

XIV

The Limits of Coalition Cooperation in the War on Terrorism

Ivan Shearer¹

The Wide Range of Issues

The events of September 11, 2001 revealed deep and widespread feelings of revulsion, even in unlikely quarters, against the indiscriminate use of violence to achieve political ends. National leaders throughout the world condemned the terrorist attacks in the United States and expressed their solidarity with the American government and people. The world's press and other media were equally condemnatory. The reaction of the United Nations was swift: resolutions of broad reach and specific content were passed directing measures to be taken by all states to suppress terrorism and to cooperate in bringing terrorists to justice.²

The military operations carried out by the United States and a number of its allies in Afghanistan were not specifically authorized by the United Nations Security Council. Although justifiable as an exercise of the right of self-defense, recognized by Article 51 of the Charter of the United Nations, the failure of the United States to seek such authorization retrospectively, as

1. Ivan Shearer is the Challis Professor of International Law, University of Sydney, Australia

2. See, e.g., S. C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/1368/(2001); S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001); S. C. Res. 1377, U.N. SCOR, 56th Sess., U.N. Doc. S/1377/(2001).

envisaged by Article 51, raises both political and legal questions. This paper will not, however, be concerned with these issues—the *jus ad bellum*—since they are dealt with elsewhere in this publication.³ Moreover, it is perhaps less probable that the future war against terrorism will be conducted in circumstances where a state has admitted its responsibility for harboring terrorists and has refused to take effective measures against them. As a consequence, traditional *jus in bello* issues will not frequently arise in the familiar context of battlefield conditions, such as in Afghanistan, where operations were conducted against regular forces as well as terrorists, but may call for application, if at all, rather by way of analogy.

The issues most likely to arise are those relating to the cooperation between states in the early warning, hunting down, and bringing to justice of terrorists. There is unlikely to be a clearly delineated battlefield where terrorists conduct open armed operations or hide in caves. Their shadowy operations will be directed under the cover of apparently innocuous business or other entities located in unsuspecting host countries. They will move easily between countries on valid or false documents. Financial transactions will take place under seemingly innocent cover, or through informal means. Intelligence and communications networks will operate using freely available public facilities.

Since there is nearly universal recognition of the threat to international peace and security posed by terrorists and of the need for cooperation in their suppression, it follows that an effective response must lie in the hands of the many nations comprising the international community. That response must be multilateral and multilayered. It must not be left entirely to the states directly affected by terrorism, still less to the most powerful among them, above all the United States. There must be a coalition of states. This coalition will no doubt consist of an inner circle of closely allied states, and a perimeter of others, more loosely—or not at all—allied, which acknowledge the dangers to themselves of failing to cooperate to meet the global challenge of terrorism. Differences in their policies, laws, human and material resources, and in the efficiency of the exercise of their governmental powers, will call for consideration. Whether these differences constitute impediments to the effectiveness of the war against terrorism, and thus call for elimination, or whether they constitute legitimate constraints or sensitivities, and thus call for respect, is the topic of this paper.

It is taken as a given that international law is an integral part of the planning process in any actions against terrorists and that it constitutes the only

3. See Chapters VIII-XIII *supra*.

yardstick the world has against which to measure the legitimacy of the actions taken. There is a tendency in some quarters to see international law as an undue restraining factor to be set aside in times of crisis.⁴ Not only does this attitude strike at the heart of civilized values; it ignores the very real opportunities afforded by the concessive rules of international law to allow effective action to be taken against terrorists in a principled fashion which upholds world public order.

Particular reference will be made in this paper to the laws and policies of Australia, as an example of a close ally of the United States and a coalition partner in the war against terrorism.

National Laws With Respect To Terrorism

In the absence of a universally accepted definition of terrorism, states are presently free to adopt their own definitions for the purposes of their domestic law. Many have no defined crime of terrorism, as such, in their laws, but all have laws respecting most of the constituent elements of terrorism, such as murder, manslaughter, violence against the person, criminal damage to property, and threats and conspiracies to commit crimes of violence.

In enacting anti-terrorism laws, states will generally note the definitions of terrorism contained in international conventions to which they are parties or to agreed definitions adopted by authoritative international bodies. Unfortunately, a universal definition of terrorism has proved to be difficult to achieve as witnessed by the lack of consensus found in the attempted definition in the Draft International Convention on Terrorism, presently before the United Nations.⁵ The core definition of the crime in that draft is, however, not in doubt as Article 2 of the Draft Convention provides:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) death or serious bodily injury to any person; or

4. Former Australian Permanent Representative to the UN and head of the UN Special Commission on Disarmament in Iraq Ambassador Richard Butler, quoted US Undersecretary of State John Bolton, as having said in 2000 when discussing the International Criminal Court that "[t]here is no such thing as international law, only national sovereignty." Richard Butler, *The supine leading the blind*, THE AUSTRALIAN, June 14, 2002 at 13.

5. See Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U.N. GAOR, 57th Sess., Supp. No. 37, U.N. Doc A/57/33.(2002), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/248/17/PDF/N0224817.pdf?OpenElement> [Jan. 11, 2003] [hereinafter Draft International Convention on Terrorism].

(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,

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.⁶

The difficulty that has arisen, and that so far remains to be resolved through continuing negotiations, concerns the qualifying provisions of draft article 18 of this convention. In one version, that article would exempt from categorization as terrorism the activities of armed forces during armed conflict governed by international humanitarian law, and in the other version, proposed by the Member States of the Organization of the Islamic Conference, would exempt the activities of the parties to an armed conflict, "including in situations of foreign occupation."⁷ The basis of the disagreement in the continuing conflict between Israel and the Palestinians is obvious.

Both the United Kingdom⁸ and Australia⁹ have already adopted a domestic law definition of terrorism with the Australian definition largely following the UK model. It requires as an element of the offense that the act be committed "for the purpose of advancing a political, religious or ideological cause." It also excludes from the definition acts that consist of advocacy, protest, dissent or labor disputes.

For the purposes of domestic law, an internationally accepted definition of terrorism, if and when it eventuates, will be of crucial importance. In the constitutional systems of some states, the definition in the Convention will operate directly as domestic law upon its ratification and promulgation by the state parties. In other constitutional systems, especially those of the English common law inheritance such as Australia, Canada, and the United Kingdom, the

6. *Id.* at art. 2. Note that the precise definitions of the property and institutions mentioned in Article 2, paragraphs 1(b) and 1(c) are contained in Article 1 of the Draft Convention.

7. *Id.* at art. 18.

8. See Anti-terrorism, Crime and Security Act, 2001, c. 11 § 1 (UK). The version of this Act printed in CURRENT LAW STATUTES, 2000 (Sweet & Maxwell eds., 2000) contains annotations which trace the history of the definition from the troubles in Northern Ireland, from the Diplock and Lloyd Commissions, to the present.

9. See Criminal Code Act, c. 1, pt. 5.3 d. 100 (Austl.).

Convention definition will require adoption and incorporation by statute, and possibly also adaptation to meet local circumstances.

In the meantime, in many countries, new laws are being introduced or drafted in order to give the police, or intelligence agencies, increased powers to detain and question not only those suspected of terrorism but also those who may be thought to have relevant information. Bills currently before the Australian Parliament, for example, would give to the Australian Security and Intelligence Organization (ASIO), an organization not previously invested with coercive powers, the power to obtain a warrant to secretly detain persons suspected of terrorism or those thought to possess information about terrorists.¹⁰ It is also proposed that the Attorney-General be given power to proscribe certain organizations.¹¹ Members and supporters of those organizations could be jailed for up to 25 years.

The definition of terrorism in domestic law, or the applicability under domestic law of other denominations of offense to terrorist acts, will have particular implications for jurisdiction and extradition.

Jurisdiction

International law recognizes the jurisdiction of states to prescribe and enforce their criminal laws subject to certain conditions.¹² The very wide power to prescribe laws, seemingly allowed by the Permanent Court of International Justice in the *Case of the S.S. Lotus* (1927),¹³ must now be regarded as somewhat narrower in extent, especially since the decision of the present International Court of Justice in the *Case of the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) (2002).¹⁴ It must now be regarded as essential to prescriptive jurisdiction that there be some nexus or linking point between the legislating state and the reprehended activity that is supported by the positive

10. The Australian Security and Intelligence Organization Legislation Amendment (Terrorism) Bill after passing both the Australian House and Senate was not approved by Prime Minister John Howard. The Bill will be reconsidered in the 2003 Parliament. See Paul Sheehan, *PM's Doubled-dissolution Trigger Finger must be Itching over ASIO Bill*, SYDNEY MORNING HERALD, Dec. 16, 2002, at 13.

11. See Security Legislation Amendment (Terrorism) Bill, No 65, 2002 (Austl.).

12. See generally A.L.I. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432, at pgs. 232, 235–238 (1987).

13. *S.S. Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sep. 7, 1927).

14. See *Case of the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), 41 I.L.M. 536 (2002), available at http://www.lawschool.cornell.edu/library/cijwww/icjwww/ipresscom/ipress2002/ipresscom2002-04_cobe_20020214.htm (Jan. 10, 2002).

practice of other states.¹⁵ In any event, the power to enforce validly prescribed laws is dependent upon physical custody of the offender or upon the availability of extradition from another state having custody.

States have jurisdiction to prescribe the applicability of their criminal laws upon the following generally recognized bases:

(a) The territorial basis of jurisdiction. States have jurisdiction to prescribe laws governing activities occurring in their territory, or in places assimilated to their territory, such as ships and aircraft of their nationality. It is an accepted extension of this basis of jurisdiction that states also have jurisdiction over offenses, elements of which occur outside their territory but which are completed, or have effect, or are intended to have effect, within it.¹⁶

(b) The nationality basis of jurisdiction. States have jurisdiction to prescribe laws governing the activities of their citizens wherever they occur. Whether states are also justified in international law in asserting jurisdiction over those who commit offenses *against* their citizens (the “passive nationality” basis of jurisdiction) is disputable. State practice in the matter is not uniform.¹⁷

(c) The protective principle of jurisdiction. States have jurisdiction to prescribe laws governing the activities of those who would assault its existence or damage its essential interests.¹⁸ Accepted examples include planning an invasion of the territory or the overthrow of its government, counterfeiting its currency, and breaching the fiscal, immigration, sanitary and customs laws applicable against inbound vessels in the contiguous zone under the international law of the sea. Extensions, however, to interests that are not shared by the international community, such as the protection of the national religion through blasphemy laws, or the reputation of national rulers (“slander against the state”) will not be widely recognized.

(d) The universality principle of jurisdiction. States have jurisdiction to prescribe laws that correspond to offenses regarded by international law as

15. See, e.g., *Israel v. Adolf Eichmann*, 36 I.L.R. Rep. 5 (D.C. Jm., 1961) [hereinafter *Eichmann*].

16. See *Liangsiriprasert v. US*, [1991] 1 A.C. 225 (P.C.).

17. United States law recognizes this basis of jurisdiction for certain purposes, e.g., hostage-taking. See, e.g., *Hostage Taking Act* § 2001, 18 U.S.C. § 1203 (2002). On a more comprehensive basis a Bill has been introduced into the Australian Parliament: *The Criminal Code Amendment*. This bill has now been enacted as Division 104 of the *Criminal Code Act, 1995*, available at [http://search.aph.gov.au/search/ParlInfo.ASP?action=browse&Path=Legislation/Current+Bills+by+Title/Criminal+Code+Amendment+\(Offences+Against+Australians\)+Bill+2002&Start=3&iGD#top](http://search.aph.gov.au/search/ParlInfo.ASP?action=browse&Path=Legislation/Current+Bills+by+Title/Criminal+Code+Amendment+(Offences+Against+Australians)+Bill+2002&Start=3&iGD#top) (Jan. 10, 2003).

18. See *Eichmann*, *supra* note 15, at 5.

crimes by the law of nations. The historic instance is piracy. Beyond that there is doubt, because of the difficulty in establishing whether definitions have crystallized as customary international law. Strong candidates for inclusion in the category, however, are slavery, crimes against humanity, genocide, planning and conducting a war of aggression, and war crimes.

Instead of leaving the development of crimes against international law, and the concomitant universality of jurisdiction over them, to the evolutionary processes of customary law, the trend since 1948 has been to define offenses against international law in international conventions. There are a large number of these.¹⁹ The jurisdiction prescribed by these conventions is not truly universal in the sense that any state may prosecute, as in the case of piracy. Instead they prescribe a variety of jurisdictional bases for prosecution and a duty on the state actually having custody of the offender to either prosecute the offender itself or extradite to another state having jurisdiction on one of the bases set out. This duty is described as *aut dedere aut judicare* (*punire*) (the duty to extradite or to prosecute). It might therefore be described as a “quasi-universality” basis of jurisdiction, because there must be a linking point between the offense and the prosecuting state, even though that might merely be the fortuitous presence of the offender in the territory of the state that first finds and detains the offender.

Note that many of the above conventions incorporating the *aut dedere aut judicare* formula are related to particular forms of terrorism. The latest of these, the International Convention for the Suppression of Terrorist Bombings, 1998, incorporates the same formula.²⁰

The Draft Comprehensive International Convention on Terrorism, under negotiation in the United Nations, also incorporates the *aut dedere aut judicare*

19. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC IV]; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641 (1971); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027, and in 24 I.L.M. 535 (entry into force for United States on Nov. 20, 1994)

20. See International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164 (Dec. 15, 1997), 37 I.L.M. 249 (1998) (ratified by the United States on Jun. 26, 2002) [hereinafter Terrorist Bombings Convention].

principle.²¹ In addition to the states whose jurisdiction must be assured pursuant to the Convention—the territorial state, the state of nationality of a vessel or aircraft affected, and the state of nationality of the offender—the following optional bases of national jurisdiction are also prescribed:

- (a) The offence is committed by a stateless person who has his or her habitual residence in the territory of that state; or
- (b) The offence is committed wholly or partially outside its territory, if the effects of the conduct or its intended effects constitute or result in, within its territory, the commission of an offence set forth in article 2;
- (c) The offence is committed against a national of that state; or
- (d) The offence is committed against a state or government facility of that state abroad, including an embassy or other diplomatic or consular premises of that state; or
- (e) The offence is committed in an attempt to compel that state to do or to abstain from doing any act; or
- (f) The offence is committed on board an aircraft which is operated by the government of that state.²²

The Relevance of International Norms of Human Rights

In the treatment of suspected terrorists after their detention, states are bound by the international norms of human rights. The provisions of the Universal Declaration of Human Rights, 1948 are regarded as declaratory of generally binding international law, as are—for the greater part—the provisions of the International Covenant on Civil and Political Rights of 1966. The United States and 147 other states are parties to the latter instrument and are thus bound by it also as a treaty instrument.²³

The following provisions of the Universal Declaration are especially relevant to the treatment of suspected terrorists:

21. See Draft International Convention on Terrorism, *supra* note 5, at art. 11.

22. *Id.*, art. 6(2).

23. See Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights]; International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 1991 U.N.T.S. 171 (entered into force Mar. 23, 1976, ratified by the United States on June 8, 1992) [hereinafter ICCPR].

Article 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²⁴

Article 9. "No one shall be subjected to arbitrary arrest, detention or exile."²⁵

Article 10. "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."²⁶

Article 11. "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."²⁷

These provisions are confirmed and expanded in articles 7, 9, and 14 of the International Covenant on Civil and Political Rights.²⁸

Do these provisions impose extraterritorial obligations on states? Article 2 (1) of the Covenant obliges each state party to respect and to ensure the rights recognized in the Covenant "to all individuals within its territory and subject to its jurisdiction." Is the word "and" to be read conjunctively or disjunctively? The latter appears to be the preferred reading. The Human Rights Committee established under the Covenant, has determined that this article "does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the government of that state or in opposition to it."²⁹ The Committee has also had occasion to address the same point in its observations on Belgium's periodic report:

The Committee is concerned about the behaviour of Belgian soldiers in Somalia under the aegis of the United Nations Operation in Somalia (UNOSOM II), and acknowledges that the State Party has recognized the applicability of the

24. See Universal Declaration of Human Rights, *supra* note 23, art. 5.

25. *Id.* at art. 9.

26. *Id.* at art. 10.

27. *Id.* at art. 11.

28. See ICCPR, *supra* note 23, arts. 7, 9, 14.

29. See Sergio Ruben Lopez Burgos v. Uruguay, Comm. no. 12/52, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 176, U.N. Doc. A/36/40 (1981); *digested in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (S. Joseph et al. eds., 2000), at 59–60 [hereinafter INTERNATIONAL COVENANT]. As noted by these authors, the separate reasoning in this case of Committee Member Christian Tomuschat is most persuasive. A similar conclusion was reached by the Human Rights Committee in the case of Celiberti de Casariego v. Uruguay. See Comm' No. R. 13/56, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (1981).

Covenant in this respect and opened 270 files for the purposes of investigation.³⁰

It would thus appear to be the case that states, in their operations against terrorists, cannot avoid their obligations under international human rights law by detaining suspects in offshore facilities. “Jurisdiction” means effectively “within the power of.” In battlefield conditions, where it is not immediately obvious who are lawful combatants and who are criminals, the law of the Geneva Conventions, 1949, must obviously apply as a *lex specialis*. But in cases not covered by the Geneva Conventions, international human rights law applies.

It may be argued that the international norms of human rights apply only in normal circumstances and not in relation to terrorists, whose very aim is the violation of the human rights of others and the destruction of institutions—in many cases, transparent and democratically accountable institutions. The Covenant recognizes this by the inclusion, in Article 4, of a right of derogation, but in strictly limited circumstances. Article 4 states:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.³¹

30. See Human Rights Committee, 64th Sess., Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.99 available at <http://www.hri.ca/fortherecord1998/documentation/tbodies/ccpr-c-79-add99.htm> (Jan. 11, 2003); reprinted in INTERNATIONAL COVENANT, *supra* note 29, at 62.

31. See ICCPR, *supra* note 23, art. 4.

The provisions of Article 4 have been the subject of considerable elaboration and interpretation. The Human Rights Committee itself issued a General Comment on the article in 2001;³² in 1984 the International Law Association adopted the Paris Minimum Standards of Human Rights Norms in a State of Emergency;³³ and, in 1985 a group of experts in international law adopted the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.³⁴ Common to these formulations is the invocation of the principle of proportionality of the measures in derogation, and the requirement that they be withdrawn as soon as the emergency has passed.

It will be seen that the threshold of justification is set high by the terms of paragraph 1. For countries such as the United States or Australia, there would be an understandable reluctance to declare a state of emergency, even after such catastrophic events as those of 11 September 2001, for fear of spreading panic in the community, or of appearing to confess the inability of the government to take effective measures against terrorists within the existing law. The danger should have manifested itself more widely and frequently to justify such a step.³⁵ Nevertheless, certain measures have been taken in relation to suspected terrorists arrested in the United States, and those detained in Afghanistan and other places, without a declaration so far of derogation under the Covenant. Special powers of arrest and detention in relation to suspected

32. See U.N. International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Addendum, General Comment No. 29, U.N. Doc. HRI/GEN/1/Rev.5/Add.1 (Apr. 18, 2002) available at http://www.unhcr.ch/pdf/Gen1rev5add1_E.pdf (Jan. 12, 2003).

33. See THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY (1984), reprinted in 79 AM. J. INT'L L. 1072 (1985).

34. See The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, arts. 29–32, reprinted in 7 HUMAN RIGHTS QUARTERLY 1 (1985).

35. The United Kingdom had availed itself in the past of the power of derogation under the Covenant, but only in respect of the territory of Northern Ireland, notwithstanding that sporadic terrorist acts were being committed elsewhere in the United Kingdom. On 18 December 2001, however, the United Kingdom gave notice of derogation for the whole of the United Kingdom by reason of a general public emergency following the events of September 11, 2001. The declaration referred to the enactment of the Anti-terrorism, Crime and Security Act, 2001, but was limited to a derogation from article 9 of the Covenant in relation to extended powers of arrest and detention of *foreign* nationals where there is an intention to deport. See Anti-terrorism, Crime and Security Act 2001, c. 24, 21–23 (Eng.) (detailing the new law of the United Kingdom for dealing with suspected international terrorists, through certification, deportation, and detention), available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm> (Jan. 12, 2003).

terrorists are currently being considered by the Australian Parliament.³⁶ There is a question therefore whether these measures are compatible with the Covenant, in the absence of a formal declaration of derogation.

Extradition of Terrorists

It has long been accepted that there is no duty in customary international law to grant extradition of accused or convicted criminals at the request of another state. A duty to extradite is imposed only by treaty. These treaties may be bilateral, or they may be contained in multilateral treaties, especially of the type described above in which the parties are bound to either extradite or prosecute (*aut dedere aut judicare*).

Existing extradition treaties, whether bilateral or multilateral, between many countries already cover in substance the offenses commonly regarded as pertaining to terrorism. There are gaps in that coverage, however, both geographically and substantively. For those countries whose power to grant extradition depends on the existence of an applicable treaty the treaty network may have become neglected or have fallen behind in its recognition of new types of offenses, such as terrorism. For those countries whose laws permit them to grant extradition without a treaty, on an ad hoc basis, and subject to a demonstration of criminality under the laws of both the requesting and the requested states (the rule of dual criminality), those laws may similarly have fallen behind current needs.

Two frequently encountered exceptions to extradition found in treaties and national laws are a prohibition of the extradition by a state of its own citizens, and the exception of politically motivated offenders.

The prohibition of extradition of citizens is a rule deeply entrenched in the legal systems of civil law countries. It derives from Roman Law and exchanges for the duty of obedience that the citizen owes to the state a duty of the state not to deliver up a citizen to a foreign jurisdiction. Countries of the common law tradition recognize no such restriction. In many extradition treaties between civil law and common law countries, therefore, the refusal to extradite citizens is made discretionary, so that the civil law position can be maintained while giving an opportunity to the common law country to refuse by way of reciprocity. The result is a mismatch. Civil law countries allow for prosecution of their own citizens for crimes committed anywhere in the world, as is recognized in international law by the nationality principle of jurisdiction. With few

36. See note 10 *supra* and accompanying text.

exceptions, the common law countries remain attached to the territorial principle of jurisdiction. This attachment goes back to the earliest days of the English common law and the institution of trial by jury; crime was local because it could be presented by a grand jury and judged by a petty jury, composed only of local citizens. The result can be that where a common law country refuses extradition of one of its citizens by way of reciprocity, there is no power to try the offender in the common law country, and a failure of justice may result.³⁷ There would appear to be no way around this difficulty. The non-extradition of citizens is a principle even embedded in the constitutions of some countries. It is unlikely that any international convention on terrorism would succeed in setting aside that principle. Perhaps only the United Nations Security Council could do so, as it did in relation to those charged with the Lockerbie incident.³⁸

The exception from extradition of political offenses and of persons who, if extradited, might suffer prejudice at their trial on account of their race, religion, nationality or political opinion is almost universally recognized in extradition treaties and national extradition laws.³⁹ Terrorism is an example par excellence of a politically motivated offense. As far back as the 19th century, doubts began to be voiced about protecting individuals from extradition who had committed indiscriminate or cruel crimes for a political motive. Anarchists were held to be outside the rule and therefore extraditable. Attempts to exclude the rule against the extradition of such individuals failed in the Hague (1970) and Montreal (1971) Conventions on hijacking and sabotage of aircraft, respectively. However, the European Convention on the Suppression of Terrorism, 1977, expressly set aside the rule⁴⁰ and the current Draft

37. IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 94–131 (1971) [hereinafter SHEARER].

38. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US; Libya v. UK) (Request for the Indication of Provisional Measures), 1992 I.C.J. 3. [hereinafter Lockerbie Case].

39. SHEARER, *supra* note 37, at 166–193.

40. See European Convention on the Suppression of Terrorism, Eur. T.S. No. 90 (Jan. 27, 1977), available at <http://conventions.coe.int> (Jan. 13, 2003). The Convention requires that none of the following offenses shall be regarded as political for the purposes of extradition: crimes under the international conventions regarding hijacking and sabotage of aircraft, hostage taking, attacks against internationally protected persons, or “an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons.” Attempts or complicity in the above offenses are also excluded. Optionally, under article 2, states parties may regard any act of violence against the person, or any act against property if the act created a collective danger to persons, as not qualifying as a political offense. *Id.*

Comprehensive Terrorism Convention, being considered by the United Nations, does so also.

Within some states, the domestic law may be in advance of what the conventions require, as is the case of Australia. The extradition laws of Australia exclude from the application of the political offense exception offenses established under the international conventions concerning the hijacking of aircraft, sabotage of aircraft, genocide, internationally protected persons, hostage taking, and torture.⁴¹ Regarding countries to which this provision is applied specifically by regulation, the exception may not be invoked in respect of the murder, kidnapping or attack on the person of a Head of State or Head of Government of a country, or the taking or endangering of life being an offense “committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons.”⁴² However, a general exception of terrorism from the category of political offenses in Australia’s extradition laws has not yet been effected.

It thus emerges that the non-extradition of citizens rule constitutes the greater continuing handicap to the surrender of a terrorist offender to a requesting state. The national state of the offender, not being the state where the act occurred or had its effects, is entitled to prosecute but might do so under evidentiary handicaps, or without diligence. That state might indeed be most reluctant to undertake the task of prosecution, where local sympathies lay with the offender, or where the state felt intimidated by the prospect of possible retaliation against itself by associates of the offender. In such cases, if the International Criminal Court were invested with jurisdiction over the offense, it would be a relief to be able to cede the case to that Court.

Resolution 1373 (2001), adopted unanimously by the United Nations Security Council on 28 September 2001, did not attempt to impose a duty of extradition as such, but laid down several important obligations ancillary to the extradition process. Paragraph 2 of the resolution, adopted under Chapter VII of the Charter and under the heading “Decides” (which triggers its binding effect for all Members of the UN, as prescribed in article 25 of the Charter of the UN), includes the following subparagraphs:

41. See Extradition Act, 1988, § 5 (Austl).

42. *Id.*

Decides also that all States shall . . .

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.⁴³

The phrase in subparagraph (e) “is brought to justice” seems to comprehend the *aut dedere aut judicare* principle without explicitly saying so. The injunction that domestic laws be enacted to make terrorist acts, as such, distinct offenses under national law serves as a necessary precondition to the full application of the dual criminality requirement of extradition law.

Paragraph three of the resolution, in which the Security Council “Calls upon all States to . . .”, is not binding under article 25 of the Charter, not being a decision, but is nonetheless a directive that has weight. Subparagraph (g) of this paragraph calls upon states to ensure that “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”⁴⁴ This relatively weak provision reflects the failure of previous efforts in multilateral conventions, such as the hijacking and sabotage of aircraft conventions, to exclude the political offense exception to extradition altogether. On the other hand, the political offense exception has been explicitly excluded in the International Convention for the Suppression of Terrorist Bombings (1998)⁴⁵ and in the current Draft Comprehensive International Convention on Terrorism.⁴⁶

Another aspect of extradition of terrorists is revealed by the case of three men accused of conspiracy with Osama bin Laden and the al Qaeda group to

43. See S. C. Res. 1373, *supra* note 2.

44. *Id.*

45. See Terrorist Bombing Convention, *supra* note 20, art. 11.

46. See Draft International Convention on Terrorism, *supra* note 5, art. 5, which provides that “[e]ach State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

commit the bombings of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. They were arrested in the United Kingdom and held for extradition to the United States. No point could have been taken that the offenses, being politically motivated, should have been excluded from extradition, because terrorism is expressly excepted from the category of political offenses for which extradition may not be given.⁴⁷ The point taken on behalf of the accused on appeal to the House of Lords was that the alleged crimes, having been committed in Kenya and Tanzania, were not committed “within the jurisdiction” of the United States, as required by the applicable bilateral treaty of extradition between the United Kingdom and the United States, and the UK Extradition Act, 1989. The House of Lords held unanimously that “jurisdiction” was a wide enough expression to comprehend extraterritorial jurisdiction of the kind asserted by both the United States and the United Kingdom in like cases.⁴⁸ Lord Hutton stated that:

[m]y principal reason for forming this opinion is that in the modern world of international terrorism and crime proper effect would not be given to the extradition procedures agreed upon between states if a person accused in a requesting state of an offence over which that state had extra-territorial jurisdiction (it also being an offence over which the requested state would have jurisdiction) could avoid extradition on the ground that the offence was not committed within the territory of the requesting state.⁴⁹

The Death Penalty

Still another impediment to extradition of terrorists is the difference in policies among even otherwise like-minded states as to the death penalty. The countries of the European Union, Australia, Canada and New Zealand have abolished the death penalty in their own laws, and will extradite to states, such as the United States, which retain the death penalty, only on condition that the death penalty, if imposed, will not be carried out.

In the case of *In re Fawwaz*, Lord Scott of Foscote in his separate opinion noted that the Act of 1989 contained certain safeguards for the fugitive criminal whose extradition is sought. Among these was:

47. Extradition Act, 1989, c. 33, § 24 (UK).

48. *In re Al-Fawwaz* [2002] 1 A.C. 556; 41 I.L.M. 1224 (2002).

49. *Id.* at para. 64.

[h]e will not be extradited unless the [UK] Secretary of State decides, as a matter of discretion, to order that the extradition may proceed. It has become the settled practice, as I understand it, for the Secretary of State, in a case where the law of the extraditing state might subject the extradited prisoner on conviction to the death penalty, to require a guarantee that a death sentence will not be imposed (*see Soering v. UK* (1989) 11 EHRR 439).⁵⁰

If, as is to be expected, an increasing number of terrorists associated with the events of September 11, 2001 are arrested in countries outside the United States, these differences in policies raise serious legal and political questions. The legal questions will arise under the laws of the requested state and under the terms of the applicable extradition treaties with the United States. Where the death penalty is available under the laws of both requesting and requested states there will be no problem. But an increasing number of states have abolished the death penalty. This gives rise to the specter of discrimination: the imposition of the death penalty on a terrorist extradited from another country will depend upon whether conditions have been attached to the extradition, as in *Fawwaz*. Presumably the United States would be in a position to enforce those conditions, where terrorists are prosecuted under federal and not state laws.⁵¹

The political questions are obvious, but their answers are not. How can one explain to the people of New York City, or indeed the entire United States, that an extradited terrorist associated with the attack on the World Trade Center can get a maximum of life imprisonment, whereas an ordinary murderer faces the death penalty?

Fair Trial Safeguards in Extradition

Extradition treaties do not usually contain provisions requiring the parties to observe accepted standards of a fair trial after extradition. In the past, the very existence of a bilateral treaty, or a willingness to act on an ad hoc basis, have been regarded as tacit acknowledgment of the respect the parties have for one another's processes. Doubts have emerged, however, in recent years where multilateral treaties containing extradition clauses are open to all states to adhere. It may sometimes be the case that the internal situation in a bilateral

50. *Id.* at para 121.

51. *See* Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. US*), 1998 I.C.J. 99, 37 I.L.M. 812 (1998); *Breard v. Greene*, 532 U.S. 371 (1998) *reprinted in* 37 I.L.M. 824; *LaGrand Case* (F.R.G. v. US), 1999 I.C.J. 9.

partner state, once of an acceptable order, has deteriorated. There is concern that under the laws of some states it is difficult or impossible to refuse extradition on the grounds that the human rights of the person extradited might be violated after return: the so-called “rule of non-inquiry.”⁵²

To some extent, the issue of fair trial safeguards overlaps with the protection accorded political offenders. The formula most often used is to the effect that the extradition of a requested person may be refused if the requested state has reason to believe that, if returned, the alleged offender may be punished, or suffer prejudice at his or her trial, on account of race, religion, nationality or political opinion. On the other hand, if the issue of a fair trial arises in the context of corruption or incompetence in the legal system of the requesting state, or of cruel or unusual punishments, it is likely to be dealt with through the exercise of the general discretion of requested states to refuse extradition in all the circumstances of the case. Where the exercise of that discretion is unreviewable by a court in the requested state, the outcome for the alleged offender can be unpredictable.

A more principled manner in which the executive discretion to refuse extradition in such circumstances could be exercised would be by reference, to Article 14 of the International Covenant on Civil and Political Rights, which sets out fair trial rights in detail. Article 14 provides, *inter alia*, that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁵³ There is an exception, however, of particular relevance in respect to the procedures proposed for the trial of terrorist suspects in the United States:

[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or where the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁵⁴

Parts of this provision (made somewhat turgid in its attempt at comprehensiveness) have obvious implications for the trial of terrorists.

52. On this question see John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L. L. (1998).

53. See ICCPR, *supra* note 23, art. 14.

54. *Id.*

In the case of *Fawwaz*, Lord Scott, after raising the question of the death penalty, proceeded to another matter of concern: trial before special courts,

[t]he media have, over the past few weeks, carried reports of the intention of the President of the US, acting under emergency executive powers, to establish military tribunals to try non-US citizens who are accused of terrorist offences. The offences with which these appellants are charged might well fall within the category of offences proposed to be dealt with by military tribunals. It is reported that the proposed military tribunals will be presided over by military personnel, not judges, will be able to admit evidence that would not ordinarily be admissible before a criminal court of law, and will be able to conduct the trial behind closed doors. The charges against the appellants that have led to the extradition requests were laid before the US District Court for the Southern District of New York. If the appellants are to be extradited I imagine that they will be tried before that court or some other Federal Court and not before a military tribunal that will not need to sit in public and that need not observe the rules of evidence.⁵⁵

Although another member of the House of Lords, Lord Hutton, expressly dissociated himself from the remarks of Lord Scott, observing that the issue had not been raised in argument,⁵⁶ this consideration could clearly arise on a future occasion.

The International Criminal Court

The opposition of the United States to the establishment and future operation of the International Criminal Court is well known. It stands in contrast to the attitude of many of its closest allies, including Australia, Canada, and the United Kingdom, which have all ratified the Rome Statute. It is not proposed to examine the differences in policies in this paper. There are, however, two points of relevance to the topic of terrorism.

In the first place, terrorism, as such, is not a crime within the jurisdiction of the International Criminal Court. At the Rome Conference, states urging that terrorism be designated a crime within the jurisdiction of the Court included Algeria, India, Israel, Libya, Russia, and Turkey. However, most delegations were opposed. As one commentator has remarked, "An essential reason behind the resistance to the inclusion of terrorism within the ICC's jurisdiction

55. See *In re Al-Fawwaz*, *supra* note 48, at para. 121.

56. *Id.* at para. 93.

is the fear of politicization of the ICC. The League of Arab States opposed the inclusion of international terrorism in the ICC Statute on the ground that the international community has not been able to define 'terrorism' in such a way as to be generally acceptable."⁵⁷

However, it seems that certain acts of terrorism might constitute a crime against humanity, as defined in the Statute. On the face of it, the definition of murder in Article 7 of the Rome Statute would cover such acts as the destruction of the PanAm flight over Lockerbie, Scotland, in 1988, and the attack on the World Trade Center on September 11, 2001:

1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) murder; . . .

2. For the purpose of paragraph 1:

a) 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.⁵⁸

In both cases there was a systematic⁵⁹ attack causing multiple deaths of civilians in furtherance of an organizational policy by terrorist groups.

Whether such cases would be brought before the International Criminal Court, and whether that Court would accept jurisdiction over them, remains to be seen. It may be that, if current negotiations in the United Nations succeed in producing a widely accepted and comprehensive convention on terrorism, a new category of crimes following the convention definition of terrorism might be added to the Rome Statute by way of the amendment mechanism included in that Statute. The existence of such a neutral forum for the prosecution of terrorist offenses would have several advantages over

57. KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* (2001), 227.

58. See Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (1998), available at <http://www.un.org/law/icc/statute/rome.htm> (Jan. 13, 2003) [hereinafter Rome Statute].

59. While not defined in the Rome Statute, the term "systematic" is familiar to recent ad hoc tribunals and was discussed in *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T (Sep. 2, 1998), which stated that: "systematic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources." See *Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7, 1997), excerpted in 36 I.L.M. 908, § 6.4.

prosecution before the courts of the states most closely affected. The most important of these are the transparency and international character of the Court's proceedings, and the credibility of its findings and sentences.

There is some force in the objections raised by the United States towards the ICC, or at least in so far as it might in future assert jurisdiction over US citizens. As the almost always indispensable leader of UN and other peace enforcement operations, US personnel are more likely than others to be exposed to the possibility of maliciously inspired prosecutions for alleged war crimes. The principle of complementarity, which gives primacy to the national courts of the alleged offender, goes a long way towards meeting that objection. This, of course, assumes that in such a case the United States would be willing at least to conduct an investigation into the allegations. A negative finding would be accepted by the Court as a bar to prosecution before it, unless the decision not to prosecute in the national jurisdiction "resulted from the unwillingness or the inability of the State concerned genuinely to prosecute."⁶⁰

Another protection built into the Rome Statute is that where a request is made of a state for the surrender of an accused person to the Court, the requested state may not be required to "act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent to the surrender."⁶¹ The term "sending state" is not defined, but it is a term of art used not only to refer to the state establishing a diplomatic or consular mission in another state ("the receiving state") but also the state which stations military personnel in another state under arrangements of the nature of a status of visiting forces agreement. Thus US military personnel stationed in Australia would not be surrendered by Australia to the Tribunal without the consent of the United States.

The United States introduced into the Security Council in June 2002 a draft resolution that would have the effect of excluding from the jurisdiction of the ICC the personnel of all missions, military and civilian, engaged in operations sanctioned by the United Nations.⁶² This is understandable. A Security

60. See Rome Statute, *supra* note 58, art. 17.

61. *Id.* at art. 98(2).

62. **Editors note:** This draft resolution resulted in S. C. Res. 1422, U.N. SCOR, 57th Sess., U.N. Doc. S/1422/(2002), which provides that consistent with Article 16 of the Rome Statute, "the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operations, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."

Council resolution would, of course, “trump” the provisions of the Rome Statute.⁶³ Less understandable is a draft bill introduced into Congress, the American Servicemembers’ Protection Act, which would authorize retaliatory measures in the event that a US citizen were ever placed before the Court.⁶⁴ This is the kind of reaction that dismays America’s allies. A spirit of triumphalism, or American exceptionalism, serves to undermine the international goodwill and spirit of cooperation that alone can defeat the forces of terrorism.

Conclusion

The events of September 11th, 2001 have driven home the point that significant issues impacting coalition operations continue to exist. These issues, ranging from the lack of an internationally accepted definition of terrorism, to the problems associated with jurisdiction and extradition of terrorists, highlight that a truly effective response to terrorist acts must be through an effective, coherent multilateral and multistate effort. Clearly there is much still to be done in these areas to win the war on terrorism.

63. See Lockerbie Case, *supra* note 38.

64. **Editor’s note:** The American Servicemembers’ Protection Act of 2002, was signed into law by President George W. Bush on August 2, 2002. Section 7427 of the act authorizes the president to use all necessary means to free certain individuals from the jurisdiction of the ICC. See The American Servicemember’s Protection Act of 2002, 22 U.S.C.S. § 7427 (2002).