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International Extradition and Global Terrorism: Bringing International Criminals to Justice

CHRISTOPHER C. JOYNER*

I. INTRODUCTION

The attacks on the United States on September 11, 2001 dramatically crystallized the pervasive threat of global terrorism.¹ In the wake of the carnage and destruction from the three airplanes that crashed into the World Trade Center and the Pentagon, acts of terrorism are no longer viewed as contained, selective, minor threats. Such acts now are seen as global, omnipresent, and incredibly destructive. In the minds of the public and statesmen alike, the danger of terrorism escalated from a localized, low intensity conflict phenomenon to a pervasive world-wide war, with military countermeasures to be waged accordingly.²

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1. Terrorism indeed is a global phenomenon, as several factors demonstrate. First, terrorism is not restricted to any state, region or jurisdiction. The repercussions of terrorism affect people beyond one area. Second, the increased mobility of terrorists to cross borders, acquire resources in several states, and access advanced communications, including the Internet, creates a global milieu. Third, victims of terrorist attacks are often many nationalities, such as the passengers aboard an international air flight or workers in the World Trade Center. Consequently, the task of detecting and apprehending terrorists exceeds the capabilities of any state and truly requires an international effort.

2. On September 20, 2001, in an address to a Joint Session of Congress and the American people, President George W. Bush declared war on terrorism in general and al Qaeda in particular. 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001). For international legal implications, see Jack M. Beard, *America's New War on Terror: The*

This Article accepts the long-established premise that a law-enforcement approach, as opposed to the currently popular law-of-armed-conflict approach, is the principal means for dealing with global terrorism. Using military force governed by humanitarian law to counter terrorist activities is but one facet of counter-terrorism policy. It is vital that governments practice a law enforcement approach as well.

Under this law enforcement approach, the strategic key to combating transnational terrorist activities remains the apprehension, prosecution, and punishment of persons who perpetrate or conspire to commit such criminal offenses. To that end, close international cooperation and collaboration is required, as are the open diplomatic channels and feasible legal means to accomplish those ends. While much cooperation to combat terrorism has been accomplished through bilateral efforts³ and regional organizations, such as the European Union (EU) and Organization of American States (OAS),⁴ the chief forum for coordinating multilateral responses to the world-wide terror threat

Case for Self Defense Under International Law, 25 HARV. J.L. & PUB. POL'Y 559 (2001). On the legal distinctions and implications of terrorism as war vis-à-vis terrorism as a crime, see Noah Feldman, *Choices of Law, Choices of War*, in 25 HARV. J.L. & PUB. POL'Y 457 (2001).

3. Bilateral cooperative efforts to apprehend and prosecute terrorists are conducted primarily through general extradition treaties between states. Realizing the importance of the extradition process, the Eighth U.N. Congress on the Prevention of Crime and Treatment of Offenders in 1990 completed the drafting of a "Model Treaty on Extradition" to assist governments interested in negotiating bilateral agreements to improve cooperation in preventing international crimes and promoting criminal justice. UNITED NATIONS, EIGHTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, REPORT OF THE EIGHTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, U.N. Doc. A/CONF.144/28 (1990).

4. The EU and OAS have adopted special anti-terrorist conventions for their memberships. *E.g.*, Council of Europe, European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, Europ. T.S. No. 90 (articles 1-7 discuss extradition); Organization of American States, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, *opened for signature* Feb. 2, 1971, arts. 3, 5, 7, 8, 1438 U.N.T.S. 195, 196-97 (providing extradition requirements). Other regional organizations have also adopted special counter-terror instruments. *See* League of Arab States, Arab Convention for the Suppression of Terrorism, Apr. 22, 1998, *available at* <http://www.al-bab.com/arab/docs/league/terrorism98.htm> (articles 5-8 concern extradition of offenders) (last visited Sept. 21, 2003); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999, U.N. GAOR, 54th Sess., Agenda Item 160, at 15-16, U.N. Doc. A/54/637 (2000) (articles 5-8 concern extradition).

is the United Nations (UN).⁵ Preeminent among the U.N.'s international legal contributions is the adoption and promotion of twelve international instruments that codify and criminalize certain terrorist acts as unlawful offences against the peace and security of humankind.⁶ The possibility that states can extradite criminal offenders provides a critical ingredient for implementing law enforcement among parties to these international conventions.

This Article examines the international extradition process that operates through these U.N. multilateral counter-terrorism instruments. To set the appropriate legal context, Part II provides a brief introduction to the general nature of terrorism, extradition, and the customary bases of establishing jurisdiction necessary for exercising the extradition process internationally. The thrust of the analysis comes in Part III, which outlines the provisional framework for extradition in these U.N. conventions and assesses how each instrument contributes to international extradition law. Part IV examines the extradition process in the emergent U.N. convention that outlaws and seeks to suppress international terrorism. A critical aspect of the analysis focuses on the possibility that the political offense exception might be inserted

5. The United Nations is the principal source of international legal measures to combat global terrorism. The General Assembly's adoption of its 1994 Declaration on Measures to Eliminate Terrorism signaled the U.N.'s formal commitment to condemn and suppress terrorist activities. G.A. Res. 49/60, U.N. GAOR, 49th Sess., 84th plen. mtg., Annex, U.N. Doc A/RES/49/60 (1994). In 1996, the General Assembly adopted its Declaration to Supplement the 1994 Declaration on Measures to Eliminate Terrorism, which seeks to restrict granting asylum to possible terrorists, remove the political offenses exception for persons who commit terrorist acts, and promote the extradition of offenders. G. A. Res. 51/210, U.N. GAOR, 51st Sess., 88th plen. mtg., Annex, U.N. Doc A/RES/51/210 (1996). Moreover, this resolution created an Ad Hoc Committee to develop a comprehensive legal framework of conventions dealing with terrorism. This committee, in concert with the General Assembly's Sixth (Legal) Committee, is now negotiating texts for a convention for the suppression of acts of nuclear terrorism and a comprehensive convention on the suppression of international terrorism. In addition, on September 28, 2001, the Security Council created a special Counter-Terrorism Committee in Resolution 1373. Acting under Chapter VII of the Charter, the Security Council, in Resolution 1373, unequivocally condemned the attacks of September 11 as threats to international peace and security, thus legitimizing an international military response by the United States and other countries in self-defense. U.N. SCOR, 56th Sess. 4385th mtg., U.N. Doc., S/RES/1373 (2001). It must be said, however, that the principal U.N. contribution to combating terrorism remains the series of international counter-terrorism instruments adopted from 1963 to the end of 1999. See *Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GAOR, 57th Sess., Annex, U.N. Doc. A/57/273 (2002).

6. See *infra* notes 39–117.

into this anti-terrorism convention. Special attention is given to why this exception could debilitate the efficacy of implementing the extradition process in the instrument. Finally, Part V concludes by discussing the modern legal implications of extradition for countering terrorist activities, and offering some conclusions on the relevance of recent events for the international extradition process in general.

II. TERRORISM AND THE EXTRADITION PROCESS

An act of terrorism is generally a political act. Terrorism is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Acts of terrorism are more than mere criminal actions. Terrorist acts entail a systematic tactic used to attain political or strategic ends. They involve calculated political strategies of fear, coercion, and warfare. More recently, terrorist activities have arguably become convenient instruments of certain states' foreign policies against other states.

The concept of terrorism defies precise definition. Because of its highly subjective and politicized nature, an exact, universally-agreed upon definition of terrorism remains elusive.⁷ In a sense, the difficulties associated with defining terrorism recall Justice Stewart's reflection on the nuances of defining obscenity—we know it when we see it—but there is no generally established definition.⁸ Consequently acts of terrorism are easier to identify than to define in precise legal terms acceptable to most governments.

A. *The Origins of State Sponsored Terrorism*

State-sponsored terrorism emerged during the 1970's as a dangerous strain of transnational violence. State sponsorship is distinguished from other categories of terrorism by the premeditated use of state agents for clandestine transnational activity that is instituted, supported or authorized by a legitimate

7. See, e.g., Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U.L. REV. 97 (1986) and Louis Rene Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239 (1995); see *infra* note 122 for the definition of an "offence" in the Comprehensive Convention on Terrorism.

8. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)

national government. Benefits derived from such a strategy are clear. First, a sponsoring government is able to encourage and effectively pursue an internationally unlawful policy of its own choosing, while maintaining a cover of plausible denial. Second, state sponsorship represents a low-cost, expedient means of eliminating exiled dissidents, coercing or intimidating adversarial governments, and destabilizing and embarrassing antagonistic foreign leaders. Third, state sponsors of terrorism offer means of exporting revolutionary ideology. Thus, as an extended weapon of the state, terrorism has evolved as a pernicious, furtive tactic aimed at committing highly sophisticated mayhem and murder of innocent people and destruction of private property. Sponsoring states often view terrorism as effective means for overcoming threats to their national autonomy.⁹ As a consequence, some governments have refused to condemn state-sponsored terrorism when it is avowedly used as an instrument against imperialism.¹⁰ This policy attitude has contributed to the inability to produce a universally accepted legal definition of terrorism, as acts of unlawful terrorism are characterized as lawful measures in wars of national liberation.¹¹

Under international law, responsibility lies with the governments of individual states to ensure that their citizens do no

9. In 2002, the United States Government officially listed seven designated state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. U.S. Dep't of State, *Patterns of Global Terrorism 2001*, at <http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10249.htm> (May 21, 2002) (last visited Sept. 21, 2003).

10. This was especially so during the 1960s and 1970s among peoples in Africa, Asia, and the Middle East, which were engaged in struggles for independence against European colonial powers. Today, a main focus of such anti-imperialist sentiments is the plight of the Palestinians under Israeli occupation on the West Bank.

11. In 1972, the United States put before the General Assembly a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism. U.N. GAOR, 27th Sess., 6th Comm., Agenda Item 92, U.N. Doc. A/C.6/L.850 (1972). Agreement on this convention proved elusive, however, on account of contending political interpretations over the lawfulness of violent acts committed by "national liberation organizations," as opposed to unlawful activities engaged in by "terrorist" organizations. A General Assembly resolution ultimately was adopted in lieu of the convention, by a vote of 76-35, with seventeen abstentions. It affirmed the inalienable right to self-determination of all peoples under colonial and racist regimes, and condemned the "continuation of repressive and terrorist acts" by such regimes in denying self-determination and independence to such peoples. G.A. Res. 3034 (XXVII) U.N. GAOR, 27th Sess., 2114th plen. mtg., U.N. Doc. A/RES/3034 (1972).

harm to foreign nationals or other states.¹² If a government learns of its citizens' intent to commit a wrong, or instigates the offense itself, the state is culpable. Governments, however, are neither responsible nor liable for each and every act conducted by their nationals. Nevertheless, when a government discovers its territory has become a staging ground for hostile acts against another state, international law requires that it take measures to prevent such acts.¹³ This duty under customary law is clearly established through international arbitral decisions,¹⁴ and was articulated in 1970 by the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States.¹⁵

The politically sensitive, subjective nature of what constitutes "terrorism" and how terrorists should be punished has fostered reluctance among certain states to harmonize their national criminal codes on such unlawful activities. Municipal laws tend to concentrate on the intentions and targets of terrorists. Hence, unlawful activity in one state may be regarded as lawful in another. This conundrum has precluded some governments from asserting jurisdiction over terrorist acts. The consequence throughout most

12. Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session* [hereinafter ILC 53d Report], U.N. GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/reports/2001/2001report.htm> (last visited Sept. 21, 2003).

13. See Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 257 (1977).

14. See e.g., *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 ICJ 14, at 191 (June 27). This norm of non-intervention was reaffirmed earlier. See Conference on Security and Co-operation in Europe, Final Act (Helsinki Accord), 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 I.L.M. 1292 (1975). In Principle VI (Non-Intervention in Internal Affairs), the Act provides that the participating states "will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations." The succeeding paragraphs prohibit not only armed intervention or threats thereof, but also "any other act of military, or of political, economic or other coercion," including "subversive or other activities directed towards the violent overthrow" of a state's government.

15. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 8082, U.N. GAOR, 25th Sess., Annex, Agenda Item 50, U.N. Doc. A/8082 (1970). The declaration asserts that every State is obligated "to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State." Each state must also "refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts. . . ." *Id.*

of the last century was often the failure to prosecute. One strategy for states in meeting this challenge is for governments to adopt and implement special extradition procedures for accused criminal offenders.

B. Extradition Defined

Extradition is the process by which a person charged with or convicted of a crime under the laws of one state is arrested in another state and returned to the former state for trial or punishment. Although states have no general obligation in international law to extradite persons, the practice has become widespread and is nearly universal. Even so, the process of international extradition has serious defects.¹⁶ Due to so many unique legal systems throughout the world, no single set of rules is available to govern the process of international extradition. Consequently, the conditions upon which extradition may be granted vary widely. Most states require that fugitives can only be extradited from their territory pursuant to authorization by statute or treaty. Virtually all extraditions take place pursuant to bilateral extradition treaties or conventions, although certain excepted conditions can complicate the process between states.¹⁷

Extradition is vital for enforcing international legal rules and compelling respect for law and order. Without the political capability or legal means to extradite accused criminal offenders to states where they can be investigated, prosecuted, convicted, and appropriately punished, those persons will remain at large, the beneficiaries of impunity. Thus, extradition becomes neither a diplomatic game nor trivial activity in seeking to apprehend international criminals. It is an international process that is essential today for bringing international fugitives to justice in states where their alleged criminal offenses were committed.

Extradition procedures thus provide a necessary conduit for bringing to justice individuals accused of international criminal

16. For a critical view of the extradition process, see John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988).

17. For example, while the United States extradites its own nationals, many other governments do not, among them in Europe France, Germany, Austria, and Belgium and in Latin America, Brazil, Ecuador, Venezuela, and Panama. *International Law: The Importance of Extradition: Hearing before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the Comm. on Government Reform*, 106th Cong. 14 (2000) (testimony of Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State).

offenses, including of terrorist activities. A criminal who succeeds in placing himself outside the territory of the state where he committed the crime also places himself beyond the reach of the law that he has violated. Through the formal process of extradition, one government transfers the accused individual to the custody of another government. This process is usually done by treaty, reciprocity, or comity. Indeed, four centuries ago, Hugo Grotius asserted that it was a state's duty either to extradite or prosecute accused criminals found within its territories if a second state requests extradition.¹⁸ That vital role is highlighted by key provisions in contemporary legal instruments to suppress international terrorist activities, as extradition is used to facilitate the apprehension, prosecution, trial, and punishment of individuals who commit acts of terrorism. Additionally, if vigorously exercised and enforced, extradition may serve as a viable deterrent to the commission of criminal terrorist acts.

Historical experience, however, demonstrates that a treaty agreement providing for the extradition process between states, while necessary, may not be sufficient. Under contemporary international law, no universal rule obligates governments to extradite, or even prosecute, alleged offenders who hide in their territory.¹⁹ Indeed, the international extradition process today operates almost entirely through bilateral treaties, and certain conditions such as the nationality of the offender, concern over the fairness of a foreign trial, or the supposed political nature of the offense can obstruct the extradition process. Moreover, the international extradition system is neither comprehensive nor complete. No state has extradition treaties with every other state.²⁰

18. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 526–27 (James B. Scott ed., Francis W. Kelsey trans., Oceana Publications 1964)(1583–1645).

19. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 83 (2001); M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE, THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW*, at XI (1995); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmt. b (1987) [hereinafter Third Restatement].

20. The United States, for example, has extradition treaties with approximately 100 states, although today there are at least a total of 193 states in the international community. See U.S. DEPT. STATE, *A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000*, pt. 1 (Bilateral agreements) passim, at http://www.state.gov/www/global/legal_affairs/tifindex.html (last visited Sept. 21, 2003).

Perhaps most problematic for extradition cases involving acts of terrorism is the political offense exception. Many modern extradition treaties specifically exempt political offenses from extradition, since liberal and democratic governments developed a strong antipathy toward the idea of surrendering dissidents into the hands of a despotic government.²¹ There are, however, no recognized criteria as to what constitutes a “political” offense, nor is there a rule of international law prohibiting the extradition of political offenders. As a result, the decision whether to extradite rests on subjective criteria, as determined by the holding government. Accordingly, the bilateral extradition system can provide only partial remedies for bringing international terrorists to justice. The consequence is that, while governments might agree that terrorist acts rise to being criminal offenses against the international community, strict multilateral enforcement through extradition in prosecuting such acts may still be lacking.

Since 1970, the threat of various international terrorist activities prompted the ad hoc negotiation of a series of special multilateral agreements dealing with criminal activities, nearly all of which contain specific extradition provisions. These instruments contribute much to expanding the opportunities for governments to extradite accused offenders to other states, even in the absence of specific bilateral treaties. Preeminent among the concerns for which multilateral agreements have been negotiated are the international criminal offenses associated with terrorist acts.

The United Nations assumed the lead role as convener and sponsor of the various diplomatic conferences that negotiated these anti-terrorism instruments. The rationale for this U.N. strategy is plainly evident. Terrorist activities challenge in many ways the core principles and mandates of the organization. Terrorist acts are intended to be assaults on the principles of law, order, human rights and peaceful settlement of disputes on which the world body was founded. In addition, the effectiveness of any international legal regime depends on its implementation and support by participant governments.

21. For overviews of the political offense exceptions, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 502–83 (3rd ed. 1996) and CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* 264–70 (1992).

The U.N. system must therefore strive to raise awareness of the various threats posed by terrorism. To meet this goal, it stipulated that certain terrorist acts rise to the level of international crimes. Between 1963 and 1999 the United Nations sponsored and promoted the promulgation of twelve law-making instruments relating to international terror violence.²² Further, the United Nations today is promoting the negotiation of two other prominent international instruments, a convention to suppress acts of nuclear terrorism and a comprehensive convention on the suppression of international terrorism. In nearly all of these instruments, extradition is assigned the central role in law enforcement. For extradition of an accused terrorist to proceed, however, the government of a state must establish lawful jurisdiction over that offender.

C. Jurisdictional Authority

Jurisdiction is critical as a legal ingredient to the extradition process. For extradition to occur legally, a state must establish lawful jurisdiction over both the criminal offense and an accused offender. International law sets limits on a state's jurisdiction to apply its statutes extraterritorially. Traditionally, a state may not prosecute a criminal seized beyond its borders unless it has both lawful jurisdiction over the committed act and has gained jurisdiction over his person. Similarly, for governments to exercise extradition under international law, lawful jurisdiction must be secured by those states over an offender. In effect, the jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce.

Obtaining extraterritorial jurisdiction for extradition involves a two-step process. First, it must be determined whether the requesting state's domestic law covers the offensive act, i.e., whether there are grounds for exercising national jurisdiction. Second, a sovereign state must ascertain whether it may proscribe such conduct extraterritorially under international legal rules. For this second criterion, governments can apply any of international law's five theoretical constructs for exercising prescriptive jurisdiction: (1) the territorial principle; (2) the nationality principle; (3) the protective principle; (4) the passive personality

22. See the discussion *infra*, notes 39–100.

principle; and (5) the universality principle.²³ To facilitate broader enforcement opportunities, these jurisdictional constructs are integrated, to a greater or lesser degree, into special provisions of the 'twelve U.N. anti-terrorist conventions. Therefore, each merits brief comment.

1. Territorial Principle

The territorial principle determines jurisdiction according to the location of the crime and holds that a state may punish crimes committed within its territory. A variant of this, the theory of "floating" territoriality, recognizes the jurisdiction of a state for criminal acts committed aboard its flag vessels and aircraft. This notion assumes that all flag-bearing air and sea vessels are detached pieces of a state's territory. Any harm to its vessels constitutes an offense against the state itself. Thus, criminal jurisdiction for terrorist acts committed against these vessels anywhere in the world attaches to the flag state. Of the jurisdictional principles for extradition, the territorial principle remains the most widely accepted and most traditionally applied.²⁴

2. Nationality Principle

The generally accepted nationality principle allows a state to prescribe laws that bind its nationals, regardless of the location of either the national or the offense. The nationality principle extends a state's jurisdiction to actions taken by its citizens outside its territorial boundaries. The government is expected not only to protect its citizens when they are abroad, but it may also punish its citizens' criminal conduct, regardless of where it occurs.²⁵

23. See generally 2 CHRISTOPHER BLAKESLEY, *Extraterritorial Jurisdiction*, INTERNATIONAL CRIMINAL LAW 33-105 (M. Cherif Bassiouni ed., Transnational Publishers Inc., 2d ed. 1999); Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177 (1997).

24. Third Restatement, *supra* note 19, § 402 (1). This theory is confirmed in the 1963 Tokyo Convention by its reaffirmation of the "law of the flag principle" that assigns the state of registration competence to exercise jurisdiction over offense and acts committed on board its aircraft. 1963 Tokyo Aircraft Convention, *infra* note 36, art. 3(1); see also Christopher L. Blakesley, *United States Extradition Over Extraterritorial Crime*, 29 J. CRIM. L. & CRIMINOLOGY 1109, 1118-19, 1123 (1982).

25. Third Restatement, *supra* note 19, § 402(2).

3. Protective Principle

The protective principle concerns acts abroad that are considered prejudicial to the state's security interests. Under the protective principle, a state may exercise jurisdiction over certain acts that take place outside its territory, when such acts threaten the security, territorial integrity, or political independence of the state. Moreover, the protective principle permits governments to prosecute nationals of other states for their conduct outside the offended state.²⁶

4. Passive Personality Principle

The passive personality principle gives a state extraterritorial jurisdiction over offenses committed against its nationals, regardless of where the crime occurs. Jurisdiction is based on the nationality of the victim. The passive personality principle has not been widely used, mainly because it is controversial and often conflicts with the territorial principle. Passive personality implies that people carry the protection of their state's law with them beyond the state's territorial jurisdiction.²⁷ This assertion challenges the fundamental premise of a state's sovereign jurisdiction over its own territory, which would undercut the fundamental principle of territorial sovereignty.

5. Universality Principle

The principle of universal jurisdiction recognizes that certain acts are so heinous and widely condemned that any state may prosecute an offender once it obtains custody. Such crimes are of universal interest to states and their perpetrators are considered to be the enemies of all humanity. Since acts of terrorism are universally recognized as international crimes, any government may extend jurisdiction over terrorists under the universal principle on the basis of *hoste humani generis*.²⁸ A person accused of such a crime can be arrested and tried by any state without concern for the nationality of the accused or the location of the offense, and without establishing any link between the accused

26. Third Restatement, *supra* note 19, § 402 cmt. f.

27. *Id.* cmt g.

28. Christopher L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM; US PROCEDURAL ASPECTS 142-53 (M. Cherif Bassiouni ed., 1988).

offender and the prosecuting state. The only requirement is that the crime qualifies as being universally condemned.²⁹

D. Principles in Support of Extraterritorial Jurisdiction

Three of the above international law principles specifically support the legal theory of extraterritorial jurisdiction needed to extradite terrorist offenders. In order of practical legal priority, these are the universality principle, the protective principle, and the passive personality principle. First, the principle of universal jurisdiction holds special standing, as it asserts that certain acts of terrorism are crimes against humanity and as such, any state is permitted to arrest, prosecute or extradite accused offenders on behalf of the international community. The United Nations, by codifying such terrorist acts as international offenses through these prominent multilateral conventions, effectively rendered these offenses international crimes and activated the application of the universality principle for all state parties.

Second, the protective principle justifies a state's right to punish offenders for crimes deemed harmful to the security or vital interests of the state. This notion provides jurisdiction on the basis of a perceived threat to national security, integrity, or sovereignty by an extraterritorial offense.³⁰ Since many terrorist activities are intended to sway the foreign policy of a state, vital interests of that state may be affected. Extending protective jurisdiction may therefore be lawful, and thus extraterritorial claims for extradition acquire standing.

The third principle on which extradition may be premised—passive personality—represents the most polemical basis on which to assign state jurisdiction over an offender. This view permits jurisdiction for extradition to be extended over persons who victimize citizens of the particular state seeking jurisdiction.³¹ Though passive personality remains controversial, the *Third Restatement of Foreign Relations Law of the United States* specifically recognizes this principle when applied to terrorist and

29. Third Restatement, *supra* note 19, § 404.; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 106–108 (2001); see also Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 159–60 (1996).

30. Third Restatement, *supra* note 19, § 402(3) cmt. f.

31. *Id.* § 402, cmt. g.

other organized attacks against a state's citizen by reason of their nationality.³² It seems reasonable that, if used in conjunction with other jurisdictional principles, the passive personality principle can bolster claims for extraterritorial jurisdiction which may be needed to exercise the extradition process in U.N. counter-terrorism conventions.

These five principles provide a framework for states to establish jurisdiction over acts of international terrorism, and to subsequently follow through by extraditing or prosecuting the accused offenders. Few restrictions are imposed on the use of extraterritorial jurisdiction. Therefore, governments have the opportunity to expand their law enforcement internationally to exercise extradition proceedings. These legal principles provide grounds for governments to extend their scope of jurisdiction over terrorists abroad to secure their extradition. Important in this regard is the fact that all of these jurisdictional principles are incorporated to varying degrees into the U.N.'s counter-terrorism instruments.

III. U.N. COUNTER-TERRORISM CONVENTIONS

Even before the United Nations was founded, the extradition of persons accused of committing terrorist activities was formally recognized as a means of international law enforcement. During the League of Nations era, an unsuccessful Convention for the Prevention and Punishment of Terrorism³³ was drafted in 1937 for international legal consideration (1937 Convention). Prompted largely by the assassination of King Alexander of Yugoslavia, this abortive instrument obligated parties to prevent and punish offenders who committed "acts of terrorism."³⁴ The convention went further as it imposed a duty on parties to criminalize certain specific acts amounting to terrorist offenses. To that end, Article 2 mandated that:

32. As the Third Restatement opines, the passive personality principle "has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." *Id.*

33. Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 LEAGUE OF NATIONS O.J. 23 (1938) [hereinafter 1937 Convention].

34. *Id.* art. 1. Instructively for present legal considerations, "acts of terrorism" were defined in the 1937 draft as "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." *Id.* art. 1(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 1:

(1) Any willful act causing death or grievous bodily harm or loss of liberty to:

(a) Heads of States, persons exercising the prerogatives of the head of State, their hereditary or designated successors;

(b) The wives or husbands of the above-mentioned persons;

(c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Willful 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 willful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offense 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.³⁵

The instrument also would make conspiracy, incitement, willful participation and assistance given in the commission of such criminal offenses illegal.³⁶

The 1937 Convention explicitly included extradition as the principal means for bringing alleged offenders to justice. The instrument asserted that any of the offenses in Articles 2 and 3 shall be deemed as extradition crimes for extradition treaties that are already in force or may be concluded between contracting parties. Moreover, offenses committed within the territory of a contracting party may be regarded as extraditable crimes,³⁷ and

35. *Id.* art. 2.

36. *Id.* art. 3.

37. *Id.* art. 8.

parties were required to prosecute nationals when national law prevented their extradition.³⁸ This draft text contributed to the contemporary law against terrorism. It represented the first serious attempt to criminalize acts of terrorism. Moreover, its language contributed to various principles and provisions that were incorporated into subsequent U.N. counter-terrorism conventions that today are part of modern international law.

International anxieties over global terrorism grew sporadically. Certain events gave rise to harmful activities that prompted the international community to take action to prohibit those activities and punish the offenders. The forums for creating and instituting these new international legal rules were special organs and agencies within the U.N. system. Since 1960, four specific issue-areas tended to dominate international concern over global terrorism: crimes against the safety of international aviation; crimes against the safety of individual persons; crimes against the safety of maritime navigation; and crimes associated with violent terrorist activities. As the need to deal with these concerns arose, U.N. agencies became the organizers for instigating legal action.

A. Crimes Against the Safety of International Aviation

The first U.N. effort to criminalize terrorist activities internationally dealt with threats to the safety of international aviation. During the 1960s, the international community became seriously concerned over the unlawful seizure of aircraft flying international routes. To suppress these dangerous activities, the principal U.N. agency concerned with safe and secure global air transportation, the International Civil Aviation Organization (ICAO), sponsored the promulgation of four prominent international legal instruments.

1. The Tokyo Convention

First, in 1963, ICAO sponsored the negotiation of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).³⁹ This instrument addresses

38. *Id.* art. 9.

39. Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention]. On January 1, 2003, 173 states were parties to the Tokyo Convention.

offenses committed on board aircraft, but is not specifically directed against terrorist offenses.⁴⁰ The prominent focus of this Convention focuses on establishing jurisdiction over offenders. Not only is an aircraft's state of registration competent to exercise jurisdiction over offenses committed on board, but each contracting state is obliged to take the measures necessary to establish jurisdiction over the offenses as the state of registration. The Convention does not eliminate existing or future jurisdiction in states other than the state of registration. A contracting state, which is not the state of registration, may interfere with an aircraft in flight to exercise its criminal jurisdiction over an offense committed on board in limited cases. For instance, it may do so if (1) the offense was perpetrated in the territory of the state asserting jurisdiction, (2) the offense was committed by or against a national or permanent resident of that state, or (3) the offense was against the security of that state.

The Tokyo Convention applies, irrespective of whether the aircraft is engaged in international or domestic flight, in only two situations: (1) if the location of the aircraft's take-off or landing is situated outside the territory of the state of registration of the aircraft; (2) if the offense is committed in the territory of a state other than the state of registration of the aircraft.⁴¹ The main focus of the convention aims to ensure that offenders cannot escape punishment on account of the lack of jurisdiction. Accordingly, the convention provides in Articles 3 and 4 that legal jurisdiction exists for the state of an aircraft's registration, as well as for the state in whose territory the offense was committed. Even so, no specific provision is made in the 1963 Tokyo Convention for the extradition of offenders.

2. The Hague Convention

The watershed legal development for extraditing terrorist skyjack offenders came in 1970 with the adoption of Hague Convention for the Suppression of Unlawful Seizure of Aircraft

40. The Tokyo Convention applies to "offences against penal law" and "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board." *Id.* art. 1.

41. *Id.* art 4(2).

(Hague Convention).⁴² This instrument specifically deals with aircraft hijacking. By defining the act of unlawful seizure of aircraft, contracting states were obliged to make an offense punishable by severe penalties. As defined in the convention, an offense occurs when

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act. . . .⁴³

The Convention in Article 2 imposes a duty on states to punish such offenses, and goes on to obligate contracting states to enact measures for establishing jurisdiction over alleged offenders.⁴⁴

The extradition process assumes a critical role within the 1970 Hague Convention. The convention contains a lengthy provision on the extradition of alleged offenders in Article 8, which in full stipulates that:

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

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

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an

42. Hague Convention for the Suppression of Unlawful Seizure of Aircraft Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971) [hereinafter Hague Convention]. As of January 1, 2003, at least 175 states are parties to the Hague instrument.

43. *Id.* art. 1.

44. *Id.* art. 4.

extraditable offence between themselves subject to the conditions provided by the law of the requested state.

4. The offence shall be treated, for the purposes of extradition between Contracting States, as if it has been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article VI, paragraph 1.⁴⁵

This provision obligates parties to treat the offenses defined in the Convention as extraditable offenses in present and future extradition treaties. It permits a state party, which conditions extradition of an offender on the existence of an extradition treaty, to regard the Convention itself as the basis for extradition to a state with which it has no extradition treaty. For parties which do not insist on a treaty as the basis for extradition, it requires that the offense defined in the convention be regarded as an extraditable offense.

The Hague Convention, unlike the Tokyo Convention, puts considerable emphasis on enforcement. Under the Hague instrument, a state is obliged, whether or not it is the state of registration, to take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory and is not extradited. If no extradition treaty exists between the states concerned, and an offender is in the territory of a contracting state, which refuses to extradite that offender, then it must submit the case to its domestic authorities for the purpose of prosecuting that offender under its criminal law. This provision still leaves extradition subject to all the other conditions imposed by a relevant extradition treaty or by the extradition law of the requested state. These conditions might include the political offense exception (which precludes extradition where the crime for which it is requested is considered to be a "political offense"), as well as the rule barring the extradition of nationals.⁴⁶

45. *Id.* art. 8.

46. Some efforts have been made to "depoliticize" multilateral extradition provisions. Among them are the Optional Protocol Regarding the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 395; the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 7, 78 U.N.T.S. 277; the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. 11, 1015 U.N.T.S. 243; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res.

It is important to realize that Article 8 of the Hague Convention has been used as the model extradition provision in several later U.N. counter-terrorism conventions. Concurrently, if a state's government decides not to extradite an accused offender, then the government must prosecute the offender under the Hague Convention. The key provision is Article 7, which provides that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purposes of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.⁴⁷

The legal principle here is *aut dedere aut judicare*—the duty to extradite or prosecute accused offenders.⁴⁸ Subsequent U.N. counter-terror agreements have mirrored the language of their extradite-or-prosecute obligations according to Article 7 of the Hague Convention. This prescription requires the state in which an alleged offender is discovered either to extradite that person to a state which is acknowledged to have jurisdiction over the offense or “to submit the case to its competent authorities for the purposes of prosecution.” However, neither the Hague Convention, nor any other U.N. counter-terrorism instrument, requires the state to prosecute the alleged offender through judicial proceedings. All that is required is a decision by the competent authorities on whether to prosecute given the factual circumstances of the situation. In essence, this language preserves for the alleged offender the rights of due process, a fair trial, and guarantees the concept of innocent until proven guilty. Presumably, an investigation into the facts of the allegation against an accused offender determines whether to proceed to the trial phase. If the

39/46, U.N. GAOR, 39th Sess., Supp. No. 5, at 197, U.N. Doc. A/39/51 (1984); and the European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 1, Europ. T.S. No. 90.

47. Hague Convention, *supra* note 42, art. 7.

48. The duty to extradite or prosecute stems from the Roman notion of *aut dedere aut judicare*. The term *dedere* means to surrender or extradite, while *judicare* refers to the need to adjudicate or prosecute. For use of this expression, see 1 OPPENHEIM'S INTERNATIONAL LAW 953, 971 (R. Jennings & A. Watts eds., 9th ed. 1992).

investigation produces sufficient evidence, the offender may be prosecuted.

3. The Montreal Convention

During the late 1960s, the threat of terrorists destroying international airliners became a serious concern to ICAO members. Between 1967 and 1970, terrorists destroyed several airplanes by placing bombs on board. To address the crimes of aircraft sabotage, the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Civil Aviation was negotiated in 1971 (Montreal Convention).⁴⁹ The Montreal Convention defines a broad spectrum of unlawful acts against the safety of civil aviation. The Convention contains detailed provisions on jurisdiction, custody, prosecution and extradition of an alleged offender similar to those in the Hague Convention. Like the Tokyo and Hague Conventions, the Montreal Convention does not apply to aircraft used in military, customs or police services. Moreover, this instrument strives to establish universal jurisdiction over the offender.⁵⁰

A person commits an offense under the Montreal Convention if he “performs an act of violence against a person on board an aircraft in flight” that might endanger the safety of the aircraft; “destroys an aircraft in service or causes damage to such an aircraft” in flight; places a device on board an aircraft that is likely to destroy or damage that aircraft; “destroys or damages air navigation facilities or interferes with their operation”; or

49. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention]. By Jan. 1, 2003, 176 states had become parties to the Montreal Convention.

50. In relevant part, Article 5 provides:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

- a. when the offence is committed in the territory of that State;
- b. when the offence is committed against or on board an aircraft registered in that State;
- c. when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- d. when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

Id. art. 5(1). Taken as a whole, these conditions permit a very broad basis for the assertion of jurisdiction over accused offenders.

communicates false information that endangers the safety of an aircraft in flight.⁵¹ The Montreal Convention obliges parties to treat these offenses as extraditable. In so doing, the Convention relies heavily on the language found in Article 8 of the 1970 Hague Convention.⁵² In that context, states parties are obligated to treat the offenses defined in the Convention as extraditable offenses in both current and subsequent extradition treaties. Further, a state party, which conditions extradition on the existence of an extradition treaty, may regard the convention itself as the lawful basis for extraditing an accused offender to a state with which it has no extradition treaty. For states which do not insist on a treaty as the basis for extradition, the provision requires that the offense defined in the Convention be considered as an extraditable offense. Moreover, like the Hague Convention, Article 7 of the Montreal Convention obligates a state party to “submit the case to its competent authorities for the purpose of prosecution” if an offender is not extradited, while other provisions require that parties cooperate with other governments in preventing and punishing these offenses.⁵³ Once again, however, the instructed obligation is to “submit the case” to its domestic authorities, not to initiate prosecution through trial proceedings.

51. *Id.* art. 1.

52. Article 8 of the Montreal Convention provides:

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

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

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

4. Each of the offences shall be treated, for the purposes of extradition between Contracting States, as if it has been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1(b), (c) and (d).

Id. art. 8.

53. *Id.* arts. 7, 10, 11, 13 and 21.

4. The Montreal Convention Refined

In February 1988, ICAO sponsored the negotiation of a Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Protocol), supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.⁵⁴ The Protocol adds to the definition of “offence” given in the Montreal Convention of 1971 by including unlawful and intentional acts of violence against persons at an airport serving international civil aviation.⁵⁵ Such acts are offenses when they cause or are likely to cause serious injury or death to persons, destroy or seriously damage airport or aircraft facilities not in service, or disrupt the services of the airport.⁵⁶ The qualifying element of these offenses is the fact that such an act endangers or is likely to endanger safety at that airport.⁵⁷ These offenses are punishable by severe penalties, and contracting states are obliged to establish jurisdiction over offenses not only in the case where the offense was committed in their territory but also where the alleged offender is present in their territory and they opt against extradition to the state where the offense took place.

B. Crimes Against the Safety of Individual Persons

In the early 1970s, the international community became acutely concerned over threats that serious harm or injury might be inflicted on diplomats and individual persons taken hostage by groups of terrorists. A principal catalyst for this apprehension came in March 1973, when U.S. Ambassador Cleo Noel and Charges d’Affaires George Curtis Moore, along with Belgian diplomat Guy Eid, were kidnapped and murdered in Khartoum, Sudan, by Palestinians terrorists.⁵⁸ This tragic event prompted the

54. Protocol for the suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, ICAD Doc. 9518, *available at* http://www.undcp.org/odccp/terrorism_convention_airports.html (last visited Sept. 21, 2003) (entered into force Aug. 6, 1989) [hereinafter Protocol]. In January 2003, 126 states were parties to this Protocol.

55. *Id.* art. 1 bis. (a).

56. *Id.* art. 1 bis (a)(b).

57. *Id.* art. 1(b).

58. On March 1, 1973, “eight members of Black September, part of Arafat’s Fatah organization, stormed the Saudi embassy in Khartoum, [sic] took Noel, Moore, and others hostage. A day later . . . Noel, Moore and Eid were machine-gunned to death . . .” See Joseph Farah, *New Evidence Arafat Killed U.S. Diplomats: Nixon Historian Finds CIA*

United States to introduce in the General Assembly the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (Internationally Protected Persons Convention), including Diplomatic Agents.⁵⁹

1. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons

The Internationally Protected Persons Convention applies to the crimes of direct involvement or complicity in the actual or threatened murder, kidnapping, or attack on the person, official premises, private accommodation, or transportation services of diplomatic agents and other "internationally protected persons."⁶⁰ States are obligated to (1) establish their jurisdiction over the offenses described; (2) make the offenses punishable by appropriate penalties; (3) take alleged offenders into custody; (4) prosecute or extradite alleged offenders; (5) cooperate in preventive measures; and (6) exchange information and evidence needed in related criminal proceedings. The offenses in the convention are deemed extraditable between states under existing extradition treaties, and under the convention itself.

Universal jurisdiction is essential to ensure the performance of the two key provisions relating to extradition of offenders. As with other U.N. counter-terrorism conventions, the Internationally Protected Persons Convention mandates in Article 6 that a state party which discovers an alleged offender in its territory, "shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."⁶¹ Article 8 then enumerates several

Report on Fatah Link to 1973 Murders, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=26856 (Mar. 18, 2002) (last visited Sept. 21, 2003).

59. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977) [hereinafter Internationally Protected Persons Convention]. In January 2003, there were 124 parties and 25 signatories to this convention.

60. *Id.* art. 2. "Internationally protected persons" are defined as Heads of State or Government, Ministers for Foreign Affairs, State officials and representatives of international organizations entitled to special protection in a foreign State, and their families. *Id.* art. 1. The notion of an internationally protected person derives from Article 1 of the 1937 League of Nations Convention on Terrorism. See 1937 Convention, *supra* note 33, art.1(1).

61. Internationally Protected Persons Convention, *supra* note 59, art. 7.

stipulations intended to simplify the requirements for extradition among state parties regarding criminal offenses covered by the convention. If these crimes are not listed as extraditable offenses in existing extradition treaties, they are deemed as having been included. If a state grants requests for extradition only on the basis of a treaty, it is given the choice of treating the articles in the treaty as a basis for extradition, while states not bound to such a requirement are expected to recognize the Article 2 crimes as extraditable offenses. In both instances, extradition would be performed "subject to the procedural provisions and the other conditions of the law of the requested State."⁶²

Articles 7 and 8 of the Internationally Protected Persons Convention closely resemble companion provisions in the 1970 Hague and 1971 Montreal Conventions. The state where an alleged offender is found retains the option of either instituting proceedings aimed at prosecution of that person or, assuming that a request for extradition has been received, of complying with that request. If no request for extradition is received, the requisite proceedings for prosecution must proceed forward. If one or more requests for extradition are received, but the decision is made not to extradite the alleged offender, the holding government must proceed to prosecute. The reasons for non-extradition are irrelevant. A requested state can refuse extradition on various grounds, including the nationality of the alleged offender, concern over the prospects of receiving a fair trial, or concern over the possibility of capital punishment. Additionally, a state can decide that it prefers to institute proceedings itself. In any event, the critical consideration is that if extradition is refused, the requested state is obligated to institute prosecution proceedings against the alleged offender. Nonetheless, the obligation is for the state to institute proceedings against an accused offender. It is not duty-bound to complete trial proceedings or to convict and punish the offender.

2. Convention Against the Taking of Hostages

Hostage-taking became a serious international concern in the immediate aftermath of the Islamic Revolution in Iran. On November 4, 1979, Iranian students seized the U.S. embassy

62. *Id.* art 8(3).

complex in Teheran, Iran, and took more than one hundred persons hostage, most of them American citizens.⁶³ While all the hostages were eventually released unharmed, the incident prompted the United States to introduce in the United Nations the International Convention against the Taking of Hostages in December of 1979 (Hostages Convention).⁶⁴ This Convention defines the peacetime taking of hostages as a separate international crime. It declares the offense of hostage-taking to be the following: direct involvement or complicity in the seizure or detention of a person, and threatening to kill, injure, or detain a hostage in order to compel a state, an international intergovernmental organization, a person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.⁶⁵ Each contracting party is required to make this offense punishable by appropriate penalties and to cooperate in preventing such offenses.⁶⁶ Where hostages are held in the territory of a state, that government is obligated to take all measures it considers appropriate to ease the situation of the hostages and secure their release. Each state is further obligated to take such actions as may be necessary to establish jurisdiction over the offense of taking of hostages.⁶⁷

The Hostages Convention relies heavily on extradition for the apprehension of suspected offenders. States are obligated to take alleged offenders into custody, prosecute or extradite them, and exchange information and evidence needed in related criminal proceedings. Article 10, which mainly replicates language in the 1970 Hague Convention,⁶⁸ assigns extradition a salient role in the enforcement process. The provision stipulates that the offenses in

63. The Iranian government refused to intervene, allowing 53 Americans to be held hostage by the "students" in the Ministry of Foreign Affairs for 440 days until they were released on January 20, 1981. The United States also brought suit against Iran in the International Court of Justice arguing that this act violated the diplomatic sanctity of the U.S. embassy. See International Court of Justice Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) 1979 I.C.J. 3 (Dec. 15). The ICJ decided unanimously that Iran must redress the situation resulting from the events on November 4, 1979. *Id.* at 124.

64. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 204 (entered into force June 3, 1983) [hereinafter Hostages Convention].

65. *Id.* art. 1.

66. *Id.* arts. 2 & 4.

67. *Id.* art. 5.

68. See Hague Convention, *supra* note 42, art. 8.

the convention are deemed to be extraditable offenses between states parties under existing and future extradition treaties, as well as under the convention itself. The convention may also be used as the legal basis for the extradition of alleged offenders, subject to the law of the requested state. Finally, to facilitate the lawful execution of the extradition process, offenses associated with hostage-taking will be treated as if they occurred not only in the territory of actual commission, but also in the territories of states required to establish legal jurisdiction over an offender. In this manner, the Hostages Convention directly applies the universality and passive personality principles.

The Hostages Convention deviates from the pattern of U.N. counter-terrorism treaties in a fundamental aspect. It prescribes a duty for states to detain accused offenders pending prosecution or extradition. The state in which an alleged offender is found is obliged to "take appropriate measures, including detention," under its domestic law to ensure that prosecution or extradition can be carried out. The holding government is also obligated to notify, without delay, all states concerned so that they might proceed to establish jurisdiction for purposes of extradition.⁶⁹

Yet, unlike other active U.N. counter-terrorism conventions, the Hostages Convention also sets out specific reasons for which extradition might be refused. An extradition request can be denied by a state if that government has "substantial grounds" for believing that the request has been made by another government "for the purposes of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion."⁷⁰ Such criteria are normally reserved for persons seeking asylum as refugees in a foreign state. Nonetheless, insertion of this language into the convention gives considerable discretion to the holding state in determining whether to extradite an accused offender. The refusal to extradite must be supplemented with the possibility of prosecution by the holding state. This convention similarly imposes on states the obligation to go forward with prosecution proceedings against alleged offenders if extradition does not occur. As provided for in Article 8, the state in whose territory an alleged offender is found must, "without exception whatsoever and whether or not the offence was committed in its

69. Hostages Convention, *supra* note 64, art. 9.

70. *Id.* art. 9(1).

territory," submit the case for prosecution by its competent authorities "through proceedings in accordance with law of that State."⁷¹ Perpetrators will not, therefore, be able to evade prosecution and punishment without the holding government's investigation of those options.

C. Crimes Against the Safety of International Maritime Navigation

1. The Convention for the Suppression of Unlawful Acts Against the Safety of International Maritime Navigation

Over the last two decades, terrorist threats to maritime security became a serious international concern. Accordingly, the United Nations adopted two special legal instruments dealing with crimes affecting the safety of international maritime navigation. On October 7, 1985, five Palestinian gunmen seized the Italian-flagged *Achille Lauro* cruise ship while it was sailing off the shore of Egypt. During the episode, the perpetrators deliberately murdered a wheelchair-bound American passenger. This horrific act, erroneously branded an act of piracy in the international media, was in fact a crime distinct in international law.⁷² It served as the catalyst for the International Maritime Organization's (IMO) sponsorship of a special legal instrument, the Convention for the Suppression of Unlawful Acts Against the Safety of International Maritime Navigation (1988 SUA Convention),⁷³ to address such unlawful terrorist acts against ocean vessels.⁷⁴ The 1988 SUA Convention applies to all ships navigating through waters beyond the outer limit of the territorial sea of a single state, the lateral limits of its territorial sea with adjacent states, or when the alleged offender is found in the territory of a state. The jurisdictional provisions are clear-cut. A contracting party may directly establish jurisdiction over these offenses if it is the flag

71. *Id.* art 8.

72. For discussion, see Christopher C. Joyner, *The 1988 IMO Convention on the Safety of Maritime Navigation: Towards a Legal Remedy for Terrorism at Sea*, [1989] 31 F.R.G. YB INT'L L. 230; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269 (1988).

73. Convention for the Suppression of Unlawful Acts Against the Safety of International Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 222 (entered into force Mar. 1, 1992) [hereinafter 1988 SUA Convention]. On January 1, 2003, seventy-eight states were parties and fifty-eight were signatories to this IMO Convention.

74. See Halberstam, *supra* note 72, at 270.

state, if an offense occurs within its territorial sea, or if one of its own nationals commits an offense.⁷⁵ Under this Convention, a person commits an offense when he “unlawfully and intentionally” seizes control over a ship by force, performs an act of violence against a persons on board the ship that is likely to endanger the safe navigation of that vessel, destroys or causes damages to a ship that endangers the safe navigation of that vessel, places a device on board that ship that is likely to destroy or cause damage to that vessel, destroys or damages maritime navigational facilities that might endanger the safe navigation of a ship, knowingly communicates false information endangering the safe navigation of ships; or commits injury to or murder of any person in connection with any of the preceding acts.⁷⁶

To ensure prosecution and punishment, the offenses in this Convention are deemed extraditable acts. To facilitate that process, jurisdictional factors assume salient consideration. States have obligations to establish their jurisdiction over the offenses described,⁷⁷ make the offenses punishable by appropriate penalties,⁷⁸ take alleged offenders into custody,⁷⁹ prosecute or extradite alleged offenders,⁸⁰ cooperate in preventative measures,⁸¹ and exchange information and evidence needed in related criminal proceedings.⁸² To accomplish these ends, the Convention establishes two types of formal jurisdiction—obligatory and discretionary. Article 6 provides that each party “shall take such measures as may be necessary to establish its jurisdiction” when the offense is committed “against or on board a ship flying the flag of the State at the time the offence is committed; or (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.”⁸³ This provision goes on to assert that a state party may also establish jurisdiction over any offense when “(a) it is committed by a stateless person whose habitual residence is in that State; (b) during its commission a national of that State is

75. 1988 SUA Convention, *supra* note 73, art. 6.

76. *Id.* art. 3(1).

77. *Id.* art. 6.

78. *Id.* art. 5.

79. *Id.* art. 7.

80. *Id.* art. 10.

81. *Id.* art. 13.

82. *Id.* art. 15.

83. *Id.* art. 6(1).

seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.”⁸⁴

2. Similarities and Differences

Article 11 of the 1988 SUA Convention provides for the extradition of offenders in language that essentially replicates Article 8 of the 1970 Hague Convention.⁸⁵ The offenses in question are deemed extraditable in cases where extradition treaties are concluded between parties.⁸⁶ If no treaty is available, the Convention may serve as the legal basis for the extradition of

84. 1988 SUA Convention, *supra* note 73, art. 6(2).

85. See Hague Convention, *supra* note 42, art. (8). In full, article 11 of the IMO Convention provides that:

1. The offences set forth in article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 3. Extradition shall be subject to the other conditions provided by the law of the requested State Party.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 3 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 3 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 a place within the jurisdiction of the State Party requesting extradition.

5. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article 7 and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.

6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in article 7, paragraph 3, can be effected in the requesting State.

7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

1988 SUA Convention, *supra* note 73, art. 11.

86. 1988 SUA Convention, *supra* note 73, art.11(1).

alleged offenders.⁸⁷ Finally, for purposes of extradition, the pertinent offenses may be treated as if they were committed within the jurisdiction of a requesting state.⁸⁸ The 1998 Convention's extradition article, however, elaborates three additional points beyond those included in The Hague and Montreal Conventions.⁸⁹ First, a state, which receives more than one request for extradition from states having proper jurisdiction, and which decides not to prosecute, is expected to "pay due regard" to the state whose flag the vessel was flying when the offence was committed.⁹⁰ Second, the requested state is expected to pay due regard to whether the rights of an alleged offender can be protected in the requesting state.⁹¹ Finally, Article 11 aims to ensure that all extradition treaties and arrangements are modified so that they are made compatible with the provisions in the 1988 SUA Convention.⁹²

Intimately associated with the 1988 SUA Convention is its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (IMO SUA Protocol).⁹³ The IMO SUA Protocol applies to the offenses described in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation when they are committed on a "fixed platform." This is defined as an artificial island, installation, or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes.⁹⁴ States assume obligations for establishing their jurisdiction over the offences described, and to make the offenses punishable by appropriate penalties, take alleged offenders into custody, and either extradite or institute procedures for prosecuting them. Not surprisingly, the extradition

87. *Id.* art. 11(2).

88. *Id.* art. 11(4).

89. See Hague Convention, *supra* note 42, art. 8; see also Montreal Convention, *supra* note 49, art. 8.

90. 1988 SUA Convention, *supra* note 73, art. 11(5).

91. *Id.* art. 11(6). An offender has two stipulated rights: (1) to communicate "without delay" with his nearest appropriate state representative or, if he is a stateless person, the state in the territory of which he has his habitual residence; and (2) to be visited by a representative of that state. *Id.* art. 7(3).

92. *Id.* art. 11(7).

93. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (entered into force Mar. 1, 1992) [hereinafter IMO SUA Protocol]. By January 2003, at least seventy-one states were parties to the IMO SUA Protocol.

94. *Id.* art. 1(3).

and submission-of-cases-for-prosecution procedures are taken verbatim from the 1988 IMO Convention.

In 2003, international concern remains acute over the possibility of terrorism at sea. The scenarios producing great anxiety today include ramming speedboats loaded with high explosives into luxury cruise ships or terrorists commandeering a freighter carrying dangerous chemicals or liquefied natural gas and crashing it into an urban area port.⁹⁵ While the IMO SUA Convention would clearly apply to offenders who might commit such activities, the critical objectives for governments should include proactive policy, rather than legal response. That is, governments must provide viable national means to prevent, deter and apprehend would-be offenders before these violent crimes are committed.

D. Crimes Associated with Violent Terrorist Activities

Four special U.N. conventions have been negotiated to deal with particular activities associated with destructive terror violence. The first of these was negotiated under the auspices of the International Atomic Energy Agency (IAEA) to prevent international smuggling of nuclear materials. In the post-Cold War world, serious concern arose over the possibility that nuclear material might be smuggled from Russia, or other nuclear states, into the hands of potential nuclear weapons states, or even terrorist organizations.

1. The Convention on the Physical Protection of Nuclear Materials

Presently, the international legal system has few institutional defenses against such activities, with the most salient being the 1979 Convention on the Physical Protection of Nuclear Material (PPNM Convention).⁹⁶ Significantly, the Physical Protection Convention functions mainly as an anti-terrorism agreement, not a nonproliferation measure. Accordingly, it presents two objectives. First, the convention aims to establish levels of physical protection needed for the safe international transportation of nuclear

95. See John Mintz, *15 Freighters Believed to Be Linked to Al Qaeda*, WASH. POST, Dec. 31, 2002, at A1.

96. Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080 (entered into force Feb. 8, 1987) [hereinafter PPNM Convention]. In January 2003, there are at least eighty-one parties and forty-five signatories to this convention.

material used for peaceful purposes. Second, it provides for measures to be taken against unlawful acts that affect such nuclear materials when they are being transported internationally, and while stored and transported domestically.

The application of physical protection prescribed in the convention applies only to nuclear material used for peaceful purposes while in international transport.⁹⁷ Other provisions (e.g., requirements that relate to making specified acts punishable offences under national law, establishing jurisdiction over those offenses and providing for the prosecution or extradition of alleged offenders) pertain also to nuclear material used for peaceful purposes while used, stored, or transported domestically.⁹⁸ Accordingly, states parties to the PPNM Convention are obliged to punish, under their national law, the offenses pertaining to nuclear material in the Convention.⁹⁹ In particular, such offenses include intentional commission of unlawful unauthorized acts dealing with nuclear material that may cause or threaten death, serious injury, or damage to any person or property; the theft of nuclear material; embezzlement or fraudulent attainment of nuclear material; demands made through intimidation for nuclear material; threats to use nuclear material to cause death, serious injury, or damage to any person or property; or threats to steal nuclear material in order to compel a person, international organization, or government to do or refrain from doing any act.¹⁰⁰ Most importantly for this study, the convention prescribes specific rules for jurisdiction over, and extradition of, alleged offenders. Article 9 sets out the obligation for states to detain offenders for the purposes of extradition or prosecution,¹⁰¹ while Article 10 articulates the duty of the holding government either to extradite or alternatively, to prosecute an accused offender.¹⁰² The duty to extradite is then elaborated in Article 11,

97. *Id.* art. 2(1).

98. *Id.* art. 2(2).

99. *Id.* art. 3.

100. *Id.* art 7(1).

101. *Id.* art. 9.

102. *Id.* art. 10. Article 10 substantially repeats the “extradite-or-prosecute” language in Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. Hague Convention, *supra* note 42, art. 7.

in language nearly verbatim to that in previous U.N. counter-terrorism conventions.¹⁰³

Once again, extradition emerges as the critical legal ingredient underpinning the international enforcement process. The legal obligations are clear and the procedures are familiar. Under the doctrine of state responsibility, each state must ensure that these processes function efficiently.

2. The Convention on the Making of Plastic Explosives

The second instrument, the Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention),¹⁰⁴ was sponsored by ICAO in 1991 to suppress the use of unmarked plastic explosives for bombing aircraft in flight. The Convention requires each state party to prohibit and prevent the manufacture in its territory of unmarked plastic explosives. Plastic explosives must be marked during the manufacturing process by special detection agents that are defined in the Technical Annex to the convention. This Convention also requires each state to prohibit and prevent the movement into or out of its territory of unmarked plastic explosives and to exercise strict and effective control over the possession of any existing stocks of unmarked explosives. Stocks of plastic explosives not held by military or police authorities must be destroyed or used for peaceful purposes consistent with the objectives of the convention. These stocks must be marked or rendered permanently ineffective within three years from the convention's entry into force for each state. The Convention also establishes an International Explosives Technical Commission comprised of experts in the manufacture, detection and research of explosives. The Commission is supposed to evaluate technical developments relating to the manufacture, marking and detection of explosives. It then reports its findings through the Council of ICAO to all states and international

103. PPNM Convention, *supra* note 96, art. 11. This substantially repeats the language contained in Article 8 of the 1970 Hague Convention, Article 8 of the Montreal Convention, and Article 10 of the Hostages Convention. Hague Convention, *supra* note 43, art. 8; Montreal Convention, *supra* note 49, art. 8; Hostages Convention, *supra* note 64, art. 10.

104. Final Act of the Conference on Air Law and Convention on the Marking of Plastic Explosives for the purpose of Detection, ICAO Doc. 9,571 (June 21, 1998). At least eighty-eight states are party to this instrument in January 2003.

organizations concerned, and if necessary, proposes amendments to the Technical Annex to the Convention.

Unlike other post-1970 U.N. counter-terrorism instruments, the Plastics Explosives Convention omits provisions for extradition or prosecution of offenders. The focus of this instrument is not on the prosecution and punishment of persons who use these plastic explosives. Rather, the Convention aims at imposing obligations for strict authoritative control and destruction of such explosives in states. Consequently, no specific mention is made within the convention for extradition, prosecution, or means of direct interstate enforcement of provisions.

3. The International Convention for the Suppression of Terrorist Bombings

A third violent activity intimately associated with terrorism is the act of bombing public buildings and private property. To suppress this violent activity, the U.N. General Assembly adopted the International Convention for the Suppression of Terrorist Bombings in 1997 (Terrorist Bombing Convention).¹⁰⁵ This instrument is modeled on the structure of previous counterterrorism conventions adopted at the United Nations and its specialized agencies. Like its predecessors, the Terrorist Bombing Convention does not attempt to define "terrorism." Instead, the instrument defines particular behavior that, irrespective of motivation, is condemned internationally as an offense and is therefore made an appropriate subject of international law enforcement cooperation. Under the Convention, an offense is committed when any person engages in the intentional and unlawful delivery, placement, discharge or detonation of "an explosive or other lethal device in . . . a place of public use, a State or government facility, a public transportation system or an infrastructure facility. . . ."¹⁰⁶ The Convention

105. International Convention for the Suppression of Terrorist Bombings, S. TREATY DOC. NO. 106-6 (1997) (entered into force May 23, 2001) [hereinafter Terrorist Bombing Convention]. In January 2003, seventy-seven states were parties and fifty-eight states were signatories to this convention. The United States initiated negotiation of this convention in the aftermath of the 1996 deadly truck bombing attack on U.S. military personnel at the Khubar Towers housing facility in Dhahran, Saudi Arabia. Nineteen American citizens were killed and some 500 other persons were wounded. See U.S. DEP'T OF STATE, PUB. NO. 10,433, PATTERNS OF GLOBAL TERRORISM: 1996, at 21, 35 (1997).

106. *Id.* art. 2(1).

underscores the pernicious intention of such bombings as a crime, namely to cause death, serious bodily injury, or extensive destruction that may result in major economic loss. Any person also commits an offense under the Convention if he participates as an accomplice in any of these acts, organizes others to commit them, or in any other way contributes to their commission.¹⁰⁷ The Convention does not apply, however, where such an act does not involve any international elements as defined by the convention.

States are obliged to establish jurisdiction over, and make punishable under their domestic laws, the offenses specified in the convention. Governments are also required to extradite or submit for prosecution persons accused of committing or aiding in the commission of the offenses.¹⁰⁸ In addition, states are obligated to assist each other with criminal proceedings under the Convention. To this end, Article 9 stipulates that the offenses in the convention are deemed to be extraditable offenses between states under existing extradition treaties, and under the Convention itself. Further, should states have no extradition treaty with one another, the Convention may serve as the legal basis for extradition. Finally, the Convention declares that universal jurisdiction may be used by states as a lawful conduit for extradition.¹⁰⁹

107. *Id.* arts. 2(2) & 2(3).

108. Article 8 provides in full that:

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

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 this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Id. art. 8.

109. In full, the Terrorist Bombing Convention makes extradition possible under the following circumstances:

1. The offences set forth 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

In contrast to previous U.N. counter-terrorism instruments, the Terrorist Bombing Convention explicitly recognizes the problematic nature of the political offenses exception. Accordingly, Article 11 rejects the political offenses exception as it tersely avers that:

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.¹¹⁰

This stipulation aims to contribute to legally differentiating terror violence from other violent activities of national liberation movements. In the past, the political offense conundrum generated not only considerable legal polemics to defining terrorism as a crime, but also formidable political encumbrances to exercising the extradition between governments. To a certain degree, the provision succeeds in that ambition. But at the same time the convention contains a caveat that governments could use to refuse

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 for extradition from another State Party with which it has no extradition treaty, the requested State Party 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 set forth in article 2 as extraditable offences between themselves, subject to the conditions provided 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 State Parties to the extent that they are incompatible with this Convention.

Id. art 9. Compare Hague Convention, *supra* note 42, art. 8; Montreal Convention, *supra* note 49, art. 8; IMO SUA Convention, *supra* note 93, art. 11.

110. Terrorist Bombing Convention, *supra* note 105, art. 11.

extradition of alleged offenders to another state. Like the Hostages Convention, the Terrorist Bombing Convention asserts that no government is obligated to extradite if it has "substantial grounds" to believe that an extradition request is being 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."¹¹¹ Such conditions normally are reserved for governments to consider in grants of political asylum to persons seeking refugee status.¹¹² While this provision preserves that protection for refugees, it seems critical that governments must not abuse these conditions as loopholes or rationales to protect terrorist offenders.

4. The International Convention for the Suppression of the Financing of Terrorism

The final U.N. counter-terrorism convention strives to curtail financial support for terrorist activities. The international community has demonstrated serious concern for the transnational financing of terrorist activities that kill innocent people and destroy civilian property. It is well known that the international terror network is financed by a complex web of wealthy donors, money launderers, and cross-border currency transfers. Hence, elimination of sources of funding is tantamount to suppressing terrorist activities. To facilitate this objective, the General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism in 1999 (Terrorism Financing Convention).¹¹³ This Convention provides for a legal regime prohibiting certain unlawful activities by individuals or groups that are ancillary to terrorist acts.

The Convention defines an offense as the direct involvement or complicity in the intentional and unlawful provision or collection of funds with the intention or knowledge that any part of the funds may be used to perpetrate: (1) any of the offenses described in the eleven U.N. conventions enumerated in the

111. *Id.* art. 12.

112. Convention Relating to the Status of Refugees, done July 28, 1951 (entered into force Apr. 22, 1954) 189 U.N.T.S. 137, at art. 1 (definition of refugee).

113. International Convention for the Suppression of the Financing of Terrorism, SEN. TREATY DOC. NO. 106-49 (Dec. 9, 1999) (entered into force Apr. 10, 2002) [hereinafter *Terrorism Financing Convention*].

Annex; or (2) an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population or to compel a government or an international organization to do or abstain from doing any act.¹¹⁴

The provision or collection of funds in this manner is an offense, irrespective of whether the funds are actually used to carry out the proscribed acts. Each state is required to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for committing the offenses described. The offenses referred to in the Convention are deemed to be extraditable offenses.¹¹⁵ Accordingly, states are mandated to establish their jurisdiction over these offenses, take alleged offenders into custody, prosecute or extradite alleged offenders,¹¹⁶ cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. Of significance here is that states parties are obligated to offer each other “the greatest measures of assistance” in conducting criminal investigations and extradition proceedings. The convention unequivocally asserts that states parties “may not refuse a request for mutual legal assistance on the ground of bank secrecy.”¹¹⁷ Through this stipulation, governments are obliged to be more forthcoming in their transactions.

Extradition is central to enforcing the Terrorism Financing Convention. The offenses defined in the Convention are deemed to be extraditable between states parties under existing extradition treaties, future extradition treaties, and even in the absence of treaties. This Convention, like earlier U.N. counter-terrorism

114. *Id.* art. 2(1)(b).

115. *Id.* art. 11.

116. The “extradite or prosecute rule” contained in Article 10 provides in relevant part:

The State Party in the territory of which the alleged offender is present shall, . . . if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Id. art. 10. This language is virtually identical to the Article 8 “extradite or prosecute” provision in the International Convention for the Suppression of Terrorist Bombings. See Terrorist Bombing Convention, *supra* note 105, art. 8.

117. Terrorism Financing Convention, *supra* note 113, art. 12(2).

instruments, may also serve as the legal basis for extradition between states. Moreover, states may use this convention as the legal rationale for exercising universal jurisdiction against an alleged offender.¹¹⁸ Using verbatim language in the 1997 Terrorist Bombing Convention, the Terrorism Financing Convention also forbids resorting to political offenses as the only reason for refusing a government's request for extradition or mutual legal assistance.¹¹⁹ It provides that:

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

While the events of September 11 clearly highlight the value and critical nature of denying financial assets to terrorists—and hence the direct relevance of this convention—it remains obvious that the government of each state must take action to cut off funds to these groups. The criminal offense of financing terrorism has been established and the legal rules are clear; however, taking action to implement the means for denying those funds and punishing offenders remain the responsibility of individual governments.

IV. THE COMPREHENSIVE CONVENTION ON TERRORISM

The U.N.'s most recent initiative against terrorist activities is a comprehensive draft convention on international terrorism. The text for such an instrument was first proposed by India in 1996,¹²⁰ but it was not until 1999 that the General Assembly entrusted its Ad Hoc Committee to further develop a convention (Draft Anti-Terrorism Convention). Those negotiations, which began in 2000 in the Working Group of the Sixth Committee, have progressively continued. The substantive content for the Convention is nearly

118. *Id.* art. 11.

119. *Id.* art. 14.

120. *See* U.N. GAOR 6th Comm., 51st Sess., Annex, Agenda Item 151, at 2, U.N. Doc. A/C.6/51/6 (1996).

complete,¹²¹ although the Working Group encountered serious difficulties in reconciling three important issues in the text: (1) the definition of terrorism;¹²² (2) the relationship of the comprehensive convention to existing and future counter-terrorism treaties; and (3) the differentiation between terrorism and the right of peoples to self determination and to combat foreign occupation. Although these issues remain both politically troublesome and legally unresolved, this draft Convention to suppress international terrorism relies on extradition as a critical tool for law enforcement.

To a considerable degree, the Draft Anti-Terrorism Convention is a combination of provisions from earlier U.N. conventions. Of the twenty-seven proposed articles in the Draft Anti-Terrorism Convention's text (the final five of which are procedural clauses), fifteen directly relate to extradition or jurisdictional considerations for exercising that process.¹²³ The Convention will not apply to situations where the offense is committed entirely within a state, the perpetrators and victims are nationals of that state, and the government of that state has the alleged offenders in custody.¹²⁴ Moreover, criminal acts committed within the scope of the Convention cannot be justified by political, philosophical, ideological, racial, ethnic, religious or similar

121. The text of the draft convention is in the report of the Ad Hoc Committee. See G.A. Res. 51/210, U.N. GAOR, 6th Sess., Annex 1, Supp. No. 37, at 3, U.N. Doc. A/57/37 (1993).

122. The draft text does not include a definition for "terrorism" among the terms articulated in Article 1. Yet, the "informal text" of Article 2 defines terrorist activities as "an offence within the meaning of this Convention" if a person causes "by any means, unlawfully and intentionally,"

(a) Death or seriously 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.

Id. at 6. The threat or attempt to commit such acts constitutes an offense as well. The text for the alternative Article 2 provision simply reads: "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." *Id.* at 7.

123. *Viz.*, articles 3–17.

124. G.A. Res. 51/210, *supra* note 121, art. 3.

considerations.¹²⁵ For purposes of prosecution or extradition, this Convention's jurisdictional scope over the offenses is broader than any other U.N. counter-terrorism instrument. States may establish jurisdiction on at least nine legal grounds: (1) if the offense is committed in that state; (2) on board a vessel flying the flag of that state; (3) by a national of that state; or (4) by a stateless person who lives in that state. In addition, jurisdiction may be established: (5) if an offense is committed outside the territory of a state, but its intended effects are to intimidate or influence that government; (6) if an offense is committed against a national of that state; (7) if the offense is committed against a state's government-owned facility or diplomatic mission; (8) if the offense is committed to compel a state to do or abstain from doing something; or (9) if the offense occurs on board an aircraft operated by the government of that state.¹²⁶

The Convention contains safeguards to prevent offenders from evading apprehension. States are obligated to ensure that refugee status with asylum is not granted to possible terrorist offenders.¹²⁷ They must also prevent their territory from being used for terrorist training camps or other terrorist activities.¹²⁸ One of the convention's more intriguing provisions asserts that if a member of a legal entity within a state commits a terrorist offense, that legal entity will be held criminally, civilly or administratively liable for the act.¹²⁹

A. Article 10

Article 10 initiates the Draft Anti-Terrorism Convention's extradition procedures. Parties are obligated to investigate and apprehend alleged offenders. Accused offenders are afforded rights to communicate with the "nearest appropriate Representative" of the state of which they are a national, as well as to be visited by that representative. A state is also directed to notify the Secretary General of the United Nations that it has taken a person into custody.¹³⁰ Article 11 reaffirms for states parties the extradite-or-prosecute principle, in language virtually

125. *Id.* art. 5.

126. *Id.* arts. 6 (1) & (2).

127. *Id.* art 7.

128. *Id.* art 8.

129. *Id.* art. 9.

130. *Id.* art. 10.

identical to similar provisions in earlier U.N. counter-terrorism conventions.¹³¹ Significantly, the Draft Anti-Terrorism Convention contains an explicit prohibition on the use of the political offense exclusion as the “sole ground” for denying a request for extradition or mutual legal assistance.¹³² That proscription, however, is subsequently qualified by a mandate stating that no obligation exists for a requested state to extradite “if it has substantial grounds for believing that the request for extradition for 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.”¹³³ Such preemptive protections are welcome, yet the highly subjective nature of this exclusionary clause might make it possible for governments to deny the extradition of alleged offenders to other states on evidence that is merely interpretative, which could obfuscate bringing offenders to justice.

B. Article 17

Article 17, the core extradition provision, draws its language from obligations in similar provisions in earlier counter-terrorism instruments:

1. The offences set forth 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 the 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 for extradition 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 Party.

131. See, e.g., Terrorist Bombing Convention, *supra* note 105, art. 9.

132. G.A. Res. 51/210, *supra* note 121, art. 14.

133. *Id.* art. 15; see also Terrorist Bombing Convention, *supra* note 105, art. 12.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences referred to in article 2 as extraditable offences between themselves, subject to the conditions provided 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 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.¹³⁴

In sum, the offenses in the convention are deemed to be extraditable offenses under existing extradition treaties and under future treaties. Should states lack extradition agreements with each other, the Convention may serve as the legal basis for undertaking extradition between them. The Convention also declares that universal jurisdiction may serve as a lawful justification amongst parties for extradition.

C. Article 18

The third area of controversy in negotiating the Draft Anti-Terrorism Convention pertains to exclusions from the scope of the convention. In the Article 18 text circulated by the Coordinator of the General Assembly's Ad Hoc Committee, the provision asserts that, "[t]he activities of armed forces during an armed conflict, as those terms are understood by international humanitarian law, which are governed by that law, are not governed by this convention."¹³⁵ The critical consideration here is that military forces engaged in armed conflict are governed by the laws of war and international humanitarian law, as opposed to rules prohibiting terrorist activities.

134. G.A. Res. 51/210, *supra* note 121, art. 17; *see e.g.*, IMO SUA Convention, *supra* note 93, art. 11; Terrorist Bombing Convention, *supra* note 105, art. 9.

135. UN Doc. A/57/37 (Annex IV), at 17.

The difficulty over this provision, however, hinges on a draft provision proposed by the Islamic Conference that adds a politically problematic caveat. The provision would provide that, “[t]he activities of the *parties* during an armed conflict, *including in situations of foreign occupation*, as those terms are understood by international humanitarian law, which are governed by that law, are not governed by this convention.”¹³⁶ The phrase “situations of foreign occupation” seems clearly directed at the situation of the Palestinians on the West Bank. Consequently, if this caveat were adopted, the resort by Palestinian extremists to committing violent acts against Israelis, including homicide bombers who indiscriminately target civilians, would not be regarded as unlawful terrorist offenses under the Convention. Rather, these acts would be converted into legitimate activities taken in the struggle for Palestinian self-determination and national liberation from Israeli occupation. Thus, any Palestinians who survived a violent attack, or conspired to commit such destructive activities, would be immune from extradition by states. It therefore remains clear that no easy solution is likely to be found that resolves this dilemma to the satisfaction of all. Hence, for the foreseeable future, the Draft Anti-Terrorism Convention, with its considerable potential for extraditing terrorist offenders, remains more a legal prospect than a prospective set of legal rules.

V. CONCLUSIONS

The internationalization of law enforcement activities remains a vital strategy for governments in combating global terrorism. The key to this law enforcement process is having special international instruments that designate certain acts as criminal offenses and provide for the extradition of accused offenders to states having jurisdiction over the offense for trial and prosecution. Since 1963, the U.N. agencies have sponsored, adopted, and promoted implementation of a combination of conventions that criminalize certain terrorist acts as offenses under international law and facilitate extradition or prosecution of the perpetrators. The Sixth Committee of the U.N. General Assembly, as well as ICAO, IMO and the IAEA, contributed immensely to this law-making process. In this connection, governments now realize that

136. UN Doc. A/57/37 (Annex IV), at 17 (emphasis added).

the fight against global terrorism necessitates a multifaceted response that must incorporate improved law enforcement procedures, including further widespread use of extradition. Governments should be given wider legal scope for bringing alleged terrorist perpetrators to trial, and extradition practice should be reformed such that more restrictions are placed on using the political offence exception. Accordingly, more effective measures to promote international cooperation in the prevention of terrorist violence and the prosecution of its perpetrators must be developed at the international, regional and bilateral levels. These U.N. conventions facilitate that process, especially by criminalizing certain offenses and highlighting extradition as an integral means for multilateral law enforcement.

The U.N. counter-terrorism instruments address the question of extraditable offenses and proffer mandatory requirements for extradition with few grounds for refusal to do so. Considered collectively, they provide a wider basis for extradition arrangements by eliminating the list-of-specific-offenses approach in favor of a more generalized, indeed, universal jurisdictional approach for extraditing terrorist offenders. Further, where no bilateral treaty exists between states, extradition traditionally could be premised upon the customary international law principles of reciprocity and comity. The constellation of U.N. agreements gives formal structure and direction for using the extradition process over a broad multilateral jurisdictional scope. In addition, these instruments aim to coordinate and enhance mutual assistance among parties with the goal of combating serious transnational terrorist crimes.

The most recent of these instruments seeks to impose limits on the mandatory political offense exception by excluding terrorist acts that are recognized in multilateral conventions as being especially grave criminal offenses. Indeed, the political offense exception is specifically declared not to be a bar to extradition for crimes of terrorist violence. Yet, it is important to realize that a government's decision to extradite is still subjective because extradition can be denied if government officials believe the prosecution of an accused offender might be motivated by that person's race, religion, nationality, ethnic origin, or political opinion. The problem with such a prophylactic stipulation seems plainly obvious. Persons might commit terrorist acts in violent reaction to a government's policies that affect their racial,

religious, ethnic, or national minority group in that state. This situation therefore might qualify for a denial of extradition from another government, even though the person sought was not attempting to change the political system of the requesting state.

It is true that the series of U.N. counter-terrorism instruments were negotiated piecemeal and do not create a fully integrated anti-terrorist legal system. Still, these instruments establish a framework for international cooperation among states that is designed to prevent and suppress international terrorism. This is to be accomplished by requiring states to cooperate in the prevention and investigation of terrorist activities, to criminalize terrorist acts, to assist other states in the prosecution of terrorists, and either to extradite or to prosecute alleged offenders found in their territory. The end goal is to ensure that accused terrorists are apprehended, prosecuted, and punished. In this manner, the United Nations may have instituted a patchwork quilt of international legal commitments to stem terrorism. These conventions build on each other as they incorporate the process of extradition among states parties as the principal means for international enforcement.

At the heart of these anti-terrorism conventions is the "extradite or prosecute" requirement. This principle imposes upon each state the obligation either to extradite an offender to one of the states that has jurisdiction under the convention, or to submit the case to its authorities for prosecution. Since the Hague Convention, this choice has been provided in every U.N.-sponsored agreement that seeks multilateral cooperation in law enforcement to suppress international acts of terrorism.¹³⁷

It is clear that contemporary global terrorism involves criminal acts usually perpetrated by nonstate actors. It is also apparent that the appropriate response of a victim state in defense against such acts is to seek the assistance of law enforcement. Preeminent is the obligation of states party to U.N. counter-terrorism instruments to extradite or prosecute. All nonstate actors, however, operate within the sovereign territory of a state, thus creating the potential for conflicts of legal jurisdiction. When

137. Indeed, given the persuasive importance of the principle of *aut dedere aut judicare* for the enforcement of contemporary international criminal law, some highly respected commentators have suggested that this obligation has today attained the level of a rule of general international law. See generally M. Cherif Bassiouni & Edward M. Wise, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

a government is unwilling or unable to cooperate in the suppression of such terrorism, or when it is covertly supporting such terrorist activities, then law enforcement fails as an option.

The international legal authority for a government to respond to acts of international terrorism remains dependent on other international actors. States must rely on each other to combat international terrorism effectively through means of extradition. To strengthen international criminal law against terrorist activities, states parties to an international agreement must be obligated to prosecute an offender if the holding government decides against extradition. The obligation to prosecute or extradite persons accused of terrorist offenses underscores the pervasive recognition that governments are duty-bound to act, either through prosecution or extradition, to make certain that persons who perpetrate injury or damage to the fundamental interests of the international community are apprehended, prosecuted, and brought to justice. Yet, the legal obligation for governments to extradite or prosecute, while necessary, is not sufficient.

The force of legal obligation may motivate governments to move toward enforcing legal rules that punish terrorists, but the critical ingredient for that process is political will. Governments must have the political resolve to fully implement obligations into policy action and must be willing to make international extradition law function as it is intended. International statesmen crafted and implemented these U.N. instruments to outlaw various acts of global terrorism and to facilitate means for punishing the offenders. But if governmental officials are not willing to convert these laws into actual practice, those legal obligations will be nothing more than words on paper.

Legal obligations must be transformed into policy actions. However, if the past is prologue, that recognition should give pause for concern. States are not only legal entities, but also political creatures. Their governments are overtly sensitive to both domestic and international political pressures. In a world earmarked by conflicting political, ideological, and economic tensions at home and abroad, governments will have difficulty in mobilizing the political will to make the international extradition process work more effectively in apprehending and prosecuting terrorist offenders. In the end, the critical challenge for governments in this era of global terrorism will be to discover how they can resolutely and consistently marshal the necessary political

will to prosecute accused offenders, particularly their own nationals, for their alleged terrorist offenses abroad.

