INTERNATIONAL TERRORISM AND THE PROBLEM OF JURISDICTION*

Sompong Sucharitkul**

I. INTRODUCTION

Problems of pluri-dimensional complexity of definition, classification and norm-formulation converge in any meaningful endeavor to explore practical measures to prevent, preempt or otherwise to discourage and suppress acts of terrorism on an international scene. The present study is devoted to the treatment of only one of these problems, namely, the problem of jurisdiction. This problem presents itself in more than one connection. To ensure proper appreciation of the nature and scope of the multi-faceted problem of jurisdiction in the context of international terrorism, preliminary attention is focused on the need to adopt a balanced approach to the basic notion of international terrorism.

In the pages that follow, the study will consist of five substantive parts. In addition to Part I, Part II will deal with the problem of defining "international terrorism," examining the definition previously adopted in the Geneva Convention of 1937 and its current adaptations analyzing various elements of acts of terrorism, and illustrating the different types of offenses associated with "international terrorism."

Part III will examine the conceptual problem relating to the different types as well as the nature and scope of national jurisdiction of a sovereign State, the exercise of such jurisdiction, the causes of jurisdictional problems and some plausible solutions.

Part IV will consider the permissible legal bases of jurisdiction, through the Territorial Principle, subjective and objective, including its extended notion and intended effect, the Nationality or Personality Principle, active and passive, the Protective Principle

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* This article, in its original form, was a statement made by the Principal Speaker on the "The Problem of Jurisdiction," being the topic for the second panel in a four-panel symposium on International Terrorism, organized by the Syracuse University College of Law - International Law Society, co-sponsored by the American Society of International Law, Communications Law Society, and Center for Interdisciplinary Legal Studies, on April 4, 1987, at the Grant Auditorium, Syracuse University College of Law, Syracuse, New York.

** B.A. Hons, M.A., D. Phil. (Oxford); Docteur-en-Droit (Paris); LL.M. (Harvard); Robert E. and Marion D. Short Professor of International Law at Notre Dame Law School; Faculty Fellow, Institute for International Peace Studies, Notre Dame; Membre titulaire of the Institut de Droit International, Geneva; sometime Member and Special Rapporteur of the International Law Commission, United Nations.

and its role as an alternative to the passive nationality principle, the Universal Principle in its glowing splendor and the Principle of Consent expressed in the form of an international agreement. These principles are presented with all necessary ramifications.

Part V will suggest a possible posture in response to international terrorism, partly through ratification of the anti-terrorism related conventions, partly by introduction of improved procedures for extradition of alleged offenders of terrorist acts, and without impairing the right to seek political asylum, especially excluding "terrorism" from the exception of political offense in extradition treaties and statutes, taking into account the available option to surrender or to prosecute the alleged offender.

Part VI will leave readers with an irresistible conclusion in support of an international obligation for all States to cooperate and to adopt all measures necessary to contain and combat acts of international terrorism, to preempt or prevent terrorist acts, and to punish the offenders for their international crimes regardless of race, sex or religion, and indeed their official status or governmental connections notwithstanding.

II. DEFINING "TERRORISM"

A. An Accepted Definition of "International Terrorism"

Definitional problems of primary importance loom large in any attempt to encapsulate the general notion of "terrorism" or to identify the salient features of "acts of terrorism." A marked increase in the intensity, frequency and variety of occurrences of "acts of terrorism" in the diverse parts of the globe has prompted more recent authors to suggest a definitional approach[1] with varying components[2] without sufficiently reflecting the existing notion of terrorism as earlier defined in a general multilateral convention.

For a purpose, not unlike that of the present study, the Con-

1. *See, e.g.*, Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191-251 (1983).

2. Paust, *supra* note 1, at 192-93. "Terrorism itself can be defined as a process that involves the international use of violence, or threat of violence, against an instrumental target in order to communicate to a primary target a threat of future violence so as both to coerce the primary target into behavior or attitudes through intense fear or anxiety and to serve a particular political end." *Id. Compare* Mickolus, *Statistical Approaches to the Study of Terrorism*, in TERRORISM: INTERDISCIPLINARY PERSPECTIVES 209-10 (Y. Alexander & S. Finger eds. 1977); Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 219 n.1 (1977).

vention for the Prevention and Punishment of Terrorism, adopted by the Internatational Conference On the Repression of Terrorism on November 16, 1937 (1937 Convention),[3] contains a pertinent definition of "acts of terrorism" as well as provisions elaborating and enumerating criminal offenses under this heading.

Article 1, paragraph 2, of the 1937 Convention provides:

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

Before proceeding to define the notion of terrorism, Paragraph 1 of the 1937 Convention reaffirms "the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape."[5] It also stipulates the obligation of States to "undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose."[6] This undertaking implies the duty on the part of each of the States that are parties to adopt legislation establishing jurisdiction not only to arrest, try and punish, but above all to prescribe as a punishable offense acts of terrorism so defined[7] and to extend criminal jurisdiction of its courts to prosecute and enforce judgements.

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

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3. An alarming number of political assassinations have taken place in Europe in rapid succession since 1934. Notable among the internationally protected persons who fell victim to terrorist acts may be mentioned: Monsieur Louis Barthou, the French Minister of Foreign Affairs, and King Alexander of Yugoslavia, who was assailed in Marseilles while visiting France.

The two notorious incidents prompted France and its European allies to convene an international conference in Geneva under the auspices of the League of Nations, which adopted the Convention for the Prevention and Punishment of Terrorism, on Nov. 16, 1937. *See Draft Code of Offences against the Peace and Security of Mankind, Compendium of Relevent International Instruments*, U.N. Doc. A/CN.4/368, at 18-22 (Apr. 13, 1983) [hereinafter *Draft Code*]; *see also International Conference on the Repression of Terrorism, Convention for the Creation of an International Criminal Court*, Nov. 16, 1937, U.N. Doc. A/CN.4/368, at 23-26 (1983) [hereinafter *Geneva Convention of 1937*]. Neither of the two Conventions entered into force as World War II interrupted the process of ratification by States.

4. *Draft Code*, *supra* note 3, at 18.

5. *Id.* art. 1, para. 1, at 18.

6. *Id.*

7. *Id.* arts. 2-4, at 18-19.

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

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

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

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

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

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

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

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

The definition adopted by the 1937 Convention and the list of punishable offenses of acts of terrorism were incorporated in the third report of Minister Doudou Thiam, Special Rapporteur, for the International Law Commission in Draft Code of Offences against the Peace and Security of Mankind, in 1985.[9] Draft Article 11 of the fourth report by the same author, enumerates acts constituting crimes against peace, among which paragraph 4 includes: the undertaking, assisting or encouragement by the authorities of a State of terrorist acts in another State, or the toleration by these authorities of activities organized for the purpose of carrying out terrorist acts in another State.[10] Subparagraph (a) contains a definition of terrorist acts[11] taken almost verbatim from the 1937 Convention[12] and sub-paragraph (b) in effect enumerates offenses constituting terrorist acts in the same fashion as Article 2 of the

8. *Id.* at 18.

9. *See* Thiam, *Third Report on the Draft Code of Offences against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/387, art. 4, para. (D), *reprinted in* [1985] 2 Y.B. INT'L L. COMM'N 82-83, U.N. Doc. A/CN.4/Ser.A/1985/Add.(Part 1).

10. *See Report of the International Law Commission on the Work of its 38th Session*, U.N. Doc. A/41/10, *reprinted in* [1986] Y.B. INT'L L. COMM'N ch. 5, art. 11, para. 4, at 43 n.105 [hereinafter *International Law Commission Report*].

11. *Id. Compare* Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, U.N. Doc. A/CN.4/368, at 23-26 (1983).

12. *See id.*

earlier Convention.[13]

B. Elements of "Acts of Terrorism"

The elements of "acts of terrorism" as contained in the 1937 Convention and the Draft Articles by Minister Doudou Thiam are broadly similar. The acts in question, the *actus reus*, must be punishable offenses, directed against a State, and intended or calculated, *mens rea*, to create a state of fear or "terror" in the minds of public figures, or a group of persons or the general public. First, to constitute a crime against peace, as a category of offenses against the peace and security of mankind, the "terrorist acts" or "acts of terrorism" must be by the authorities of a State consisting either in the "undertaking," "assisting" or "encouragement" and it has to be committed in another State.

Alternatively, the definition also covers "toleration" by State authorities "of activities organized for the purpose of carrying out terrorist acts in another State."[14] To amount to a crime against peace, the terrorist acts must have been attributable to a State either through State authorities, in the form of active undertaking, assistance or encouragement, or indeed passive toleration without actual participation. In any event, the definition presupposes the existence of an obligation on the part of a State not knowingly to allow its territory to be used in the organizing or staging of activities for the commission of terrorist acts in another State.

Secondly, the act must be directed against "another State." To this requirement is added "or the population of a State," thereby extending the scope of terrorism to cover also the population of another State.[15] Finally, the element of intent or purpose or *mens rea* is clearly referable to the intentional inducement of "fear" or "terror," a psychological effect to be produced by the *actus reus* or the act of terror in question.

Thus, an act of terrorism which is directed against a State or its population and calculated to create a state of fear in the minds of individuals, a group of persons or the public at large does not constitute an offense against peace (or against the peace and secur-

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13. *International Law Commission Report*, *supra* note 10, at 43 n.105. *Compare* Geneva Convention of 1937, *supra* note 3, at 4.

14. *See International Law Commission Report*, *supra* note 10, para.4, at 43 n.105.

15. *Id.* Note especially "Definition of Terrorist Acts." In fact, this extension is implicit in the creation of a state of "terror" or "fear" in the minds of public figures (chez des personalites), or a group of persons or the general public. The last "phrase" is invariably referable to the population of that other State.

ity of mankind) under the Draft Code, unless the act in question was committed by another State or was otherwise imputed or attributable to the State through its officials' action or omission or toleration.

Even without this additional element linking the act of terrorism to the State through the "undertaking," "assisting," "encouragement" or "toleration" by State authorities, an act of terrorism by whomsoever performed remains a criminal act nonetheless. The imputation of the act to a State serves to aggravate the nature and seriousness of the offense so as to elevate it from an ordinary international crime required by treaty to be made punishable under domestic law, to the top category of the gravest crimes, an "offence against the peace and security of mankind," with all the grave consequences that inevitably follow.

The 1937 Convention obliged State parties not only to refrain from any acts designed to encourage terrorist activities but also to prevent the acts in which terrorist activities take shape.[16] Thus, States undertook thereby to prevent and punish activities of this nature. A breach of such an undertaking does not entail responsibility of a State for the commission of the act or organization of activities by individuals who are neither authorities nor officials of the State. Nevertheless, knowledge and toleration of such activities may amount to a breach of duty engaging State responsibility for failure to prevent the occurrence of such unlawful activities on its territory. A closer examination of concrete examples in State practice may help clarify some of the inherent obscurities and ambiguities. Given the existence of an act of terrorism, our concern may still be precluded by the noninternational or nontransnational character of the act.

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

An act of terrorism may constitute but an ordinary crime or criminal offense if committed wholly within the boundary of one State and not directed against any other State.[17] In a sense, every

16. *See Draft Code*, *supra* note 3, art. 1, para. 1, at 18. Examples are numerous. Libya has been known to encourage terrorist activities directed against Egypt, Chad and the United States. On the other hand, the United States together with the People's Republic of China, Iran and Pakistan have been accused by a socialist country of training and assisting Afghan terrorists whom we believe to be freedom-fighters in their struggles to liberate Afghanistan from Soviet domination. *See Secretary General's Report on Terrorism*, U.N. Doc. (1985).

17. For instance, the Tylenol terror was confined to the United States and not in-

crime is an offense directed against the society or the State. Indeed, some offenses are specifically labeled offenses against the State, whether in form of offenses against national security, such as sedition or high treason, or offenses against economic or financial stability. According to the definition given above, an "act of terrorism" is at least a crime calculated to create a state of fear in the mind of individuals, groups or the general public. It is also directed against another state.[18]

An "act of terrorism," however, is elevated to the status of "international terrorism" solely on account of its "internationality." It therefore presupposes the involvement of at least two States, the State responsible for the terrorist act directly or by imputation and the victim State against which the terrorist act is directed.

History has known notorious instances of terrorism, although not always categorized as such an offense. Thus, we have heard of Ivan *the Terrible* as distinguished from Richard *the Lion Heart*. In post-revolutionary France the expression "la regne de terreur" has been used to describe the terrifying occurrences.[19] During World War II, a resolution was adopted by the Allied governments condemning German Terror and demanding retribution.[20] Subse-

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tended to cause injury outside this country, unless the product was exported abroad. The element of intent has also to be taken into account.

18. Thus, the killing of an American national in the Achille Lauro incident is said to be directed, *inter alia*, against the United States. The definitions here examined represent international efforts under the League of Nations and present-day United Nations. They are essentially more objective than national efforts, such as those attributable to the United States or the United Kingdom, which tend to protect their own nationals in contemporary environment as prospective victims of terrorist attacks by Iranian or Libyan or the Irish Republican Army. Thus, Americans and English are by definition not terrorists but victims of terrorism under their respective statutes.

19. Terrorism, both as a concept and a term of art, dates back to the era of the French Revolution and the Jacobin Reign of Terror (1793-1794). *See* OXFORD ENGLISH DICTIONARY 216 (1911). This practice of terror provided the contemporary prototype of what has come to be known as State terrorism or government terrorism, whereby an existing regime inflicts severe penalties and acts of arbitrary violence on defenseless population. The most glaring example of our time is the *apartheid* regime in South Africa.

20. In London, on January 13, 1942, representatives of the governments of the occupied countries of Europe then established in London, and of the Free French National Committee, met at St. James's Palace and signed a formal resolution condemning the German regime of terror throughout occupied Europe, recalling "that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the law in force, or to overthrow national institutions." *See* U.N. Doc. A/CN.4/368, at 28 (1983). Reference was also made to declarations on October 25, 1941 by the President of the United States and by the British Prime Minister.

quently, a declaration was made in Moscow on German atrocities.[21]

Aside from wartime terrors or terrorist acts committed during an armed conflict, "acts of terrorism" continued long after the cessation of hostilities. Happenings in various parts of the world did not conform to the same or similar pattern of terror connected with post-war guerilla activities as in Greece.[22] The first notable terrorist group known in Asia with transboundary activity were the C.T. (Chinese, or at times Communist, Terrorists)[23] in Malaya before and also after independence in 1957. Their purpose was to change the regime in the country by means of terrorism.[24] If their activities were confined to the borders of Malaya without instigation or assistance or encouragement from outside, they would amount to nothing more than ordinary bandits or highway men, operating against local law, not unlike Robin Hood of Sherwood Forest, except that there was no oppression against the poor on the part of the ruling authority. In fact, it was an attempt to bring about changes by force of terror, directed from outside against the internal security and stability of Malaya.

The C.T. might have been the first such classic example of international terrorism. On the other hand, there had been other instances of native uprising with the aim to overthrow existing colonial government or removing alien domination. These colonial peoples were not only denied their basic right of self-determination as peoples but were also labeled "terrorist," such as the "Mau

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21. The Moscow Declaration on German Atrocities of October 30, 1943 was signed by President Roosevelt, Prime Minister Churchill and Chairman Joseph Stalin, referring to the atrocities, massacres and cold-blooded executions being perpetrated by the Hitlerite forces, and to the brutalities of Hitlerite domination as "the worst form of government by *terror*." U.N. Doc. A/CN.4/368, at 29 (emphasis added).

22. After the close of hostilities in World War II, Communist guerillas were infiltrated into Greece across the border from Albania, Yugoslavia and Bulgaria. Proposals by the Commission of Investigation to set up a permanent frontier commission were rejected by Soviet double veto in the Security Council. *See* 2 U.N. SCOR Special Supp. (No. 2) at 156-57; 2 U.N. SCOR (Nos. 51-64) at 1126-1547; *see also* G.A. Res. 109(II) (Oct. 2, 1947), setting up a special committee to observe compliance by the four governments concerned with recommendations of the General Assembly.

23. These were Communist-inspired bandits of Chinese origin taking hostages and demanding extortions from among the Chinese population in Malaya in order to embarrass the British Colonial Government and subsequently its Malayan successor, the Federation of Malay States.

24. Chinese inspired Communist Parties were formed in almost every country in South-East Asia, notably Burma, Laos, Thailand, Malay, Indonesia, Singapore and the Philippines. Ho Chi Minh and Sihanouk were both supported by Peking from the start. The fate and growth of the Chinese oriented communist parties in South-East Asian countries have been discussed in other works. *See, e.g.*, Rahman, *The Communist Threat in Malaysia and Southeast Asia*, PACIFIC COMMUNITY 8 (July 1977); FOREIGN AFFAIRS MALAYSIA No. 3, at 1.

Maus" in Africa or even the Algerians and the Indo-Chinese before their respective independence, struggling to liberate their nationals from the yoke of colonial oppression.[25] The process of decolonization could indeed be painful; the deliverance of an independent nation has often entailed far greater labor pain for the reluctant colonial power than the delivery of an overgrown child by an uncooperative mother. National liberation movements could avail themselves of external assistance with world-wide endorsement.[26]

One crucial point has been rendered crystal clear beyond any shadow of suspicion. General Assembly Resolution 3103(XXVIII), which enumerates the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, has succeeded in precluding national liberation movements from the presumption of guilt. There is less possibility of converting "freedom-fighters" into "terrorists," and "mercenaries" into "national heroes." The four categories are so far apart that no confusion would seem likely today, although the recent past was still contaminated with such distortions. Freedom-fighters are now accepted as national heroes, while mercenaries have been outlawed in Africa, and condemned as criminals. Mercenarism is a crime, when used to oppose national liberation movements.[27] Paragraphs 5 and 6 of Resolution 3103(XXVIII) run:

5. The use of mercenaries by colonial and racist regimes against the

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25. *See, e.g., Implementation of Declaration 1514 on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 2465(XXIII) para. 8 (Dec. 20, 1968). This resolution declared the practice of using mercenaries against movements of national liberation and independence to be a punishable criminal act. *See also* G.A. Res. 2548(XXIV) (1969), declaring that the continuation of colonial rule threatens international peace and security and that the practice of apartheid and all forms of racial discrimination constitute a crime against humanity, and reiterating the criminality of the use of mercenaries against movements for national liberation and independence. Of late, mercenaries were also used by foreign powers to invade the independent Republic of Seychelles in an attempt to overthrow its legitimate government. *Compare* G.A. Res. 2708(XXV) (1970), and O.A.U. Convention for the Elimination of Mercenarism in Africa, Libreville, June 30, 1977, U.N. Doc. A/CN.4/368, at 64-66 [hereinafter O.A.U. Convention].

26. *See* G.A. Res. 1514(XV) (1960), on the Granting of Independence to Colonial Countries and Peoples, and subsequent resolutions on the implementation and accelaration of the decolonization process. G.A. Res. 2465(XXIII) (Dec. 20, 1968); G.A. Res. 2548(XXIV) (Dec. 11, 1969); G.A. Res. 2708(XXV) (Dec. 14, 1970).

27. The first Algerian delegation to the United Nations was headed by Mohamed Ben Balla, leader of the FLN, at one time the most dreaded "terrorist" by French standard. A similar path was followed by many a statesman in Africa and the so-called Middle East, by the Zulus and the Mau Maus, and by the Jews in Palestine, each of whom has had to struggle hard to earn national liberation and independence. Once treated as "terrorists" by former colonial masters, they are today respected and proclaimed world-wide as national heroes.

national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

6. The violation of the legal status of the combatants struggling against colonial and alien domination and racist regimes in the course of armed conflicts entails full responsibility in accordance with the norm of international law.[28]

Between mercenaries and national liberations movements, the position has been made unquestionably clear. Mercenaries or hired killers fight for reward, not to achieve independence or national liberation, but rather to prolong colonial and alien domination or racist regimes.[29] On the other hand, this clarity will in no way justify "acts of terrorism" or "international terrorism" by whomsoever committed.

Regulation of the use of force in an armed conflict in the course of liberation, as in other instances of armed conflict, does not necessarily guarantee absence of violations of the laws and customs of war by either side of the combatants. Suffice it to confirm that such violations entail State responsibility under international law.[30] Not only the State that violated the regulation would be responsible, but the insurgents or rebels considered to be protected by the Geneva Conventions of 1949[31] and additional Protocols of

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28. G.A. Res. 3103(XXVIII), Dec. 12, 1973, U.N. Doc. A/CN.4/368, at 90. On the other hand, combatants are also required to observe the laws and customs of armed conflict without exception.

29. *See, e.g.*, O.A.U. Convention, *supra* note 25, at 64-69. *Compare* Additional Protocols to the Geneva Conventions of August 12, 1949, adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, June 8, 1977, U.N. Doc. A/CN.4/368, at 95; 1977 U.N. JURID. Y.B. ch. IV.

30. Every State is held responsible for its internationally wrongful act. *See Draft Articles on State Responsibility, Part I*, [1980] 2 Y.B. INT'L L. COMM'N pt. 2, at 26-63 (provisionally adopted by the International Law Commission at first reading). Take special notice of Chapter I: General Principles, Articles 1-4, and Chapter II: The "Act of the State" under International Law, Articles 5-15.

31. The Geneva Convention of 1949 on the Protection of War Victims. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. *See, e.g.*, Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which imposes on each Party to the armed conflict, as a minimum, the obligation to treat humanely all persons who are "*hors de combat*" (out of

1977[32] could be equally liable. Violations in the form of taking of hostages, torture, killing of hostages, or reprisals could be punishable as offenses against the laws and customs of war, and could take the form of "acts of terrorism."

There are also other "acts of terrorism" which are not exclusively taking place within one and the same State, but may have transboundary connections or networks that are regional or global. Just as the *pirates jure gentium* operate on the high seas, outside national jurisdiction of any State, an organized band of terrorists may have their planning and operational sites in more than one country. The Red Army or other extremist groups of Japan,[33] the Baader-Meinhof gang[34] in the Federal Republic of Germany, the Mafia or the Brigatto Rosso of Italy (Red Brigade) need not stay put at one headquarters within one country, they often cross national borders.

A gang of terrorists like the Mafia or the Red Brigade, which could operate for private ends or for loftier motives, could commit within Italy an act of terrorism such as the assassination of the Anti-terrorist Commander in Sicily,[35] or the kidnapping and subse-

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combat) by sickness, wounds, detention or any other cause, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

32. *Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions*, Aug. 12, 1949, U.N. Doc. A/32/144, *reprinted in* 16 I.L.M. 1391 (adopted June 8, 1977). Protocol I, Part III, Section I (Methods and Means of Warfare), Article 35 (Basic rules), provides in paragraph 2, "[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering," and in paragraph 3, "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." *See also id.* arts. 36-37.

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

34. *See, e.g.*, the Klaus Croissant Extradition Case, 106 JOURNAL DU DROIT INTERNATIONAL 91 (1979). The Conseil d'Etat, Section du Contentieux, Fr., upheld the decision of the French Government to extradite Klaus Croissant, a German national closely associated with the Baader-Meinhof terrorist gang, in response to the request made by the Government of the Federal Republic of Germany, on the ground that the charge of furnishing aid to persons who committed crimes was not political in its purpose, although the purpose was described in the international arrest warrant as "to topple the established order of the Federal Republic of Germany." *Id.* at 96. *See* Le Figaro, Nov. 17, 1977, at 17, col. 3; Le Monde, Oct. 2-3, 1977, at 7, col. 1; Le Monde, Oct. 5, 1977, at 16, col. 5; Le Monde, Nov. 26, 1977, at 1, col. 3; *see also* Carbonnau, *Terrorist Acts, Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265-97.

35. The Italian General was waylaid and assassinated in his own car on his way home in the fall of 1982. The case was reported in Italian newspapers and the European edition of

quent assassination of former Prime Minister Aldo Moro of Italy,[36] could be considered as being directed against the territorial government or the home State. On the other hand, the taking hostage of General Dozier,[37] NATO Commander of Logistics in Northern Italy, although motivated by private gains, was nevertheless directed against another State (i.e., the United States, of which General Dozier was a national) as well as against an international organization (NATO). Regardless of the political motivations in all three cases mentioned above, the offenses committed in Italy could clearly be regarded as acts of terrorism. Of the three instances, however, the Dozier case was apparently the only example of "international terrorism," since the hostage was a foreign (non-Italian) national and the act was directed against another State.

These three instances may be distinguished from yet another category of terrorist acts, such as, the kidnap of the heir of Bulgari[38] for a ransom, which took place in Italy as well as outside Italy, for the place of payment of the extortion money was made in Switzerland despite official efforts to intercept any transfer of money from Italy. Since there are multiple venues of the crime, the *locus delicti commissi* was duplicated in more than one State. This could be viewed in a sense as an international crime or rather an act of transboundary terrorism. But it was for purely private ends, and as such would not be of direct concern to the present inquiry, which, by definition, excludes acts of transboundary terrorism not directed against any other State, but against an individual or family to extort money or undue advantages.

Further instances could be cited which illustrate the international character of the acts of terrorism. The explosion which killed the President of the Republic of Korea and injured many members of his party while on a state visit in Rangoon, Burma in 1982[39] was clearly directed against the Republic of Korea, as well as incidentally against the Union of Burma, as the host State responsible for the safety and security of the visiting head of State and dignitaries. The fact that the terrorists were agents of the

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the Herald Tribune.

36. *See, e.g., Red Brigade Hunt Intensifies in France*, Int'l Herald Tribune, Sept. 4, 1979, at 5, col. 1 (the *Piperno* extradition case in connection with the assassination of Aldo Moro).

37. N.Y. Times, Jan. 1, 1982, at 3, col. 4; N.Y. Times, Dec. 18, 1981, at A3, col. 1.

38. The incident was reported in local press as well as in the European edition of the Herald Tribune in 1984.

39. *See* debate in the Sixth Committee of the General Assembly, 1982.

Democratic People's Republic of Korea did not make the act any less international. Similarly, the shooting of a Korean jet liner over the Pacific by Soviet shore missiles on August 31, 1983 was not a purely domestic incident, as the act entailed far-reaching repercussions in the history of civil aviation.[40] Nor was the destruction of the *Rainbow Warrior*, a vessel of Greenpeace, in a harbor in New Zealand, by French agents ever to be deemed within France's domestic jurisdiction.[41]

The international character of the act of terrorism attributable to a State in all these cases fit the definition of "international terrorism." Moreover, they constitute instances of State terrorism, par excellence. The mining of a harbor in time of peace for whatever reason has been found by the International Court of Justice to constitute breaches of international obligations entailing international responsibility of the Respondent, the United States of America."[42]

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40. *See, e.g.*, the decision of the Pilot Association boycotting landing in Moscow, and other counter-measures adopted by the Council of Europe. Efforts were made to prevent the recurrence of such incidents by establishing points for monitoring routing services in Japan, U.S.S.R., and the United States to coordinate the locality of each civil aircraft. *See* Memorandum of Understanding Concerning Air Traffic Control, July 29, 1985, United States-Japan-U.S.S.R., 25 I.L.M. 74 (entered into force Oct. 8, 1985). For the agreement among Air Traffic Control Centers implementing the memorandum, *see* 25 I.L.M. 77 (1986); *see also* Documents Concerning Korean Air Lines Incident, 22 I.L.M. 1109 (1983); INT'L CIVIL AVIATION ORG., REP. REGARDING KOREAN AIRLINER INCIDENT, 23 I.L.M. 864 (1984); Amendment to the Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, May 10, 1984, 23 I.L.M. 705.

41. On July 10, 1985, members of the French Directorate General of External Security (DGSE) placed detonating devices aboard the Greenpeace vessel *Rainbow Warrior*, docked in Aukland harbor, New Zealand. The vessel was planning to sail to French Polenesia to protest against nuclear testing about to be carried out there. The explosion resulted in the death of one Dutch crew member and total destruction of the vessel. Two French agents were arrested, tried, and sentenced to a term of ten years imprisonment by the New Zealand Chief Justice, for manslaughter and wilful damage to the ship. The dispute between New Zealand and France was settled on the basis of a *Ruling Pertaining to the Difference between France and New Zealand Arising from the Rainbow Warrior Affair, Report of the Secretary-General to the U.N. General Assembly*, 41 U.N. GAOR Supp. (No. 1) at 6, U.N. Doc. A/41/1 (1986). The final settlement of the amount of reparation and compensation is still under arbitration. *See also* Commonwealth Bulletin, Apr. 1986, at 380; D. ROBIE, EYES OF FIRE: THE LAST VOYAGE OF THE *Rainbow Warrior* (1987); Sawyer, *Rainbow Warrior: Nuclear War in the Pacific*, 8(4) THIRD WORLD Q. 1325 (Oct. 1986).

42. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment of June 26, 1986). The Court found in favor of the Applicant, Nicaragua, on at least 14 different counts. In particular, Count (6) by twelve votes to three, the court decided that, by laying mines in the internal and territorial waters of the Republic of Nicaragua during the months of 1984, the United States has acted against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to

D. Types of Offenses Associated with "International Terrorism"

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

1. Offenses against internationally protected persons,[43] such as the kidnapping or assassination of a head of state.

2. Taking of hostages[44] or seizing a public building, such as an embassy or a consulate.

3. Wilful destruction of, or damage to public property devoted to public purpose,[45] such as explosion of bombs in a courthouse or a department store.

4. Wilful acts calculated to endanger the lives of members of the public,[46] such as throwing grenades or firing machine guns in a crowded airport.

5. Hijacking of aircraft, vessels and other public means of transport.[47]

6. The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances

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interrupt peaceful maritime commerce. *See id.* para. 292, at 137-42.

43. *See* Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 13 I.L.M. 41 [hereinafter Convention on the Prevention and Punishment of Crimes]; European Convention on the Suppression of Terrorism, Nov. 10, 1976, T.S. No. 90, 15 I.L.M. 1272 [hereinafter European Convention].

44. *See* International Convention against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp., U.N. Doc. A/C.6/34/L.23, *reprinted in* 18 I.L.M. 1456 (1979); European Convention, *supra* note 43, art. I(D).

45. *See* European Convention, *supra* note 43, art. I(E); *Draft Code*, *supra* note 3, Art. 2, Doc. A/CN.4/368, para. 2 at 18.

46. *See* Geneva Convention of 1937, supra note 3, Art. 2, para. 3.

47. *See* Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 10 I.L.M. 133 [hereinafter Hague (Hijacking) Convention of 1970].

with a view to the commission of any of the above offenses.[48]

To this list should also be added acts which constitute the commission of any of the above offenses, such as:

(1) conspiracy to commit any such act enumerated in numbers one to five above;[49]
(2) any incitement to any such act, if successful;[50]
(3) direct public incitement to any such act whether or not successful;[51]
(4) wilful participation in any such act; [52]
(5) assistance, knowingly given, towards the commission of any such act;[53]
(6) any attempt to commit any such act.[54]

III. THE PROBLEM OF JURISDICTION

A. The Problem Stated

1. The Conceptual Problem

The problem connected with jurisdiction is manifold. To begin with, there seems to be a basic conceptual problem inherent in the expression "jurisdiction." Secondly, the use of the term may also vary with the different meanings ascribed to it by the user. Lastly, there is traditionally more than one type of jurisdiction that appears to be highly relevant to any consideration of international terrorism. The problem whether a State has jurisdiction to arrest, to prosecute or to punish an alleged offender, may therefore be tackled in these separate but closely related connections.

A conceptual problem of paramount importance surrounds the expression "jurisdiction." The term has been used in several legal contexts, not necessarily interconnected. In its etymological sense, "jurisdiction" is a combination of "jus" - "juris" and "dicere" - "dictio," literally the statement of the law or power to determine the right or what the law is on the point at issue, or the determination of the right or interest in question or the interpretation and

48. *See* Convention for the Prevention and Punishment of Terrorism, *supra* note 11, art. 2, para. 5, at 18.
49. *See id.* art. 3, para. 1, at 19.
50. *Id.* art. 3, para. 2, at 19.
51. *Id.*
52. *Id.* art. 3, para. 4, at 19.
53. *Id.* art. 3, para. 5, at 19.
54. *Id.* art. 3, para. 4, at 18.

application of the law.[55]

In international law, even from the classics of the law of nations, the term "jurisdictio" or jurisdiction has been equated with "imperium" or sovereignty, as in the maxim *par in parem non habet imperium* or *non habet jurisdictionem*. In this sense, jurisdiction may be said to constitute one aspect of "sovereignty," or governmental authority of the State, for which an equivalent phrase adopted by the International Law Commission in connection with State responsibility is *perogatives de la puissance publique*.[56]

In private international law, the expression "jurisdiction" refers either to the term "legal system" or the territory in which an autonomous legal system operates. This meaning is conceptually different from that contained in the idea of imperium.

In constitutional law, jurisdiction is exercisable by the three branches of the government more or less in conformity with the theory and practice of the separation of powers.[57] This may correspond more closely to the different meanings ascribed to the different types of jurisdiction under international law.[58]

The different uses of the same term in various branches or disciplines of the law have created some confusion of thought as well as of expression. Further complication has been added as the result of different usages of that terminology in the same context, or discipline, in public international law.[59]

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55. *See* L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS ch. 10, at 820-90 (2d ed. 1986) [hereinafter L. HENKIN]. "Jurisdiction is commonly used to describe authority to affect legal interests." *Id.*

56. *See, e.g., Draft Articles on State Responsibility*, art. 7, para. 2, *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 31. Here, reference is made to an entity, which is empowered by the internal law of that State to exercise *elements of the governmental authority* (the French equivalent being, *les prerogatives de la puissance publique* or in Spanish, *las prerogativas del podero publico*, found in the French Annuaire and the Spanish Anuario, respectively).

57. *See* A. PEASLEE, CONSTITUTIONS OF NATIONS (1984).

58. *See* L. HENKIN, *supra* note 55, at 820-21. Jurisdiction may be defined on several levels, namely, under municipal law and under international law. Under municipal, the legislative, judicial and executive powers of the federal branches of government are defined first in the constitution, which sets the limits beyond the various branches of the federal and state government may not go. Conflict of laws rules within a federal union often define the limits of legislative, judicial and executive jurisdiction, not necessarily conterminous with constitutional limits.

59. Users do not always express themselves with sufficient clarity when adopting the term "jurisdiction." *See id.* at 820. Usages of publicists in this country merely distinguish between enforcement and prescriptive jurisdiction which appears to include power to adjudicate. *Id.*

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

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

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

(b) *Adjudicative or judicial jurisdiction* means the power to adjudicate or determine a legal conflict or dispute, such as the authority of a court of law to decide whether an offense has been committed or to determine the guilt or reaffirm the innocence of an accused person. Jurisdiction may be found lacking in any given case on several grounds, either *ratione personae* or *ratione materiae*.[60] Jurisdiction to adjudicate may be defined as the authority of a State to subject particular persons or things to its judicial process.[61]

(c) *Executive or enforcement jurisdiction* denotes the administrative or executive authority of the State to prevent and suppress the commission of any offense against the law of nations or of any other crime, including the power to arrest, apprehend, prosecute and execute orders or judgments of the court.[62] This is sometimes defined as "the capacity . . . to enforce a rule of law, whether this capacity be exercised by the judicial or the executive branch."[63]

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60. Jurisdiction may be based on *ratione materiae*, i.e., on the ground of or by reason of the subject matter or nature of the offense, its seriousness, its place of commission, the punishability of the offense and its territorial connection. Jurisdiction may also be based on *ratione personae*, i.e., on the person or personality, including status and nationality of the alleged offender.

61. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 6 pt. I, introductory note (1965). The Restatement prefers the expression jurisdiction to adjudicate over the term judicial jurisdiction.

62. *Id.* Jurisdiction to enforce also covers the power to cooperate with other nations in the investigation, apprehension and extradition or exchange of alleged offenders or convicts.

63. *Id.* Jurisdiction to enforce is defined as the authority of a State "to use the re-

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

B. *Causes of the Jurisdictional Problem*

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

1. *Absence of a Comprehensive Set of Rules in International Law Defining with Precision all Types of Jurisdiction*

International law has not developed or prescribed a complete set of norms delimiting the scope of jurisdiction that each State may exercise whether in the form of jurisdiction to legislate, to adjudicate or to enforce.[64] That is true also of international organizations which may have been vested with some of the attributes of State jurisdiction.[65] International law has been relatively silent on the limits of prescriptive, adjudicative and executive jurisdiction of each State or international institution in civil and criminal matters generally, although attention has been paid more particularly to the outer-limits of State jurisdiction in criminal matters.[66]

2. *Lack of Uniformity in State Practice*

Each State is sovereign within its own borders. Yet, States have prescribed laws with extraterritorial effects; have sought to adjudicate disputes in civil litigation with little or no territorial connection or to prosecute and try persons accused of crimes committed outside their territorial confines, and at times even to en-

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sources of government to induce or compel compliance with its law."

64. *See* L. Henkin, *supra* note 55, at 821. Compare the classic dictum of Chief Justice Marshall in Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136-37 (1812). Jurisdiction appears to be unlimited even by territorial confines of the State.

65. *See* Vienna Convention on the Law of Treaties between States and International Organizations, Mar. 22, 1986, Conf. A. 129/15.

66. More emphasis is placed on the validity or impropriety of extraterritorial jurisdiction based on considerations other than territorial connections as in the famous Mexican case concerning Mr. Cutting, an American national accused of criminal libel in Texas, in 1887. *See* 2 J. Moore, International Law Digest § 201, at 228 (1906); The Lotus Case, Concerning Criminal Negligence on the High Seas, 1927 P.C.I.J. (ser. A) No. 10, at 5 (1927).

force such decisions beyond their national borders.[67] The extent to which States tend to legislate, adjudicate and enforce measures outside their territory is far from uniform. While for historical or geopolitical reasons some countries are shy of exercising jurisdiction extraterritorially, others appear to enjoy such extravagant luxury of extraterritorial jurisdiction.[68] The end results point to a marked absence of consistency in State practice.

3. *Emergence of the Jurisdictional Problem*

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

(a) The gap or vacuum in national jurisdiction

Because of the diversity of State practice in the quality and extent of the authority to prescribe, the capacity to adjudicate and the power to enforce, it may happen that in a given circumstance or case, no State appears to have jurisdiction or to be competent to exercise jurisdiction at a particular phase of the proceedings. For example, before the Hague Convention of 1970,[69] a terrorist hijacking an aircraft in flight over the high seas could be free of any jurisdiction upon landing in a third State that had no provision in its criminal code making hijacking or seizure of aircraft in flight or over the high seas a punishable offense. The offense was commited in no man's land, that is, beyond national jurisdiction of any State.

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67. For criminal matters, an example would be the *Eichman* case. *See* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087 (1974), concerning the amendment of Israel Penal Law in 1972, adopted by the Knesset on the 6th Nisau, 5732 (Mar. 21, 1972), Sefer Ha-Chukkim 52. *See* RESTATEMENT (REVISED) 404; *Security Council Report to the General Assembly in the Eichman Case*, 15 U.N. GAOR Supp. (No. 2) at 19-24, U.N. Doc. A/4494; Security Council Resolution S/4349. *Compare Anti-Terrorism Act of 1986: Hearing on H.R. 4294 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

68. After the establishment of the capitulations regime or extraterritoriality in Turkey, China, Japan and Siam, the Western powers, including the United States and subsequently even Japan, seemed to enjoy extraterritorial rights and jurisdiction over their respective nationals in distant Asian Lands. *See* British Foreign Jurisdiction Act, 1890, 53 & 54 Vict. 286, ch. 37, §§ 1-2, providing for *inter alia*, exercise of jurisdiction in foreign country and power to assign jurisdiction to British courts in cases within the act.

69. Hague (Hijacking) Convention of 1970, *supra* note 47. More than 120 States have ratified the Convention.

There was no jurisdiction to arrest, or prosecute as the act was not considered a criminal offense; hence there was no subject matter jurisdiction to begin with. Nor would the terrorist be arrested where landing occurred, since there was no authority to arrest a person who in the eyes of the State had committed no offense against its law or the law of nations.

The situtation has improved somewhat in like circumstances for countries having ratified the Hague Convention of 1970.[70] There would be an obligation under Articles 2 and 4 of the Convention to pass legislation to create jurisdiction to prosecute and punish such offenses as hijacking or seizure of aircraft in flight by a number of States including the State of registration as well as the State in whose territory the aircraft has landed, the State of destination, where the alleged offender is present, and the State of transit after landing.[71] Of course, the State of registration normally would have jurisdiction, the problem was the lack of capacity to arrest the accused without his physical presence in the territory of the forum State after the commission of the offense. Such a gap or vacuum does exist and may exist in countless imaginable cirucmstances, and States have endeavored to bridge the gap or to fill the vacuum with jurisdiction.

In some systems, there may be jurisdiction to prosecute and to try an accused person *in absentia*, but without physical presence of the accused person, enforcement or punishment would not be possible. This defect could be cured by cooperation of a third State through the process of extradition which presents another major problem in the suppression and punishment of international terrorism. If at any time during any stage of the proceedings a vacuum in the jurisdiction occurs, the defect becomes incurable. Extradition cannot proceed if, in the substantive law of the requested State, the offense is not considered to be a crime or punishable offense, or indeed an extraditable offense.[72]

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70. *Id.* An increasing number of States are now either jointly owning or operating national airlines, such as Denmark, Norway and Sweden (SAS); individually operating national lines, such as Thailand, Singapore, Kuwait, Republic of Korea and U.S.S.R.; or supporting private-owned national carriers or flag lines, such as the United States (TWA, PanAm, United, American, etc.), United Kingdom (British Caledonia), France (UTA) and the Netherlands (KLM).

71. *See id.* arts. 1-3, 7-8.

72. For a more detailed examination of the problem of extradition, *see infra* notes 133-53 and accompanying text.

(b) Overlapping or concurrent jurisdiction

Another problem area may be identified in connection with the extension of jurisdiction by one State which overlaps that of another State, both claiming to exercise the authority to prosecute, to adjudicate and to punish the offender. This is not uncommon in transboundary crimes and torts where the *locus delicti commissi* may cover more than one territory, or where the injured party may have the nationality of one State, the offender being a national of another State. Two or more States may have concurrent jurisdiction for various reasons which provide different grounds or bases for jurisdiction.[73]

In the case of concurrent jurisdiction, the State with the custody of the accused or where the defendant can be located appears to have an upper hand in the exercise of jurisdiction if it wishes to apprehend and prosecute, or to allow proceedings to be initiated. Other States will have to try the case in the absence of the defendant or, in penal matters, to request extradition which may or may not be accorded,[74] depending on numerous factors to be taken into consideration. In the final analysis, physical presence of the defendant or the accused is crucial in criminal cases although not indispensable in civil matters. The State with the custody of the alleged offender may have several options, *aut dedere* (to extradite),

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73. Not only is this common in all cases of transboundary crimes or conspiracy taking place in more than one State, but in all cases involving members of foreign visiting forces; the local criminal courts as well as the commanding officer of the sending State would retain concurrent jurisdiction over the alleged offenders. Arrangements are often made in the form of Status of Forces Agreements, as in the following treaties: Agreement under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1652, T.I.A.S. No. 4510; Agreement Respecting the Status of the Korean Service Corps, Feb. 23, 1967, United States-Korea, 18 U.S.T. 249, T.I.A.S. No. 6226. *See also* Status of NATO Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846; Application of NATO Status of Forces Agreement to United States Forces at Leased Bases, Apr. 28, 1952, United States-Canada, 5 U.S.T. 2139, T.I.A.S. No. 3074; Agreement Regarding the Status of Personnel of Military Assistance Advisory Group and Offshore Procurement Program, Dec. 12, 1956, United States-Denmark, 9 U.S.T. 271, T.I.A.S. No. 4002; Agreement Regarding the Status of Military Assistance Advisory Group, Apr. 13, 1954, United States-Norway, 5 U.S.T. 619, T.I.A.S. No. 2950; Agreement Concerning the Status of the United States Forces in Greece, Sept. 7, 1956, United States-Greece, 7 U.S.T. 2555, T.I.A.S. No. 3649; Agreement Regarding the Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, United States-Netherlands, 6 U.S.T. 103, T.I.A.S. No. 3174; Agreement Regarding the Status of United States Forces in Turkey, June 19, 1951, United States-Turkey, 5 U.S.T. 1465, T.I.A.S. No. 3020.

74. For a more detailed examination of the problem of extradition, *see infra* notes 133-53 and accompanying text.

aut judicare (to prosecute, adjudicate), or to release the detainee on various grounds including political expediency or humanitarian consideration.[75]

To facilitate closer cooperation in this area, a series of bilateral treaties has been negotiated and concluded by States to make appropriate adjustment with regard to priority or necessity to bring to justice a person responsible for a crime.[76] Multilateral conventions or regional arrangements sometimes provide for the allocation or division of concurrent jurisdiction.[77]

(c) Conflict of jurisdictions

The problem is more acute when overlapping jurisdiction contains an element of conflict. In *The Lotus Case*,[78] the Court of Turkey had tried and condemned Monsieur Demons, a Frenchman, for criminal negligence which took place on the high seas against a Turkish vessel. The French Government objected strongly to the exercise of Turkish jurisdiction on the ground that the Court of the Flag State (France) had exclusive jurisdiction to try the master or members of the crew of the *S.S. Lotus*, the vessel Demons was on. This conflict had to be resolved by the Permanent Court of International Justice. The court by a dubious majority of five, plus one ad hoc judge, plus the casting vote of President Max Huber, to six, including British, French and American Judges, found for Turkey.

To a limited extent, the decision may have been partially overruled by the adoption of a different ruling by the 1958 Geneva Convention on the High Seas,[79] as confirmed by the 1982 U.N. Convention on the Law of the Sea.[80] These conventions codify ex-

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75. For instances of actual decisions in connection with the political offense exception, *see infra* notes 152-61.

76. An excellent example is the Supplementary Treaty concerning Extradition, United States- United Kingdom, June 25, 1985, 87 DEP'T ST. BULL. 87 (Feb. 1987) (entered into force Dec. 23, 1986). Ratification of the treaty passed by a vote of 87-10. *See* 132 Cong. Rec. 9273. The United Kingdom approved the amended version on November 25, 1986. *See also* Talcolt, *Questions of Justice: U.S. Courts. Powers of Inquiry under Article 3(a) of the U.S.-U.K. Supplementary Extradition Treaty*, 62 NOTRE DAME L. REV. 274 (1987).

77. *See* Status of NATO Forces Agreement, *supra* note 73.

78. 1927 P.C.I.J. (ser. A) No. 10.

79. *See* Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, arts. 5-6, 11 [hereinafter 1958 Geneva Convention].

80. *See U.N. Convention on the Law of the Sea*, Oct. 7, 1982, U.N. Doc. A/CONF.62/122, arts. 92, 94, 97, *reprinted in* 21 I.L.M. 1261, 1287-88 (1982). This convention was signed by 159 States, and was intended to replace the four 1958 Conventions on the Law of the Sea. This part of the convention represents the codification of existing custom.

isting rules of customary international law. The prevailing ruling appears to be that no penal or disciplinary proceedings may be instituted against the master or any other person in the service of the ship in the event of a collision or other incident of navigation concerning a ship on the high seas except before the judicial or administrative authorities either of the flag State or of the State of which person is a national.[81] This was the ruling adopted earlier by another Convention on Collision at Sea.[82]

In a different context, however, the dictum of the court regarding the nearly unlimited power of a State to legislate, to adjudicate and even to enforce measures affecting the interests of foreigners beyond its own territories has not been rejected. On the contrary, recent developments show an increasing tendency on the part of States to extend their jurisdiction over crimes or torts committed by non-nationals and non-residents outside their territorial confines, especially in order to protect the nations' interests or those of their nationals or residents.[83]

Such conflict is not often resolved by judicial instance. *The Lotus Case* was an exception rather than a rule, having regard to the treaty between France and Turkey establishing compulsory jurisdiction of the Permanent Court in matters of conflict of jurisdiction, resulting from differing interpretation of the bilateral treaty,

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81. *See id.* art. 97, para. 1, at 1288; 1958 Geneva Convention, *supra* note 79, art. 11(1).

82. The Brussels Maritime Convention of 1952 for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions, 439 U.N.T.S. 233; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 502 (rev. tent. draft no. 3, 1982), on the rights and duties of the flag State.

83. *See, e.g.*, Anti-Terrorism Act of 1986, H.R. 4294, 99th Cong., 2nd Sess. (1986). This legislation is avowedly based on the protective principle, following the adoption of the new § 351 of the U.S. Criminal Code. *See* 18 U.S.C. § 351 (1971). This section covers offenses directed at members of Congress, and makes it an indictable offense for a foreigner to attack a member of U.S. Congress anywhere in the world, since the U.S. Government protested against the passive nationality principle relied upon by Mexico in the *Cutting* case in 1887, exactly 100 years ago. *See* 2 J. MOORE, *supra* note 66, § 201, at 228.

France reluctantly adopted a change of heart by similarly amending its Code of Penal Procedure on July 11, 1975 (D.L., 1978-79), half a century after vainly instituting proceedings against Turkey in 1927, in The Lotus Case.

The United Kingdom has also abandoned its former position as reflected in its objection to the Netherlands position in the Costa Rica Packet Arbitration in 1888 (87 BRITISH AND FOREIGN STATE PAPERS, 21, Ad. 89, and 1181), seeing that virtually all the "civilized nations" have actually followed the traditions established by Asian, African and Latin American practices. For the dispute concerning the extraterritorial application of the U.S. antitrust law, *see* Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 1957 BRIT. Y.B. INT'L L. 146; Editorial, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 A.J.I.L. 380 (1957); *see also* INT'L LAW ASSOCIATION, REP. ON THE 51ST CONFERENCE 304 (1964).

failing which there would be little opportunity for an international judicial settlement.[84] In the absence of agreement between the parties to submit their dispute for determination by the International Court of Justice or by arbitration, or by other means of dispute settlement, solution would have to be found elsewhere. Negotiations or agreements between the States concerned may provide the ultimate satisfaction to the affected parties.

C. *Prospective Solution to the Jurisdictional Problem*

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

A salutary solution to the absence of jurisdiction is to create one where none has existed as in various conventions on unlawful seizure of aircraft,[85] the taking of hostages,[86] crimes against internationally protected persons including diplomatic agents,[87] or other acts of international terrorism.[88] States have been invited to ratify a number of terrorism-related conventions in order to fulfill their obligations to prevent, preempt and suppress acts of terrorism by leaving no hole nor loophole in their jurisdiction.[89]

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84. Article 15 of the Lausanne Peace Treaty of July 24, 1923, provides that "all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law." Turkey and France agreed in a compromise to submit the dispute to the P.C.I.J.

85. *See, e.g.*, Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter the Tokyo Convention]; The Hague (Hijacking) Convention of 1970, *supra* note 47; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 10 I.L.M. 1151 [hereinafter Montreal (Sabotage) Convention of 1971].

86. International Convention against the Taking of Hostages, Dec. 17, 1979, U.N. Doc. A/34/819, *reprinted in* 74 A.J.I.L. 277 (1980).

87. Convention on the Prevention and Punishment of Crimes, *supra* note 43.

88. *See* European Convention, *supra* note 43; Measures to Prevent International Terrorism, G.A. Res. 40/61 (1985), *reprinted in* 25 I.L.M. 239 (1986).

89. Such a gap has existed in several penal codes which have had to be amended or supplemented by subsequent legislation, either following adoption of an international convention or generally enabling the courts to exercise jurisdiction in furtherance of conventional or treaty provisions. For instance, Article 694 of the Code de Procedure Penale of France, July 11, 1975 (Dalloz 1978-79) extends the seldom applied passive personality jurisdiction as well as widens the scope of protective jurisdiction to cover extraterritorial activities endangering French diplomatic and consular posts and agents. *See* Bigay, *Les dispositions nouvelles de compétence des jurisdictions françaises à l'égard des infractions commises à lètranger*, D.S.L. 51-52 (1976). The amendment enables the court to give effect to obligations arising from France's ratification of anti-terrorism conventions, such as the Hague (Hijacking) Convention of 1970, and the Montreal (Sabotage) Convention of 1971, as

The problem area that is more complex and not easy to settle is that of concurrent or conflicting jurisdiction. Here again, cooperation among States is required to explore and identify the most suitable means to resolve the jurisdictional problem, including the simplification of procedures and facilities for extradition or transfer of the alleged offenders. Clearly, the creation of an international criminal court[90] may provide a solution to both problems, either lack of or excess of jurisdiction. But the likelihood of general acceptance of such a court is somewhat remote.[91] Besides, it would not solve the problem in every case where there is a conflict of jurisdiction, especially if one State insists on its exclusive right to try the offender or that at least the offender be either extradited or tried by the requested State.

A different solution was adopted in the colonial era where chunks of territories were transferred to or annexed by a Western Power with authority to legislate, adjudicate and enforce over the entire territory.[92] In some instances short of annexation, a regime of capitulations or extraterritoriality was established without the possibility of conflict or concurrence of jurisdiction.[93] The Colonial Power or the State concluding such an archaic and unequal treaty would thereby enjoy exclusive territorial jurisdiction over its own territory and extraterritorial jurisdiction over the territory of another sovereign State to the exclusion of the latter in all matters affecting the interests of nationals or subjects of the Colonial Power. Such a regime was abolished in various parts of Asia including China, Japan, Thailand and Turkey by the close of World War II, after adoption of respective penal and civil codes by Asian

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well as other international conventions. *See supra* note 85.

90. *See, e.g., Geneva Convention of* 1937, *supra* note 3; Brierly, *Do We Need an International Criminal Court?*, 1927 BRIT. Y.B. INT'L L. 81-88.

91. Not unlike the Convention on the Prevention and Punishment of Terrorism of 1937, the Convention for the Creation of an International Criminal Court was also signed in 1937 at Geneva. This was not due to a lack of enthusiasm or support, but rather to the interruption of World War II. For earlier endeavors to set up such a court, *see* Brierly, *supra* note 90, at 81-88; M. BASSIOUNI, DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

92. For the establishment of extraterritorial jurisdiction in Asia in the 19th century or regime of capitulations in Turkey, *see* G. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984).

93. There could be no conflict nor indeed concurrence of jurisdiction, since the Western powers enjoyed exclusive jurisdiction over their nationals and subjects while remaining in or traveling through the territories of Asian nations, the local sovereigns, having waived not only their jurisdiction to try certain cases involving foreign interests, but also suspended the application of their own laws in favor of the *lex patriae* or the national law of the aliens presumed by treaty to be extraterritorial.

countries,[94] patterned after European systems.

This solution was an imposition by Colonial Powers and was unequal, unjust and far from satisfactory. It is now outmoded since General Assembly Resolution 1514(XV) on the granting of independence. The process of decolonization is now irreversible.[95] Thus, agreement to subject a State to a regime of extraterritoriality would be invalid today for violation of a peremptory norm which admits of no derogation.[96]

The only possible solution left open appears to rest with the obligation of States to cooperate and to negotiate in good faith. Many have reached agreement in the adjustment of their respective rights and obligations to request and to comply with a request for extradition.[97] Extradition then has become an affordable solution sought after on a multilateral as well as bilateral basis.[98] It is flexible enough to give satisfaction for all concerned. The problem of extradition remains to be examined in the light of current legal developments and recent State practice, especially with regard to the exception of "international terrorism" to the "political offense exemption" from extradition.[99]

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94. *See, e.g.*, F. PIGGOTT, EXTRATERRITORIALITY: THE LAW RELATING TO CONSULAR JURISDICTION AND RESIDENCE IN ORIENTAL COUNTRIES (1892).

95. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV). For the implementation of the Declaration, *see* G.A. Res. 2465(XXIII) (Dec. 20, 1968); G.A. Res. 2548(XXIV) (Dec. 11, 1969); G.A. Res. 2708(XXV), (Dec. 14, 1970); *Programme of Action for the Full Implementation of the Declaration*, G.A. Res. 262(XXV) (Oct. 12, 1970).

96. *See* Vienna Convention of the Law of Treaties, 1969, arts. 53, 64 (jus cogens) (entry into force Jan. 27, 1980); WORK OF THE INTERNATIONAL LAW COMMISSION 236-62 (3d ed.).

97. In Factor v. Laubenheimer, 290 U.S. 276, 287 (1933), the Supreme Court noted that the "principles of international law recognize no right to extradition apart from treaty." This statement appears to reflect adequately the situation prevailing in 1933 which probably remains true today. In the United States, extradition is a matter for the Federal Government and is governed by federal law under 18 U.S.C. §§ 3184-3195; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, §§ 476-479 (rev. tent. draft no. 7, 1986); C. BASSIOUNI, INTERNATIONAL EXTRADITION (1983); MICH. Y.B. INT'L LEGAL STUDIES, TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE (1983).

98. For examples of bilateral treaties, *see, e.g.*, Treaty of Extradition, United States-Brazil, Jan. 13, 1961, 15 U.S.T. 2093, T.I.A.S. No. 5691, 532 U.N.T.S. 177; Supplementary Extradition Treaty, United States-United Kingdom, Dec. 23, 1986, 87 DEP'T OF ST. BULL. 89 (Feb. 1987). For multilateral conventions, *see, e.g.*, *Draft Convention on Extradition*, 29 A.J.I.L. 81-86 (Special Supp. 1935); O.A.S. Inter-American Convention on Extradition, Feb. 25, 1981 (Caracus), O.A.S. Doc. OEA/Ser.A/36 (SEPF), *reprinted in* 20 I.L.M. 723 (1981); European Agreement concerning the Application of the European Convention on the Suppression of Terrorism, Dec. 4, 1979, 19 I.L.M. 325 (1980); European Convention, *supra* note 43; O.A.S. Convention to Prevent and Punish the Acts of Terrorism, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413.

99. *See infra* notes 142-72 and accompanying text.

IV. PERMISSIBLE LEGAL BASES OF JURISDICTION

A survey of State practice and legal theories appears to suggest a number of permissible legal bases of jurisdiction in its entirety, including the authority to prescribe, the power to adjudicate and the capacity to enforce.[100] For convenience, the bases of jurisdiction may be classified under five headings with some overlap.[101]

A. The Territorial Principle

By far the most cogent and solid foundation for the exercise of jurisdiction is the territorial principle, traceable to the more basic principle of sovereignty as source of State authority itself.[102] Territorial sovereignty is the strongest of all the bases of jurisdiction and would easily take precedence over other concurrent or competitive principles. As far as enforcement or executive jurisdiction is concerned, the principle of territoriality is absolutely supreme and as such is *exclusive* of other principles. The only possible exception must be based on an equally basic norm, namely, the sovereign will of the State itself. Thus, a State may consent to any proposition, or agree to waive any part of its sovereign authority even in respect of activities within its own territory in favor of the exercise by another State of an aspect of sovereignty.[103] This consent is nearly absolute, subject only to the reservation that it does not contravene a peremptory norm out of which no State could opt through unilateral or mutual consent.[104]

The territorial principle is valid for civil as well as criminal or penal matters. Territoriality or the *locus delicti commissi* provides a clear and firm basis for all the three forms of jurisdiction. The last which is enforcement jurisdiction could be preventive, suppressive or even punitive.[105] In civil as well as criminal cases, the

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100. *See Jurisdiction with Respect to Crime*, 29 A.J.I.L. 443-65 (Supp. pt. II, 1935) (introductory comment by Professor Edwin D. Dickinson).

101. For current legal and policy problems, *see, e.g.*, Rosenthal, *Jurisdictional Conflicts between Soveriegn Nations*, 19 Int'l Law. 487-503 (1985).

102. *See, e.g.*, The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812). In dictum, Chief Justice John Marshall stated that, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself . . . . All exceptions therefore to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."

103. *See id.*

104. *See supra* note 96.

105. *See, e.g.*, de Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, U.S., 105 S. Ct. 2656 (1985) (action for personal injury resulting from car explosion). *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (death by torture abroad may

territorial connections need not be confined to one and the same State. A crime may be committed across the boundary line as in transfrontier offenses or transboundary torts. The territorial connections in civil liability may refer to the domicile of one of the parties litigants, or the *situs* of the property in dispute or the place of celebration of marriage or performance of a contract. Furthermore, in criminal matters the physicial notion of the *locus delicti commissi* may be extended by legal fiction or theory.[106]

Thus, the territorial principle, in this context, has been extended to include the following:

(a) *The objective territorial principle*, by reference to the location of the object or victim of the offense or tortious act within the State of the *forum*.[107]

(b) *The effect doctrine*, by reference to the effect produced in the territory of the *forum* State.[108]

(c) *The subjective territorial principle*, by reference to the locality of the actor, the subject or author of the offense being located in the State of the *forum*.[109]

(d) *Plurality of localities of acts constituting the offense* by holding the locality of each act as the *locus delicti commissi*, although other acts forming part of the offense were performed outside the territory of that State.[110]

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create basis for jurisdiction under the Alien Tort Claims Act). *But see* Siderman v. Republic of Argentina, (C.D. Cal. Mar. 7, 1985); *Agora: What Does Tel-Oren Tell Lawyers?*, 79 A.J.I.L. 106-07 (1985) (death by torture abroad, no jurisdiction under either Foreign Sovereign Immunities Act (F.S.I.A.) of 1976, 28 U.S.C. §§ 1602-1606, or Alien Tort Claims Act, 28 U.S.C. § 1350 (1982).

106. *See, e.g.*, The Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, where the *locus delicti commissi* was held to be on board the Turkish vessel, based on the effect doctrine of the territorial principle, and fictitious equation of a vessel on the high seas as a floating territory.

107. *See, e.g.*, MODEL PENAL CODE § 1.03 (1985) (territorial applicability).

108. *See id.* §§ (1)(e)-(f); The Lotus Case, 1927 P.C.I.J. (ser. A) No. 10. For a discussion of the objective territorial jurisdiction and the effect doctrine, *see* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE - THE PUBLIC ORDER OF THE WORLD COMMUNITY 1319-68, 1385-92 (1981); Paust, *The Mexican Oil Spill: Jurisdiction, Immunity, and Acts of State*, 2 HOUS. J. INT'L L. 239, 240-44 (1979).

109. *See* 2 J. MOORE, *supra* note 66, § 201. Moore distinguished between the locality of the act and the locality of the actor, in the *Cutting* case.

110. *See* Hammond v. Sittel, 59 F.2d 683, 686 (9th Cir. 1932), recognizing both the effect doctrine and the continuing act theory as bases for jurisdiction. *Compare* Morau v. United States, 264 F.2d 768, 770 (6th Cir. 1920) (theft of ship or goods could constitute continuing act for purpose of jurisdiction in every successive place to which the vessel was

(e) *The fiction of territoriality*, by deeming a seagoing vessel to be a "floating territory" of a State, thereby injury suffered on board the vessel, even on the high-seas, could be regarded fictitiously on the objective territorial principle as occurring in the territory of the flag State; likewise an aircraft could be deemed a flying territory of the State of registration or user State.[111]

B. The Nationality or Personality Principle

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

(a) *Active nationality principle*, by reference to the nationality of the accused or alleged offender, this is applicable to a large extent by most systems including the common law countries.[112]

(b) *Passive personality principle*, by reference to the nationality of the victim of a crime or the injured party. This principle which was adopted by Mexico in the *Cutting Case*[113] and Turkey half a century later in *The Lotus Case*[114] has given rise to much objection and criticism on the part of common law countries.[115]

It might come as a surprise to those who still resist the passive personality principle in the combat of international terror-

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carried).

111. *See, e.g.*, The Lotus Case, 1927 P.C.I.J. (ser. A) No. 10. To compare the constructive presence theory, as distinct from personal presence, *see* Hyde v. United States, 225 U.S. 347, 362 (1912). In *Hyde*, constructive presence was assigned to conspirators as well as other criminals. For jurisdiction with respect to crimes committed on board an aircraft or by an aircraft or space object, the flag or registration connection may be reinforced by the fact of control or use by the State responsible. The territorial connection is expanded to cover also other forms of linkage such as registration, lease, use or control of the craft.

112. *See, e.g.*, McCleoud v. Attorney General of New South Wales, App. Cas. 455, 457 (1891). Note especially the sweeping reservation of Lord Halsbury, "*except over her own subjects*." (emphasis added).

113. *See* 2 J. Moore, *supra* note 66, § 201.

114. *See* 1927 P.C.I.J. (ser. A) No. 10; Turkish Penal Code, art. 6.

115. *See* R. v. Keyn, 2 Ex. D. 63,117 (the *Franconia*), where Amphlett, J.A. believed it to be an established and undisputed proposition that "a foreigner committing an offence of any kind, even against an Englishman, on foreign territory cannot be tried for it in an English Court."

ism to learn that even more than half a century ago the trend had already been against such resistance. There were even then more countries applying than rejecting it. Now the trend becomes much more irresistible, and most enlightened governments support the principle. The most adamant resistance has weakened in France in Article 694 of the Code de Procedure Penale of 1975,[116] in the U.S. Anti-Terrorism Act of 1986,[117] and in the Criminal Code of Thailand.[118]Although not every State has adopted the passive personality principle in their criminal legislation, it can no longer be said that remaining opposition is realistic.

(c) *The extended notion of nationality*, attributes personality or nationality to something other than a natural person, such as a corporate personality, a ship of war, a merchant vessel, an aircraft or spacecraft.[119] This theory extends the scope of an already artificial notion of nationality or juridical personality to inanimate but, intangible objects as well as incorporeal hereditaments, including several forms of assets as well as intellectual property rights protected by the law of the State of registration with the extended notion of nationality, jurisdiction may also be enlarged.

C. *The Protective Principle*

Reference may be made to the national interests affected or injured by an offense, such as national security, or other vital political, economic or financial interest of the State of the forum. Jurisdiction in all forms may be exercised on the basis of the necessity to protect one of the above national interests.[120] In the practice of some systems, such as the one in United States, the protective

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116. Law of July 11, 1975, No. 75-624, art. 189, C. PR. PEN. (Dalloz 1975). The Penal Code specifically refers to cases where the victim of the crime is a French national.

117. Terrorist Acts against U.S. Nationals Abroad, 99th Cong. H.R. 3712, § 2332, H.R. 4288, authorizing the prosecution of terrorists who attack U.S. nationals abroad.

118. *See* Criminal Code of Thailand, B.E. 2499, sec. 4 (Territorial principle), sec. 5 (Objective territorial principle and effect doctrine), sec. 6 (Plurality of localities of acts), sec. 7 (Protective principle, for selected offences, security, forgery, robbery and universality principle, piracy), sec. 8 (Nationality principle (i) active and (ii) passive). Thailand's Criminal Code appears to have adopted all the five principles without any hesitation. These provisions were taken from the best of European, Japanese and Latin American models.

119. *See supra* note 114. The fiction of "floating territory" of a vessel in *Lotus* is no different from the fiction of nationality attributable already to the vessel through the flag it flies.

120. *See, e.g.*, Petersen, *The Extraterritorial Effect of Federal Criminal Statutes: Offences Directed at Members of Congress*, 6 HASTINGS INT'L & COMP. L. REV. 773-802 (1982-83); §351 U.S. Crim. C.; 18 U.S.C. ss. 35 (1971).

principle tends to overlap the passive personality principle long discredited since the *Cutting Case*, but re-instated and revived under the preferred designation of protective principle, as the preamble of the U.S. Anti-Terrorism Act of 1986, clearly reflects.[121]

D. The Universal Principle

Reference may be made to the universal character of the offense made justiciable by the law of nations. The principle of universality includes such offenses as piracy *jure gentium*,[122] genocide,[123] slave trade,[124] and narcotics trafficking.[125] The offense under this heading is seen as an offense against the international community as a whole. Offenses against the peace and security of mankind including war crimes may also be viewed in the same light.[126] In this way, terrorism is not an infrequent phenomenon accompanying the commission of such offenses against the law of nations, and in most circumstances a terrorist may be arrested, prosecuted and tried under the Universal Principle, regardless of the *locus delicti commissi*, so long only as the offender can be physically apprehended.[127] International cooperation is recom-

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121. *See* Anti-Terrorism Act of 1986, § 2731, H.R. 4294, 99th Cong., 2nd Sess. (1986). Findings and Purpose: over 8,000 incidents of international terrorism were noted, more than half were directed against American targets. A country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions. Terrorist attacks on Americans abroad threaten a fundamental function of the U.S. Government; that of protecting its citizens; such attacks also threaten the ability of the U.S. to implement and maintain an effective foreign policy; terrorist attacks further interfere with inter-state and foreign commerce, threatening business travel and tourism as well as trade relations.

122. *See* Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 Va. J. Int'l L. 723 (1986).

123. *See* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 2670, 3 U.N. GAOR (Pt. 1) at 124, U.N. Doc. A/810 (1948) (entered into force Jan. 12, 1951) [hereinafter Convention on Genocide].

124. *See* Protocol Amending the Slavery Convention Signed at Geneva On September 25, 1926, Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (1956).

125. *See* 1982 *U.N. Convention on the Law of the Sea*, *supra* note 80, arts. 108, 109; United States v. Dominiquez, 604 F.2d 304 (4th Cir. 1979).

126. *See, e.g.*, Convention on Genocide, *supra* note 123; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, *supra* note 31; International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068(XXVIII), *reprinted in* 13 I.L.M. 50 (entered into force July 18, 1976). The United States was one of the four States voting against the resolution.

127. *See supra* note 125; 1958 Geneva Convention, *supra* note 79, art. 19; 1982 U.N. Convention on the Law of the Sea, *supra* note 80, art. 105.

mended for the suppression and punishment of the offenses.

E. The Principle of Consent

The principle of consent is applicable in practice for civil cases as well as for criminal matters. For civil litigation, jurisdiction may be exercised by several *fora*, among which should be mentioned the *forum rei sitae*[128] (where the property is situated), the *forum connexitatis*[129] (where there is a close connection) and the *forum prorogatum*[130] (where the parties have elected to submit their disputes). The parties have not only the choice of law, but also the choice of *forum*, subject to public policy of the *forum* or other rules, such as *forum non conveniens*, non-justiciability and the act of State doctrine. In addition, the *forum* State may also seize a property or arrest a vessel *ad fundandam jurisdictionem*.[131] But such seizure may not be recognized by other jurisdictions.

In criminal matters, it is not the consent of the parties that matters. Rather the consent of the State, having priority to arrest, prosecute and punish the offender, may afford the basis for another State, with or without physical custody of the alleged offender, to either arrest and prosecute or make a request for extradition or start extradition proceedings as the case may be.[132]

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128. Since the *lex situs* or the law of the place where the property is situated determines most if not all questions relating to property rights, the *forum rei sitae* is generally the appropriate court of competence to examine most cases involving rights to immovable and movable properties.

129. The court may be considered competent to try a case under private international law because the proceeding involves legal issues with which by reason of the nationality of the parties to the litigation, their domicile or situs of the property in dispute or a combination of these criteria, it has substantial if not the closest connection.

130. The theory of *forum prorogatum* commonly known in private international law as the doctrine of the chosen forum is also applicable in international transactions or disputes to which States are also parties. *See, e.g.*, Memorial of the United Kingdom (U.K. v. Alb.) 1948 I.C.J. Pleadings (1 Corfu Channel) 15 (where subsequent special agreement of the Parties replaced the Court's prorogated jurisdiction).

131. *See, e.g.*, I Congreso del Partido Case [1981] W.L.R. 3821(H.L.) , where two sister ships, the *Playa Larga* and the *Marble Islands*, were arrested. The court found jurisdiction (*ad fundandam jurisdictionem*) against the owners and persons interested in the *I Congreso del Partido*, in relation to transactions concluded by them, the *I Congreso del Partido* being a ship belonging to the same Cuban fleet. The *Playa Larga* was owned by the Republic of Cuba and flying the Cuban flag, while the *Marble Islands* was owned by a Leichstenstein corporation and flying the Somali flag, but was under a demise charter to Mambisa, a Cuban State enterprise. The *I Congreso del Partido* was a new vessel being built at a yard in Sunderland, England, for a Liberian company, but assigned the benefit of the contract to Mambisa, which took her delivery on behalf of the Republic of Cuba, as a trading vessel, intended for use for trading, when she was arrested.

132. Consent is a key to a number of issues. Without consent of the territorial State, it

Consent to the exercise of jurisdiction by another State is generally accorded in the form of bilateral agreements between like-minded nations or multilateral conventions within a region or sub-region of approximate legal and cultural background. Thus, a State may exercise jurisdiction, not because the accused is arrested in its territory, nor because the offense was committed by or against its national, but more precisely and resolutely because another State, having the custody of the accused, has agreed to deliver or surrender the alleged offender to be tried by the *forum* State. Had there been no rendition, there would be no ground for jurisdiction.

V. *A RESPONSE TO INTERNATIONAL TERRORISM*

A. *RATIFICATION OF ANTITERRORISM-RELATED CONVENTIONS*

A response to acts of international terrorism should be adequate and appropriate if international terrorism is to be discouraged. Each State has been urged to ratify the various conventions designed to prevent and suppress offenses that are related to international terrorism, such as the taking of hostages,[133] unlawful seizure of aircraft,[134] and offenses against internationally protected persons including diplomatic agents[135] in compliance with Resolution 61(XL) of the General Assembly.[136] Ratification also requires the adoption of legislation giving effect to the obligations under the relevant conventions.[137]

Such actions by States could contribute in no small measure to international cooperation in the field of prevention and suppression of international terrorism. With the willingness on the part of

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might be considered unlawful intervention to exercise enforcement jurisdiction over the territory of another State as in the *Eichman* case, to effect an arrest or in the Entebbe incident to rescue hostages and protect nationals. On the other hand, with the consent of the territorial authority, Indonesian commando units successfully stormed the hijacked Garuda aircraft at Don Muang Airport in 1984, with the assistance of Thai security force.

133. Internationsl Convention against the Taking of Hostages, *supra* note 44.

134. *See, e.g.*, The Hague (Hijacking) Convention of 1970, *supra* note 47; Tokyo Convention, *supra* note 85; Montreal (Sabotage) Convention of 1971, *supra* note 85 (recommended also by I.C.A.O.).

135. Convention on the Prevention and Punishment of Crimes, *supra* note 43.

136. G.A. Res. 61(XL), Dec. 9, 1985, 25 I.L.M. 239.

137. Several States have adopted legislation to give effect to treaty obligations in the absence of existing federal statute enabling the State to assume jurisdiction "by treaty." *See, e.g.*, 18 U.S.C. § 1651 (1984) (piracy); Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (1983) (war crimes); Alien Tort Claims Act, 28 U.S.C. § 1350 (1982) (torts). "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

the overwhelming majority of States to combat international terrorism, incidents of transnational terrorism should be curtailed. If hijackers were arrested wherever the hijacked aircraft landed, hijacking could be deterred. This would require cooperation of States to ensure safety in international air transport and navigation,[138] and not to yield to the demand of terrorists.

B. Improvement of Extradition Procedures

The problems relating to extradition deserve the most meticulous attention. In the first place, extradition depends on the agreement or consent of the requested State to turn over or surrender custody of an alleged offender or a condemned person to the authority of the State requesting extradition. As a matter of principle, extradition is generally carried out at the discretion of the requested State.[139] The request for extradition itself is discretionary on the part of the executive branch of the government requesting extradition, taking into account the existence of legal provisions and the process of law to be fully observed.[140] There is thus an element of discretion on both sides, as far as the executives are concerned.

Legal provisions, if any, and procedures to be followed would also have to be improved.[141] If according to the law, the offense is not recognized as a crime in the requested State or the offense is political,[142] extradition will not take place.

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138. The mining of a harbor of a State disrupting international maritime trade has been held to violate international law as well as restricting freedom and safety of navigation. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 (Judgement of June 26, 1986).

139. The requested State, by virtue of its territorial sovereignty, is virtually free to surrender the alleged offender or else to grant asylum. The discretion of the territorial State is almost unqualified in spite of a binding treaty obligation *aut dedere aut judicare*, for the option *aut judicare* is necessarily conditional on several considerations, such as, legal procedures, due process and political expediency. *See supra* note 75. For further discussion of the political offense exception, *see infra* note 140 and accompanying text.

140. In the extradition statutes and practice of many States, procedural safeguards exist to ensure respect for human rights of the accused person, at times to the extent of allowing the court of the requested State to investigate the danger of persecution or discrimination based on race, religion or political opinions to the detriment of the fugitive. *See, e.g.*, Quinn v. Robinson, 783 F.2d 776, 792-803 (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986), and sources cited in support of the various standards surrounding the political offense exception.

141. *See, e.g., New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties*, Annuare de L'Institut de Droit International No. 60-II, at 211-83 (1983) (session de Cambridge) [hereinafter *Problems of Extradition*].

142. For recent literature in regard to the practice of the United States, *see, e.g.*, Gil-

Extradition is therefore based on law or statutes of the States concerned and also on the availability of treaty provisions applicable to the situation. The problems are multiplied in this connection by a lack of uniformity in the treaty practice of States and absence of common standards in national legislation in regard to extraditable offenses, non-extraditability of nationals and particularly the treatment of political offenders.

Notwithstanding the discretionary element of extradition as far as the administration or executive branch of the government is concerned, the judicial practice of States in defining an offense as political, or mixed or with political motivation has been neither helpful nor instructive.[143] The case law of various countries has not demonstrated any consistent pattern of legal developments. Contradictory theories and opposing criteria are interpreted and applied without any regularity. Persons accused of offenses which could be classified as acts of international terrorism have sometimes been extradited and other times released on the ground that the offenses complained of were either political,[144] with political motivation,[145] relatively or preponderantly political[146] or indeed there was potential danger of the accused being persecuted for political offenses.[147] Given the jurisprudence of the more advanced

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bert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695-723 (1985); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193-210 (1980); Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777-800 (1980).

143. *See, e.g.*, Carbonneau, *Terrorist Acts - Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265 (1979-1980). Note especially the survey of State practice, the Anglo-American model; the Predominance Approach of the Swiss Courts; the French Test; and The Extradition of Transnational Terrorists by French Courts. *Id.* at 271-97.

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

145. *See, e.g.*, Vali, *The Santa Maria Case*, 56 NW. U. L. REV. 168-75 (Mar.-Apr. 1961) (discussion of the *Santa Maria*, a steamship, that was captured by Captain Galvao as a protest against the Portugese Government).

146. *See, e.g.*, Karadzole v. Artukovic, 355 U.S. 393 (1958) (per curiam) In *Karadzole*, the extradition request was regarded by the Supreme Court as being for a relative political offense.

147. *See, e.g.*, Regina v. Governor of Brixton Prison, [1954] 1 Q.B. 540. The extradition request was denied on the ground that it would result in punishment for the treasonous act of defecting to a capitalist country and not for the common crimes of use of force. *See id.*

Western civilization, such as France, the United Kingdom, the United States, Switzerland, Italy and the Federal Republic of Germany, the practice cannot be said to be free of inconsistency in this regard,[148] especially when the offenses are closely associated with acts of international terrorism.

The very definition of "international terrorism," as it is more generally accepted in international convention,[149] contains an inherently political element. Terrorism is an offense directed against another State for which a State is responsible either for undertaking, assisting or tolerating its commission. Applying this definition to offenses classified as terrorist acts, such activities would invariably appear to be politically inspired.

In actual practice, the decision of a State to extradite or not to extradite a terrorist is likely to be prompted by political or humanitarian considerations. Among the closely associated States or in an economically integrated community, it is easier to extradite terrorists for acts directed against a friendly government, an ally, or a member of the same regional community.[150] On the other hand, the State sympathizing with the cause of the insurgents for whatever motivation is not easily persuaded to extradite terrorist-insurgents,[151] whether or not they are to be labeled freedom-fighters

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148. *See, e.g., Hearing, supra* note , at 63-114 (statement by Christopher L. Blakesley before the House of Representatives, Judicial Committee, Mar. 4, 1986).

149. *See supra* notes 1-54 and accompanying text; *see also* M. BASSIOUNI, INTERNATIONAL CONTROL OF TERRORISM: SOME POLICY PROPOSALS, in U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, INTERNATIONAL REVIEW OF CRIMINAL POLICY at 44, U.N. Doc. ST/ESA/SER.M/37, U.N. Sales No. (1981).

150. *See, e.g.,* Klaus Croissant Extradition Case, decision of the Chambre d'accusation de Paris, 1979. In the *Klaus Croissant* case, where for reasons of European solidarity, extradition was granted from France to Germany, compare the *Piperno and Pace* case, where extradition was ultimately allowed to Italy whose statesman and former Prime Minister Aldo Moro was assassinated by the Rosso Brigatto.

151. Note the U.S. cases concerning extradition requested for members of the Irish Republican Army (I.R.A.) to Northern Ireland. *See, e.g.,* Quinn v. Robinson, 783 F.2d 776, 792-803 (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986); *In re* Mackin, 668 F.2d 112 (2d Cir. 1981); *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), *appeal dismissed*, 786 F.2d 49 (2d Cir. 1986); *In re* McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979), *reprinted in* 132 CONG. REC. §§ 9146-9147 (daily ed. July 16, 1986).

These cases gave rise to considerable debate in the Senate preceding the amendment of the Supplementary Extradition Treaty with the United Kingdom. Supplementary Extradition Treaty, United States-United Kingdom, June 8, 1972, 87 DEP'T ST. BULL. 89 (Feb. 1987) (entered into force on December 23, 1986). Compare the French case of *Abu Daoud*, allegedly an organizer of the Munich Olympics Massacres of Israeli Athletes, who entered France under a false identity in early January, 1977 as part of an official PLO delegation. Germany as well as Israel requested extradition of Abu Daoud. France was placed in an exceedingly difficult situation, having taken strong public stand against transnational terrorism, and yet wishing to cultivate relations with Arab countries. Abu Daoud was released on technical

rather than terrorists. It is not inconceivable that a State, not wanting to prejudice its foreign relations, may avoid the obligation to extradite by simply deporting the alleged offender.[152] Deportation could be an alternative to extradition if extradition is indeed otherwise precluded by the political character of the offense which is clearly non-extraditable.[153]

C. *Terrorism as an Exception to the Political Offense Exemption*

Recent trends in State practice appear to reflect political flavor in the treatment of political offenders. Decisions to extradite or to release the alleged offender may depend on factors that are purely political, such as whether the fugitive is from a socialist country,[154] whether the requesting State is an ally or a trading partner,[155] or whether there is a support for his group in the asylum State.[156] It is true that due process of law dictates some participation by the judiciary whose role could be conclusive in a negative way. If the offense was considered non-extraditable by the judicial authority, the executive could not very well override that ruling, although there was nothing to stop a disguised form of extradition through the deportation process.[157] Therefore, the finding by the court that the offense is extraditable will not necessarily result in actual extradition, since the executive branch of the government could review the final process of rendition.

The political offense exemption was first seen in the Anglo-Belgian Treaty of 1834.[158] It is a standard clause in extradition

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grounds and quickly deported to Algeria. London Times, Jan. 11, 1977, at 6, col. 4; Le Monde, Jan. 13, 1977, at 14, col. 3.

152. *See, e.g.*, Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 Va. J. Int'l L. 495 (1977). Abu Daoud was quickly deported to Algeria.

153. *See, e.g.*, O'Higgins, *Disguised Extradition: The Soblen Case*, 27 Mod. L. Rev. 521 (1964).

154. *See, e.g.*, R. v. Governor of Brixton Prison, [1955] 1 Q.B. 540; *In re* Kavic, Bjelanovic and Arsenijevic, [1952] I.L.R. 373 (Case No. 80). Note Lord Goddard's statement in *Kavic*: "Those who do not wish to submit to the regime have no alternative but to escape it by flight abroad." *Id.* at 374.

155. *See, e.g.*, Cheng v. Governor of Pentonville Prison, [1973] A.C. 931, H.L. (E.), where the court held that a fugitive should not be returned to the State of dispute; Cheng was wanted for attempting to overthrow the Nationalist regime in Taiwan.

156. *See supra* note 151 for examples of U.S. practice in regard to the Irish cases.

157. *See supra* notes 151-52. In the Abu Daoud case, France preferred to avoid the dilemma by ordering sudden deportation of Abu Daoud to Algeria.

158. 22 British and Foreign State Papers 223.

treaties and legislation. As has been seen, however, the application of this exemption has been far from settled.[159]

States are nevertheless free to conclude agreements undertaking to extradite even political offenders.[160] There is no preemptory norm requiring non-extradition of political offenders. In actual practice, it would be extremely difficult to conceive of such a norm, since the concept of political offense exemption itself is not free of confusion, susceptible to differing interpretation, hence opposite results.[161]

The current trend has been to preclude certain offenses, which could be viewed as relatively political, from the political offense exemption. This has been achieved in a number of conventions, especially on the Prevention and Suppression of Terrorism,[162] Seizure of Aircraft,[163] Taking of Hostages,[164] Lèse Majesté,[165] the Attentat Clause[166] and War Crimes.[167] Acts of terrorism have been classified among offenses against the peace and security of man-

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159. *See* VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXEMPTION TO EXTRADITION, THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER 204 (1980).

160. *See* Agreement Relating to Common Law Criminals, An Exchange of Letters Between Cambodia and Thailand, Dec. 15, 1960, No. 5493, 382 U.N.T.S. 322-27 [hereinafter Exchange of Letters].

161. In 1960, Thailand and Khmer (Kampuchea or Cambodia) concluded four agreements by exchange of letters with the good offices of Secretary-General Dag Hammarskjold of the United Nations. Exchange of Letters, *supra* note 160, Nos. 5490-5493, 382 U.N.T.S. 342. Number 5492 relates to rebels and political refugees. The object was to oblige Thailand not only to refrain from supporting Khmer rebels and assisting Cambodian political refugees within Thailand, but also to surrender political rebels who had been tried and convicted in absentia in Pnompenh. Soon after the conclusion of the exchange of letters, Cambodia requested the extradition of a certain Khmer Serei named by Sihanouk Government as a common criminal. The fugitive sought by Cambodia died probably of fright upon learning of the conclusion of such an arrangement. *Id.*

162. *See generally* the Convention for the Prevention and Punishment of Terrorism, *supra* note 11; the Washington Convention to Prevent and Punish the Acts of Terrorism, Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (1971); and *See* the European Convention on the Suppression of Terrorism, Strasbourg, (Jan. 27, 1977) at 18-26, 101-104 and 104-108.

163. Regarding the safety of aricraft as recommended by the I.C.A.O., *see* the Tokyo Convention, *supra* note 85; The Hague (Hijacking) Convention of 1970, *supra* note 47; The Montreal (Sabotage) Convention of 1971, *supra* note 85.

164. The Hostages Convention 1979, at 117-120.

165. Lèse Majesté is an offense against the Head of State. BLACK'S LAW DICTIONARY 812 (5th ed. 1979).

166. *See also* Convention on the Prevention and Punishment of Crimes, *supra* note 43.

167. *Surrender of War Criminals and Traitors*, G.A. Res. 170(II) (October 31, 1947); Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII) (Dec. 12, 1973).

kind. Once the revised draft code is adopted, the extradition problem will be better clarified if not further simplified.[168]

Bilateral treaty practice of States appears to have started a clear trend in support of extradition of terrorists whether or not there has been a taint of political flavor in their activities. A balanced approach must nevertheless be maintained between the interest of the international community to prevent, suppress and punish acts of terrorism, and the interest of the individual to enjoy asylum from political persecution and the right of self-determination of every people. Human rights should be respected and not be sacrificed at any price. Thus, the new series of U.S. extradition treaties, starting with the Supplementary Treaty with the United Kingdom, precludes in its first article from the political offense exemption five categories of offenses.[169] However, article 1 is subject to the reservation of article 3: "There would be no extradition if the request was made 'with a view to try or punish him (the alleged offender) on account of his race, religion, nationality or political opinions, or that he would, if surrendered, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.' "[170]

This innovation is not a complete answer to every problem connected with extradition. It remains to be seen in actual practice how the United States and the United Kingdom will apply the provisions of article 1 subject to the safeguard contained in article 3. States still retain discretion and freedom of action through differing interpretation.[171]

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168. *See* REPORT OF THE INTERNATIONAL LAW COMMISSION, S. DOC. NO. 10, 99th Cong., 39th Sess. (1986).

169. S. EXEC. REP., 99th Cong., 2d Sess. 17 (1986). Supplementary Extradition Treaty with the United Kingdom, July 8, 1986. The following categories of offenses are excluded from the political offense exceptions:

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

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

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

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

Id.

170. *Id.* at art. 3(a) of the Supplementary Extradition Treaty with the United Kingdom.

171. For recent developments in multilateral treaties, *see Problems of Extradition, supra* note 141, at 211-283. As stated by Rapporteur Karl Doehring: "New problems of the international legal system of extradition with special reference to multilateral treaties," pro-

The language of the recent General Assembly Resolution 61(XL) on measures to prevent international terrorism is more emphatic. Paragraph 8 runs as follows:

> The General Assembly
>
> . . . .
>
> 8. also urges all States to cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combatting of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists.[172]

VI. CONCLUSION

The preceding study appears to suggest that the problem of establishing jurisdiction over terrorist activities is but part and parcel of the bigger problem of combatting international terrorism. It is nevertheless a key to unlocking other problems. As always, international cooperation provides a hopeful means in our search for a meaningful response to terrorism and the problem of jurisdiction.

One practical measure of international cooperation is to adopt legislation creating jurisdiction to adjudicate by making terrorist acts, as defined in the Introduction, justiciable and punishable, thereby avoiding a vacuum in the substantive law, recognizing the criminality and punishability of acts of international terrorism, and bridging whatever gap or loophole that may exist in the jurisdiction of the *forum* State.

All the legitimate bases of jurisdiction may be adopted, including the passive personality principle which need not be completely dissociated from the protective principle. A State has the right and also, in some instances, the duty to protect its own nationals abroad. One means of securing protection is to make it a punishable offense for anyone to commit an act against a national of the State calculated to create fear or terror within the State. An act of international terrorism against an American citizen because of the nationality may be deemed to be directed against the secur-

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posing definition of political offense in a negative sense. *Id.*

172. *See* G.A. Res. 61 (XL), *supra* note 136. The resolution also endorses I.C.A.O. and International Maritime Organization (I.M.O.) recommendations for ratification of conventions dealing with terrorism aboard aircraft or against ships. *Id.*

ity interest or stability of the United States. Once jurisdiction is created for an offense against a national abroad whatever the true basis, the *forum* State may assume and exercise jurisdiction, not only to prosecute the alleged offender if and when found within the territory, but also to secure his custody through the process of extradition.

A more effective control of international terrorism may be achieved through closer cooperation among States by ratifying international agreements dealing with terrorism, thereby applying a common definition and standard for identification of acts of international terrorism, and facilitating exchange of relevant information concerning the prevention, suppression and punishment of acts of terrorism as well as the arrest, prosecution or extradition of the authors of such acts which should not be deemed to be political offenses so as not to preclude the possibility of extradition.[173]

The current problem is also closely linked to the possibility of apportionment of criminal jurisdiction in the event of a jurisdictional conflict. Priorities may be set through bilateral or multilateral treaties, while the possibility of extradition provides room for further flexibility of adjustment. Further developments of State practice in this direction are about to assume a new dimension as States, as members of the world organization, are moving closer in their collective efforts to combat international terrorism. The problem of jurisdiction patiently awaits its turn for a more orderly settlement.

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

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173. *See* the Fifth Report by Minister Doudou Thiam on the Draft Code of Offences Against the Peace and Security of Mankind, Mar. 17, 1987. The new text of Art. 4 (1) of the Draft Code provides that "every State has the duty to try or prosecute (aut dedere aut punire), any perpetrator of an offence against the peace and security of mankind arrested in its territory." *Id.* at 7-8. It was noted that decisions rendered at municipal levels were contradictory, and even a supreme jurisdiction to harmonize judicial decisions could itself adopt decisions that would have to vary with the progress of time. Difficulty to secure extradition is inherent in all cases where offenses are politically motivated. In reality, States might prefer to try the offenders and give them light sentences or acquit them altogether. *Id*