

INTERNATIONAL CRIMINAL LAW AND THE RESPONSE TO INTERNATIONAL TERRORISM

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I INTRODUCTION

The threat posed to international peace and security by transnational terrorism is serious. However, the available statistics suggest that this phenomenon presents a less significant challenge to world order and wellbeing than is often supposed, and must therefore be kept in perspective alongside countless other global challenges to human security, including environmental threats.¹ According to recently revised figures released by the US Department of State, in 2003 a total of 625 people were killed in 208 international terrorist attacks.² This was a slight increase from the total of 198 attacks in 2002, and a 42 per cent fall from the 355 attacks in 2001.³ Providing a broader historical perspective, the Australian Government has recently estimated that since 1992 a total of 3 985 people have been killed in major international terrorist attacks linked to 'transnational extremist-Muslim terrorism'.⁴

There nonetheless remains an obvious need for strong domestic and international legal frameworks to suppress terrorism in all its manifestations, including domestic terrorism, which is estimated to account for around 90 per

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1 Such as lack of access to clean water, which the United Nations estimates was responsible for 2.2 million deaths worldwide in 2000: United Nations World Water Assessment Programme, *Water for People, Water for Life: UN World Water Development Report – Executive Summary* (2003) 11.

2 US Department of State, *Patterns of Global Terrorism 2003* (2004) 1. The initial estimate was 307 fatalities in 190 attacks (which the State Department reported to be the lowest number of attacks since 1969). However, this was later increased, with the State Department admitting errors in calculation partly due to the mislabelling of attacks. The State Department report defines 'international' terrorism as that 'involving the citizens or territory of more than one country' and on this basis excludes the Palestinian-Israeli conflict. The report acknowledges that '[d]omestic terrorism is probably a more widespread phenomenon than international terrorism' but does not seek to provide information or statistics on domestic terrorism at xii.

3 Ibid 1.

4 Australian Government, Department of Foreign Affairs and Trade, *White Paper: Transnational Terrorism: The Threat to Australia* (2004) 12.

cent of terrorist attacks globally.⁵ The very nature of terrorist violence often means that small-scale attacks, causing only limited casualties, may nevertheless engender widespread shock, fear and terror. Moreover, the potential for terrorist organisations to deploy weapons of mass destruction cannot be ignored.⁶ However, despite widespread awareness and acceptance of the necessity for developing a comprehensive response to terrorism in international criminal law, attempts to realise this objective have been beset by a greater degree of controversy than virtually all other areas of international law-making. In particular, there remains ongoing disagreement over a general definition of terrorism that could form the basis of a comprehensive counter-terrorism convention.

While it is widely accepted that politically-motivated violence that terrorises and intimidates should be suppressed through appropriate international legal measures, there is a concern that a crime of terrorism broadly defined could frustrate the legitimate aspirations for self-determination held by many minority groups. International counter-terrorism law therefore remains in a state of some perplexity, a disorderly condition that is not unique to international legal discourse.⁷

This unfinished debate as to the basic elements of a general crime of terrorism has had several implications for international law. As explained in the discussion that follows, it has forestalled the elaboration of a comprehensive terrorism convention and has frustrated efforts to include terrorism as a crime within the jurisdiction of the International Criminal Court ('ICC'). However, there are broader legal implications. The absence of a clear legal conception of terrorism has led to significant confusion in understanding the nature and legal consequences of terrorist violence. Some terrorist acts have, for instance, been incorrectly characterised as 'acts of war'.⁸ Definitional ambiguity also allows some armed conflict situations, such as the ongoing military engagement by US-led forces in Iraq, to be described in crude terms as part of the 'war on terrorism'.⁹ Moreover without a definition of terrorism, the ubiquitous expressions 'war on terror' and 'war on terrorism' can have no more than rhetorical content and may be employed to inhibit valid dissent, de-legitimise political opponents and trample upon human rights.¹⁰

5 Clive Williams, *Terrorism Explained: The Facts about Terrorism and Terrorist Groups* (2004) 39.

6 However, the grave consequences of a terrorist attack using biological, chemical or nuclear weapons should not be confused with the risk of such an attack occurring, which remains very low: *Report of the Policy Working Group on the United Nations and Terrorism*, UN Doc A/57/273-S/2002/875 (2002). See also David Claridge, 'Exploding the Myths of Superterrorism' in Max Taylor and John Horgan (eds), *The Future of Terrorism* (2000) 133.

7 Alex Houen, *Terrorism and Modern Literature* (2002) 2.

8 Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993, 993.

9 An example of the use of the language of terrorism in this way is found in the Australian Government's recently released White Paper, above n 4, 80-1.

10 *Report of the Policy Working Group on the United Nations and Terrorism*, above n 6, Annex, 6; Detlev F Vagts, 'Which Courts Should Try Persons Accused of Terrorism?' (2003) 14 *European Journal of International Law* 313, 320.

Various branches of international law have a bearing on international efforts to suppress terrorist violence. As explained by Devika Hovell in her contribution to this thematic issue, international legal principles relating to the use of armed force have been relied upon by states in limited circumstances to justify military action in response to terrorist attacks.¹¹ However, such responses remain highly exceptional and of questionable long-term effectiveness.¹²

Instead, a variety of alternative non-military strategies constitute the chief methods for suppressing terrorism. These include (a) economic sanctions against terrorists or states which support or condone their activities; (b) civil litigation; (c) covert action; and (d) criminal law enforcement.¹³ It is this last strategy, and specifically the efforts to develop international legal mechanisms to enhance the criminalisation of terrorism and the apprehension, prosecution, and punishment of terrorists, that is the focus of this article.

This article offers an overview and appraisal of efforts by the international community to respond to terrorism through the principles and institutions of international criminal law. Part II of the article considers the vexed issue of defining terrorism and, after briefly exploring the history of efforts to devise a general definition, assesses some problematic features of recent formulations of a universal offence of terrorism. In Part III, the article turns to assess the coterie of United Nations conventions adopted since the 1960s. By criminalising specific terrorist activities including hijacking, hostage-taking, bombing, and terrorist financing, these conventions have avoided difficult questions as to the quintessence of terrorism, and instead have sought to suppress particular types of terrorist violence. Undoubtedly the most significant innovation of the UN conventions is the establishment of a mandatory regime for the prosecution and extradition of terrorist suspects.

However, as explained in Part IV, there are a number of substantive gaps and practical shortcomings in this legal framework. Although these have been partially overcome in what might be described as a 'new generation' of counter-terrorism conventions concluded since the 1990s, it remains the case that efforts to prosecute terrorist suspects may be frustrated where there is a lack of international cooperation. Against this background, Parts IV and V offer some reflections on the extent to which the UN Security Council and the International Criminal Court may be utilised to overcome such limitations and thereby enhance the effectiveness of international counter-terrorism law.

11 See Devika Hovell, *Chinks in the Armour: International Law, Terrorism and the Use of Force* (2004) 27 *University of New South Wales Law Journal* 398. See generally Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401; Peter Rowe, 'Responses to Terror: The New "War"' (2002) 3 *Melbourne Journal of International Law* 301.

12 Not least because of the potential for armed responses to terrorist attacks to lead to perverse and unintended effects such as increasing recruitment into terrorist organisations: Emily Camis, 'War against Terrorism: Fighting the Military Battle, Losing the Psychological War' (2003) 15(2) *Current Issues in Criminal Justice* 95.

13 Sean D Murphy, 'International Law, the United States, and the Non-military "War" against Terrorism' (2003) 14 *European Journal of International Law* 347.

II THE SEARCH FOR MEANING

A The Origins of 'Terrorism' and the Problem of Definition

The term 'terrorism' first emerged during the French Revolution to describe the system of terror overseen by the Jacobins ('*terrorisme*').¹⁴ In its original sense, terrorism was therefore inextricably linked to the notion of state-instigated terror unleashed on a state's own population as a mechanism of control. While retaining its core association with 'terror', the concept was later expanded to describe acts of violence by private citizens intended to intimidate other citizens, groups or states. Terrorism can therefore be separated into three categories: (1) state instigated policies of terror applied domestically; (2) domestic or internal terrorism carried out by private individuals or groups; and (3) international terrorism, including state-sponsored acts of transnational violence. The involvement by states in terrorism remains a contemporary concern, both in terms of domestic policies of terror and state-sponsored cross-border terrorist attacks.¹⁵ However, international criminal law is most concerned with the third type of terrorism, and normally only insofar as it involves non-state actors.¹⁶

Terrorism is generally understood as a method of violence that is intended to 'create a climate of fear' in order to 'service political ends' by coercing a targeted group or government into acceding to the attackers' aims.¹⁷ Under this conception, it is a means of combat, which often has very significant effects at relatively little cost, deployed in pursuit of a political strategy. The obvious difficulty with the notion of terrorism as expressed in this way is that it is very broad and leaves much unsaid. It can embrace a very wide variety of discrepant activities, including behaviour that would otherwise be regarded as ordinary criminal activity.¹⁸ Beyond the proposition that civilians should under no circumstances be the targets of violence, no international consensus has yet been reached that all acts of politically-motivated violence generative of fear and anxiety should be characterised as acts of terrorism.

The fact remains that violence bearing the hallmarks of terrorism has not been universally condemned by the international community, and has in some instances been celebrated. To take an historical example: although the violent resistance by partisans in occupied France during World War II falls within the generally accepted meaning of terrorism, French resistance forces were widely

14 Gilbert Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 537–8.

15 For instance, in 2003 the US Department of State identified six states as sponsors of terrorism: Cuba, Iran, Libya, North Korea, Syria and Sudan: United States Department of State, above n 2, 85.

16 State-sponsored international terrorism is largely addressed under general international law, including principles concerning the responsibility of states for international wrongful acts. See especially *UN General Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 25th sess, 1883rd mtg, Supp no 28, art 1, para 8, UN Doc A/8028 (1970).

17 Allan Bullock, Oliver Stallybrass and Stephen Trombley, *The Fontana Dictionary of Modern Thought* (2nd ed, 1988) 851.

18 Louis René Beres, 'The Meaning of Terrorism – Jurisprudential and Definitional Clarifications' (1995) 28 *Vanderbilt Journal of Transnational Law* 239, 240.

recognised as ‘heroes of liberation’.¹⁹ In this context and in more contemporary situations involving the assertion by individuals and groups of rights to self-determination, there therefore remains a fundamental issue of perspective, which is concisely captured by the hackneyed aphorism that ‘one man’s terrorist is another man’s freedom fighter’.

The difficulty in identifying who falls into the category of ‘terrorist’ is also a consequence of the failure to identify precisely who constitutes a legitimate ‘freedom fighter’. As Allen Buchanan has explained, this depends upon a developing a clearer understanding of fundamental concepts of state legitimacy against which claims for self-determination can be evaluated.²⁰ Buchanan warns that there are moral risks in waging a war against terrorism without an ethical framework for assessing the legitimacy of grievances expressed by sub-national groups. Buchanan suggests that these questions can only be answered through a moral theory of international law, which regards as legitimate possessors of state sovereignty those governments that respect human rights – including the right to self-determination.²¹ The international community remains far from reaching consensus on such ethical underpinnings of the international legal system: hence the ongoing difficulty in a satisfactory demarcation between terrorism and the violence that continues to be used in aid of what many states consider to be legitimate political struggle.

Against this background, there has been limited success in arriving at agreement on a definition of terrorism that attracts the widespread support of states. Notwithstanding the plethora of regional and universal counter-terrorism conventions that have emerged since the 1960s, a comprehensive definition has not been agreed upon. Significantly, neither the United Nations General Assembly nor the Security Council have enunciated a definition of terrorism. As a general offence under international law, terrorism therefore remains a crime in search of a definition.

There appear to be at least five issues to be resolved in defining a general crime of international terrorism: (1) whether it should include both non-state and state actors; (2) the types of acts to be criminalised; (3) the nature of the international element of the offence; (4) the intention and motive elements of the offence; and (5) the categories of person and property to be protected.²² What is clear is that a general definition of terrorism will need in particular to address the last two issues in order to distinguish terrorism from criminal behaviour already covered by ordinary criminal laws:²³ hence the need to incorporate an additional element of the offence, such as an intention to intimidate a population or government in order to achieve a political objective. However, while it seems

19 Jean-Marc Sorel, ‘Some Questions about the Definition of Terrorism and the Fight against Its Financing’ (2003) 14 *European Journal of International Law* 365, 366.

20 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004) 11.

21 *Ibid.*

22 Thomas M Franck and Bert B Lockwood, ‘Preliminary Thoughts towards an International Convention on Terrorism’ (1974) 68 *American Journal of International Law* 69, 72–82.

23 Rosalyn Higgins, ‘The General International Law of Terrorism’ in Rosalyn Higgins and Maurice Flory (eds), *International Law and Terrorism* (1997) 15.

essential to refer to a motivation to intimidate or terrorise a population or government to distinguish terrorist activities from ordinary criminal activities, this in turn raises the problem of ‘catch[ing] all acts intended to terrorize any government, anywhere, without exception – thereby setting the stage for some states to insist on including specific exceptions for national liberation movements’.²⁴

B Efforts to Define Terrorism

The *Convention for the Prevention and Punishment of Terrorism*²⁵ (‘1937 Convention’), drafted under the auspices of the League of Nations following the assassination of King Alexander I of Yugoslavia in Marseilles, represents the first attempt to elaborate a treaty-based definition of terrorism. The 1937 Convention sought to proscribe acts of terrorism that had an ‘international character’, and was mainly directed at protecting senior government officials.²⁶ Article 1(2) of the 1937 Convention defined terrorist acts as those ‘criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’. However, the Convention never entered into force. Only India ratified the instrument, and many states refrained from supporting the Convention because of the wide definition adopted in art 1.

It was not until the 1970s that there was a new impetus to reach consensus on a general offence of terrorism. Responding to the growing problem of international terrorism, the United Nations General Assembly established an Ad Hoc Committee on Terrorism in 1972 to identify measures to eliminate international terrorism and to study its underlying causes.²⁷ However, the Committee could not reach agreement and accordingly refrained from offering a definition in its final report to the General Assembly in 1979.²⁸ Over a decade later, and on the assumption that a comprehensive definition of terrorism would enhance efforts to suppress the phenomenon, the Secretary-General was asked by the General Assembly to seek the views of Member States on international terrorism with a view to convening a general conference to define terrorism and to distinguish it from the struggle of peoples for national liberation.²⁹ The Secretary-General’s report in response to this request revealed a sharp and seemingly intractable divergence of views among member states. While some states such as Syria welcomed efforts to differentiate terrorist groups from legitimate national

24 Franck and Lockwood, above n 22, 78.

25 *Convention for the Prevention and Punishment of Terrorism*, opened for signature 16 November 1937, (1938) 19 *League of Nations Official Journal* 23 (not in force).

26 John Dugard, ‘Towards the Definition of International Terrorism’ (1973) 67 *American Society of International Law Proceedings* 94, 95.

27 GA Res 3034, UN GAOR, 27th sess, 2114th mtg, UN DOC A/RES/3034 (XXVII) (1972).

28 *Report of the Ad Hoc Committee on Terrorism*, UN GAOR, 34th sess, Supp No 37, UN Doc A/34/37 (1979).

29 GA Res 42/159, UN GAOR, 42nd sess, 94th mtg, UN Doc A/RES/42/159 (1987).

liberation movements, other states such as Norway maintained that violence that spread fear and terror could never be justified, under any circumstances.³⁰

However, despite these initial failures, more recent efforts by the United Nations suggest there may be reason to be hopeful that agreement on a general definition may eventually be reached. First, the position of the United Nations has shifted significantly from one that initially expressed some sympathy for liberation movements employing terror tactics to one of unequivocal condemnation, regardless of the objectives sought to be achieved.³¹ In 1994, the General Assembly re-affirmed this new approach of condemning 'all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed' in the *Declaration on Measures to Eliminate International Terrorism*.³² Although stopping short of providing a definition, the declaration does provide a general outline of the concept of terrorism in para 3:

*Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*³³

In addition, although resolutions of the United Nations Security Council have avoided defining terrorism in any comprehensive way, they have nonetheless contributed to international practice in the area. The Security Council has expressly condemned specific incidents as acts of international terrorism, including the 11 September 2001 attacks in the United States,³⁴ the bombings on 12 October 2002 in Bali³⁵ and the 11 March 2004 train bombing in Madrid.³⁶

Moreover, following the 11 September 2001 attacks, the Security Council now occupies a pivotal position in coordinating international efforts to combat terrorism. Shortly after the 11 September 2001 attacks the Security Council, acting under Chapter VII of the *Charter of the United Nations*, adopted Resolution 1373 which established the Counter-Terrorism Committee ('CTC') comprising all 15 members of the Council. The task of the CTC is to monitor the implementation of Resolution 1373 which, among other things, called upon states to become parties to the 12 counter-terrorism conventions that are discussed

30 *Report of the Secretary-General*, UN GAOR, 44th sess, UN Doc A/44/456 (1989).

31 For the first clear statement of this new approach see GA Res 40/61, UN GAOR, 40th sess, 108th mtg, UN Doc A/RES/40/61 (1985) adopted in response to the Achille Lauro seizure. See generally Malvina Halberstam, 'The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed' (2003) 41 *Columbia Journal of Transnational Law* 573.

32 GA Res 49/60 UN GAOR, 49th sess, 84th mtg, Annex, UN Doc A/RES/49/60 (1994).

33 Ibid (emphasis added). See also the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, GA Res 51/210, 51st sess, 88th mtg, UN Doc A/RES/51/210 (1996).

34 SC Res 1368 UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1371 (2001).

35 SC Res 1438, UN SCOR, 4624th mtg, UN Doc S/RES/1438 (2002).

36 SC Res 1530, UN SCOR, 4923rd mtg, UN Doc S/RES/1530 (2004).

below in Part III.³⁷ Through Resolution 1373, and through the ongoing work of the CTC, the Security Council has stopped short of defining terrorism in general terms but has nonetheless clarified and reinforced the primary obligations of states in responding to international terrorism.

C International Convention for the Suppression of the Financing of Terrorism

Arguably the most important development to date in articulating a general definition of terrorism is found in the *International Convention for the Suppression of the Financing of Terrorism*³⁸ ('*Terrorism Financing Convention*'), which was concluded in 1999. This Convention establishes a treaty framework for several of the obligations imposed upon UN members by Security Council Resolution 1373.

The treaty represents an important attempt at curbing transnational terrorism by denying financial support for terrorist activities. For the most part, it follows the blueprint provided by previous counter-terrorism conventions, particularly the 1997 *International Convention for the Suppression of Terrorist Bombings*³⁹ ('*Terrorist Bombings Convention*'). However, unlike those conventions, the *Terrorism Financing Convention* provides a definition of terrorism in an indirect way through the definition, in art 2(1), of terrorism financing:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the [United Nation's twelve counter-terrorism conventions]; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The first limb of the definition relies on well-recognised types of terrorism-related offences enshrined in the United Nation's 12 counter-terrorism treaties. The second limb speaks of terrorism more generally and incorporates a dual intention requirement, focussing on both the intended victims and the political purpose of the act.

37 See generally Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *American Journal of International Law* 333. As of 13 December 2002, the obligations imposed by Resolution 1373 are implemented in Australia through pt 4 of the *Charter of the United Nations Act 1945* (Cth) and the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth).

38 *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002). See generally Ilias Bantekas, 'The International Law of Terrorist Financing' (2003) 97 *American Journal of International Law* 315.

39 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

An intention only to kill or injure civilians would not distinguish terrorism from violence already criminalised under national legal systems. Hence art 2(1) adds an additional intention element, designed to incorporate the 'terror' dimension of terrorism, via the condition that the act must be revealed by its nature or context to be aimed to 'intimidate a population' or to 'compel a government'.

Although it is an indirect and incomplete definition of terrorism, art 2(1)(b) is the closest the international community has yet come to an agreed legal understanding of a general offence of terrorism. Significantly, the definition seeks to rely on the proposition that in all circumstances it is unjustifiable and impermissible to target civilians and others who are not actively involved in hostilities. In this respect the definition can be seen to apply, by analogy, protections that international humanitarian law extends to civilians during armed conflict.⁴⁰

D The Draft Comprehensive Convention on Terrorism

The *Draft Comprehensive Convention on Terrorism* ('*Draft Comprehensive Convention*') represents the most recent and ambitious initiative by the United Nations to elaborate a treaty-based definition of terrorism and to establish a comprehensive approach for combating international terrorism through international criminal law.⁴¹ The *Draft Comprehensive Convention* emerged from the work of an Ad Hoc Committee established by the United Nations General Assembly in 1996 to draft conventions for the suppression of terrorist bombings, acts of nuclear terrorism and thereafter to develop a comprehensive terrorism convention.⁴² The Committee was later requested to elaborate the *Terrorism Financing Convention*.⁴³ Both the proposed convention for the suppression of acts of nuclear terrorism and the *Draft Comprehensive Convention* are yet to be finalised.

Work began on the *Draft Comprehensive Convention* in late 2000 and a draft text was included in the report adopted by the Ad Hoc Committee in 2002.⁴⁴ The text, which adopts many features of the existing counter-terrorism treaties discussed below in Part III, is almost complete. Under the *Draft Comprehensive Convention*:

40 See especially *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

41 Article 3 provides that the Convention does not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that state and no other state has a basis for exercising jurisdiction. The text of the *Draft Comprehensive Convention* is included in Annexes to the *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 57th sess, Supp no 37, UN Doc A/57/37 (2002).

42 *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51st sess, 88th mtg, UN Doc A/RES/51/210 (1996).

43 *Measures to Eliminate International Terrorism*, GA Res 53/108, UN GAOR, 53rd sess, 83rd mtg, UN Doc A/RES/53/108 (1999). They fulfilled their brief by concluding the *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002).

44 Above n 41.

- states are required to establish as criminal offences within their domestic legal systems the offences set out in the *Draft Comprehensive Convention*;⁴⁵
- states are obliged to extend jurisdiction over *Draft Comprehensive Convention* offences which are committed (a) in the territory of the state; (b) on board a vessel or aircraft registered by the state; or (c) by a national of the state;⁴⁶
- states are also permitted to exercise jurisdiction over the offences in a much broader variety of situations;⁴⁷
- states are required to cooperate in preventing terrorist offences from being committed including through the exchange of information and coordinating law enforcement;⁴⁸
- a state in whose territory an alleged offender is present and which has jurisdiction shall either extradite or submit the case to its competent authorities for the purposes of prosecution;⁴⁹
- the offences proscribed by the Convention are to be deemed to be included as extraditable offences in any existing extradition treaty between states parties to the Convention. Where a state only permits extradition on the basis of a treaty and there is no treaty with a requesting state, the requested state may consider the Convention as a legal basis for extradition. Where a state does not make extradition conditional on the existence of a treaty, it shall recognise the offences as extraditable offences. Finally, and to ensure the broadest possible basis for extradition by relying on the territorial principle of jurisdiction, the offences are to be treated wherever they were in fact committed as if they were committed not only in the place they were committed but also in the territory of those states that have exercised jurisdiction over them.⁵⁰

Although agreement has been reached on these features of the *Draft Comprehensive Convention*, there remain two substantial obstacles to the conclusion of a final text. The first is the issue of definition in art 2 which is currently only an informal draft. The informal text of art 2 provides that:

- (1) Any person commits an offence within the meaning of the Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
 - (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss,

45 *Draft Comprehensive Convention*, above n 41, art 3.

46 *Ibid* art 6(1).

47 *Ibid* art 6(2).

48 *Ibid* art 8.

49 *Ibid* art 11.

50 *Ibid* art 17.

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

In addition, art 2 further provides that it is an offence to make a credible and serious threat to commit any of these acts,⁵¹ or to attempt to commit any of these acts.⁵² An additional provision also makes criminal the participation in, organisation of, or contribution to, the commission of any of these acts.⁵³

As can be seen, this definition adopts the basic structure of the *Terrorism Financing Convention*. The *Terrorism Financing Convention* includes in its art 2 identical language in relation to the intention requirement for terrorist offences. Significantly, under both formulations there is no element of subjective intention that the violent act was calculated to achieve a political purpose. A crime of terrorism will be committed so long as a specified act of violence is intentionally committed and the act can be said 'by its nature or context' to have the purpose of intimidating a population, or of compelling a government or international organisation to do or abstain from doing any act.

By comparison, the *Draft Comprehensive Convention* greatly broadens the range of protected targets. Whereas the *Terrorism Financing Convention* in art 2 focuses on acts 'intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict', the *Draft Comprehensive Convention* refers to acts 'intended to cause death or serious injury to any person', or 'to cause serious damage to public or private property', or even 'to cause damage to property likely to result in major economic loss'. This expansion is likely to be welcomed by some states for a number of reasons. First, by seeking to capture the widest possible range of politically motivated violence, it avoids the incidental effect that narrow definitions may legitimate forms of violence not caught by their proscription.⁵⁴ Second, the expansion of the conception of terrorism may also be recognised as an appropriate response to the increasing diversification of targets of terrorist violence. For instance, the informal text of art 2 includes environmental damage, and in so doing follows parallel expansions occurring in the scope of international humanitarian law.⁵⁵

However, the broad definition adopted in the informal text of art 2 has been strongly resisted by several states. As the report of the Plenary Discussion in the Sixth Committee reveals, a number of states refuse to support the treaty unless and until it satisfactorily accommodates what they view as legitimate national liberation movements.⁵⁶ The primary concern is that art 2 is too broad and could

51 Ibid art 2(2).

52 Ibid art 2(3).

53 Ibid art 2(4).

54 Philip Allott makes this point, although from a radically different perspective, in his strong critique of international criminal law: Philip Allott, *The Health of Nations* (2002) 68.

55 See, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, art 8(2)(b)(iv) (entered into force 1 July 2002) which provides that intentional and severe damage to the environment is a war crime.

56 For a summary of the debate in the Sixth Committee, see <<http://www.un.org/law/cod/sixth/57/sixth57.htm>> at 15 November 2004.

be used to suppress legitimate political expression by characterising as terrorist activity that which would normally be regarded as commonplace criminal behaviour; behaviour that is already the subject of domestic criminal laws. Isolated acts of violence directed at police or security forces during public protests could, for instance, potentially be prosecuted as terrorism offences under the informal text of art 2.

Putting aside ongoing political debates as to the appropriateness of art 2, the current draft does appear to pose significant practical difficulties. The combination of an undemanding purpose requirement and the wide scope of protected targets is likely to make the offence unwieldy and unpredictable in application and may in fact have capricious effects.

If it were thought essential to retain the broad and problematic purposive component of the offence, it may have been preferable for the informal text of art 2 of the *Draft Comprehensive Convention* to limit the range of protected targets to 'civilian[s], or to any other person not taking an active part in the hostilities in a situation of armed conflict', as the *Terrorism Financing Convention* does in art 2(1). There appears to be little objection to the proposition that attacks against such persons are, to adopt the language of art 5 of the *Draft Comprehensive Convention*, 'under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The second major difficulty in finalising the *Draft Comprehensive Convention* is the savings clause in art 18, which seeks to reconcile the interaction between the Convention and international humanitarian law. The original draft provides in art 18(2) that 'the activities of armed forces during an armed conflict ... are not governed by this Convention'. The Organization of the Islamic Conference, in a clear reference to the Palestinian situation, has proposed an alternative formulation which provides that 'the activities of the *parties* during an armed conflict, *including in situations of foreign occupation* ... are not governed by this Convention'.⁵⁷

According to the coordinators of informal consultations on the *Draft Comprehensive Convention*, art 18 has now emerged as the 'sole remaining outstanding issue on which the adoption of the draft convention hinge[s]'.⁵⁸ It seems highly unlikely that, in resolving this impasse, the parties will revert to the language found in art 12 of the *International Convention against the Taking of Hostages* ('*Hostages Convention*'), which provides that that Convention is inapplicable to 'an act of hostage-taking committed in the course of armed conflicts ... in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.⁵⁹ As has been seen, in recent practice the United Nations has moved away from recognising that terrorism may be justified, even in such

57 Above n 41, Annex IV (emphasis added).

58 *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 58th sess, Annex II (Reports of the Coordinators on the Results of the Informal Bilateral Consultations), UN Doc A/58/37 (2003).

59 *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

circumstances of subjugation. Accordingly, in resolving the terms of art 18 the stark choice appears to be between removing the applicability of the *Draft Comprehensive Convention* to armed conflicts altogether or, instead, to devise language that is not seen to favour one party in an armed conflict over another.

The ongoing debate over the texts of arts 2 and 18 of the *Draft Comprehensive Convention* clearly presents formidable, and perhaps insurmountable, obstacles to consensus both on a general offence of terrorism and on the appropriate field of operation for a comprehensive counter-terrorism convention.

III UN COUNTER-TERRORISM CONVENTIONS AND PROTOCOLS

It appears that, in 2004, ‘terrorism’ as a general legal concept remains in much the same state as in 1997, when Judge Rosalyn Higgins observed that it was ‘a term without any legal significance’ which is ‘merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both’.⁶⁰

In the absence of agreement on a general offence of terrorism, the international community has adopted a pragmatic approach to the criminalisation of specific types of terrorist activities. This has been achieved through 12 counter-terrorism treaties concluded since the 1960s under the auspices of the United Nations. Recent practice confirms that these instruments are considered essential to contemporary international efforts to suppress transnational terrorism. The Security Council has repeatedly called upon all states to become parties to these agreements. There have been similar efforts to encourage participation in these treaties on a regional basis, such as the counter-terrorism declaration signed by Australia and the Association of Southeast Asian Nations (‘ASEAN’) on 1 July 2004, which urges Australia and all ASEAN members to become parties to all 12 conventions and protocols.⁶¹

In addition to criminalising various types of terrorist activity, the major achievement of the United Nations’ counter-terrorism conventions has been to overcome jurisdictional impediments to the prosecution of terrorism-related offences.

Traditionally, states have exercised jurisdiction over terrorism-related offences committed in their territory (the *territorial principle* of jurisdiction). In relation to offences committed extraterritorially, some states have sought to exercise jurisdiction on the basis that the offender is a national of the state (the *nationality principle* of jurisdiction), or on the basis that the security of a state and the integrity of its institutions are threatened (the *protective principle* of jurisdiction),

60 Higgins, above n 23, 28.

61 *Australia-ASEAN Joint Declaration for Cooperation to Combat International Terrorism*, opened for signature 1 July 2004, art 4 <http://www.dfat.gov.au/globalissues/terrorism/aus-asean_interr.html> at 15 November 2004.

or on the grounds that the victims of the offence were nationals of the state (the *passive personality principle* of jurisdiction). However, there has been a general absence of coordination in the exercise of jurisdiction over terrorist offences and, above all, a reticence to exercise jurisdiction on the basis of the mere custody of an offender accused of committing a terrorism offence, regardless of where that offence was committed (the *universality principle* of jurisdiction). Indeed, under general international law the basis on which universal jurisdiction may be exercised is limited to a select few offences, such as piracy and genocide, and would generally not extend to transnational terrorist acts.

Accordingly, the United Nations counter-terrorism treaties attempt to resolve these difficulties by expanding the basis upon which jurisdiction of states over terrorist offences may be established, including where there is no connection between an offender and the arresting state other than the mere presence of the offender within the territory of the arresting state.

These jurisdictional provisions are built into a broader framework, which is designed to maximise the prospects that terrorism offences will be prosecuted by:

- ensuring that the relevant offences are included in domestic criminal laws;
- ensuring that states possess and assert jurisdiction over the relevant offences;
- ensuring that states with custody of an offender either prosecute or extradite the offender to a jurisdiction that will; and
- ensuring, where the arresting state does not prosecute, that extradition arrangements function effectively.

The following discussion evaluates each of the 12 counter-terrorism conventions in light of contemporary needs. Although all of the United Nations' counter-terrorism conventions adopt broadly similar strategies, they can be divided into two distinct generations. The first generation of instruments, modelled on the counter-hijacking treaties adopted in response to the growing incidence of aircraft hijacking in the 1950s and 1960s, set the basic framework for all counter-terrorism treaties which followed both in terms of formulaic jurisdiction provisions and the core obligation to either prosecute or extradite alleged terrorist offenders. Characteristic of this first generation of conventions is the inclusion of the political offence exception to the extradition obligation. This doctrine, which was developed by liberal-democratic states in the nineteenth century, seeks to prevent extradition procedures from being used to deliver alleged offenders into the hands of their political opponents. By contrast, the new generation of counter-terrorism treaties adopted since the late 1990s attempts to strengthen the legal framework by removing the political offence exception and other impediments to effective prosecution of terrorist offenders.

A The 'First Generation' of Counter-Terrorism Treaties

1 *International Civil Aviation*

Following the increase in aircraft hijacking in the 1960s, the International Civil Aviation Organization ('ICAO') sponsored four multilateral treaties directed specifically at the issue of terrorist threats to civil aviation. The first was

the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* ('Tokyo Convention').⁶² The *Tokyo Convention* applies generally to all acts that jeopardise the safety of aircraft, passengers and crew⁶³ in respect of aircraft registered in a contracting state. The main focus of the Convention is to ensure that the jurisdiction of states parties over offenders is made clear and may be effectively exercised. The state of registration has competence to exercise jurisdiction over offences⁶⁴ and must take steps to ensure that it can exercise that jurisdiction.⁶⁵ In addition, a contracting party which is not the state of registration is permitted to exercise jurisdiction if an offence is committed by one of its nationals.⁶⁶

The *Tokyo Convention* specifically avoids creating obligations on states parties to extradite offenders.⁶⁷ By contrast, the *Convention for the Suppression of Unlawful Seizure of Aircraft* ('Hague Convention')⁶⁸ is far more extensive, and establishes the basic framework for all subsequent counter-terrorism conventions. The *Hague Convention* makes it an offence to seize or to attempt to seize an aircraft by force⁶⁹ and requires contracting parties to make such offences 'punishable by severe penalties'.⁷⁰ Each party is required to take whatever steps are necessary to establish its jurisdiction over the offence if it is committed on board an aircraft registered in that state; or where the offender is present in the territory of the state.⁷¹

In addition to these jurisdictional provisions, which serve to establish a treaty-based form of universal jurisdiction based on custody,⁷² the key to the operation of the *Hague Convention* is the stipulation that the state where the offender is found 'shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution'.⁷³ This obligation *aut dedere aut punire (judicare)* ('either extradite or punish (prosecute)') is the key mechanism for ensuring that offenders are tried, and is a central device in all subsequent counter-terrorism treaties. It makes clear that the arresting state cannot choose to do nothing.

62 *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969).

63 *Ibid* art 1(1)(b).

64 *Ibid* art 3(1).

65 *Ibid* art 3(2).

66 *Ibid* art 4(b).

67 *Ibid* art 16(2). Note however art 16(1) which aims to facilitate extradition to the registering state by providing that offences are taken to have been committed not only in the place of commission, but also in the territory of the state of registration.

68 *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

69 *Ibid* art 1.

70 *Ibid* art 2.

71 *Ibid* art 4.

72 David Freestone, 'International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction' in Higgins and Flory, above n 23, 50.

73 *Hague Convention*, opened for signature 16 December 1970, 860 UNTS 105, art 7 (entered into force 14 October 1971).

In order to ensure that the obligation to extradite can be effectively discharged where an arresting state does not prosecute, art 8 of the *Hague Convention* is designed to clarify and expand the bases upon which extradition might be sought and granted. This formula has been adopted in later conventions including the *Draft Comprehensive Convention* that was discussed above in Part II.⁷⁴

The third treaty applying specifically to civil aviation is the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* ('*Montreal Convention*').⁷⁵ In its jurisdiction and extradition provisions, the *Montreal Convention* closely follows the model provided by the *Hague Convention*. The *Montreal Convention* seeks to minimise threats to aviation safety by making it an offence to (a) perform an act of violence on board an aircraft which is likely to endanger the safety of the aircraft; (b) damage or destroy an aircraft in service; (c) place a device on board an aircraft which is likely to damage or destroy the aircraft; (d) destroy, damage or interfere with air-navigation facilities; or (e) communicate false information which endangers the safety of an aircraft in flight.⁷⁶

These offences were subsequently enlarged by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation⁷⁷ ('*Airports Protocol*'). The Protocol adds a new para 1 bis to the *Montreal Convention* which makes it an offence for a person unlawfully and intentionally to (a) perform an act of violence against a person at an airport serving international civil aviation which may or is likely to cause serious injury or death; or (b) destroy or seriously damage facilities at an international airport or aircraft located there if such an act endangers or is likely to endanger safety at that airport.

This suite of conventions relating to the safety of civil aviation was supplemented in 1991 by the ICAO-sponsored *Convention on the Marking of Plastic Explosives for the Purpose of Detection*⁷⁸ ('*Marking of Plastic Explosives Convention*'). This Convention does not create any criminal offences but instead seeks to assist forensic investigation of attacks by requiring that plastic explosives be marked with a detection agent (as specified in the Technical Annex to the Convention). In contradistinction to the other aviation treaties, the preamble expressly refers to the Convention as a response to the threat of terrorism.

2 *Internationally Protected Persons and Hostage-Taking*

74 See above n 41, and accompanying text.

75 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

76 *Ibid* art 1.

77 *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*), opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989).

78 *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, opened for signature 1 March 1991, 30 ILM 726 (entered into force 21 June 1998).

Both the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons⁷⁹ ('IPP Convention') and the Hostages Convention⁸⁰ were proposed by the United States in the 1970s, following several attacks directed at diplomats and the dramatic seizure of the US embassy and its staff in Tehran by Iranian students during the Iranian Revolution.⁸¹

Both Conventions are based on the *Hague Convention* model. Under the *IPP Convention*, states are required to criminalise under their domestic law the actual or threatened murder or kidnapping of, or attack upon the person or premises, of an internationally protected person.⁸² The Convention defines an internationally protected person to include a head of state, head of government or minister for foreign affairs and officials of states and international organisations 'entitled pursuant to international law to special protection from any attack'.⁸³

Significantly, the *Hostages Convention* was the first of the UN's counter-terrorism conventions to refer to the offences that it established as 'manifestations of international terrorism',⁸⁴ and to this extent the *Hostages Convention* has assisted in developments towards a more general conception of terrorism. The *Hostages Convention* provides that an offence of hostage-taking is committed by any person who seizes or detains and threatens to kill, to injure or to continue to detain a hostage in order to compel a state, an international organisation, a person or group of persons to do or to refrain from doing any act as a condition for the release of the hostage.⁸⁵

3 Maritime Navigation

The seizure of the *Achille Lauro* cruise liner in the Mediterranean in 1985 by Palestinian militants and the murder of an American passenger was an important catalyst for the development of a specific treaty applicable to terrorist acts directed at ocean vessels.⁸⁶ The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*⁸⁷ ('*Maritime Terrorism Convention*') was the result.

79 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

80 *Hostages Convention*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

81 See *US Diplomatic and Consular Staff in Tehran Case (United States v Iran) (Provisional Measures)* [1979] ICJ Rep 7; (*Merits*) [1980] ICJ Rep 3.

82 *IPP Convention*, opened for signature 17 December 1979, 1316 UNTS 205, art 2, (entered into force 3 June 1983).

83 *Ibid* art 1.

84 *Hostages Convention*, opened for signature 17 December 1979, 1316 UNTS 205 Preamble (entered into force 3 June 1983).

85 *Ibid* art 1.

86 Christopher C Joyner, 'International Extradition and Global Terrorism: Bringing International Criminals to Justice' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 493, 520.

87 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992). See also the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

As with the *Hostages Convention*, the preamble to this Convention refers to the threat of terrorism, noting that states parties to the Convention are '[d]eeply concerned about the world-wide escalation of acts of terrorism in all of its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings'.⁸⁸ At the same time, however, the *Maritime Terrorism Convention* also makes reference to the General Assembly Resolution adopted following the attack on the *Achille Lauro* which urged all states

to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.⁸⁹

Although it provides important context, this language is superfluous in the sense that it is unlikely to influence the operation of the Convention, and has been avoided in the new generation of counter-terrorism conventions.

Under the *Maritime Terrorism Convention*, an offence is committed if a person seizes or exercises control over a ship by force, performs an act of violence against a person on board a ship, destroys or damages a ship, places an explosive device on board a ship, destroys or damages navigational facilities or communicates false information endangering the safe navigation of a ship.⁹⁰

B The 'New Generation' of Counter-Terrorism Conventions

Through the Ad Hoc Committee and working groups of the Sixth Committee, the United Nations continues to work on elaborating conventions for the suppression of nuclear terrorism⁹¹ and the *Draft Comprehensive Convention*. This process has already successfully produced two recent and significant instruments, the *Terrorist Bombings Convention*⁹² and the *Terrorism Financing Convention*.

Both of these Conventions are similar in structure and operation and, as with all of the counter-terrorism conventions, they only apply to offences with an international element. Under the *Terrorist Bombings Convention*, it is an offence for a person to unlawfully and intentionally deliver, place, discharge or detonate an explosive or other lethal device in or against a place of public use, a state or government facility, a public transport system or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause

88 *Maritime Terrorism Convention*, opened for signature 10 March 1988, 1678 UNTS 221, Preamble (entered into force 1 March 1992).

89 Ibid citing GA Res 40/61, above n 31.

90 *Maritime Terrorism Convention*, opened for signature 10 March 1988, 1678 UNTS 221, art 3 (entered into force 1 March 1992).

91 The new Convention will supplement the *Convention on the Physical Protection of Nuclear Materials* which seeks to enhance safety in the use, storage and transport of nuclear material by suppressing unlawful acts involving nuclear materials including theft and unauthorised use: *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).

92 *Terrorist Bombings Convention*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

extensive destruction of such a place, facility or system, where such destruction results in, or is likely to result in, major economic loss.⁹³ A person also commits an offence if that person attempts to commit such an offence, participates as an accomplice in such an offence or organises or directs others to commit such an offence.⁹⁴

Both the *Terrorist Bombings Convention* and the *Terrorism Financing Convention* adopt the familiar approach of earlier conventions in their provisions relating to jurisdiction over offences and the extradition and prosecution of offenders. However, these two instruments together with the *Draft Comprehensive Convention* can be seen to represent a new generation of counter-terrorism treaties through their attempt to strengthen the extradition regime.

Previous anti-terrorism conventions preserved the operation of general principles of extradition law, including the political offence exception. However, the new generation of counter-terrorism conventions mark a shift from this tolerance for politically-motivated violence and provide that states cannot refuse extradition on the grounds that the offence committed was of a political character:

None of the offences [covered by the relevant Convention] shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.⁹⁵

The intention of this provision is to remove any appearance of political legitimacy from the offences to which the treaties apply. The provision can therefore be seen as an attempt to distinguish between unlawful, terrorist violence and other uses of force by individuals or groups in the pursuit of self-determination or other accepted political objectives.⁹⁶

However, at the same time these Conventions seek to retain some protection against politically-motivated prosecution of alleged terrorism offenders. All three Conventions provide that arresting states are not required to extradite, or to afford mutual legal assistance, if they have good reason to believe that the requesting state has made the extradition request for the purpose of 'prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'.⁹⁷

93 Ibid art 2(1).

94 Ibid arts 2(2), (3).

95 *Terrorist Bombings Convention*, opened for signature 15 December 1997, ATS [2002] 17, art 11 (entered into force 23 May 2001); *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229, art 14 (entered into force 10 April 2002); *Draft Comprehensive Convention*, above n 41, art 15.

96 Joyner, above n 86, 529.

97 *Terrorist Bombings Convention*, opened for signature 15 December 1997, 2149 UNTS 284, art 12 (entered into force 23 May 2001); *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229, art 15 (entered into force 10 April 2002); *Draft Comprehensive Convention*, above n 41, art 15.

The combined effect of the removal of the political offence exception and the insertion of this new humanitarian exception, which continues to afford a requesting state some discretion in refusing an extradition request, is to shift attention away from the *nature* of the offence to a broader consideration as to the *fairness* of an offender's trial. It is only on the basis of concerns as to the latter that politics is permitted to play a role in extradition arrangements for alleged terrorist offenders. This marks a major shift in emphasis from the earlier generation of counter-terrorism treaties. Nonetheless, it might be questioned whether in practice the new scheme will operate substantially differently, as very similar considerations would appear relevant to determining whether an offence is 'political' and to determining whether the requesting state has sought extradition for the purpose of a politically-motivated prosecution.

IV WEAKNESSES IN INTERNATIONAL COUNTER-TERRORISM LAW

The 12 United Nations counter-terrorism conventions and protocols are now among the most widely ratified international agreements⁹⁸ and establish an extensive and sophisticated system for cooperative efforts to prosecute terrorism-related offences. Nonetheless, there are several gaps and weaknesses in this framework.

A The Absence of a General Offence of Terrorism

The most significant substantive lacuna is the absence of a comprehensive terrorism convention that would criminalise terrorist activities generally, and not only in the specific situations covered by the existing counter-terrorism treaties. A general counter-terrorism convention could also serve to integrate and strengthen existing conventions by revising aspects of these earlier instruments.

98 As at 31 May 2004 the *Tokyo Convention*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969) had 178 parties; the *Hague Convention*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) had 177 parties; the *Montreal Convention*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) had 180 parties; the *IPP Convention*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977) had 146 parties; the *Hostages Convention*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) had 138 parties; the *Convention on the Physical Protection of Nuclear Materials*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987) had 104 parties; the *Airports Protocol*, opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989) had 146 parties; the *Maritime Terrorism Convention*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992) had 104 parties; the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992) had 95 parties; the *Marking of Plastic Explosives Convention*, opened for signature 1 March 1991, 30 ILM 726 (entered into force 21 June 1998) had 106 parties; the *Terrorist Bombings Convention*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001) had 123 parties; and the *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002) had 117 parties. See generally *Conventions on Terrorism*, United Nations Treaty Collection <<http://untreaty.un.org/English/Terrorism.asp>> at 15 November 2004.

For instance, a comprehensive convention may be used to bring the first generation of counter-terrorism treaties into line with the new generation of instruments by providing that, as between states parties to the comprehensive convention, the political offence exception included in earlier treaties may not be exercised. Although such adjustment would only be effective for states who are party to both the new comprehensive convention and the earlier instrument sought to be amended,⁹⁹ if it attracts widespread support a new general counter-terrorism treaty could be a useful vehicle for bringing the entire framework of international counter-terrorism law up-to-date with contemporary standards.

However, in its present form the *Draft Comprehensive Convention* does not seek to achieve this result, although there does remain an opportunity for the draft treaty to be amended prior to its conclusion. The informal text of art 2 *bis* presently provides that where the *Draft Comprehensive Convention* and a treaty dealing with a specific category of terrorist offence are both applicable in relation to the same act, the provisions of the specific instrument will prevail. In the interests of consistency, it would perhaps be desirable for the *Draft Comprehensive Convention* to effectively replace the earlier Conventions by establishing that those acts proscribed by previous treaties are criminal offences under the *Draft Comprehensive Convention*.

B The Lockerbie Case: Some Practical Shortcomings in International Counter-Terrorism Law

There are several practical limitations to the effectiveness of the existing international scheme that cannot be overcome with the conclusion and entry into force of the *Draft Comprehensive Convention*. In securing the prosecution of terrorist offenders, the *Draft Comprehensive Convention* relies, as do existing counter-terrorism conventions, on the central obligation to prosecute or extradite terrorist suspects. In relation to the relevant offences, if a state does not extradite, it is 'obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution'.¹⁰⁰

However, there are circumstances in which this mechanism may not operate effectively and could thereby lead to an undermining of confidence in the capacity of international counter-terrorism law to secure the prompt and effective prosecution of terrorist suspects. A helpful way of appreciating some of these practical limitations is through an examination of the international community's response to the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988.

Following the Lockerbie bombing, the United Kingdom and the United States simultaneously issued indictments against two Libyan suspects and demanded

99 *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331, art 30(4) (entered into force 27 January 1980).

100 See, eg, *Draft Comprehensive Convention*, above n 41, art 11 which replicates the language in previous instruments.

that Libya surrender them to either jurisdiction.¹⁰¹ Libya refused and indicated that it would prosecute the two Libyan nationals pursuant to the *Montreal Convention*, as it was entitled (and indeed obliged) to do under art 7. However, given that one of suspects was a member of the Libyan Intelligence Agency, doubts were expressed as to whether Libya would provide genuine trials of both men.

At the initiative of the United Kingdom and the United States, the UN Security Council subsequently became involved, urging Libya in Resolution 731 to respond to the requests for extradition.¹⁰² Subsequently, in March 1992, the Security Council adopted Resolution 748 in which they decided that Libya's failure to respond effectively to Resolution 731 amounted to a threat to international peace and security. Acting under Chapter VII of the *Charter of the United Nations*, the Security Council demanded compliance with the requests for the surrender of the suspects and imposed economic sanctions upon Libya.¹⁰³

Contemporaneously, the International Court of Justice ('ICJ') was seized of a case brought by Libya against the United Kingdom and the United States under art 14 of the *Montreal Convention*. In its application, Libya argued that it had complied with its obligations under that Convention by taking steps in its own courts to investigate and prosecute the offences, and alleged that the United Kingdom and the United States were in breach of their obligations to Libya under the *Montreal Convention*. Libya also sought provisional measures enjoining the United Kingdom and the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya.

The Court refused Libya's request for interim orders, finding that Resolution 748 (which effectively required the surrender by Libya of the two suspects) took precedence over the *Montreal Convention* by operation of art 103 of the *Charter of the United Nations*.¹⁰⁴ At subsequent proceedings on the issue of jurisdiction, the ICJ went on to conclude, on narrow grounds, that it was competent to hear the merits of the case.¹⁰⁵ Had the case been heard in full, it may have provided the ICJ with an opportunity to examine both the legality of Security Council Resolution 748 and the capacity of the Court to engage in the judicial review of the decisions of the political organs of the United Nations. The Court might also have clarified the scope of key provisions of the *Montreal Convention* and the

101 At trial one accused was acquitted and the other convicted. That conviction was later upheld on appeal: *Megrahi v HM Advocate* [2002] ScotCS 68. For a concise discussion of the Lockerbie trial see Susan D Anderson, 'Guilty? An Explanation of the Lockerbie Trial' (2001) 21(2) *University of Queensland Law Journal* 220. See also Donna E Arzt, 'The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?' (2002) 18 *American University International Law Review* 163.

102 SC Res 731, UN SCOR, 3033rd mtg, UN Doc S/RES/731 (1992).

103 SC Res 748, UN SCOR, 3063rd mtg, UN Doc S/RES/748 (1992).

104 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3; (*Libyan Arab Jamahiriya v United States*) [1992] ICJ Rep 114.

105 *Questions of Interpretation and Application of the Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Preliminary Objections)* [1998] ICJ Rep 8; (*Libyan Arab Jamahiriya v United States*) [1998] ICJ Rep 115.

respective obligations of arresting and requesting states. However, these opportunities did not eventuate, as on 10 September 2003 the parties agreed to discontinue the proceedings 'with prejudice'.

The main lesson from the international legal repercussions of the Lockerbie bombing is that the obligation to either extradite or prosecute, found in art 7 of the *Montreal Convention* (and repeated in other counter-terrorism instruments), may give rise to significant and intractable disputes between arresting and requesting states as to the appropriate forum for prosecuting terrorist offences. The obligation to prosecute when extradition is refused may be regarded by some states not as evidence of the effective operation of international counter-terrorism law, but instead as a contrivance employed to prevent offenders from facing justice. The bipartite *aut dedere aut punire (judicare)* obligation, which lies at the fulcrum of international counter-terrorism law, is designed to ensure that offenders are brought to trial and cannot enjoy immunity by escaping the jurisdiction where an offence was committed. However, this obligation rests on the assumption that the criminal justice systems of all states are of equal standing. Hence an arresting state is entitled to refuse to extradite an offender and instead elect to prosecute, notwithstanding claims by other states parties that the arresting state's trial processes are unsatisfactory. There is no way in which states can make an enforceable demand, on the basis of existing treaties, for the extradition of a terrorist suspect on the grounds of such claims.

However, there are several strategies by which attempts may be made to resolve such deadlocks. Dispute settlement procedures, both diplomatic and legal, may play a role in facilitating international cooperation in the extradition and prosecution of alleged offenders to a jurisdiction satisfactory to all interested states. In this respect, a distinctive feature of the United Nations' counter-terrorism treaties is their inclusion of compulsory dispute settlement provisions that require the submission of unresolved disputes between contracting parties to arbitration or to the International Court of Justice.¹⁰⁶ Indeed, it was on the basis of such a provision in the *Montreal Convention* (art 14) that Libya sought the resolution of its dispute with the US and the UK over the extradition of the Libyan suspects in the Lockerbie case.

The ICJ could therefore be utilised to settle disputes as to whether an arresting state is justified in refusing extradition, either on the grounds of the political offence exception or on the basis that the alleged offender would be subject to a politically-motivated prosecution. The Court might also be called upon to pronounce on the obligations of an arresting state that refuses both to extradite

106 See, eg, *Draft Comprehensive Convention*, above n 41, art 23. Article 23(1) provides that

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

Article 23(2) goes on to provide that on becoming a party to the *Draft Comprehensive Convention* a state party may include a reservation stating that it does not consider itself bound by art 23(1).

and to initiate a prosecution against an accused. However, neither arbitration nor judicial settlement is likely to be of significant assistance in situations such as that faced in the Lockerbie case where Libya, the arresting state, demonstrated a willingness to prosecute the two suspects ostensibly in conformity with the terms of the *Montreal Convention*. In such circumstances there will be a need to look beyond the relevant counter-terrorism instruments.

In the Lockerbie case the dispute was ultimately resolved only through the involvement of the Security Council and the emergence of an alternative third forum – in the form of a Scottish court sitting in the Netherlands – for the trial of the two Libyan suspects. There are reasons to be hopeful that, in the future, the Security Council may be able to be more proactive in similar circumstances. As has been noted, in the wake of the 11 September 2001 attacks on the United States, the Security Council has assumed wide-ranging responsibilities in combating international terrorism and has demonstrated a willingness to become more closely involved in monitoring the compliance by states with their obligations to combat terrorism.

In Resolution 1373, the Security Council recognised that international terrorism constitutes a threat to ‘international peace and security’,¹⁰⁷ a determination that, in turn, activated the power of the Security Council to impose binding obligations on all United Nations members. Under Resolution 1373 all member states are required to take steps to suppress terrorism, regardless of their participation in the United Nations’ counter-terrorism conventions and protocols. The CTC, established under Resolution 1373, and charged with the task of monitoring the implementation of the obligations imposed by the resolution, pursues this aim primarily through reviewing reports by member states as to their domestic implementation of the terms of the Resolution. (Reports have now been received from all 191 member states, and are in the process of analysis by the CTC.)

Although it is not the main responsibility of the CTC to identify terrorist suspects, impose sanctions upon states that do not comply with their obligations to suppress terrorism, or determine measures in response to specific acts of terrorism,¹⁰⁸ the ongoing work of the CTC is likely to improve the functioning of international counter-terrorism law and to reduce the likelihood of disputes between states as to the modalities for prosecuting alleged terrorists. First, by the operation of a transparent monitoring process and by assisting states in building capacity to deal with terrorism through appropriate domestic legislative and judicial mechanisms, the CTC can help enhance public confidence that terrorist suspects are likely to be subject to prosecution in all member states according to generally accepted standards. Second, the work of the CTC in identifying the strengths and weaknesses in the overall framework of international counter-terrorism law will provide a more secure basis upon which the Security Council may take specific action to deal with situations where states are at loggerheads over the prosecution of terrorist offenders.

107 SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1371 (2001).

108 Rosand, above n 37, 337.

However, notwithstanding these developments, the Lockerbie experience suggests that the Security Council has at its disposal only a limited range of tools in responding to disputes between states as to the forum which is most appropriate for prosecuting terrorist offences. In the Lockerbie case the ad hoc strategy of referring the prosecution of the suspects to trial by a Scottish court, sitting in the Netherlands, proved decisive in ultimately bringing two Libyan nationals before an institution that commanded the confidence of the international community. This process was a difficult and unwieldy one, and is highly unlikely to be repeated. However, with the recent establishment of the International Criminal Court, there may now be a more permanent solution to this particular practical conundrum.

V PROSECUTING TERRORISTS IN INTERNATIONAL TRIBUNALS

There has been considerable scholarly speculation as to the possibility of an international court assuming jurisdiction over terrorist offences.¹⁰⁹ In light of the Lockerbie experience it appears highly desirable that such an opportunity exist. However, presently neither the ICC, nor any other international or internationalised¹¹⁰ criminal tribunal, has been given jurisdiction over crimes of terrorism.

In the course of preparatory work for the ICC, there had been some consideration given to the possibility of incorporating a terrorism offence or offences in the Court's founding document. The International Law Commission's 1994 *Draft Statute for the ICC* had included 'treaty crimes'; that is, crimes under the United Nations' specific counter-terrorism treaties. However, although 12 states spoke in favour of the inclusion of terrorism as a crime within the ICC's jurisdiction at the Rome Conference,¹¹¹ all terrorist offences were ultimately omitted from the *Rome Statute of the International Criminal Court*¹¹² ('*Rome Statute*') as no agreement could be reached on an appropriate definition.¹¹³ In addition, a specific proposal made at the Rome Conference to include terrorism

109 See especially Lucy Martinez, 'Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems' (2002) 34 *Rutgers Law Journal* 1. *Contra* Alfred P Rubin, 'Legal Response to Terror: An International Criminal Court?' (2002) 43 *Harvard International Law Journal* 65.

110 Internationalised or hybrid courts and tribunals are judicial bodies with both domestic and international elements. Examples include the Special Court for Sierra Leone, the Cambodian Extraordinary Chambers and the East Timor Special Panels. See generally Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd ed, 2003) 397 ff.

111 Kriangsak Kittichaisaree, *International Criminal Law* (2001) 227.

112 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

113 Richard J Goldstone and Janine Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 16 *Harvard Human Rights Journal* 13, 14; Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' (1998) 3 *Journal of Armed Conflict* 27.

as a crime against humanity failed to attract consensus and was therefore abandoned.¹¹⁴

The ICC will therefore only be able to exercise jurisdiction over terrorism-related offences if either (1) the *Rome Statute* is amended to include terrorism; or (2) the relevant offence can be characterised in such a way as to fall within the definition of a crime currently within the ICC's jurisdiction.

A procedure is established in art 121 of the *Rome Statute* for the amendment of the Statute after the expiry of seven years from entry into force.¹¹⁵ In addition, art 123(1) provides that seven years after the Statute enters into force, the UN Secretary-General is to convene a Review Conference to consider any amendments to the Statute including, but not limited to, the crimes within the jurisdiction of the Court. Terrorism is likely to be on the Review Conference's agenda in 2009 following the resolution included in the *Final Act of the Rome Conference* recommending that the 2009 Review Conference consider including both terrorism and narcotics offences.¹¹⁶

Whether or not sufficient consensus can be reached at the Review Conference remains to be seen. To a considerable extent this will depend upon whether, in the interim, the *Draft Comprehensive Convention* is finalised. Evidently, the inclusion of a clearly defined crime of terrorism could be a helpful addition to the ICC's jurisdiction, not least because it would add impetus for the strengthening of domestic anti-terrorism laws. The experience to date suggests that, because the ICC is designed to complement rather than replace national criminal jurisdictions,¹¹⁷ the entry into force of the *Rome Statute* has had the positive effect of encouraging states to enact domestic legislation that criminalises those offences within the ICC's jurisdiction.¹¹⁸

The ICC's competence is currently 'limited to the most serious crimes of concern to the international community as a whole',¹¹⁹ namely genocide, crimes against humanity, war crimes and, when (and if) defined, the crime of aggression.¹²⁰ Nonetheless, the ICC may have an opportunity to deal with terrorist offences under its existing jurisdiction, as very serious terrorist offences could potentially be characterised as 'crimes against humanity' within the

114 *Proposal Submitted by Algeria, India, Sri Lanka and Turkey on Article 5*, UN Doc A/CONF.183/C.1/L.27/Corr.1 (1998).

115 *Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, art 121(1) (entered into force 1 July 2002).

116 *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex 1, Res E, UN Doc A/CONF.183/10 (1998).

117 The jurisdiction of the ICC is 'complementary' to national criminal jurisdictions (*Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, Preamble (entered into force 1 July 2002)) in the sense that a case can only be brought before the ICC if a state with jurisdiction is unwilling or unable genuinely to investigate or prosecute the case (*Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, art 17 (entered into force 1 July 2002)).

118 Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507.

119 *Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, art 5(1) (entered into force 1 July 2002).

120 *Ibid* arts 6, 7, 8 define genocide, crimes against humanity and war crimes respectively.

definition provided by art 7 of the *Rome Statute* and art 7 of the Elements of Crimes adopted by the Assembly of States Parties in September 2002.¹²¹

Article 7 of the *Rome Statute* defines as crimes against humanity any of a number of specified acts (including murder) when committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.¹²² An 'attack directed against any civilian population' is, in turn, defined as 'a course of conduct involving the multiple commission' of specified prohibited acts 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.¹²³ Although art 7 envisages that a crime against humanity may in some circumstances be committed by non-state actors such as terrorist organisations, it establishes a high threshold for the offence in the requirement that the attacks have been (1) either widespread *or* systematic and; (2) involve the multiple commission of specified acts. The effect of this definition is to exclude all but the most serious of terrorist attacks.

If the ICC is to assume jurisdiction over terrorism offences, then it will be necessary for the *Rome Statute* to be amended to include the specific terrorism offences set out in the United Nations' existing counter-terrorism conventions, or alternatively incorporate a general offence of terrorism, assuming agreement can be reached on a satisfactory definition. However, it must also be recognised that, by virtue of the complementary character of the ICC's jurisdiction, the ICC is unlikely ever to play a front-line role in prosecuting terrorist offences. Instead, in limited circumstances it can serve to supplement the procedures that already exist for investigating and prosecuting crimes through domestic courts.

There are two situations where the ICC could prove to be of considerable utility in this regard. First, where domestic courts are unwilling or unable to exercise jurisdiction over terrorist crimes that can also be characterised as crimes against humanity, the ICC may step in to assure effective investigation and prosecution of terrorist offences.¹²⁴ Second, in future high-profile cases the ICC could potentially be used to avoid the types of difficulties encountered in the Lockerbie case where several states, each competent to assert jurisdiction, make competing claims. In such situations the referral of a prosecution to the ICC could help break the political deadlock in negotiations between states, and provide a neutral forum for prosecution. The ICC is a permanent judicial body that has attracted widespread support.¹²⁵ It is an independent and impartial international institution that incorporates significant due process guarantees for suspects¹²⁶ and includes a right of appeal.¹²⁷ Hence, prosecutions by the ICC may

121 These are available at the ICC's website <<http://www.icc-cpi.int>> at 15 November 2004. For an analysis of the issues involved in characterising a terrorist attack as genocide, a crime against humanity or a war crime, see Martinez, above n 109, 19–53. See also Goldstone and Simpson, above n 113, 15.

122 *Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, art 7(1) (entered into force 1 July 2002).

123 Ibid art 7(2)(a).

124 *Policy Working Group on the United Nations and Terrorism*, above n 6, 8.

125 As of 3 May 2004 there were 94 states parties to the *Rome Statute*: <<http://www.icc-cpi.int/statesparties.html>> at 15 November 2004.

126 See, eg, *Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 90, arts 22, 23, 55, 66, 67 (entered into force 1 July 2002).

be widely perceived to be fairer and more legitimate than prosecutions by domestic courts in highly contentious cases, and may thereby 'enhance worldwide assurance of the justice of the conviction of terrorists'.¹²⁸

VI CONCLUSION

Built around core provisions establishing universal jurisdiction and an obligation to extradite or prosecute terrorist suspects, the UN's counter-terrorism conventions establish extensive and generally effective mechanisms for enlivening the international criminal justice system to respond to a variety of terrorism-related offences. As has been seen, there are several functional limitations to the efficacy of these mechanisms, some of which were encountered in the attempts to prosecute the perpetrators of the Lockerbie bombing. However, the involvement of the Security Council in the Lockerbie case also illustrates that it is possible to supplement and enhance these mechanisms where there is sufficient international will. Additionally, the ICC has a potential role to play as a neutral and effective forum in situations where there is competition between two or more states possessing and asserting jurisdiction over a terrorist offender.

Nonetheless, international criminal law remains in a state of confusion in relation to terrorism as a distinctive international crime. Unlike recognised crimes such as genocide, crimes against humanity and war crimes, each of which revolve around a central reasoning or rationale, terrorism in international criminal law continues to comprise an assortment of offences relating to specific methods of violence or prohibited targets. To date it has not proven possible to subsume these individual offences under a comprehensive framework because consensus has not been reached on a definition of terrorism.

It remains to be seen whether ongoing work on the *Draft Comprehensive Convention* will produce a text that can successfully accommodate the various specific offences that have been developed since 1963 in a universal conception of terrorism. Ideally, such a universal conception will assist the international community in suppressing political violence that terrorises and intimidates, while at the same time preserving space for legitimate political expression.

127 Ibid art 81.

128 Vagts, above n 10, 325.