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

KOLB, Robert


Available at:
http://archive-ouverte.unige.ch/unige:44876

Disclaimer: layout of this document may differ from the published version.
I. INTRODUCTION:
The phenomenon of terrorism and its repression

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

Most of these movements found their roots in political revolt, social upheaval, or religious protest. As early as the first century of our era, the Jewish sect of the Sicarii led a bloody struggle against the Romans in Palestine. Tacitus relates that they engaged in assassinations, set fire to food depots, and sabotaged water distribution systems². The 11th century saw the emergence of the famed Assassins,

¹ Goethe, Faust, Part II, Act 2.
² See W. Laqueur, Terrorism (1977) 7-8; M. Hengel, Die Zeloten (1961) 47 et seq.
fuelled by a skilful blend of messianism, politics and violence. Emanating from the Ismails, the sect, finally crushed by the Moghols almost two centuries after its inception, was trying to preserve its religious autonomy and traditional way of life against the Seljucs. Militarily inferior but efficiently organised in highly structured, clandestine groups, the Assassins littered their path with victims of political killings. Saladin himself only miraculously escaped from two attempts at their redoubtable hands3.

2. The state-oriented shift in the socio-political centre of gravity occurred much later. The emergence of the state was historically achieved in the wake of religious wars around the unity of a given territory, and arose out of considerable transformations, be they social (fall of the feudal system, secularisation), spiritual (the nationalisation of religion), or economic (monetary reforms, birth of mercantilism, expansion of commerce). In the light of these developments, terrorism reshaped its forms and figures to suit this new model of political organisation. It was used either as a tool in the exercise of state power, or as a means to upset the existing attribution of state powers. In this latter case, it might target the existence of the state order itself, or attack one of its historically coterminous manifestations. From this point on, terrorism can be solely conceived and understood in relation with the state: this is illustrated by "La Terreur" wielded during the French Revolution4, the Anarchist movements' feats at the turn of the century5, or the more contemporary nationalist or separatist action6.

These developments have to be seen in the context of the changing conceptions of power. There is especially the noticeable displacement of weight from the individual to the state7 perceptible since the end of the First World War. Charles De Visscher aptly described8 how vari-

---

7 W. Röpke, Civitas Humana (1946) 173.
ous causes prompted an accumulation and concentration of power that was unfettered by the moderating ideas found in the tradition of the Middle Ages. Through the sublimation of the political allegiance of subjects and of politics itself, this concentration subverted the exercise of all public functions from its human ends towards power-oriented security goals. It is only in the light of the profound disruption of the fabric of social organisation; of the heightened politicisation of public order relations at the expense of law and of moral values culminating in irreconcilable ideological clashes; and of the progressive de-humanisation of political designs, that the true place and role of the phenomenon under study can be properly examined. Thus one has to be aware that if terrorist deeds are criminal, they are also political to the highest degree. This proximity to political struggle explains why the suppression of terrorism rested for a long time on extremely decentralised decision-making, as old concepts like the “Belgian clause” or other aspects of extradition law show.

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

---


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

11 See infra, footnote 16.
opening of a rather more political avenue: through its increasingly frequent presence on the agenda of various international summits (for instance at the G-7), the topic has been addressed through several resolutions or other concerted acts, more flexible in form than treaties. The long list of such policy-generating summits include those of Tokyo (1986), Paris (1987), Venice (1987), Toronto (1988), Paris again (1989), London (1991), Charm el Cheik (1996), Lyon (1996), and the recent ministerial meeting convened in Paris on 30 July 1996, following the explosion aboard TWA Flight 800. One finds there a growing and manifest intent to efficiently combat terrorism and swiftly bring alleged culprits to justice.

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

---

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

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

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

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


\textsuperscript{15} On this point, B. Conforti, Cours général de droit international public, 212 \textit{RCADI} 1988-V, 9 et seq.; B. Conforti, \textit{International Law and the Role of Domestic Legal Systems} (1993), 3 et seq.
II. THE GENERAL FRAMEWORK FOR SUPPRESSION OF TERRORISM ON THE INTERNATIONAL PLANE: A NETWORK OF PARTICULAR TREATIES

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

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

---


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

Yet other causes contributed to the standstill, be they the multiplicity of violent deeds that extended the common genre and made a single descriptive notion more difficult to achieve 22; the very relative autonomy of terrorist offences vis-à-vis various crimes already covered under municipal criminal law 23; the divergence between national and
international texts dealing in similar matters24; the uncertain role as­
signed to elements of subjective qualification such as intent or mo­
tive25; or the difficult choice of the initial point of reference, between
the nature of the act (means) or its subjective and social ends (self­
determination, etc.)26. On top of all that lay the necessary determina­
tion of criteria that would help define specifically international ter­
rorism27. It is no wonder that the wealth of uncertainty and hypothe­
ses thus created yielded various approaches to the definition, in aca­
demic circles as well as in international conferences28.

a) Some choose to place the emphasis on a particular element of
qualification. This was done in the International Conferences for the
harmonisation of penal law that took place from 1927 to 1938, notably
in Warsaw (1927), Brussels (1930), Paris (1931), Madrid (1934) and
Copenhagen (1935). The criterion retained there was that of the com­
mon danger29. In article 1, paragraph 2 of the Geneva Convention for
the Prevention and Punishment of Terrorism, signed under the aus­
pices of the League of Nations on 16 November 1937, terrorism is de­
fined in relation to the criterion of terror (terreur). This stance has
been denounced by several authors as tautological30.


24 Frayssse-Druesne, supra note 22, 989.

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

26 Lowe/Young, supra note 17, 306.

27 Sottile, supra note 18, 98-99; Skubiszewski, supra note 9, 49-50; Franck/Lock­
wood, ibid., 78; David, ibid., 127 et seq.; Wurth, supra note 18, 57 et seq.; Guil­
laume/Levasseur, supra note 18, 66-67; Prevost, ibid., 589; Oppermann, ibid., 501-503.

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

29 Sottile, supra note 18, 113-115; Wurth, ibid., 27 et seq.; Prevost, ibid., 580-581;
Guillaume/Levasseur, ibid., 82-83. See also UN Official Documents, Study by the Sec­

30 Sottile, supra note 18, 95. On the 1937 Convention see Sottile, ibid., 116 et seq.;
Wurth, ibid., 48 et seq., 91 et seq.; H. Mosler, Die Konferenz zur internationalen Be­
kämpfung des Terrorismus, 3 ZaöRV 1938, 99 et seq.; H. Donnedieu de Vabres, La ré­
pression internationale du terrorisme: Les Conventions de Genève (16 novembre 1937),
19 RDILC 1938, 37 et seq.; V. Pella, Les Conventions de Genève pour la prévention et
la répression du terrorisme et pour la création de la Cour pénale internationale, 18 Re­
vue de droit pénal et de crimino logic et archives internationales de médecine légale
1938, 402 et seq.; Panzera, supra note 18, 22 et seq.; Herzog, supra note 9, 170 et seq.
On the drafting of the Convention: G. von Gretschananow, Der Plan eines interna­
tionalen Abkommens betreffend die Bekämpfung politischer Verbrechen und die Errich­
tung eines internationalen Strafgerichtshofes, 5 ZaöRV 1945, 181 et seq. For the offi­
cial documents: League of Nations, Actes de la Conférence internationale pour la ré­
pression du terrorisme, Doc. C.94. M. 47 1935 V.
A slightly different view would extract a specific criterion from the fundamental provisions of humanitarian law in times of war. Distinguishing between "absolute terrorism"\(^31\) and "relative terrorism"\(^32\), Eric David suggests a definition that focuses on the violation of humanitarian norms. An action is absolutely prohibited if it uses cruel or barbaric means or targets objectives that are either innocent or militarily insignificant\(^33\). It is then called an act of absolute terrorism.

---

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

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

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

\(^31\) David, supra note 9, 114 et seq., characterised by the use of methods which are absolutely prohibited under the laws of war, such as indiscriminate violence.

\(^32\) Ibid., 118 et seq., distinguished not by the methods used but by the context, the intentions, etc.

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

"is any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons which is directed against internationally protected persons, organisations, places, transportation or communication systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communication systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States" 34.

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

"The following shall constitute an act of international terrorism: undertaking, organising, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way" 35.

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

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

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


36 On this point, see ibid.

37 U.R. Latypov, On the Definition of International Terrorism (in Russian, with English summary), Soviet YBIL 1988, 141. See also article 5 of the Corpus of Principles Relative to the Attitude of States towards International Terrorism, Centre d'étude et
c) A third option consists in giving up attempts to attain a single definition, focusing instead on a flexible approach. Given the extraordinary variety of the acts under scrutiny, it is deemed preferable to indicate the typical elements whose relative presence and weight define the range and provide the measuring tool required to apprehend the phenomenon. By reference to a well-known technique, such authors distinguish between central or nodal aspects (violence, means, etc.), and peripheral ones (intent, etc.).

Other authors merely enumerate the criteria they consider relevant. For Skubiszewski, the terrorist act is characterised by its effect (creation of a common danger; fear), its means (symbolic violence), its victims (indiscriminate number or singled-out prominent figures), and its authors (only individuals, never states per se). Oppermann qualifies the crime according to its philosophy (the end justifies the means), its authors (marginal groups), its victims (common danger, indiscriminate violence), its motives (political, religious, social, or military), and its goals (transformation in depth of existing power attributions). Herzog, who recently penned an exhaustive study on the topic, points to the following chain of elements:

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

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

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

“We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.”

---

38 Greenwood, supra note 33, 189.
39 Skubiszewski, supra note 18, 42-49.
40 Oppermann, supra note 18, 496-502.
41 Herzog, supra note 9, 106-107; see also Stein, supra note 18, 40.
42 Baxter, supra note 18, 380.
In a similar vein, Franck/Lockwood think that
"Terrorism is an historically misleading and politically loaded
term which invites conceptual and ideological dissonance"\textsuperscript{43}.

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

In the wake of those efforts, several multilateral instruments were
signed: the three Conventions on the Safety of Civil Aviation of Tokyo
(14 September 1963, Convention on Offences and Certain Other Acts
Committed on Board Aircraft), The Hague (16 December 1970, Con-
vention for the Suppression of Unlawful Seizure of Aircraft) and
Montreal (23 September 1971, Convention for the Suppression of Un-
lawful Acts against the Safety of Civil Aviation)\textsuperscript{45}; the UN Convention

\textsuperscript{43} Franck/Lockwood, \textit{supra} note 9, p. 89; see also Mertens, \textit{supra} note 10, 37-8.

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

\textsuperscript{45} On these Conventions, see J.M. Breton, \textit{Piraterie aérienne et droit international
public}, 75 \textit{RGDIP} 1971, 392 et seq.; G. Guillaume, \textit{La Convention de La Haye du 16 dé-
cites dirigés contre la sécurité de l’aviation civile}, 17 \textit{AFDI} 1971, 855 et seq.; K. Hail-
bronner, \textit{Luftpiraterie in rechtlicher Sicht} (1972); C. Emmanuelli, \textit{Étude des moyens de prévention et de sanction en cas d’action illicite contre l’aviation civile internationale},
77 \textit{RGDIP} 1973, 577 et seq.; E. McWhinney, \textit{Illegal Diversion of Aircraft and Interna-
tional Law}, 138 \textit{RCADI} 1973-I, 261 et seq.; E. McWhinney, \textit{Aerial Piracy and Interna-
tional Terrorism} (2nd ed. 1987); W.D. Joyner, \textit{Aerial Hijacking as an International
Crime Proceedings of the Conference held in the Hague in 1974 on Aviation Security


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

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

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

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

---

49 Annex to Resolution A/52/653, 7 et seq.
50 Supra, text and footnote 46.
Excessive optimism is, however, not warranted. During the same session of the Sixth Commission, the Swedish delegate, Mr. Roth, dryly declared his delegation's opposition to all projects of this nature. This merely evidences that which already clear: there exist deep divisions concerning the subject and no resolution of this problem may be envisaged in the near future. Too many obstacles, be they technical or political, block the path that paves the way to a single anti-terrorist convention.

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

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

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

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

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

56 See infra, III.4.2.b.

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

III. THE PROBLEM OF UNIVERSAL CRIMINAL JURISDICTION APPLIED TO ACTS OF INTERNATIONAL TERRORISM

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

---


A. Universal jurisdiction in conventional law

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

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

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution"\textsuperscript{61}.

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

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

\textsuperscript{61} Italics added. For the text of the Convention, see 860 \textit{UNTS} 105 et seq. or 10 \textit{ILM} 1971, 133 et seq.; the French version may be found in 75 \textit{RGDIP} 1971, 297 et seq.

\textsuperscript{62} Guillaume, supra note 18, 368.

\textsuperscript{63} See e.g., article 4(2) of the aforementioned Hague Convention; article 5(2) of the 1971 Montreal Convention; article 3(2) of the 1973 UN Convention on Internationally Protected Persons; article 6 of the 1977 European Convention on the Suppression of Terrorism; article 5(2) of the 1979 Convention against the Taking of Hostages (1979); article 6(4) of the 1988 Rome Convention on the Safety of Maritime Navigation; and articles 6(4) and 8(1) of the 1997 International Convention for the Suppression of Terrorist Bombings. On the \textit{travaux préparatoires} of this last convention, see the Report of the \textit{Ad Hoc} Committee established by GA Resolution 51/210 of 17 December 1996, UNGAOR, 52th Session, Suppl. no. 37 (A/52/37), 55-6 (article 6, then article 5); 58-59 (article 8, then article 7). Guillaume, \textit{supra} note 18, 351-352; Panzera, supra note 18, 157-161.
2. This system of repression has generally been interpreted as establishing a regime of universal jurisdiction through conventional means. Some nuance this affirmation by speaking of a "particular" universal jurisdiction, or by terming the jurisdiction "quasi-universal".

The use of such words as "quasi-" or "particular" in reference to a phenomenon usually denotes an a priori conception of its form and scope. Here, this a priori conception is attached to the very notion of universal jurisdiction. It may indeed be held that universal jurisdiction rests upon norms that are themselves of universal character, that is, on general international law only. Only then could one speak of a jurisdictional basis which is, strictly speaking, universal ratione personae,

---


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

"In so far as this provides for the jurisdiction of all parties to the Convention (...) it is perhaps understandable that it is spoken of as universal jurisdiction. But it is still not really universal jurisdiction stricto sensu, because in any given case only a small number of contracting parties would be able to exercise jurisdiction...".
attaching to any prosecutable individual anywhere (the classical example being that of piracy *iure gentium*, i.e. for the high seas). But what really counts for universal jurisdiction is not universality *ratione personae*: it is the absence of any specific link required for prosecution by a given state. Thus, there is no reason to deny that universal jurisdiction could operate only between the parties to a given agreement. The jurisdiction indeed remains universal, in that it casts away the usual requirement of a specific link between State and individual before allowing the former to prosecute the latter for the commission of acts defined in the agreement. Hence, the difference between a customary universal jurisdiction and a conventional one is merely one of range of application. It is in fact generally admitted that a multilateral treaty can create to the benefit of its parties such a universal jurisdiction.

At first glance, if one does not focus more specifically on the status of third states, it would appear that the universal jurisdiction established by anti-terrorist Conventions has a double relative effect: one in terms of the parties to the agreements (*ratione personae*), and one in terms of the object and purposes thereof (*ratione materiae*). In other words, the Convention, through its jurisdictional provisions, creates and delimits a unique legal territory between the parties regarding the crime or crimes it seeks to repress.

The system of universal jurisdiction provided for by these conventions has other peculiarities. As compared to general international law, the requirements for exercising universal jurisdiction are stricter on the one hand but lighter on the other. In general international law, universal jurisdiction entitles States to prosecute alleged criminals, but does not force them to do so. States are empowered to proceed should they so wish. The conventions against terrorism invariably transform this mere faculty into an obligation for the State that holds a suspect. Criminal proceedings must be initiated and carried out against the individual by judicial authorities competent to deal with the case. On the other hand, the rigidity of this obligation is somewhat softened by the alternative option, namely to extradite the alleged culprit to a State able to claim a jurisdictional link. The conven-

---

67 *Infra*, III, 2.
68 Cassese, *supra* note 61, 593.
69 Fraysse-Druesne, *supra* note 22, 986.
70 See the several treaty provisions cited at footnote 60. See also Guillaume, *supra* note 18, 350-353, 367-71; Randall, *supra* note 56, 821.
tions concerned often favour this option\textsuperscript{71}.

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

3. Rare are the authors that object to this conception of universal jurisdiction. Still, in her General Course on Public International Law, given at The Hague in 1991, Professor Rosalyn Higgins lent her considerable authority to the dissenters. In her view, the provision that imposes a duty to prosecute or extradite is not normative in itself, but merely constitutes a \textit{renvoi} to the specific grounds of jurisdiction be they territorial, personal (nationality or flag) or otherwise based, invariably listed in the conventions\textsuperscript{74}. Hence, such agreements would merely co-ordinate repression on those specific grounds, without creating a separate basis of universal jurisdiction.

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

\footnotesize
\textsuperscript{71} Guillaume, \textit{supra} note 18, 350, 353, 355 et seq. For the 1977 European Convention see, e.g., Fraysse-Druesne, \textit{supra} note 22, 993 et seq.

\textsuperscript{72} Recueil officiel des lois fédérales, 0.353.3.

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

\textsuperscript{74} Higgins, \textit{supra} note 56, 98; Oehler, \textit{supra} note 56, 539.

\textsuperscript{75} In particular the Dissenting opinion of Judge Fitzmaurice, \textit{ICJ Reports} 1971, 292-
remains open to controversy, such is not the case in the present one: the relevant conventions clearly establish, apart from any specific grounds they may mention, that the mere custody of an alleged culprit is sufficient to grant jurisdiction to the custodial state. If the specific grounds listed in the agreements were exclusive, the purpose of these instruments, which is to fill any lacuna that would result in impunity for a guilty individual, would be defeated. Indeed, their effet utile on this point would be next to naught. Their contribution would be limited to render prosecution on the basis of specific grounds of jurisdiction compulsory rather than facultative. Unfortunately, the traditional, specific mechanisms do not suffice to ensure punishment. This is precisely the problem that the conclusion of the agreements was intended to correct.

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

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


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

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

78 See the provisions cited in footnote 60.

79 For instance in cases relating to the passive personality principle. On this principle, see Oehler, supra note 56, 413-429; Oppenheim, supra note 56, 471-472.
This was further affirmed, for example, in the California US District Court decision on the Layton case (1981). This conclusion is also warranted by the examination of the various travaux préparatoires, which show the larger interpretation to be most in accordance with the will of the parties. The drafters frequently made explicit as well as implicit references to the principle of universality. Thus, it is not surprising to find that the vast majority of authors and official committees alike consider the rule aut dedere aut iudicare to be in itself a ground of jurisdiction, and not a mere cross-reference to the specific links traditionally used in such cases.

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

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

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

---

80 Supra, text and footnote 70.
81 US District Court, Northern District, California, 509 F. Supp. 212 and 645 F. 2d. 681, quoted by Randall, supra note 56, 790. The judgment can also be found in B.D. Reams (ed.), American International Law Cases, 2nd Series, 1979-1986 (vol. 5) 102 et seq., 111, or in 94 ILR 83 et seq., 94.
82 Randall, supra note 56, 826, with numerous references at footnote 238.
83 See the authors referred to in footnote 61.
84 See the comments by Randall, supra note 56, 821-832; Schachter, supra note 56, 263-264.
85 On the rule pacta tertiis nec nocent nec prosunt, see P. Cahier, Le problème des effets des traités à l'égard des États tiers, 143 RCADI 1974-III, 589 et seq.; C. Rozakis, Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law, 35 ZaoRV 1975, 1 et seq. Other references can be found in Oppenheim, supra note 56, 1260.
86 See, e.g., Oehler, supra note 56, 520; Cassese, supra note 61, 593-594; De Schutter, supra note 61, 388; Dinstein, supra note 61, 70.
87 See Goldie, supra note 21, 131; Dinstein, supra note 61, 70; Centre d'études, supra
(b) The second view holds that the principle aut dedere aut iudicare already belongs to general international law. Rather than relying on the rather inconclusive international practice on the subject, those who defend this opinion buttress it with proclamations and normative resolutions of variable legal value. They anchor it to a vision of the international community as civitas maxima, whose role is to safeguard vital interests common to all its members. In this view, the prevention (and repression) of international criminal activity unquestionably belongs to this category. A slightly different version of this axiomatic reasoning suggests that the duty to try or extradite is inherent by necessary implication to the concept of an international criminal act (delictum iuris gentium). Given that acts that violate the international public order are contrary to an essential aspect of the international rule of law, and that they cannot be punished by nonexistent international organs dedicated to this purpose, international law would make their repression (through trial or extradition) incumbent upon each state, through some form of compulsory dédoublement fonctionnel. Identifying the source of the definition of the offence, be it custom or a universal treaty, would become irrelevant in such a case.

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

---

88 See Bassiouni/Wise, supra note 60, 20-50.
89 Ibid., 43 et seq.
90 On UN GA resolutions and on the concept of international (conventional) legislation, ibid., 46-50.
91 Ibid., 22-24, 26 et seq.; E.M. Wise, Extradition, the Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare, 62 Revue internationale de droit pénal 1991, 109 et seq. For I. Detter, The International Legal Order (1994) 175, the application of universal jurisdiction to the repression of terrorism is inherent to the prohibitive rule, given the norm’s ius cogens character.
92 The term ‘dédoublement fonctionnel’ was constructed by G. Scelle: it means that, absent centralised, regular and compulsory organs exercising legislative, executive and judiciary functions on the global plane, state organs that act according to powers they hold through their domestic constitutional regime are also acting on behalf of the international community, filling in a decentralised manner such functions at the international level; see G. Scelle, Précis de droit des gens (t. I, 1932) 55-7; G. Scelle, Règles générales du droit de la paix, 46 RCADI 1933-IV, 358-359; G. Scelle, Manuel élémentaire de droit international public (1943) 21-22.
international community that it is urgent and legitimate to facilitate repression of a particular crime on the basis of universal jurisdiction. The agreement then becomes the expression of the general interest in sanctioning a category of offences deemed especially serious by the international community. While this does not suffice *per se* to raise its content to the status of a new customary rule, other legal effects may nevertheless be attached to the agreement’s provisions. In that sense, it could even be considered as having certain effects on states not party to it (Drittwirkung). For instance, one could deduce therefrom a type of permissive value, akin to that devolved to certain resolutions of international organisations94. Hence, a third-party state using the margin of freedom thereby granted to establish the relevant grounds of criminal jurisdiction would, in this grey zone of uncertainty in legal determination, find support for the exercise of its authority: the benefits reaped for its unilateral claim of jurisdiction would derive from the state’s insertion in the fray already set in motion by events and by the growing opinio. Conversely, whether or not it is a party to the convention, the state whose national is affected would find the legal effect of its eventual protest significantly diminished. The difference between parties to the convention and non-party states would reside in the fact that the latter, although eventually granted the *faculty* to proceed according to the universality principle given the general inclination to accept this exercise, would be under no *obligation* to do so.

A variation on this theme would see the treaty instituting universal jurisdiction as a declaratory instrument, through which the states of the international community acknowledge the existence of a universal jurisdiction for a given crime. The agreement serves here as a catalyst, instantly crystallising the rule into custom95. This new customary rule is, again, only a permissive one, that entitles the states to prosecute but does not require it of them.

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

---


C. Universal jurisdiction in customary international law

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

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

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

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

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

96 This is particularly true of the sectorial or regional conventional law; see Gross, supra note 17, 509.
pronounced where, as he says in the original French version,

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

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

2. To appreciate the legal situation prevailing in this field, one also has to bear in mind that the subject-matter calls more easily for general statements expressing opinio iuris - be it through declarations, resolutions, conventional drafts or treaties - than for consistent and concrete instances of practice. The situation is not unlike that of the law relating to the use of force, as analysed by the ICJ in the Nicaragua case98: the preponderance of political considerations prevent the picture of actual practice from disclosing the same degree of coherence and legal uniformity than in other branches of international law. Hence, any evolution in this field of law would rely more heavily upon policy-statements and conventional norms than upon actual practice in the classical sense. This, in turn, shows how the evaluation of the conditions for establishing international customary norms is linked to the concrete circumstances prevailing in a particular branch of international law. Given the predominance of the particular over the general element in international legal relations99, the formation of an international customary rule is more heavily dependent than elsewhere upon the particular shape of the legal or factual environment. This explains the existence of a variable scale of criteria and processes for its creation. Such flexibility imparts international custom with the ability to cement the heterogeneous elements and areas of the legal order in which it operates.

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

97 de Visscher, supra note 8, 298.
98 ICJ Reports 1986, Merits, 97 et seq.
series of declarations and texts which reveal this will. Only these declarations and texts are capable of offering a unity of view likely to give grounds to the process of generalisation specific to legal norms. True, a dynamic conception is in any case inherent to the notion of custom. And it is also true, as has been said by an eminent lawyer, the role of a jurist is not merely to register facts, but to try to discover the curve along which such facts evolve, and where this curve will eventually lead. In our context, the examination of facts, in the light of the recent trends that help to delineate their curve, reveals a significant strengthening of the notion of universal jurisdiction in the fields of international criminal offences in general, and of terrorist acts in particular.

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

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

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

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

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

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

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

\textsuperscript{104} See supra our chapter devoted to the anti-terrorist conventions.


\textsuperscript{107} Article 2(6) of the 1954 Draft, YBILC 1954-II, 151.
in general to the extent it is state-sponsored. Undeterred by doubts raised by certain members as to the feasibility and the opportunity of such a course, the ILC had reached for a global understanding of the phenomenon. Since then the Commission has reduced the scope of coverage of the Code in the interest of its rapid adoption and of obtaining support by governments. Thus the general provision dealing with state terrorism seems to have been definitively renounced.

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

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

"1. An individual who, as an agent or as a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced to...
2. The following shall constitute an act of terrorism: undertaking, organising, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror (fear or dread) in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way" (ibid., 58, footnote 45).

109 For details, see the Report of the ILC on the Work of its 48th Session, UNGAOR, Suppl. No. 10 (A/51/10), 12, para. 40.
110 YBILC 1990-II, Part 2, 19 et seq.; YBILC 1991-II, Part 1, 41 et seq.; YBILC 1992-II, Part 1, 52 et seq.; YBILC 1993-II, Part 2, 14 et seq., 100 et seq.; YBILC, 1994-II, Part 2, 20 et seq. In article 20(e) of the Draft Statute for an International Criminal Court presented by the ILC, the jurisdiction of this court will include "crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern";

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


(ibid., p. 68). See also the Draft of the Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/1997/WG.1/CPR.4, which adds a basis of jurisdiction for offences involving use of firearms, weapons, explosives and dangerous substances. Given the opposition that this draft elicits, it is unlikely that it will succeed. While these drafts do not touch on any competence exercised uti singuli by states, they do show the general interest in repression of the crimes that they define, includ-
this context terrorism has been maintained as heading within the competence of an international criminal tribunal. The other avenue, that of article 9, is more decentralised, and proposes the general application of universal jurisdiction, on the basis of the rule aut dedere aut iudicare, to all crimes defined in the Draft Code. In this context, as mentioned above, the Commission decided not to keep a specific provision on international terrorism. This is no doubt due to the specific definition of its mission which was essentially to examine crimes linked to the state's activities. Indeed, article 24, quoted earlier, had as its object state-sponsored terrorism. Henceforth, according to the 1996 final draft, terrorism is regulated insofar as it takes the form of crime against UN and associated personnel (article 19) or in the context of war crimes (article 20(f)(iv)). Absent an international instance, or as a complement to such a body, states are vested with the exercise of a compulsory public function. Article 9 of the Draft Code reads:

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

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

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

---

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

112 Graefrath, supra note 59, 72 et seq.


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

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

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

115 Centre d'études, supra note 23, 16.
116 Ibid.
117 Restatement, supra note 59, 254-255.
118 Conseil de l'Europe, supra note 56, 15-16.
119 See Cassese, supra note 61, 606; De Schutter, supra note 61, 379; B. De Schutter, Prospective Study of the Mechanisms to Repress Terrorism, in Colloque, supra note 9, 255; Dinstein, supra note 61, 56; Randall, supra note 56, 832.
120 See Schachter, supra note 56, 264; Bassiouni/Wise, supra note 57, 21; Sucharitkul, supra note 18, 171; Detter, supra note 88, 175; Dahm/Delbrück/Wolfrum, supra note 61, 322, referring to bomb attacks; Oppenheim, supra note 56, 470, and footnote 22; C. van den Wijngaert, The Political Offence Exception to Extradition (1980) 207, including further references. In a more restrictive sense, see Randall, supra note 56, 815 et seq., 837-9, particularly 839.
121 See De Schutter, supra note 61, 388; Dinstein, supra note 61, 70; Goldie, supra note 21, 131; Higgins, supra note 56, 97-99.
States. It is true that their consistency and coherence is hard to
gauge. For instance, Japan had already claimed, even before the
1970s and the adoption of the Hague Convention, universal jurisdic-
tion in all matters related to the hijacking of aeroplanes.22 Moreover,
individuals have been found guilty of terrorist acts by domestic courts,
even where no specific links were established with the state under the
authority of which they were tried: in 1970, Sweden prosecuted a
Greek citizen for the hijacking of a Greek flight between Crete and
Athens forcibly re-routed to Cairo;23 in the aforementioned Layton
case (1981), a foreign national was tried in the United States for ter-
rorist acts committed in Guyana and the federal district court held
that states had begun extending universal jurisdiction to
"crimes considered in the modern era to be as great a threat to
the well-being of the international community as piracy."24
Various states have extended the powers of repression they can ex-
ercise in accordance with their domestic legislation, by having re-
course to the principle of universality. Such was the case in the
United Kingdom, with laws dealing with the Irish situation.25 These
laws do not seem to have given rise to any formal protest.26
b) On the institutional plane, norms and decisions were adopted to
fight international terrorism more efficiently. Resolution 40/61 of the
UN General Assembly (9 December 1985)27 is a case in point. Coming
on the heels of changes already detectable in international society and
notably the new flexibility shown by the socialist régimes of Eastern
Europe, the Resolution voices a clear and decisive will to combat ter-
rorism. This will is perhaps more acutely expressed in paragraph 8,
the aim of which is undoubtedly operational: States shall

\[\text{\footnotesize\cite{122}}\]
\[\text{\footnotesize\cite{123}}\]
\[\text{\footnotesize\cite{124}}\]
\[\text{\footnotesize\cite{125}}\]
\[\text{\footnotesize\cite{126}}\]
\[\text{\footnotesize\cite{127}}\]
"cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts ..."128.

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

A decade later, on 17 February 1995, the General Assembly adopted Resolution A/49/60 (Measures to Eliminate International Terrorism), that prescribes the implementation of international and domestic measures of prevention and repression in the field130. This Resolution's aim is to fill any potential legal lacuna that could prevent effective prosecution. Since then, the UN General Assembly has adopted a series of resolutions in the context of the fight against terrorism. A case in point is Resolution 49/60 of 9 December 1994 and Resolution 50/53 of 11 December 1995. By its Resolution 51/210 of 17 December 1996 (Measures to Eliminate International Terrorism), the General Assembly set up an ad hoc Committee with the task

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

The work of this Committee led to the adoption of the International Convention for the Suppression of Terrorist Bombings adopted on 25 November 1997132. In paragraph 7 of the Draft Resolution II annexed to Resolution A/52/653 adopting the Terrorist Bombing Convention one reads:

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

128 The French text is stronger on that point: States shall "coopérer plus étroitement, notamment en échangeant des informations pertinentes concernant les mesures propres à prévenir et combattre le terrorisme, en appréhendant et en poursuivant en justice ou en extradant les auteurs de tels actes..." (italics added).
129 Quoted by Murphy, supra note 18, 19.
131 Resolution 51/210, para. 9.
132 See supra note 60.
was a comprehensive legal framework covering all aspects of the matter” (italics added).

In operative paragraph 6, the General Assembly calls upon all states “to enact, as appropriate, domestic legislation necessary to implement the provisions of those Conventions and Protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts...”.

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

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


134 Supra note 45 and corresponding text.
ignore the fact that the Libyans had just submitted the dispute to the International Court of Justice. This Resolution states that the negative attitude of Libya, namely its failure to demonstrate by concrete action its repudiation of terrorism, is a threat to international peace and security within the meaning of article 39 of the Charter, and paves the way for coercive action open to all members of the Organisation.

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

---


138 YBILC 1966-II, 247-249. See A. Gomez-Robledo, supra note 58, 167 et seq. For
of the peace with no justifiable motive is deemed an international crime of the state\textsuperscript{139} as well as of the individual\textsuperscript{140}.

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

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

\textsuperscript{139} In Article 19 of the Draft on the International Responsibility of States, \textit{YBILC} 1976-II, Part 2, 89 et seq.

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


\textsuperscript{143} See, in the \textit{Lockerbie} case, the dissenting opinion of Judge Bedjaoui, \textit{ICJ Reports} 1992, 154 et seq., and of Judge \textit{ad hoc} El Kosheri, \textit{ibid.}, 97 et seq., 105-107. See also Bedjaoui, \textit{supra} note 127, 75 et seq., particularly 81 et seq.; B. Graefrath, \textit{Leave to the Court what Belongs to the Court: The Libyan Case}, 4 \textit{EJIL} 1993, 184 et seq.
3. Coordinated state action has also occurred to fight terrorism. It has disclosed that the suppression of terrorism is viewed as an objective interest of the communal body, a development that is part of a more general trend in international law. Traditional international law operated on the relativity of juridical situations and the bilateralism of rights and obligations. The legal effects produced often depended upon a complex web of individualised interactions; hence the central part played by auto-interpretation and unilateral acts such as recognition. A tendency towards its progressive objectivisation has recently emerged, through the acknowledgement of the existence of an international public order, of which *ius cogens* norms, *erga omnes* obligations, and international crimes of states are sub-categories.


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

147 We follow for the present purposes the conception of international *ius cogens* which has become very largely accepted. It identifies peremptory norms with fundamental values of the international community as a whole (eventually called *ordre public*). This simple equation of *ius cogens* with fundamental values should be critically reviewed. On international *ius cogens* and related notions, see, among others, V. Starace, La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale, 153 *RCADI* 1976-V, 271 et seq.; Frowein, *supra* note 129, 353 et seq.; C. Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 *Austrian Journal of Public and International Law* 1994, 131 et seq.; P. Picone, *Nazioni Unite e obblighi erga omnes*, 48 *Comunità internazionale* 1993, 709 et seq.; G. Gaja, *Obligations Erga Omnes*, *International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts* in H. Weiler/A. Cassese/M. Spinedi (eds.), *International
Thus defined, these notions imply the recognition of a hierarchy of values and of norms in international law. They are grounded in the common idea that there exists obligations or, more generally, norms that are so essential to the values that underlie and sustain the international system that their violation, or even an attempted derogation thereof touches upon the interests of all members of the community. It was rightly argued that this evolution somewhat buttressed revendications of universal jurisdiction for crimes contravening such norms of ordre public. Indeed, a violation of this superior legality, whether committed by agents of the state or by individuals, concerns all states because of the required objective protection that lies at its core. Since this is precisely where the fundamental justification for the granting of universal jurisdiction lies, one could argue that a universal jurisdictional sanction is one of the natural complements flowing from the emergence of a body of public order norms.

This concern appears in the vast doctrinal debate on collective counter-measures against a State accused of shirking its duty to cooperate and suppress international terrorism. One must also consult the cases of Barcelona Traction, ICJ Reports 1970, 32, para. 33 and of East Timor, ICJ Reports 1995, 102, para. 29.

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


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

151 See Centre d'études, supra note 23, 34 et seq., 63 et seq., in particular 71-75; Levitt, supra note 138, 95 et seq.; Guillaume, supra note 18, 399 et seq.; Y.Z. Blum, State Responses to Acts of Terrorism, 19 German YBIL 1976, 223 et seq.; J.F. Murphy, State Self-Help and Problems of Public International Law, in Evans/Murphy, supra note 33, 553 et seq., particularly 565 et seq. For a more restrictive view, see Stein, supra note 18, 38 et seq. See also Frowein, supra note 129, 416-422, who provides examples.
states parties to that economic summit. The leaders of the world's seven largest industrialised democratic states announced thereby the imposition of an air traffic boycott against any country refusing to extradite or prosecute the hijackers of an aircraft. A group of experts was set up to study and advise on questions of implementation of the principle enunciated in the Declaration. They submitted the Guidelines for the Application of the Bonn Declaration, which were agreed upon in London on 9 May 1979.

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

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

---


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

154 Ibid., 104.

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

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


158 Ibid.

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

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

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

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

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

\textsuperscript{160} See Levitt, \textit{supra} note 138, 98-99.

\textsuperscript{161} 34 ILM 1995, 782.
primus ente et iure. Freedom comes deontically before Law. Thus, thought through, this would mean that a state could unilaterally set whatever title of jurisdiction it wished with the sole proviso that no other rule of international law is opposed to it. The existence of such an opposing rule would have to be established by ordinary means of proving facts which give rise to conventional or customary rules. The difficulties in doing so have already been revealed in the case of the Lotus, as well as in the Norwegian Fisheries case (1951)\textsuperscript{162}. Thus the State claiming the validity of a title of jurisdiction unilaterally established enjoys moreover a procedural privilege. This is inevitable despite the rule \textit{iura novit curia}, which is difficult to apply in the context of a series of acts and omissions which underlie customary law.

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

In a famous \textit{dictum}, the Court says:

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

in terms of delineating jurisdiction, the Court argues further:

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


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

\textsuperscript{164} J. Basdevant, \textit{Règles générales du droit de la paix}, 58 \textit{RCADI} 1936-IV, 594.

\textsuperscript{165} PCIJ, series A, no. 10, 18.
ception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable"166.

This statement of the Permanent Court has given rise to numerous refutations and criticisms that cannot be reviewed here in detail. Indeed, as a general rule it is indefensible167. Authors have criticised its Hegelian inspiration, placing the state above the law and contributing thus to the international anarchy168; others claimed the argument was circular, since the point is precisely to determine in a case-by-case fashion where law stops, not to postulate it a priori169; some found the principle unhelpful, since many instances of concurrent and contradictory claims or actions could not be settled according to it170; some found the rule especially dangerous in a system of law still fragmen-

166 Ibid., 19.


168 Bourquin, supra note 160, 105-107; Brierly, supra note 169, 143-144.

169 Verdross/Simma, supra note 61, 388.

170 Castberg, supra note 160, 344-345; Le Fur, supra note 166, 302.
tary\textsuperscript{171}. Yet others tried to limit the scope of the rule, either to the territorial or quasi-territorial exercise of jurisdiction allegedly ascribed by the Court, with regard to the status of a ship at sea as akin to a floating portion of the state's territory\textsuperscript{172}; to the field of activities not prohibited by international law, but not to those where rules are lacking (\textit{lacunae})\textsuperscript{173}; or to the domains where the level of international cooperation has not reached a high stage\textsuperscript{174}.

Social life and law in its dynamic aspect are by necessity ultimately founded in an irreducible core of liberty\textsuperscript{175}. Thus, the \textit{Lotus} rule cannot be held a general rule in the face of a \textit{strictly} defined law, grounded only in conventions and custom\textsuperscript{176}, and excluding the general principles of law and social necessities which underlie the entire legal order. Whatever the value of the \textit{Lotus} principle\textsuperscript{177}, authors have generally tried to blunt its sharp anarchical point. The definition and exercise of extra-territorial jurisdiction always presents an international facet, as the argument goes. Hence, in order to be valid and opposable, the new initiative must conform to the rules, precepts and spirit of international law. To this effect, F.A. Mann devised the theory of "reasonable link", which holds that a jurisdictional title is relative, insofar as its existence and validity depend upon a sufficiently strong connection between the activity endeavoured and the jurisdiction claimed: the link must be stronger for the state wishing to exercise jurisdiction than with any other state voicing a concurrent claim. The theory substitutes a primacy based on the balancing of interests to the equality of titles that stems from sovereignty\textsuperscript{178}.

\textsuperscript{171} Le Fur, \textit{supra} note 169, 302.
\textsuperscript{172} PCIJ, Series A, no. 10, 24. In support of this view, Bourquin, \textit{supra} note 160, 104-105.
\textsuperscript{173} Salvioli, \textit{supra} note 169, 21.
\textsuperscript{174} Bleckmann, \textit{Die Völkerrechtsordnung}, \textit{supra} note 166, 407 et seq.
\textsuperscript{175} See the vivid illustration of this point by C. Cossio, \textit{Panorama der ökologischen Rechtslehre} in A. Kaufmann (ed.), \textit{Die ontologische Begründung des Rechts} (1965) 279.
\textsuperscript{176} That is, according to the \textit{Lotus} judgment, in law flowing only from the will of States.
\textsuperscript{177} Several recent instances bear witness of the contemporary pertinence of the \textit{Lotus} rule and to its use as a basis for legal reasoning. See, e.g., the opinion of the \textit{Avocat Général} Darmon at the Court of Justice of the European Communities (25 May 1988), Ahlstrom case, 96 ILR 179. See also the \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion (1996), \textit{ICJ Reports} 1996, paras. 21, 52. The Permanent Court of International Justice had somewhat dampened the residual freedom of the \textit{Lotus} in the \textit{Territorial Jurisdiction of the International Commission of the River Oder} case (1929), PCIJ, Series A, no. 23, 26.
\textsuperscript{178} F.A. Mann, \textit{supra} note 59, 44 et seq., 82 et seq. with many references; B. Stern, Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit, 32 \textit{AFDI} 1986, 44-45; W. Meng, \textit{Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht}, Beiträge zum ausländischen öffentlichen Recht und Vol-
If one accepts this theory, the *ratio iuris* it is rooted in could be applied by analogy to the case of universal jurisdiction. One can then start from the very minimal hypothesis of the *Lotus* principle being that of freedom as against specific restrictions by the law writ large\(^{179}\). Whereas the state possesses the original freedom to regulate its own jurisdiction and thus to extend unilaterally its titles to universal jurisdiction, these titles will only be valid in international law if the state can demonstrate a "reasonable interest" in their exercise. Hence, the residual freedom of the *Lotus* case would only find justification in international law if it is related to some discipline that has gathered a certain degree of general assent, because it aims to protect interests seen as legitimate. This reasonable interest to prosecute according to universal jurisdiction surely exists for severe acts of terrorism.

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

"There is in fact no general rule of international law prohibiting the application of the principle of the universality of law in the absence of special provision by international convention"\(^ {181}\).

The Court went on to say that

"any extension of State criminal jurisdiction to cover offences committed abroad by aliens requires the presence of some factor, connecting the case to the forum, which constitutes a justifiable basis for the exercise of jurisdiction"\(^ {182}\).

Such a connection was found in the present case:

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

---

\(^{179}\) That is, including general principles of law and analogies.

\(^{180}\) 74 *ILR* 168-169.

\(^{181}\) Ibid., 169.

\(^{182}\) Ibid., 168.
Universal criminal jurisdiction in international terrorism

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

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

IV. CONCLUSION

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

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

Even if one allows for these strict criteria and the contingent considerations of political opportunity that, in this field more than in others, stand against the regulatory function of law, there is no heresy in affirming that current international law acknowledges the unilateral faculty to claim the privilege of exercising universal jurisdiction for qualified terrorist acts as defined by custom or the several anti-

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

184 De Visscher, supra note 8, 169-170.
terrorist treaties\textsuperscript{185}. The strength of the new trends that have emerged in international society can be construed at least as having removed the justification (or the \textit{opinio iuris}) of the alleged prohibitive rule, if it even existed at all.

Whether the potential customary rule granting universal jurisdiction for the prosecution of terrorists has positively crystallised or merely remains \textit{in statu nascendi} might not affect the heart of our problem. Suffice it to say that, in all probability, a state's claim to exercise universal jurisdiction in a case related to our topic \textit{would not arouse any protest} in principle on the part of other interested states. Instead of granting a jurisdictional title through custom, the growth of a sufficiently general legal conviction may have reoriented the law towards the recognition of the power (\textit{faculté}) to engage in a repressive endeavour based on titles of municipal law. This would be an intermediary stage between a mere freedom, based on an abstract, negative presumption, and an established custom based upon a series of concrete, positive acts. The difference between this stage and a general presumption of freedom lies in its justification, which in the former case is buttressed by additional considerations provided by circumstantial factors. The freedom is not here negatively presumed, but positively conferred. A relatively uniform and prolonged use of this faculty may, in accordance with recognised rules, result in the emergence of a real customary rule.

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

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


\textsuperscript{187} Horace, \textit{Satires}, I, 1, 106.
LES NATIONS UNIES ET LA LUTTE CONTRE
LA DÉSERTIFICATION AVEC EXAMEN PARTICULIER DU CAS
DE LA RÉGION DE LA MEDITERRANÉE SEPTENTRIONALE

JOSÉ ROBERTO PÉREZ-SALOM*

LE PROBLÈME DE LA DÉSERTIFICATION

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

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

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

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

* Assistant à l'Université de Valencia, Espagne.
