri also appeared in an earlier video, made by the gang leader, Siddique Khan, which was released on 1 September 2005.

3.4 Impact of Crime Pattern Changes on International Law

Introduction

The changes which have been recorded in terrorist crime patterns have had a significant impact on the way in which the international community has responded to terrorist attacks which rebound on the international community. There can be little doubt that 'terrorism works', because the more heinous the outrage and the greater the range of consequences in terms of injuries and property damage, the swifter will be the response from States, whether it be the disastrous rescue attempt in the case of the *Munich Olympic Massacre*, or the unleashing of military hardware upon the perceived source of the unprovoked attack, as triggered in response to the 9/11 attacks. Neither strategy resulted in any diminution in terrorist activity in the international arena. Indeed, acts of terrorism have become more widespread than has been the experience in earlier decades, due to the range of targets which are within the reach of contemporary terrorists.[188]

3.4.1 Consequences of Changes in Terrorist Intent

The resolve of the terrorists has hardened over time and they have widened their horizons, from seeking to target 'third party States', in order to compel the victimised State to accede to their demands to far more ambitious goals. It has recently become apparent that these include attacking States run on democratic lines, as presaged by the 9/11 attacks on the US homeland. As a result, States have increased the severity of their responses, from missile strikes launched on sites where the perpetrators of terrorist onslaughts were believed to be located,[189] to major military action on foreign

[186]House of Commons, Report of the Official Account of the Bombings in London on 7 July 2005 (London: The Stationery Office, 2006) 21, para 54; see also Hoffman, *op cit*, n 185, 13.
[187]*Ibid*, 21, para 53.
[188]Gunaratna, *op cit*, n 13, 53.
[189]For example, the US retaliatory attack on Afghanistan in August 1998, in response to the East Africa Embassy bombings.

soil.[190] By contrast, the pace of constructing and putting in place legislative measures aimed at addressing this very serious escalation in international criminality has been reactive, inevitably slow and in some respects, such as deterring attacks on diplomats,[191] inadequate.[192]

3.4.2 The Effect of Changes in *Modus Operandi*

There have been changes in the tactics used by terrorists, from attempts to compel the targeted State(s) to accede to their demands,[193] towards a propensity for inflicting grievous bodily harm on hostages whom the perpetrators had specifically selected for abduction, in order to force compliance, so that coercion has supplanted compulsion in this respect.[194] The measures aimed at preventing hostage taking were shown to be ineffedtual.[195]

The difficulty with sectoral conventions is that they have in the main been reactive, drawn up narrowly in response to the particular changes in *mos* which have been identified. All too often, terrorists have countered by changing or varying their tactics, but never actually abandoning any of them.[196] Part of the cause of this agility and perseverance might be attributed to the 'new breed' of terrorists who are ultimately responsible for much of the criminality.

3.4.3. The Challenge Posed by Contemporary Terrorists

Many of the ringleaders behind terrorist organisations have been shown to be well educated, intelligent and able to use and access modern technology in pursuance of their goals. The most important feature which has come to light more recently,

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[190]For example, the decision by many nations to send troops to Iraq on 20 March 2003, as part of the 'War on Terror'.

[191]Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977).

[192]For example, the assassination of the British Defence Attaché, Stephen Saunders, in an ambush in Athens on 8 June 2000; and the murder of the UN Special Representative, Sergio Viera de Mello, in the bombing of the UN Headquarters in Baghdad on 19 August 2003.

[193]For example, the Entebbe Hostage Crisis which began on 27 June 1976 when members of the Baader-Meinhof Group and the PFLP seized an Air France airline with its 258 passengers.

[194]For example, the treatment meted out to Kenneth Bigley following his kidnapping on 16 September 2004 and his eventual beheading on 7 October 2004.

[195]International Convention Against the Taking of Hostages (New York, 18 December 1979, 1316 UNTS 205, in force 3 June 1983).

[196]Hoffman, *op cit*, n 1, 36.

however, is the role of the non-State actor, one who attempts to don the mantle of statehood and challenges the way in which some States run their affairs. One of the activities of these individuals takes the form of selecting and manipulating some of their followers to commit heinous terrorist acts in their State of nationality.[197]

As has been noted, such individuals are unlikely to be deterred by measures put in place to thwart their ambitions (see *supra* p101). They are more likely to die as a result of their high risk tactics, or to be captured. In the latter event, it is therefore important that they face fair trials conducted to universally accepted standards. This can only be achieved if the appropriate legislative structure is in place to support those standards, which States have endorsed and are willing to incorporate within their national legal systems. Although they may be dismissive of such democratic principles, the sophisticated terrorists who are endangering world peace at the present time should at least be aware of the retribution they would face.

Conclusion

The impact of these changed and changing crime patterns on the international rule of law is immense: no nation is exempt from terrorist attacks, the international community is at greater risk from such onslaughts, due in no small measure to the debut of the suicide bomber, whilst the lawfulness of the responses of States to the 9/11 attack has been the subject of debate with regard to the collective security provisions contained in the UN Charter on the one hand, and the resort to use of force on the other.[198]

CONCLUSION

The changes in terrorist criminality which have been identified are significant, not least because they are as much to do with the changing ambitions of the terrorists as with any significant successes on the part of those who oppose them. Initially, for example, the aim of Al Qaeda was to evict the US presence in Saudi Arabia,[199] but more recently, their declared aim is to eradicate all the anti-Islamic forces worldwide

[197]For example, the simultaneous attacks on London Transport on 7 July 2005, perpetrated by British nationals.

[198]Article 51 of the UN Charter; see also Conte, *Security in the 21st Century The United Nations, Afghanistan and Iraq* (Aldershot: Ashgate Publishing Limited, 2005) 139; Duffy, *op cit*, n 36, 214.

[199]Gunaratna, *op cit*, n 13, 46.

and for Islam to take over the entire world and subjugate all other religions.[200] Indeed, each new initiative to inhibit their activities *via* international conventions[201] and the introduction of more stringent security measures[202] only ignites their ingenuity in devising ways to overcome them, as in the case of Richard Reid the shoe bomber (see *supra*, pp96-97). For example, the International Convention for the Suppression of Terrorist Bombings[203] and the heightened awareness of the dangers which they present to public safety, resulted in an increase in the number of suicide bombings, such as the 9/11 aerial attacks and the 7/7 bombings on London Transport.

The recent detection of a suspected plot to smuggle bomb making components in liquid form onto five airliners at Heathrow Airport,[204] allegedly to execute a reprise of the 9/11 attacks, is the latest chilling reminder that terrorism simply mutates into new, more insidious forms. It is worth noting, however, that 'tried and tested' tactics remain on the agenda to be used when it best suits the particular circumstances, which Gunaratna aptly describes as "chameleon-like manouevring.[205]

Hoffmann argues that in the light of the recent experiences in Israel, the potential for terrorist tactics to change and become even more catastrophic is such that the role of the intelligence agencies and law enforcement organizations in the prevention, pre-emption and deterrence of attacks will be key in restricting the ability of the terrorists to succeed.[206]

His analysis adds weight to the argument that it is timely to focus on the identification of a comprehensive definition of international terrorism in order to design a proactive, comprehensive convention. Compiling reactive legislation is no longer viable, because the rapid rate at which crime patterns are changing results in the situation where measures are likely to be overtaken by events before they can take effect. Proactive legislation which attempts to cater for any and all eventualities, upon which

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[200]Hoffman, *op cit*, n 181, 5.
[201]For example, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973).
[202]Hoffman, *op cit*, n 4, 1.
[203]International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1977, UN Doc A/RES/52/164, in force 23 May 2001).
[204]Webster, O'Neill and Tendler, "A Plan to Commit Unimaginable Mass Murder", *The Times* 11 August 2006, pp 2-3.
[205]Gunaratna, *op cit*, n 13, 94.
[206]Hoffman, above, n 200, 16-17.

the law enforcement organisations and intelligence agencies can base their codes of practice, would appear to be the most effective way of dealing with the unprecedented dangers which the global community faces in the twenty-first century.

Every avenue to achieve this objective should be explored, particularly with regard to the establishment of the new international Criminal Court and the possibility of its jurisdiction being extended to include the crime of international terrorism. Welcome as such a proposal might be, it could not turn into reality without first defining the offence for which those who may have to face trial stand accused, which would have to accord with the high standards pertaining to the new Court.

CHAPTER FOUR

The International Criminal Court

INTRODUCTION

> "When prospects for international criminal justice boomed, international lawyers were ... the prime force behind the promotion and study of the newly created international criminal tribunals."[1]

So said Mégret in his review of recent texts on international criminal justice[2] and this is borne out by events. The ILC was first directed by the UN to prepare a draft code of offences against the peace and security of mankind in 1947[3] and Morton records that the 1950 draft contained a proposal for an international criminal court,[4] together with an offence of "fomenting external organized terrorism".[5] When the ILC set about the task of preparing the second Draft Code of Offences Against the Peace and Security of Mankind in 1983,[6] Mr Thiam, the Special Rapporteur, posed the question as to whether the scope of their subject matter should consider the question of international penal jurisdiction to enforce the code[7] and the link between an international definition of, *inter alia*, terrorism and an international criminal court was never thereafter off the agenda of the ILC.[8]

The crime of terrorism is not part of the jurisdiction of the International Criminal Court. A variety of reasons have been mooted as to why it was omitted: according to Nsereko, some delegates considered that neither terrorism nor drug trafficking were as serious as the core crimes in the view of some States, therefore insisting on their inclusion might have delayed adoption of the Statute.[9] With reference to terrorism in

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[1]Mégret, 'The Politics of International Criminal Justice' (2002) 13 *European Journal International Law* 1261.
[2]*Ibid*
[3]GA Res 177 (II) 'Formulation of the principles recognized in the Charter of the Nurernberg Tribunal and in the judgment of the Tribunal', 21 November 1947, UN Doc A/RES /177 (II).
[4]Morton, *The International Law Commission of the United Nations* (South Carolina: University of South Carolina Press, 2000) 38.
[5]*Ibid.*
[6]First Report on the Draft Code of Offences against the Peace and Security of Mankind, 18 March 1983, UN Doc A/CN.4/364.
[7]*Ibid*, para 4.
[8]Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 137.
[9]Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *Criminal Law Forum* 87, 93-94.

particular, Cassese identifies four reasons why many States (including the US) wished to exclude terrorism from the list.[10] Firstly, the offence was not well defined, secondly its inclusion would politicize the Court, thirdly not all acts of terrorism warranted prosecution by an international tribunal and finally, trial and punishment by national courts was generally more efficient.[11] Although an opportunity was missed, it has to be acknowledged that the time was not right to press for its inclusion because to do so might not just have delayed adoption of the Statute, but defeated it altogether.

The precedent for a permanent international court of justice *per se* was set in 1920 with the establishment of the PCIJ,[12] to be superseded in 1945 by the ICJ.[13] One fundamental difference between the ICJ and the ICC is that the former deals exclusively with disputes between States, whereas the latter mirrors the jurisdiction of those national criminal courts which recognise only the culpability of the individual rather than those which also include liability in respect of corporate bodies.[14] The jurisdiction therefore adheres to the precedent set at Nuremberg.[15] The ICC has inherent jurisdiction over genocide, crimes against humanity and war crimes.[16] The Court also has subject matter jurisdiction over the crime of aggression,[17] but interestingly, there is a parallel with the crime of terrorism in that aggression also currently defies definition,[18] and jurisdiction over it will only be activated when, *inter alia*, this obstacle is overcome.[19]

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[10]Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', (2001) 12 *European J International Law* 993, 994.

[11]*Ibid.*

[12] Statute of the Permanent Court of International Justice, (Geneva, 16 December 1920, League of Nations Doc 6 LNTS 379, 390. in force 20 August 1921).

[13]Statute of the International Court of Justice, (Sam Francisco, 26 June 1945, 3 Bevans 1179, in force 24 October 1945).

[14]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 25.

[15]H M Attorney-General *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* Part 2 (London: HMSO, 1946) 56.

[16]1998 Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002), Article 5; see also Arnold, 'The *Mens Rea* of Genocide under the Statute of the International Criminal Court' (2003) 14 *Criminal Law Forum* 127.

[17]*Ibid*; see also Strapatsas, 'The Crime of Aggression' *Criminal Law Forum* 89, 89-91; Schabas, *op cit*, n 8, 22.

[18]Schabas, *op cit*, n 8, 26.

[19]1998 Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002), Article 5(2).

Of the three methods available for establishing the new court, *i.e.*, as a regular organ of the UN, as an *ad hoc* court set up by the Security Council, or as a separate entity outside the UN *via* a treaty,[20] the UN General Assembly chose the third option, on the basis of the Report of the ILC on its work during its forty-fourth session,[21] and requested the ILC to undertake elaboration of a draft statute for an international criminal court.[22] The independence of the Court was therefore guaranteed and in addition, States would have the option of signing up to, or remaining aloof from, the treaty and the UN would not have to provide any financial support, which would be the responsibility of the States Parties.

In 1995 a Preparatory Committee (the 'PrepCom'), open to all States Members of the UN, was established to take the process further.[23] The PrepCom examined the ILC draft thoroughly and made extensive amendments to it during two three-week sessions in 1996[24] and a further three sessions in 1997.[25] The final draft[26] was considered by the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held during the period 15 June-17 July 1998[27] and was adopted by 120 of the 160 participating States.[28] Despite the setback caused by opposition from the US, China and Israel, who were among the seven States which voted against adoption of the Statute,[29] the required sixty ratifications had been deposited with the Secretary-General of the UN, in accordance with Article 126, within three years.

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[20]Nsereko, *op cit*, n 9, 90.

[21]Report of the International Law Commission on the Work of its Forty-Fourth Session, UN Doc A/C.6/47/10 (1992) Supplement No 10.

[22]GA Res 47/33, 'Report of the International Law Commission on the work of its forty-fourth Session', 24 November 1992, UN Doc A/RES/47/33 (1992) para 6.

[23]GA Res 50/46, 'Establishment of an international criminal court', 11 December 1995, UN Doc A/RES/50/46 (1995) para 2.

[24]Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) *Official Records of the UN General Assembly*, Fifty-first session Supplement No 22 (A/51/22), UN Doc A/51/22.

[25]The sessions were held on 21 February, 4-15 August and 1-12 December 1997; see UN Press Releases L/2824, issued on 21 February 1997 and L2837, issued on 1 August 1997.

[26]UN Doc A/CONF.183/2/ADD.1 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998).

[27]UN Doc A/CONF.183/2/Add.1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', (Rome, Italy 15 June-17July 1998).

[28]Schabas, *op cit*, n 8, 18.

[29]Robertson, *Crimes Against Humanity the Struggle for Global Justice* (second edition) (London: Penguin Books, 2002) 391; see also above, n 8, 18.

When one considers the length of time which had elapsed since the concept of such a court was first mooted, it is remarkable that this complex and well constructed Statute, as exemplified by the way in which jurisdictional issues were addressed, took a mere six years to create. Overshadowing the euphoria of 1 July 2002, however, when the Court opened at The Hague, was the decision by President George W Bush two months earlier, to 'unsign' the last minute endorsement made on behalf of the US by his predecessor, President Clinton, shortly before the end of his term in office on 31 December 2000.[30] Despite this setback, Banchik (writing in 2003) was correct in his prognosis, viz:

> [T]he Rome Statute has entered into force and the court will start its work sooner or later - there is no way back.[31]

4.1 Unique Features of the Court

Introduction

It is impossible to forecast what the outcome might be at the first Review Conference, when the crimes of terrorism and drug trafficking are on the agenda for possible inclusion in the jurisdiction of the Court. Whilst the latter may be easier to define, identifying the former may remain elusive, or if defined, may not receive the required majority in the Assembly of States Parties. In order to put the proposal to include acts of international terrorism within the jurisdiction of the Court in context,[32] it is first apposite to examine some of the unique features which have been incorporated into the Statute.

4.1.1 Complementarity

The concept of complementarity was first mooted by the ILC in their 1994 Report on the work of its forty-sixth session,[33] to describe the process whereby exercise of the jurisdiction of the new Court could only be activated in the event that national courts

[30]Lobe, 'Bush 'Unsigns' War Crimes Treaty', AlterNet, posted 6 May 2002, available at http://www.Alternet.org/story/13055; Scheffer, 'A Treaty Bush Shouldn't "Unsign"' *New York Times* 6 April 2002, 27; Robertson, *op cit*, n 29, 391.

[31]Banchik, 'The International Criminal Court & Terrorism', (2003) 3 *Journal Peace, Conflict and Development Studies*, 19.

[32]UN Doc A/CONF.183/10 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 17 July 1998, Annex I, Resolution E.

[33]Report of the International Law Commission on the Work of Its Forty-Sixth session, 2 May-22 July 1994, UN Doc A/49/10, Article 35.

were either unwilling or unable to prosecute (Article 1). By this means the sovereignty of States Parties would be preserved in time honoured fashion. However, the intricacies of the interdependence between the various provisions within the Statute had implications for the complementarity principle.

It is not always the case that the domestic criminal law of States is in line with international jurisdiction, and the Articles contained in the Statute do not deviate from this accepted principle. However, Schabas argues that the very concept of complementarity which has been introduced in the Statute, carrying the presumption that States will be responsible for prosecuting suspects found within their own borders, erodes this principle. He considers that since States which are Parties to the treaty accept this responsibility, "many must also bring their substantive criminal law into line, enacting the [core crimes] as defined in the Statute"[34] and further, he regards this as being the first task which States Parties must undertake.[35] Whilst acknowledging that most States have incorporated the crime of genocide (Article 6) within their domestic legislation, he argues that this is not the case with regard to crimes against humanity (Article 6) and war crimes (Article 7) because the definitions of these two crimes under the Statute are original.[36] Finally, with regard to this issue, even if there is similarity between these definitions and those already enacted in some domestic penal codes, he considers that "there may still be problems with respect to criminal participation and the availability of defences"[37] because the question of State immunity which was invoked by General Pinochet to some extent remains unresolved.[38]

Such ambiguities raise again the spectre of uncertainty in the law and States Parties which have not considered this potential problem might do well to do so. It underlines the importance of precision with regard to definitions and continuity when jurisdiction can be 'shared' between national and international Courts under the complementarity principle as described in Article 17 (issues of admissibility).

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[34]Schabas, *op cit*, n 8, 19; see also Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13 *Quater Nouvelles Etudies Penales* 113.
[35]Schabas, 'The Follow Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute (1999) 20 *Human Rights Law J* 157, 160.
[36]*Ibid.*
[37]*Ibid.*
[38]*Ibid*; see also *Ex Parte Pinochet (No 3)* [2000] 1 AC 147, 201-2 (Lord Browne-Wilkinson).

Under Article 17, States which wish to become Parties to the Statute must recognise that should they decide not to prosecute, are unwilling to do so, or are unable to do so, jurisdiction may pass to the Court. Schabas comments that attempting to mount a 'sham' trial in order to protect a national from the consequences of conviction in a further trial, by invoking the double jeopardy rule, may also result in intervention by the Court.[39] The *ne bis in idem* rule is addressed in Article 20, viz:

> 1 Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
>
> 2 No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.
>
> 3 No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

There is also the caveat recorded in Article 17(d) to the effect that the Court may consider that the case is of insufficient gravity to justify taking any further action.

Despite this carefully constructed Article, Schabas draws attention to one loophole which remains in this area of the complementarity regime. Article 110 categorically forbids early release of prisoners,[40] but no ruling is given with regard to pardons, for which there is a precedent. Schabas cites the case of William Calley and the My Lai massacre during the Vietnam War:[41] Calley was convicted of premeditated murder by a Court-Martial in 1971,[42] was sentenced to life imprisonment and lost his Appeal, but was granted a pardon by President Nixon in 1974. Robertson expresses the same

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*The core crimes of genocide, crimes against humanity and war crimes.

[39]Schabas, *op cit*, no 8, 67-68; Robertson, *op cit*, n 29, 372.

[40]Para 1.

[41]Above, n 39, 70.

[42]US *v* William L Calley Jr, US Army Appellant No.26,875, *US Court of Military Appeals*,22, 1973,534.

reservation with regard to this potential loophole in the complementary regime[43] and has other misgivings concerning the opportunity which the complementarity principle may offer to "pariah states"[44] to derail or delay a prosecution for years by mounting successive appeals to the Court.[45]

Cassese, whilst sharing some of these concerns,[46] also notes that complementarity has merit in respecting national courts and is an incentive to some of those courts to become more effective.[47] As with any legislation, the practical implementation may give an indication as to whether some refinement in required, which could be addressed by the provisions contained in Article 121 (Amendments) of the Statute. Any fundamental change, however, relating to jurisdictional issues, would require the convening of a Review Conference in accordance with paragraphs 2-7 of Article 121. Now that referrals have been made to the Court, if the complementarity principle raises concerns before 2009, it is conceivable that the issue could be put on the agenda for the first Review Conference planned for that year. Any proposals for major changes, however, would have implications for the inherent jurisdiction vested in the Court.

4.1.2 Inherent Jurisdiction

The understanding of what is meant by the term inherent jurisdiction, was set out by the Ad Hoc Committee in 1995:

> If the Court was given inherent jurisdiction over a crime, then any State that became party to the statute would *ipso facto* accept that the court had the power to try an accused for that crime without additional consent being required from any State party.[48]

At the same time, it was pointed out that this did not mean exclusive jurisdiction, because States Parties retained the power to exercise jurisdiction at the national level, with the question of priority being decided on the basis of the complementarity principle[49] (see, *supra*, section 4.1.1).

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[43]Robertson, *op cit*, n 29, 373.
[44]*Ibid*, 374.
[45]*Ibid.*
[46]Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 352.
[47]*Ibid*, 353.
[48]Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995, UN Doc A/50/22, Part II.C.2(a), para 91.
[49]*Ibid.*

Views were divided on the issue during the initial deliberations,[50] but inherent jurisdiction was granted to the ICC, limited to the crimes of aggression, genocide, crimes against humanity and war crimes, as set out in Article 5. Had this not been agreed, it would have been impracticable for the Prosecutor to use the *proprio muto* power vested in him/her, which is the third trigger mechanism activating the exercise of jurisdiction set out in Article 13(c)

Inherent jurisdiction endows the ICC with considerably more authority than that vested in the ICJ, which was established as the principal judicial organ of the UN[51] and reflects the independence which the former has, but which the latter lacks. This is as it should be, given the differing functions of the two, but how to grant such independence was a matter of some debate.

4.1.3 Independence of the Court

The relationship between the new Court as an independent judicial organ and the UN was one of the first matters to be raised during the initial meetings of the Ad Hoc Committee on the Establishment of an International Criminal Court (the Ad Hoc Committee) in 1995.[52] The Agreement which was eventually made between the Court and the UN defining the terms on which the two organisations were brought into relationship contains details, *inter alia*, of the amount of access which each has to the facilities of the other.[53] For example, the Court has observer status at the UN General Assembly and at the invitation of the Security Council, the Prosecutor may address its members.[54] The conduit, *inter alia*, for Security Council referrals [Article 13(b) of the Statute] and deferrals (Article 16 of the Statute) is, respectively, the UN Secretary General and the ICC Prosecutor.[55]

The principal source of funds is provided by the States Parties, but the Agreement also sets out arrangements with regard to any financial support to be provided by the UN in accordance with Article 115 of the Statute. This is principally concerned with

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[50] *Ibid*, paras 92-96.
[51] 1945 Statute of the International Court of Justice (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 1.
[52] Above, n 48, A.2, para 17.
[53] 'Relationship Agreement between the Court and the United Nations', 4 November 2004, Doc Doc ICC-ASP/1/3, Article 15.
[54] *Ibid*, Article 4, paras 1 and 2.
[55] *Ibid*, Article 17.

expenses incurred due to referrals by the Security Council, over which the States Parties have no control.[56]

The tone of the Agreement is one of cooperation in all matters, including use of facilities offered by each to the other and therefore this document tacitly acknowledges the importance of preserving the independence of the Court to pursue its mandate without fear or favour.

4.1.4 Surrender to the Court

The difficult problems which can be experienced when States are involved in responding to requests for the extradition of alleged offenders do not arise in cases where individuals are to face trial at the international level. Rather, this process is regarded as a transfer, or surrender, as set out in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR).[57]

Although the term 'surrender' is not new, the concept, as described under Article 102(a), *i.e.*, "the delivering up of a person by a State to the Court" is a feature of the ICC. As Schabas points out, side-stepping the extradition process overcomes a potential problem for some States which may wish to sign up to the treaty, notwithstanding that their national law prohibits extradition of their citizens.[58]

4.1.5 Immunity

The uniqueness of the surrender regime gives rise to questions with regard to the potential custody of individuals who may qualify for immunity from prosecution, but such exceptions are rare. One such rarity is to be found under Article 26, wherein immunity is granted to any person who had not attained the age of 18 years at the time of commission of the offence.

Immunity is a common feature within the national legislation of some States and also under obligations undertaken *via* bilateral/multilateral agreements in respect of, for

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[56] *Ibid*, Article 13, para 1.

[57] Statute of the International Criminal Tribunal for the Former Yugoslavia (concluded 25 May 1993, SC Res 827, UN SCOR 48th Session, 3217th meeting at 1-2 (1993)) Article 29(2)(e); Statute of the International Tribunal for Rwanda (concluded 8 November 1994, SC Res 955, UN SCOR 49th Session, 3453rd meeting UN Doc S/Res/955 (1994) Article 28(2)(e).

[58] Schabas, *op cit*, n 8, 110.

example, Heads of State, diplomats and even some officials. In view of the reaffirmation of the Nuremberg principle contained in Article 27 of the Statute, the Court is therefore obliged, in such cases, to seek the co-operation of the third State to the waiver of immunity and also its consent to surrender of the person to the Court, without which it is powerless to proceed (Article 98). The blanket ban on immunity set out within Article 27 also rules out any reduction of sentence on those grounds alone.

As if to underline the prohibition on immunity, Article 28 sets out in some detail the criminal responsibility which accrues to military commanders and other superiors for crimes over which the Court has jurisdiction, which are committed by their subordinates.

In complete contrast to the prohibition on immunity for those arraigned before the Court, its own officials would not be able to carry out the work of the Court where this has to be undertaken on the territories of States Parties without the protection of immunity when so engaged. Article 48 not only addresses this issue, but also sets out the 'pecking order' of which Court officials may have their privileges and immunities waived and by whom (paragraph 5). Whereas those who work for the Court may be denied such benefits under certain circumstances, others who are present in the Court, such as witnesses and experts, may benefit from them (paragraph 4).

4.1.6 Prohibition of Reservations

The 1969 Vienna Convention on the Law of Treaties states:

> For the purposes of the present Convention...'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in the application to that State."[59]

However, the Statute departs from this accepted practice under Article 120, which categorically states that "No reservations may be made to this Statute." Reservations to any part of the legal framework of the Court would undermine its authority, rendering it ineffective. At the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, convened in Rome on 15 June 1998, many delegates were in favour of the prohibition,[60] but France was among those

[59]Article 2(1)(d); see also Belilos *v* Switzerland, (1988) ECHR, Ser A, Vol 132, para 49.
[60]Schabas, *op cit*, note 8, 15-16.

who did not share this view.[61] As a consequence, there is an exception to Article 120, which relates specifically to jurisdiction over war crimes and is contained in Article 124, entitled "Transitional Provision":

> Notwithstanding article 12, paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

The contradiction in terms which Articles 120 and 124 represent, reveals a loophole in the structure of the Statute and was used by France at the time of ratification, when an interpretative declaration with respect to the jurisdiction over war crimes contained in Article 8 was lodged.[62] In the light of events since 2002, in Afghanistan, Iraq and more recently the Lebanon, there is likely to be a strong lobby to retain the exception when it is reviewed in 2009. If Article 120 is not renewed, then even with a change of administration in the US, it is unlikely that the US will be persuaded to change policy and support the Court. The virulent opposition to the Court emanating from that quarter[63] seems likely to continue for the foreseeable future. However, it is to be hoped that if a definition of international terrorism is approved at the Review Conference, no such exception will be allowed to dilute the inherent jurisdiction of the Court which would be applicable to the crime.

Conclusion

The unique features which have been incorporated in the Rome Statute may assist in building up confidence in the impartiality and fair administration of international

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[61] *Ibid*, 159.

[62] *Ibid.*

[63] See, for example, Bolton, 'The Risks and the Weaknesses of the International Criminal Court from America's Perspective' (2000) 41 *Virginia J International Law* 186, 188-9; 'Establishment of an International Criminal Court', Summary Record of the 9th meeting of the Sixth Committee held on 21 October 1998, *Official Records of the UN General Assembly*, Fifty-third session, 4 November 1998, UN Doc A/C.6/53/SR.9, para 57; Ailslieger, 'Why the United States Should be Wary of the International Criminal Court: Concerns over Sovereignty and Constitutional Guarantees' (1999) 39 *Washburn Law J* 80, 88-89; and Gurule, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?' (2002) 35 *Cornell International Law J* 1, 5.

criminal justice and enhance the likelihood that those subject to international arrest warrants will be surrendered to the Court where appropriate.

4.2 Important Provisions in the Statute

Introduction

The establishment of a permanent international criminal court which will, in certain circumstances, be given responsibility for trying those suspected of being involved in the commission of any of the core crimes, requires provisions which are not found in conventions addressing criminality prosecuted solely within national legal systems. Apart from the obvious necessity to ensure the impartiality of the Court and its judges, together with the Elements of Crimes required under Article 9 to assist the Court in the interpretation and application of Articles 6, 7 and 8 (the core crimes), some other important provisions pertinent to this study are worthy of note. 4.2.1

4.2.1 Rules of Procedure and Evidence

Together with the Elements of Crime and the Statute itself, the Rules of Procedure and Evidence (the Rules) are central to interpretation of the applicable law, as set out in Article 21, paragraph 1(a). They contain comprehensive details on a variety of procedural and evidentiary matters devised by drawing on both common and civil law disciplines to formulate principles common to both. For example, paragraph 1(b) of Rule 145 permits aggravating circumstances surrounding the crime to be taken into account when determining the sentence to be imposed, which will be familiar to lawyers used to the common law discipline. Less familiar, but equally important, Rule 89 concerns participation of victims in the proceedings. In the event of terrorist crimes being brought within the jurisdiction of the Court, these rules are likely to assume considerable significance in the proceedings.

4.2.2 Role for the Victim

There is an interplay between the responsibilities of States Parties and those of the Court with regard to reparations: the Court may make an order for specific reparations to be made to the victim by a convicted person,[64] and request the

[64]Rule 217, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part I, Finalized draft text of the Rules of Procedure and Evidence, 2 November 2000, UN Doc PCNICC/2000/1/Add.1.

cooperation of relevant States Parties in publicising the reparation proceedings.[65] However, where the Court orders forfeiture of assets, States are obliged to give effect to them. This is in line with recent international law, *e.g.*, Article 8 of the 1999 International Convention for the Suppression of the Financing of Terrorism.[66] There is also provision under Article 79 for a Trust Fund to be established for the benefit of both victims and witnesses.

The attention which has been paid to the welfare of witnesses, victims and third parties who may be affected by the crime is an important feature of the Court, which would be particularly apposite were terrorists ever to be arraigned before its judges.

4.2.3 Procedure for Amendments

The Elements of Crimes and to some extent the Rules of Procedure and Evidence, curb the discretion of the judges with regard to interpreting the law set in place by the Statute. Minor modifications can be effected by the Assembly of States Parties by a majority vote, but where amendments are proposed to the Statute, the process is more complicated because it will also involve the process of ratification.[67] It follows that when a State does not ratify the amendment, the Court cannot exercise its jurisdiction over the amended crime in circumstances where it was committed by nationals of, or on the territory of, that State.[68] If an amendment receives approval by seven-eighths of the States Parties it will take effect, which means those in the remaining eighth will have no option but to withdraw from the Statute by giving notice within a year of the amendment coming into force.[69]

Where the Elements of Crimes are concerned, a definition of acts of international terrorism may be easier to achieve in broad terms, due to the facility to expand upon the various elements which contribute to the whole. As with all international deliberations, much will depend upon the mood of the delegates in the light of the extent of the threat to world peace which terrorism poses at the time.

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[65] *Ibid*, Rule 96, para 2.
[66] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, entered into force 10 April 2002) Article 8.
[67] Article 121, para 4.
[68] *Ibid*, para 5.
[69] *Ibid*, para 6.

4.2.4 Trigger Mechanisms

A State Party to the Statute is the first of three sources from which referrals to initiate investigations leading to a possible prosecution may emanate,[70] followed by the Security Council, which has been given a controlling influence under Chapter VII of the UN Charter. In addition to making referrals to the Court,[71] the Security Council also has the power to make deferrals,[72] subject to an annual renewal process,[73] which effectively means it could prevent a prosecution from ever being mounted.

The third source is unique to the realms of international law and concerns the powers of the Prosecutor to act *proprio muto*, subject only to the approval of the Pre-Trial Chamber.[74] Schabas identifies the distinction between national and international prosecution as resting in "the unfettered discretion of the prosecutor".[75] In the event of international terrorism being elevated to a crime within the jurisdiction of the Court, the role of the Prosecutor could well be pivotal as to the instigation of any prosecution. In line with, respectively, Article 15 of the ICTY[76] and Article 16 of the ICTR,[77] Article 15 of the Statute sets out the role of the Prosecutor in relation to the investigation of crimes within the jurisdiction of the Court. Interestingly, whereas both Article 16 of the ICTY and Article 15 of the ICTR specifically state that "[The Prosecutor] shall not seek *or receive instructions* from any Government or any other source"[78] (emphasis added), Article 15 of the Statute only states that he may seek additional information from such sources, hence the "unfettered discretion" to which Schabas refers.[79]

The bipartite structure for referrals which has been put in place between the Prosecutor and the Security Council should alleviate any concerns by States - whether

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[70]Article 14.
[71]Article 13(b).
[72]Article 16.
[73]*Ibid.*
[74]Article 15, paras 3-4.
[75]Schabas, *op cit*, n 8, 99; see also Nanda, 'The Establishment of a Permanent International Criminal Court: Challenges Ahead' (1998) 20 *Human Rights Quarterly* 413, 425-6; and Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American J International Law* 510; see also, Nsereko, *op cit*, n 9, 110.
[76]ICTY, established by SC Res 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993).
[77]ICTR, established by SC Res 955 (1994), 8 November 1994, UN Doc S/RES/955 (1994).
[78]Above, n 76, para 2; above, n 77, para 2.
[79]Schabas, *op cit*, n 8, 99.

parties to the treaty or not - that checks are in place if the political situation is such that initiating a prosecution in relation to crimes which Danner describes as "politically sensitive",[80] could trigger, for example, a diplomatic incident which might have more serious consequences for world equilibrium than the prosecution of the alleged offence.

Conclusion

These provisions have built upon good practice which has built up as tribunal has succeeded tribunal and the way in which State sovereignty has been preserved, whilst taking account of the political imperative of incorporating a role for the Security Council, is indicative of the compromises which delegates made in order to enable the 1998 Rome Conference to come to a successful conclusion.

4.3 Jurisdictional Scope of the Court

Introduction

Three important principles of criminal law must be put into the context of the ICC at the outset of this section. Firstly, looking towards the future, crimes within its jurisdiction are not subject to any statute of limitations (Article 29), contrary to the standard practice operating under national criminal law systems. As a result, those suspected of offences punishable by the Court will find no hiding place from justice on the territories of States Parties. Secondly, looking at the past and having regard to the principle of *ratione temporis*, the Statute makes clear that the Court only has jurisdiction with respect to crimes committed after the entry into force of the treaty (Article 11). This has a bearing on the third principle, namely the *nullum crimen sine lege* rule, which is set out in Article 22, but about which there is some controversy, which dates back to the Nuremberg trials.

Kelsen argues that the stance adopted at the Nuremberg Tribunal may have set a precedent in international law,[81] because the crimes for which it had been given

[80]Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American J International Law* 510, 510.

[81]Kelson, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153; H M Attorney-General *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* Part 2 (London: HMSO, 1946) 56.

jurisdiction were committed before its Charter was adopted. That Tribunal parried objections raised at the time by arguing that adhering to the *nullum crimen sine lege* principle of justice would actually result in the perpetrators of Nazi crimes escaping punishment.[82] Schabas points out that raising the defence of *nullum crimen* in the international arena in the past has met with little success,[83] because of the standard adopted by the European Court of Human Rights regarding retroactive crimes being foreseeable by the defendant.[84] Bearing in mind the fact that the ICC is concerned with bringing to justice those accused of four of the most serious crimes known to man, the *nullum crimen* rule is likely to be subject to challenge by those arraigned under the Statute.

4.3.1 The Status of Aggression

A definition of aggression had been agreed by the UN General Assembly in 1974,[85] but was not considered fit for purpose twenty-four years on, at the time of the Rome Conference and the delegates could not agree on a suitable amendment,[86] nor, as Schabas records, an appropriate mechanism for judicial determination of whether or not the crime had actually been committed.[87]

Since aggression is synonymous with the use of force, one can understand the political sensitivities surrounding its inclusion within the jurisdiction of the Court, particularly of those States involved in peace-keeping missions in various trouble spots throughout the world. The core of the objections raised by the US to the very establishment of the ICC centred round this issue: their delegates were concerned that without Security Council involvement in deciding which crimes were to be tried before the Court, its soldiers engaged in military missions around the world could be indicted specifically for committing aggression. No consensus was reached on the issue at the time, therefore the current status with regard to aggression and the ICC remains as succinctly set out in the second paragraph of Article 5 of its Statute, viz:

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[82] *Ibid*, 165.
[83] Schabas, *op cit*, n 8, 58.
[84] SW *v* United Kingdom, Series A, No 335-B, 22 November 1995, paras 33-4.
[85] GA Res 3314 (XXIX), 'Definition of Aggression', 14 December 1974, UN Doc. A/RES/3314 (XXIX).
[86] Above, n 83, 26.
[87] *Ibid.*

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The Preparatory Commission for the International Criminal Court has now embarked on drawing up proposals for a provision on the crime of aggression in advance of the Review Conference to be held in 2009.[88] Depending on the wording of any agreed definition, the possibility might exist for some *ad hoc* acts of international terrorism to be prosecuted as a crime of aggression for two reasons. Firstly, one of the general meanings of the word is understood to be an unprovoked attack and certainly this is one of the central features of terrorism in any or all of its manifestations and secondly, both aggression and terrorism were recognised as being crimes against the peace and security of mankind up to and including the 1991 ILC draft code of such crimes.[89] Although this nexus was absent from the second ILC draft code, due to the omission of terrorism from the text, this was due more to the heightened sensitivity of States surrounding the issue which had become evident by 1995, when the second draft was agreed.[90] It could therefore be argued that similarities exist within some of the elements of both crimes, even to the extent that those similarities are more credible than some of the links argued by those who advocate terrorist prosecutions being mounted under any one of the three core crimes over which the Court has inherent jurisdiction.

4.3.2 The Core Crimes

The four crimes over which the ICC has jurisdiction are in line with those recognised over many years, particularly since 1945, and as proposed by the ILC. Whilst aggression is included under Article 5, it remains undefined and until an acceptable definition is agreed, active jurisdiction will not be granted to the Court, leaving genocide, crimes against humanity and war crimes as the three offences for which inherent jurisdiction was granted.

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[88] Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II Proposals for a Provision on the Crime of Aggression, UN Doc PCNICC/2002/2/Add.2.

[89] Report of the International Law Commission on the work of its Forty-third session, 11 September 1991, UN Doc A/46/405.

[90] *Yearbook of the International Law Commission*, Vol 1 (New York: United Nations Press, 1992) 2262nd meeting, 57.

4.3.2.1 Genocide

As proof of its enduring integrity, the definition of genocide which forms Article II of the Convention on the Prevention and Punishment of the Crime of Genocide 1948,[91] was adopted verbatim as Article 6 of the Statute:-

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

During its first session, the UN had recognised genocide as a crime which "shocked the conscience of mankind".[92] In the case of the *Prosecutor* v *Kambanda* the ICTR reinforced this view by labelling it "the crime of crimes".[93] It is therefore not surprising that the crime was one of the first to be drawn up under the auspices of the UN. In the immediate post World War II period, the legislators wished to draw a distinction between genocide and crimes against humanity which could only be committed during international armed conflict. It was intended that the ambit of genocide should also encompass its perpetration in peacetime, as is made clear within Article I of the Convention. The integrity of the definition may be tested in the new Court sooner than might have been anticipated, due to the Security Council referring the situation in Darfur to the Prosecutor.[94]

4.3.2.2 Crimes against Humanity

The ICTR led the way in recognising that the commission of crimes against humanity

[91]Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948, 78 UNTS 277, in force 12 January 1951).
[92]Preamble, GA Res 96(I), ;The Crime of Genocide', 11 December 1946, UN Doc A/RES/96 (I).
[93]Case No.ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para 16.
[94]SC Res 1593, 31 March 2005, UN Doc S/RES/.1593 (2005).

was not restricted to war zones, but also occurred in peace-time.[95] It was therefore a natural progression that such crimes should follow genocide in being abstracted from war crimes under the Statute. The distinguishing feature between genocide and crimes against humanity is located in the selection of the target: the latter are aimed at *any* civilian population, rather than being attacks on an identifiable group within it. The core definition is contained in the opening section of Article 7:

> [A] 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

The list of crimes which could be perpetrated in pursuance of that aim covers murder, extermination, enslavement, deportation, imprisonment, torture, rape and other sexual offences, persecution, enforced disappearance, apartheid, and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".[96]

Unlike both the crime of genocide (a term first used by Lemkin in 1944)[97] and crimes against humanity, which came to prominence at Nuremberg in 1945, the third core crime within the ICC jurisdiction has a very long 'pedigree'.

4.3.2.3 War Crimes

War crimes have an added dimension not present in the context of other criminal offences, due to the history of rules aimed at regulating the conduct of armed conflict in which States have engaged at a national and regional level over many centuries. Codification of the rules, however, only commenced in the latter part of the nineteenth century and developed along two distinct paths known, respectively, as Geneva law which concerned the protection of victims and Hague law, aimed at regulating the methods and materials used in military actions.[98] Both sets of rules applied to

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[95]Statute of the International Criminal Tribunal for Rwanda (concluded 8 November 1994, SC Res 955, UN SCPR 49th Session, 3453 meeting, UN Doc S/RES/955 (1994)) Annex, Article 3.
[96]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 7(1)(a)-(k).
[97]Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for World Peace, 1944).
[98]Schabas, *op cit*, n 8, 41.

international warfare - internal armed conflicts were only included in 1994 with the establishment of the Rwandan Tribunal[99] and subsequently received endorsement in the Statute.[100]

The Article 8 offence set out in paragraph 1 is as follows:

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

with war crimes defined in paragraph 2(a) as "[g]rave breaches of the Geneva Conventions of 12 August 1949" and is followed by a lengthy list of the acts which can be committed in pursuance of the crime set out in sub-sections 2(a)-(e)

Paragraph 2(c) addresses the situation where there is armed conflict of a non-international nature, to which the four Geneva Conventions of 12 August 1949 (the Geneva Conventions) apply and paragraph 2(d) which excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" from their ambit. Even further clarification with regard to the application of the Geneva Conventions is made in paragraph 2(f), which states:

> Paragraph 2(e)... It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Article 8 of the Statute is the longest of the three Articles under discussion. It is also the most detailed and as such the narrowest, but interestingly does not include the provisions set out in the 1977 Protocol II to the Geneva Conventions,[101] Article 4(d) of which refers to "acts of terrorism" without further definition as to what such acts may involve. It is likely that the omission was intended, due to the determination of the delegates in Rome to defer consideration of the inclusion of acts of international terrorism within the jurisdiction of the Court at the Review Conference in 2009.

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[99] Statute of the International Criminal Tribunal for Rwanda (concluded 8 November 1994, SC Res 955, UN SCPR 49th Session, 3453 meeting, UN Doc S/RES/955 (1994)) Annex, Article 4.

[100] Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 8, para 2(c).

[101] Protocol Additional to the Geneva Conventions of 1 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977, 1125 UNTS 609, in force 7 December 1978).

4.3.3 The Excluded Crimes

At the commencement of the Rome Conference consideration had been given to including drug trafficking and terrorism with the three core crimes, but both suggestions fell by the way side. Barbados, Dominica, Jamaica and Trinidad and Tobago had proposed that drug trafficking should be added to the list under Article 5,[102] but insufficient support was forthcoming. There were two attempts to get acts of terrorism included as an addition to the itemised list of crimes against humanity (Article 7), after (i) the crime of apartheid. The first (by Algeria, India, Sri Lanka and Turkey)[103] included a shorter definition of terrorism than the one which was set out in the second proposal (by India, Sri Lanka and Turkey).[104] These two draft definitions are discussed further in Chapter 5 (see *infra*, pp158-159).

By the time the Statute came into force on 1 July 2002, both drug trafficking and terrorism had acquired even more significance due to their increased occurrence, global reach and - in the case of terrorism - greater ferocity and it is fortunate that there is provision in the Statute for other crimes to be added in the future.

Conclusion

Some commentators are promoting the idea that there is sufficient leeway within the definitions of the three core crimes for acts of international terrorism to be prosecuted under Articles 6, 7, or 8. It is open to question whether this proposal would provide an interim solution, but it might result in offering a hostage to fortune, because there is the potential for cases to be lost, where defence counsel might present a robust argument, depending on the particular circumstances of the case, to the effect that acts of terrorism do not precisely coincide with the criteria set out for any of the three crimes put forward as a surrogate charge. Nevertheless, this somewhat dubious proposal should be explored, because of the historical difficulties associated with

[102]Proposal submitted by Barbados, Dominica, Jamaica and Trinidad and Tobago, to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3 July 1998, UN Doc A/CONF.183/C.1/L.48.

[103]Proposal submitted by Algeria, India, Sri Lanka and Turkey, to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 29 June 1998, UN Doc. A/CONF.183/C.1/L.27.

[104]Proposal Submitted by India, Sri Lanka and Turkey, to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 6 July 1998, UN Doc. A/CONF.183/C.1/L.27/Rev.1.

attempts to identify a comprehensive definition of this criminality, which still persist to the present day.[105]

4.4 Terrorism vis-à-vis the Core Crimes

Introduction

The 9/11 attacks sparked much debate among lawyers with regard to the feasibility of subsuming terrorist crimes within the jurisdiction of the Court. All three of the core crimes have been considered as potential hosts in this approach.

4.4.1 Genocide

Of the three active crimes under the Statute, the case for arguing that terrorism would fit within the framework defined for genocide under Article 6, seems the least convincing. The main stumbling block is the stipulation that there must be a demonstrable targeting of any of the groups identified in the definition, whereas one of the constant central features of terrorism is the objectively perceived random nature of the attacks.

With regard to genocidal victimisation, the judgment in the *Krstic* case,[106] concerning the Srebrenica massacre, illustrates the wide gulf between the genocide proven to have been committed in that tragedy and, for example, the carnage caused by the terrorists who carried out the Madrid train bombings on 12 March 2004.

In the *Krstic* case the accused was charged, *inter alia*, with genocide in relation to the massacres of Bosnian Muslim men of military age in Srebrenica between 11 July and 1 November 1995. Although the Trial Chamber entered a guilty verdict in relation to the charge of genocide,[107] this was set aside by the Appeals Chamber. Instead, they found Krstic guilty of aiding and abetting the genocide, on the grounds that he was aware of the genocidal intent of those under his command.[108] The victims had been systematically separated from the rest of the inhabitants and killed in a number of mass executions. Although the surviving inhabitants may well have been traumatised

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[105] Work on the draft comprehensive convention on international terrorism remains stalled over the text of the definition; see Report of the Working Group, Annex, A, para 1, 14 October 2005, UN Doc A/C.6/60/L.9.

[106] Prosecutor *v* Radislav Krstic, ICTY Trial Chamber, (2001) Case No. IT-98-33-T.

[107] *Ibid*, Judgment 2 August 2001, para 645.

[108] Prosecutor *v* Radislav Krstic, ICTY Appeals Chamber (2004) Case No. IT-98-33-A, para 418.

by what they witnessed during the segregation process, they were not themselves targeted, rather they were set aside: nor was there any suggestion that the fate of the victims was intended to serve as a lesson or warning to them. It therefore follows that this was not characteristic of an act of international terrorism.

Compare this with the very different situation in the case of the Madrid train bombings. The targeted group was rail commuters with a myriad of origins and nationalities. The outcome - a massacre - was the result in each case, but the motives were different. Extermination of the members of the group was the aim at Srebrenica, but in the case of the Madrid train bombings it transpired that the terrorists were intent on halting Spanish support for the US in both Afghanistan and Iraq.[109] In other words, the Madrid massacre was a means to another end entirely.

Whereas in the Srebrenica massacre the perpetrators overtly selected their prey by their national, ethnical and racial origins, the target within the sights of the terrorists in the Madrid attack was the disparate commuting public. The objective was to cause the maximum mayhem and it may be speculated that the intention was to bring about a change in the foreign policy of the legitimate government of the country. The timing of the assault was also significant - two days before the Spanish legislative elections. This reveals a high level of sophistication by those who planned the attack: it was an attempt to achieve the fall of the Spanish Government by terrorising the electorate into voting for those who were opposed to the 'war on terror'.

With regard to the list of criminal acts which could be committed in pursuance of the genocidal attempt under Article 6 of the Statute, only the first two, namely killing and causing serious bodily or mental harm, are in common with the *modi operandi* deployed by terrorists. However, due to the limitations imposed on the selection of the group to be victimised, which is the hallmark of genocide, the two crimes do not appear to be on all fours.

One should never lose sight of the second fundamental characteristic of terrorism, whether it be within a national, regional or international context, namely the *indiscriminate* targeting of the general public. One of the identifying features of

[109]This threat was faxed in a letter to the Spanish daily newspaper ABC during the weekend 13-14 March 2004, purported to have emanated from the Al-Qaeda European group.

genocide is the preparatory act of separating those to be exterminated from others within a given area, as happened at Srebrenica. When terrorists attack a target, be it public transport, an office block or a house of worship, this characteristic is absent, because the intention is to create terror in those who witness or learn of the resultant mayhem, in order to bring about a change of government, create anarchy, or cause the downfall of a whole system of government. Nor has evidence come to light in relation to international terrorist outrages that any prior warnings were issued, unlike the tactic used by the terrorists in Northern Ireland, for example in the Omagh bombing atrocity.[110]

The situations extant when acts of genocide are being committed, may at least present some opportunity for potential victims to flee the danger zone, whereas the terrorist strikes by means of causing explosions which engulf all those who happen to be within range. In the former case, the citizens are selectively targeted, whereas in the latter case, the site may be selected, but those caught up in the blast are not singled out before the terrorist strikes. This is the essential feature which distinguishes terrorism from genocide.

4.4.2 Crimes against Humanity

There is much support in the literature for the view that acts of terrorism satisfy the criteria of the definition of crimes against humanity as defined under Article 7 of the Statute[111] because there are similarities between the basic elements of the definition and the elements which are recognised as essential ingredients in acts of terrorism.

Where terrorism is concerned, civilians are always targeted and an ideological or political purpose can also be identified in the attacks. Proulx makes this point in support of the proposition that Article 7 covers acts of terrorism,[112] using the 9/11

[110] A 500-pound car bomb planted by the Real IRA exploded outside a local courthouse in the central shopping district of Omagh, Northern Ireland, killing 29 persons and injuring over 330 on 15 August, 1998.

[111] See, for example, Blakesley, 'Ruminations on Terrorism & Anti-Terrorism Law & Literature', (2003) 57 *University Miami Law Rev* 1041; Goldstone and Simpson 'Evaluating the Role of the International Court as a Legal Response to Terrorism' (2003) 16 *Harvard Human Rights J* 13; Robertson, *op cit*, n 29, 357; Robinson, 'Five Years on From 9/11 - Time to Reassert the Rule of Law' JUSTICE - International Rule of Law Lecture 20 March 2006; Drumbl, 'Judging the 11 September Terrorist Attack', (2002) 24 *Human Rights Quarterly* 323.

[112] Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) 19 *American University International Law Rev* 1009, 1034.

attacks to illustrate his argument. The difficulty which arises when the 9/11 onslaught is used in this way is that ICC jurisdiction did not exist at the time, but Proulx stresses that he invokes it as an example, "a standard against which to measure subsequent acts of terrorism".[113]

With that *caveat* in mind, which also applies to most of the incidents cited in the argument for and against the inclusion of terrorism within the jurisdiction of the ICC,[114] there is commonality in the identification of a deliberate intention to target "any civilian population" (Article 7, para 1).

Proulx analysed the required *mens rea* and *actus reus* of a crime against humanity of murder, as set out in the Elements of Crimes under Article 7(1)(a). He identifies the four distinct elements of the *actus reus* as being identifiable in the 9/11 attack, viz an attack, a nexus between the specific crimes and the attack, which must be directed at a civilian population and be committed on a widespread or systematic basis.[115] Similarly, he highlights to the essential element of the *mens rea* - the knowledge that the perpetrator must have with regard to the widespread or systematic nature of the attack.[116] The conclusion which he draws from this analysis is that the 9/11 attack is within the ambit of the Article 7 offence, because it resulted in the murder of civilians,[117] and further, he argues that the bombing of the US embassies in East Africa in 1998 was a similar attack.[118] Two hundred and ninety-one people were murdered in the Kenyan embassy bombing and ten were murdered in the Tanzania outrage. Overall, the victims were US military and civilian personnel, together with Kenyan and Tanzanian civilians. According to Prouxl, the two essential differences between the attacks on 9/11 and the earlier embassy bombings is the scale of the former and the "unparalleled death toll that ensued".[119]

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[113] *Ibid*, 1040.
[114] For example, the *Lockerbie Incident*, see Wright, 'Limitations on the Prosecution of International Terrorists by the International Criminal Court' 8 *J International Law & Practice* 139; the *Tadic Case*, see Banchik, 'The International Criminal Court & Terrorism', (2003) 3 *Journal Peace, Conflict and Development Studies* 19.
[115] Above, n 112, 1060.
[116] *Ibid*, 1061.
[117] *Ibid*, 1071.
[118] *Ibid*, 1083.
[119] *Ibid.*

A much wider ranging view of the terrorist problem and its place within international law is taken by Cassese, not only with regard to the core crimes over which the ICC has jurisdiction, but also in relation to the damaging consequences which it is having on the legal international order and general principles.[120] With regard to the three core crimes, however, he does agree that terrorism may amount to crimes against humanity, in instances where all three elements of the crime are present, quoting the terrorist attacks perpetrated on 9/11 as the prime example.

On that day, civilians were targeted and he maintains this was done as part of a widespread or systematic practice.[121] However, although he does not mention the third element of the crime, namely that the perpetrators knew that their actions were part of a widespread or systematic attack, if one breaks down the 9/11 onslaught into three separate hijackings, timed to be activated simultaneously, then that third element is also fulfilled. Despite quoting the support which defining the onslaught as a crime against humanity has received from leading authorities, such as Robert Badinter (a former French Minster of Justice)[122] and Mary Robinson (the former UN High Commissioner for Human Rights),[123] Cassese does not wholeheartedly back the proposition. On the contrary, he remains somewhat ambivalent and points to the broadening of the definition of this crime which would result if it became generally accepted that attacks such as 9/11 came to be regarded as a crime against humanity within the jurisdiction of the Court.[124]

Cassese does not envisage changes to the definition *per se*, but rather a potential acceptance that acts of terrorism which involve murder, extermination or other inhumane acts [respectively, (a), (b) and (k) on the list crimes which can be perpetrated during commission of the offence] would fit the definition of Article 7 crimes.[125] Acts of international terrorism usually do involve killings or other inhumane acts, but it can be argued that if they involve extermination, there would need to be an identifiable intention to annihilate those within the target area, whereas

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[120]Cassese, *op cit*, n 10, 993.
[121]*Ibid*, 995.
[122]*Ibid*, 994, fn 5.
[123]*I bid.*
[124]*Ibid*, 995.
[125]*Ibid.*

terrorists appear to have the intention of maiming, injuring, and/or killing in equal measure, although haphazardly with regard to which victims suffer which fate. Cassese sees merit in the argument that "the atrocious features of the attacks of 11 September"[126] do, indeed, satisfy the requirements set out in the definition, but this implies that not all acts of international terrorism would so qualify.

Cassese foresees problems arising, however, if terrorism is accepted as a crime under Article 7, firstly with regard to the specific conditions to be met for it to be categorised as a crime against humanity, but secondly, and more importantly, whether the Court would be authorized to adjudicate "serious cases of terrorism".[127] This begs the question as to why the eminent international lawyers to whom he refers as supporting this proposition[128] would do so, if it were not to overcome the very high hurdle of extending the jurisdiction of the Court? Cassese does not address this question, further hinting that he might not be convinced that such a "makeshift" solution is really viable. Rather, he has adopted a far more sanguine view of the problem, for if some acts might slot into a definition of an offence on some occasions and not on others, that would seem to suggest that a separate definition which covers all the core elements that are constants in any acts of international terrorism would be more appropriate.

It is the sheer scale of the 9/11 attacks which concentrates the minds of lawyers and turns their attention to the possibility that the outrage qualifies as a crime against humanity and this is the view held by Blakesley.[129] He points to the fact that three thousand people were killed, multiple acts were committed as part of a widespread or systematic attack upon innocent civilians and that some, if not all of those involved in the attacks intended - or knew - that they were part of a systematic attack on a civilian population.[130] However, he also argues that if a prosecution is to take place, the elements of the offence(s) of terrorism must be clearly established and he identifies these as:-

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[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] Blakesley, *op cit*, n 109, 1046-47.
[130] *Ibid*, 1047.

(1) violence committed by any means;

(2) causing death, great bodily harm, or serious property damage;

(3) to innocent individuals;

(4) with the intent to cause those consequences or with wanton disregard for those consequences; (and for the purpose of coercing or intimidating some special group, or government, or otherwise to gain some perceived political, military or other philosophical benefit); and

(5) without justification or excuse.[131]

On close examination, one can readily see that it is the words in parentheses which go to the crux of the matter. Further, this is the element which is not part of the definition of crimes against humanity. Greenwood explores the constituent parts of acts of international terrorism and identifies an "inner core and an outer region",[132] the latter including attacks on military targets with weapons that are not prohibited by any rule of international law".[133] When this type of attack is labelled as terrorism, Greenwood highlights identification of the wrongdoer, the status of the group to which he/she is affiliated *or* achievement of the objective as the trigger. His argument therefore is that some, but not all aspects of the act are crucial to the definition.[134] Applying Greenwood's thesis to Blakesley's four key elements which he sees as essential in order for a prosecution for a terrorist attack to succeed, the common denominator is inarguably those words in parentheses which are contained in the fourth criterion. The Greenwood argument was prescient, however, he would surely concur with Blakesley on this fourth element, but not necessarily on all or any of the other three.

Cassesse cites two pertinent definitions of terrorism in his concise account of the evolution of the notion of terrorism.[135] The first is contained in the 1999 Convention for the Suppression of the Financing of Terrorism in Article 2(1)(b) and the second

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[131] *Ibid*, 1144-45.

[132] Greenwood, 'Terrorism and Humanitarian Law - the Debate over Additional Protocol I' (1989) 19 *Israel Yearbook Human Rights* 187, 189.

[133] *Ibid.*

[134] *Ibid*; see also Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004), 234.

[135] Cassese, 'Terrorism as an International Crime' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 213, 214.

was included in the US "Iran and Libya Sanctions Act 1996" [*Public Law* HR 3107, Section 14(1)] 5 August 1996. Both definitions contain the element of coercion which is as essential to contemporary international terrorist activity, as is the targeting of civilians, viz, in the first document this is defined as:

> [T]o compel a government or an international organization to do or to abstain from doing an act.[136]

and in the second document as:

> (ii) to influence the policy of a government by intimidation or coercion.[137]

In essence, if acts of terrorism are to be prosecuted as crimes against humanity under Article 7 of the Statute, there has to be commonality on the distinguishing elements of that criminality from those specified in paragraph 1 of Article 7, in relation also to one or more of the specific crimes listed in the remainder of the first paragraph. Of the crimes on the list which Cassese nominates,[138] it is questionable whether extermination and rape within this context would qualify, since there does not appear to be any evidence to support the premise that international terrorists seek to eradicate particular ethnic, racial, or religious groups when targeting civilians. Similarly, the anonymity of the terrorist goes against rape, except perhaps where hostage taking is the chosen crime, but hostage taking is not on the list of crimes which can be perpetrated under Article 7.

Rather than attempting to identify elements of terrorism which would fit the requirements of Article 7, it might be more enlightening to consider any essential features which could rule it out, in order to come to some conclusion on the matter. There are two such essential elements. Firstly, the creation of a state of terror in the minds of any person was identified in the definition contained in Article 1, para 2 of the 1937 Convention for the Prevention and Punishment of Terrorism.[139] By detailing who would be so targeted, namely "particular persons, or a group of persons

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[136] *Ibid*, 215

[137] *Ibid*, 216, fn 8.

[138] Cassese, *op cit*, n 46, 128.

[139] Article 1(2), Convention for the Prevention and Punishment of Terrorism (Geneva, 1937; never entered into force), League of Nations Doc C.546M.383(1).1937.V.; see also Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005), 19.

or the general public",[140] no-one is excluded. Secondly, but of equal importance, is the element of coercion. This has featured in the majority of treaties targeting specific acts of international terrorism, using terminology such as the intention to coerce/compel a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act.[141] Within the confines of international acts of terrorism, the coercion factor is fundamental to the intention of the perpetrator, whether overtly stated, or implicit in the deed, because of the likely reactions of the surviving victims and the international society . If this element is absent, then the case for arguing that attacks which mirror those which took place on 9/11 may qualify as crimes against humanity, but if the coercion factor is present, it is argued that a prosecution under Article 7 of the Statute would be inappropriate.

4.4.3 War Crimes

There appears to be less support for the idea that international terrorism could be prosecuted within the war crimes provisions of the Statute. Whereas crimes against humanity do not have to be linked to the existence of an armed conflict, the reverse is the case in respect of war crimes. The two factors which dictate whether an armed conflict is in progress are evidence of the use of force and, crucially in the present context, the existence of identifiable parties engaged in it.[142] One of the principal characteristics of terrorists - particularly in the international arena - is the cloak of anonymity which surrounds them and the way in which they structure themselves within cells embedded within society. Viewed from the more traditional perspective of war crimes, those engaged in these activities would be regarded as guerrillas. One can readily see that this raises the spectre of arguments regarding 'struggles for national liberation from alien domination' with which the annual General Assemblies of the UN have been plagued over many years. The first question to be addressed,

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[140] *Ibid.*

[141] See, for example, International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, entered into force 3 June 1983) Article 1(1); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March, 1998, 1678 UNTS 221, in force 1 March 1992) Article 3(1)(c); International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 15 April 2005, UN Doc A/RES/59/290 (2005), not yet in force) Article 2(1)(b)(iii).

[142] Duffy, *The War on Terror' and the Framework of International Law* (Cambridge, Cambridge University Press, 2005) 251.

therefore, is whether a situation of armed conflict can exist, when one side could be described as an "abstract phenomenon",[143] which nonetheless has a global reach. In seeking answers, Duffy considers the events of 9/11 and is in no doubt that the first criteria (the use of force) has been exerted by Al Qaeda, the undisputed culprits,[144] but the second issue is not so easy to resolve. According to international humanitarian law, the parties to an armed conflict are emphatically identified as States and unless States are involved either overtly or covertly in support of armed groups/individuals, armed conflict does not 'exist'.[145] However, scholars are seriously questioning whether this legal framework can remain intact.[146]

There is scope, however, for taking the opposite view. Paragraph 2 of Article 8 sets out the meaning of "war crimes" for the purpose of the Statute and sub paragraph (a) refers to grave breaches of the Geneva Conventions of 12 August 1949 and the status of civilians. If they qualify as protected persons, acts of terrorism committed against them are prohibited.[147] Cassese points to this and further provisions in relation to civilians which are included in the First and Second Additional Protocols of 1977[148] to suggest that there may be a case for terrorism to be banned and criminalised, but only if it is directed against civilians.[149] Within the context of the general intent to harm or threaten to harm civilians, Cassese points to the special criminal intent which must be evident, *i.e.*, to bring about terror among civilians, which is the essential purpose of those threats or illegal acts.[150]

Placing the primary purpose of bringing about terror among civilians, which Cassese raises, within the context of the 9/11 attacks, Proulx makes the particular point that the admitted aim of the perpetrators was "to terrorize the American population,

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[143] *Ibid*, 250.
[144] *Ibid*, 251.
[145] *Ibid.*
[146] See, for example, Cassese, *op cit*, n 10, 993; Rogers, "Terrorism and the Laws of War: September 11 and its Aftermath", comments made on 21 September 2001, available at http://www.crimesofwar.org/expert/attack-apv.html.
[147] Protocol Additional to the Geneva Conventions of 1 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977, 1125 UNTS 609, in force 7 December 1978) Article 4(2)(d).
[148] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Conflicts (Protocol I) (Geneva, 8 June 1977, 1125 UNTS 3, in force December 1987) Article 51(2) Protection of civilian population.
[149] Cassese, n 135, 221.
[150] *Ibid*, 222.

particularly the citizens of New York City and Washington, D C".[151] Interestingly, he also notes that the attacks "catapulted Americans into a state of chaos and panic",[152] which could be seen as being one step away from creating anarchy and anarchy is the state of affairs which Cassese warns could ensue if terrorism is not parried by the instigation of collective legal measures.[153]

The arguments resting on the provisions contained in the Geneva Conventions of 12 August 1949, raised by Cassese and rehearsed above, are also examined by Gross,[154] but he comes down emphatically on the side of acts of international terrorism being eligible for prosecution under Article 8.[155]

Returning to the two criteria which have to be met according to Duffy, namely evidence of the use of force and the existence of identifiable parties engaged in it,[156] there does not appear to be a convincing argument for overriding the second stricture that regardless of any circumstances pertaining to attacks on civilians, unless these are committed within the wider framework of State(s) *versus* State(s) belligerency, such terrorist activity does not qualify as being a war crime within the meaning of Article 8.

In the face of such uncertainty, one can only conclude that it might be unwise to test the argument by charging terrorist suspects with war crimes pursuant to Article 8 and risk losing what might have been a valid prosecution because of uncertainty over admissibility under Article 18 (Preliminary rulings regarding admissibility).

Conclusion

Genocide is arguably the least attractive of the three core crimes which have been considered as surrogate 'hosts' for acts of international terrorism, due to the specificity of its targeted groups. Targeting groups is the antithesis of the blanket approach to attacks on civilians *per se*, which is one of the hallmarks of the tactics used universally by terrorists. Taken together with the general lack of nexus in the

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[151]Proulx, *op cit,* n 112, 1039.
[152]*Ibid.*
[153]Cassese, *op cit*, n 10, 993.
[154]Gross, 'Trying Terrorists: Justification for Differing Trial Rules: the Balance between Security Considerations and Human Rights' (2002) 13 *Indiana International & Comparative Law Rev* 1, 85.
[155]*Ibid.*
[156]Duffy, *op cit*, n 142, 251.

definition as between genocide and terrorism, it would hardly make for a sound basis on which to try suspected international terrorists.

Apart from the difficulty of circumventing the issue of non-state combatants under Article 8, there appears to be some merit in the argument that as terrorism is embedded within the 1949 Four Geneva Conventions, specifically in relation to civilians, acts of international terrorism could be regarded as fulfilling the requirements of Article 8, but there is no certainty that a case under this core crime would succeed either.

This leaves crimes against humanity under Article 7 as the most convincing of the three sites. However, when the element of coercion, which runs through many of the more recent definitions which have found favour within conventions aimed at suppressing acts of international terrorism,[157] is laid over the first paragraph of Article 7 of the Statute, there is a significant mismatch. In addition, only murder (Article 7(1)(a) and the more general category of other inhumane acts (Article 7(1)(k) might be considered as having an affinity with international terrorist criminality.

With every passing year, international terrorism climbs higher up the agenda of the UN, with exhortations from the Secretary-General for the international community to support his initiatives to tackle transnational terrorism which he declares has "grown more urgent in the last five years",[158] the Security Council examining ways to improve international cooperation against terrorism[159] and the delegates at the 2005 World Summit strongly condemning terrorism in the following terms:

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[157] See, for example, International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, entered into force 3 June 1983) Article 1(1); International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/209, entered into force 10 April 2002) Article 2(1)(b); International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 15 April 2005, UN Doc A/RES/59/290 (2005), not yet in force) Article 2(1)(b)(iii).

[158] Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* 21 March 2005, UN Doc A/59/2005, Part III B 'Preventing catastrophic terrorism', para 87.

[159] "Security Council Examines Ways to Improve International Cooperation Against Terrorism", Press Release SC/8273, reporting on the 5104th Meeting of the Security Council, issued on 17 December 2004.

> We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.[160]

When the world leaders, the UN General Assembly and above all, the UN Security Council all unite in their concern with regard to the level of threat posed by international terrorism, it can be argued that this is not the time to be attempting to place the 'square peg' of terrorism into the 'round hole' of crimes against humanity. Both crimes deserve to remain divorced in the interests of justice and certainty under the law and it therefore follows that the wiser course might be to adhere to the option which has been included in the Statute of considering the crime as a separate offence when the Review Conference convenes in 2009, for which provision has already been made.[161]

CONCLUSION

The years of work which went into the final draft of the Rome Statute in the 1990s, together with the work undertaken in drafting the Elements of Crimes and Rules of Procedure and Evidence[162] have resulted in a complex, but well designed institution. The legislators have achieved their objective, whilst taking into account the need to preserve the neutrality of this new justice system, together with the principle of State sovereignty *via* introduction of the complementary regime.

At the same time, provision has been made for the Security Council to have a role in the Court process, by way of making referrals to the Court, although this is restricted to its powers under Chapter VII of the UN Charter. However, in addition to referring situations to the Court, the deferral mechanism does enable the Security Council effectively to veto prosecutions, which could have a deleterious effect if it resulted in suspects evading trial. Nevertheless, the involvement of the Security Council in this way was inevitable, due to the integral role which diplomacy and politics plays in world affairs in general and international public law in particular.

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[160] GA Res 60/1, '2005 World Summit Outcome', 24 October 2005, UN Doc A/RES/60/1 (2005) para 81.

[161] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc A/CONF.183/10, 17 July 1998, Annex I, Resolution E.

[162] *Ibid.*

The definitions which set out the parameters within which jurisdiction has been given to the Court over the three core crimes were painstakingly constructed by the delegates. Although they have yet to be tested in a court, the 9/11 attacks turned the spotlight on the three definitions, the wording of which continues to be the focus of much academic discussion in relation to acts of international terrorism. Whether defining this criminality as a separate offence would have remained on the original agenda of the Rome Conference if it had taken place post, rather than prior to the 9/11 attacks, is a moot point. What is clear is that the atrocities perpetrated on that day have had a profound effect on international affairs and, as Cassese concludes, have "potentially shattering consequences for international law".[163]

Taken together, the establishment of the ICC and the events of 9/11 have, within the space of eleven months, had a profound impact on international criminal law, creating an additional route for dealing with some of the most serious crimes known to man on the one hand, and added to the mounting pressure on States to address the threat to world peace posed by international terrorism on the other.

Ultimately, however the international community responds to this complex problem, progress will be at best impeded and at worst non-existent until agreement is reached on a definition of the crime. The somewhat limited possibilities which do exist for making progress are discussed in the following, penultimate chapter of this study.

[163]Cassese, *op cit*, n 10, 994.

CHAPTER FIVE

Options for Progress on the Definitional Issue

INTRODUCTION

Public statements of support have not been matched by actions when it comes to that crucial final meeting of minds which would result in a positive conclusion to work on the draft comprehension convention on terrorism,[1] opening up an option which might be instrumental in challenging acts of international terrorism.[2] It is difficult to comprehend why the draft should have stalled over the text of draft article 18, since the version drawn up by the Coordinator (see *supra*, Chapter 2, pp67-68) had been approved and included within the 1998 International Convention for the Suppression of Terrorist Bombings.[3]

One of the principal reasons for this reticence could well be linked to another of the options for progress which has - despite all predictions to the contrary - become a reality, namely the Rome Statute establishing the ICC[4] (hereinafter referred to as the Statute). This refers to concerns about an erosion of state sovereignty, which Malanczuk aptly describes as "the conservative force of the doctrine of state sovereignty".[5] It is timely, therefore, to rehearse the limitations which surround the framework of public international law in general and international criminal law in particular, - the realpolitik of interstate relations.

Chief among these constraints is the sovereignty of every State to conduct its affairs within its own territorial boundaries in an autonomous way.[6] Once outside those

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[1]Report of the Tenth session of the Ad Hoc Committee (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, A, para 2.

[2]The latest version of the draft comprehensive convention on terrorism is reproduced at Appendix VI.

[3]International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001) Article 19(2).

[4]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002).

[5]Malenczuk, *Akehurst's Modern Introduction to International Law* (seventh revised edition) (New York: Routledge, 1997) 361.

[6]Established with the commencement of the classical system of international law, marked by the Peace of Westphalia in 1648. See also Malanczuk, above n 5, 10; the *Island of Palmas* case, (1928) 2 RIAA 829, 838; and Jones *v* Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Others Intervening) Mitchen and Others *v* Al-Dali and Others, *Times Law Reports* 15 June 2006.

borders, States have discretion as to which of the rules of law they will agree to be bound. In the *Lotus* case, for example, the PCIJ stated:

> The rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.[7]

As a consequence, States will place their own interests first when considering whether to sign up to treaties and never more so than in the context of measures designed to suppress, punish and prevent acts of international terrorism.[8] To complicate matters further, the final decisions to endorse the rules which individual States agree to observe are not made by the lawyers who have compiled the initial drafts, but by government officials and diplomats who have a broader view of international law and a wider remit, which takes into account the diplomatic and political situations at home and abroad, on which their decisions will impact.[9] Therefore a definition may be an impediment to aspects of domestic and/or foreign policies which States may wish to pursue, for example, in committing their armed forces to peace-keeping missions abroad.

Nonetheless, and with this background in mind, a sufficient number of States were content with the terms of the Statute in this respect to ratify it, enabling the Court to be inaugurated on 1 July 2002.[10] Since, also, there might yet be further diplomatic manoeuvres which could bring about a similarly satisfactory outcome to the draft comprehensive convention on terrorism, this route has been included as one of the potential options for progress on the definitional issue.

One of the significant results to emerge from this research, however, is the evidence that addressing the scourge of global terrorism remains high on the agenda of items causing grave concern to the international community, from the Secretary-General of

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[7]France *v* Turkey (1927) PCIJ Series A, No 10, 19; Hillier, *Principles of Public International Law* (second edition) (London: Cavendish Publishing Ltd, 1999) 146; GA Res 375 (IV), 'Draft declaration on rights and duties of States', 6 December 1949, UN Doc A/RES/375 (IV) Preamble.

[8]See, for example, the discussion of the Report of the *Ad Hoc* Committee on International Terrorism, (UN Doc A/9028) *Official Records of the UN General Assembly*, Thirtieth session, UN Doc No A/C.6/SR.1581, 4 December 1975, para 36.

[9]See, for example, Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American J International Law* 12.

[10]Sixty ratifications were required under Article 126 of the Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002).

the UN[11] to the many articles and texts which abound in the literature.[12] Some leading researchers argue that the existing norms of international law offer other avenues for responding to the latest manifestations of terrorism, thereby obviating the need to pursue an all-embracing definition of the phenomenon. Duffy, for example, points to the existing provisions for prosecuting terrorism under international humanitarian law in relation to armed conflict[13] and human rights law,[14] whilst Cassese[15] and Paust[16] argue that customary international law could hold the key to successful prosecutions for terrorist crimes. However, given that international criminal law is a relatively new discipline,[17] efforts to define international terrorism comprehensively and proactively in response to the rising tide of very serious international criminal activity in general and international terrorist attacks in particular should perhaps continue, in order to maximise the number of routes to justice available to the global community.

Past failures and present difficulties over the definitional issue should be borne in mind when ranking the initiatives aimed at extending, refining and/or strengthening existing options for progress in relation to their realistic prospect of success.

5.1 Feasibility of Achieving a Consensus on a Comprehensive Definition

Introduction

Events have demonstrated that the catalyst for further legislation aimed at curbing the activities of terrorists has usually been the perpetration of some terrorist atrocity

[11]See, for example, the UN Secretary General's address to the UN General Assembly, 'Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy', UN Doc GA/10456, 2 May 2006.

[12]See, for example, Cassese, 'Terrorism is Also Disrupting some Crucial Legal Categories of International Law' (2001) 12 *European Journal International Law* 993; Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' (2002) 96 *American Journal International Law* 428; Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: a Case of too much Convergence between International Humanitarian Law and International Criminal Law?' (2001) 7 *ILSA Journal International and Comparative Law* 391.

[13]Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) Chapter 6.

[14]*Ibid*, Chapter 8.

[15]Cassese, 'Terrorism as an International Crime', in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 213, 214.

[16]Paust, 'Addendum: Prosecution of Mr bin Laden *et al* for Violations of International Law and Civil Lawsuits by Various Victims' *ASIL Insights* No 77, 21 September 2001, available at www.asil.org.

[17]de Than and Shorts *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) 13.

which plumbs new depths of depravity, aimed at the innocent and embroiling nations having no direct link with the underlying causes which led to the attack. A case in point was the massacre of athletes attending the Munich Olympics on 5 September 1972,[18] which engaged the members of the UN General Assembly.[19] This was due in part because of the effect which it had on the global community[20] and partly because the Black September terrorists had managed to bring their struggle for national liberation to the attention of the world in a way which impacted on more of the global community than had hitherto been the case.[21]

5.1.1 The First Initiative

The enormity of the task began to emerge, when, after three years of deliberations following the Munich massacre, the Ad Hoc Committee (hereinafter referred to as the Committee) which had been established to draft, *inter alia*, a comprehensive definition of international terrorism,[22] had to admit defeat.[23] The impasse was caused by the apprehension of some delegations with regard to the effect which condemnation by the General Assembly could have on the "legitimate struggle of certain peoples or movements... for self-determination".[24] Such political considerations had, in the words of the Israeli delegations "virtually wreck[ed] the Secretary-General's initiative in 1972".[25] It was therefore not surprising that the Committee reported to the UN General Assembly that it "...ha[d] been obliged to suspend its work.".[26]

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[18]See, for example, Reeve, *One Day in September* (London: Faber and Faber, 2000); see also Carlton, "Future of Political Substate Violence" in Alexander, Carlton and Wilkinson (eds) *Terrorism: Theory and Practice* (Colorado: Westview Press, 1979) 211.

[19]General Assembly Res 3034 (XXVII), 'Measures to prevent international terrorism', 18 December 1972, UN Doc A/RES/3034 (XXVII) para 9; see also, McWhinney, 'Aerial Piracy and International Terrorism The Illegal Diversion of Aircraft and International Law' (Dordrecht: Martinus Nijhoff Publishers, 1987) 138.

[20]Griset and Mahan, "Reporting Terrorism Media, Law, and Terrorism" in Griset and Mahan (eds) *Terrorism in Perspective* (London: Sage Publications, 2003) 129, 131-2.

[21]Hoffman, *Inside Terrorism* (revised and expanded edition) (New York: Columbia University Press, 2006) 68.

[22]GA Res 3034 (XXVII), 'Measures to prevent international terrorism', 18 December 1972, UN Doc A/RES/3034 (XXVII) para 9.

[23]Minutes of the 1581st meeting of the Ad Hoc Committee, UN Doc A/C.6/SR.1581, held on 4 December 1975, para 36.

[24]Minutes of the 1580th meeting of the Ad Hoc Committee, UN Doc A/C.6/SR.1580, held on 4 December 1975, para 20.

[25]*Ibid*, para 34.

[26]GA Res 31/102, 'Measures to prevent international terrorism', 15 December 1976, UN Doc A/RES/31/102 (1976) Preamble, para 3.

As Duffy comments, efforts to arrive at a generic definition "fell by the wayside"[27] and the pattern of reactive conventions targeting specific forms of the phenomenon continued, in order that some progress could be achieved in challenging the increase in attacks.

5.1.2 The Second Initiative

The major shifts in the political landscape at the end of the 1980s, caused by the end of the Cold War, resulted in, *inter alia*, the demise of the Soviet Union,[28] and the consequential emergence of the US as the only superpower.[29] There was a rise in the number of religious terrorist groups[30] and a decrease in the number of what Hoffman terms "ethno-nationalist/separatist"[31] groups due to their members getting embroiled in conflict and civil wars in their countries of origin[32] and there was an escalation in the number of acts of international terrorism with a religious imperative.[33] However, none of these events inhibited the same sensitivities over terrorist acts vis-à-vis legitimate struggles against oppressive regimes which had impeded progress earlier, from resurfacing when the second Ad Hoc Committer was established in 1996,[34] resulting in a similar lack of progress.[35] Such seismic events, together with others pointed out by Duffy[36] (for example the eradication of apartheid in South Africa and the achievement of independence by other African nations)[37] demonstrate that self-determination can be achieved against seemingly insurmountable odds. The same cannot be said, however, in relation to the degree of compromise required to reach a consensus on the two outstanding issues blocking completion of the draft

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[27]Duffy, *op cit*, above, n 13, 19.
[28]Hoffman, *op cit*, above, n 21, 85.
[29]van der Vyver, Byers, Nolte, Hathaway, Mickelson and Wedgwood, 'The Single Superpower and the Future of International Law' (2000) 94 *American Society International Law Proceedings* 64, 66; Bergen, *Holy War Inc Inside the Secret World of Osama bin Laden* (London: Weidenfeld & Nicholson, 2001) 241.
[30]Above, n 28, 86.
[31]*Ibid*, 85.
[32]*Ibid.*
[33]*Ibid*, 86.
[34]GA Res 51/210 of 17 December 1996, UN Doc A/RES/51/210 (1996).
[35]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Report of the Tenth session (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, A, para 2.
[36]Above, n 27.
[37]*Ibid.*

comprehensive convention on terrorism[38] and it may prove impossible to resolve the definitional issue by this route.

Members of the Working Group set up by the second Ad Hoc Committee[39] had looked afresh at the long-standing difficulty regarding struggles for national liberation and attempted to divorce the issue from the definition by addressing it under a separate article concerned with armed conflict.[40] In this way, forceful actions taken in the cause of national liberation would come within IHL, overcoming the reticence of delegates to endorse their earlier unequivocal condemnation of terrorism 'in all its forms and manifestations'.[41] This manoeuvre, however, ran into a further difficulty, as highlighted by Duffy:[42] The terminology used in draft article 18 excludes only 'armed forces', hence non-state combatants engaged in non-international armed conflicts, or the proverbial struggles for national liberation, would be subject to the strictures of IHL.[43]

As stalemate loomed towards the end of 2004, the Working Group was opened to all States Members of the UN, its organized agencies, and the International Atomic Energy Agency (IAEA).[44] The question of convening a high-level conference under the auspices of the UN to formulate a joint organized response by the international community to terrorism, which was first reported in 2000,[45] came to the fore again. When first raised in 2000, the proposal had met with a mixed response.[46] Those in favour commented on the opportunities which it would present for strengthening the existing framework of international cooperation, filling any existing gaps in the legal framework for combating terrorism and concomitant cooperation among law-enforcement authorities of States.[47] The most significant benefit which might

[38]Draft articles 2 and 18, as discussed in Chapter 2, Section 2.3.2.1, 43 *et seq.*
[39]UN Doc A/C.6/56/L.9, Report of the Working Group of the Sixth Committee on 'Measures to eliminate international terrorism', 29 October 2001, Introduction, para 2.
[40]*Ibid*, Annex II, Part A, paras 3-4.
[41]*Ibid*, Annex IV, para 1.
[42]Duffy, *op cit*, n 13, 22.
[43]*Ibid.*
[44]UN Doc A/C.6/59/L.10, Report of the Working Group of the Sixth Committee on 'Measures to eliminate international terrorism', 8 October 2004, Introduction, para 2.
[45]Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Fourth session (14-18 February 2000), UN Doc A/55/37, Supplement 37, Chapter III 'Summary of the general debate' B.
[46]*Ibid*, para 22.
[47]*Ibid.*

emanate from such a conference was the suggestion that the conference should define terrorism and distinguish it from the legitimate struggles for self-determination.[48] Doubters held the view that it might distract delegates from the work of the Committee and re-open issues which had prevented progress from being achieved in the past.[49]

By 2004, however, as the spotlight focused more sharply on the nub of the difficulties, namely the text of draft articles 2 bis and 18,[50] the Chairman reported that no specific proposals regarding the proposal to convene a high-level conference had been forthcoming, although some delegations had been in contact informally on the matter.[51] The resolution which was adopted by the General Assembly on 8 January 2004 on measures to eliminate international terrorism[52] reveals the growing concern about the persistence of terrorist acts worldwide,[53] linking it to the role of the UN which was in need of enhancement[54] and deciding that the Ad Hoc Committee should, *inter alia*, keep the question of convening a high-level conference under the auspices of the UN on its agenda.[55] Viewed in context with the launching of the UN Secretary-General's initiative entitled "In Larger Freedom" in March 2005[56] and publication of the Report which he had commissioned from the High-Level Panel on Threats, Challenges and Change,[57] it is not difficult to make the connection between the accelerated threats to world peace from international terrorism and the vulnerability of the UN to criticism that the organisation is in need of modernisation.

Despite the seriousness of the threat and the importance which the UN General Assembly places upon convening a high-level conference to assist in resolving the outstanding issues, the Committee remains ambivalent and unable to make a decision on the matter. It seems that some delegations are either unable or unwilling to sever

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[48] *Ibid.*
[49] *Ibid*, para 23.
[50] *Ibid*, Annex I, A, para 14.
[51] *Ibid*, Chapter II Proceedings, para 12.
[52] GA Res 58/81, 8 January 2004, UN Doc A/RES/58/81 (2004).
[53] *Ibid*, Preamble, para 6.
[54] *Ibid*, Preamble, para 12.
[55] *Ibid*, para 15.
[56] Report of the Secretary-General 'In Larger Freedom: Towards Development, Security and Human Rights for All' UN Doc A/59/2005, published on 22 March 2005.
[57] UN High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' 2 December 2004, UN Doc A/59/565.

the link between terroristic tactics and legitimate means in seeking self-determination and it could be argued that the reason for this is quite simply that terrorism is effective. It keeps the plight of those who labour under 'alien domination' in the headlines[58] and it has proven to be an effective means to get results.[59]

5.1.3 The UN Secretary-General's Initiative

Since the last meeting of the Committee,[60] there has been a further initiative by the UN Secretary-General, with the launch of his recommendations for a global counter-terrorism strategy.[61] In his address to the General Assembly when he launched the strategy, he pertinently said:

> [I]t was also essential that Member States conclude, as soon as possible, a comprehensive convention on international terrorism. ...however, that lack of progress in building consensus on a convention could not be a reason for delay in agreeing on a [comprehensive, coordinated and consistent counter-terrorism] strategy.[62]

The Secretary-General could be interpreted as placing more pressure on the Committee members to complete their task. Equally, there are other factors at work which, although not directly aimed at the Committee are relevant to its work, namely the violations of human rights which are also on the increase, the situation in both Iraq and Afghanistan and the incidental fact that the Secretary-General's term of office ends with the end of the sixty-first session of the UN. Little wonder that the current Secretary-General wishes to make progress on some, if not all of these issues before he leaves office. He has adopted a broader, tangential approach to counter the terrorism threat to these core values of the UN, consisting of five pillars:

- dissuading people from resorting to terrorism or supporting it;.
- denying terrorists the means to carry out an attack;
- deterring States from supporting terrorism;
- developing State capacity to defeat terrorism; and
- defending human rights[63]

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[58]For example, the attack on the headquarters of the UN Assistance Mission for Iraq in Baghdad on 19 August 2003.

[59]Hoffman, *op cit*, above n 21, 61-62.

[60] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February-3March 2000), UN Doc A/61/37, Supplement 37.

[61]Report of the Secretary-General, 'Uniting Against Terrorism Recommendations for a Global Counter-terrorism strategy' UN Doc A/60/825.

[62]Address by the UN Secretary-General, Sixtieth General Assembly, Plenary 78th Meeting, General Assembly Press Release UN Doc GA/10456, para 6.

[63]Above, n 61, I Introduction, para 1

It could be argued that even if the Committee does abandon its efforts, the lesson of history is that the definitional issue is likely to resurface at some time in the future. It would be preferable, therefore, for the option to remain open - indeed, it is arguable that it is closer to being identified than has been the situation heretofore. Whilst some commentators disagree[64] and others are ambivalent,[65] the Secretary-General is not alone in recognising the urgency of adopting a global position on countering terrorism[66] and he recognises that completion of a comprehensive convention would be a notable achievement which would benefit all nations, whether "large or small, strong or weak".[67]

Conclusion

The construction of the draft currently indicates that the definition would be broad, referring only to an intention to kill, or cause serious bodily injury to person(s) and/or cause damage to property and infrastructure; coupled with the key element of the purpose to intimidate a population or compel a Government to do or abstain from doing any act.[68] This would also apply to threats to commit such acts and complicity in their commission.[69] Whether or not this broad approach will eventually be considered adequate , it is not the only option. Other options may require a different approach to be made, resulting in a narrower, or more expansive definition of the crime, depending on the context. There may even be some merit in considering the option of establishing ad hoc tribunals and by-passing the perceived view of many

[64]See, for example, Murphy, 'International Law and the War on Terrorism: The Road Ahead', (2002) 32 *Israel Yearbook on Human Rights* 117; and Freeman 'Order, Rights and Threats: Terrorism and Global Justice' in Wilson (ed) *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) 37, 45.

[65]McWhinney, *Aerial Piracy and International Terrorism The Illegal Diversion of Aircraft and International Law* (second revised edition) (Dordrecht: Martinus Nijhoff Publishers Ltd, 1987) 141-3; Cassesse, *op cit*, n 15, 218.

[66]See, for example, Duffy, *op cit*, n 13, 22-23; Kolb, 'The Exercise of Criminal Jurisdiction Over International Terrorists' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 281; Abi-Saab 'The Proper Role of International Law in Combating Terrorism' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) xx; and Cassese, 'The International Community's "Legal" Response To Terrorism' (1989) 38 *International and Comparative Law Quarterly* 589, 605.

[67]Above, n 62.

[68]UN Doc A/57/37, Report of the Ad Hoc Committee on 'Measures to eliminate international terrorism', 11 February 2002, Annex II, draft article 2.

[69]*Ibid.*

that a definition is a prerequisite to prosecution.[70]

5.2 The Ad Hoc Tribunals Option

Introduction

Ad Hoc tribunals are a proven mechanism for addressing particular criminal transgressions in the international arena, providing a 'half-way house' between reactive treaties addressing specific criminality and proactive treaties which seek to address comprehensively those offences which come within the category of most serious crimes threatening the peace and security of mankind, such as the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[71] In the longer term view of international justice, however, they fall short of the advantages which a permanent international criminal court can offer, for although the tribunal will function for an indeterminate length of time, the period during which the relevant crimes were committed is finite.

5.2.1 The International Criminal Tribunal for Rwanda

Ad hoc tribunals are, by their very nature, a vehicle for dealing with specific critical situations which demand the urgent attention of the UN because, in the opinion of the Security Council, they pose a threat to world peace and security. The establishment of the ICTR[72] serves as an illustration of how such an ad hoc tribunal might be used to advantage in respect of certain terrorist activity, such as the 9/11 outrage, by-passing the definitional issue *per se*.

The number of appointees to a Commission of Experts which is established to investigate the alleged criminality is small - in the case of the ICTR there were only three in the first instance[73] and their terms of reference were to investigate the reports of grave violations of international humanitarian law in the territory of Rwanda and to

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[70]See, for example, de Than and Shorts, *International Criminal Law and Human Rights*, London: Sweet & Maxwell, 2003) 232-233; Banchik, 'The International Criminal Court & Terrorism', (2003) 3 *Journal Peace, Conflict and Development Studies* 1, 12; and Abi-Saab, 'State Sponsors of Terrorism: Issues of International Responsibility' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 6.

[71]International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005, UN Doc A/Res 59/290 (2005), not yet in force).

[72]SC Res 955 (1994), 8 November 1994, UN Doc S/RES/955 (1994).

[73]Mr Atsu-Koffi Amega (Togo), Mrs Habi Dieng (Guinea) and Mr Salifou Fomba (Mali). See letter dated 29 July 1994, from the Secretary-General to the President of the Security Council, UN Doc S/1994/906, para 2.

submit their findings to the Secretary-General.[74] The Experts were given four months in which to report back to the Secretary-General on their conclusions.[75]

Unlike committees with a large membership engaged in the codification of draft conventions, the much smaller number of experts comprising a commission, whose task is to uncover evidence of the perpetration of existing crimes identified in their mandate,[76] does not involve the political sensitivities which dog the former. Moreover, having to work to a deadline keeps minds focused sharply on the task in hand. The essence of the ad hoc tribunal is the urgency surrounding the issue and the implication is that failure to bring alleged perpetrators before a court would inevitably lead to use of force.

Significantly, the jurisdiction of the ICTR dealt with acts of terrorism without an attendant definition. Whether by chance or design, but probably the latter, the statute which the Security Council established[77] identified three crimes, viz genocide (defined in Article 2), crimes against humanity (defined in Article 3), and violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of additional Protocol II thereto of 8 June 1977. The jurisdiction covered the limited period of one calendar year, namely 1994. Each of the Articles commenced with a core definition which was followed by a list of crimes which could be committed in furtherance of the offence. Of particular interest to the present study is Article 4, which includes acts of terrorism in the list of examples of violations which could be committed, but without further amplification, viz:

> Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II
>
> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) Collective punishments;

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[74]SC Res 935 (1994), 1 July 1994, UN Doc S/RES/935 (1994) para 1.
[75]*Ibid*, para 3.
[76]Above, n 39.
[77]Statute of the International Tribunal for Rwanda (concluded 8 November 1994 SC Res 955, UNSCOR 49th Session, 3453 meeting UN Doc S/Res/955 (1994)).

(c) Taking of hostages;
(d) Acts of terrorism;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
(h) Threats to commit any of the foregoing acts.

Ad hoc tribunals are, by their very nature, established to deal with particularly egregious crimes perpetrated during the course of international conflicts, but the significance of the ICTR is that the jurisdiction is designed on the assumption that the conflict in Rwanda was non-international in essence.[78] This is an extension of the jurisdiction of the ICTY which was limited international armed conflict.[79] In either case, the emphasis is on prosecuting those who transgress against humanitarian law, be they States, other authorities and groups, or individuals.[80]

The legal legitimacy of the ad hoc tribunal route with respect to the ICTY was challenged in the *Tadic case*, when Counsel for the defence argued, unsuccessfully, that the jurisdiction of the court was invalid because it was outwith the powers of the UN Security Council to delegate judicial powers which it did not itself possess.[81] The issue of legal legitimacy with regard to the delegation of jurisdictional powers by the Security Council when it does not possess those powers in the first place has been highlighted by both Morton[82] and Malanczuk.[83] Morton argues that the jurisdiction of courts which are established by treaty removes the selectivity aspects of tribunals which by design, are created to deal with specific conflicts.[84] Malanczuk identifies with the doubts which have been expressed regarding the authority of the Security Council in this respect, but comments on the practicality of the ad hoc tribunal route as opposed to the treaty based tribunal in terms of the length of time involved in the treaty process.[85]

[78]Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American J International Law*, 554, 556.
[79]*Ibid*, 559
[80]Above, n 78.
[81]Prosecutor *v* Tadic, Case IT-94-1-T, Decision on Jurisdiction, 10 August 1995.
[82]Morton, *The International Law Commission of the United Nations* (Columbia: University of South Carolina Press, 2000) 63.
[83]Malanczuk, *op cit*, n 5, 360.
[84]Above, n 82.
[85]Above, n 83.

A further issue regarding the jurisdiction which is vested in ad hoc tribunals relates to the *ex post facto* principle of justice - the fundamental prohibition of retroactive penal measures. Duffy points out, however, that a distinction can be drawn between the application of this principle to international, as opposed to national legislation: prosecution of conduct that was criminal under international law at the relevant time is not precluded by the principle, even though such conduct was not considered to be criminal under domestic law at the time of its commission.[86]

Apart from domestic legislation, there was no appropriate international provision to cover the enormity of the 9/11 onslaught. Duffy argues that extending the jurisdiction of an existing tribunal, or creating a new one would indeed be a possibility.[87] She bases her argument on the lessons of history, and the introduction of "hybrid models of quasi-international justice that have emerged from negotiation and agreement",[88] citing the creation of the Nuremberg tribunal and the Statute of the Special Court for Sierra Leone in support of her thesis.[89] As a further example of how law can be created imaginatively to fit particular circumstances, one need look no further than the example of the Scottish court which was convened on foreign soil to try the Libyan nationals who were suspected of being implicated in the *Lockerbie* terrorist explosion in 1988.[90] However, it should be borne in mind that if the ad hoc tribunal were considered in relation to 9/11, there is the risk that the Security Council might be hindered by the definitional issue, delaying the process and thus defeating the whole aim of the tribunal route, which is designed to provide expeditious access to a court.

The way in which these tribunals are established, *i.e.*, under the auspices of the Security Council using its powers under Chapter VII of the UN Charter, should also be borne in mind, particularly since the Security Council controls which crimes in what circumstances and for what period of time their jurisdiction is activated. As with all public international law, this is the point at which political considerations

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[86]Duffy, *op cit*, n 13, 95; see also Meron, above, n 78, 567.
[87]*Ibid*, 105.
[88]*Ibid.*
[89]*Ibid.*
[90]On 21 December 1988, Pan Am flight 103 was blown up over Lockerbie, killing 259 on board and 11 residents of Lockerbie.

influence the decisions. It is also the point at which acts of international terrorism are likely to blur the distinction between IHL and international criminal law. The 9/11 attacks have revealed a new set of circumstances in which no armed conflict was in progress, despite the warlike nature of the terrorist operation. Account must also be taken of the increasing prevalence of suicide bombings,[91] and the implications which this has with regard to the role of the conspirators and facilitators. These factors need to be considered when drafting the generic definition of acts of international terrorism. It is a matter of concern that this definition is still unidentified and that agreement is still outstanding on the terms of a comprehensive convention on terrorism. Might it not be argued, therefore, that an ad hoc tribunal which has jurisdiction over undefined 'acts of terrorism', could provide one feasible option?

Looking to the future, there might be a role for an ad hoc tribunal if weapons of mass destruction (WMD) and/or chemical, biological, radiological or nuclear (CBRN) material were to fall into the hands of terrorists. The magnitude of the consequences of their criminal use would have repercussions beyond the immediate response measures set out under Chapter VII of the UN Charter. It is likely that terrorists capable of mounting an attack using such weaponry would aim to achieve as widespread an impact as possible, affecting more than one country and the nationals of many more. There are lessons to be learnt from the difficulties which the US and the UK have experienced in containing and bring before the courts those apprehended abroad and suspected of being involved in the commission of acts of terrorism, in terms of human rights[92] and fair trials.[93]

Creating an ad hoc tribunal using the precedent of the Special Court for Sierra Leone, for example, might be considered as one option in the context of such an apocalyptic scenario. It might even be premature to rule out this precedent with regard to terrorist outrages of a lower order of magnitude than the 9/11 attacks. For example, following an initial request from the Prime Minister of Lebanon to the UN Secretary-General in

[91]For example, the four simultaneous suicide bomb attacks on London Transport on 7 July 2005.
[92]Hoffman, *op cit*, n 21, 129.
[93]See, for example, the case of A(FC) and others (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent) [2004] UKHL 56; see also Universal Declaration of Human Rights (New York, 10 December 1948, GA Res 217A (III), UN Doc A/810 at 71 (1948); Terrorism Act 2000 c11, Section 11(2).

December 2005,[94] negotiations are proceeding between the UN Secretary-General and the Lebanese Government, at the behest of the Security Council, to establish a tribunal "of an international character" to try those found responsible for the assassination of Rafiq Hariri.[95] On the other hand, it might be argued that repetition of such a disastrous attack as 9/11 could provide the final catalyst which would engender sufficient agreement for the definitional issue finally to be resolved.

Conclusion

It can be seen from the Rwandan illustration that ad hoc tribunals could be harnessed as an option to prosecute those accused of committing or being complicit in the commission of certain terrorist acts, carried out within a specified period of time by replicating the design of the Statute of the ICTR. Therefore it could be argued that any person apprehended and suspected of complicity in the attacks perpetrated on the US homeland in 2001 could be tried before an ad hoc tribunal. On the other hand, those three-pronged, simultaneous attacks carried out on a single day were overtaken by a chain of events triggered by the use of force in self defence, making it unlikely that this route to justice will ever be considered appropriate in relation to those attacks, because of subsequent revelations of IHL violations by coalition troops.[96]

The controlling influence of the Security Council is a significant feature in the process leading to the establishment of ad hoc tribunals, not least because it is subject to veto by the permanent members at every stage and is selective as to which crimes will be included, whilst excluding others. Once established, all States are obliged to co-operate fully with the tribunal, which means implementing the provisions set out in its statute and keeping the Secretary-General informed of the measures taken in order so to comply. In addition, neither ratifications nor reservations hamper the pursuit of justice once the tribunal has been established.

As Morton observes, such tribunals illustrate the ability of the international community to respond appropriately to mass violations of international law if the need

[94] Letter from the Prime Minister of Lebanon to the Secretary-General (13 December 2005) UN Doc S/2005/783.
[95] SC Res 1664 (2006), 29 March 2006, UN Doc S/RES/1664 (2006) para 1.
[96] For example, Farrell, "Inside Baghdad's Torture Prison", *The Times*, 6 May 2004, 1.

arises.[97] Scharf, however, is more pessimistic. He points out that there have been occasions when tribunals could have been instigated, but did not materialise due to "tribunal fatigue".[98]

Bearing in mind the cost involved in establishing ad hoc tribunals, which is borne by the UN, it is quite possible that these factors, together with the arrival on the scene of the ICC, will mean that ad hoc tribunals are even less likely to be considered as an option within the criminal international law armoury in the future than has been the case in the past. It is, however, one option which is available in principle for the pursuit of justice in respect of past acts of international terrorism without actually defining the term and one which is strongly endorsed by Robertson.[99]

5.3 The Potential for Progress *via* the ICC Route

Introduction

The creation of the ICC has been described as "arguably the most significant international organization to be created since the United Nations."[100] The US exercised its right to require a vote on whether the draft statute should be adopted.[101] There were twenty-one abstentions, but only six nations sided with the US in formally voting to oppose the motion.[102] The hostile stance adopted by the US might have given rise to pessimism as to a viable future for the Court, if it were ever to be established. Few would have predicted that less than four years later, the Court would indeed have become a reality:[103] Perhaps most of those opposed to its creation anticipated the truth of Robertson's prescient statement that "[J]ustice, once there is a procedure for its delivery, is prone to have its own momentum".[104]

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[97]Morton, *op cit*, n 82, 65.

[98]Scharf, 'The Politics of Establishing an International Criminal Court' (1995) 6 *Duke J Comparative International Law* 167, 169.

[99]Robertson, "Fair Trials for Terrorists?" in Wilson (ed) *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) 181; Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 *European J International Law* 241, 261; Drumbl, 'Judging the September 11 Terrorist Attack' (2002) 24 *Human Rights Quarterly*, 323.

[100]Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) introductory remarks by the publishers.

[101]*Ibid*, 18.

[102]*Ibid.*

[103]The required sixty ratifications were reached on 11 April 20002 and the Court was inaugurated on 1 July 2002.

[104]Robertson, *Crimes Against Humanity The Struggle for Global Justice,* (second edition) (London: Penguin Books, 2002) xxxiv.

5.3.1 The Obstacle Barring Progress

The templates of the ad hoc tribunals for both the ICTY and the ICTR were instrumental in the drafting of the statute which established the ICC[105] and Schabas maintains that they provided "a reassuring model of what an international criminal court might look like."[106] It is worthy of note that the provision granting jurisdiction over terrorism to the ICTR,[107] is concerned only with acts of terrorism committed in armed conflict, whereas, as Duffy points out, in the context of international jurisdiction pertinent to the ICC, a broader generic offence of terrorism would be a prerequisite.[108]

There are a number of reasons why terrorist acts were excluded at the time of the Rome Conference. First and foremost, terrorist crimes did not receive the necessary consensus for inclusion.[109] This was not for want of trying: Kolb observes that proposals to add terrorism to the list of crimes were put forward but were defeated at the Rome Conference.[110] The first was submitted by Algeria, India, Sri Lanka and Turkey, and was set out as an inclusion to the list of crimes against humanity:-

> An act of terrorism, in all is forms and manifestations involving the use of indiscriminate violence, is a crime committed against persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it.[111]

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[105]Schabas, *op cit*, 100, 12; Morton, *op cit*, at n 82, 108.

[106]*Ibid.*

[107]Statute of the International Criminal Tribunal for the Former Yugoslavia (concluded 25 May 1993, SC Res 827, UN SCOR 48th session, 3217th meeting at 1-2 (1993)), *cf* the construction of Article 3 (Violations of the laws or customs of war) with the Statute of the International Tribunal for Rwanda (concluded 8 November 1994, SC Res 955, UN SCOR 49th session, 3453rd meeting UN Doc S/Res/933 (1994)) Article 4.

[108]Above, n 13, 39.

[109]See, for example, Schabas, *op cit*, n 100, 28; Duffy, *op cit* at n 13, 128; 235; Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, 93; and Goldstone and Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 66 *Harvard Human Rights J* 13, 14.

[110]Kolb, 'The Exercise of Criminal Jurisdiction Over International Terrorists' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 279. See also de Than and Shorts, *op cit*, at n 17, 235.

[111]Proposal to the Committee of the Whole, submitted by Algeria, India, Sri Lanka and Turkey, UN Doc A/CONF.183/C.1/L27, 29 June 1998.

and the second, to which Algeria was not a signatory, contained a minor amendment to the above wording (the omission of the words 'is a crime' after the word 'violence') and added a second paragraph, *viz*:

> This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.[112]

The failure of these attempts draws attention to the second and third, interrelated reasons, *i.e.*, the lack of any existing, agreed definition, despite the years of legal acumen devoted unsuccessfully to the task by the ILC[113] and thirdly, in the light of the time constraints imposed by the Rome Conference, described as "a daunting prospect" by Schabas,[114] it can safely be assumed as noted earlier in this study (see *supra* p108) that the issue was jettisoned primarily in order to avoid putting completion of the Statute within the allotted time span at risk.

India had been the driving force behind the initial draft of the Rome Statute[115] and therefore it was no surprise that India was also involved in the proposal to include acts of terrorism. Had this not been the case, a cynic might have taken the view that getting this contentious issue on the agenda could be regarded as a delaying tactic in view of the problems which have been experienced over many years. However, the implacable opposition to the Rome Statute by some States - principally the US[116] - probably had more to do with the implications for armed forces engaged in peace-keeping missions around the world,[117] who might be affected by the jurisdiction which it was proposed that the court should have over war crimes under Article 8.

It could be argued that if the Rome Conference had followed, rather than preceded the 9/11 atrocities, the outcome of the former might well have been different, because of

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[112]Proposal to the Committee of the Whole, submitted by India, Sri Lanka and Turkey, UN Doc A/CONF.183/C.1/L27/Rev.1, 6 July 1998. June 1998.

[113]Morton, *op cit*, n 82, 37-53.

[114]Schabas, *op cit*, n 100, 17.

[115]Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Fourth session (14-18 February 2000), UN Doc A/55/37, Supplement 37, Chapter III, C, para 26.

[116]See, for example, Bolton, 'The Risks and the Weaknesses of the International Criminal Court from America's Perspective' (2000) 41 *Virginia J International Law* 186, 188-89.

[117]Morton, *op cit*, n 82, 109; see also Scheffer, 'The International Criminal Court - the Challenge of Jurisdiction' (1999) 93 *American Society of International Law Proceedings* 68, 72.

the profound consequences resulting from that onslaught,[118] which coincidentally generated a plethora of texts and articles on its impact on international criminal law.[119]

In particular, with regard to the absence of terrorism from the list of core crimes in the ICC jurisdiction, there has been a tendency to consider whether terrorist acts could be prosecuted within any one of those three,[120] as previously discussed (see *supra*, Chapter 4). However, the terrorist attacks of 9/11, together with subsequent high profile outrages,[121] have reignited the issue of extending the ICC jurisdiction, with commentators highlighting the opportunity which exists to rectify this at the 2009 Review Conference.[122] The fact that this matter is already on the agenda[123] is encouraging and if a draft definition could be drawn up in time, this option would represent one of the best ways to make substantial progress towards bringing to trial those suspected of terrorist involvement in the future. A note of caution must be added, however, because a successful conclusion to the Review Conference on the issue would not only depend on a sufficient number of delegates actually endorsing the draft, but also would only impact on those States which chose to sign up to the amendment.

Conclusion

The caveat with regard to this route is the time factor, because extensions will not be possible in relation to the preparatory work. The Review Conference is scheduled to

[118]For example, the involvement of UN and NATO forces engaged in military operations and peace-keeping missions in both Afghanistan and Iraq.

[119]See, for example, Cassese, *op cit*, n 12, 993; Blakesley, 'Ruminations on Terrorism & Anti-Terrorism Law & Literature' (2003) 15 *University of Miami Law Rev* 1041; Scheffer, 'Staying the Course with the International Criminal Court', (2002) 35 *Cornell International Law J* 47; Teifenbrun, 'A Semiotic Approach to a Legal Definition of Terrorism' (2003) 9 *ILSA J International and Comparative Law*, 357.

[120]See, for example, Martinez, 'Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems' (2002) 34 *Rutgers Law J* 1, 19-26; Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) 19 *American University International Law Rev* 1009, 1034; and Cassese, *op cit*, n 15, 222.

[121]For example, the Bali nightclub bombings on 12 October 2002 and the Madrid Massacre on 11 March 2004.

[122]Duffy, *op cit*, n 13, 128; Kolb, *op cit*, n 110, 280; Morris, 'Arresting Terrorism: Criminal Jurisdiction and International Relations' in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 63, 76.

[123]Resolution E was adopted by the Rome Conference on the International Criminal Court as part of its Final Act (UN DOC A/CONF.183/10).

take place in 2009, whereas those involved in the drafting of a comprehensive definition, whilst being urged to finalise the wording,[124] do not actually have a preordained deadline to meet. Already one extension has been granted by the UN General Assembly,[125] but still agreement on the wording of the definition has not been reached.[126] Neither of these two routes would be effective retrospectively and it is perhaps for this reason that some commentators look to yet another route in order to make progress, *i.e.*, customary international law.[127] It would be interesting to see whether their arguments for maintaining that acts of terrorism fall within this area of international law would be persuasive at trial, if investigations were to uncover in the future other persons suspected of complicity in, for example, the 9/11 attacks.

5.4 Customary International Law - a Feasible Option?

Introduction

The obstacle which has perennially blocked agreement on the wording of a comprehensive definition of international terrorism is located in the two diametrically opposing views of its motivation, both of which have been acknowledged consistently in UN General Assembly Resolutions.[128] For example firstly, recognition of the validity of the subjective view of those engaged in struggles for national liberation, was set out in UN General Resolution 44/29:

> [T]he inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination.[129]

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[124]GA Res 60/1, 'World Summit Outcome Resolution', 24 October 2005, UN Doc A/RES/60/1, para 3.

[125]GA Res 60/43, 'Measures to Eliminate International Terrorism', 6 January 2006, UN Doc A/RES/60/43, para 22.

[126]UN Doc A/61/37, 'Draft Comprehensive Convention on International Terrorism', in the Report of the Ad Hoc Committee, Tenth session (27 February-3 March 2006), Supplement No37 (UN Doc A/61/37) Annex I, Part A.

[127]See, for example, Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 130; and Paust, 'Addendum: Prosecution of Mr bin Laden *el al* for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No 77, 21 September 2001, available at www.asil.org.

[128]Higgins, 'The General International Law of Terrorism' in Higgins and Flory (eds) *Terrorism and International Law* (London: Routledge, 1997) 17-18.

[129]GA Res/44/29, 'Measures to prevent international terrorism', 4 December 1989, UN Doc A/RES/44/29 (1989), Preamble, para 16; see also, *e.g.*, GA Res/3034 (XXVII), 'Measures to P revent international terrorism', 18 December 1972, UN Doc A/RES/3034 (XXVII) para 3; GA Res 32/147, 'Measures to Prevent International Terrorism', 16 December 1977, UN Doc A/RES/32/147 (1977) para 3.

Secondly, and contemporaneously, the opposing, objective view was pronounced:

> Once again unequivocally condemns, as criminal and unjustifiable, all acts, methods and practices of terrorism wherever and by whomever committed.[130]

Despite the change in attitude by the UN in 1994, when, significantly, the acknowledgement of the legitimacy of struggles for self-determination was omitted and the UN stated that it was "[f]irmly determined to eliminate international terrorism in all its forms and manifestations",[131] there has been no consequential meeting of minds over the text of the definition, although the gap appears to be narrowing.[132] Due to the impasse, might there be a possibility of resolving the issue by turning aside briefly from the quest for a comprehensive definition in favour of investigating whether terrorism qualifies as a crime under customary international law?

5.4.1 The Viability of the Option

The 1945 Statute of the International Court of Justice describes international custom "as evidence of a general practice accepted as law"[133] and Jennings and Watts elaborate further by defining custom as a clear and continuous habit of carrying out certain actions which it is believed are "obligatory or right".[134] It is also important to highlight the requirement of *opinio juris* in establishing the existence of the rule of customary international law, *i.e.*, the "legal conviction that a particular practice is carried out 'as of right'",[135] which is the deciding factor in distinguishing a customary rule from mere observance of a practice.

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[130] *Ibid*, para 1; see also, *e.g.*, GA Res/42/159, 'Measures to prevent international terrorism', 7 December 1987, UN Doc. A/RES/42/159 (1987) para 1.

[131] Res 49/60, 'Measures to eliminate international terrorism', 9 December 1994, UN Doc A/RES/49/60 (1994), Preamble, para 7; UN Press Release GA/L/3254, 18 October 2004 "Terrorism Never Justified, Legal Committee is told, but Fight Against it Must Conform to Rule of Law", (issued on 19 October 2004).

[132] UN Doc A/60/37, Report of the Ad Hoc Committee on Measures to eliminate international terrorism, Ninth session (28 March-1 April 2005) Annex I para 6; UN Doc A/61/37, Report of the Ad Hoc Committee on Measures to eliminate international terrorism, Tenth session (27 February-3 March 2006) Annex I, A para 2.

[133] Article 38(1)(b).

[134] Jennings and Watts, *Oppenheim's International Law* vol 1 (ninth edition) (London: Longman, 1996) 27; see also Morton, *op cit*, n 82, 1.

[135] Henckaerts and Doswald-Beck, "Study on Customary International Humanitarian Law: a Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", 87 (2005) *International Rev Red Cross*, 175, 181; Duffy, *op cit,* n 13, 6.

On the one hand, therefore, custom has the advantage of being unwritten (unless or until the law is codified) and if the status of terrorism were to be recognised as a customary international law crime, the present impasse with regard to a comprehensive definition of the phenomenon might be considered to be of lesser importance. Contemporary society recognises that the word 'terrorism' epitomises one of the most serious crimes currently plaguing the world,[136] just as the word 'piracy' encompassed the worst excesses of criminal acts perpetrated in earlier centuries (see, *supra*, Chapter 2, section 2.1.1), and piracy had been subject to universal jurisdiction even when the crime was first codified in 1958.[137]

Customary law is imprecise and therefore flexible, but as a result it can be ambiguous.[138] Ambiguity is surely anathema to the principles of criminal justice, wherein certainty is a core value. On the other hand, as Shaw also points out, customary law reflects the consensus approach to decision-making.[139] Unlike the long-drawn out process of treaty-making, he argues that if the majority of the global community wish to introduce a new law creating obligations *erga omnes*, this route constitutes the most expeditious way of accomplishing it.[140]

There has been sharp disagreement, however, with regard to the concept of "instant custom",[141] first introduced by Cheng,[142] not least because the very phrase is a

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[136]See, for example, Kennedy and McGrory "September 11, 2001: The search for al-Qaeda" *The Times* Friday September 6 2002, 16.

[137]Convention on the High Seas (Geneva, 29 April 1958, 13 UST 2312; 45 UNTS 11, in force 30 September 1962).

[138]Shaw, *International Law* (fifth edition) (Cambridge: Cambridge University Press, 2003) 70; see also, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports (1986) 14, 98 and Higgins, *op cit*, n 128, 20.

[139]*Ibid*.

[140]*Ibid*; see also the *Barcelona Traction, Light and Power Company Limited, Second Phase*, ICJ Reports 1970, 3, 32, para 33.

[141]Gray, *International Law and the Use of Force*, (second edition) (Oxford: Oxford University Press, 2004) 164; Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 191; Thirlway, *International Customary Law and Codification* (Leiden: A W Sifthoff, 1972) 72-77. *Cf, e.g.*, the views of Shaw, above, n 138, 70; Jennings and Watts, above, n 134, 30; Freestone, 'International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction' in Higgins and Flory (eds) *Terrorism and International Law* (London: Routledge, 1997) 43, 60; Charney, 'Universal International Law' (1993) 87 *American J International Law* 529, 545.

[142]Cheng, 'Custom: the Future of General State Practice in a Divided World', in Macdonald and Johnston (eds) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine* (Lancaster: Martinus Nijhoff, 1983) 513.

contradiction in terms.[143] For example, Gray, in discussing the impact of 9/11 on international law in general and the right of self-defence by way of response in particular, is dismissive of what she terms "the fiction of instant custom".[144]

Duffy challenges those who assert that terrorism is a crime under customary international law, pointing to the fundamental principles of legality and certainty with regard to criminality.[145] In support of her view she cites those who negotiated the Statute of the ICC, who omitted terrorism from their agenda due to the lack of any accepted definition of the crime.[146]

In the immediate aftermath of 9/11, Paust considered how terrorists who conspired to launch those attacks - particularly bin Laden himself - might be brought to justice within the US.[147] One route he proposes is *via* universal jurisdiction, since acts of international terrorism are "already recognizable as international crimes under customary international law".[148] At the same time, he acknowledges that one of the problems with harnessing customary international law in this way is the prohibition against *ex post facto* laws.[149] However, he points to two cases, albeit domestic prosecutions, where the cardinal law principle of non-retroactivity was countermanded. In the *Eichmann* case, the Supreme Court of Israel convicted Adolf Eichmann for, *inter alia*, war crimes:[150] in the *Demjanjuk* case,[151] John Demjanjuk was extradited from the US to Israel,[152] where he also stood trial for war crimes, was found guilty, but acquitted on appeal to the Israeli Supreme Court.[153]

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[143]Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001' (2003) 26 *Boston College International & Comp. Law Rev* 145, 150-51.

[144]Above, n 141; International Law Association, 'Final Report of the Committee on the Formation of General Customary International Law', Report of the Sixty-ninth Conference, London, 2000, Principle 12, 731; Henckaerts and Doswald-Beck, *op cit*, n 135, 181.

[145]Duffy, *op cit*, n 13, 89.

[146]*Ibid*; UN Doc A/CONF.183/10 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 17 July 1998, Annex I, Resolution E.

[147]Paust, 'Addendum: Prosecution of Mr bin Laden *et al* for Violations of International Law and Civil Lawsuits by Various Victims' *ASIL Insights* No 77, 21 September 2001, at www.asil.org.

[148]*Ibid*, para 3; see also, Cassesse, *op cit* n 15, 218; Conte, *Security in the 21st Century The United Nations, Afghanistan and Iraq* (Aldershot: Ashgate Publishing Limited, 2005) 20..

[149]*Ibid.*

[150]*Attorney-General of the Government of Israel v Eichmann*, 36 (1961) ILR 5.

[151]Demjanjuk *v* Petrovsky 79 (1985) ILR 535.

[152]*Demjanjuk (in the matter of the extradition of)*, United States, US District Court for the Northern District of Ohio, Eastern Division, decision of 15 April 1985, 612 F Supp 544.

[153]Appeal by Ivan (John) Demjanjuk to the Supreme Court of Israel, Cr.A. 347/88, 29 July 1993.

There are other cases which would back up his endorsement of exceptions to the non-retroactivity principle in relation to the 9/11 attacks. In the *Barbie* case[154] Klaus Barbie was convicted of crimes against humanity between 1942 and 1944 and in the *Touvier* case,[155] the defendant was convicted of complicity in the shooting of seven Jews at Rillieux in June 1944: in both cases, the statute of limitation periods was ruled inapplicable by the French courts.

The first important decision to disregard the non-retroactivity principle, however, was made at the Nuremberg Tribunal in 1945, with regard to both crimes against peace and crimes against humanity.[156] A second significant endorsement came in 1968, when the UN General Assembly passed Resolution 2391 (XXIII),[157] adopting the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[158] Cassese recognised that the import of these exceptions, in relation specifically to crimes against humanity and crimes against peace, is that both crimes are now prohibited under customary international law.[159] However, despite the ground-breaking precedent at Nuremburg, backed by the General Assembly forty-three years later, it does not automatically follow that a leap can be made from crimes against peace and crimes against humanity to make an assumption that acts of terrorism have been universally accepted as falling within the same category.

Therefore, in relation to the attacks witnessed by the world on 11 September 2001, any charges relating to retrospective legislation could only have substance if they are laid specifically for the suspected commission of war crimes or crimes against peace. In order to 'catch' acts of international terrorism *per se*, the argument for siting this crime as well within customary international law must first be accepted. Perhaps the

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[154] *Federation National des Deportees et Internes Resistants et Patriots and Others* v *Barbie*, 78 ILR 124 (French Cour de Cassation 1985), 100 ILR 330 (French Cour de Cassation 1988).
[155] Touvier, 100 ILR 338 (France, Cour de cassation, decision of 13 April 1992) 159.
[156] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November1945-1 October 1946* (Nuremberg, 1947).
[157] GA Res 2391 (XXIII), 'Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity', 26 November 1968, UN Doc A/RES/2391 (XXIII).
[158] Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968, GA Res 2391 (XXIII), annex, 23 UN GAOR Supp (No 18) at 40 UN Doc A/7218 (1968); 754 UNTS 73 (1979) in force 11 November 1970).
[159] Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 333.

case as set out by Cassese is the most convincing.[160]

In the context of acts of international terrorism vis-à-vis customary international law, Cassesse draws attention to the views generally held by scholars and diplomats alike. Firstly, that "since States are yet to agree upon a definition of terrorism, it would be impossible to criminalize terrorism under international law";[161] and secondly, that outwith specific forms of terrorism proscribed by particular treaties, "terrorism *per se* is not a discrete crime under customary international law".[162] On this basis, therefore, any proposal that customary international law might be a feasible option for overcoming the present definitional difficulties would appear to be ruled out. However, having pointed out that this is the majority view, he goes on to argue why he disagrees with it and considers it to be incorrect.[163]

Cassese draws attention to IHL and the treaties which, whilst addressing terrorism, are couched in terms which proscribe such acts, without actually defining the crime. The thrust of this argument is that the prohibition is express, but at the same time, it is unqualified.[164] In support, he cites the phraseology of the Fourth Geneva Convention of 1949 at Article 33(1), "...all measures of intimidation or of terrorism are prohibited", which in the context of internal armed conflict is correspondingly banned under Article 4(2)(d) of the 1977 Second Additional Protocol viz: "...at any time and in any place *whatsoever*"[165] (emphasis added). Cassese also points to Article 4(d) of the Statute of the ICTR, which contains the phrase "acts of terrorism" without further amplification. Therefore, taken together, these factors are evidence of the general practice accepted as law, which is the second ingredient required for behaviour to qualify for inclusion within international custom, as described in Article 38(1)(b) of the 1945 Statute of the International Court of Justice.[166] From this, Cassese reasons that those who drafted these articles well understood the concept which he described as "a general notion (of terrorism) which underlies the treaty provisions and is also

[160]Cassese, 'International Criminal Law' in Evans (ed) (second edition) *International Law* (Oxford: Oxford University Press, 2006) 720, 745.
[161]*Ibid.*
[162]*Ibid.*
[163]*Ibid*, 746.
[164]*Ibid.*
[165]*Ibid.*
[166]Statute of the International Court of Justice (San Francisco, 26 June 1945, TS 993, in force 24 October 1945).

laid down in customary rules".[167]

Without more, this argument will not win over sceptics who adhere to the view that even if acts of terrorism are universally regarded as part of customary international law, this in no way circumvents the definitional difficulty.[168] Indeed, it is inarguable that in order for there to be a crime in law, the offence must be defined. Cassese responds directly to this criticism by pointing out not only that consensus on a generic definition of terrorism is emerging, but also that it is couched in terms which are:

> [B]oth acceptable and sufficiently clear and which renders it a crime not just as a matter of treaty obligation but also as a matter of customary law.[169]

He refers to the definition of acts of terrorism which are defined in Article 2(1) of the 1999 International Convention for the Suppression of the Financing of Terrorism to underpin his argument.[170] Interestingly, he draws attention to the construction of Article 2, which commences by embracing the intention unlawfully to administer funds for the advancement of terrorism[171] within the context of the nine preceding treaties which are itemised in the annex to the document.[172] As pointed out in Chapter 2 Part Two of the present work (see *supra*, p55), each of those treaties defines specific acts of international terrorism.[173] The thrust of the Cassese argument then follows. He highlights the fact that having established the link with these specific

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[167]Cassese, *op cit*, n 160, 746.

[168]Duffy, *op cit*, n 13, 88-89; Saul, *Defining Terrorism in International* Law (Oxford: Oxford University Press, 2006) 270.

[169]Cassese, above, n 160, 747.

[170]International Convention for the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002).

[171]*Ibid*, Article 2(1) para 1.

[172]*Ibid*, Article 2(1)(a).

[173]Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977); International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983); Convention on the Physical Protection of Nuclear Material (Vienna, 3 March, 1980, 1456 UNTS 101, in force 8 February 1987); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24 February 1988, 27 ILM 627 (1988), in force 6 August 1989); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome 10 March 1988, 1678 UNTS 304, in force 1 March 1992); International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001).

definitions, Article 2(1)(b) goes on to provide what amounts to a generic definition of the crime, viz:

> Any other act intended to cause death or other serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[174]

He contends that evidential support underpinning the above definition is to be found in some of the regional conventions aimed at suppressing terrorism, where the definition follows the same pattern. For example, he cites the following definitions which have been adopted in three recent regional conventions. Firstly, Article 1(2) of the 1998 Arab Convention for the Suppression of Terrorism:[175]

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty and security in danger, or seeking to cause damage to the environment or to public or private installations or property or occupying or seizing them, or seeking to jeopardize a national resource.

Secondly, the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism has similar wording at Article 1(2):[176]

> Any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States

Thirdly, he quotes Article 1(3) of the latest regional convention, namely the Organization of African Unity (OAU) Convention on the Prevention and Combating

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[174]International Convention for the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002), Article 2(1)(b).

[175]Arab Convention on the Suppression of Terrorism (adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, Cairo, April 1998).

[176]Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted at Ouagadougou 1 July 1999, Annex to Resolution 59/26-P).

of Terrorism 1999:[177]

(a) Any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or

(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

(iii) create general insurrection in a State;

(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) to (iii).

Cassese does acknowledge, however, that all three of these conventions carry an exemption in circumstances where peoples are engaged in struggles for national liberation and self-determination, whereby their actions shall not be considered to be a terrorist crime.[178] He is not deterred from his thesis by this observation, but rather, he turns to another important criterion against which one can judge whether a particular phenomenon amounts to a customary international law crime, *i.e.*, judicial decisions.[179] In particular, he cites the opinion of the Supreme Court of Canada in the *Suresh* case.[180]

Suresh was a refugee from Sri Lanka who applied for immigrant status in Canada. His application was rejected by the Canadian Government in 1995, with orders that he

[177]OAU Convention on the Prevention and Combating of Terrorism, 1999 (adopted at Algiers on 14 July 1999).

[178]Arab Convention on the Suppression of Terrorism (adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, Cairo, April 1998), Article 2(a); Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted at Ouagadougou 1 July 1999, Annex to Resolution 59/26-P), Article 2(a); OAU Convention on the Prevention and Combating of Terrorism, 1999 (adopted at Algiers on 14 July 1999), Article 3.

[179]For example, Report of the International Law Commission, 'Part II Ways and means for making the evidence of customary international law more readily available', *Yearbook of the International Law Commission*, 1950, 367, 368, para 28(d); Jennings and Watts, *op cit*, n 134, 28; Hillier, (second edition) *Principles of Public International Law* (London: Cavendish Publishing Ltd, 1999, 20.

[180]Suresh *v* Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3.

be deported on the basis that he was a security risk. His appeal was dismissed, but after two applications for judicial review, the case went to the Supreme Court. In coming to their unanimous decision, the Court studied the definition set out in the Convention on the Financing of Terrorism (see *supra*, p159). Cassese draws attention to the endorsement of the Court to this definition as being "sufficiently certain to be workable, fair and constitutional".[181] This was despite acknowledgement by the Court that disagreement would be bound to arise in borderline cases. As he also points out, this definition is endorsed by both the UN Secretary-General[182] and the High-level Panel on Threats, Challenges and Change.[183]

The argument which Cassese posits is persuasive, but the weakness lies in the caveat which appears in the three regional conventions with regard to exemptions for freedom fighters, despite his assertion that this should be regarded as an exception to the definition over the siting of such activities within IHL, rather than coming under the umbrella of the international criminal law. An exception it may be, but it has been shown to be fundamental in blocking agreement on the draft comprehensive convention.[184]

It might also be argued that if exceptions to the rule are to be permitted, the necessary element of *opinio juris* would be undermined. There should surely be no exceptions to a legal obligation. If those who argue, for example, that terrorist acts committed by freedom fighters should be subject to IHL, rather than the international criminal law, on what grounds could such acts be defended, since terrorism is an offence under both disciplines when attacks upon civilians are committed. The fact remains that if a number of States defend the terrorist activities of freedom fighters, the case for arguing that terrorism is a crime proscribed under customary international law has not been made out.

Saul, for one, remains unconvinced. He considers that the arguments are

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[181] *Ibid*, para 98.

[182] Report of the Secretary-General, 'In Larger Freedom Towards Development, Security and Human Rights for All', Part II, 'Freedom from Fear' B, 'Preventing catastrophic terrorism', 26 para 91.

[183] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc A/59/565, VI, Terrorism, 48-49, paras 157-164.

[184] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February-3 March 2006), UN Doc A/61/37, Supplement 37, Annex I, A, paras 3 and 4.

"premature".[185] He argues that most judicial decisions "are silent on the international legal status of terrorism"[186] and further, that national definitions of this criminality, remain too divergent to support the theory that terrorism is already a customary international crime.[187] He does acknowledge, however, that domestic definitions are "gradually drifting towards generic definition",[188] but there remains a great gulf between what some States are prepared to designate as terrorist acts under their national laws and the extent of terrorist activity which they are prepared to denounce in the international arena.[189]

Conclusion

There are a number of UN General Assembly and Security Council resolutions, which refer to terrorism in condemnatory language.[190] Such documents are a factor in the development of customary law and the forthright language in which they have been expressed since the 9/11 attacks on the US leaves little room for misinterpretation.[191] Further, it demonstrates that acts of terrorism constitute behaviour which is denounced, rather than actually being proscribed under customary law.

The *Suresh* case (see *supra*, p169), admittedly, is exceptional in comparing the terminology of the definition of terrorism contained in section 19 of Canadian Immigration Act of 1976 with the International Convention for the Suppression of the Financing of Terrorism. However, it has to be remembered that the latter only came into force in 2002 and there may well be other appeals under national legislation in various countries before long, which will make similar comparisons. Whether domestic judgments will reflect or reject that definition it is impossible to conjecture.

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[185] Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 270.
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] For example, GA Res 2625 (XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', 24 October 1970, UN Doc A/RES/2625 (XXV) Annex, 1, para 10; GA Res 51/210, 'Declaration to supplement the 1994 Declaration on measures to eliminate international terrorism', 17 December 1996, UN Doc A/RES/51/210 (1996) I, para 2; GA Res 59/46, 'Measures to eliminate international terrorism', 16 December 2004, UN Doc A/RES/59/46 (2004) Preamble, para 17. See, also SC Res 1373, 28 September 2001, UN Doc S/RES/1373 (2001) para 5; SC Res 1511 (2003) 16 October 2003, UN Doc S/RES/1511 (2003) para 18; SC 1566, 8 October 2004, UN Doc S/RES/1566 (2004) paras 1-3.
[191] *Ibid.*

Nevertheless, the element of *opinio juris* with regard to acts of international terrorism vis-à-vis customary international law may become clearer as a result.

Despite the persuasiveness of the Cassese thesis, the strength of opposition from scholars such as Duffy, Gray and Saul is more convincing. However, the International Convention for the Suppression of the Financing of Terrorism[192] highlighted by Cassese may yet provide the key which opens the door to progress with regard to the proscription of acts of international terrorism. The rapidity with which this treaty came into force within sixteen months of adoption is not without significance. It demonstrates strong support from States and hence may provide the evidence needed to establish this crime as being contrary to customary international law within the foreseeable future, as more States fall victim to events such as 9/11.

Customary international law clearly is not feasible as an option for dealing directly with those who perpetrate acts of international terrorism. Nevertheless, should recognition of its inclusion within customary international law come to pass, the level of support which triggered that event may also have other benefits. One such might be enhancement of the will to compromise over final agreement of the draft comprehensive convention on terrorism.

CONCLUSION

The encouragement of the international community continues to underpin the attempt being made to define global terrorism,[193] or to find a credible alternative which would satisfy the rigours of the international criminal law,[194] despite the chequered history of past failures over more than thirty years of endeavour. There appears to be some interdependence between options in aiming to facilitate the prosecution of alleged perpetrators and ensuring that no loopholes remain through which they may be shielded from facing trial, whether this is *via* national courts, ad hoc tribunals, or a

[192]International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/Res/54/109 (1999), in force 10 April 2002).

[193]GA Res 54/110 'Measures to Eliminate Terrorism' 2 February 2000, UN Doc A/RES/54/110 (2000) para 13.

[194]For example, the Report of the Secretary-General, 'In Larger Freedom towards Development, Security and Human Rights for All', Part II, 'Freedom from Fear' B, 'Preventing Catastrophic Terrorism', paras 87-94; UN High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', 2 December 2004, UN Doc A/59/565, VI, Terrorism, 45-49.

permanent international arena. However, it is doubtful whether all of the routes would, if successful, provide an optimum result for justice - both in terms of fair trials, commensurate levels of punishment and victim support.

Seeking to site terrorism within customary international law could be viewed as a thinly disguised attempt to by-pass the entire vexed question of definition. Whilst there is a strong case for arguing that global terrorism has overtaken the boundaries of treaty law, it remains questionable whether abandoning attempts to define the crime would actually produce a workable result. National courts would be able to deal with alleged offenders according to their domestic laws, which may vary widely from nation to nation. Since the escalation in violence witnessed during the 9/11 attacks, some States have placed severe constraints on the civil liberties of their citizens, involving an erosion of human rights for which governments have been castigated in the courts.[195]

The very advantages which customary international law offers - universal jurisdiction over alleged *hosti humani generis* - militate against uniformity regarding evidential standards and punishment, which in turn creates a lack of certainty within the law and introduces a risk that democratic principles will be degraded in the process.

Next to by-passing the definitional issue altogether, another way of overcoming the problem was 'engineered' in the statutes setting up *ad hoc* tribunals, by taking a lead from the 1977 Protocol II to the Fourth Geneva Convention of 1949 and including the crime of 'acts of terrorism' without further qualification. This advantage, however, is far outweighed by the imposition of a period of time during which the specified crimes were committed, rendering the use of *ad hoc* tribunals an ineffective and expensive instrument for dealing with global terrorism. Ad hoc tribunals do, however, have one advantage over all other options in that States are obliged to co-operate with them.

The most arduous route appears to be that which would lead to a comprehensive definition of the phenomenon, but it could also provide the most satisfactory solution

[195]For example, A (FC) and others (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) *v* Secretary of State for the Home Department (Respondent) [2004] AC (HL) 56.

to the problem. There are a number of advantages to be gained. The definition would not need amendment when new *modi operandi* emerge and it would ensure uniformity of national legislation among those States which become parties to the subsequent convention. The definition might assist in progressing other options, particularly with regard to extending the jurisdiction of the ICC to include the crime, if a consensus on the definition precedes agreement on the latter. However, as with all conventions, a comprehensive convention on international terrorism would only apply to those nations which sign up to it and ratify it. Some States may lodge reservations to it, if the provisions of the convention allow this practice, thereby introducing different standards of compliance.

The support and encouragement given by the UN Secretary-General to those steadfastly attempting to accomplish this very difficult task has ensured that their efforts have received maximum publicity, which naturally puts pressure on the delegates. However, there is the advantage that in practical terms, the drafting work is not constrained by deadlines. More time has been granted to the drafters, based on the progress which has been achieved thus far,[196] together with exhortations by the UN General Assembly to expedite completion of their work.[197] Even if the elusive definition is finally located and agreed, would it provide the best solution in the interest of justice, or would bringing the crime within the auspices of the ICC have other advantages which would not be gained by the creation of a comprehensive convention on terrorism?

The Rome Statute contains significant advantages which would be available should the jurisdiction of the Court be extended to include global terrorism. Primarily, in relation to the definitional issue, the way in which the definitions of crimes over which the ICC already has jurisdiction point the way to the most effective pattern which could be followed if acts of international terrorism are to be defined comprehensively for the purposes of the Court, *i.e.*, an overarching statement encompassing the intention, followed by a list of crimes which could be perpetrated in pursuance of that intention. Attendant advantages which the ICC route has over the

[196]GA Res 60/43, 'Measures to eliminate international terrorism', 6 January 2006, UN Doc A/RES/60/43 (2006) para 22.
[197]*Ibid*, para 21.

other options are firstly, the impartiality of the Court which guarantees a fair hearing and respect for the rights of the accused in line with developments in human rights law.[198] Secondly, uniformity in the evidential standards set out in the Rules of Procedure and Evidence would encourage co-operation between the security forces of the States Parties[199] and thirdly, its trigger mechanism,[200] which ensures not only access to the Court by the Security Council in addition to States Parties, but also - according to Schabas - by interested States *via* intervention by the Prosecutor.[201]

Overall, if placed in an order of merit with regard to effectiveness, an extension of the jurisdiction of the ICC to include acts of international terrorism appears to be the best option. It is just possible, however, that a comprehensive definition will be agreed before the first Review Conference convenes in 2009, when this proposal will be explored. Should that transpire to be the case, the agreed wording may assist the deliberations of the delegates when this agenda item comes up for consideration.

The lack of support from the US for the ICC in general and also for any proposal to recognise that terrorism comes within the ambit of customary international law remains a major disadvantage which could hamper both options. In the absence of any progress in these two areas, then the establishment of further *ad hoc* tribunals by the Security Council might remain a viable, though far from ideal, way of bringing alleged terrorists to trial. Following the route of customary international law would seem to be the least likely to produce the desired result of justice tempered by respect for human rights which has become the hallmark of international justice.

It is axiomatic that terrorists disregard the law, so their activities will not be suppressed by the existence of international laws, rules or customary norms proscribing their criminality unless their sources of support, principally financial, but also by the endorsement of those who remain sympathetic to their cause, are diminished.

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[198]Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Article 67.

[199]Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1, instrument adopted by the Assembly of States Parties of the ICC on 2 November 2000.

[200] Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002) Articles 13, 14 and 15.

[201]Schabas, *op cit*, n 100, 97.

In view of the continued worsening situation with regard to world peace and security and the blurring of lines of demarcation between war crimes and acts of global terrorism, it is very much in the interests of international justice that clarity and certainty under the law should be established in this area of the international criminal law before more alleged terrorists are incarcerated without access to a court of law and the civil liberties so prized by democratic societies are further eroded.

Whichever option might be considered to be the most favourable, one arrives at the same overall conclusion - defining the crime is a prerequisite to achieving any positive progress towards the suppression of the phenomenon. As the ferocity of the attacks intensifies, so the need for agreeing on a comprehensive, proactive definition becomes more pressing.

CHAPTER SIX

Conclusion: the Political Imperative

During the course of this study, the level of disruption caused by acts of international terrorism has increased to the point where it presents a very serious - arguably the most serious - current threat to world peace and security.[1] In the light of the past history of terrorism, this might have been foreseeable.[2] However, less predictable was the chain of events which has inexorably unfolded as a consequence of the immediate response of some States to the wider implications of the 9/11 terrorist attacks.[3] Therefore, it might not be overstating the case to conclude that the felonious activities of those terrorists who openly seek to undermine democracy and the rule of law have been assisted, rather than hindered, by the decisions of some States seeking to defend these core principles.[4] The impact of the political factor on the international legal fraternity, as mentioned in the introduction to this study (see *supra*, p2), is demonstrably pivotal in shaping the future progress of international criminal law in general and in formulating measures to combat and contain acts of international terrorism in particular.

At the present time there are few more intractable problems in international criminal law than those stemming from acts of international terrorism and few where the need

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[1]Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc A/59/565, Part I, A, para 8; SC Res (1368), 12 September 2001, UN Doc S/RES/1368 (2001) para 1; SC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001) preambular para 3; GA Res 60/43, 6 January 2006, UN Doc A/RES/60/43 (2006) preambular para 6.

[2]Wilkinson, "Report of an Investigation into the Current and Future Threat to the UK from International and Domestic Terrorism (other than that connected with the affairs of Northern Ireland), and the Contribution which Legislation can make to Measures to Counter that Threat" in Lord Lloyd of Berwick *Inquiry into Legislation Against Terrorism* Cm 3420 Vol 2 (London: HMSO, 1996) Appendix F, *International Trends*, 24-28; Tokyo Subway Station sarin nerve gas attack, 20 March 1995; the bombing of the Federal Building in Oklahoma City, 19 April 1995.

[3]For example, the invasion of Iraq on 20 March 2003; SC Res 1511 (20030, 16 October 2003, UN Doc S/RES/1511 (2003) para 18; Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 214; Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006, 224.

[4]Abi-Saab, 'The Proper Role of International Law in Combating Terrorism' 2002) 1 *Chinese J International Law*, 313, 312.; Shaw, *International Law* (fifth edition) (Cambridge: Cambridge University Press, 2003), 1087; Hoffman, *Inside Terrorism* (revised and expanded edition) (New York: Columbia University Press, 2006) 19-20.

to address them is more pressing, not least because of the detrimental effect which the crime is also having on human rights.[5] Wilkinson pointed out in 1977 that in terms of numbers of people killed or injured, other forms of criminality cause greater harm overall[6] and this continues to be the case.[7] However, the significant difference to-day is that some States use public concern over terrorism as a stalking-horse to legitimise the erosion of civil liberties in the name of national security.[8] As a consequence, terrorism and democracy are increasingly being perceived as locked in a struggle tantamount to adversaries engaged in a war.[9]

As this study has confirmed, the origins of contemporary terrorism can be traced back to the 1930s. The assassination of King Alexander I of Yugoslavia and the French Foreign Minister on 9 October 1935 was the catalyst which alerted States to the inherent potential of terrorism to disrupt peaceful relations between States. Indeed, these murders may well have evoked memories of the earlier assassination of Archduke Franz Ferdinand of Austria.[10] His murder was the last in a series of events which led to the outbreak of World War I.[11] It might be argued that the comparatively rapid conclusion of the 1937 Convention for the Prevention and Punishment of Terrorism[12] owes its completion in part to memories of that tragic period.

The Committee of Experts who drafted the document were not hamstrung by the political and diplomatic minefield which was to confront lawyers engaged in later years, *i.e.*, how to differentiate between the activities of the freedom fighter and those

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[5] *Op cit* n 1, Part VI, A, para 145. 'A More Secure World: our shared responsibility' Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN doc A/59/565, Part VI, A, para 145.

[6] Wilkinson, *Terrorism and the Liberal State* (London: The Macmillan Press Ltd, 1977) 197.

[7] Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 314; Chomsky, 'Terror and Just Response', in Sterba (ed) *Terrorism and International Justice* (Oxford: Oxford University Press, 2003) 69, 70-71.

[8] Rogers, "British the most spied-on people in western world" *Sunday Times*, 29 October 2006, 13; Coates, "Brown and Read compete to take the lead on terror", *The Times*, 13 November 2006, 28.

[9] Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 1; President George W Bush, Address to a Joint Session of Congress and the American People, 20 September 2001, available at http://www.whitehouse.gov/news/releases/2001-/09/20010920-8.html.

[10] The Archduke and his wife Sophie were shot at point blank range whilst on a formal visit to Sarajevo on 28 June 1914.

[11] World War I began on 28 July 1914 with Austria-Hungary declaring war on Serbia.

[12] 1937 Convention for the Prevention and Punishment of Terrorism, (Geneva, 16 November 1937, League of Nations Doc C.546(1).M.383(1).1937.V., never entered into force).

of the terrorist. The delegates were thus able to pinpoint the three elements which are essential features of the crime. These are set out in Article 1(2) of the 1937 Convention for the Prevention and Punishment of Terrorism,[13] (see Appendix VI). Firstly, acts of terrorism are criminal acts. Secondly, these acts are criminal when perpetrated with the intention of creating a state of terror in the minds of particular persons, or a group of persons or the general public.[14] Thirdly and arguably the most important element, such acts offend against international criminal law when directed against States in order to coerce changes in their strategic policies. The outbreak of World War II intervened between acceptance of the document and the ratification process, which meant that this first - and presently only - agreed generic definition of acts of international terrorism foundered.

The second attempt to identify a generic definition of the crime was undertaken in the 1970s. This time the deliberations were abandoned because of the political sensitivities surrounding the issue of protecting the activities of the freedom fighter whilst condemning those of the terrorist. The sectoral approach to combating terrorism which had been adopted in 1963 to suppress aerial hijacking[15] therefore continued.[16] However, the ongoing process of specific codification has been shown to be largely ineffective in deterring or suppressing the crime. Successive conventions in the wake of changes in the *mo* adopted by terrorists are an inadequate

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[13] *Ibid.*

[14] *Ibid*, Article 1(2).

[15] Convention on Offences and Certain other Acts Committed on Board Aircraft (Tokyo, 14 September 1963, 704 UNTS 219, in force 4 December 1969).

[16] Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977); International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983); Convention on the Physical Protection of Nuclear Material (Vienna, 3 March, 1980, 1456 UNTS 101, in force 8 February 1987); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24 February 1988, 27 ILM 627 (1988), in force 6 August 1989); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome 10 March 1988, 1678 UNTS 304, in force 1 March 1992); Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991, 30 ILM 721 (1991), in force 21 June 1998); International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc A/RES/52/164, in force 23 May 2001).

response. Such legislation cannot keep pace with the increasing lethality of the phenomenon, let alone stem the rising tide in terrorist attacks. Consequently, the perceived lacuna in this area of international criminal law has continued and if anything, widened by default, as global terrorism has become arguably the most serious single issue threatening world peace.

Since that time, terrorists have harnessed each new advance in communication networks in furtherance of their criminal enterprises. The more sophisticated of their number have engaged with the international community *via* videos and certain news media outlets sympathetic to their rationale.[17] The events of 9/11 are engraved on the memories of those who were caught up in the event, but survived. The millions of viewers around the world who watched the grim atrocity unfold on their television screens may also have been adversely affected by the images they witnessed second-hand. Consequently, terrorism now has a new dimension, for those who commit such crimes can potentially create a sense of terror in people far removed from the site of the crime.

The reasons for this escalation in threat became apparent in the study of the changes in terrorist crime patterns charted in Chapter 3 of the research. A number of factors have contributed to this, quite apart from the political and diplomatic dimensions. The first launch of a television satellite by the US in 1968 began a revolution in the way news could be communicated around the globe[18] and terrorists were not slow to recognise the possibilities which this new technological advance offered. The hijackers who carried out the *Dawson's Field Incident* in 1970, for example, made full use of the enhanced capabilities of the media to disseminate news and pictures instantaneously around the world. By this means, they could assure the world that their hostages were alive and well, whilst increasing the pressure being exerted on the negotiators.

This bears out the opinion of many commentators who considered that terrorists were

[17]For example, the Arabic language news channel Al-Jazeera, based in Qatar.
[18]Hoffman, *Inside Terrorism* (revised and expanded edition) (New York: Columbia University Press, 2006) 178.

more interested in the publicity value of their attacks,[19] rather than the killing and wounding of as many people as possible. This view, however, no longer holds sway. Since 9/11, there have been mass casualties as a result of single attacks. For example, the Bali bombing on 12 October 2002 resulted in two hundred and two fatalities with injuries inflicted on an additional three hundred people. The Madrid train massacre on 11 March 2004 claimed the lives of one hundred and ninety-two people and injured more than one thousand, four hundred others.

The sharp escalation in attacks by suicide bombers noted in Chapter 3 (see *supra*, p90) has enhanced the ability of terrorist organisations to create a sense of terror in the minds of the general public. This type of terrorism is currently by far the most effective method of terrorising members of the public, because of the resultant chaos and disruption which such attacks wreak on the normal state of society. The apparently random selection of targets, which can be changed on a whim, underscores the wildcat nature of the crime[20] and exacerbates the inculcation of fear in the citizenry.

A further factor which impinges on the changing crime patterns has been the advances in military hardware.[21] Terrorists have become adroit at using or deflecting some of this weaponry,[22] in addition to devising new ways of executing their attacks. The IRA led the way, when a mercury switch bomb was used in the assassination of Airey Neave MP, on 30 March 1979. According to Burke, Ramzi Yousef plotted to incorporate a poison gas in the bomb which exploded under the World Trade Centre in 1993.[23] Investigations by the Spanish security services into the Madrid bombings on 11 March 2004 revealed that mobile phone technology was the means used to trigger the simultaneous explosions (see, *supra*, p91).

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[19]Laqueur, *Terrorism* (London: Weidenfeld and Nicolson, 1977) 231; Jenkins, 'International Terrorism: a New Mode of Conflict', in Carlton and Schaerf (eds) *International Terrorism and World Security* (London: Croom Helm, 1975) 15; Hoffman, *op cit*, n 18, 269.

[20]Reid, "The 28,000 Victims of Terrorism: new figures show dramatic increase in global attacks" *The Times* 7 July 2005, 1.

[21]Cruise missiles were launched by the US to destroy the al-Shifa chemical plant in Khartoum, Sudan on 20 August 1998 in retaliation for the bombings of their embassies in Kenya and Tanzania.

[22]Rocket propelled grenades were used by terrorists to destroy a US Black Hawk military helicopter in Iraq on 25 October 2003 and a US Chinook helicopter Afghanistan on 28 June, 2005.

[23]Burke, *Al-Qaeda Casting a Shadow of Terror* (London: I B Tauris, 2003) 93.

Driving all of these attacks and the different methods used to execute them is the prime motivation of the terrorist, *i.e.*, to coerce the relevant authorities to submit to their demands. The aim may be to change policies, whether domestic, regional or international, or to bring about fundamental changes in the way in which the victim State is administered.[24] The prognostications of leading authorities in the field that terrorists are actively seeking to acquire WMDs and CBRN material and would not hesitate to use them[25] is therefore entirely plausible.

Members of the 1996 Ad Hoc Committee considering measures to eliminate international terrorism needed no convincing that the threat of a nuclear terrorist attack would have grave consequences around the world.[26] This may have concentrated the minds of delegates and diplomats alike when drafting the convention aimed at suppressing the threat from nuclear terrorism.[27] Equally, use of the phrase 'acts of nuclear terrorism' does not appear in the text, but the offence delineated in Article 2 contains the essential intentional elements of the phenomenon. The sleight of hand of the draftsmen is to be applauded, because they were able to avoid getting enmeshed in circular discussions of the kind which continue to prevent completion of the draft comprehensive convention on terrorism.

The intention behind all of these attacks and the different methods used to carry them out has become much more ambitious since the Al Qaeda organisation emerged in the late 1980s.[28] This particular organisation trumpets its desire to undermine democratic

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[24]Hoffinan, *op cit*, n 18, 89.

[25]See, for example, Laqueur, 'Postmodern Terrorism' (1996) 75 *Foreign Affairs* 34; Burke, *op cit*, n 23, 187; Reeve, *The New Jackals Ramzi Yousef, Osama bin Laden and the Future of Terrorism* (London: Andre Deutsch, 1999) 216-7; Gunaratna, *Inside Al Qaeda Global Network of Terror* (London: Hurst & Co, 2002) 48.

[26]Report of the Ad Hoc Committee established by GA Res 51/210, 'Measures to Eliminate International Terrorism' 17 December 1996, Second session (17-27 February 1998), UN Doc A/53//37, Supplement 37, Chapter III Summary of the general debate, para 17.

[27]International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force) Preamble, para 10.

[28]Gunaratna, *Inside Al Qaeda Global Network of Terror* (London: Hurst & Company, 2002) 55; Harris, *Cases and Materials on International Law* (sixth edition) (London: Sweet & Maxwell, 2004) 943; Blair, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001* Office of the Prime Minister, 4 October 2001 (London: The Stationery Office, 2001).

institutions and impose theocracy in its place.[29] Other terrorists operating in the international arena adhere to the enduring campaign in the cause of the Palestinian people.[30] It might therefore be argued that on occasion, attacks in the cause of a regional campaign may be confused with, or aided by, attacks in the cause of a global 'crusade' and *vice versa.*

The activities of the so-called 'freedom fighter' are likely to feature prominently in, for example, terrorist attacks in the Middle East. However, such criminality should not be part of a defence where the aim of the terrorists is to cast aside styles of State governance of which they disapprove. It is therefore important that the global aspirations of the international terrorist are well defined, in order to retain a clear distinction between the two. The research carried out in this study suggests that a resolution of this impasse can only be achieved *via* diplomatic channels, accompanied by a greater degree of political good will than is evident at the present time. One can only conclude that it may take a further escalation in the level of terrorist violence to bring this about.

Predicting the future trend in international terrorism is an impossible task, since *un*predictability is one of the principal stocks in trade of the terrorist, whether acting alone, or at the behest of others who head terrorist organisations. It would be unwise to dismiss the level of risk from either lone terrorists or their more prominent peers, whose profiles were studied as part of this research (see *supra*, Chapter 3, pp94-100). Clearly, the abilities and capabilities of contemporary terrorists have outstripped the type of terrorist offending which is addressed in the present, narrowly defined crimes contained in the existing specific conventions. Therefore more needs to be done to redress the balance.

It is in the interests of all States to unite in efforts to compromise in order to agree on a generic definition of terrorism. The approach needs to be broad, rather than specific, in order to avoid being overtaken by developments in terrorist activities. At

[29]bin Laden, *A Declaration of War by Osama bin Laden, together with leaders of the World Islamic Front for the Jihad against the Jews and the Crusaders* (Al-Jabhah Al-Islamiyyah Al-Alamiyyah Li-Qital Al-Yahud Wal-Salibiyyin), Afghanistan 23 February 1998; see also, above, n 28, 46; Robertson, *Crimes Against Humanity the Struggle for Global Justice* (second edition) (London: Penguin Books, 2002) 476.

[30]Hizbollah launched a rocket campaign against Israel in July and August 2006; SC Res 1701 (2006) 11 August 2006, UN Doc S/RES/1701 calling for a cessation of hostilities on both sides, para 1.

the same time, it will be crucial to capture the essential, fundamental elements of the crimes which the research has shown are common to the majority of crime patterns studied (see *supra*, pp85-93). This approach should ensure that the definition will achieve the aim of encompassing acts of international terrorism comprehensively.

The latest endorsement by the UN General Assembly of the need for a comprehensive convention on terrorism was issued as recently as January 2006.[31] This is surely an indication that efforts to agree on the outstanding wording continue to have the backing of the UN and will not yet be discontinued through lack of support from that quarter. On the other hand, the risk that abandonment will be the final outcome of the work of the Committee remains and other options may have to be considered. Nevertheless, it is difficult to see how any other course of action open to the international community would have the potential to by-pass the definitional difficulty, enabling positive progress to be made. The fact remains that international terrorism as a jurisdictional crime has to be defined before any prosecutions could be mounted under the auspices of an international tribunal.

In stark contrast to the above difficulty, establishing an international criminal court in the face of stiff opposition from the US[32] was achieved in the remarkably short space of four years from adoption of the Rome Statute.[33] As discussed in Chapter 4, there is provision in the Rome Statue for extensions to be made to its core jurisdiction,[34] but as far as acts of international terrorism are concerned, the same difficulties over definition are bound to arise. Past difficulties should not be permitted to inhibit the discussion regarding an extension of the jurisdiction to include acts of international terrorism, not least because the ICC would offer other benefits. For example, the process of surrender to the Court of persons subject to international arrest warrants[35] might prove to be a more effective way of bringing suspects to justice than is the case

[31]GA Res 60/43, 6 January 2006, UN Doc A/RES/60/43 (2006), paras 20-21.
[32]Ailslieger, 'Why the United States should be Wary of the International Criminal Court: Concerns over Sovereignty and Constitutional Guarantees' (1999) 39 *Washburn Law J* 80; Casey, 'The Case Against the International Criminal Court' (2002) 25 *Fordham International Law J* 840; Goldsmith, 'The Self-defeating International Criminal Court' (2003) 70 *University of Chicago Law Rev* 89.
[33]Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2001).
[34]*Ibid*, Article 121.
[35]*Ibid*, Article 89.

with extradition procedures. Surrendering a suspect to a neutral Court, based in The Hague, is perhaps less likely to be called into question by whichever State has initial custody of the wanted person.

The various checks and balances set in place concerning the work of the Prosecutor[36] should provide a further testament to the impartiality and fairness in the way the Court will be conducted. However, even supposing that the will to extend the jurisdiction of the Court is forthcoming, a definition of the core crime would still have to be identified. It is to be hoped that trust in the Court will develop once its provisions have been tested in the course of prosecutions undertaken within its current active jurisdictional areas. This may well be measured in years, but in the longer term envisaging a protracted delay is surely infinitely preferable to attempting to 'shoehorn' acts of international terrorism into any of the existing core crimes over which the Court presently has jurisdiction.

The option of establishing ad hoc tribunals should not be summarily dismissed because of the arrival on the scene of the permanent Court. Following the terrorist bombing which killed the former Lebanese Prime Minister on 14 February 2005, the Security Council unanimously adopted resolution 1664[37] authorising the establishment of a tribunal of international character to try those responsible for his death and those of twenty-two other persons.[38] This tends to suggest that ad hoc tribunals along the lines of the Special Court for Sierra Leone, established to prosecute persons for serious violations of international humanitarian law and Sierra Leonean law,[39] remain among the options available to the Security Council with respect to bringing terrorists to justice. However, if ad hoc tribunals follow the pattern which was constructed for the establishment of the ICTY[40] and the ICTR,[41] reliance may again be placed on

[36] *Ibid*, Article 18 (Preliminary rulings regarding admissibility), Article 19 (Challenges to the jurisdiction of the Court or the admissibility of a case), Article 54 (Duties and powers of the Prosecutor with respect to investigations) and Article 57 (Functions and powers of the Pre-Trial Chamber) respectively; Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) 100-105.
[37] SC Res 1664 ((2006), 29 March 2006, UN Doc S/RES/1664 (2006).
[38] *Ibid*, para 1.
[39] Statute of the Special Court for Sierra Leone (Freetown, Sierra Leone, 16 January 2002, 2178 UNTS 138, in force 12 April 2002) Article 1.
[40] SC Res 827 (1993), 25 May 1993, UN Doc S/RES/827 (1993).
[41] SC Res 955 (1994), 8 November 1994, UN Doc S/RES/955 (1994).

Article 4(d) of Protocol II to the 1949 Geneva Conventions[42] in order to circumvent the definitional difficulty. The cost implications to UN members when this option is harnessed are onerous. Nevertheless, this course might be deemed more practical than embarking on another round of difficult diplomacy with a view to extending the jurisdiction of the ICC to include the crime of global terrorism.

If all these options fail to engage sufficient support from the international community, the only other possible way forward concerns the controversial utilisation of customary international law as a vehicle for the prosecution of alleged terrorists. In the aftermath of the 9/11 attacks, terrorism vis-à-vis the use of force in self-defence sparked a re-examination of the role of custom in this area. Whilst some lawyers consider it to be a viable option,[43] others remain unconvinced.[44] The jurisdictional principle of universality which is triggered by customary international law is, according to Harris, generally accepted as the basis of an auxiliary competence,[45] a view shared by Dixon and McCorquodale.[46] Piracy is acknowledged as a customary international law crime subject to universal jurisdiction[47] and it is interesting that some scholars do argue that terrorism also falls within that category, with Jennings and Watts pointing to the *Achille Lauro Incident* as being the point at which terrorism and piracy converge.[48]

The latest argument put forward by Cassesse, as discussed in Chapter 5 (pp166-170), is persuasive, to the effect that there are some circumstances wherein acts of

[42]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977, 1125 UNTS 609, in force 7 December 1978); Saul, *op cit*, n 3, 300.

[43]Paust, 'Addendum: Prosecution of Mr bin Laden *et al* for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No 77, 21 September 2001, at www.asil.org/insights-/insigh77.htm, para 3; Cassesse, 'Terrorism as an International Crime', in Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 218.

[44]Duffy, *op cit*, n 9, 188; Jennings and Watts, *Oppenheim's International Law* (ninth edition) Vol 1 (London: Longman, 1996) 421.

[45]Harris, *Cases and Materials on International Law* (sixth edition) (London: Sweet & Maxwell, 2004) 266.

[46]Dixon and McCorquodale, *Cases & Materials on International Law* (fourth edition) (Oxford: Oxford University Press, 2003) 288

[47]Above, n 45; Dixon and McCorquodale, above n 46; Shaw, *International Law* (fifth edition) (Cambridge: Cambridge University Press, 2003), 117.

[48]Jennings & Watts, *Oppenheim's International Law* (ninth edition) Vol 1, (London: Longman, 1996) 746; Cassesse, *Terrorism, Politics and Law: the Achille Lauro Affair* (Princeton: Princeton University Press, 1989) 68; House of Commons Transport Committee, Piracy Eighth Report of Session 2005-06, HC 1026 (London: The Stationery Office, 2006) 37; Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 131.

terrorism count as a customary international law crime.[49] He maintains that broad agreement on a general definition of terrorism has evolved, which renders it a crime also under customary international law.[50] This broad agreement is evidenced by a statement which first appeared in UN General Assembly resolution 49/60,[51] in which terrorism is defined as a criminal act, the primary element of which is identified as:

> ...provoking a state of terror in the general public, a group of persons or particular persons for political purposes";[52]

This phraseology has been repeated in subsequent General Assembly Resolutions.[53] Gray, however, is dismissive of what she terms as "the fiction of instant custom".[54] Nevertheless, both Gray and Cassese agree that an inability to deal with terrorism by some States thrusts the problem into the international arena, because it is then a matter of concern and a threat to the peace of the entire international community.[55]

In the short term, however, unless there is codified law which adequately addresses acts of international terrorism on the scale of a 9/11 onslaught, legitimate use of force in self-defence remains restricted to the provisions contained in Chapter VII of the UN Charter.[56]

With regard to the draft comprehensive convention on terrorism, it is significant that the Chairman of the Ad Hoc Committee noted a willingness by the delegates to persevere in the search to reach a consensus solution.[57] With relevance to the actual offence, a broad definition would have to include those essential features which mark out acts of terrorism as being a discrete crime. On this basis, the *mens rea* will be made up of two elements, the primary one being the objective intention to coerce a government or an international organization to do or to abstain from doing any act.

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[49]Cassese, "International Criminal Law" in Evans (ed) (second edition) *International Law* (Oxford: Oxford University Press, 2003) 746.
[50]*Ibid.*
[51] GA Res 49/60, 9 December 1994, UN Doc A/RES/49/60 (1994).
[52]*Ibid*, I, para 3.
[53]GA Res 50/53, 11 December 1995, UN Doc A/RES/50/53 (1995); GA Res 51/210, 17 December 1996, UN Doc A/RES/51/210 (1996); GA Res 55/158, 30 January 2001 UN Doc A/RES/55/158 (2001).
[54]Gray, *International Law and the Use of Force* (second edition) (Oxford: Oxford University Press, 2004) 164.
[55]*Ibid*, 186; above, n 49, 749.
[56]Charter of the United Nations (San Francisco, 26 June 1945, TS 993, entered into force 24 October 1945) Chapter VII, Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.
[57]Report of the Ad Hoc Committee established by GA Res 51/210, Tenth Session (27 February-3 March 2006), annex I, A, para 2.

The secondary intention is to achieve the first, by terrorising a population, the inference being that chaos, anarchy, or public unrest will prevail, which may have a similar effect in bringing about the disintegration of the *status quo* in a given society. This has been termed a specific intent,[58] which is central to recognition of the crime.

The *actus reus* may take a variety of forms of recognised criminality. For example, the list of crimes would include, *inter alia*, murder, hostage-taking, torture in any form, grievous bodily harm or serious/catastrophic property damage which impacts upon the public, or particular groups of persons. If the definition is to be comprehensive, then the list of possible ways in which this may be achieved will be inexhaustible. The motivation, however, contradicts that which drives other criminality because the terrorist is not motivated by private gain, but by ideological, religious or political imperatives.

It is therefore submitted that the original 1937 definition:

> "[A]cts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.[59]

as modified by the interpretation of the phenomenon which the UN General Assembly approved in 1994, viz:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[60]

forms the basis of the definition. This has been enhanced during the passage of various specific conventions along the way,[61] to include wording such as:

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[58]Casesse, *op cit*, n 49, 750.

[59]Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937, C.546(1) M.383(1).1937.V, never entered into force) Article 1(2).

[60]GA Res 49/60, 9 December 1994, UN Doc A/RES/49/60 (1994) I, para 3.

[61]See, for example, International Convention Against the Taking of Hostages (New York, 17 December 1979, 1316 UNTS 205, in force 3 June 1983) Article 1(1); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992) Article 3(2)I; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999, UN Doc A/RES/54/109, in force 10 April 2002) Article 2(1)(b); International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 14 September 2005, UN Doc A/RES/59/290 (2005), not yet in force) Article 2(1)(b)(iii), Article 2(4)I and Article 6.

> Terrorism means any acts intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public, with intent to intimidate a population, or to coerce or compel a government or an international organization to do or to abstain from doing any act in order to destroy or fundamentally change the way in which a given society orders its affairs.
>
> Any person also commits an offence if that person participates as an accomplice in the commission of the above offence; organizes or directs others to commit the above offence; aids, abets or conspires in the commission of the above offence.

However, agreeing on such a text does little to resolve the crux of the problem which has been exposed, namely how to divorce the activities of the 'freedom fighter' from those of the terrorist. It can be seen that there is at least one motivation which is common to the 'freedom fighter' and the contemporary terrorist, *i.e.*, the desire to dismantle an existing mode of government against the will of its citizens. The difference lies in the scope and the methods: the former is domestic in the case of the 'freedom fighter' and regional or global in the case of the terrorist. With regard to the latter, utilising the methods of the terrorist are outwith the rule of law, both according to IHL[62]and in the opinion of the international community.[63] It is one thing to get States to agree on this broad principle, quite another to get them to do so in sufficient numbers to recognise it within international law because "terrorism works".[64] States do, on occasion, succumb to the demands of terrorists.[65]

Prior to the 1990s, terrorist tactics were harnessed by 'freedom fighters' in order to end alien domination, an aim which befits their chosen designation. However, the 9/11 attacks, together with subsequent onslaughts on a global scale, bear no relation to those former aims. Rather, the perpetrators seek by their actions, fundamentally to change the world order and eliminate the freedom of nations to choose how they wish

[62]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977, 1125 UNTS 609, in force 7 December 1978) Article 4(2)(d).

[63]GA Res 49/60, 9 December 1994, UN Doc A/RES/49/60 (1994) I, para 3.

[64]Dershowitz, *Why Terrorism Works: Understanding the Threat Responding to the Challenge* (London: Yale University Press, 2002) 31; Hoffman, *op cit*, n 18, 61-62.

[65]For example, the capitulation of the Philippine Government to the demands of an Islamic militant group to withdraw their troops from Iraq in order to obtain the release of one of their nationals, Mr De la Cruz, whom the terrorists had taken hostage on 9 July 2004.

to be governed within their own borders. Should their behaviour be judged according to the international criminal law? If so, their alleged crimes will be tried in accordance with the comprehensive convention on terrorism (once accepted and ratified by the international community). Alternatively, would IHL be the more appropriate forum? In that case 'freedom fighters' using terrorist tactics would be exempt from the terms of the draft comprehensive convention as presently drawn up. This is a political matter, not least because history demonstrates that terrorism is effective in many instances and some States appear to be reluctant to relinquish the potential to use such tactics in extreme circumstances.

In terms of world peace and security, this impasse is a matter of serious concern. No-one is more aware of this than the UN Secretary-General, as evidenced by his initiative in devising a new approach to the terrorist problem, should the draft comprehensive convention on terrorism fail to be agreed. His global counter-terrorism strategy[66] outlines other ways to suppress the crime, by means of dissuasion, denial (of the means to carry out attacks), deterrence, development (of the capacity of States to defeat the phenomenon) and defence (of human rights).[67] The document is couched in terms with which States will be able to concur. Nevertheless, it does not materially assist in resolving the disagreement which prevents the crucial draft comprehensive convention from being finalised. This critical gap in international law, coupled with the tendency by some targeted States to place their national interests above their obligations to abide by that law, is moving global diplomacy into uncharted waters.

In the long term, achieving a consensus on the text of the draft is a matter for Heads of States and diplomats, rather than lawyers because such diplomatically sensitive issues can only by dealt with at the highest levels. There is a political imperative for action to be taken by the UN members in reminding all States of their international obligations under the UN Charter. Equally importantly, UN members have to address deficiencies in the international law which propel States towards uni- or multi-lateral action to protect their domestic interests in the face of terrorist attacks.

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[66] Report of the Secretary-General, 'Uniting Against Terrorism Recommendations for a Global Counter-terrorism Strategy, 27 April 2006, UN Doc A/60/825.

[67] *Ibid*, I Introduction, para 1.

Heads of States might also be better advised to turn their attention towards collaboration and compromise in finalising the draft comprehensive convention on terrorism, rather than 'tinkering' with perceived inadequacies in the UN Charter.[68]

The problem can therefore only be resolved when the threat to world peace is so great that world leaders can no longer ignore the political imperative to acknowledge the need for compromise in order to retain domestic and global stability in the interests of all.

[68]Charter of the United Nations (San Francisco, 26 June 1945, TS 993, entered into force 24 October 1946) Chapter VII, Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.

APPENDIX I

TABLE OF RELEVANT
UNITED KINGDOM STATUTES

YEAR	CITATION	TITLE
1534	26 Hen VIII c13	An act whereby diverse offences be made high treason and taking away all Sanctuaries for all manner of high treasons
1535-6	27 Hen VIII c4	An Act concerning Pirates and Robbers of the Sea
1536	28 Hen VIII c15	An Act for the Punishment of Pirates and Robbers of the Sea
1692	4 Gul & Mar c25	An Act for continuing the Acts for prohibiting all Trade and Commerce with France and for the encouragement of Privateers
1698	11 Gul III c7	An Act for the more Effectual Suppression of Piracy [aiding and abetting treated as principals (s9); private commissions not recognised and perpetrators treated as principals (s10)]
1997	45 Er II c28	Merchant Shipping Act
1998	46 Er II c42	Human Rights Act
2000	48 Er II c11	Terrorism Act

APPENDIX II

HARVARD DRAFT CONVENTION ON PIRACY*

Article 1

1. The term "jurisdiction" means the jurisdiction of a state under internal law as distinguished from municipal law.
2. The term "territorial jurisdiction" means the jurisdiction of a State under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a State over its ships outside its territory.
3. The term "territorial sea" means that part of the sea which is included in the territorial waters of a State.
4. The term "high sea" means that part of the sea which is not included in the territorial waters of any state.
5. The term "ship" means any water craft or air craft of whatever size.

Article 2

Every State has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

Article 3

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without *bona* fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a sip with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of international facilitation of an act described in paragraph 2 or paragraph 2 of this Article.

Article 4

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 2 of Article 3, or to the purpose of committing any similar act within the territory of a State by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the State to which the ship belongs.
2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a State by descent from the high sea, as long as it continues under the same control.

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*"Harvard Draft Research, Part IV - Piracy" Joyner, *Aerial Hijacking as an International Crime* (New York: Oceana Publications Inc, 1974) Annex B.

Article 5

A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the State from which it was derived.

Article 6

In a place not within the territorial jurisdiction of another State, a State may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

Article 7

1. In a place within the territorial jurisdiction of another State, a State may not pursue or seize a pirate ship or a ship taken by piracy and possessed by Pirates; except that if pursuit of such a ship is commenced by a State within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any State, the pursuit may be continued into or over the territorial sea of another State and seizure may be made there, unless prohibited by the other State.
2. If a seizure is made within the territorial jurisdiction of another State in accordance with the provisions of paragraph 1 of this article, the State making the seizure shall give prompt notice to the other State, and shall tender possession of the ship and other things seized and the custody of persons seized.
3. If the tender provided for in paragraph 2 of this article is not accepted, the State making the seizure may proceed as if the seizure had been made on the high sea.

Article 8

If a pursuit is continued or a seizure is made within the territorial jurisdiction of another State in accordance with the provisions of paragraph 1 of article 7, the State continuing the pursuit or making the seizure is liable to the other State for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

Article 9

If a seizure because of piracy is made by a State in violation of the jurisdiction of another State, the State making the seizure shall, upon the demand of the other State, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 10

If a ship seized on suspicion of piracy outside the territorial jurisdiction of the State making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the State making the seizure shall be liable to the State to which the ship belongs for any damage caused by the seizure.

Article 11

1. In a place not within the territorial jurisdiction of any State, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy ad possessed by pirates, it may be stopped and questioned to ascertain its character.
2. If the ship is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the State making the interference shall be liable to the State to which the ship belongs for any damage caused by the interference.

Article 12

A seizure because of piracy may be made only on behalf of a State, and only by a person who has been authorized to act on its behalf.

Article 13

1. A State, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.
2. The law of the State must conform to the following principles:
   (a) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.
   (b) Claimants of any interest in the property are entitled a reasonable opportunity to prove their claims.
   (c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefore, subject to a fair charge for salvage and expenses of administration.

Article 14

1. A State which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the State which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
3. The law of the State must, however assure protection to accused aliens as follows:
   (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
   (b) The accused person must be given humane treatment during his confinement pending trial.
   (c) No cruel and unusual punishment may be inflicted.
   (d) No discrimination may be made against the nationals of any State.
4. A State may intercede diplomatically to assure this protection to one of its nationals who is accused in another State.

Article 15

A State may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another State.

Article 16

The provisions of this convention do not diminish a State's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

Article 17

1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to such treaties inter se.
2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement inter se.

Article 18

The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in cooperation.

Article 19

1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any application agreements in force between the parties to the dispute providing for the settlement of international disputes.

2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute, be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the protocol of December 16 1920, relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of December 16, 1920, to an arbitral tribunal constituted in accordance with the provisions of the Convention for the Pacific Settlement of International disputes, signed at The Hague, October 18, 1907.

APPENDIX III

DRAFT CONVENTION FOR THE ESTABLISHMENT OF AN INTERNATIONAL JUDICIAL BODY SUITABLE FOR THE PREVENTION AND PUNISHMENT OF VIOLATIONS OF THE GENEVA CONVENTION*

Article 1

In order to ensure the implementation of the Geneva Convention of 22 August 1864, and of its additional articles, there will be established, in the event of a war between two or more Contracting Powers, a tribunal to which may be addressed complaints concerning breaches of the aforementioned Convention.

Article 2

The tribunal will be set up as follows:

As soon as war has been declared, the President of the Swiss Confederation will choose by lot three Powers which are signatory to the convention, excluding belligerents.

The governments of these three Powers, as well as those of the belligerent States, will each be invited to nominate an adjudicator. The five adjudicators chosen will meet, as promptly as possible, at a place which will be notified to them, on a provisional basis, by the President of the Swiss Confederation.

If the conflict involves more than two sovereign States, those which are on the same side will consult on the selection of a single adjudicator.

If, during the war, a neutral State which has provided one of the adjudicators itself becomes a belligerent, a new selection by lot will be held to replace the adjudicator nominated by that State.

Article 3

The adjudicators will decide on the definitive choice of the place where they will sit. The details of the organization of the tribunal, and the procedures to be followed, will be left to their discretion.

They will also decide when it is possible to end their activities.

Article 4

The tribunal will only deal with breaches which are the subject of complaints addressed to it by interested governments.

The latter must defer to the tribunal all those cases which they wish to pursue and in which foreigners are involved.

The tribunal will submit all facts to an adversarial inquiry, which must receive every facility from governments signatory to the Convention and in particular from the belligerents.

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*Translated from the French original by the International Committee of the Red Cross.

Article 5

The tribunal will present its decision, for each individual case, as a verdict of guilty or not guilty.

If guilt s established, the tribunal will pronounce a penalty, in accordance with provisions of international law. The latter shall be the subject of a treaty which is to be complementary to the present Convention.

Article 6

The tribunal will notify its judgments to interested governments. The latter shall impose on those found guilty the penalties which have been pronounced against them.

Article 7

Where a complaint is accompanied by a request for damages and interest, the tribunal will have the competence to rule on this claim and to fix the amount of the compensation.

The government of the offender will be responsible for implementing the decision.

Article 8

The tribunal's judgments will be communicated to all governments which are signatory to the convention, which will, where necessary, translate them into their national language and publish them as soon as possible, in their official gazette.

The same will apply to any decisions which the adjudicators consider should be publicized in the interests of their work, and in particular those relating to the penalty and payment of damages and interest.

Article 9

The costs of the tribunal, including the adjudicators' salaries and travelling expenses, will be provided in equal parts by the belligerent States which must, as and when required, provide the tribunal with the necessary funds.

The financial accounts of the tribunal will be covered in a final report which will receive the same publicity as the tribunal's decisions.

Article 10

The tribunal's activities will be amalgamated with those of the Swiss Confederation at Bern.

APPENDIX IV

1937 CONVENTION FOR THE PREVENTION AND PUNISHMENT OF TERRORISM

The Plenipotentiaries, having communicated their full powers, which were found in good and due form, have agreed upon the following provisions:

Article 1

1. The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.

2. In the present Convention the expression "acts of terro4ism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

Article 2

Each of the High Contracting Parties shall, if this has not already been done, make the following acts committed on his own territory criminal offences if they are directed against another High Contracting Party and if they constitute acts of terrorism within the meaning of Article I:

(1) any wilful act causing death or grievous bodily harm or loss of liberty to:

(a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary designated successors;

(b) The wives or husbands of the above-mentioned

(c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject
to the authority of another High Contracting Party.

(3) Any wilful ac calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

Article 3

Each of the High Contracting Parties shall make the following acts criminal offences when they are committed on his own territory with a view to an act of terrorism falling within Article 2 and directed against another High Contracting Party, whatever the country in which the act of terrorism is to be carried out:

(1) Conspiracy to commit any such act;

(2) Any incitement to any such act, if successful;

(3) Direct public incitement to any act mentioned under heads (1); (2) or (3) of Article 2, whether the incitement be successful or not;

(4) Wilful participation in any such act;

(5) Assistance, knowingly given, towards the commission of any such act.

Article 4

Each of the offences mentioned in Article 3 shall be treated by the law as a distinct offence in all cases where this is necessary in order to prevent an offender escaping punishment.

Article 5

Subject to any special provisions of national law for the protection of the persons mentioned under head (1) of Article 2, or of the property mentioned under head (2) of Article 2, each High Contracting Party shall provide the same punishment for the acts set out in Articles 2 and 3, whether they be directed against that or another High Contracting Party.

Article 6

1 In countries where the principle of the international recognition of previous convictions is accepted, foreign convictrions for any of the offences mentioned in Articles 2 and 3 will, within the conditions prescribed by domestic law, be taken into account for he pr=purpose of establishing habitual criminality..

2 Such convictions will, further, in the case of High Contracting Parties whose law recognises foreign convictions, be taken into account, with or without special proceedings for the purpose of imposing, in the manner provided by that law, incapacities, disqualifications or interdictions whether in the sphere of public or of private law.

Article 7

In so far as *parties civiles* are admitted under the domestic law, foreign *parties civiles*, including, in proper cases, a |high Contracting Party shall be entitled to all rights allowed to nations by the law of the country in which the case is tried.

Article 8

1 Without prejudice to the provisions of paragraph 4 below, the offences set out in Articles 2 and 3 shall be deemed to be included as extradition crimes in any extradition treaty which has been, or may hereafter be, concluded between any of the High Contracting Parties.

2 The High Contracting Parties who do not make extradition conditional on the existence of a treaty shall henceforward, without prejudice to the provisions of paragraph 4 below and subject to reciprocity, recognise the offences set out in Articles 2 and 3 as extradition crimes as between themselves.

3 For he purposes of the present article, any offence specified in Articles 2 and 3, if committed in the territory of the high Contracting Party against whom it is directed, shall also be deemed to be an extradition crime.

4 The obligation to grant extradition under the present article shall be subject to any conditions and limitations recognised by the law or the practice of the country to which application is made.

Article 9

1 When the principle of the extradition of nationals is not recognised by a High Contracting Party, nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned in Articles 2 or 3 shall be prosecuted and punished in the same manner as if the offence had been committed on the=at territory, even in a case where the offender has acquired his nationality after the commission of the offence

2 The provisions of the present article shall not apply if, in similar circumstances, the extradition of a foreigner cannot be granted.

Article 10

Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in Articles 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that high Contracting Party, if the following conditions are fulfilled – namely, that:

(a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself;

(b) The law of the country of refuge recognises he jurisdiction of its own courts in respect of offences committed abroad by foreigners;

(c) The foreigner is a national of a country which recognises the jurisdiction of its own courts in respect of offences committed abroad by foreigners.

Article 11

1 the provisions of Articles 9 and 10 shall also apply to offences referred to in Articles 2 and 3 which have been committed in the territory of the High Contracting Party against whom they were directed.

2 2As regard the application of Articles 9 and 10, the high Contracting Parties do not undertake to pass a sentence exceeding the maximum sentence provided by the law of the country where the offence was committed.

Article 12

Each High Contracting Party shall take on his own territory and within the limits of his own law an administrative organisation the measures which he considers appropriate for the effective prevention of all activities contrary to the purpose of the present Convention.

Article 13

1 Without prejudice to the provisions of head (5) of Article 2, the carrying possession and distribution of fire-arms, other than smooth-bore sporting-guns, and of ammunition shall be subjected to regulation. It shall be a punishable offence to transfer, sell or distribute such arms or munitions to any person who does not hold such licence or make such declaration as my be required by domestic legislation concerning the possession and carrying of such articles; this shall apply also to the transfer, sale or distribution of explosives.

2 Manufacturers of fire-arms, other than smooth-bore sporting guns, shall be required to mark each arm with a serial number or other distinctive mark permitting it to be identified; both manufactures and retailers shall be obliged to keep a register of the names and addresses of purchasers.

Article 14

1 The following acts shall be punishable:

(a) Any fraudulent manufacture or alteration of passports or other equivalent documents;

(b) Bringing into the country, obtaining or being in possession of such forged or falsified documents knowing them to be forged or falsified;

(c) Obtaining such documents by means of false declarations or documents;

(d) Wilfully using any such documents which are forged or falsified or were made out for a person other than he bearer.

2 the wilful issue of passports, other equivalent documents, or visas by competent officials to persons known not to have the right thereto under the laws o regulations applicable, with the object of assisting any activity contrary to the purpose of the present Convention shall also be punishable.

3 The provisions of the present article shall apply irrespective of the national or foreign character of the document.

Article 15

1 Results of the investigation of offences mentioned in Articles 2 and 3 and (where there may be a connection between the offence and preparations for an act of terrorism) in Article 14 shall in each country, subject to the provisions of its law, be centralised in an appropriate service.

2 Such service shall be in close contract:

(a) With the police authorities of the country;

(b) With the corresponding services in other countries

4 It shall furthermore bring together all information calculated to facilitate the prevention and punishment of the offences mentioned in Articles 2 and 3 and (where there may be a connection between the offence and preparations for an act of terrorism) in Article 14; it shall, as far as possible, keep in close contract with the judicial authorities of the country.

Article 16

Each service, so far as it considers it desirable to do so, shall notify to the services of the other countries, giving all necessary particulars:

(a) Any act mentioned in Articles 2 and 3, even if it has not been carried into effect, such notification to be accompanied by descriptions, copies and photographs;

(b) Any search for any prosecution, arrest, conviction or expulsion of persons guilty of offences deal with in the present Convention, the movements of such persons and any pertinent information with regard to them, as well as their description finger-prints and photographs;

(c) Discovery of documents, arms, appliances or other objects connected with offences mentioned in articles 2, 3, 13 and 14.

Article 17

1 The High Contracting Parties shall be bound to execute letters of request relating to offences referred to in the present Convention in accordance with their domestic law and practice and any international conventions concluded or to be concluded by hem.

2 The transmission of letters of request shall be effected:

(a) By direct communication between the judicial authorities;

(b) By direct correspondence between the Ministers of Justice of the two countries;

(c) By direct correspondence between the authority of the country making the request and the Minister of Justice of the country to which the request is made;

(d) Through the diplomatic or consular representative of the country making the request in the country to which the request is made; this representative shall send the letters of request, either directly or through the Minister for Foreign Affairs, to the competent judicial authority or to the authority indicated by the Government of the country to which the request is made and shall receive the papers constituting he execution of the letters of request from this authority either directly or through the Minister for Foreign Affairs.

3 In cases (a) and (d), a copy of he letters of request shall always be sent simultaneously to the Minister of Justice of the country to which application is made.

4 Unless otherwise agreed, the letters of request shall be drawn up in the language of the authority making the request, provided always that the country to which the request is made may require a translation in its own language, certified correct by the authority making the request.

5 Each High Contracting Party shall notify to each of the other High Contracting Parties the method or methods of transmission mentioned above which he will recognised for the letters of request of the latter High Contracting Party.

6 Until such notification is made b a High Contracting Party, his existing procedure in regard to letters of request shall remain in force.

7 Execution of letters of request shall not give rise to a claim for reimbursement of charges or expenses of any nature whatever other than expenses of experts.

8 Nothing in the present article shall be construed as an undertaking on the part of the High Contracting Parties to adopt in criminal matters any form or methods of proof contrary to their laws.

Article 18

The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that party's attitude on the general question of the limits of criminal jurisdiction as a question of international law.

Article 19

The present Convention does not affect the principle that, provided the offender is not allowed to escape punishment owing to an omission in the criminal law, the characterisation of the various offences dealt with in the present Convention, the imposition of sentences, the methods of prosecution and trial, and the rules as to mitigating circumstances, pardon and amnesty are determined in each country by the provisions of domestic law.

Article 20

1 If any dispute shall arise between the HIGH Contracting Parties relating to the interpretation or application of the present Convention, and if such dispute has not been satisfactorily solved by diplomatic means, it shall be settled in conformity with the provisions in force between the parties concerning the settlement of international disputes.

2 If such provisions should not exist between the arties to the dispute, the parties shall refer the dispute to an arbitral or judicial procedure. If no agreement is reached on the choice of another court, the parties shall refer the dispute to the Permanent Court of Justice, if they are all parties to the Protocol of December 16th 1920, relating to the Statute of that Court; and if they are not all parties to that protocol, they shall refer the dispute to a court of arbitration constituted in accordance with the Convention of The Hague of October 18th 1907, for the Pacific Settlement of International Disputes.

3 The above provisions of the present article shall not prevent |high Contracting Parties, if they are Members of the League of Nations, from bringing the dispute before the Council or the Assembly of the League if the Covenant gives them the power to do so.

Article 21

1 The present Convention, of which the French and English texts shall be both authentic, shall bear to-day's date. Until May 31st 1938, it shall be open for signature on behalf of any Member of the league of nations and on behalf of a non-member State represented at the Conference which drew up the present Convention or to which a copy thereof is communicated for this purpose by the Council of the League of Nations.

2 The present Convention shall be ratified. The instruments of ratification shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their deposit to all the Members of the league and to the noon-member States mentioned in the preceding paragraph.

Article 22

1 After June 1st 1938, he present Convention shall be open to accession by any Member of the League of Nations, and any of the non-member States referred to in Article 21, on whose behalf the Convention has not bee signed.

2 The instruments of accession shall be transmitted to the Secretary-General of the League of Nations to be deposited in the archives of the League; the Secretary-General shall notify their receipt to all the Members of the League and to the non-member States referred to in Article 21.

Article 23

1 Any Member of the League of Nations or non-member State which is prepared to ratify the Contention under the second paragraph of Article 21, or to accede to the Convention under Article 22, but desires to be allowed to make reservations with regard to the application of the Convention, may so inform the Secretary-General of the \league of Nations, 'who shall forthwith communicate such reservations to all the members of the League and non-member States on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. Should he reservation be formulated within three years from the entry into force of the Convention, the same enquiry shall be addressed to |members of the League and non-member States whose signature of the Convention has not yet been followed by ratification. If, within six months from the date o f the Secretary-General's communication, no objection to the reservation has been made, it shall be treated as accepted by the High Contracting Parties.

2 In the event of any objection being received, the Secretary-General of the League of Nations shall inform the Government which desired to make the reservation and request it to inform him whether it is prepared to ratify or accede without the reservation or whether t prefers to abstain from ratification or accession.

Article 24

Ratification of, or accession to, the present Convention by any high Contracting party implies an assurance by him that his legislation and his administrative organisation enable him to give effect to the provisions of the present Convention.

Article 25

1 Any High Contracting Party may declare, at the time of signature, ratification or accession, that, in accepting the present Convention, he is not assuming any obligation in respect of all or ay f his colonies, protectorates, oversea territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him; the present Convention shall, in that case, not be applicable to the territories named in such declaration.

2 Any \high Contracting Party may subsequently notify the Secretary-General of the League of Nations that he desires the present Convention to apply to all or any of the territories in respect of which the declaration provided for in the preceding paragraph has been made. In making such notification, the high Contracting Party concerned may state that the application of the Convention to any of such territories shall be subject to any reservations which have been accepted in respect of that High Contracting Party under Article 23. The Convention shall hen apply, with any such reservations, to all the territories named in such notification ninety days after the receipt thereof by the Secretary-General of the League of Nations. Should it be desired as regards any such territories to make reservations other than those already made under article 23 by the High Contracting Party concerned, the procedure set out in that Article shall be followed.

3 Any High Contracting Party may at any time declare that he desires the present Convention to cease to apply to all or any of this colo9nies, protectorates, oversea territories, territories under his suzerainty or territories in respect of which a mandate has been entrusted to him. The Convention shall, in that case, cease to apply to the territories named in such declaration one year after the receipt of this declaration by the Secretary-General of the League of Nations.

4 The Secretary-General of the League of Nations shall communicate to all the Members of the League of Nations and to the non-member states referred to in Article 21 the declarations and notifications received in virtue of the present Article.

Article 26

1 The present Convention shall, in accordance with the provisions of Article 18 of the Covenant, be registered by the Secretary-General of the League of Nations on the ninetieth day after the receipt by the Secretary-General of the third instrument of ratification or accession.

2 The Convention shall come into force on the date of such registration.

Article 27

Each ratification or accession taking place after the deposit of the third instrument of ratification or accession shall take effect on the ninetieth day following the date on which the instrument of ratification or accession is received by the Secretary-General of the League of Nations.

Article 28

A request for the revision of the present Convention may be made at any time by any High Contracting Party by means of a notification to the Secretary-General of the League of Nations. Such notification shall be communicated by the Secretary-General to all the other High Contracting Parties and, if it is supported by at least a third of those Parties, the High Contracting Parties undertake to hold a conference for the revision of the Convention.

Article 29

The present Convention may be denounced on behalf of any High Contracting Party by a notification in writing addressed to the Secretary-General of the League of Nations, who shall inform all the Members of the League and the bin-member States referred to in Article 21. Such denunciation shall take effect one year after the date of its receipt by the Secretary-General of the League of Nations, and shall be operative only in respect of the High Contracting Party on whose behalf it was made.

DONE at Geneva, on the sixteenth day of November one thousand nine hundred and thirty-seven.

APPENDIX V

THE NUREMBERG PRINCIPLES

Principle I Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

Principle II The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI the crimes hereinafter set out are punishable as crimes under international law:

(a) **Crimes against peace:**

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)

(b) **War crimes:**

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation of slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) **Crimes against humanity:**

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

APPENDIX VI

DRAFT COMPREHENSIVE CONVENTION ON TERRORISM*

The States Parties to this Convention,

Recalling the existing international conventions relating to various aspects of the problem of international terrorism, in particular the Convention on Offences and Certain Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; the Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 19 March 1988; the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991; the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999,

Recalling also General Assembly resolution 49/60 of 9 December 1994 and the Declaration on Measures to Eliminate International Terrorism annexed thereto,

Recalling further General Assembly resolution 51/20 of 17 December 1996 and the Declaration to supplement the 1994 Declaration on Measures to Eliminate International Terrorism annexed thereto,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings,

Reaffirming their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize friendly relations among States and peoples and threaten the territorial integrity and security of States,

Recognizing that acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the undermining of human rights, fundamental freedoms and the democratic basis of society,

Recognizing also that the financing planning and inciting of terrorist acts are also contrary to the purposes and principles of the united Nations, and that it is the duty of the States Parties to bring to justice those who have participated in such terrorist acts,

Convinced that the suppression of acts of international terrorism, including those which are committed or supported by States, directly or indirectly, is an essential element in the maintenance of international peace and security and the sovereignty and territorial integrity of States,

Realizing the need for a comprehensive e convention on international terrorism,

Have resolved to take effective measures to prevent acts of terrorism and to ensure that perpetrators of terrorist acts do not escape prosecution and punishment by providing for the extradition or prosecution and to that end have agreed as follows:

Article 1

For the purposes of this Convention:

1. "State or government facility" includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

2. "Military forces of a State" means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility.

3. "Infrastructure facility" means any publicity or privately owned facility providing or distributing services for the benefit of the public, such as water, sewerage, energy, fuel, banking, communications, telecommunications and information networks.

4. "Place of public use" means those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial business, cultural, historical, education, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.

*Text compiled from the Report of the Ad Hoc Committee established by GA Res 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), UN Doc A/57/37, Supplement 37, Annexes I-III inclusive.

5 "Public transportation system" means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of person or cargo.

Article 2 (informal text prepared by the Coordinator)

1 Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility, or the environment; or
(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

4. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1, 2, or 3 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2, or 3 of this article; or

(c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 2bis

Where this Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both treaties, the provisions of the latter shall prevail.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2 of this Convention to exercise jurisdiction, except that the provisions of articles 8 and 12 to 16 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) to make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

Article 5

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) the offence is committed on board a vessel flying the flat of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State may also establish its jurisdiction over any such offence when:

(a) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(b) The offence is committed wholly or partially outside its territory, if the effects of the conduct or its intended effects constitute or result in, within its territory, the commission of an offence set forth in article 2;

(c) The offence is committed against a national of that State; or

(d) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(e) The offence is committed in an attempt to compel that State to do or to abstain from doing any act; or

(f) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its domestic law in accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

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

1. When more than one Stat Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

2. With prejudice to the norms of general international law, this Convention does not exclude any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 7

States Parties shall take appropriate measures, in conformity with the relevant provisions of national and international law, including international human rights law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offence referred to in article 2.

Article 8

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, including, if necessary and where appropriate, adapting their domestic legislation to prevent and counter preparations in their respective territories for the commission within or outside their territories, of those offences, including:

   (a) Measures to prohibit the illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the commission of offences set forth in article 2;

   (b) In particular, measures to prohibit the establishment and operation of installations and training camps for the commission of offences set forth in article 2.

2. States Parties shall further cooperate in the prevention of the offences set forth in article 2, in accordance with their national law, by exchanging accurate and verified information and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 2, in particular by

   (a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

   (b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

      (i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

      (ii) The movement of funds, property, equipment or other instrumentalities relating to the commission of such offences.

3. States Parties may exchange information through the International Criminal Police Organization (Interpol) or other international and regional organizations.

Article 9

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence referred to in article 2. such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 2 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 10

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence referred to in article 2 may be present in its territory, the State party concerned shall take such measures under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

   (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

   (b) Be visited by a representative of that State;

   (c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 6, paragraph 1, sub-paragraph (c), or paragraph 2, subparagraph (a), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the united Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraph 1 or 2, and if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 11

1. The State Party in whose territory the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case, without undue delay, to its competent authoriti4s for the purpose of prosecution through proceedings in accordance with the Laws of that State. Those authorities shall take their decision in the same manner s in the case of any other offence of a grave nature under the law of that State.

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

Article 12

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

Article 13

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. States parties shall carry out their obligations under paragraph 2 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

3. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuance to article 9.

Article 14

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

Article 15

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

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met:

   (a) The person freely gives his or her informed consent; and

   (b) the competent authorities of both States Parties agree, subject to such conditions as those states Parties may deem appropriate.

2. For the purposes of this article:
   (a) The State to which the person is transferred shall have the authority and obligation to keep the persons transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
   (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

   (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

   (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for the time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred to in accordance with this article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

1. The offences referred to in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

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

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences referred to in article 2 extraditable offences be5ween themselves, subject to the conditions provided for by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this convention.

Article 17 bis

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or its applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information 5to the othe5 States Parties.

Text relating to Article 18 (no agreement yet reached)

Text drafted by the Coordinator

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

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

3 The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.

Variation proposed by the OIC Member States

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

2. The activities of the parties during an armed conflict, including situation of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law are not governed by this Convention.

4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21 [*deleted*]

Article 22

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

Article 23

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of he request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 24

1. this Convention shall be open for signature by all States from ... to ... at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 25

1. This Convention shall enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 26

1. A State may denounce this Convention by Written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which such notification is received by the Secretary-General of the United Nations.

Article 27

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the |united Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations headquarters in New York on ... 2002.

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