Terrorism and International Law

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SEMINAR ON
'THE PHENOMENON OF TERRORISM IN THE CONTEMPORARY WORLD AND ITS IMPACT ON INDIVIDUAL SECURITY, POLITICAL STABILITY AND INTERNATIONAL PEACE'
GENEVA (23-25 JUNE, 1987)
PAPER ON TERRORISM AND INTERNATIONAL LAW

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TERRORISM AND INTERNATIONAL LAW

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I. INTRODUCTION : DEFINITIONAL PROBLEMS

Problems of pluri-dimensional complexity converge in any meaningful endeavour to explore practical measures to prevent, pre-empt or otherwise to discourage and suppress acts of terrorism on an international scene. The present paper is devoted to the treatment of only some of these problems, namely, definitional problems, the problem of jurisdiction, its legal bases and a meaningful response to terrorism. These problems present themselves in more than one connections. To ensure proper appreciation of the nature and scope of these multi-faceted problems relating to terrorism in the eyes of international law, preliminary attention is focused on the need to adopt a balanced approach to the basic notion of "International Terrorism".

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* This paper is presented to a Seminar on the phenomenon of "terrorism" in the contemporary world and its impact on individual security, political stability and international peace. The title is taken from the second theme of the seminar, organized by the Organization of Islamic Conference at Geneva, June 23-25, 1987.

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A. An Accepted Definition of "International Terrorism"

Definitional problems of primary importance loom large in any attempt to encapsulate the general notion of "terrorism" or to identify the salient features of "acts of terrorism". A marked increase in the intensity, frequency and variety of occurrences of "acts of terrorism" in the diverse parts of the globe has prompted more recent authors to suggest a definitional approach with varying components without sufficiently reflecting the existing notion of terrorism as defined in a general multilateral convention.

For a purpose, close akin to the present, the Convention for the Prevention and Punishment of Terrorism, adopted by the International Conference on the Repression of Terrorism on November 16, 1937, Geneva, contains a pertinent definition of "acts of terrorism" as well as provisions elaborating and enumerating criminal offences under this heading.


2/ Ibid., at pp. 192-193: "Terrorism itself can be defined as a process that involves the international use of violence, or threat of violence, against an instrumental targets in order to communicate to a primary target or that of further violence so as both to coerce the primary target into behavior or attitudes through intense fear or anxiety and to serve a particular political end. Compare, Micholus, Statistical Approaches to the Study of Terrorism, in Terrorism; Indisciplinary Perspectives, 209, 209-10 (Y. Alexander and S. Figer eds. 1977); and Lillich and Paxman, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 26 Am. U.L. Review, 217, 219 (1977).

Article I, paragraph 2, of the 1937 Geneva Convention provides:

"In the present convention, the expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or the general public public." 4/

Before proceeding to define the notion of terrorism, paragraph 1 reaffirms "the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to present the acts in which such activities take shape." 5/ It also stipulates the obligation of States to "undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose." 6/ This undertaking implies the duty on the part of States parties to adopt legislation establishing jurisdiction not only to arrest, try and punish, but above all to prescribe as punishable offence acts of terrorism so defined 7/ and to extend criminal jurisdiction of this courts to prosecute and enforce judgements.

Article 2 requires each of the States parties to make following acts of terrorism punishable criminal offences if committed on its territory and directed against another State party: -

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4/ Ibid., at p. 18.
5/ Ibid6., Article 1, paragraph 1, at p. 18.
6/ Ibid., operative part of paragraph 1, at p. 18.
7/ Ibid., Articles 2, 3 and 4, pp. 18-19.
"(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:-

(a) Head of States, persons exercising the perogatives of the head of the 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) Wilful destruction of, or damage to, public property or property devoted to a public purposes belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives, or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.₈/

The definition adopted by the 1937 Geneva Convention and the list of punishable offences of acts of terrorism were incorporated in a recent report of Minister Doudou Thiam, Special Rapporteur, for the International Law Commission for the topic: Draft Code of Offences against the Peace and Security of Mankind. Draft Article 11 enumerates acts constituting crimes against peace, among which Paragraph 4 includes:

5/...
of a State of terrorist acts in another State, or the toleration by these authorities of activities organized for the purpose of carrying out terrorist acts in another State.\(^9\) Sub-paragraph (a) contains a definition of terrorist acts taken almost verbatim from the 1937 \(^{10}\) Convention and sub-paragraph (b) in effect enumerates offences constituting terrorist acts in the same fashion as article 2 of the earlier Convention.\(^11\)

B. Elements of "Act of Terrorism"

The elements of "acts of terrorism" as contained in the 1937 Convention and the Draft Article by Minister Doudou Thiam are broadly similar. The acts in question must be punishable offences, directed against a State, and intended or calculated to create a state of fear or "terror" in the minds of public figures, or a group of persons or the general public. First, to constitute a crime against peace, as a category of offences against the peace and security of mankind, the "terrorist acts" or "acts of terrorism" must be by the authorities of a State consisting either in "undertaking", "assisting" or "encouragements", and it has to be committed in another State. Alternatively, the definition also covers "toleration" by State authorities of activities organized for the purpose of carrying out terrorist acts in another State.\(^12\) To amount to a crime against peace, the terrorist acts must have been attributable to a State either through State authorities, undertaking, assistance or encouragement, or indeed mere toleration without actual participation. In any event, it presupposes the


\(^{10}\) Ibid., at p. 109.

\(^{11}\) See Note 3, A/CN.4/368, at p. 18.

\(^{12}\) See A/41/10 Supplement No. 10, para 4, at p. 109.
existence of an obligation on the part of a State not knowingly to allow its territory to be used in the organizing or staging of activities for the commission of terrorist acts in another State. Secondly, the act must be directed against "another State. To this requirement is added "or the population of a State", thereby extending the notion of direction to cover also the population of another State. In fact, this extension is implicit in the creation of a state of "terror" or "fear" in the minds of public figures (chez des personalités), or a group of persons or the general public. The last "phrase" is invariably referable to the population of that other State. Finally, the intent or purpose or "mens rea" is clearly the inducement of "fear" or "terror", a psychological effect to be produced by the "actus reus" or the act of terror in question.

A valid query may be raised whether an ordinary act of terrorism which is defined as a criminal offence directed against a State or its population and calculated to create a state of fear in the minds of individuals, a group of persons or the public at large becomes an offence against peace (or against the peace and security of mankind) only if it is committed by a State or attributable to the State through its officials' action or omission or toleration. In other words, without this additional element of the "undertaking", "assisting", "encouragement" or "toleration" by State authorities, an act of terrorism remains a terrorist act nonetheless. The imputation of the act to a State merely aggravates the nature or seriousness of the offence so as to make it not only a criminal offence required to be punishable under domestic law by treaty, but also an

13/ Ibid., at p. 109: (a) Definition of Terrorist Acts.
"offence against the peace and security of mankind" with all the grave consequences that inevitably follow. The 1937 Convention obliged States parties not only to refrain from any acts designed to encourage terrorist activities but also to prevent the acts in which terrorist activities take shape. Thus, States undertake thereby to prevent and punish activities of this nature. A breach of such an undertaking does not entail responsibility of State for the commission of the act or organization of activities by individuals who are neither authorities nor officials of the State. Nevertheless, knowledge and toleration of such activities may amount to a breach of duty engaging State responsibility for failure to prevent the occurrence of such unlawful activities on its territory. A closer examination of concrete examples in State practice may help clarify some of the inherent obscurities and ambiguities. Given the existence of an act of terrorism, our concern may still be precluded by the non-international or non-transnational character of the act.

C. "Acts of Terrorism" and "International Terrorism"

An act of terrorism may constitute but an ordinary crime or criminal offence if committed within the boundary of one State and not directed against any other State. In a sense, every crime is an offence directed against the society or the State. Indeed, some offences are specifically labelled offences against the State, whether in the form of national security, economic or financial stability, sedition or high treason. According to the definition given above, an "act of terrorism" is at least a crime calculated to create a state of fear in the mind of individuals, groups or the general public. It is also directed against the State. An "act of terrorism" is elevated to the status of "international terrorism" solely on account of its "internationality".

8/...
History has known notorious instances of terrorism, although not always categorized as an offence. Thus, we have heard of "Ivan the Terrible" as distinguished from "Richard the Lion Heart". In post-revolutionary France, the expression "la règne de terreur" has been used to describe the terrifying occurrences. During World War I, a resolution was adopted by the Allied governments condemning German Terror and demanding retribution. 14/ Subsequently, a declaration was made in Moscow on German atrocities. 15/

Aside from war-time terrors or terrorist acts committed during an armed conflict, "acts of terrorism" continued long after the cessation of hostilities. Happenings in various parts of the world did not conform to the same or similar pattern of terror connected with post-war guerilla activities as in Greece for instance. The first notable terrorist group known in Asia with transboundary participation were the C.T. (Chinese, or at times Communist, Terrorists) in Malaya before and also after independence. They were Communist-inspired bandits of Chinese origin taking hostages and demanding extortions from among the Chinese population in Malaya in order to embarrass the British Colonial Government and subsequently its Malayan successor or the Federation of Malay States. Their purpose was to change the regime of government in the country by means of terrorism. If their activities were confined to the borders of Malaya without instigation or assistance or encouragement from outside, they would amount to nothing more than ordinary bandits or highwaymen, operating against local law, not unlike Robin Hood of Sherwood Forest except that there was no oppression against the poor in the part of the ruling...

14/ A/CN.4/368, at p. 28.
15/ Ibid., at p. 29.
authority. In fact, it was an attempt to bring about changes by force of terror, directed from outside against the internal security and stability of Malaya.

The C.T. might have been the first such classic example of international terrorism. On the other hand, there had been other instances of native uprising with the aim to overthrow existing colonial government or removing alien domination. These colonial peoples were not only denied their basic right of self-determination as peoples but were also often labelled "terrorists", such as the "Mao Maos" in Africa or even the Algerians and the Indo-Chinese before their respective independence, struggling to liberate their nations from the yoke of colonial oppression. The process of deolonisation could indeed be painful; the deliverance of an independent nation has often entailed far greater labour pain for the reluctant colonial power than the delivery of an overgrown child by an uncooperative mother. National liberation movements could avail themselves of external assistance with world-wide endorsement.

One crucial point has been rendered crystal clear beyond any shadow of suspicion. General Assembly Resolution 3103 (XXVIII) : Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, has succeeded in precluding national liberation movements from the presumption of guilt. There is less possibility of converting "freedom-fighters" into "terrorists", and "mercenaries" into "national heroes". The two are so far apart that no confusion would seem likely today, although the past was contaminated with such distortions. Paragraphs 5 and 6 run :

"5. The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism

10/...
and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

6. The violation of the legal status of the combatants struggling against colonial and alien domination and racist regimes in the course of armed conflicts entails full responsibility in accordance with the norm of international law."\textsuperscript{16/}

This much has at least been clarified. Between mercenaries and national liberations movements, the position has been made unquestionably clear. Mercenaries or hired killers fight for reward, not to achieve independence, but rather to prolong colonial and alien domination or racist regimes. On the other hand, this clarity will in no way justify "acts of terrorism" or "international terrorism" by whomsoever committed. Regulation of the use of force in an armed conflict in the course of liberation, as in other instances of armed conflict, does not necessarily guarantee absence of violations of the laws and customs of war by either side of the combatants. Suffice it to confirm that such violations engage responsibility under international law. Not only the State that violated the regulation would be responsible, but the insurgents or rebels considered to be protected by the Geneva Conventions of 1949\textsuperscript{17/} and additional Protocols of 1977 \textsuperscript{18/} could be equally liable. Violations in the form of taking of hostages, 11/...
torture, killing of hostages, reprisals could be punishable as crimes against the laws and customs of war or war crimes, and could take the form of "acts of terrorism".

There are also other "acts of terrorism" which are not exclusively taking place within one and the same State, but may have transboundary connections or networks in various parts of the region or elsewhere in the world at large. Just as the "pirates jure gentium" operate on the high seas, i.e., outside national jurisdiction of any State, an organized band of terrorists may have their planning and operational sites in more than one country. The Red Army or other extremist groups of Japan, the Bander-Meinhof gang in the Federal Republic of Germany, the Mafia or the Brigatto Rosso of Italy need not stay put at one headquarters, within one and the same country, they often cross national borders.

A gang of terrorists like the mafia or the Red Brigade, which could operate for private ends or for loftier motives, could commit within Italy an act of terrorism such as the assassination of the Anti-terrorist Commander in Sicily, The Italian General was waylaid and assassinated in his own car on his way home.

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19/ A suicide crash by a monoplane into a private home and other explosions were attempted at various industrial complexes, such as the Mitsubishi Heavy Industry, sometimes by the leftist in protest against capitalism, other times by the rightiest group urging for more militant actions on the part of the Government and other enterprises.

20/ See, e.g., the Klaus Croissant extradition Case, le Figaro, November 17, 1977, at p. 17, Col. B.

21/ The Italian General was waylaid and assassinated in his own car on his way home.
or the kidnapping and subsequent assassination of former Prime Minister Aldo Moro of Italy, could be considered as being directed against the territorial government or the home State. On the other hand, the capture and taking of hostage of General Dozier, NATO Commander of Logistics in Northern Italy, although motivated by private gains, was nevertheless directed against another State (i.e., the U.S.A. of which General Dozier was national) as well as against an international organization (NATO). Inspite of political motivations in all the three cases mentioned above, the offences committed in Italy could clearly be regarded as acts of terrorism. Of the three instances, however, the Dozier Case was apparently the only example of "international terrorism", since the hostage was a foreign (non-Italian) and the act was directed against another State, i.e., not against Italy alone as in the assassination of an Italian Anti-terrorist Commander and former Prime Minister Aldo Moro of Italy.

These three instances may be distinguished from yet another category of terrorist acts, such as, the kidnap of the heir of Bulgari for a ransom, which took place in Italy as well as outside, for the place of payment of ...
for the safety and security of the visiting head of State and dignatories. The fact that the terrorists were agents of the Democratic Peoples's Republic of Korea did not make the act any less international. Similarly, the shooting of Korean jet liner over the Pacific by Soviet shore missiles was not a purely domestic incident, as indeed the act entailed far-reaching repercussions in the history of civil aviation.\textsuperscript{28/}

Nor indeed was the destruction of a New Zealand vessel of the Green Peace by French agents ever to be deemed within France's domestic jurisdiction.\textsuperscript{29/} The international character of the act of terrorism attributable to a State in all these cases fit the definition of "international terrorism". Moreover, they constitute instances of State terrorism, par excellence. The mining of a harbour in time of peace for whatever reason has been found by the International Court of Justice to constitute violation of international law, engaging the responsibility of the State,\textsuperscript{30/} taking into account humanitarian considerations.

\textsuperscript{15/}...

\textsuperscript{28/} See, e.g., the decision of the Pilot Association boycotting landing in Moscow, and other countermeasures adopted by the Council of Europe. Efforts were made to prevent the recurrence of such incidents by establishing points for monitoring routing services in Japan, U.S.S.R., and U.S.A. to coordinate the locality of each civil aircraft.

\textsuperscript{29/} See the Green Peace incident.

D. Types of Offences Associated with "International Terrorism"

Having to some extent drawn a boundary line between "international or transboundary terrorism" of relevant interest to our enquiry and those that need not detain further attention, we may next examine briefly the types of offences which may constitute acts of international terrorism meriting the most attentive consideration. Broadly speaking, within the scope of the internationally accepted definition, acts constituting international terrorism, for present purposes, may be classified under the following categories of offences:

1. Offences against internationally protected persons, kidnap, or wilful act causing death or grievous bodily harm, murder, assassination, such as the assassination of President Anwar Sadat of Egypt and Mme. Park Chung Hee, wife of former Korean President, later himself assassinated.

2. Taking of hostages or seizing a public building, such as an embassy or a consulate, including, e.g., taking hostage of French Ambassador in The Hague, or the Iraki Ambassador in Paris.

3. Wilful destruction of, or damage to public property devoted to public purpose, such as explosion of bombs in a courthouse, public building, department store or market place, in London, Paris, Rome, etc.


See International Convention against the Taking of Hostages, December 17, 1979, Resolution 34/164; European Convention, etc., Article 1 (d).

See European Convention, Article 1 (e); 1937 Geneva Convention, cited in note 31, Article 2, paragraph 2, A/CN.4/368, at p. 18.
4. Wilful act calculated to endanger the lives of members of the public,\textsuperscript{34} such as throwing grenades or firing machine guns in a crowded airport, Leonardo da vinci or Televive, or explosion of Air India or TWA.

5. Hi-jacking of aircraft, vessels and other public means of transport,\textsuperscript{35} such as the hi-jacking of TWA or Pan American air lines, the Santa Maria or the Achille Lauro, or the Dutch train.

6. The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of any of the above offences.\textsuperscript{36}

To this list should also be added acts which contribute to the commission of any of above offences, including the planning, preparation, participation and harbouring of any such act. The following need be mentioned:

(1) conspiracy to commit any such as (1 to 5);\textsuperscript{37}
(2) Any incitement to any such act, if successful;\textsuperscript{38}
(3) direct public incitement to any such act whether or not successful;\textsuperscript{39}
(4) wilful participation in any such act;\textsuperscript{40}
(5) assistance, knowingly given, towards the commission of any such act;\textsuperscript{41}
(6) any attempt to commit any such act.\textsuperscript{42}

\textsuperscript{34} See 1937 Geneva Convention, Article 2, paragraph 3.
\textsuperscript{36} See Article 2, paragraph 5 of the 1937 Convention for the Prevention and Punishment of Terrorism, document A/CN.4/368, p. 18.
\textsuperscript{37} See Article 3, paragraph 1, \textit{ibid.}, p. 19.
\textsuperscript{38} \textit{Ibid.}, p. 19, paragraph 2 of Article 3
\textsuperscript{39} \textit{Ibid.}, p. 19, paragraph 3.
\textsuperscript{40} \textit{Ibid.}, p. 19, paragraph 4.
\textsuperscript{41} \textit{Ibid.}, p. 19, paragraph 5.
\textsuperscript{42} \textit{Ibid.}, p. 18, Article 2, paragraph 4.
II. THE PROBLEM OF JURISDICTION

A. The Problem Stated:

1. The conceptual Problem

The problem connected with jurisdiction is manifold. To begin with, there seems to be a basic conceptual problem inherent in the expression jurisdiction. Secondly, the use of term may also vary with the differing meanings ascribed to it by the user. Lastly, there are traditionally more than one types of jurisdiction that appear to be highly relevant to any consideration of international terrorism. The problem may therefore be tackled in these separate but closely related connections.

A conceptual problem of paramount importance surrounds the expression "jurisdiction". The term has been used in several legal contexts, not necessarily interconnected. In its etymological sense, "jurisdiction" is a combination of "jus" - "juris" and "dicere" - "dictio", literally the statement of the law or power to determine the right or what the law is on the point at issue, or the determination of the right or interest in question.\footnote{See, e.g., Henkin, Pugh, Schacter and Smit International Law, Cases and Materials, Second edition 1986, Chapter 10, p. 820. "Jurisdiction is commonly used to describe authority to affect legal interests".}

In international law, even from the classics of the law of nations, the term "jurisdictio" has been equated with "imperium", as in the maxim "par in parem non habet imperium", or "non habet jurisdictioem". In this sense, 18/...
jurisdiction may be said to constitute but an aspect of "sovereignty", or governmental authority of the State, "pérogative de la puissance publique".

"Jurisdiction" in private international law conveys another connotation of competence, conceptually different from imperium, while in comparative law, the expression "jurisdiction" is replaceable or interchangeable with the term "legal system" or a territory or "patria" in which an independent or autonomous legal system operates.

In constitutional law, jurisdiction is exercisable by the three branches of the government more or less in conformity with the theory and practice of the separation of powers. This may correspond more closely to the different meanings ascribed to the different types of jurisdiction under international law. 44/

The different uses of the same term in various branches or disciplines of the law have created some confusion of thought as well as of expression. Further complication 19/...

44/ See, ibid., pp. 820-821: Jurisdiction may be defined on several levels, namely, under municipal law and under international law. Under municipal law, the legislative, judicial and executive powers of the federal branches of government are defined first in the constitution, which sets the limits beyond which the various branches of the federal and State government may not go. Conflict of laws rules within a federal union often define the limits of legislative, judicial and executive jurisdiction, not necessarily conterminous with constitutional limits.
have been added as the result of different usages of that terminology in the same context, in the same discipline, in public international law.

2. The Problem of Interpretation or the Types of Jurisdiction in International Law

Thus, the meanings of jurisdiction in international law vary also with the types of jurisdictional authority exercised by the different organs of the State. In principle, it would be misleading and inaccurate not to recognize and identify the types of jurisdiction involved or invoked. There are at least three aspects, types or phases of jurisdiction in the context of international terrorism.

(a) **Prescriptive or legislative jurisdiction** refers to the authority to prescribe the rules of conduct for individuals and officials within or without the State as well as for the State organs, agencies or instrumentalities of government. This capacity to legislate or to prescribe rules of conduct is not confined to the power exercisable by the legislatures, but also by other institutions of government such as administrative agencies, and even courts.

(b) **Adjudicative or judicial jurisdiction** means the power to adjudicate or determine a legal conflict or dispute, such as the authority of a court of law to decide whether an offence has been committed or to determine the guilt or reaffirm the innocence of an accused person. Jurisdiction may be found lacking in any given case on several grounds, either **ratione personae** or **ratione materiae**. Jurisdiction
to adjudicate may be defined as the authority of a State to subject particular persons or things to its judicial process. 45/

(c) Executive or enforcement jurisdiction denotes the administrative or executive authority of the State to prevent and suppress the commission of any offence against the law of nations or of any other crime, including the power to arrest, apprehend, prosecute and execute orders or judgements of the court. This is sometimes defined as "the capacity... to enforce a rule of law, whether this capacity be exercised by the judicial or the executive branch". 46/

Thus, the terms legislative, judicial and executive jurisdiction may be used interchangeably with the expressions jurisdiction to prescribe, to adjudicate and to enforce, regardless of the governmental institution exercising the power.

21/...

45/ See, e.g., the Restatement, Second, Foreign Relations Law of the United States, ss. 6; (Revised), Part IV, Introductory Note. The Restatement prefers the expression jurisdiction to adjudicate over the term judicial jurisdiction.

46/ Ibid., Part IV: Introductory Note. Jurisdiction to enforce in defined as the authority of a State "to use the resources of government to induce or compel compliance with its law".
B. Causes of the Jurisdictional Problem

Several causes seem to have contributed to the problem of jurisdiction in connection with international terrorism. Before analyzing the problem or attempting any solution, it appears useful to examine the origin or root-causes of the problem which may be attributable to a number of salient facts.

1. Absence of a comprehensive set of rules in international law defining with precision all types of jurisdiction:

   International law has not developed or prescribed a complete set of norms delimiting the scope of jurisdiction that each State may exercise whether in the form of jurisdiction to legislate, to adjudicate or to enforce. That is true also of international organizations which may have been vested with some of the attributes of State jurisdiction. International law has been relatively silent on the limits of prescriptive, adjudicative and executive jurisdiction of each State or international institution in civil and criminal matters generally, although attention has been paid more particularly to the outer-limits of State jurisdiction in criminal matters.

2. Lack of uniformity in State practice:

   Each State is sovereign within its own borders. Yet, States have prescribed law with effect yonder, or sought to adjudicate disputes in civil litigation with little or no territorial connection, or to prosecute and try persons accused of crimes committed outside their territorial confines, and at times even to enforce such decisions beyond their national frontiers. The extent to which States tend to legislate, adjudicate and enforce measures even outside their territory is far from uniform. While for historical or geopolitical reasons...
some countries are shy of exercising jurisdiction extra-
territorially, others appear to enjoy such extravagant
luxury of extra-territorial jurisdiction. The end results
point to a marked absence of consistency in State practice.

3. Emergence of the jurisdictional problem:
Divergency in State practice regarding the limits of national
jurisdiction in different forms has given rise to a serious
problem in connection with the need to arrest, try and punish
international terrorists. The problem of jurisdiction
may arise in more ways than one:

(a) The gap or vacuum in national jurisdiction.
Because of the diversity of State practice in the quality
and extent of the authority to prescribe, the capacity
to adjudicate and the power to enforce, it may happen that
in a given circumstance or case, no State appears to have
jurisdiction or to be competent to exercise jurisdiction
at a particular phase of the proceedings. For example,
before the Hague Convention of 1970, a terrorist hi-
jacking an aircraft in flight over the highseas could be
free of any jurisdiction upon landing in a third State.
The offence was committed in no man's land, and there was
no provision in the criminal law of the State where landing
took place making hi-jacking a punishable offence. There
was no jurisdiction to arrest, or prosecute as the act
was not considered a criminal offence, hence no subject
matter jurisdiction to begin with. Simultaneously, were
the trial to take place, the accused would have committed
no punishable wrong since it was not so prescribed by the

47/ Hague Convention for the Suppression of Unlawful
Seizure of Aircraft, 1970, 10 International Legal
(1972), more than 120 States have ratified the
Convention.
law of the State of landing. Nor would the terrorist be arrested where landing occurred, since there was no authority to arrest a person who in the eyes of the State had committed no offence against its law or the law of nations. The situation has improved somewhat in like circumstances for countries having ratified the Hague Convention of 1970.

There would be an obligation to pass legislation to create jurisdiction to prosecute and punish such offences as hijacking or seizure of aircraft in flight by a number of States including the State where the aircraft has landed, State of destination and the State of departure. Of course, the State of registration normally would have jurisdiction, the problem was the lack of physical presence since the commission of the offence. Such a gap or vacuum does exist and may exist in countless imaginable circumstances, and States have endeavoured to bridge the gap or to fill the vacuum with jurisdiction. This gap or void may occur at any stage of the proceedings, thereby rendering impossible their further continuation.

In some systems, there may be jurisdiction to prosecute and to try an accused person in absentia, but without physical presence of the accused enforcement or punishment would not be possible. This defect could be cured by cooperation of a third State through the process of extradition which presents another major problem in the suppression and punishment of international terrorism. If anywhere during any stage of the proceedings, a void or vacuum in the jurisdiction occurs, the defect becomes incurable. Extradition cannot proceed if in the substantive law of the requested State the offence complained of is not considered to be a crime or punishable offence, or indeed an extraditable offence.\footnote{For a more detailed examination of the problem of extradition, see pp. infra.}

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As extradition presupposes physical presence of the accused person or the prisoner, and therefore custody by the authority of the requested State, absence of authority to arrest would result in failure to commence extradition proceedings, let alone to extradite.

(b) **Overlapping or concurrence of jurisdiction.**

Another problem area may be identified in connection with the extension of jurisdiction by one State which overlaps that of another State, both claiming to exercise the authority to prosecute, to adjudicate and to punish the offender. This is not uncommon in ordinary crimes which could be perpetrated in more than one States or transboundary torts where the **locus delicti commissi** may cover more than one territories, or where the victim or injured party may have the nationality of one State, the offender being a national of another State. Two or more States may have concurrent jurisdiction for various reasons which provide different grounds or bases for jurisdiction.

In the case of concurrent jurisdiction, the State with the custody of the accused or where the defendant can be located appears to have an upper hand in the exercise of jurisdiction if it wishes to apprehend and prosecute, or to allow proceedings to be initiated. Other States will have to try the case in the absence of the defendant or in penal matters to request extradition which may or may not be accorded, depending on numerous factors to be taken into consideration. In the final analysis, physical presence of the defendant or the accused is crucial in criminal cases although not indispensable in civil matters. The

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49/ See pp. infra in connection with the problem of extradition.
State with the custody of the alleged offender may have several options, aut dedere (either to extradite) aut judicare (or to prosecute, adjudicate) or indeed to release the detainee on various grounds including political expediency or humanitarian consideration.

To facilitate closer cooperation in this area, a series of bilateral treaties have been negotiated and concluded by States to make appropriate adjustment with regard to priority or necessity to bring to justice a person responsible for a crime or delict. Multilateral conventions or regional arrangements sometimes provide for the allocation or division of concurrent jurisdiction.50/

(c) Conflict of jurisdiction.
The problem is more acute when overlapping jurisdiction contains an element of conflict. As in the S.S.Lotus Case (1927),51/ after the Court of Turkey had tried and condemned Monsieur Demons, a Frenchman, for criminal negligence which took place on the high seas. The French Government objected strongly to the exercise of Turkish jurisdiction, on the ground that the Court of the Flag State (France) had exclusive jurisdiction to try the master or members of the crew of the S.S Lotus. This conflict had to be resolved, in that case by the Permanent Court of International Justice. In one context, the decision may be said to have been overruled by the adoption of a different ruling by the Geneva Convention on the High Seas (1958)52/ as confirmed by the U.N. Convention...
on the Law of the Sea (1958) being declaration of existing customary international law. This was in fact adopted earlier by another Convention on Collision at Sea. In a different context, however, the dictum of the court regarding the almost unlimited power of a State to legislate, to adjudicate and even to enforce measures affecting the interests of foreigners beyond its own territories was nowhere rejected. On the contrary, recent developments show an increasing tendency on the part of States to extend their jurisdiction over crimes or torts committed by non-nationals and non-residents outside their territorial confines, especially in order to protect national interests or those of their nationals or residents.

Such conflict is not often resolved by judicial instance. The S.S. Lotus was an exception rather than a rule, having regard to the treaty between France and Turkey establishing compulsory jurisdiction of the Permanent Court in matters of conflict of jurisdiction, resulting from differing interpretation of the bilateral treaty, failing which there would be little opportunity for an international judicial settlement. Solution would have to be found elsewhere. Negotiations or agreement between the States concerned may provide the ultimate satisfaction to the affected parties.

28/…

53/ See Articles 92, 94 and 97 of the 1982 Convention. U.N.Doc. No. A/CONF.62/122, October 7, 1982, 21 I.L.M. 1261 (1982). This Convention was signed by 159 States, and was intended to replace the four 1958 Conventions on the Law of the Sea. This part of the Convention represents the codification of existing custom. Article 94 (7) requires the cooperation of the flag State and the other State in the conduct of any enquiry into any marine casualty or incident of navigation, causing loss of lives or serious injury to nationals or damage to shipping or installations or marine equipment.

54/ The Brussels Convention of 1952 for the unification of certain rules relating to penal jurisdiction in matters of collisions. Cmnd. 1128: Restatement (Revised) ss. 502, on the rights and duties of the flag State.
C. Prospective Solution to the Jurisdictional Problem

The causes of the problem are related essentially to two possibilities, namely, absence or lack of jurisdiction, and overlapping or conflicting jurisdiction.

A salutory solution to the lack of jurisdiction is to create one where none has existed as in various conventions on unlawful seizure of aircraft, taking of hostages, crimes against internationally protected persons including diplomatic agents or other acts of international terrorism. States have been invited to ratify a number of terrorism-related conventions in order to fulfil their obligations to prevent, pre-empt and suppress acts of terrorism, by leaving no hole nor loophole in their jurisdiction.

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Another problem area is more complex and not easy to settle, that of concurrent or conflicting jurisdiction. Here again, cooperation among States is required to explore and identify the most suitable ways and means to solve the jurisdictional problem, including the simplification of procedures and facilities for extradition or transfer of the alleged offenders. Clearly, the creation of an international criminal court may provide solution to both problems, either lack or excess of jurisdiction. But the likelihood of general acceptance of such a court is somewhat remote. Besides, it would not solve the problem in every case where there is conflict of jurisdiction, and one State apparently insists on its exclusive right to try the offender or that at least the offender be either extradited or tried by the requested State.

A different solution was adopted in the colonial era where chunks of territories were transferred to or annexed by a Western Power with authority to legislate, adjudicate and enforce over the entire territory. In some instances short of annexation, a regime of capitulation or extraterritoriality was established without the possibility of conflict or concurrence of jurisdiction. The Colonial Power or the State concluding such an archaic and unequal treaty would thereby enjoy exclusive territorial jurisdiction over its own metropolitan territory and extraterritorial jurisdiction over the territory of another sovereign State to the exclusion of the latter in all matters affecting the interests of nationals or subjects of the Colonial

Power. Such regime was abolished in various parts of Asia including China, Japan, Thailand and Turkey by the close of World War II, after adoption of respective penal and civil codes by Asian countries, patterned after European systems. This solution was an imposition by Colonial Powers. It was unequal, unjust and far from satisfactory. It is now outmoded since resolution 1514 (XV) on the granting of independence. The process of decolonisation is now irreversible. Thus, agreement to subject a State to a regime of extraterritoriality would be invalid today for violation of a peremptory norm which admits of no derogation.

The only possible solution left open appears to rest with the obligation of States to cooperate and to negotiate in good faith. Many have reached agreement in the adjustment of their respective rights and obligations to request and to comply with request for extradition or rendition of non-nationals. Extradition then has become an affordable solution sought after on a multilateral as well as bilateral basis. It is flexible enough to give satisfaction for all


concerned. The problem of extradition remains to be examined in the light of current legal developments and recent State practice, especially with regard to the exception of "international terrorism" to the "political offence exemption" from extradition. 63/

III. PERMISSIBLE LEGAL BASES OF JURISDICTION

A survey of State practice and legal theories appears to suggest a number of permissible legal bases of jurisdiction in its entirety, including the authority to prescribe, the power to adjudicate and the capacity to enforce. 64/

For convenience sake, the bases of jurisdiction may be classified under five headings with some overlapping in between, each may compete, concur, compliment or contradict if not conflict with the others. 65/

A. The Territorial Principle. By far, the most cogent and solid foundation for the exercise of jurisdiction is the territorial principle, traceable to the more basic principle of sovereignty as source of State authority itself. Territorial sovereignty is the strongest of all the bases of jurisdiction and would easily take precedence over other

63/ See pp. infra.


concurrent or competitive principles. As far as enforcement or executive jurisdiction is concerned, the principle of territoriality is absolutely supreme and as such exclusive of other principles. The only possible exception must be based on an equally basic norm, namely, the sovereign will of the State itself. Thus, a State may consent to any proposition, or agree to waive any part of its sovereign authority even in respect of activities within its own territory in favour of the exercise by another State of an aspect of sovereignty. This consent is nearly absolute, subject only to the reservation that it does not contravene a peremptory norm out of which no State could opt through unilateral or mutual consent.

The territorial principle is valid for civil as well as criminal or penal matters. Territoriality or the locus delicti commissi provides a clear and firm basis for all the three forms of jurisdiction, prescriptive, adjudicative and executive. The last which is enforcement jurisdiction could be preventive, suppressive or even punitive. In civil as well as criminal cases, the territorial connections need not be confined to one and the same State. A crime may be committed across the boundary line as in transfrontier offences or transboundary torts. The territorial connections in civil liability may refer to the domicile or residence of one of the parties litigants, or the situs of the property in dispute or the place of celebration of marriage or performance of a contract. Furthermore, in criminal matters the physical notion of the locus delicti commissi may be extended by legal fiction or theory.


67/ See "jus cogens" in Note 61 supra, Articles 53 and 64 of the Vienna Convention on the Law of Treaties.
Thus, the territorial principle in this context has been extended to include the following:

(a) **The objective territorial principle**, by reference to the location of the object or victim of the offence or tortious act within the State of the Forum.

(b) **The effect doctrine**, by reference to the effect produced in the territory of the Forum State.

(c) **The subjective territorial principle**, by reference to the locality of the actor, the subject or author of the offence being located in the State of the Forum. (J.B. Moore in the Cutting Case 1877 distinguished between the locality of the act and the locality of the actor.)

(d) **Plurality of localities of acts constituting the offence**, by holding the locality of each act as the *locus delicti commissi*, although other acts forming part of the offence were performed outside the territory of that State.

(e) **The fiction of territoriality**, by deeming a sea-going vessel to be a "floating territory" of a State, thereby injury suffered on board the vessel even on the highseas could be regarded fictitiously on the objective territorial principle as occurring in the territory of the flag State; likewise an aircraft could be deemed a flying territory of the State of registration or user State.

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68/ See Moore, International Law Digest, Vol. II ss. 201.
(f) The fiction of extraterritoriality, by deeming the locality of the act or actor to be outside of the territory of another State and within the State of the Forum, although in fact it was located in that other State, sometimes by creating extraterritorial courts within the territory of another State. (This intolerable state of affairs was abandoned six decades ago as government grew to be more enlightened.)

B. The Nationality or Personality Principle. Side by side with the principle of territoriality has developed the nationality principle or personality principle. Jurisdiction is exercised in all forms and manifestations ratione personae, i.e., by reason of the personality involved. For the status and capacity of persons, the lex patriae would appear to govern. Nationality provides a sound basis for jurisdiction also in criminal matters. For the present purposes, the nationality principle includes the following:

(a) Active nationality principle, by reference to the nationality of the accused or alleged offender, this is applicable to a large extent by most systems including the common law countries.\footnote{See, e.g., the sweeping reservation of Lord Halsbury in McCleoud v. Attorney General of New South Wales [1891] A.C. 455 at p. 457 "except over her own subjects".}

(b) Passive personality principle, by reference to the nationality of the victim of a crime or the injured party. This principle which was adopted by Mexico in the Cutting Case (1877)\footnote{See Moore, International Law Digest, Vol. II, ss.201, Article 186 of Mexican Penal Code.} and
Turkey half a century later in the *S.S. Lotus* (1927) 71/ has given rise to much objection and criticism on the part of common law countries, especially the United States in the Cutting Case and the United Kingdom in the *Franconia* (1876). 72/ France also raised serious objection in the *S.S. Lotus*, which decision gave rise to unending controversies in the late twenties. 73/ It might come as a surprise to those who still resist the passive personality principle in the combat of international terrorism to learn that even more than half a century ago the trend had already been against such resistance. There were even then more countries applying than rejecting it. Now the trend becomes much more irresistible, and most enlightened governments gave expression in support of the principle. The most adamant resistance has weakened in France in Article 694 of the Code de Procédure Pénale of 1975, 74/ in the U.S. Anti-Terrorism Act of 1986, 75/ following the Criminal Code of Thailand, B.E. 2499 (1956). 76/ Although not every State has

71/ See P.C.I.J. (1927), Series A., Case No.1; Article 6 of the Turkish Penal Code.

72/ See R. v. Keyne, the *Franconia* (1876), 2 Exchequer, Division, p. 117, when Amphlett, J.A. believed to be an established and undisputed proposition that "a foreigner committing an offence of any kind, even against an Englishman, on foreign territory cannot be tried for it in an English Court".

adopted the passive personality principle in their criminal legislation, it can no longer be said that remaining opposition is realistic.

(c) The extended notion of nationality, by attributing personality or nationality to something other than a natural person, beginning with a corporate personality, a ship of war, a merchant vessel, an aircraft or spacecraft. This theory extends the scope of an already artificial notion of nationality or juridical personality to inanimate but tangible objects as well as incorporeal hereditaments, including several forms of assets as well as intellectual property rights protected by the law of the State of registration with the extended notion of nationality, jurisdiction may also be enlarged.
C. The Protective Principle. Reference may be made to the national interests affected or injured by an offence, such as national security, or other vital political, economic or financial interest of the State of the Forum. Jurisdiction in all forms may be exercised on the basis of the necessity to protect one of the above national interests. 78/ In the practice of some systems, such as the United States, the protective principle tends to overlap the passive personality principle long discredited since the Cutting Case (1877), but re-instated and revived under the preferred designation of protective principle, as the preamble of the U.S. Anti-Terrorism Act, 1986, clearly reflects. 79/

D. The Universal Principle. Reference may be made to the universal character of the offence made justiciable by the law of nations. Under the principle of universality may be mentioned piracy jure gentium, 80/ genocide, 81/ 38/...


79/ See Section 2731. Findings and Purpose: over 8000 incidents of international terrorism were noted, more than half were directed against American targets. A country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions. Terrorist attacks on Americans abroad threaten a fundamental function of the U.S. Government; that of protecting its citizens; such attacks also threaten the ability of the U.S. to implement and maintain an effective foreign policy; terrorist attacks further interfere with inter-state and foreign commerce, threatening business travel and tourism as well as trade relations.

80/ See a note by Constantinople: Towards a New Definition of Piracy: The Archille Lauro Incident, in Virginia Journal of International Law, Vol. 26,
slave trade, \(^{82/}\) narcotics traffic, \(^{83/}\) etc. The offence under this heading is seen as an offence against the international community as a whole. Offences against the peace and security of mankind including war crimes may also be viewed in the same light. In this way, terrorism is not an infrequent phenomenon accompanying the commission of such offences against the law of nation, and in most circumstances a terrorist may be arrested, prosecuted and tried under the Universal Principle, regardless of the \textit{locus delicti commissi}, so long only as the offender can be physically apprehended. \(^{84/}\) International cooperation is recommended for the suppression and punishment of the offences.

E. \textbf{The Principle of Consent.} The principle of consent is applicable in practice for civil cases as well as for criminal matters. For civil litigation, jurisdiction may be exercised by several \textit{fora}, among which should be mentioned the \textit{Forum rei sitae} (where the property is situated), the \textit{Forum connexitatis} (where there is

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a close connection) and the Forum prorogatum (where the parties have elected to submit their disputes). The parties have not only the choice of law, but also the choice of forum, subject to public policy of the forum or other rules, such as forum non conveniens, non-justiciability, act of State doctrine, etc. In addition, the forum State may also seize a property or arrest a vessel ad fundandam jurisdictionem. But such seizure needs not be recognized by other jurisdictions. In criminal matters, it is not the consent of the parties that matters. Rather the consent of the State, having priority to arrest, prosecute and punish the offender, may afford the basis for another State, with or without physical custody of the alleged offender, to either arrest and prosecute or make a request for extradition or start an extradition proceedings as the case may be. Consent to the exercise of jurisdiction by another State is generally accorded in the form of bilateral agreements between like-minded nations or multilateral conventions within a region or sub-region of approximate legal and cultural back-ground. Thus, a State may exercise jurisdiction, not because the accused is arrested in its territory, nor because the offence was committed by or against its national, but more precisely and resolutely because another State, having the custody of the accused, has agreed to deliver or surrender the alleged offender to be tried by the State of the forum. Had there been no such rendition, there would be no ground for jurisdiction.

Consent is a key to a number of issues. Without consent of the territorial State, it might be considered unlawful intervention to exercise enforcement jurisdiction over the territory of another State as in the Eichman Case (1962) to effect an arrest or the Entebbe Incident (1976) to rescue hostages and protect nationals. On the other hand, with the consent of the territorial authority, Indonesian commando units successfully stormed the hijacked Garuda aircraft at Dan Muang Airport (1984) with the assistance of Thai security force.
IV. A RESPONSE TO INTERNATIONAL TERRORISM

A. Ratification of Antiterrorism-Related Conventions

A response to acts of international terrorism should be adequate and appropriate if international terrorism is to be discouraged. Each State has been urged to ratify the various conventions designed to prevent and suppress offences that are related to international terrorism, such as, the taking of hostages,\(^{86/}\) unlawful seizure of aircraft,\(^{87/}\) and offences against internationally protected persons including diplomatic agents\(^{88/}\) in compliance of resolution 61 (XL) of the General Assembly.\(^{89/}\) Ratification requires an undertaking to adopt legislation giving effect to the obligations under the relevant conventions.

Such actions by States could contribute in no small measure to international cooperation in the field of prevention and suppression of international terrorism. With the willingness on the part of the overwhelming majority of States to combat international terrorism, incidents of transnational terrorism should be curtailed. If hijackers were arrested whenever the hi-jacked aircraft landed, hijacking could be deterred. This would require the cooperation of States to ensure safety in international air transport and navigation,\(^{90/}\) and not to yield to the demand of the terrorists.

\(^{86/}\) Convention against the Taking of Hostages (1979), Resolution 34/14b. (XXXIV), 18 I.L.M. (1979) 1456.


\(^{89/}\) General Assembly Resolution 61 (LX), December 9, 1985.

\(^{90/}\) The mining of a harbour of a State disrupting international maritime trade has been held to violate international law as well as restricting freedom and safety of navigation. I.C.J. Report Nicaragua v. U.S.A. (1986).
B. Improvement of Extradition Procedures

The problems relating to extradition deserve the most meticulous attention. In the first place, extradition depends on the agreement or consent of the requested State to turn over or surrender custody of an alleged offender or a condemned person or convict to the authority of the State requesting extradition. As a matter of principle, extradition is generally carried out at the discretion of the requested State. The request for extradition itself is discretionary on the part of the executive branch of the government requesting extradition, taking into account the existence of legal provisions and the process of law to be fully observed. There is thus an element of discretion on both sides, as far as the executives are concerned. Legal provisions, if any, and procedures to be followed would also have to be improved. If according to the law, the offence is not recognized as a crime in the requested State or indeed in the requesting State, or the crime is for some reason not an extraditable offence, or that the offence is political, extradition will not take place.

Extradition is therefore based on law or statutes of the States concerned and also on the availability of treaty provisions applicable to the situation. The problems are

multiplied in this connection by lack of uniformity in the
treaty practice of States and absence of common standards
in national legislation in regard to questions of extraditable
offences, non-extraditability of nationals and particularly
the treatment of political offenders.

Notwithstanding the discretionary element of extradition
as far as the administration or executive branch of the govern-
ment is concerned, the judicial practice of States in defining
an offence as political, or mixed or with political motivation
has been neither helpful nor instructive. The case law of
various countries has not demonstrated any consistent pattern
of legal developments. Contradictory theories and opposing
criteria are interpreted and applied without any regularity.
Alleged offenders of offences which could be classified as
acts of international terrorism have sometimes been extradited
and other times released on the ground that the offences complain-
ed of were either political or with political motivation or relieved of political or relatively or preponderantly political or indeed there

92/ See, e.g., In re Mcmullen (179), No. 3-78-1099
MG., mem. at 4-5 (N.D. Cal. May 11, 1979). The Federal
Magistrate found that the bombing of the British
Army Installation in England by the Provisional Irish
Republican Army (P.I.R.A.) was directed at the British
Army - a prime target for guerrilla warfare during
an "insurrection and a disruptive uprising of a
political nature" in North Ireland in 1974. Compare
Justice Denman's test of political offence exception:
There must be a political disturbance at the time
of the offence and the offence must constitute an
Overt act incidental to or part of the political
disturbance, In re Castolini [1891] 1 Q.B. 149.

93/ See, e.g., the Santa Maria, (1961) where a steamship
was captured by Captain Galvao as a protest against
the Portuguese Government, 56 Northwestern University

94/ See, e.g., the Artukovic Case, (1950) 355 U.S. 393
(per curiam), the extradition request was regarded
by the Supreme Court as being for a relative political
offence.
was potential danger of the accused being persecuted for political offences.\textsuperscript{95} Given the jurisprudence of the more advanced western civilization, such as France, United Kingdom, U.S.A., Switzerland, Italy and the Federal Republic of Germany, the practice cannot be said to be free of inconsistency in this regard, \textsuperscript{96} especially when the offences are closely associated with acts of international terrorism.

The reason for this patent ambiguity is not very difficult to conjecture. The very definition of "international terrorism" as is more generally accepted in international convention\textsuperscript{97} contains an inherently political element. Terrorism is an offence directed against another State for which a State is responsible either for undertaking, assisting or tolerating its commission. Applying this definition to offences classified as terrorist acts or terrorist-related activities, such as taking of hostages, hi-jacking of aircraft, sea-jacking, piracy in the wider sense of the term, excluding private ends requirement and the existence

\textsuperscript{95} See, e.g., Regina v. Governor of Brixton Prison, \textit{ex parte Kolezynski} [1954] 1 Q.B. 540; extradition request was denied on the ground that it would result in punishment for the treasonous act of defecting to a capitalist countries and not for the common crimes of use of force.


of another ship,\textsuperscript{98} such activities would invariably appear to be politically inspired. The political taint is unmistakable, and in all likelihood an act of international terrorism is more often than not considered as a political offence or relative political offence or mixed or for political motivation.

In actual practice, the decision of a State to extradite or not to extradite a terrorist is likely to be prompted by political or humanitarian considerations. Among the closely associated States or in an economically integrated community, it is easier to extradite terrorists for acts directed against the friendly government, member of the same community.\textsuperscript{99} On the other hand, the State sympathizing with the cause of the insurgents for whatever motivation is not easily persuaded to extradite terrorist-insurgents,\textsuperscript{100} whether or not they are to be labelled freedom-fighters rather than terrorists. It is not inconceivable that a State, not wanting to embarrass its foreign

\textsuperscript{98} See, e.g., George R. Constantinople: Towards a new Definition of Piracy; The Achille Lauro Incident, Vol. 26, No. 3, Virginia Journal of International Law, pp. 723-753, at p. 753: international political terrorism on the high seas is condemned as piracy.

\textsuperscript{99} See, e.g., decision of the Chambre d'accusation de Paris, 1979, in the Klaus Croissant Case, extradition from France to Germany, compare Piperno and Pace case.

\textsuperscript{100} Compare the U.S. case in re McMullen (1979) and the French case of Abu Daoud (1977).
relations, may avoid the obligation to extradite by simply deporting the alleged offender. On the other hand, deportation could be an alternative to extradition if otherwise prevented by the political character of the offence which is clearly non-extraditable.

C. Terrorism as an Exception to the Political Offence Exemption

Recent trends in State practice appear to reflect political flavour in the treatment of political offenders. Decisions to extradite or to release the alleged offender may depend on factors that are purely political, such as whether the fugitive is from the socialist country, whether the requesting State is an ally or economic or trading partner, or whether there is a support for his group in the asylum State and even diplomatic and economic interests. It is true that due process of law dictates some participation by the judiciary whose role could be conclusive in a negative way. If the offence was considered non-extraditable by the judicial authority, the executive could not very well overrule that ruling, although there was nothing to stop a disguised form of extradition through the deportation process. The finding by the court that the offence is extraditable will not necessarily result in actual extradition, since the executive branch of the government could review the final process of rendition.

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The political offence exemption was first seen in the Anglo-Belgian Treaty of 1834. It is not seriously contested as a standard clause in extradition treaties or extradition legislation. As has been seen, the application of this exemption has been far from settled.

States are nevertheless free to conclude agreements undertaking to extradite even political offenders. There is no peremptory norm requiring non-extradition of political offenders. In actual practice, it would be extremely difficult to conceive of such a norm, since the concept of "political offence exemption" itself is not free of confusion, susceptible to differing interpretation, hence opposite results. In 1960, Thailand and Khmer (Kampuchea) concluded four agreements by exchange of letters with the good offices of Secretary-General Dag Hammasjold. One of these agreements concerned the extradition of a certain Khmer Serei named by the Cambodian Government of the time.

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103/ 22 British and Foreign State Papers 223.
105/ See, e.g., agreement between Thailand and Cambodia, 1960, New York, U.N.
106/ The fugitive sought by Cambodia died upon conclusion of the extradition agreement.
The current trend has been to preclude certain offences, which could be viewed as political or relatively political, from the "political offence exemption". This has been achieved in a number of conventions, especially on the prevention and suppression of terrorism, seizure of aircraft, taking of hostages, lèse majesté, the attentat clause and war crimes. Acts of terrorism have been classified among offences against the peace and security of mankind. Once the revised draft code is adopted, the extradition problem will be better clarified if not further simplified. Bilateral treaty practice of States appears to have started a clear trend in support of extradition of terrorists whether or not there has been a taint of political flavour in their activities. A balanced approach has nevertheless to be maintained between the interest of the international


110/ Lèse Majesté in an offence against the Head of States.


community to prevent, suppress and punish acts of terrorism, and the interest of the individual to enjoy asylum from political persecution and the right of self-determination of every people. Human rights should be respected and not to be sacrificed at any price.

Thus, the new series of U.S. extradition treaties which starts with the Supplementary Treaty with the United Kingdom, contains Article 1 which precludes from the political offence exemption:

(a) an offence for which both Parties have the obligation to extradite under a multilateral convention;

(b) murder, manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking of hostage;

(d) an offence involving the use of bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any persons;

(e) an attempt to commit any of the foregoing or participation as an accomplice.

99th Congress 2d session SENATE Exec. Rept. 99-17. Supplementary Extradition Treaty with the United Kingdom, July 8, 1986. Article 1 is subject to the reservation of Article 3: There would be no extradition if the request was made with a view to punish him on account of his race, religion, nationality or political opinions, or that he would, if surrendered, be prejudiced at his trial, punished or detained.
This innovation is not a complete answer to every problem connected with extradition. It remains to be seen in actual practice how the United States and the United Kingdom will apply the provisions of Article 1 subject to the safeguard contained in Article 3. States still retain discretion and freedom of action through differing interpretation. 115/

The language of the recent General Assembly Resolution 61 (XL) 1985 on measures to prevent international terrorism is more emphatic: Paragraph 8 runs:— 116/

The General Assembly

8. "also urges all States to cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists."

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115/ For recent developments in multilateral treaties, see Annuaire de l'Institut de Droit International, Vol. 60-II, session de Cambridge, Rapporteur Karl Doehring, pp. 211-283: "New problems of the international legal system of extradition with special reference to multilateral treaties", proposing definition of political offence in a negative sense.

116/ 25 I.L.M. 239 (1986), adopted without a vote on December 9, 1985. The resolution also endorses I.C.A.O. and International Maritime Organization (I.M.O.) recommendations for ratification of conventions dealing with terroristisms aboard aircraft or against ships.
V. Conclusion

The preceding study appears to suggest that the problem of jurisdiction is but part and parcel of the bigger problem of combating international terrorism. It is nevertheless a key to unlock other problems. International cooperation provides a hopeful means in our search for a meaningful response to terrorism and the problem of jurisdiction.

One practical measure of international cooperation is to adopt legislation creating jurisdiction to adjudicate by making terrorist acts, as defined in the Introduction, justiciable and punishable, thereby avoiding a vacuum in the substantive law, recognizing the criminality and punishability of acts of international terrorism, and bridging whatever gap or loophole that may exist in the jurisdiction of the forum State. All the legitimate bases of jurisdiction may be adopted, including the passive personality principle which need not be completely dissociated from the protective principle. A State has the right and also in some instances the duty to protect its own nationals abroad. One means of securing protection is to make it a punishable offence for anyone to commit an act of terrorism against a national of the State, calculated to create fear or terror within the State. An act of international terrorism against an American citizen because of the nationality may be deemed to be directed against the security interest or stability of the United States. Once jurisdiction is created for an offence against a national abroad whatever the true basis, the forum State may assume and exercise jurisdiction, not only to prosecute the alleged offender if and when found

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within the territory, but also to secure his custody through
the process of extradition.

A more effective control of international terrorism
may be achieved through closer cooperation among States
by ratifying international agreements dealing with terrorism,
thereby applying common definition and standard for identification
of acts of international terrorism, and facilitating exchange
of relevant information concerning the prevention, suppression
and punishment of acts of terrorism as well as the arrest,
prosecution or extradition of the authors of such acts which
should not be deemed to be political offences so as not
to preclude the possibility of extradition. 117/

117/ See, e.g., the latest (fifth) Report by Minister
Doudou Thiam on the draft code of offences against
the peace and security of mankind, A/CN.4/404,
March 17, 1987; especially the new text of Article
4 (1) of the draft code which provides that "every
State has the duty to try or prosecute (aut dedere
aut punire), any perpetrator of an offence against
the peace and security of mankind arrested in its
territory". See also commentary, ibid., pp. 7-
8. It was noted that decisions rendered at municipal
levels were contradictory, and even a supreme
jurisdiction to harmonize judicial decisions could
itself adopt decisions that would have to vary
with the progress of time. Difficulty to secure
extradition is inherent in all cases where offences
are politically motivated. In reality, States
might prefer to try the offenders and give them
light sentences or acquit them altogether.
The current problem is also closely linked to the possibility of apportionment of criminal jurisdiction in the event of a jurisdictional conflict. Priorities may be set through bilateral or multilateral treaties, while the possibility of extradition provides room for further flexibility of adjustment. Further developments of State practice in this direction are about to assume a new dimension as States members of the world organization are moving closer in their collective efforts to combat international terrorism. The problem of jurisdiction patiently awaits its turn for a more orderly settlement.

International law cannot afford to allow terrorism to go unchecked. Legal developments by way of codification must keep pace with transnational terrorism threatening the peace and security of mankind.

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Notre Dame, May 17, 1987