TABLE OF CONTENTS
Chapter Thirteen
Other crimes

UNIVERSAL JURISDICTION:
The duty of states to enact and implement legislation
Chapter Thirteen
(Other crimes)

INTRODUCTION

There are a number of crimes other than war crimes, crimes against humanity, genocide, torture, extrajudicial executions and "disappearances" over which states may exercise universal jurisdiction, usually pursuant to treaties imposing a prosecute or extradite obligation on the states parties. These include other crimes under international law, crimes under national law of international concern and even ordinary crimes under national law.[1] Some of these crimes are important because they may also - depending on the circumstances under which they are committed - amount to war crimes, crimes against humanity, genocide, torture, extrajudicial executions or "disappearances".

A detailed examination of the scope of these crimes, national implementing legislation and jurisprudence is beyond the scope of this memorandum and there is an extensive scholarly literature concerning most of them.[2] Universal jurisdiction over the crime under international law of piracy and its domestic equivalent are briefly discussed in Chapter Two, Section I. C. State practice concerning ordinary crimes under national law is addressed in Chapters Four, Six, Eight and Ten, since national legislation permitting national courts to exercise such jurisdiction also permits them to try cases where the conduct abroad amounts to war crimes, crimes against humanity, genocide or torture.

[1] As described above in Chapters Four, Six, Eight and Ten, there are many states which also provide for universal jurisdiction over ordinary crimes under international law – usually serious in that they carry a certain minimum sentence.

[2] Ordinary crimes under national law of international concern are sometimes subdivided into two sub-categories: (1) ***crimes defined in treaties*** and (2) ***ordinary crimes which treaties impose a requirement on states parties to suppress***. In this categorization, the first group of crimes are usually considered to include highjacking; attacks on aircraft; attacks on internationally protected persons, including diplomats; hostage-taking; attacks on ships and navigation at sea. The second group of crimes are often viewed as including those listed in the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft and all treaties dealing with drug-related crimes. There is no clear agreement about which crimes fit within each sub-category, but the International Law Commission has explained the distinction as treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. *See* Report of the International Law Commission on the work of it forty-sixth session 2 May-22 July 1994, 49 U.N. G.A.O.R. Supp. (No. 10), at 76-79, U.N. Doc. A/49/10 (1994). Given the lack of agreement over the two sub-categories and the limited usefulness of any such categorization when considering the question of universal jurisdiction, both groups of crimes are treated together in this memorandum.

The widespread signature and ratification by countries from all regions of the world of treaties, adopted by the UN General Assembly, Parliamentary Assembly of the Council of Europe and the General Assembly of the Organization of American States, which permit the exercise of universal jurisdiction or impose an *aut dedere aut judicare* obligation on states parties is further evidence of the global acceptability of the exercise of universal jurisdiction as fully consistent with national sovereignty, particularly in the absence of almost any objections by states.[3] Indeed, some scholars have suggested that it is evidence of an emerging *aut dedere aut judicare* rule of customary international law with regard to particularly serious crimes.[4]

Several treaties before the Second World War provided for universal jurisdiction over some of the crimes in this category, such as counterfeiting and "terrorism". However, most such treaties were adopted later and based on the Hague Convention adopted in 1970. These treaties are generally similar, usually containing a provision defining the crime or specifying the crime under national law which must be suppressed, a provision obliging the state party to take measures to ensure its courts have jurisdiction over the crime and an *aut dedere aut judicare* provision which is self-executing. They fall into one of six main models: (I) counterfeiting, (II) international treaties governing politically motivated attacks on civilians and civilian objects, (III) narcotics trafficking, (IV) crimes related to armed conflict or collapsed states (mercenary activities and attacks on peace-keepers), (V)transnational crimes and (VI)treaties adopted by regional organizations (Council of Europe, Organization of American States and the Organization of African Unity).

I. Counterfeiting - the 1929 Counterfeiting Convention

The 1929 International Convention for the Suppression of Counterfeiting Currency (Counterfeiting Convention) contains a limited *aut dedere aut judicare* obligation on states parties, provided that their law authorizes as a general rule extraterritorial jurisdiction and an extradition request by another state (not necessarily a territorial state or even a state party) has been made and refused.[5]

[3] Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 826 (1988).

[4] *See* M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995); Naomi Roht-Arriza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 451, 466 (1990) (noting that treaties imposing an *aut dedere aut judicare* obligation, "whether addressing international or national crimes, show an increasing tendency in international law to require states to investigate and prosecute offences"). *See also* Marc Henzelin, *Le Principe de l'Universalitê en Droit Pênal: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* 377 (Bâle/Genève/Munich: Helbing &Liechtenhahn and Bruxelles: Bruylant 2000) (noting tendencies in the direction of a customary international law rule of *aut dedere aut judicare* with respect to certain crimes).

[5] For a discussion of the jurisdictional provisions of this treaty, see Henzelin, *supra*, n. 4, 285-286.

Article 3 requires that states parties make counterfeiting of foreign currency and attempts to do so ordinary crimes. Article 9 states:

> "Foreigners who have committed abroad any offence referred to in Article 3 [listing counterfeiting offences], and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.
>
> The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence."[6]

Article 10 requires that the offences listed in Article 3 be made extradition crimes. As of 14 September 2001, 72 states were parties to this treaty and 7 states had signed, but not yet ratified it.[7]

II. Politically motivated attacks on civilians and civilian objects - anti-"terrorism" treaties

A. A note on "terrorism"

[6] International Convention for the Suppression of Counterfeiting Currency, 20 April 1929, 112 L.N.T.S. 371, Art. 9.

[7] As of 14 September 2001, according the United Nations treaty database (www.untreaty/un.org), the following 71 states were parties to the 1929 Convention: Algeria, Australia, Austria, Bahamas, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Colombia, Coté d'Ivoire, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Holy See, Hungary, Indonesia, Iraq, Ireland, Israel, Italy, Kenya, Kuwait, Latvia, Lebanon, Malawi, Malaysia, Mali, Mauritius, Mexico, Monaco, Morocco, Netherlands, Niger, Norway, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, San Marino, Senegal, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, Togo, Turkey, Uganda, United Kingdom, Federal Republic of Yugoslavia and Zimbabwe. This list is modified to indicate that the Russian Federation is a party as a successor state to the USSR and the Federal Republic of Yugoslavia is a party as a successor state to Yugoslavia.

There is, as yet, no agreed definition of a crime of "terrorism" under international law, although the use of terror and acts of terrorism are identified as war crimes under Protocols I and II to the Geneva Conventions.[8] In addition, a number of crimes of international concern which are usually considered to fall within the category of "terrorism" have, since 1970, been made the subject of treaties which provide for universal jurisdiction, such as hijacking and attacks on aircraft, hostage-taking in peacetime, attacks on internationally protected persons, attacks on ships and navigation at sea, damage to undersea cables, theft of nuclear materials, "terrorist" bombings and financing of "terrorism". The concept of "terrorism" - whether by agents of the state or armed political groups - is so broad that it would include the crimes under international law which are the subject of this paper - war crimes, crimes against humanity, genocide, extrajudicial executions, "disappearances" and torture. In the absence of a generally accepted definition, the treaties providing for universal jurisdiction over "terrorism" generally fall back upon listing these treaties or addressing only certain specified conduct considered to fall within this category rather than attempting to define the concept. Indeed, the inability of states to agree on a precise definition was one of the reasons that the first treaties on this crime never entered into force and that this crime was omitted from the Rome Statute.[9]

[8] Protocol I, Art. 51 (2) (prohibiting "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population"); Protocol II, Art. 4 (2) (d) (prohibiting "acts of terrorism" against "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted").

[9] The first two treaties dealing with this subject were adopted by the League of Nations in 1937. One defined the crime and provided for universal jurisdiction. Convention on the Prevention and Punishment of Terrorism, 16 November 1937, League of Nations O.J. 23 (1938), *reprinted in* Manley O. Hudson, 7 *International Legislation* 862 (1935-1937). The other would have established the first permanent international criminal court. Convention of an International Criminal Court, *opened for signature*, Geneva, 16 November 1937, *reprinted in* Hudson, *supra*, 878. Neither treaty entered into force. For further information about the jurisdictional provisions of these treaties, see the discussion in Chapter Two, Section I.E.2.

However, the acts covered by these treaties are almost invariably ordinary crimes under international law, such as murder, assault, kidnapping and intentionally damaging property, over which states have long exercised universal jurisdiction. It is, therefore, not necessary to search for evidence that there is a rule of customary international law expressly permitting national courts to exercise universal jurisdiction over a crime whose definition remains elusive.[10] There is extensive evidence, as documented in Chapters Four, Six, Eight and Ten, that states have enacted legislation permitting their courts to exercise universal jurisdiction over ordinary crimes under national law that would be violated when the conduct addressed in the "terrorist" treaties is committed. Given the widespread enactment of such legislation over the past two centuries, the broad network of more recent treaties authorizing or requiring states to exercise universal jurisdiction should be seen as codifying a general rule that states may exercise universal jurisdiction over even ordinary crimes which are common to most legal systems and not contrary to international law. Such treaties should not been seen, as a few commentators have claimed, as creating a series of exceptions to a general rule prohibiting states from exercising such jurisdiction.[11] They should also not be seen as carving out exceptions to a supposed rule of

[10] Several authorities have suggested that there is such an express affirmative rule. *Restatement (Third) of the Foreign Relations Law of the United States* (1989), § 404 ("A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern [including] perhaps certain acts of terrorism . . .") and § 404, comment a ("Universal jurisdiction is increasingly accepted for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large.") (1986); David Freestone, *International Cooperation against terrorism and the development of international law principles of jurisdiction*, in Rosalyn Higgins & Maurice Flory, *Terrorism and International Law* 43, 60 (London/New York: Routledge 1997) ("It is probably still true to say that 'terrorism' is not itself a crime triable according to the universality principle, if only because of the intrinsic difficulty of defining 'terrorism'. It would not however be true to say that terrorist *offences* are not so triable, for there is a wealth of treaty-making practice to gainsay that. Indeed, in relation to the core of offences which are covered by those multilateral conventions which have achieved wide adherence - such as hijacking and hostage-taking - it might be argued that this general pattern of treaty practice, which includes custody jurisdictional provisions within its obligatory forms of jurisdiction (and which seeks to extend its ambit to the nationals of signatories and non-signatories alike), suggests that not simply hijacking, but also a wider core of 'terrorist offences', are subject to jurisdiction according to this principle under customary international law. . . . The exact content of this core of offences would be controversial, but might perhaps include those offences listed in Article 1 (a) - (d) of the Terrorism Convention . . . .Whether this argument is accepted or not, it is clear that the universality principle itself is widely accepted. We appear at the beginning, or even in the midst, of a piecemeal but still quite radical change in the customary law limits of this kind of jurisdiction.").

[11] The leading contemporary exponent of this view based his conclusion almost exclusively on the drafting and adoption of treaties, but did not discuss the long standing and extensive state practice in the form of legislation antedating many of the "terrorism" treaties or scholarly views, and did not distinguish the evidence relevant to whether customary international law permitted universal jurisdiction and the evidence relevant to whether it contained a rule of *aut dedere aut judicare*. *See* Henzelin, *supra*, n. 4, 374-377.

One scholar has argued that these treaties create forms of jurisdiction that can only be exercised by states parties. Sami Shubber, *Aircraft Hijacking under the Hague Convention 1970 - A New Regime?*, 22 Int'l & Comp. L. Q. 687, 714-715 (1972-1973) ("The scheme of jurisdiction over hijackers has helped to render the offence of hijacking as much international as piracy under international law, with one difference. While the latter rests on international customary law, and therefore *every State* has the right to arrest and try the pirate, the former rests on a treaty and therefore only *States parties to the Convention* have the right to exercise jurisdiction over the hijacker.") (emphasis in original). However, this scholar also did not address state practice of non-states parties, such as legislation, criminalizing conduct covered by the treaties. It also overlooks a standard provision in such treaties preserving any other jurisdiction under national law, which recognizes that the treaties do not occupy the full extent of

international law prohibiting states parties to a treaty with an *aut dedere aut judicare* obligation from exercising universal jurisdiction over foreign suspects found in their territory who are nationals of a non-state party.[12] No such rule exists, and it would be contrary to the intent of the drafters of such treaties to repress crimes committed by nationals of all states, including states parties, and stateless persons, as well as contrary to current state practice.

jurisdiction of states (see Section II.B of this chapter for a discussion of this standard provision).

[12] The primary proponent of this view has contended that the drafters of the "terrorism" treaties "appear baldly to purport to create, by treaty, jurisdiction having no other lawful basis, and to make that jurisdiction applicable to nationals of states that are not parties to the treaties". Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 New Eng. L. Rev. 337, 348 (2001). She contended that, "in the absence of contrary explanation, some commentators concluded that, since the crimes covered by the terrorism treaties arguably were not previously recognized as entailing universal jurisdiction, and yet the treaties provide that universal jurisdiction may be exercised over those crimes, the treaties must have 'created' universal jurisdiction over those crimes, with application to the nationals of consenting and non-consenting states alike". *Ibid.*, 349. The same commentator also claimed that the "terrorism" treaties "do not represent any exceptional power to create universal jurisdiction by treaty or in any other way to alter customary international law of jurisdiction". *Ibid.*

There is even some support today for the view that there is an affirmative rule under customary law specifically requiring states to extradite suspects or to exercise universal jurisdiction over such conduct which involves attacks on civilians or civilian objects and satisfies the popular concept of "terrorism". For example, at the international level, the UN General Assembly has adopted a number of conventions providing for universal jurisdiction, such as the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 Convention for the Suppression of the Financing of Terrorism. At the national level, many states have provided for extraterritorial jurisdiction over "terrorist" offences under their own national law.[13] Some national courts have stated that such conduct is subject to universal jurisdiction.[14]

B. Hijacking - the 1970 Hague Convention model

The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) was the first of a series of treaties incorporating the *aut dedere aut judicare* principle, primarily for crimes of international concern, but some of these treaties, such as the Convention against Torture, address crimes under international law.[15] The treaties after 1970 expressly providing for universal jurisdiction were modelled on the Hague Convention and contain similarly worded jurisdictional provisions.[16] They usually follow the structure of the Hague Convention: an article defining or identifying the crime (Article 1); an article requiring the states parties to take steps to establish jurisdiction over the offences, based on a number of grounds, including universal jurisdiction (Article 4); an article requiring states parties to submit cases to their prosecuting authorities if they do not extradite the suspect (Article 7) and provisions governing extradition (Article 8) and mutual legal assistance (Article 10).

Article 4 of the Hague Convention provides:
"1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:
(a) when the offence is committed on board an aircraft registered in that State;

[13] *See, for example,* ***Ireland:*** Extra-territorial Criminal Law Jurisdiction Act 1976; ***United Kingdom:*** Criminal Jurisdiction Act 1975 (Northern Ireland). No attempt has been made in this memorandum to document such legislation.

[14] *See, for example, U.S. v. Layton*, 509 F.Supp. 212, 223 (N.D.Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981) (terrorism is "now considered by the international community to be deserving of treatment in a manner traditionally reserved for piracy.").

[15] Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.S. 39, *reprinted in* 10 Int'l Leg. Mat. 133 (1971), Art. 4.

[16] For pre-Second World War treaties concerning politically motivated attacks on civilians and civilian objects with universal jurisdiction provisions, see Section II.A of this chapter. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed 14 September 1963 (Tokyo Convention), 704 U.N.T.S. 219 (1969) does not expressly provide for universal jurisdiction. *See* Roger S. Clark, *Offences of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 Nordic J. Int'l L. 49, 54-56 (1988).

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged hijacker still on board;
(c) when the offence 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.
2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Article 7 of the Hague Convention provides:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."[17]

[17] For further information about the Hague Convention, see Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft - Part 1: The Hague Convention*, 13 Column. J. Transnat'l L. 381 (1976); Gilbert Guillaume, *La Convention de La Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéonefs*, 16 *Annuaire Français de Droit International* 35-61 (1970); Henzelin, *supra*, n.4, 298-307; R.H. Mankiewicz, *Capture et détournements illicites d'aéronefs*, 15 *Annuaire Français de Droit International* 462-489 (1969); Nicholas M. Poulantzas, *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft - 16 December 1970*, 18 Neth. Int'l L. Rev. 25-75 (1971); Sami Shubber, *Aircraft Hijacking under the Hague Convention 1970 - A New Regime?*, 22 Int'l & Comp. L. Q. 687 (1972-1973); Gillian M.E. White, *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 6 Rev. Int'l Comm'n Jur. 42, 44 (1971)

Article 7 incorporates a compromise between states, such as the United States and the USSR, that wanted an absolute extradite or try obligation and those that wanted to preserve prosecutorial independence.[18] There is no requirement that extradition have been requested and refused before the *aut dedere aut judicare* obligation arises, and the drafters expressly rejected proposals to impose such a requirement in the 1970 Hague Convention and in later international treaties.[19] Indeed, when drafters wished to impose such a requirement in a treaty, as in certain European treaties, they expressly stated that an extradition demand had to have been made before an obligation arose under the treaty to submit the case to the forum state's prosecuting authorities.

The choice whether to extradite or to submit the case to the appropriate authorities for the purpose of prosecution is the choice of the state where the suspect is found.[20] Other international treaties follow the same approach, which respects the national sovereignty of the forum state, which has jurisdiction and custody of the suspect, and do not prefer one or the other option. Indeed, the drafters of these international treaties repeatedly rejected proposals to specify a priority among states with concurrent jurisdiction.[21] In contrast, certain European treaties favour extradition, but contain the

[18] According to one commentator,

> "Article 7 was the subject of a considerable controversy at the Diplomatic Conference. A number of States, including both the United States and the Soviet Union, argued that States should be under an obligation in every case either to extradite or prosecute the hijacker. However, such a provision would have been unacceptable to many other States who considered that there could be exceptional cases where, perhaps for lack of evidence or for humanitarian reasons, the circumstances would not justify bringing a prosecution. Those States considered that although cases where proceedings were not brought would be rare, they could not accept a fetter on the discretion enjoyed by their prosecuting authorities to decide whether or not to prosecute in the light of all the facts of a case."

White, *supra,* n.17, 44. *See also* Poulantzas, *supra,* n.17, 56; Declan Costello, *International Terrorism and the Development of the Principle* Aut Dedere Aut Judicare, 10 J. Int'l L. & Econ. 483, 487 ("Thus, if the evidence available does not establish a *prima facie* case, there will be no breach of the Convention if a prosecution is not undertaken.").

[19] Henzelin, *supra,* n.4, 301; Robert Rosenstock, *International Convention against the Taking of Hostages: Another International Community Step against Terrorism,* 9 Den. J. Int'l L. & Pol. 169, 181 (1980). 181; Wood, Michael, *The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents,* 23 Int'l & Comp. L. Q. 791, 810-811 (1974).

[20] Henzelin, *supra,* n.17, 302-304. The author reviews the *travaux préparatoires* of the Hague Convention, including a vote rejecting by 39 votes against a proposal for a single principle of jurisdiction or a priority among different principles, with 12 in favour and 10 abstentions, and the different views of commentators.

[21] Shubber, *Hague Convention 1970, supra,* n.17, 715.

Although "Article 4 does not expressly state that the jurisdictional alternatives are in some order of priority", Clark, *supra,* n.16, 59, and although the drafters of the Hague Convention and of similar provisions in subsequent treaties rejected any such priority, some commentators have suggested that the order in which the grounds are listed creates a priority, with universal jurisdiction as the least favoured ground. Clark, *supra,* n.16, 59; Yoram Dinstein, *Criminal Jurisdiction over Aircraft Hijacking,* 71 Israel L. Rev. 195 (1972). Other commentary states that there is no such priority. Shneur-Zalman Feller, *Comment on "Criminal Jurisdiction over Aircraft Hijacking,* 71 Israel L. Rev. 207 (1972).

Although Clark notes the silence of Article 4 on the subject of any priority and states that "[i]t is difficult, moreover, to be sure whether anything may be inferred from the structure of the Article", he suggests that "[g]iven the way fallback universality jurisdiction is separated out in a distinct paragraph, it would seem that some primacy is to be given to the grounds in paragraph 1 and universal jurisdiction when the alleged offender is 'found' in any State Party

same *aut dedere aut judicare* obligation (see Section VI.A of this chapter). Similarly, such treaties do not favour jurisdiction of the state of the nationality of the suspect or of the victim or the territorial state over the jurisdiction of the forum state. They also do not impose an exhaustion of domestic remedies rule - there is no requirement that the state where the suspect is found must demonstrate that the state seeking extradition, or any other state, is unable or unwilling to investigate, and, if there is sufficient admissible evidence, to prosecute. The failure to include such a system of priorities strongly suggests that there is no such priority in customary international law.

is only a last resort." Clark, *supra*, n.16, 59; *see also ibid.*, 62-63 (arguing that universal jurisdiction was a last resort in other treaties modelled on the Hague Convention). After reviewing the various possibilities and stating that he "has not discovered any clear discussion in any of the preparatory work of the treaty sample of the priority question", *ibid.*, 59 n. 117, he concludes that "neither the treaty nor general international law contain clear rules for resolving competing claims to jurisdiction". *Ibid.*, 59.

Reportedly, one of the charges in the Spanish criminal investigation of Argentine military officers is air piracy for throwing drugged prisoners out of aircraft into the sea.[22] Some authorities appear to suggest that states under customary international law may exercise universal jurisdiction over hijacking of aircraft.[23] Other authorities disagree.

C. Attacks on aircraft - the 1971 Montreal Convention

The 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) was the second in this series of treaties incorporating the *aut dedere aut judicare* principle.[24] Articles 1 and 2 define unlawful acts covered by the Convention; Article 5 spells out measures to be taken by states parties to establish jurisdiction; Article 8 governs extradition and Articles 11, 12 and 13 impose a duty to provide mutual legal assistance.

Article 7 of the Montreal Convention provides:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

D. Attacks on internationally protected persons, including diplomats - the 1971 and 1973 Conventions

There are two treaties concerning attacks on internationally protected persons, such as diplomats, that impose *aut dedere aut judicare* obligations on states parties: the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (Internationally Protected Persons Convention) and the 1971 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (see Section VI.B of this chapter).

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[22] Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 Hum. Rts Q. 938 (1999)

[23] *Restatement (Third) of the Foreign Relations Law of the United States* (1989), § 404; Ian Brownlie, Principle of International Law, Oxford University press 5th Edition 1998, 308; Freestone, *supra*, n.10, 60.

[24] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 565, *reprinted in* 10 Int. Leg. Mat. 1151 (1971). For the background of this Convention, see Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft - Part II: The Montreal Convention,* 14 Column. J. Transnat'l L. 268-300 (1975); Clark, *supra*, n.16; Henzelin, *supra*, n.4, 298-307; R.H. Mankiewicz, *La Convention de Montréal (1971) pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile,* 17 *Annuaire Français de Droit International* 855-875 (1971-1973).

Article 2 of the 1973 Internationally Protected Persons Convention defines unlawful acts covered by Convention; Article 3 spells out measures to be taken by states parties to establish jurisdiction; Article 8 governs extradition and Article 10 imposes a duty to provide mutual legal assistance. Article 7 of the Convention, drafted by the International Law Commission, includes an *aut dedere aut judicare* obligation which is essentially the same as that in the 1970 Hague and 1971 Montreal Conventions:

> "The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State." [25]

[25] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 14 December 1973, U.N. G.A. Res. 3166, 27 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/Res/3166, 1035 U.N.T.S. 167, 28 U.S.T. 1975, Art. 7. A member of the United Kingdom delegation which negotiated the text of the Internationally Protected Persons Convention has explained that Article 7, "though somewhat differently worded, is substantially the same in content [as Article 7 of the Hague Convention and Article 7 of the Montreal Convention]." Wood, Michael, *supra* n.19, 810-811 (1974). He added:

> "The words 'whether or not the offence was committed in its territory', which occur in the Hague and Montreal Conventions, were omitted by the [International Law] Commission because it had provided for universal jurisdiction in draft article 2 (1), but they would appear to be superfluous in any event. The words 'without undue delay' do not appear in the Hague or Montreal Conventions and do not add anything to the content of the obligation since if there were undue delay there would certainly not be a good faith performance of the obligation. The Hague and Montreal Conventions contain a second sentence: 'Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.' This is replaced by 'thorough proceedings in accordance with the laws of that State.'"

Ibid., 811. For further background on the Convention and its drafting history, see Clark, *supra*, n.16, 60-61; Kearney, *Twenty-Fourth Session of the International Law Commission*, 67 Am. J. Int'l L. 84 (1973); Przetacznik, *Prevention and Punishment of Crimes against International Protected Persons*, 13 Indian J. Int'l L. 65-86 (1973); Rozakis, *Terrorism and the International Protected Persons in the Light of the ILC's Draft Articles,* 23 Int'l & Comp. L. Q. 32-72 (1974). *See also* Henzelin, *supra,* n.4, 307-308.

The drafting history of the Convention makes clear that there is no requirement that an extradition request have been made and refused before the *aut dedere aut judicare* obligation arises.[26] Indeed, the state where the suspect is found has the choice whether to extradite or to submit the case to its authorities for the purpose of prosecution.[27]

As of 14 September 2001, 107 states had ratified the 1973 Convention.[28]

[26] An amendment proposed by the Netherlands early in the drafting process which would have stated that the obligation to establish jurisdiction in the case when a suspect is found in the territory of a state party and not extradited arose only if a requested had been received and rejected was not pressed to a vote. Wood, *supra*, n.19, 808. A subsequent proposal which would have added a requirement to Article 7 that an extradition request have been received three months after the state in whose territory the suspect was found had notified interested states, was rejected. *Ibid.*, 811. The Netherlands delegate subsequently stated in the UN General Assembly:

> ". . . it is now clear that a State party, where an alleged offender is found will be bound to submit the case to prosecution even if the States which have primary jurisdiction under the terms of article 3 all shirk requesting extradition."

U.N. Doc. A/PV.2202, p. 131, *quoted in* Wood, *supra*, n.19, 811.

[27] The International Law Commission explained that the draft article, which was included unchanged as Article 7,

> "embodies the principle *aut dedere aut judicare*, which is basic to the whole draft. The same principle serves as the basis of Article 5 of the OAS Convention, Article 7 of the Hague and Montreal Conventions, Article 4 of the Rome draft and Article 5 of the Uruguay Working Paper. The Article gives to the State party in the territory of which the alleged offender is present the option either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. In other words, the State Party in whose territory the alleged offender is present is required to carry out one of the two alternatives specified in the Article it being left to that State to decide which that alternative will be. It is, of course, possible that no request for extradition will be received in which case the State where the alleged offender is present is found would be effectively deprived of one of its options and have no recourse save to submit the case to its authorities for prosecution. . . . Some members of the Commission had been concerned to ensure that there is no impairment of the principle of *non-refoulement.* The article as drafted makes this point clear. Thus, if the State where the alleged offender is found considers that he would not receive a fair trial or would be subjected to any type of abusive treatment in a State which has requested extradition, that request for extradition could, and should be rejected."

International Law Commission, Report, 27 U.N. G.A.O.R. Supp. (No. 10), at 97, U.N. Doc. A/8070/Rev. 1 (1973).

[28] As of 14 September 2001, according to the United Nations treaty database (<http://www.untreaty/un.org>), the following states were parties to the 1973 Convention: Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, Gabon, Germany, Ghana, Greece, Guatemala, Haiti, Hungary, Iceland, India, Iran (Islamic Republic of), Iraq, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Korea (Democratic Republic of), Kuwait, Latvia, Lebanon, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Macedonia (Former Yugoslav Republic of), Malawi, Maldives, Mauritania, Mexico, Moldova, Mongolia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, St. Vincent and the Grenadines, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Yemen and Federal Republic of Yugoslavia,. The State Department list has been modified to delete the German Democratic Republic, to indicate that the Russian Federation is a party as a successor state to the USSR and the Federal Republic of Yugoslavia is a party as a successor state to the Federal Socialist Republic of Yugoslavia. Niue may now be a party as a successor state to New Zealand.

A ***United States*** Federal District Court stated in a case involving the killing in Guyana of a Member of Congress, an internationally protected person within the meaning of these treaties, that "nations have begun to extend [universal] jurisdiction to . . . crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy."[29]

E. Hostage-taking - the 1979 Hostage-Taking Convention

[29] *United States v. Layton*, *supra*, n.14, 223.

The 1979 International Convention against the Taking of Hostages (Hostage-Taking Convention) follows the same structure and imposes the same obligations on states parties as earlier treaties, with one significant addition, confirming that each state party can exercise universal jurisdiction over stateless persons resident in its territory.[30] Article 1 of the Hostage-Taking Convention defines unlawful acts covered by the Convention; Article 5 spells out measures to be taken by states parties to establish jurisdiction; Articles 8, 9 and 10 govern extradition and Article 11 imposes a duty to provide mutual legal assistance. It contains two types of universal jurisdiction, one voluntary and the other mandatory.

First, Article 5 (1) (b) confirms that states parties may exercise universal jurisdiction over stateless residents:

> "Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 [listing the offences] which are committed:
> . . . .
> (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory."[31]

Second, Article 5 (2 requires that

> "[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article."[32]

Article 8 (1) of the 1979 International Convention against the Taking of Hostages (Hostage-Taking Convention) contains an *aut dedere aut judicare* obligation which is almost identical to that in the 1970 Hague and 1971 Montreal Conventions. It states:

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[30] International Convention against the Taking of Hostages, 4 December 1979, U.N. G.A. Res., 34/146, 34 U.N. G.A.O.R. Supp. (No. 39), U.N. Doc. A/C.6/34/L.23, *reprinted in* 18 I.L.M. 1456 (1979). For commentary on the 1979 Hostage-Taking Convention, see: Henzelin, *supra*, n.4, 310-311; Shabtai Rosenne, *The International Convention against the Taking of Hostages 1979*, 10 Israel Y. B. Int'l L. 109 (1980); Rosenstock,*supra*, n.19; Sami Shubber, *The International Convention against the Taking of Hostages*, 52 Brit. Y. B. Int'l L. 205 (1981).

[31] 1979 Hostage-Taking Convention, Art. 5 (1) (b). For an explanation why extraterritorial jurisdiction over stateless persons should not be seen as active personality jurisdiction, see Chapter One, Section II.B.

[32] *Ibid.*, Art. 5 (2). One commentator has argued that this provision (and, by necessary implication, similarly worded provisions in other treaties) not only imposes an obligation to take legislative measures, but also to take judicial measures to deal with actual offenders. Shubber, *The International Convention against the Taking of Hostages, supra*, n.30, 220. National courts addressing this question, as in the *Habré* case (see discussion in Senegal entry in Chapter Ten, Section II), have generally interpreted such provisions as simply imposing an international obligation on states to enact legislation, not a self-executing obligation directly enforceable by courts.

> "The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.".[33]

The Hostage-Taking Convention was cited as the basis of some of the counts in the extradition request to the United Kingdom in the *Pinochet* litigation, although it was ultimately unsuccessful because of the way the alleged conduct was characterized did not fit the definition of taking of hostages. However, had the conduct been properly characterized as detaining the victims of abductions and "disappearances" to intimidate the families and colleagues of the victims and the general population into acquiescing to the wishes of those detaining the hostages, the outcome of the case could have been different. As of 14 September 2001, 96 states were parties to the 1979 Convention and 9 additional states had signed, but not ratified it.[34]

F. Attacks on ships and navigation at sea - the 1988 Maritime Navigation Safety Convention

Article 3 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation defines unlawful acts covered by the Convention; Article 6 spells out measures to be taken by states parties to establish jurisdiction; Article 11 governs extradition and Article 12 imposes a duty to provide mutual legal assistance. Article 10 (1) of the Convention incorporates an *aut dedere aut judicare* obligation with respect to certain crimes committed on board ships or which would interfere with ship navigation.[35] It provides:

> "The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him be obliged, without exception

[33] *Ibid.*, Art. 8 (1)).

[34] As of 31 December 1999, according to the United Nations treaty database, Multilateral Treaties Deposited with the Secretary-General *obtainable from* <http://www.un.org>), the following states were parties to the 1979 Hostage-Taking Convention: Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belgium, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Canada, Chile, China, Côte d'Ivoire, Cyprus, Czech Republic, Denmark, Dominica, Ecuador, Egypt, El Salvador, Federal Republic of Yugoslavia, Finland, France, Germany, Ghana, Greece, Grenada, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lebanon, Lesotho, Liechtenstein, Lithuania, Luxembourg, Macedonia (Former Yugoslav Republic of), Malawi, Mali, Mauritania, Mauritius, Mexico, Mongolia, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, St. Vincent and the Grenadines, Saudi Arabia, Senegal, Slovak Republic, Slovenia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan, and Venezuela. As of this date, a further 9 states had signed, but not yet ratified it: Bolivia, Democratic Republic of Congo, Dominican Republic, Gabon, Iraq, Israel, Jamaica, Liberia and Uganda.

[35] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 Int'l Leg. Mat. 668, 10 March 1988.

whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution , through proceedings in accordance with the laws of that state. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

G. Damage to undersea cables - the 1928 Bustamente Code and the 1940 Montevideo Treaty

Two regional treaties recognize universal jurisdiction over damage to undersea cables.

Article 308 of the 1928 Bustamente Code (Offenses Committed Outside the National Territory) provided:

> "Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offences of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal law of the latter."[36]

At least 15 states ratified this treaty.[37]

Similarly, Article 14 of the1940 Montevideo Treaty of International Penal Law stated:

> "International piracy, drug trafficking, white slavery and the destruction or damaging of submarine cables, shall be subject to the jurisdiction and the law of the State where the suspects are apprehended, independently of where the crimes have been committed. This shall not preclude the jurisdictional preference, inherent to the State where the criminal acts have been committed, of demanding by means of extradition the handing over of the suspect." (English translation by Amnesty International.)[38]

[36] Bustamente Code, annexed to the Convention on Private International Law, adopted in the Final Act of the Sixth International Conference of American States, Havana, 20 February 1928, Art. 308. Text reproduced in Harvard Research, 29 Am. J. Int'l L. Supp. 435, 642, 643 (1935).

[37] As of 1 January 1935, these states were: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. Harvard Research, *supra*, n.36, 642.

[38] Treaty of International Penal Law of 1940, Art. 14 (English translation by Amnesty International). The original text in Spanish reads:

> *"La piratería internacional, el tráfico de estupefacientes, la trata de blancas, la destrucción o deterioro de cables submarions, quedan sujetos a la jurisdicción y la ley del Estado bajo cuyo poder caigan los delincuentes, cualquiera sea el lugar endonde se cometen dichos delitos, sin perjuicio del derecho de preferencia que compete al Estado en el cual los hechos delictuosos sean consumados, de solicitar, por la via de extradición, la entrega de los delincuentes."*

Tratado Sobre de Dercho Penal Internacional de 1940, suscrito en Montevideo, Uruguay, el 19 de marzo de 1940, Alto Comissionado de las Naciones Unidas para los Refugiados, *Compilacion de Instrumentos Juridicos Interamericanos Relativos al Asilo Diplomatico, Asilo Territorial, Extradicion y Temas Conexos* (1992). This treaty was signed by Brazil, Colombia, Bolivia, Argentina, Peru, Paraguay and Uruguay, but only Uruguay appears to have signed it.

H. Theft of nuclear materials - the 1980 Nuclear Material Protection Convention

Article 7 of the 1980 Convention on the Physical Protection of Nuclear Material defines unlawful acts covered by the Convention; Article 8 spells out measures to be taken by states parties to establish jurisdiction; Article 11 governs extradition and 13 imposes a duty to provide mutual legal assistance. Article 9 of the Convention requires states parties to detain suspects pending a decision whether to prosecute or extradite:

> "Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take appropriate measures, including detention, under its national law to ensure his presence for the purpose of prosecution or extradition. Measures taken according to this article shall be notified without delay to the States required to establish jurisdiction pursuant to article 8 and , where appropriate, all other States concerned."[39]

Article 10 of this treaty imposes an *aut dedere aut judicare* obligation on states parties:

> "The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."[40]

I. "Terrorism", "terrorist" bombings and financing of "terrorism" - the 1977, 1997 and 1999 Conventions

There are at least three treaties expressly using the word "terrorism" which provide for universal jurisdiction based on the *aut dedere aut judicare* principle: the 1977 European Convention on the Suppression of Terrorism (European Terrorism Convention), the 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention) and the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention).

European Terrorism Convention. Article 7 of the European Terrorism Convention obliges states parties, when there has been a request for extradition from another Contracting State which is not fulfilled and when the request is from a Contracting State whose jurisdiction is based on a rule also existing in the requested state (for the text and scope of the relevant provisions, see Section VI.A of this chapter).

[39] Convention on the Physical Protection of Nuclear Material, 3 March 1980, 18 Int'l Leg. Mat. 1422 (1979), Art. 9.

[40] For a discussion of the jurisdictional provisions of the 1980 Convention, see Henzelin, *supra*, n.4, 309-310.

"Terrorist" Bombing Convention: In marked contrast to the European Terrorism Convention, the 1997 Terrorist Bombings Convention is designed to exclude most state human rights and humanitarian law violations carried out by armed forces, although it may reach certain crimes committed by death squads and intelligence agencies. It imposes an *aut dedere aut judicare* obligation on states parties with respect to persons who unlawfully and intentionally use explosives and other lethal devices in certain public places within intent to kill or cause serious bodily injury or to cause extensive destruction of the public place.[41] Article 2 defines the crimes and ancillary crimes covered.[42] In addition to requiring states parties to establish territorial and active personality jurisdiction, permitting them to establish passive personality and protective personality jurisdiction and jurisdiction over resident stateless persons in Article 6 (1) and (2), the Convention requires states parties in Article 6 (4) to establish jurisdiction over suspects found in their territory who are not extradited to any state with jurisdiction under the Convention.[43] Article 8 (1) imposes a strict *aut dedere aut judicare* obligation:

> "The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

[41] International Convention for the Suppression of Terrorist Bombings, 37 Int'l Leg. Mat. 249 (1998), Art.8. For the background to this treaty, see Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 Am. J. Int'l L. 774 (1998). For a discussion of the jurisdictional provisions of the 1997 Convention, see Henzelin, *supra*, n.4, 314-316.

[42] Terrorist Bombings Convention, Art. 2. Paragraph 1 reads:

"Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility [these places are defined in Article 1]:

(a) with the intent to cause death or serious bodily injury; or

(b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss."

Paragraph 2 defines attempt and paragraph 3 covers those who organize or direct others to commit an offence.

[43] Article 6 (4) provides:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2. .

One novel aspect of the Convention is that it permits satisfaction of the *aut dedere aut judicare* obligation by a temporary transfers of nationals of a state for trial in another state when that state prohibits extradition of nationals and, if the accused is convicted, to be returned to the state of the accused's nationality to serve any sentence imposed.[44]

[44] Article 8 (2) states:
"Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradtion or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article."

Two provisions are designed to limit the possibilities for using the Terrorist Bombings Convention for crimes committed by state agents against their own people. First, Article 3 restricts the *aut dedere aut judicare* obligations to cases with some international aspect.[45] Second, Article 19 excludes crimes committed by armed forces during armed conflict.[46] The Convention also excludes conduct by a state's military forces when carrying out their official duties.[47] Whether the term "official duties" would include crimes under international law such as the crime against humanity of murder, murder which constitutes an act of genocide or an extrajudicial execution is doubtful in the light of the judgment of the House of Lords in the *Pinochet* case that acts of torture were not part of the official duties of a head of state.

As of 14 September 2001, 26 states had ratified the Convention and 41 others had signed but not yet ratified.[48]

[45] Article 3 provides that, with limited exceptions, the Convention does not apply "Where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis [under Article 6 (1) and (2)] to exercise jurisdiction". The exceptions include the mutual legal assistance provisions in Articles 10 to 15.

[46] Article 19 (2) provides that the Convention does not apply to activities of armed forces during an armed conflict when these activities are governed by international humanitarian law:

> "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention."

A member of the United States delegation involved in the negotiation of the Convention has argued that "an appropriate source of authority" in interpreting what activities did not amount to armed conflict (and thus were covered by the Convention) would be Article 1 (2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Witten, *supra*, n.41, 780 n. 32. Article 19 (1) contains a related and broadly worded exception, the meaning of which is not entirely clear, stating that "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law."

[47] Article 1 (4) defines "military forces of a State" as "the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility." Although it is not entirely free from doubt, activities by government organized, trained and equipped death squads probably would be covered by the Convention because the command, control and responsibility of the state would normally be informal and clandestine or even disavowed. However, one of those involved in drafting the Convention has claimed that "[t]he conduct of certain civilians who act in support of official activities of state military forces is also exempted from the Convention's scope of application" and that "because the Convention does not reach the official activities of state military forces, it similarly does not reach persons, including nonmilitary policy-making officials of states, who might direct or organize the activities of state military forces or who might otherwise have been subject to the ancillary offenses in Article 2 if state military forces had not been so excluded." Witten, *supra*, n.41, 781 n. 33.

[48] As of 14 September 2001, according to the UN treaty database (www.untreaty/un.org) the following 26 states had ratified the Terrorist Bombing Convention: Austria, Azerbaijan, Botswana, Cyprus, Czech Republic,

Terrorist Financing Convention: Article 2 of the 1999 Convention defines unlawful acts covered by the Convention; Article 7 spells out measures to be taken by states parties to establish jurisdiction; Article 11 governs extradition and Article 12 imposes a duty to provide mutual legal assistance. Article 7 (4) of the requires states parties to take measures to establish jurisdiction over two types of offences defined in Article 2 (1) of the Convention: financing acts which constitute offences under any one of nine treaties listed in an annex and "[a]ny 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."[49]

Article 10 (1) imposes an *aut dedere aut judicare* obligation on states parties in absolute terms:

> "The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

III. Narcotics trafficking - the 1961 Single Convention on Narcotics Drugs, as amended by its Protocol and the 1971 Psychotropic Drug Convention

At least two widely ratified treaties concerning drug trafficking include universal jurisdiction and impose an *aut dedere aut judicare* obligation on states parties with respect to persons suspected of such offences found in their territory.

1961 Single Convention on Narcotics Drugs, 1961 as amended by the Protocol amending the Single Convention on Narcotic Drugs. Article 36(1) of the 1961 Single Convention on Narcotic Drugs Convention as amended by the Protocol amending the Single Convention on Narcotic Drugs defines unlawful acts covered by the Convention; Article 36(2) governs extradition and Article 35 imposes a duty to provide mutual legal assistance. Article 36 (2) (a) (iv) of the 1961 Convention contains an *aut dedere aut judicare* obligation on states parties:

France, Guinea, India, Kyrgyzstan, Libyan Arab Jamahiriya, Maldives, Monaco, Mongolia, Norway, Panama, Russian Federation, Slovakia, Soain, Sri Lanka, Sudan, Sweden, Trinidad and Tobago, Turkmenistan, United Kingdom, Uzbekistan and Yemen. The following 41 states have signed but not ratified: Algeria, Argentina, Belarus, Belgium, Brazil, Burundi, Canada, Comoros, Costa Rica, Coté d'Ivoire, Denmark, Egypt, Estonia, Finland, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Lithuania, Luxembourg, Madagascar, Nepal, Netherlands, Philippines, Poland, Portugal, Republic of Korea, Romania, Slovenia, South Africa, The Former Yugoslav Republic of Macedonia, Togo, Turkey, Uganda, United States of America, Uruguay and Venezuela.

[49] The treaties listed are: the Hague Convention, the Montreal Convention, the Internationally Protected Persons Convention, the Hostage-Taking Convention, the Nuclear Material Convention, the Attacks on Airports Convention, the Maritime Navigation Safety Convention, the Fixed Platforms Convention and the Terrorist Bombings Convention.

> "Subject to the constitutional limitations of a Party, its legal system and domestic law,
> . . . .
> (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given."[50]

As of 14 September 2001, the 1961 Single Convention, as amended by its Protocol had 164 states parties.[51]

[50] Single Convention on Narcotic Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 8 August 1975, U.N.T.S. vol. 976, p.105, Art. 36 2 (a) (iv). For discussions of the jurisdictional provisions of the 1961 Convention, see Clark, *supra*, n.16, 57-58; Henzelin,, *supra,n.*4, 325-327.

[51] As of 14 September 2001, according to the UN treaty website (www.untreaty/un.org) , the following states had ratified the Single Convention on Narcotic Drugs of 1961 as amended by it Protocol or who have ratified both instruments or who have ratified the Convention after the entry into force of the Protocol: Albania, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, the Former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe.

1971 Convention on Psychotropic Substances. An identical *aut dedere aut judicare* obligation is found in Article 22 (2) (a) (iv) of the 1971 Convention on Psychotropic Substances.[52] As of 26 April 2001, 167 states were parties to this Convention. One state had signed but not ratified.[53]

Although there were a number of reservations to the 1961 Single Convention and to the 1972 Protocol, there were no reservations to Article 36 (2) (a) (iv), imposing an *aut dedere aut judicare* obligation. One state, Vietnam, made a reservation to Article 36 (2) (b), concerning extradition. Austria, Finland, Sweden and the United Kingdom objected to this reservation as incompatible with the Convention. At least one authority has suggested that offences related to the traffic in narcotics are subject to universal jurisdiction.[54]

IV. Crimes related to armed conflict or collapsed states

Two unrelated treaties provide for jurisdiction over crimes under national law of international concern, one on mercenaries in 1989 and one on UN and associated personnel in 1994. It has been argued that these crimes now also are crimes under international law. Indeed, certain attacks on UN and associated personnel have been included in the Rome Statute, which is persuasive evidence in support of this view, although it has not yet been unanimously accepted, so both crimes are discussed in this chapter, rather than in Chapters Three and Four.

A. Mercenaries - the 1989 Mercenaries Convention

[52] Convention on Psychotropic Substances, 21 February 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 175, Art. 22 (2) (a) (iv).

[53] The 167 states that were parties to the Convention on that date were: Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Hungary, Iceland, India, Indonesia, Islamic Republic of Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, the former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe. The Convention has also been signed, but not ratified, by Liberia.

[54] Brownlie, *supra*, n.23, 308 (citing the *Drug Offences* case (Germany)), 17 Int'l L. Rep. 166 (Federal Supreme Court).

Article 2, 3 and 4 define unlawful acts covered by the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries; Article 9 spells out measures to be taken by states parties to establish jurisdiction; Article 15 governs extradition and Article 13 imposes a duty to provide mutual legal assistance. Article 12 of 1989 Convention the imposes an *aut dedere aut judicare* obligation on states parties:

> "The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."[55]

As of 14 September 2001, the 1989 Convention has 21 parties and 9 additional signatories.[56]

B. Crimes against United Nations and associated personnel - the 1994 Convention

Article 9 of the 1994 Convention on the Safety of United Nations and Associated Personnel defines unlawful acts covered by the Convention; Article 10 spells out measures to be taken by states parties to establish jurisdiction; Article 15 governs extradition and Article 16 imposes a duty to provide mutual legal assistance. Article 14 of the 1994 Convention provides that states parties shall either extradite persons found in their territory who are suspected of attacking peace-keepers or associated personnel in violation of that treaty or submit the case to their competent authorities for the purpose of prosecution:

[55] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 29 Int'l Leg. Mat. 91 (1990), Art. 12. For further information about the 1989 Convention see sources cited in the bibliography to this memorandum. For a discussion of the jurisdictional provisions, see Henzelin, *supra,* n.4, 363-365.

[56] As of that date, according to the United Nations treaty database, *obtainable from* <http://www.un.org>, the following states were parties to the 1989 Convention: Azerbaijan, Barbados, Belarus, Cameroon, Croatia, Cyprus, Georgia, Italy, Libyan Arab Jamahiriya, Maldives, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan; the following states had signed, but not ratified the Convention: Angola, Congo; Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Yugoslavia.

> "The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State."[57]

The International Law Commission has suggested that attacks against United Nations and associated personnel are subject to universal jurisdiction.[58] Some of the crimes in the Convention are now considered to be war crimes and are included within the jurisdiction of the International Criminal Court.[59] As of 14 September 2001, 53 states were parties to the Convention and a further 12 had signed, but not yet ratified, it.[60] Some of these crimes are also crimes under customary law.

V. Transnational crime - the 2000 Transnational Crime Convention

On 15 November 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crime (Transnational Crime Convention). The purpose of the Convention is "to promote cooperation to prevent and combat transnational organized crime more effectively", and the definitions in the Convention indicate that it would include much of the conduct amounting to crimes under international law addressed in this memorandum, but not all.[61]

[57] Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 49/59 of 9 Dec. 1994, Art. 14. For the background to this convention, see Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 Am. J. Int'l L. 621 (1995); M.-Christiane Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 Int'l & Comp. L. Q. 560 (1995) ("The Convention follows closely the mechanism established in the anti-terrorism conventions for the practical implementation of the above-mentioned principle *aut dedere aut judicare*."); Antoine Bouvier, *"Convention on the Safety of United Nations and Associated Personnel": Presentation and analysis,* Int'l Rev. Red Cross, No. 309, 638 (1995) ("Articles 14 and 15 stipulate the applicability of the *aut dedere aut judicare* principle to the Convention.") (footnote omitted); TJAGSA Practice Note, 199 Army Law. 21, 22 (1999) ("This Convention implements international law by making it a universal jurisdiction crime to attack neutral persons deployed on behalf of the UN.").

[58] International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, para. 50

[59] Rome Statute, Article 8 (2) (b) (3) (iii) and (e) (iii).

[60] As of 14 September 2001, according to the UN treaty database, the following 54 states are parties to the 1994 Convention: Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Botswana, Brazil, Bulgaria, Chile, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Fiji, Finland, France, Germany, Greece, Guinea, Hungary, Iceland, Italy, Jamaica, Japan, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Monaco, Nepal, New Zealand, Norway, Panama, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Singapore, Slovakia, Spain, Sweden, Tunisia, Turkmenistan, Ukraine, United Kingdom, Uruguay and Uzbekistan. As of that date, it has been signed, but not ratified by the following 12 states: Belgium, Bolivia, Canada, Haiti, Honduras, Malta, Netherlands, Pakistan, Samoa, Sierra Leone, Togo and the United States.

[61] The purpose of the Convention is stated in Article 1.

Article 3 states that the crimes covered by the Convention include two types of crime:

> "1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:
> (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
> (b) Serious crime as defined in article 2 of this Convention;
> where the offence is transnational in nature and involves an organized criminal group."[62]

Articles 5, 6, 8 and 23 define ancillary and related offences.[63] A serious crime is defined as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".[64] An offence is transnational in nature when

> "(a) It is committed in more than one State;
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State."[65]

An organized criminal group is defined as

> "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit[.]"[66]

A structured group means "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure[.]"

These definitions indicate that the Convention would reach some war crimes, crimes against humanity and genocide, as well as torture, carried out by state agents, whether regular armed forces, paramilitary forces or death squads. Such forces often would fit the definition of organized criminal groups. They are structured and some of the crimes they commit are frequently - although not always -

[62] Transnational Crime Convention, Art. 3.

[63] *Ibid.*, Art. 5 (Criminalization of participation in an organized criminal group), Art. 6 (Criminalization of the laundering of proceeds of crime), Art. 8 (Criminalization of corruption) and Art. 23 (Criminalization of obstruction of justice).

[64] *Ibid.*, Art. 2 (b).

[65] *Ibid.*, Art. 3 (2).

[66] *Ibid.*, Art. 2 (a).

carried out with the aim of obtaining, directly or indirectly, financial or other material benefits. For example, the forced displacement of civilians is usually carried out with the aim of seizing their homes and looting their possessions. This conclusion is reinforced by the omission of a exception, such as found in the Terrorist Bombings Convention, for crimes committed by military forces or other state agents.

In marked contrast to other treaties, possibly because the range of ordinary crimes is so much broader, the *aut dedere aut judicare* provisions are much more limited in scope. Each state party is required to adopt measures to establish jurisdiction over offences in Articles 5, 6, 8 and 23 (there is no similar obligation with respect to serious crime as defined in Article 2 (b)) when the offence is committed in the territory of a state party or aboard one of its ships or planes.[67] A state party may, under the Convention, subject to Article 4 (concerning the protection of national sovereignty), adopt such measures to establish jurisdiction over these offences based on active and passive personality and over stateless residents; it may also, pursuant to the Convention, establish its jurisdiction over certain types of the offences defined in Articles 5 and 6 (again omitting serious offences defined in Article 2 (b)), committed abroad.[68]

In addition, each state party is required to "adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention [this would appear to include serious crimes defined in Article 2 (b)] when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals".[69] However, a state party is not under an *aut dedere aut judicare* obligation with respect to suspects who are not nationals. Article 15 (4) simply states that "[e]ach State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her."[70] Nevertheless, as in other similar treaties, the Convention makes clear that nothing in the Convention limits other grounds for jurisdiction.[71] Article 16 (10) imposes an *aut dedere aut judicare* obligation on states parties with regard to its nationals:

[67] *Ibid.,* Art. 15 (1).

[68] *Ibid.,* Art. 15 (2).

[69] *Ibid.,* Art. 15 (3).

[70] *Ibid.,* Art. 15 (4).

[71] *Ibid.,* Art. 15 (6) ("Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.").

> "A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution."[72]

As of 14 September 2001, 3 states were parties to the 2000 Convention and 124 other states had signed, but not yet ratified it.[73]

VI. Regional treaties

A. Council of Europe

The Council of Europe has adopted at least one treaty since 1977 including an *aut dedere aut judicare* universal jurisdiction obligation on states parties, although, in contrast to most international treaties, it accords priority to the state requesting extradition. In addition, the Council of Europe has adopted some treaties providing for the transfer of criminal proceedings by territorial states parties to other states parties to exercise universal jurisdiction over ordinary crimes committed in the territorial state.

European Terrorism Convention. Article 1 of the 1977 European Terrorism Convention identifies unlawful acts covered by the Convention, by providing that they are not political offences or connected to political offences, including seizures of aircraft under the 1970 Hague Convention, attacks on aircraft covered by the 1971 Montreal Convention, attacks on internationally protected persons, kidnapping or hostage-taking, use of explosives or firearms which endangers persons and attempts to commit these offences or to act as an accomplice of one

[72] *Ibid.*, Art. 16 (10).

[73] As of 14 September 2001, according to the UN treaty database, the following 3 were parties to the 2000 Convention: Monaco, Nigeria and the Federal Republic of Yugoslavia.

As of the same date, the following 124 states had signed, but not yet ratified, it: Afghanistan, Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahamas, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gambia, Georgia, Germany, Greece, Guatemala, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia and Zimbabwe.

who commits or attempts to commit one of these offences.[74] Article 8 imposes a duty to provide mutual legal assistance.[75]

Article 6 spells out measures to be taken by states parties to establish jurisdiction. It provides:

> "1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.

[74] European Convention on the Suppression of Terrorism, E.T.S. No. 90, 27 January 1977, Art. 1.

[75] *Ibid.*, Art. 8.

> 2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."[76]

Article 7 of the Convention obliges states parties, when there has been a request for extradition from another Contracting State which is not fulfilled and when the request is from a Contracting State whose jurisdiction is based on a rule also existing in the requested state Article 7 states:

> "A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 [listing offences which may not be treated as political offences] is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1 [dealing with requests by other Contracting States which have the same jurisdictional basis], shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner under the law of that State."[77]

As of 14 September 2001, 36 of the 43 member states of the Council of Europe were parties to the 1977 Convention. One state had signed, but not yet ratified.[78]

B. Organization of American States

There is a long history, dating back to the 19th century, in Latin American and the Caribbean of adopting treaties providing universal jurisdiction over crimes under international law and over ordinary crimes under national law of international concern, including the 1878 Treaty to Establish Uniform Rules for Private International Law, the 1889 Treaty on International Penal Law, the 1928 Bustamente Code and the 1940 Montevideo Treaty on International Criminal Law(see Chapter Two, Section 1.C). This tradition was continued after the Second World War by the Organization of American States (OAS), which adopted two treaties imposing an *aut dedere aut judicare* universal jurisdiction obligation on states parties for crimes under international law, the 1985 Inter-American Convention to Prevent and Punish Torture and the 1994 Inter-American Convention on Forced Disappearance of Persons (see Chapters Nine and Twelve).

In addition, the OAS has adopted another treaty including *aut dedere aut judicare* universal jurisdiction obligations on states parties, the 1971 Convention to Prevent and Punish the Acts of

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[76] *Ibid.*, Art. 6.

[77] *Ibid.*, Art. 7. For discussions of the jurisdictional provisions, see Clark, *supra*, n.16, 61; Henzelin, *supra*, n.4, 318-321.

[78] As of 14 September 2001, according to the Council of Europe website (www.conventions.coe.int) , the following 36 states were parties to the 1977 Convention: Albania, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom.

As of the same date, the Ukraine had signed the Convention, but not yet ratified it.

Terrorism Taking the Form of Crimes against Persons and the Related Extortion that are of International Significance.

Article 5 of the 1971Convention states:

> "When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory. The decision of these authorities shall be communicated to the state that requested extradition. In such proceedings, the obligation established in Article 4 shall be respected."[79]

This OAS convention has been ratified by 13 of the 35 members of the OAS. Four other states had signed but not ratified.[80]

C. Organization of African Unity

The Organization of African Unity (OAU) adopted the Convention for the Elimination of Mercenaries in Africa in 1972, which provides for universal jurisdiction over persons carrying out mercenary activities in Africa.[81] As of July 1999, it had been ratified by 22 of the 53 member states of the OAU, signed by three other current members of the OAU and by one former member of the OAU.[82]

[79] Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, adopted 27 February 1971, 27 U.S.T. 3949, 10 Int'l Leg. Mat. 255 (1971), Art. 5.

[80] As of 14 September 2001, according to the Organisation of American States website (www.oas.org), the following states are parties to the 1971 OAS convention: Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Peru, United States, Uruguay and Venezuela. Four states Chile, Honduras, Jamaica and Trinidad and Tobago has signed but not ratified.

[81] OAU Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev.L, Annex 1 (1972) (*obtainable from* <http://www.up.ac.za/chr/ahrdb/ahrdbtreaties.html>). For discussions of the jurisdictional provisions, see Clark, *supra*, n.16, 61; Henzelin, *supra*, n.4, 362-363.

[82] As of 14 September 2001, according to the African Human Rights Database website (www.up.ac.za/chr/ahrdb/statorat_1.html>) the following member states had ratified the OAU Convention: Benin, Burkina Faso, Cameroon, Congo, Democratic Republic of the Congo, Egypt, Ethiopia, Ghana, Lesotho, Liberia, Mali, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia and Zimbabwe. The following member states had signed, but not yet ratified it: Algeria, Angola and Guinea. Morocco had signed it when it was still a member of the OAU.

Article One defines "mercenary"; Article Two (Offence) defines the actions of mercenaries and the recruitment, training, financing and protection of mercenaries as "crimes against the peace and security of Africa" and Article Three (Duties of State) requires states parties to "undertake all necessary measures to eradicate from the African continent the activities of mercenaries . . . particularly : . . . (f) to take as soon as possible all necessary legislative measures for the implementation of the present Convention". Article Four (Sanctions) requires states parties to impose severe penalties for the crimes in Article Two.[83] Article Five (Competence) provides for universal jurisdiction over persons suspected of crimes in Article Two who are found in the territory of a state party:

> "Every contracting State undertakes to take the measures necessary to punish any individual found in its territory who has committed one of the offences defined in Article Two of the present Convention, if [it] does not hand him over to the State against which the offence has been committed or would have been committed."[84]

Article Seven provides that a request for extradition cannot be refused unless the state with custody of the suspect undertakes to prosecute him or her.[85]

[83] *Ibid.*, Arts One to Four.

[84] *Ibid.*, Art. Five. The word "it" replaces the word "he", which is a misprint.

[85] *Ibid.*, Art. Seven (Extradition). It reads:
"1. A request for extradition cannot be rejected, unless the State from which it is sought undertakes to prosecute the offender in accordance with the provisions of Article Five of the present Convention.
2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.
3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.
4. A state will be regarded as an interested party for the outcome of a prosecution as defined in section 3 of this Article if the offence has some connection with its territory or militates against its interests."