CHAPTER 8

INTERNATIONAL TERRORISM

I. INTRODUCTION

Terrorism today clearly ranks at the top of the list of international criminal concerns and presents one of the most serious challenges to the international community. In its various manifestations, international terrorism poses a pervasive and growing threat in every region of the world. More international instruments address terrorism than any other form of criminal activity. At the same time it remains the most contentious issue in the field. No single agreed definition of terrorism exists, no comprehensive treaty has yet been agreed, and terrorism as a matter of international law has not been included as a distinct "core crime" in any international court or tribunal.

II. THE CONCEPT OF TERRORISM

Terrorism itself is hardly a new phenomenon. The assassination of Archduke Francis Ferdinand in Sarajevo in June 1914 ignited the First World War. The destruction of the two World Trade Center towers in New York on September 11, 2001 resulted in the death of thousands of U.S. citizens. Today, terrorist attacks, including both the indiscriminate killing of innocent civilians as well as targeted attacks on government officials and other political leaders, are an increasingly common tactic, used by religious as well as revolutionary movements and other dissident groups to secure their political objectives.

The growth in the use of terrorist tactics may be attributed, among other factors, to technological advances in weapons, their ready availability to non-governmental actors, greater ease of movement of people and material across borders, and growth of global communications. It is easier than ever for aspiring terrorists to obtain small weapons of great destructive power and for terrorist networks to communicate with their members. The almost instantaneous dissemination of news around the world magnifies the impact of any given terrorist act.

§ 8–1 A CONTEXTUAL CRIME?

Most acts of terrorism constitute domestic criminal offenses wherever they occur. The main challenge lies in achieving international agreement to punish those crimes without regard to their political context. By definition, the violence that forms the core of a "terrorist act" is committed for political purposes or objectives. Can such acts ever be legitimate, and if so, when? This question is well reflected in the hoary adage "one man's terrorist is another's freedom fighter."

How do you determine, for example, whether violent efforts to overthrow a government or regime are valid acts of self-determination or crimes? Can some otherwise criminal acts (murder, bank robbery, use of nerve gas, blowing up an aircraft in flight) be legitimized by the perpetrator's avowed purpose? Are some acts simply so heinous that they can never be accepted, no matter what the intent behind them? How do you tell the difference? As long as the use of violence in some circumstances is accepted, consensus on these issues will remain elusive.

§ 8–2 EFFORTS TO DEFINE TERRORISM

Many competing definitions of terrorism exist at the international level. The first serious attempt took place within the League of Nations. In 1937 the Member States adopted a Convention for the Prevention and Punishment of Terrorism, which defined the term as including "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." An annexed protocol would have established a special international criminal court to prosecute such crimes. However, only one State—India—ratified the Convention, and it never entered into force.

Adopted in 1977, article 51(2) of Protocol I and article 13(2) of Protocol II to the 1949 Geneva Conventions require States Parties to protect civilian populations from "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."

In 1995, the UN General Assembly adopted a resolution calling on all States to adopt measures to eliminate international terrorism. The first paragraph of that resolution stated that all UN Member States "solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States." The resolution continued:

> 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 circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them . . . .

U.N. G.A. Res. 49/60, para. 3 (February 19, 1995). This has become standard language for the United Nations and is frequently repeated, most recently for example, in paragraph 4 of UN G.A. Res. 67/99 (January 14, 2013).

By comparison, no definition of terrorism was included in the UN's Global Counter-Terrorism Strategy and Plan of Action adopted by the General Assembly (UN G.A. Res. 60/288, Sept. 20, 2006). Instead, that resolution did repeat a formulation which the General Assembly had previously adopted calling on Member States to protect human rights and fundamental freedoms while countering terrorism. That prior resolution had said that:

> acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

UN G.A. Res. 60/158, preambular para. 12 (Feb. 28, 2006).

By comparison, the International Convention for the Suppression of the Financing of Terrorism (art. 2(1)(b)) defines the term to include 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, when the purpose of such 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.

A 2011 decision of the Special Tribunal for Lebanon, presided over by the late Judge Antonio Cassese, suggested the existence of a definition of terrorism in customary international law. (Uniquely, the STL has jurisdiction over the crime of terrorism as defined in Lebanese law). The Appeals Chamber addressed the issue more broadly, in the context of Lebanon's international obligations, and identified an emergent definition including three key elements:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.

Para. 85, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL–11–01/I (Feb. 16, 2011), which can be retrieved at *http://www.stl-tsl.org/*.

For its part, the UN Security Council has been involved in responding to terrorist acts for a number of years, *inter alia* in the context of sanctions regimes imposed under Chapter VII of the UN Charter. In Resolution 1989 (June 17, 2011), for instance, it stated that:

> terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and reiterating its unequivocal condemnation of Al-Qaida and other individuals, groups, undertakings and entities associated with it, for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property and greatly undermining stability.

In U.N. Sec. Coun. Res. 1566, para. 3 (Oct. 4, 2004), the Security Council stated that:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . .

Accordingly, the Security Council called upon all UN Member States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

§ 8–3 DRAFT COMPREHENSIVE CONVENTION

Potentially the most far-reaching UN effort was undertaken in 1996, when the UN General

Assembly established an *Ad Hoc* Committee to prepare a draft comprehensive convention on international terrorism. UN Res. 51/210 (Dec. 15. 1996). The Committee began work on a draft text prepared by India. With respect to the definition, draft article 2(1) provided:

> Any person commits an offence within the meaning of the present 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 to the environment; or
>
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

The draft would also have criminalized making a "credible and serious threat to commit" such an offense as well as attempts, participating as an accomplice, organizing or directing others to commit the offense, and contributing to the commission of one or more offenses by a group of persons acting with a common purpose.

Disagreements arose quickly over the definition, and in recent years little progress has been made; indeed, no meetings of the Committee have been held since 2013. A working group of the Committee was created in an effort to finalize the draft comprehensive convention but has not made visible progress. See *http://www.un.org/en/ga/sixth/73/int_terrorism.shtml.*

§ 8–4 NOTE ON STATE-SPONSORED TERRORISM

From the foregoing, it is possible to extract some common elements of a possible definition of terrorism. It might cover (i) one or more acts of violence causing death or injury, or acts such as hostage-taking or kidnapping, or which cause damage to property or governmental facilities or systems, (ii) intended to create fear or "terror" among the public or civilian population, (iii) for the purpose of intimidation or to compel a government to do or abstain from an act. Such acts might also violate internationally recognized human rights and fundamental freedoms, or principles of friendly relations between States or the political independence or territorial integrity of particular States or destabilizing legitimate governments. Such acts cannot be justified on the basis of political, philosophical, ideological, racial, ethnic, religious or other considerations.

But who are the actors? Must the offender be an individual or group of individuals? Can a State or its officials or military personnel commit terrorism? How can a State be held criminally responsible? If it makes no sense to hold a State responsible as an entity, what about the individuals who are just following its policies and direction? What about those it supports, directly or indirectly?

III. TERRORISM CONVENTIONS

In the absence of an agreed general definition, the international community has focused

instead on defining and prohibiting specific acts carried out by terrorists, such as hijacking, hostage taking, sabotage, bombings, etc. This thematic approach results from the fact that the impetus for reaching an agreement was largely generated by a specific incident or threat, which galvanized the international community to action. Some therefore deal with terrorist threats to civil aviation and shipping, some with certain kinds of attacks on individuals, some with concerns about the use of explosives, others with nuclear concerns, etc.

Besides condemning certain acts and making a political statement that States should cooperate to combat them, these conventions share some common characteristics or structural elements. Not all of the treaties contain all of these elements, nor do they use entirely consistent language in addressing them.

(1) They typically begin by describing the conduct that caused the incident in question.

(2) They state that the proscribed conduct is an international crime, or a crime of international concern, which all States must make an offense under their domestic laws.

(3) They set out the primary jurisdictional bases on which States Parties must be able to prosecute offenders (such as territoriality, nationality, passive personality, etc.).

(4) They create obligations to extradite or prosecute (*aut dedere aut judicare)* so that even where a State lacks one of the primary jurisdictional grounds, it must establish jurisdiction to prosecute the offense when the offender is found in its territory and it does not extradite that offender to another State Party.

(5) They make the offense an extraditable offense in all existing extradition treaties between States Parties; many also provide that for extradition purposes it cannot be considered a "political offense."

(6) They set out obligations of mutual legal assistance and cooperation between States Parties in respect of the covered offense. In a few instances, these obligations extend to training and even prevention.

The following descriptions summarize a selected group of the more significant counter-terrorism treaties. They are presented chronologically and are intended only to acquaint you with the scope and application of the various conventions, with particular emphasis on their criminal provisions; no effort is made to describe them in their entirety.

§ 8–5 SAFETY OF AVIATION (1963)

The Convention on Offences and Certain Other Acts Committed on Board Aircraft ("Tokyo Convention"), Sept. 14, 1963, 704 UNTS 219, 20 U.S.T. 2941, TIAS 6768, 2 I.L.M. 1048 (1963), text available at *https://treaties.un.org/doc/db/terrorism/conv1-english.pdf*. It has 186 States Parties.

The Convention applies to acts (including but not limited to criminal acts) that jeopardize "the safety of the aircraft or of persons or property therein" or "good order and discipline on board." It specifically covers (but does not independently define) "offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight

or on the surface of the high seas or of any other area outside the territory of any State." For this purpose, an aircraft is considered to be "in flight" from the moment when power is applied for the purpose of take-off until the moment when the landing run ends. *See* art. 1.

The State in which the aircraft is registered has jurisdiction. Other States may not "interfere" with an aircraft in flight in order to exercise criminal jurisdiction over an offense committed on board except when the offense (a) has "effect" on the territory of that State, (b) has been committed by or against a national or permanent resident of that State, (c) is "against the security" of that State, (d) consists of "a breach of any rules or regulations relating to the flight or maneuver of aircraft" in force in that State, or (e) exercising jurisdiction is necessary to ensure the observance of any obligation of that State under a multilateral international agreement.

The Convention authorizes the aircraft commander to impose reasonable measures, including restraint, to protect the aircraft, maintain good order, or deliver the person to the authorities. It also lists obligations that all Contracting States must respect, including taking custody of any offenders and returning control of the aircraft to the lawful commander.

For purposes of extradition, offenses committed on aircraft registered in a Contracting State must be treated as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft. The Convention must be deemed to create an obligation to grant extradition.

*U.S. Legislation***.** This treaty is primarily implemented by the Air Piracy (Destruction of Aircraft) Act, 18 U.S.C. § 32.

§ 8–6 AIRCRAFT HIJACKING (1970)

The UN Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague" or "Hijacking" Convention), Dec. 16, 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, TIAS 7192, 10 I.L.M. 133, entered into force in the United States Oct. 14, 1971. The text is available at *http://treaties.un.org/doc/db/ Terrorism/Conv2-english.pdf*. It has 185 State parties.

Under article 1, any person on board an aircraft in flight commits an offense if he or she "unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or is an accomplice of a person who performs or attempts to perform any such act." If an alleged offender is present in its territory, a Contracting State must take that offender into custody, and conduct an inquiry into the circumstances, and restore command of aircraft to the commander.

Article 4 obligates Contracting States to establish jurisdiction over the offense "and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence" when the offense is committed on board an aircraft registered in that State, when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board, when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. They must also establish jurisdiction "where the alleged offender is present in its territory and it does not extradite him."

Under article 8, the offense must be "deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States." Contracting States are also obliged to include the offense as an extraditable offense in every extradition treaty to be concluded between them. Contracting States are required to afford each other the "greatest measure of assistance" in respect of criminal proceedings.

The 1970 Convention was amended by a supplementary Protocol adopted in Beijing in

2010. It includes hijackings taking place before or after a flight (as defined in the Convention itself) and covers attempts, acting as an accomplice, and conspiracy. It also contains additional provisions on extradition and mutual legal assistance. For additional information on the 2010 Protocol, see *http://www.icao.int/publications/journalsreports/ 2011/6601_en.pdf*.

U.S. Legislation. Although the Aircraft Piracy Act, 18 U.S.C.A. § 32, had long prohibited such actions, the Hague Convention was implemented in U.S. law by the Anti-Hijacking Act of 1974, 49 U.S.C. § 46502 et seq.

§ 8–7 AIRCRAFT SABOTAGE (1971)

The UN Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the "Montreal" or "Sabotage" Convention), Sept. 23, 1971, 974 UNTS 178, 24 U.S.T. 564, TIAS 7570, 10 I.L.M. 1151, text available at *http://www.mcgill.ca/files/iasl/montreal 1971.pdf*. The Montreal Convention has 188 States Parties.

Article 1 of the 1971 Montreal Convention targets any person who unlawfully and intentionally does any of the following:

> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
>
> (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
>
> Attempts and acting as an accomplice are also covered.

States Parties must establish jurisdiction to prosecute the covered offenses when committed in their territory or against or on board their registered aircraft, and when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board. They must also cover offenses committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. In addition, they must also have jurisdiction where the alleged offender is present in its territory and they do not extradite him.

The Convention also imposes duties with respect to prevention and mutual legal assistance.

U.S. Legislation. The 1971 Convention was implemented through amendments to 18 U.S.C. § 32 *et seq.* by the Aircraft Sabotage Act 1984. *See also* 49 U.S.C. § 46502.

1988 Protocol. The Convention was supplemented in 1988 by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (the "Montreal Protocol"), Feb. 24, 1988, 14118 U.N.T.S. 1589, 27 I.L.M. 627 (1989). The text is available at *http://treaties.un.org/doc/db/Terrorism/Conv7-english.pdf.*

The Protocol extended the scope of the Convention to include terrorist acts at international civil airports. It criminalized unlawful and intentional acts of violence against persons at international airports as well as acts of destruction or serious damage to airport facilities of such airports which are likely to endanger safety at said airports.

2010 Beijing Convention. Under the auspices of the International Civil Aviation Organization (ICAO), a diplomatic conference in Beijing has effectively replaced both the 1971 Convention and its 1988 Protocol by adopting a new instrument for the suppression of unlawful acts relating to civil aviation. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 50 I.L.M. 141 (2011). The text is available at *https://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx*.

Article 1 of the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation includes an extensive list of offenses which include and expand those in the prior treaties, for example "using an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment." Art. 1(1)(f). It also criminalizes the release or discharge from a civil aircraft of any biological, chemical, or nuclear ("BCN") weapon or explosive or similar substance in a manner that is likely to cause death, serious bodily injury, or serious damage to property or the environment.

Paragraph 24 of the new Convention provides that, once ratified, it will prevail over both earlier instruments for those States that have accepted its obligations.

§ 8–8 INTERNATIONALLY PROTECTED PERSONS (1973)

The UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (the "IPP" Convention), Dec. 14, 1973, 1035 UNTS 167, 28 U.S.T 1975, TIAS 8532, 13 I.L.M. 41 (1974). The text of this Convention is available at *http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf.* As of December 2018, 180 States were party to this Convention.

Art. 1 of the Convention defines "internationally protected persons" to include a Head of State, Minister for Foreign Affairs, representative or official of a State, any official of an international organization who is entitled pursuant to international law to special protection, and his family. Under article 2, Contracting Parties must criminalize a variety of crimes, including the murder, kidnapping or attack on an internationally protected person, an attack on the official premises of such a person, or a threat to commit such an attack.

Under this treaty, a State has jurisdiction when the crime is committed in its territory or on board a ship or aircraft registered in that State, when the offender is a national, or if the crime is committed against a person from that State who is an "internationally protected person." States Parties must cooperate in the prevention of the mentioned crimes and in following investigations. Offenses under this Convention are extraditable, and State Parties must afford each other the "greatest measure of assistance" during any criminal proceeding related to this Convention.

U.S. Legislation. Several provisions of federal criminal law are relevant to the obligations undertaken in this Convention, in particular 18 U.S.C. §§ 112, 878, 970, 1114, 1116, 1117, 1201 and 2332.

§ 8–9 TAKING OF HOSTAGES (1979)

UN Convention Against the Taking of Hostages (the "Hostage Taking Convention"), Dec. 17, 1979, 21931 UNTS 1316, TIAS 11081, 18 I.L.M. 1456. The text of the Convention is available at *https://treaties.un.org/doc/db/terrorism/english-18-5.pdf*. As of December 2018, 176 States had ratified or acceded to this convention.

Article 1 provides that anyone who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage" commits the offense of hostage taking. Attempts and participating as an accomplice are also covered. Contracting States must make the offenses punishable by penalties that take into account their "grave nature."

Note that the Convention requires a specific *mens rea*. The Convention does not apply to acts committed during periods of armed conflict covered by the 1949 Geneva Conventions of 1949 or their two Protocols Additional. Nor does it apply in an entirely domestic situation, that is, where offense is committed within a single State, both the hostage and the perpetrator are nationals of that State, and the alleged offender is found in the territory of that State. Art. 13.

State Parties are required to take all appropriate measures to "ease the situation of the hostage, in particular, to secure his release. . . ." In addition, States must cooperate in the prevention as well as the prosecution of covered offenses.

This Convention takes a narrow approach in other respects. A State has jurisdiction only if the offense was committed in its territory, by any of its nationals, or if a hostage is that State's national. The obligation to prosecute applies only to alleged offenders "present in its territory." If a State has custody of a person, it must either extradite the person or conduct criminal proceedings against him. The offense shall be considered extraditable under existing treaties between States Parties, but the individual need not be extradited when the requested State believes the request is for the purpose of "prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin, or political opinion" or the "person's position may be prejudiced" for one of those reasons. Arts. 9 and 10.

*U.S. Legislation***.** The Convention is mainly implemented by the Hostage Taking Act, 18 U.S.C. § 1203.

§ 8–10 PHYSICAL PROTECTION OF NUCLEAR MATERIAL (1980)

The Convention on the Physical Protection of Nuclear Material (the "Nuclear Materials Convention"), March 3, 1980, 1456 UNTS 101, TIAS 11080; 18 I.L.M. 1419, text available at *http://www.iaea.org/Publications/Documents/Conventions/cppnm.html*. The treaty was amended in 2005. As of June 2018, 157 States were party to this convention.

The Convention calls for States Parties to take various steps to ensure that nuclear material is protected at prescribed levels during international and domestic transport. They agree not to export or import nuclear material unless they have received assurances that such material will be sufficiently protected during transport. Article 5 identifies various levels of cooperation that State must undertake, including if there is a robbery or theft of nuclear material.

The treaty requires States Parties to criminalize the intentional commission of "an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal

or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property" as well as the theft or robbery of nuclear material, embezzlement or fraudulent obtaining of nuclear material, an act "constituting a demand for nuclear material by threat or use of force or by any other form of intimidation."

A State Party must take measures to establish its jurisdiction to prosecute when a covered offense is committed in its territory or on board a State-registered ship or aircraft, or when the offender is a State national. The offense is extraditable but if the State does not extradite the person, the case must be submitted to its "competent authorities for the purpose of prosecution." States Parties must afford each other "the greatest measure of assistance in connection with criminal proceedings" brought under the Convention, including providing evidence at their disposal necessary for the proceedings.

*U.S. Legislation***.** The Convention was implemented by the Convention on the Physical Protection of Nuclear Materials Implementation Act of 1982, Pub. L. No. 97-351. *See* 18 U.S.C. § 831.

§ 8–11 MARITIME TERRORISM (1988)

The UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "SUA" or "IMO Maritime Terrorism" Convention), Mar. 10, 1988, 1678 UNTS 201, TIAS 11080, text at *http://www.imo.org/en/about/conventions/listofconventions/pages/sua-treaties.aspx.* As the end of 2018, it had 174 States Parties.

This Convention was adopted in the wake of the hijacking of the Italian cruise ship *Achille Lauro* to address the need for international cooperation in devising and adopting practical, effective measures to prevent "all unlawful acts" against the safety of maritime navigation. The Convention criminalizes any act to seize or exercise control over a ship by force or threat, act of violence against a person on board a ship that is likely to endanger the safe navigation of the ship, or act that destroys or damages a ship in manner that is likely to endanger the safe navigation of that ship.

The Convention applies to ships that are "navigating . . . through or from waters beyond the outer limit" of the State's territorial sea. However, it does not cover warships or vessels owned, operated or used as naval auxiliaries, or for customs, police or other non-commercial purposes.

States Parties agree to punish covered acts by penalties reflecting the "grave nature" of the offenses. A State Party must have jurisdiction when the offense is committed against or on board a ship flying its flag, in its territory or by its national. Jurisdiction may also be established over incidents in which the State's national is seized, threatened, injured or killed during the commission of a covered offense, or when the offense is "committed in an attempt to compel that State to do or abstain from doing any act."

States must take custody of alleged offenders found within their territory and notify other interested States. The offenses are extraditable and deemed included in existing extradition treaties. If the State does not extradite the accused individual, it must submit the case to its authorities for prosecution.

States must afford one another the "greatest measure of assistance" in connection with criminal proceedings, including the provision of relevant evidence. They must also take "all practicable measures to prevent preparations in their respective territories for the commission" of offenses within or outside their territories. The Convention explicitly states that it does not affect rule of international law "pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag."

***Fixed Platforms Protocol*.** In conjunction with this Convention, an optional protocol was also adopted to extend relevant obligations to acts against "fixed platforms" attached to the seabed floor. The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 U.N.T.S. 304, text available at *https://www.state.gov/t/isn/trty/81728.htm*. *As* 2018 the Protocol had 156 States Parties.

It applies to acts by which individuals seize or exercise control over a fixed platform "by force or threat thereof or any other form of intimidation" or perform an act of violence against a person on board a fixed platform "if that act is likely to endanger its safety." A "fixed platform" is defined as an "artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources."

States Parties must establish jurisdiction over offenses committed against or on board fixed platforms located on their continental shelf or when committed by their nationals. They may do so when the offense is committed in an attempt to compel them to do or abstain from doing any act, or when their national is seized, threatened injured or killed during the commission of the offense. The offenses are extraditable, and States Parties automatically assume an "extradite or prosecute" obligation.

***2005 Protocol*.** The 1988 Convention was amended in 2005 by means of a protocol, which made several changes. The text of the 2005 protocol is available at: *http://oceansbeyondpiracy.org/sites/default/files/SUA_Convention_and_Protocol.pdf.*

First, new article 3*bis* added a new offense which (among others) covers situations in which individuals use or transport explosive, radioactive or biological materials or weapons for purposes of intimidating a population, compelling a Government or an international organization to do or to abstain from any act, or causes death, serious injury or damage. Second, new article 8*bis* addresses obligations of co-operation and specific procedures to be followed in situations when a State Party has "reasonable grounds" to suspect that a ship flying another State's flag (or individuals on board) might be involved in such an offense and it wants to board that ship.

U.S. Legislation. The 1988 Convention and its Fixed Platforms Protocol are implemented in U.S. law primarily through 18 U.S.C. §§ 2280 and 2281.

§ 8–12 TERRORIST BOMBINGS (1997)

The UN Convention for the Suppression of Terrorist Bombings (the "Terrorist Bombings Convention"), Dec. 15, 1997, 2149 UNTS 256, 37 I.L.M. 249, text available at *http://treaties.un.org/doc/db/ Terrorism/english-18-9.pdf*. As of December, 2018, 170 States had ratified or acceded.

This Convention was prompted by various events during 1995 and 1996, including the "sarin" poison gas attacks in Tokyo subways, the bombing attacks by HAMAS in Tel Aviv and Jerusalem, the bombing attack by the IRA in Manchester, England, and the infamous Al-Khobar Towers bombing in Saudi Arabia that killed a large number of U.S. military personnel.

The Convention requires States Parties to criminalize the unlawful and intentional offense of delivering, placing, discharging or detonating an explosive or other lethal device in a public place, government facility, public transportation system or infrastructure facility with the intent of causing death, serious injury, or extensive destruction. It also covers acts by accomplices or organizers of an offense.

A State Party has jurisdiction over covered offenses committed in its territory, on board its

flagged vessels or registered aircraft, or by its nationals. It may establish jurisdiction when the offenses are committed against its national, against a State or government facility abroad (including an embassy or other diplomatic or consular premises) or in an attempt to compel it to do or abstain from doing an act. It may also do so with respect to offenses committed on board an aircraft operated by the government of that State.

However, much like the Hostage-Taking Convention, the Terrorist Bombing Convention does not apply when the offense is committed within a single State, both the offender and the victim(s) are nationals of that State, the alleged offender is found in that State, and no other State has jurisdiction under the provisions described above.

Covered offenses are extraditable, and States Parties must establish "extradite or prosecute" jurisdiction. They are required to provide the "greatest measure of assistance" in connection with criminal or extradition proceedings related to covered offenses. The offenses are extraditable and may not be considered political offenses or offenses connected with or inspired by political offenses. However, States Parties may not refuse requests they consider made for the purpose of prosecution or punishment "on account of that person's race, religion, nationality, ethnic origin or political opinion" or if compliance would cause "prejudice to that person's position" on account of any of those factors.

*U.S. Legislation***.** *See* the Terrorist Bombing Convention Implementation Act, codified at 18 U.S.C. § 2332f.

§ 8–13 FINANCING OF TERRORISM (1999)

The International Convention for the Suppression of the Financing of Terrorism (the "ICAO Terrorist Financing Convention"), Dec. 9, 1999, 2178 U.N.T.S. 197, T.I.A.S. 13075, 39 I.L.M. 270, text available at *http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf*. As of December 2018, 188 States were party.

The Convention provides that a person commits an offense when he or she "by any means, directly or indirectly, unlawfully and willfully, provides or collects funds" intending or knowing they should or would be used to carry out offenses under nine multilateral treaties (listed in an annex to the treaty) or "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 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."

Each State Party must adopt domestic legislation making these offenses criminal and punishable by penalties taking into account their "grave nature." States must also adopt legislation to permit holding a "legal entity" located in its territory or organized under its laws liable when a person responsible for that entity's management or control commits a covered offense.

A State Party must establish jurisdiction over covered offenses committed in its territory, on board its flagged vessels or registered aircraft, or by its nationals. It may do so for offenses directed towards or resulting in the carrying out of an offense in its territory, against its nationals, or against a State or government facility of that State abroad, including its diplomatic or consular premises, or committed in an attempt to compel it to do or abstain from doing any act, or when the offense is committed on board an aircraft operated by the government of that State.

This Convention does not apply, however, when the offense is committed within a single State, the alleged offender is a national of that State and is present in its territory, and no other State has jurisdiction (subject to some exceptions).

States Parties assume obligations regarding the identification, detection and freezing or

seizure and forfeiture of funds used for the purpose of committing covered offenses. These offenses are deemed extraditable and included in extradition treaties between States Parties. If a State with custody of an alleged offender does not extradite that offender, it must submit the case "without undue delay" for prosecution. States Parties must afford each other "the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings" for covered offenses, including assistance in obtaining evidence necessary for the proceedings.

States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy, and none of the covered offenses can be regarded for the purposes of extradition or mutual legal assistance as a "fiscal offense" or as a political offense, an offense connected with a political offense, or an offense inspired by political motives. However, a State Party may refuse such requests when it considers them made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons. Moreover, information or evidence furnished by one State Party to another can be used for investigations, prosecutions or proceedings other than those stated in the original request without that State's prior consent.

*U.S. Legislation***.** *See* the Suppression of Financing of Terrorism Convention Implementation Act (2002), codified at 18 U.S.C. § 2339C.

§ 8–14 NUCLEAR TERRORISM (2005)

International Convention for the Suppression of Acts of Nuclear Terrorism (the "Nuclear Terrorism Convention"), April 13, 2005, 2445 UNTS 89, text available at *https://treaties.un.org/doc/db/terrorism/english-18-15.pdf.* As of December, 2018 it had 114 state parties. The United States has ratified this Convention in September 2015.

This Convention was a response to the possibility that nuclear or radioactive material might fall into the hands of terrorists. It requires States Parties to criminalize a broad range of activities involving nuclear material, including possessing radioactive material or making or possessing a device with the intent to cause death or substantial damage to property or the environment or to compel a persons, State or international organization to do or abstain from doing an act. It also covers related offenses such as threatening, demanding, organizing or directing, acting as an accomplice or otherwise contributing to a covered offense.

It does not cover activities of armed forces during an armed conflict, nor can the Convention be "interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States."

States Parties must establish jurisdiction over covered offenses when committed in their territory, on board their flagged vessels or registered aircraft, or by their nationals. They may also establish jurisdiction when the offense is committed against their nationals, against their facilities abroad (including embassies or other diplomatic or consular premises), in an attempt to compel them to do or abstain from doing any act, or on board a government-operated aircraft. They must also establish "extradite or prosecute" jurisdiction.

Covered offenses are deemed extraditable and included in existing extradition treaties. States Parties must afford each other "the greatest measure of assistance in connection with investigations or criminal or extradition proceedings" in respect of covered offenses. For purposes of extradition and mutual legal assistance, none of the covered offenses can be regarded as a political offense, an offense connected with a political offense, or an offense inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance may not be refused

on such grounds.

On the other hand, the Convention cannot be interpreted as imposing an obligation to extradite or provide mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition or mutual legal assistance has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

The Convention does not apply to purely domestic situations, that is, where the offense is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in that State's territory, and no other State has a prescribed jurisdictional basis.

Interestingly, the Convention requires States Parties to adopt measures to ensure that criminal acts within its scope, "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons," are not justifiable "by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."

States Parties must cooperate by taking all practicable measures, including working to "prevent counter preparations in their respective territories for the commission . . . of the offences." The Convention also calls on States to work to ensure the protection of radioactive material.

*U.S. Legislation***.** *See* USA Freedom Act of 2015, Pub. L. No. 114-23, §§ 811-12, 129 Stat. 268, 309-13 (2015), codified at 18 U.S.C. §2332i.

§ 8–15 REGIONAL TERRORISM CONVENTIONS

In addition to the multilateral conventions listed above, a number of treaties have been adopted at the regional level to address issues of terrorism. They include:

a. The Arab Convention on the Suppression of Terrorism, April 22, 1998, text available at *http://www.unodc.org/images/tldb-f/conv_arab_terrorism.en.pdf*.

b. The Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, text available at *https://www.refworld.org/docid/3de5e6646.html*.

c. Council of Europe Convention on the Suppression of Terrorism, Jan. 27, 1977, text available at *http://conventions.coe.int/Treaty/en/Treaties/Word/090.doc.*

d. OAS Convention to Prevent and Punish Acts of Terrorism, Feb. 2, 1971, text available at *http://www.oas.org/juridico/english/treaties/ a-49.html*.

e. OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, text available at *http://treaties.un.org/doc/db/Terrorism/OAU- english.pdf.*

f. South Asian Association for Regional Cooperation (SAARC), Convention on

Suppression of Terrorism, Nov. 4, 1987, text available at *http://treaties.un.org/doc/db/ Terrorism/Conv18-english.pdf.*

g. Commonwealth of Independent States Treaty on Cooperation in Combating Terrorism, June 4, 1999, text available at *http://treaties.un.org/doc/db/ Terrorism/csi-english.pdf.*

For an overall look at regional counter-terrorism conventions and agreements in the European area, refer to the Organization for Security and Co-operation in Europe document entitled "Status of the Universal Anti-Terrorism Conventions and Protocols as well as other International and Regional Legal Instruments related to Terrorism and Co-operation in Criminal Matters in the OSCE Area" (July 2018), available at *https://www.osce.org/atu/17138?download=true.*

IV. TERRORISM IN AMERICAN LAW

Most of the international conventions listed above have been implemented in U.S. law by appropriate legislation. In enacting these provisions, Congress has relied *inter alia* on its constitutional authority over interstate and foreign commerce and to "define and punish Piracies and Felonies committed on High Seas and Offences against Law of Nations."

A number of definitions of terrorism can be found in U.S. law, adopted at different times and for different purposes. One such provision is found in the statute that requires the Secretary of State to submit annual "country reports" on terrorism to Congress. For this purpose, the term "international terrorism" means terrorism involving citizens or the territory of more than one country; (2) the term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; and (3) the term "terrorist group" means any group practicing, or which has significant subgroups which practice, international terrorism. *See* 22 U.S.C. § 2656f(d). Those annual country reports can be accessed at *http://www.state.gov/j/ct/rls/crt/.*

For purposes of criminal prosecution, terrorism is mainly addressed in Chapter 113B of Title 18 of the U.S. Code. In 18 U.S.C. § 2331(1), "international terrorism" is defined to include activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are

> accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

The list of crimes addressed in this chapter is extensive. A number of provisions address crimes based on international conventions to which the United States is a party, such as attacks against internationally protected persons, terrorist bombings, and terrorist financing. Others deal with weapons of mass destruction, transnational terrorism, use of missile systems against aircraft, radiological dispersal devices, and other "acts of terrorism transcending national boundaries."

Three particular aspects of this statute deserve note. The first is that § 2333 provides for civil actions against terrorists over whom personal jurisdiction may be exercised (it is unusual in U.S. practice to find a civil remedy included in a criminal statute). This provision is commonly referred to at the Anti-Terrorism Act (or "ATA") and it provides for a private right of action for treble damages to any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism." 18 U.S.C. § 2333(a). It also provides for treble damages and that a criminal conviction can act as a bar to the denial of allegations related to the substance of the criminal prosecution in a civil suit. 18 U.S.C. § 2333(b).

The second is an exemption from these civil suits for (1) the United States, an agency of the United States, or an officer or employee of the United States or any agency thereof acting within his or her official capacity or under color of legal authority; and for (2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority. 18 U.S.C. § 2337. This provision maintains sovereign immunity (both domestic and foreign) with regard to ATA suits.

Third, this statute include a range of offenses not (yet) addressed by international law, including for example harboring or concealing terrorists (§ 2339), providing material support to terrorists (§ 2339(A)) or to foreign terrorist organizations (§ 2339(B)), and receiving military training from foreign terrorist organizations (§ 2339(D)). From a prosecutorial perspective, these provisions can be critical, since they permit prosecution of the activities that precede actual/executed terrorist acts.

The same can be said, of course, about the benefits of being able to prosecute intending terrorists under the conspiracy provisions of Chapter 113B or under the "racketeering influenced corrupt organization" ("RICO") statute, see 18 U.S.C. §§ 1961–1968.

U.S. law also authorizes the imposition of various economic and other sanctions against State sponsors of terrorism, foreign terrorist organizations, and individuals who provide support to terrorists. Currently Cuba, Iran, Syria and Sudan are on the "State sponsors" list designated by the Secretary of State under section 6(j) of the Export Administration Act, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act.

§ 8–16 FURTHER READING

Anna Marie Brennan, TRANSNATIONAL TERRORIST GROUPS AND INTERNATIONAL CRIMINAL LAW (Routledge Research in International Law 2018); John-Mark Iyi, Hennie Strydom, eds., BOKO HARAM AND INTERNATIONAL LAW (Springer 2018); Stella Margariti, DEFINING INTERNATIONAL TERRORISM: BETWEEN STATE SOVEREIGNTY AND COSMOPOLITANISM (Asser 2017); Katja L.H. Samuel and Nigel D. White, COUNTER-TERRORISM AND INTERNATIONAL LAW (The International Law of Peace and Security, Routledge 2017); Ben Saul, RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM (Elgar Reprint ed. 2016); Harold Hongju Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation," 50 Tex. Int'l L.J. 661 (2016).