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International Terrorism: The Legitimization of Safe Harbor States in International Law

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The Legitimization of Safe Harbor States
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INTERNATIONAL TERRORISM

*A terrorist attack on one country is an attack on humanity as a whole. All nations of the world must work together to identify the perpetrators and bring them to justice.*¹

I. INTRODUCTION

On September 11, 2001, hijackers used commercial airplanes as “deadly guided missiles” to attack the United States.² Two planes slammed into the twin towers of the World Trade Center in New York City, causing their collapse, while another plane hit the Pentagon in Washington, D.C.³ A fourth plane crashed in Pennsylvania, never making it to its target.⁴ There were more than 3,000 fatalities.⁵ Osama bin Laden eventually claimed responsibility for the attacks, although al-Qaeda, the international terrorist group he led, was almost instantly suspected.⁶

Despite the magnitude of these attacks as well as their far reaching international implications, *where* bin Laden is captured may prove to be more vexing than how or when he is captured. Under the current international legal framework governing international terrorism,⁷ the locus of capture will dictate the extent to which bin Laden and other international terrorists will face a legitimate prosecution. For example, if bin Laden is captured in Saudi Arabia by Saudi law-enforcement officials, the United States may seek extradition under the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation for trial by U.S. courts under U.S. law.⁸ Saudi Arabia, however, could invoke its legal option under this convention

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1. Press Release, Kofi Annan, Sec’y-Gen., Sec’y-Gen. Condemns Terrorist Attacks on U.S. ‘in Strongest Possible Terms,’ U.N. Doc. SG/SM/7949 SC/7142 (Sept. 12, 2001).
 2. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 1–2 (2004), <http://www.gpoaccess.gov/911/pdf/execsummary.pdf>.
 3. *Id.* at 1.
 4. *Id.*
 5. *Id.* at 1–2.
 6. See Douglas Jehl & David Johnston, *In Video Message, Bin Laden Issues Warning to U.S.*, N.Y. TIMES, Oct. 30, 2004, at A1; see also NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 115–16 (1st ed. 2004). Prior to the 9/11 attacks, the U.N. Security Council already recognized the threat of Al-Qaeda as well as the Taliban. See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (condemning, *inter alia*, the Taliban’s safe haven for bin Laden and creating “the Al-Qaida and Taliban Sanctions Committee”).
 7. “Terrorism is generally understood as a method of violence that is intended to ‘create a climate of fear’ in order to ‘service political ends’ by coercing a targeted group or government into acceding to the attackers’ aims.” Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 U.N.S.W. L.J. 454, 457 (2004) (citing ALLAN BULLOCK ET AL., THE FONTANA DICTIONARY OF MODERN THOUGHT 851 (2d ed. 1988)). For purposes of this Note, this is how terrorism will be considered. See *infra* Part II.A (discussing modern international terrorism and describing terrorism at the international level).
 8. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973; Ratification/Accession: the United States (Nov. 1, 1972); Saudi Arabia (June 14, 1974)). The Convention proscribes, *inter alia*, the aiding and abetting of individuals who destroy a commercial airplane in flight. See *id.* at art. 1, ¶ 2(b).

to prosecute rather than to extradite bin Laden which, experience dictates, does not work to address the problem of international terrorism.⁹ The convention's application to international terrorism has not only undermined the relevant international legal framework; it has also permitted international terrorism to remain an ever-present threat to international peace and security.

This Note contends that the international community's failure to define terrorism, and the principle of *aut dedere aut judicare* (the option to extradite or to prosecute), have combined to create legally legitimate safe harbor states for terrorists seeking refuge.¹⁰ States can ratify the multilateral conventions on terrorism and claim to be combating terrorism, while at the same time they are actually permitting terrorists to reside within their borders without any significant fear of prosecution for acts committed abroad. As long as the custodial-state party exercises its right to prosecute, regardless of whether it results in a *legitimate* prosecution or in any prosecution for that matter, the state party's obligations under the respective multilateral convention are fulfilled. In essence, this result perpetuates the threat of international terrorism rather than triggers the legal mechanisms necessary to address the problems of international terrorism. Member states do not need to circumvent international law to provide safe harbor for international terrorists—the multilateral conventions themselves provide the mechanism to do so. While international politics and pressures may in some cases result in the extradition of suspected terrorists, the changing nature of world affairs may further thwart the primary goal of the multilateral conventions on terrorism: to consistently bring international terrorists to justice under a predictable legal framework.

Part II of this Note lays out a basic history of modern international terrorism, particularly its rise in the last few decades, as well as the modern international legal response, including the multilateral conventions on terrorism. Part III then explores

Although the flights were domestic, the Convention still applies since Saudi Arabia is not the locus of the planes' registration. *See id.* at art. 4, ¶¶ 3, 6. All four of the planes were registered in the United States. *See* Federal Aviation Administration, Aircraft Registry Inquiry, <http://registry.faa.gov/aircraftinquiry/> (last visited Nov. 12, 2009) (flight 11 tail number: N334AA; flight 93 tail number: N591UA; flight 175 tail number: N612UA; flight 77 tail number: N644AA). Since no bilateral extradition treaty exists between the United States and Saudi Arabia, the Convention serves as a legal basis for extradition, subject to the laws of the custodial state. *See id.* at art. 8, ¶ 1; U.S. DEPT OF STATE, TREATIES IN FORCE 236–37 (Jan. 1, 2009), <http://www.state.gov/documents/organization/123746.pdf>.

9. *See infra* Part III.C (discussing Pan Am Flight 103). Although one legal scholar has claimed that the “United States does not want to have an effective multilateral scheme that would presumably restrict its unfettered political power to act unilaterally,” an effective framework is necessary regardless of a state's political power because without such a framework, there is no real legitimate basis for which a state can act to enforce its political will. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 92 (2002).
10. This Note is predominantly focused on the multilateral conventions on terrorism, as well as U.N. Security Council resolutions, as the bedrock for the international legal framework. While such a framework does involve various other mechanisms including bilateral treaties and individual states' domestic counter-terrorism laws, the author has taken issue with the role of the conventions when serving as the legal basis for extradition—regardless of whether state parties actually have bilateral extradition treaties—as well as the source for domestication of the specified offenses.

the catalysts for the creation of legitimate safe harbor states—the lack of a universal definition of international terrorism and the principle of *aut dedere aut judicare*. This part also presents a case study of Pan Am Flight 103 as evidence that legally legitimate safe harbor states exist. Finally, Part IV addresses two essential solutions to the problem of legally legitimate safe harbor states for terrorists: (1) a codified universal definition of international terrorism, and (2) a reworking of the principle of *aut dedere aut judicare*, as applied to international terrorism, via a new dispute resolution mechanism that balances various states' policies that may justify certain acts of terrorism.

II. HISTORY—TERRORISM AS AN INTERNATIONAL QUANDARY

A. *Modern International Terrorism: Boundaries, What Boundaries?*

Terrorism is not a uniquely modern phenomenon. The term “terrorism” was used pejoratively for several centuries, “usually appl[ying] to ‘the other side.’”¹¹ However, terrorism employed as a political idea was only first used during the French Revolution, when it was utilized by the French legislature to suppress the aristocratic threat to the revolutionary government.¹² The move from terrorism as a modality of “state-perpetrated violence” to one of violence also carried out by non-state actors would not occur for another century, when the term was applied to the actions of French and Russian anarchists.¹³ Often, these acts of terrorism were the result of “coherent ideological platforms and aspirations” with a focus on specific targets.¹⁴ Intentional attacks against innocent civilians were usually shunned in order to maintain “political legitimacy.”¹⁵ However, the rise of *international* terrorism—terrorism not constrained by geographical boundaries—has been much more prevalent in recent years and differs from prior practices by the deliberate targeting of civilians in addition to governments.

Some experts believe that modern international terrorism began on July 22, 1968, when three armed Palestinians hijacked a commercial flight en route from Rome to Tel Aviv.¹⁶ Although this was not the first commercial airline hijacking, it was the first to be used to achieve political ends—the exchange of hostages for imprisoned

11. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 27 (2006).

12. *Id.* (“The French legislature led by Maximilien Robespierre . . . ordered the public execution of 17,000 people . . . to educate the citizenry of the necessity of virtue.”).

13. *Id.* at 28.

14. Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 302 (2003) (citing Bruce Hoffman, *Terrorism Trends and Prospects*, in COUNTERING THE NEW TERRORISM 7, 8–10 (1999)).

15. *Id.* (citing Brian M. Jenkins, *The Organization Men. Anatomy Of A Terrorist Attack*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 9 (James F. Hoge, Jr. & Gideon Rose eds., 2001)).

16. See, e.g., BRUCE HOFFMAN, *INSIDE TERRORISM* 63 (rev. and expanded ed. 2006).

terrorists in Israel.¹⁷ The hijackers managed to put pressure on the Israeli government to respond to their demands, while also receiving significant media attention that today's terrorists so often seek.¹⁸ Since that hijacking, international travel has become one the terrorists' preferred instruments, allowing them to strike outside of their home countries¹⁹ Similarly, advances in technology not only permitted this increased use of travel; it resulted in more precise tactics and targets as well as the extension of media coverage.²⁰ Thus, terrorism today is no longer confined to traditional state boundaries.

During the second half of the twentieth century, the nature of terrorism also changed.²¹ Terrorists began targeting innocent civilians as a means to achieve greater concessions from target governments and increased media coverage.²² They thrived on the fear they could generate by acting internationally, rather than nationally.²³ Thus, a "hallmark" of international terrorism is "the 'active' use of violence in states not 'directly' involved in the conflict which results in 'innocent' persons becoming [sic] victims for 'political' ends."²⁴ Moreover, "[t]he trend now seems to be [moving] away from attacking specific targets like the other side's officials and toward more indiscriminate killing."²⁵ Hence, the violent modalities employed by terrorists today do not always reflect the terrorists' objectives.²⁶ This is evidenced in such recent terrorist attacks as the September 11, 2001 attacks in the United States, the 2004 Madrid bombings, and the 2005

17. *Id.* at 67 ("[T]he express purpose [was to trade] the passengers they held hostage for Palestinian terrorists imprisoned in Israel.").

18. *Id.*

19. *Id.* at 68.

20. *See id.*

21. Although the causes of terrorism are not addressed in this Note, the causes of terrorism still remain an important element in creating an efficient and effective framework for combating terrorism. For a general discussion on the causes of terrorism, see Martha Crenshaw, *The Causes of Terrorism*, 13 COMP. POL. 379 (1981) (noting, *inter alia*, concrete grievances and no opportunity for political participation). Yet, at least one legal scholar has argued that the root causes of terrorism should not be taken into account. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 24–25 (2002). It is possible that the politicized nature of terrorism has led to this disagreement about how to address the causes of terrorism because the recognition of "grievances" may legitimize terrorists' causes.

22. See HOFFMAN, *supra* note 16, at 64 (noting that the civilians were often from different countries and not associated with the terrorists' agendas).

23. *See id.*

24. Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 124 (1986).

25. Walter Laqueur, *Postmodern Terrorism*, 75 FOREIGN AFF. 24, 25 (1996).

26. *See* Young, *supra* note 11, at 29 ("[T]he relationship between the means employed and the terrorists' ends is more attenuated than in the past."). Likewise, it has been noted that "[t]he ideologically motivated offender of the 1960s will probably be replaced by new religious fanatics and political zealots of the 2000s who care not for the harmful consequences they can cause no matter how catastrophic." M. Cherif Bassiouni, *Forward, Assessing "Terrorism" into the New Millennium*, 12 DEPAUL BUS. L.J. 1, 16 (1999) (internal citation omitted).

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London bombings.²⁷ Just as their objectives are changing, so are the structures of terrorist groups. Terrorist organizations are now more fluid and rely on a more linear rather than hierarchical basis.²⁸ As a result, terrorists may have more freedom and less restraint in determining their tactics, including indiscriminate killing.²⁹ With this constant evolution of international terrorism, it is crucial that just as terrorism crosses borders, so should the responses to fight it.

B. Modern International Legal Response: What Have We Done

In response to the escalation of international terrorism as a serious threat to international peace and security, the international community³⁰ began to take the necessary steps to criminalize the various methods of violence employed by modern terrorists.³¹ As a result, the international community has established several multilateral conventions, each targeting a specific tactic.³² The proscribed offenses

27. See Young, *supra* note 11, at 29 (noting the increasing scale of such attacks).

28. See HOFFMAN, *supra* note 16, at 271.

29. See *id.*

30. For purposes of this Note, “international community” is in reference to states acting at the international level, either bilaterally or through various intergovernmental organizations. The author acknowledges that the international community does encompass far more actors and decision makers than just states, including governmental and non-governmental organizations, and constituencies. However, due to the focus on international law and the principle of *aut dedere aut judicare*, the author chose to narrowly focus on states as decision makers in addressing the legitimization of safe harbor states in international law.

31. See Stephens, *supra* note 7, at 466. This approach is often described as “pragmatic” due to the international community’s failure to universally define international terrorism. See *infra* Part III.A (discussing the lack of a universal definition).

32. See *infra*, a list of multilateral conventions dealing with terrorist tactics. The full text of each of these conventions, including status information and the latest party signatories, is available from the U.N. Treaty Collection, U.N. Conventions Deposited With The Secretary-General of the United Nations, available at http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG (last visited Nov. 12, 2009). The multilateral conventions dealing with terrorists tactics are: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (Entry into force: Dec. 04, 1969; 185 state parties; U.S. ratification without reservation: Sept. 05, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (Entry into force: Oct. 14, 1971; 185 state parties; U.S. ratification without reservation: Sept. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (Entry into force: Jan. 26, 1973; 188 state parties; U.S. ratification without reservation: Nov. 01, 1972); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (Entry into force: Feb. 20, 1977; 173 state parties; U.S. ratification without reservation: Oct. 26, 1976); Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. 11080, 1456 U.N.T.S. 101 (Entry into force: Feb. 08, 1987; 142 state parties; U.S. ratification without reservation: Dec. 13, 1982); International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 205 (Entry into force: June 03, 1983; 167 state parties; U.S. ratification without reservation: Dec. 07, 1984); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 3 pt 1 DEP’T ST. DISP. 259 (1992), 1589 U.N.T.S. 474 (Entry into force: Aug. 06, 1989; 169 state parties; U.S. ratification without reservation: Oct. 19, 1994); Convention for the Suppression of

range from hostage taking and bombing to hijacking and financing terrorist activities.³³ However, the mere existence of these conventions is not necessarily indicative of their recognition and approval as law. States must voluntarily ratify each convention, which enters into force (*i.e.* effect) and binds contracting state parties once the requisite number of states has ratified it.³⁴

Each convention appears to have been drafted in direct response to the increased use by terrorists of that particular tactic.³⁵ For example, the first few conventions explicitly deal with violence in civil aviation due to the early prevalence of commercial-airline hijackings by terrorists.³⁶ Likewise, an increase in incidents of hostage taking and the targeting of diplomats led to the International Convention Against the Taking of Hostages and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.³⁷ One of the most recent conventions, the International Convention for the Suppression of the Financing of Terrorism, deals with regulating common methods of terrorist financing, undoubtedly in response to the financial needs of terrorists for general operations and specific attacks.³⁸ However, as the international community targeted a specific tactic,

Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1 DEP'T ST. DISP. 59 (1990), 1678 U.N.T.S. 221 (Entry into force: Mar. 01, 1992; 156 state parties; U.S. ratification without reservation: Dec. 06, 1994); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1 DEP'T ST. DISP. 59 (1990), 1678 U.N.T.S. 304 (Entry into force: Mar. 01, 1992; 145 state parties; U.S. ratification without reservation: Dec. 06, 1994); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8 (1997), 2122 U.N.T.S. 359 (Entry into force: June 21, 1998; 142 state parties; U.S. ratification with declaration: Apr. 09, 1997); International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. TREATY DOC. NO. 106-6 (2002), 2149 U.N.T.S. 256 (Entry into force: May 23, 2001; 164 state parties; U.S. ratification with reservation & understandings: June 26, 2002); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S., 2178 U.N.T.S. 197 (Entry into force: Apr. 10, 2002; 171 state parties; U.S. ratification with reservation & understandings: June 26, 2002); International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 44 I.L.M. 815 (Entry into force: July 07, 2007; 60 state parties; U.S. signature: Sept. 14, 2005). *Id.* [hereinafter collectively referred to as the "Multilateral Conventions Against Terrorism"].

33. See Multilateral Conventions Against Terrorism, *supra* note 32.
34. This is standard practice for convention and treaty ratifications in international law. The ratification/accession process is unique to each state and must be followed accordingly. For instance, under U.S. law, the United States usually does not become a party bound by a treaty or convention until it has been ratified by two-thirds of the U.S. Senate. See U.S. CONST. art. II, § 2. Thus, its signature alone does not necessarily legally bind the United States. Likewise, the extent to which a state party is bound may be limited should the state ratify with reservations to certain provisions. However, such reservations are not observed if not permitted by the treaty or if the reservation "is incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331 (Entry into force: Jan. 27, 1980; 108 state parties; U.S. signature: April 24, 1970) [hereinafter Vienna Convention].
35. See Bassiouni, *supra* note 26, at 7-9.
36. See Stephens, *supra* note 7, at 467-68.
37. *Id.* at 470 (noting the establishment of the two relevant conventions "following several attacks directed at diplomats and the dramatic seizure of the U.S. embassy and its staff in Tehran by Iranian students during the Iranian Revolution").
38. See *id.* at 461.

terrorists began to rely on different methods to achieve their ends.³⁹ Furthermore, because the multilateral conventions target specific acts, individuals may actually be prosecuted under the relevant state law even though the actors are not really “terrorists” but may be acting for purely criminal ends.⁴⁰ Nonetheless, these conventions go beyond just proscribing a specific act. The conventions usually require state parties to criminalize the proscribed offense in their domestic law and also create a legal basis for jurisdiction and extradition.⁴¹

The most recent effort by the international community to criminalize international terrorism is the Draft Comprehensive Convention Against International Terrorism (“Draft Convention”).⁴² One legal scholar has described it as the most “ambitious initiative by the United Nations to elaborate a treaty-based definition of terrorism and to establish a comprehensive approach for combating international terrorism through international criminal law.”⁴³ The ultimate objective of the Convention is to criminalize international terrorism itself, rather than to proscribe each of the specific tactics used by terrorists.⁴⁴ However, there is a current debate as to whether the Draft Convention, once it has been adopted and has entered into force, will serve as the overarching counter-terrorism convention or as a supplementary convention to the other multilateral conventions.⁴⁵ In addition, despite active work for nearly a decade, the Draft Convention

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39. Recent attacks have shown an apparent blatant disregard by terrorists for the conventions. See U.S. Dep’t of State, *Significant Terrorist Incidents, 1961–2003: A Brief Chronology* (2004), <http://www.state.gov/t/pa/ho/pubs/fs/5902.htm> (last visited Nov. 25, 2009). Examples include: the 1998 U.S. Embassy bombings in Kenya and Tanzania; the September 11, 2001 attacks on the United States; the 2003 bombings of the Jordanian embassy and U.N. Headquarters in Iraq. *Id.*
40. For example, an individual who blows up a commercial airliner simply to commit murder and has no intention for third parties to respond in a certain way could still be tried under domestic criminal laws created under the applicable “terrorism” conventions. This is particularly relevant as some of the multilateral conventions have a “compulsion” element of the offense while others include it as a second type of offense, and still others do not mention it at all. Compare International Convention Against the Taking of Hostages, *supra* note 32, at art. 1, with Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 32, at art. 3, and International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 2. The compulsion element essentially requires the intent of the offense to be the compulsion of third party action in response to the terrorist act. See, e.g., International Convention Against the Taking of Hostages, *supra* note 32, at art. 1.
41. See Multilateral Conventions Against Terrorism, *supra* note 32. See also Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT’L L. 3, 28 (1999) (noting that the conventions “are essentially extradition and judicial assistance treaties”).
42. See Letter Dated 3 August 2005 from the Chairman of the Sixth Committee Addressed to the President of the General Assembly, Annex, app. II, U.N. Doc. A/59/894 (Aug. 3, 2005) (containing text of the Draft Comprehensive Convention Against International Terrorism) [hereinafter Draft Convention]. See *infra* Part IV.A (discussing the Draft Convention as part of the solution).
43. Stephens, *supra* note 7, at 462.
44. See Draft Convention, *supra* note 42, at art. 2 (punishing conduct “when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”).
45. See Mahmoud Hmdou, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, 4 J. INT’L CRIM. JUST. 1031, 1032 (2006). As aforementioned, individual states must voluntarily ratify or accede to treaties or conventions. See *supra* note 34.

remains stalled, primarily on the issue of *defining* international terrorism.⁴⁶ Similarly, particularly problematic issues—acts of self-determination, situations involving armed forces, and state sponsorship of terrorism—exist with regard to the scope of the convention; specifically, if or how the Convention will apply.⁴⁷

In 2006, the U.N. General Assembly formally adopted the U.N. Global Counter-Terrorism Strategy (“Strategy”).⁴⁸ The Strategy essentially calls upon member states to actively combat international terrorism by undertaking various types of measures.⁴⁹ The measures, and their requisite actions, are categorized as follows: (1) “measures to address the conditions conducive to the spread of terrorism”; (2) “measures to prevent and combat terrorism”; (3) “measures to build states’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard”; and (4) “measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.”⁵⁰ One aspect of the Strategy calls upon member states to become party to the multilateral conventions.⁵¹ In September 2008, the U.N. General Assembly reaffirmed the Strategy and called upon member states “to step up their efforts to implement the Strategy in an integrated manner and in all its aspects.”⁵² Thus, while ambitious, the Strategy does provide some guidance

46. See Hmdou, *supra* note 45, at 1032–33. Issues include whether there should be a terrorist offense or whether there should be a definition of terrorism and a list of terrorist crimes. *See id.*

47. *See id.* Under international law, individuals have a fundamental right to self-determination. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3 (Entry into force: Jan. 3, 1976; 160 state parties; U.S. signature: Oct. 5, 1977) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”). *See also* U.N. Charter art. 1, para. 2 (“respect for the principle of . . . self-determination of peoples . . .”). Thus, this issue is predominantly focused on whether the Convention will apply to situations where individuals are exercising their legitimate right to self-determination. *See* Hmdou, *supra* note 45, at 1035–36. With regard to armed situations, there is concern that two parties to a conflict that engage in the same tactics, will be labeled and treated differently based on their status (*i.e.* “the dominant military power approach versus the ‘patriotic’ power approach”). *See id.* at 1033 (“The historic and seemingly everlasting divide over who has the right to use force without being described as a terrorist have surfaced in the negotiations of the Comprehensive Convention from the beginning.”). *See also infra* Part IV.A (discussing the Draft Convention as part of the solution).

48. G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 8, 2006). According to the United Nations, the Strategy is the “the first ever comprehensive, collective and internationally approved global framework for tackling the problem of terrorism.” U.N. Peace and Security Section, U.N. Action to Counter Terrorism, Fact Sheet Implementing the Global Counter-Terrorism Strategy (March 2009), http://www.un.org/terrorism/pdfs/CT_factsheet_March2009.pdf.

49. *See* G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

50. *Id.*

51. *Id.* at Annex, Plan of Action, ¶ 2(a).

52. G.A. Res. 62/272, U.N. Doc. A/RES/62/272, at ¶ 2 (Sept. 15, 2008). *See also* The Secretary-General, *Report of the Secretary-General on the United Nations Global Counter-Terrorism Strategy: Activities of the United Nations System in Implementing the Strategy*, U.N. Doc. A/62/898 (July 7, 2008). Interestingly, in the preamble of the resolution, the General Assembly considers itself as “the competent organ with universal membership to address the issue of international terrorism.” *Id.* However, simply having universal membership does not mean there is universal consensus. *See* U.N. Charter art. 18 (voting

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to both member states and U.N. institutions in order to take the necessary steps to not only combat international terrorism, but to prevent it as well.

The international community has also created several regional conventions and treaties, which seek to suppress acts of international terrorism.⁵³ Since these treaties are often between member states of “geographically regional organizations” or organizations “defined by religious or cultural affiliations,”⁵⁴ they are limited in terms of coverage and enforcement. Likewise, due to the nature of the regional organizations, any criminalization of terrorism or specific tactics will often reflect the specific normative values of the organization’s member states.⁵⁵ Many of the regional conventions are modeled after the multilateral conventions: covering proscribed offenses; establishing jurisdiction and extradition elements; and calling on the member states to combat terrorism.⁵⁶ Also, many of the regional conventions often encourage their member states to become parties to the multilateral conventions on terrorism if the states are not parties already.⁵⁷

Finally, the U.N. Security Council has played a predominant role in responding to international terrorism, particularly because its resolutions are legally binding upon all member states of the United Nations.⁵⁸ Although the Security Council has passed several resolutions over the years with regard to international terrorism, there is one resolution that stands out as being the most aggressive. On September 28, 2001, the

procedures). Only two thirds of the majority is required when voting on issues of “maintenance of international peace and security,” which undoubtedly includes international terrorism. *Id.* at art. 18, para. 2.

53. *See, e.g.*, Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 191; European Convention on the Suppression of Terrorism, as amended by its Protocol, Jan. 27, 1977, 1137 U.N.T.S. 93; Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, <http://www.unhcr.org/refworld/docid/3de5e6646.html>; Organization of African Unity (OAU) Convention on the Prevention and Combating Terrorism, July 14, 1999, 2219 U.N.T.S. 179; Inter-American Convention Against Terrorism, June 30, 2002, S. TREATY Doc. No.107-18 (2005), 42 I.L.M. 19 (2003). [collectively hereinafter Regional Conventions Against Terrorism]. Further information regarding the status and parties of these and other regional conventions is available from the U.N. Treaty Collection, U.N. Conventions Deposited With The Secretary-General Of The United Nations, available at http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG.
54. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 142–43 (Vaughan Lowe ed., 2006).
55. *See id.*; *see, e.g.*, Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2(a) (“Peoples struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law, shall not be considered a terrorist crime.”); *see also infra* Part III.A (discussing the lack of a universal definition of terrorism and diverging normative values).
56. *See, e.g.*, Inter-American Convention Against Terrorism, *supra* note 53.
57. *See, e.g., id.* at art. 3.
58. *See* U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”). However, the extent to which a state party will be bound is usually expressed in the actual resolution.

Security Council adopted Resolution 1373.⁵⁹ Resolution 1373 extensively addressed international terrorism and the requisite steps that *all* member states must take in combating it, including denying safe haven to international terrorists.⁶⁰ It also established the Counter-Terrorism Committee (“C.T.C.”), which is explicitly charged with monitoring member states’ implementation of Resolution 1373.⁶¹ Through this mechanism, the C.T.C. is able to identify existing problems and make necessary recommendations to the Security Council.⁶² For instance, in 2004, the C.T.C. observed that “the [state] reports submitted to the C.T.C. reveal that too many countries ratify these conventions without proceeding to adopt internal enforcement measures, without which these conventions can have no practical effect.”⁶³ As a result of the binding effect of Resolution 1373, a state may still be legally obligated to combat and prevent international terrorism, regardless of its party status to any of the aforementioned multilateral conventions.⁶⁴

III. THE CATALYSTS FOR SAFE HARBOR STATES

A. Lack of a Universal Definition: The Quandary of Proscribing an Undefined Concept

Despite the international community’s efforts to develop an effective framework to deal with international terrorism, no such framework exists, and terrorism remains a threat to international peace and security. One of the main reasons for this failure is the fact that a *universal* “definition [of terrorism] remains elusive” at the international level.⁶⁵

59. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) [hereinafter Resolution 1373]. The Security Council *unanimously* adopted Resolution 1373. See Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, U.N. Doc. SC/7158 (Sept. 28, 2001).

60. *Id.* at ¶ 2(c).

61. *Id.* at ¶ 6. All states must report to the CTC “on the steps taken to implement this resolution.” *Id.*

62. *Id.* at ¶ 7.

63. Annex to Note by the President of the Security Council, *Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001)*, § II.C, U.N. Doc. S/2004/70 (Jan. 26, 2004). For a recent implementation update by region, see *Letter Dated 10 June 2008 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council*, U.N. Doc. S/2008/379 (June 10, 2008).

64. Resolution 1373 contains both compulsory obligations as well as general recommendations, which member states can take to help combat international terrorism. See Resolution 1373, *supra* note 59.

65. Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT’L L. 222, 228 (1993). However, at least one author has suggested that while there is no universal definition, the patchwork of multilateral conventions and U.N. Security Council and General Assembly resolutions have actually provided a discernable definition of international terrorism. See generally Young, *supra* note 11. While some of the regional conventions do define terrorism, the definitions vary from specific definitions to simply identifying the proscribed offenses in the multilateral conventions. Compare Organization of African Unity (OAU) Convention on the Prevention and Combating Terrorism, *supra* note 53, at art.1, ¶ 3 (specifically defining terrorism) with Inter-American Convention Against Terrorism, *supra* note 53, at art. 2 (identification of the

Clearly, this has not been the result of a lack of motivation or attempt.⁶⁶ Rather, the inability to define terrorism results from the international community's failure to reach a consensus on what the definition should be and whether there should be exceptions to the definition.⁶⁷ This is particularly prescient for states that consider some acts widely regarded as "terrorist" acts justifiable as acts of self-determination.⁶⁸ Thus, the cliché that one man's terrorist is another man's freedom fighter endures.⁶⁹ Essentially, a state's concept of terrorism—as absolutely illegal or illegal but justified—will often dictate its participation in international cooperation, including the apprehension and extradition or prosecution of terrorists apprehended within its borders.⁷⁰

The first efforts to define international terrorism began in 1937 in the League of Nations ("League"), the predecessor of the United Nations.⁷¹ The 1937 Convention for the Prevention and Punishment of Terrorism ("CPPT") was the international community's response to the 1934 assassinations of King Alexander I, the Yugoslavian head of state, and Louis Barthou, the President of the Council of the French Republic.⁷² The assassins were from Yugoslavia and it was alleged they were harbored by Hungary.⁷³ As a result, the CPPT was focused on the nature of the terrorist act and its intended target, namely "the protection of heads of state and other public figures."⁷⁴ Thus, the objective of the CPPT was "to suppress acts of terrorism having

proscribed offenses in the multilateral conventions). Often, those regional conventions that define terrorism include an exception to the defined concept, which reflects the larger debate over a universal definition. See, e.g., Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2, ¶ (a). Thus, it would be unreasonable to state that specific regional conventions' definitions represent a universal definition, especially since some of the definitions vary with respect to the elements included.

66. See generally Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491 (2004).
67. See Stephens, *supra* note 7, at 455.
68. See, e.g., Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2, ¶ (a).
69. See Zeidan, *supra* note 66, at 491. The subjective nature of defining terrorism is more relatable in the following example: "No American would label the small band of farmers who first skirmished with the British army at Lexington and Concord in 1775 as 'terrorists,' however many Americans would label an Irish Republican Army (IRA) ambush of a British convoy 'terrorism.'" Mary Beth Hansen, *Extradition—The Role of the Political Offense Exception in Combating Terrorism*, 10 SUFFOLK TRANSNAT'L L. J. 441, 441–42 (1986).
70. See generally Alex Schmid, *Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT'L L. 375 (2004).
71. John Dugard, *International Terrorism: Problems of Definition*, 50 INT'L AFF. 67, 68 (1974). The League of Nations was established by the 1919 Treaty of Versailles in an effort "to promote international cooperation and to achieve peace and security." United Nations, *History of the United Nations*, <http://un.org/aboutun/unhistory/> (last visited Nov. 11, 2009).
72. Dugard, *supra* note 71, at 68.
73. *Id.*
74. *Id.* ("In this respect the drafters were clearly acting within their terms of reference, namely the preparation of a convention 'to prohibit any form of preparation or execution of terrorist outrages upon

an ‘international character’ only.”⁷⁵ “Acts of terrorism” were defined as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”⁷⁶ However, this broad concept of terrorism may have led to the CPPT’s ultimate downfall—only twenty-four states signed the CPPT and just one ratified it.⁷⁷ So while the CPPT was formally adopted by some states, it never came into force.⁷⁸ The onset of World War II and the subsequent dissolution of the League would further delay the international community’s focus on international terrorism and its deterrence.⁷⁹

The international community did not really reassess the threat posed by international terrorism until the 1960s, when terrorism began to reemerge on the global scene.⁸⁰ In the years since, the United Nations has repeatedly attempted to define terrorism through a series of progressive conventions including, most recently, the Draft Comprehensive Convention on Terrorism.⁸¹ However, rather than set out a comprehensive definition of what terrorism is, these multilateral conventions speak to the tactics utilized by terrorists—an apparent compromise by states to criminalize some acts rather than to let the acts go unpunished.⁸² Thus, the acts, whether or not

the life or liberty of persons taking part in the work of foreign public authorities and services.”) (quoting *Resolution*, Council of the League of Nations, Oct. 10, 1936).

75. *Id.* at 68–69.

76. *Id.* (quoting the *Convention for the Prevention and Punishment of Terrorism*, League of Nations, art. 1, Doc. C.546 M.383. 1937 V (1937)). Likewise, Article 2 required contracting states to criminalize certain acts committed within its territory yet directed towards other contracting states and “if [the acts] comply with the test for terrorism laid down in Article 1.” *Id.* (citing the *Convention for the Prevention and Punishment of Terrorism*, League of Nations, art. 2, Doc. C.546 M.383. 1937 V (1937)). The offenses included:

- (1) any wilful [sic] act causing death or grievous bodily harms or loss of liberty to heads of state, their spouses, or persons holding a public position ‘when the act is directed against them in their public capacity;’
- (2) wilful [sic] damage to public property belonging to another contracting party;
- (3) any wilful [sic] act calculated to endanger the lives of members of the public;
- (4) any attempt to commit one of the above offences;
- (5) the dealing with arms and ammunition with a view to the commission of one of the above offences in any country whatsoever.

Id. (quoting the *Convention for the Prevention and Punishment of Terrorism*, League of Nations, art. 2, Doc. C.546 M.383. 1937 V (1937)).

77. See Dugard, *supra* note 71, at 68. There was also an apparent issue with the prohibition of some acts that could not really qualify as terrorism. See *id.* at 69. For example, “Article 13 outlawed the unlicensed transfer of arms and ammunition while Article 14 made it an offence to forge travel documents.” *Id.* The signature states were: Albania, Argentina, Belgium, Bulgaria, Cuba, Czechoslovakia, the Dominican Republic, Ecuador, Egypt, Estonia, France, Greece, Haiti, India, Monaco, the Netherlands, Norway, Peru, Romania, Spain, Turkey, USSR, Venezuela, and Yugoslavia. *Id.*

78. U.N. Action to Counter Terrorism, *International Instruments to Counter Terrorism*, <http://www.un.org/terrorism/instruments.shtml> (last visited Nov. 25, 2009).

79. See United Nations, *The History of the United Nations*, *supra* note 71 (“The League of Nations ceased its activities after failing to prevent the Second World War.”).

80. See HOFFMAN, *supra* note 16, at 66–67.

81. See *supra* Part II.B (discussing the modern international legal response).

82. See, e.g., Multilateral Conventions Against Terrorism, *supra* note 32.

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they are really carried out by “terrorists,” are proscribed by international law and codified as crimes under domestic law.⁸³ However, terrorism itself is not proscribed as a crime under international law.⁸⁴

While none of the multilateral conventions explicitly define terrorism, the recent International Convention for the Suppression of the Financing of Terrorism, also known as the Terrorism Financing Convention, comes the closest by providing “a definition of terrorism in an indirect way” as a secondary offense.⁸⁵ The relevant provision states in part:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to *intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*⁸⁶

However, the real criminalized act is the provision or collection of funds, which are then used to carry out the previously defined offense or an offense codified in one of the other multilateral conventions.⁸⁷ This element of compulsion, also present in some of the other multilateral conventions, appears to be more concerned with the specific tactic of terrorism as a secondary offense rather than as an offense in and of itself.⁸⁸ Also, the recent International Convention for the Suppression of Terrorist Bombings, also known as the Terrorist Bombing Convention, asserts that individual state law cannot create justifications for the criminalized offenses:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are *under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature* and are punished by penalties consistent with their grave nature.⁸⁹

83. See, e.g., *id.*

84. See Stephens, *supra* note 7, at 466. However, terrorism and terrorist acts are regularly condemned by the international community and usually by individual states, though this may depend on the nature of the circumstances surrounding the incident. See, e.g., Resolution 1373, *supra* note 59.

85. Stephens, *supra* note 7, at 461.

86. International Convention for the Suppression of the Financing of Terrorism, *supra* note 32, at art. 2, ¶ 1(b). (emphasis added).

87. *Id.* at art. 2, ¶ 1.

88. See, e.g., International Convention Against the Taking of Hostages, *supra* note 32, at art. 1. Clearly, a compulsion element is necessary for such an offense as for what other purposes would an individual take hostages other than to get a third party to act in his or her favor. See also *supra* note 40 (discussing the general issue of compulsion).

89. International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 5 (emphasis added).

This reflected an apparent desire to proscribe justified acts of international terrorism. Hence, this provision only creates an obligation upon state parties to refrain from permitting justifications to the specified criminal acts, rather than creating a criminal act of terrorism.⁹⁰ Nonetheless, while the Terrorist Bombing Convention has entered into force, states are to free to exercise their sovereignty and refrain from ratifying it and subjecting itself to such a provision.

The inability to define terrorism is predominantly due to the fact that states have different beliefs about which acts constitute international terrorism. There is a general normative principle that it is wrong for an individual or group to use violence or the threat of violence against civilians to intimidate or instill fear in order to compel third parties to react in that individual's or group's favor.⁹¹ Despite this general belief, some states hold specific normative values in which there are exceptions to this general belief. These exceptions focus predominantly on *motivations* for these acts that are political, religious, and/or self-determinative. Thus, a state's concept of terrorism and the nature of its criminalization may be dependent on whether the state chooses to qualify and make exceptions to the general normative value that terrorism is wrong.⁹² As such, even if a state generally believes that it is wrong to use violence as a means for change and voices its opinion to that effect, it may refrain from condemning or criminalizing a specific act if it believes that an individual's motivations for using the violence were justified.⁹³

While it has been argued that this general normative value (*i.e.* the use of violence against civilians to compel third party action is wrong) provides a basis for the existence of a basic universal definition of international terrorism, such a definition would be essentially expounded as customary international law.⁹⁴ The generally

90. It is interesting to note that states may be party to both the International Convention for the Suppression of Terrorist Bombings, which explicitly rejects any justifications, and regional conventions that permit certain justifications, namely acts of self-determination. For instance, Algeria is a state party to both the International Convention for the Suppression of Terrorist Bombings and the OAU Convention on the Prevention and Combating of Terrorism, which explicitly creates an exception for acts of liberation or self-determination. See Organization of African Unity (OAU) Convention on the Prevention and Combating Terrorism, *supra* note 53, at art. 3, ¶ 1.

91. See Stephens, *supra* note 7, at 457. This general normative value is also present in those regional conventions that include a definition of terrorism. See, e.g., Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism, *supra* note 53, at art. 1, ¶ 3.

92. See, e.g., Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2, ¶ (a).

93. See Bradley Larschan, *Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law*, 4 B.U. INT'L L.J. 231, 235–36 (1986). Although generally worrisome in the overall campaign against international terrorism, a state's refusal to sign on to any one or all of the multilateral conventions is not as serious a test of legitimacy as a state's ratification of a multilateral convention and its subsequent refusal to condemn terrorist acts or its positive reinforcement that some terrorist acts may be justified.

94. See, e.g., Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933 (2006) (arguing that there is a generally accepted definition of international terrorism during times of peace, but not necessarily during times of armed conflict). For those who argue that the international legal framework can create a piecemeal definition, it must be noted that not all states are

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accepted exigencies of customary international law arguably weaken this assertion as the ongoing debate regarding exceptions to or justifications for international terrorism go directly to the material aspect of terrorism—motivation.⁹⁵ While both the U.N. General Assembly and Security Council have made statements that reflect this general normative value and proscribe justifications for such acts, this is not necessarily evident of a custom.⁹⁶ First, such resolutions—regardless of whether or not they are

members to every convention, accept the U.N. General Assembly resolutions, or conform to the obligations outlined by U.N. Security Council resolutions. *See, e.g.*, Young, *supra* note 11 (arguing that the patchwork of multilateral conventions and resolutions provide a discernable definition of international terrorism). Furthermore, even though there are some regional conventions that contain a definition of terrorism that reflects this general normative value, these regional conventions are limited in scope, either geographically or culturally. Often, these conventions also contain exceptions to their definitions of terrorism. Thus, it would be unreasonable to state that a specific regional convention's definition of terrorism represents a universal definition.

95. A principle or norm may become legally binding under international law without specific codification in a convention. However, in order to become legally binding, such a principle or norm must qualify as an international custom. *See* Statute of the I.C.J., art. 38, ¶ 1(b), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993. Article 38 of the I.C.J. statute states in relevant part that sources of international law include “international custom, as evidence of a general practice accepted as law.” *Id.* This statute has been interpreted to include accepted state practice (*i.e.* a state's recognition of and responsive action to a particular custom) and *opinio juris* (*i.e.* a state's belief to be legally bound by such a custom). *See* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES, 47–48 (2d ed. 1997); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 134–36 (2001). However, the extent of accepted state practice (*e.g.* how many states and/or which states have accepted the practice) as well as the establishment of *opinio juris* are often the source of debate among international legal scholars. *See generally* VILLIGER, *supra*. Furthermore, a state's persistent objection to the custom may relieve itself of legal obligations once the custom enters into law. *See id.* at 33–37. Thus, for the general normative value (*i.e.* the use of violence against civilians to compel third party action is wrong) to serve as the international custom proscribing international terrorism (and therefore to be legally binding), there would have to be widespread recognition and responsive action by states to the general normative value, which there arguably is through such actions as U.N. General Assembly resolutions, regional conventions, domestic criminal laws, and condemnation of acts of “terrorism.” However, there would also have to be evidence that states believe themselves to be legally bound by the general normative value, which there arguably is not, as many states believe that there should be exceptions to the rule—essentially that violence against civilians may be justified in certain situations. Such exceptions create an inference that those states do not necessarily see themselves as legally bound, at least in situations regarding the exceptions, which in turn essentially defeats the foundation of the general normative value.
96. *See, e.g.*, G.A. Res. 49/60 Annex I, ¶ 3, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) (adopted without a vote). The General Assembly solemnly declared:

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

Id. It should be noted that some of the regional conventions that do have exceptions for justified acts, particularly for the U.N.-recognized fundamental right of self-determination, were created after this resolution was adopted. *See, e.g.*, Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2, ¶ (a) (July 1, 1999) and Organization of African Unity (OAU) Convention on the Prevention and Combating Terrorism, *supra* note 53, at art. 3, ¶ 1 (July 14, 1999). Assuming *arguendo* that the resolution is supposed to prohibit *any* justification, this

legally binding—do not necessarily reflect a consensus of the international community.⁹⁷ Second, it is not clear that states view themselves as legally bound by such custom.⁹⁸ At most, based on the widely adopted multilateral conventions as well as both U.N. Security Council and General Assembly resolutions, it is possible that

suggests that relevant states may not see themselves as legally bound by the general normative value if this General Assembly resolution is supposed to serve as a basis for customary international law. *See also* S.C. Res. 1566, U.N. Doc. S/RES, 1566 (Oct. 8, 2004). Resolution 1566 states in relevant part:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature[.]

Id. at ¶ 3. However, both resolutions appear to focus on acts already criminalized (*e.g.* offenses in the multilateral conventions) and that those acts cannot be justified, rather than that these resolutions are creating a new criminal offense. Likewise, while Security Council Resolution 1373 requires states to criminalize “terrorist acts” in their domestic law, there does not appear to be any explicit definition as to what constitutes a terrorist act. *See* Resolution 1373, *supra* note 59, at ¶ 2(e). One legal scholar noted that “the lack of a definition was deliberate, since consensus on Res 1373 depended on avoiding a definition.” Ben Saul, *Definition of “Terrorism” in the U.N. Security Council: 1985–2004*, 4 CHINESE J. INT’L L. 141, 157 (2005) (citing LORETTA BONDI, FUND FOR PEACE, LEGITIMACY AND LEGALITY: KEY ISSUES IN THE FIGHT AGAINST TERRORISM, at 25 (Sept. 11, 2002)). *See also* SAUL, *supra* note 54, at 191 (noting that “[w]hile there is a definite movement towards a generic definition over time, the divergent approaches to definition, and persistent disagreement over the scope of exceptions, have inhibited the emergence of a customary crime.”).

97. While most General Assembly resolutions are adopted without a vote, the absence of a voting record should not necessarily be interpreted to mean that a state adopts the sentiment of the resolution. Rather, such absence only reflects that a request to record the vote was never made. *See* United Nations Documentation: Research Guide, General Assembly: Voting Information, <http://www.un.org/Depts/dhl/resguide/gavote.htm> (last visited Oct. 5, 2009). For a resolution to pass the U.N. Security Council and become legally binding on potentially every member state, only nine of the fifteen members (including the five permanent members) have to vote in favor of such a resolution. *See* U.N. Charter art. 27 para. 3. Thus, while the Security Council is charged with addressing issues threatening international peace and security and its resolutions are legally binding, such resolutions do not necessarily reflect the consensus of the international community. *See* U.N. Charter ch. V.
98. *See e.g.*, Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 53, at art. 2(a) (“Peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”) These would be the same states involved in the U.N. General Assembly resolutions and in some situations the U.N. Security Council resolutions. For instance, Bangladesh, Mali, and Tunisia, all members of the Organization of the Islamic Conference, voted in favor of Resolution 1373 while members of the U.N. Security Council. *See* Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, U.N. Doc. SC/7158 (Sept. 28, 2001). Hence, in the case of U.N. Security Council resolutions, states may acknowledge that they are bound by the resolution itself, but not necessarily by the proposed custom within it.

the proscription of specific methods of terrorism qualify as customary international law, but not the criminal act of international terrorism itself.⁹⁹

B. Extradite or Prosecute: What's a State To Do?

Under international law, extradition is a necessary element of international cooperation in combating international terrorism.¹⁰⁰ Extradition is generally described as “the process by which a person charged with or convicted of a crime under the laws of one state is arrested in another state and returned to the former state for a trial or punishment.”¹⁰¹ Since there is no universal rule binding states to extradite accused offenders,¹⁰² the practice of extradition is predominantly founded upon the notion of mutuality.¹⁰³ As such, extradition in international law is often codified in bilateral extradition treaties.¹⁰⁴ However, multilateral treaties may sometimes serve

99. See SAUL, *supra* note 54, at 191 (2006) (“At best, there is international consensus on condemning terrorism, or support for a *prohibition* on terrorism, but which is insufficiently precise to support individual criminal liability.”).

100. See Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT'L & COMP. L. REV. 493, 499 (2003) (“Extradition is vital for enforcing international legal rules and compelling respect for law and order.”).

101. *Id.* Extradition is defined as the “official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found.” BLACK’S LAW DICTIONARY 623 (8th ed. 2004). Under the multilateral conventions, the requesting state must have established jurisdiction over the offense. See, e.g., International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 6 (laying out the requisite steps state parties must take in order to establish jurisdiction over the offenses proscribed).

102. Joyner, *supra* note 100, at 500. Although it may be argued that the widespread and systematic practice of extradition may create a state’s obligation to extradite under customary international law—established by state practice and *opinio juris*—it has been long recognized that this is not so. See *id.* This is predominantly due to the varying nature of extradition and its corresponding treaties as well as the notions of sovereignty and a state’s right to conduct its internal affairs according to its own laws. See *id.*; Kathe Flinker Mullally, *Combating International Terrorism: Limiting the Political Exception Doctrine in Order to Prevent “One Man’s Terrorism From Becoming Another Man’s Heroism,”* 31 VILL. L. REV. 1495, 1504–05 (1986).

103. Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L. J. 767, 771 (1992). Mutuality is defined as the “state of sharing or exchanging something; a reciprocation; an interchange.” BLACK’S LAW DICTIONARY 1046 (8th ed. 2004). Furthermore, extradition treaties serve the following purposes: “(1) to insure reciprocity in returning offenders to the country where the offense occurred; (2) to promote justice by cooperating in the apprehension and punishment of offenders; (3) fear that the offenders will commit similar crimes within the asylum state’s borders; and (4) to avoid international tension.” Hansen, *supra* note 69, at 444–45 (citing Barbara Ann Banoff & Christopher Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT’L L. & POL. 169, 173–74 (1984)).

104. See Joyner, *supra* note 100, at 499. Accordingly:

[A] ‘generic’ extradition treaty contains: a list enumerating crimes for which both states agree to extradite offenders to each other; a clause that determines whether a requested state will extradite its own nationals; double criminality and prior jeopardy clauses (safeguarding the offender’s right not to be extradited if the crime alleged would not be

as legal bases for extradition, should no bilateral extradition treaty exist between the contracting states of the multilateral treaty.¹⁰⁵ In theory, alleged criminals, including terrorists, would not be able to flee prosecution by escaping to another state.¹⁰⁶ However, practice has shown that extradition is far from perfect, as various obstacles can prevent the successful extradition of criminals.¹⁰⁷ With regard to international terrorism, extradition can be hindered by a number of obstacles including: the principle of *aut dedere aut judicare*, the political offense exception, and state-sponsored terrorism.¹⁰⁸

The principle of *aut dedere aut judicare*—the duty to extradite or prosecute—is a component of extradition. The principle permits a custodial state,¹⁰⁹ which has established jurisdiction over the offense, to exercise its sovereignty by either extraditing the alleged offender to a requesting state or prosecuting the alleged offender under its domestic laws.¹¹⁰ Although this principle is based in treaty law as

prosecutable in the requested state or if the offender had already been found guilty or discharged in a proceeding for the same crime); and a so-called political offense exception that often also includes a ‘political protection clause.’

Petersen, *supra* note 103, at 772 (citation omitted).

105. See, e.g., International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 9, ¶ 2 (“When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.”). This is significant as most states’ compliance for extradition requires a legal basis, either a statute or a treaty. See Joyner, *supra* note 100, at 500.
106. See Joyner, *supra* note 100, at 500.
107. See Joyner & Rothbaum, *supra* note 65, at 240 (noting the concerns of “double jeopardy, double criminality, extradition of nationals, political sovereignty, and the principle of *aut dedere aut judicare*”). Generally speaking, states’ reservations upon ratification may also undermine the efficacy of a treaty as well as any particular provision, including extradition.
108. See generally Joyner & Rothbaum, *supra* note 65. For the purposes of this Note, the political offense exception and its resulting issues will not be discussed due to the more than ample coverage already provided. See, e.g., Richard Allen, *Terrorism, Extradition & International Sanctions*, 3 ALB. L.J. SCI. & TECH. 327 (1993); Flinker Mullally, *supra* note 102; Hansen, *supra* note 69; Larschan, *supra* note 93; Petersen, *supra* note 103. Essentially, the political offense exception permits individuals to avoid extradition for political offenses by allowing “[s]tates to block extradition on grounds that the acts were committed for a political purpose or with a political motive.” Joyner & Rothbaum, *supra* note 65, at 243. Clearly, the political offense exception will swallow the multilateral conventions on terrorism if the relevant definition focuses solely on political motives or consequences. However, recent efforts suggest the international community’s preference for the political offense exception may be waning in the area of international terrorism. Compare Convention on Offences and Certain Other Acts Committed on Board Aircraft, *supra* note 32, at art. 2 (which includes a political offense exception) with International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 11 (which explicitly prohibits the political offense exception as a refusal for extradition).
109. A custodial state is the state where the alleged offender is present. See Joyner & Rothbaum, *supra* note 65, at 232.
110. See Joyner & Rothbaum, *supra* note 65, at 247. The enduring conception in *aut dedere aut judicare* evolved from the phrase coined by Hugo Grotius, a famous seventeenth century Dutch jurist—*aut dedere aut punire*, meaning “extradite” or “punish.” Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary*

INTERNATIONAL TERRORISM

it is included in at least seventy international treaties and conventions, there is an ongoing debate as to whether it should qualify as a norm of customary international law.¹¹¹ As it pertains to universal jurisdiction for international crimes (*e.g.* war crimes and crimes against humanity), the obligation of *aut dedere aut judicare* is compulsory for all states regardless of their legal obligations or the source of law for the designated crimes—treaty or customary international law.¹¹² Currently, the International Law Commission (“ICL”) has undertaken an effort to investigate whether *aut dedere aut judicare* may qualify as such a norm.¹¹³ Yet, states seem hesitant to extend the binding obligations of customary international law to *aut dedere aut judicare* due to its predominant formulation by treaties.¹¹⁴ Hence, *aut dedere aut judicare* has yet to gain the requisite status under customary international law to bind states regardless of their treaty obligations or lack thereof.¹¹⁵

With regard to international terrorism, the principle *aut dedere aut judicare* is a significant obstacle to the effective enforcement of the multilateral conventions.¹¹⁶ The framework of the principle as applied to terrorist acts was first established in the Convention for the Suppression of Unlawful Seizure of Aircraft, also known as the Hague Convention or the Unlawful Seizure Convention.¹¹⁷ The relevant provision states:

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

Law & Refusal to Extradite Based on the Death Penalty, 20 ARIZ. J. INT’L & COMP. L. 491, 496 (2003). Grotius is known as “the father of international law.” *Id.*

111. See Kelly, *supra* note 110, at 497. Such a qualification would impose a duty upon all states to either extradite or prosecute an alleged offender, regardless of whether or not the state is a contracting party to a treaty with such a provision. See *id.* at 497–98. A decade earlier, two legal scholars noted that this principle “is not an automatic customary rule of international law.” Joyner & Rothbaum, *supra* note 65, at n.146.
112. See ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 496–98 (2008). “The universality principle can be defined as providing every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the location of the offence and the nationalities of the offender and victim.” *Id.* at 496.
113. U.N. Int’l Law Comm’n, *Report of the International Law Commission*, ¶¶ 345, 349, U.N. Doc. A/62/10 (2007).
114. Press Release, General Assembly, Legal Committee, Reviewing ‘Extradite or Prosecute’ Obligations, is Told Procedures Are Based on Specific Treaty Provisions, U.N. Doc. GA/L/3357 (Nov. 4, 2008). “The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly.” Sixth Committee Legal, General Information, <http://www.un.org/ga/sixth/> (last visited Nov. 10, 2009). This appears to reflect the highly guarded recognition of sovereignty in international affairs.
115. See *supra* note 95 (discussing the basic requirements for a norm to become customary international law).
116. See Stephens, *supra* note 7, at 467. Ironically, the principle was applied in order to ensure that custodial states have jurisdiction, even if the only connection to the jurisdiction is the alleged terrorist’s presence. *Id.*
117. See Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 32. See also Joyner, *supra* note 100, at 512 (noting the use of Article 8 of the Hague Convention as “the model extradition provision” for the future multilateral conventions against terrorism).

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.¹¹⁸

Similarly, the Hague Convention gave rise to the precedent of designating the proscribed offense as an extraditable offense in bilateral treaties between contracting state parties.¹¹⁹ The recent Terrorism Financing Convention not only makes the proscribed offenses extraditable, but extraditable retroactively.¹²⁰ By criminalizing the offense, a state can fulfill its obligation to prosecute—rather than extradite—an alleged offender by submitting the case to its respective authorities for prosecution.¹²¹ In theory, *aut dedere aut judicare* suggests that no terrorist can escape prosecution by fleeing to another contracting state because that state would have the obligation to prosecute him if it chooses not to extradite him, regardless of the state's reasons for refusal of extradition.¹²² However, the principle in practice dictates otherwise.

A fundamental problem with the option to prosecute exists as it is laid out in the multilateral conventions because it is really only a “bare-bones prosecution requirement.”¹²³ A straightforward reading of the relevant provisions indicates that the only requirement is that the case is *submitted* to the proper authorities for prosecution.¹²⁴ There is no indication that the case must proceed past the investigative inquiry stage, as the investigation will be dictated by domestic evidentiary and procedural law.¹²⁵ Another problem is that there will probably be insufficient evidence

118. Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 32, at art. 7.

119. *Id.* at art. 8, ¶ 1. Furthermore, contracting states have an affirmative duty to include the proscribed offense as an extraditable offense in all of its extradition treaties with other state parties. *Id.* Compare *id.*, with the first convention to proscribe terrorist acts, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, *supra* note 32, at art. 16. However, this affirmative duty may be limited via a state's reservation. See discussion *supra* note 34.

120. International Convention for the Suppression of the Financing of Terrorism, *supra* note 32, at art. 11, ¶ 1 (including “extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention.”).

121. See Multilateral Conventions Against Terrorism, *supra* note 32. The Tokyo Convention appears to only proscribe an offense and does not explicitly require criminalization; nor does it require *aut dedere aut judicare*. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, *supra* note 32.

122. A state may refuse extradition under the multilateral conventions for any almost any reason, as long as it prosecutes the alleged offender. For example, if a state refuses an extradition request on the grounds that it does not extradite its own nationals, it would still be obligated to prosecute. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 7 (“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.”); see also Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 8, ¶ 2 (“Extradition shall be subject to the other conditions provided by the law of the requested State.”).

123. Joyner & Rothbaum, *supra* note 65, at 248.

124. *Id.*

125. See *id.* This argument reflects a basic concept of burdens and their corresponding standard in criminal procedure as well as the differing evidentiary standards.

available in the state seeking prosecution.¹²⁶ So despite the principle of good faith present in all international treaties,¹²⁷ two legal scholars have essentially labeled *aut dedere aut judicare* in its current application as “little more than a façade of justice.”¹²⁸ This concern is particularly relevant when the alleged terrorists are state-sponsored and have been found within the state that sponsored them.¹²⁹ Thus, it is this façade of justice in combination with a lack of a universal definition of international terrorism that causes the legitimization of safe harbor states for international terrorists.

Due to the lack of a universal definition for terrorism, which results from diverging normative values, a particular state’s election of prosecution over extradition may call into question the legitimacy of any resulting prosecution or lack thereof. This is particularly true when the custodial state has failed to denounce the terrorist act, or in some cases, actually sanctioned it. While some of the conventions require that state law prohibit defenses to specified crimes, the only guideline for punishment is that the specified crime must be punished similarly to other serious crimes in that state.¹³⁰ It remains unclear whether the judicial process would permit mitigating circumstances to minimize the punishment to the point of delegitimizing the prosecution all together. A sympathetic contracting state party may elect to prosecute an alleged terrorist, knowing full well that the prosecution requirements are minimal and that an actual prosecution may never take place. Even more troublesome, if an alleged terrorist is prosecuted and subsequently acquitted or convicted with minimal punishment, the rules of double jeopardy as applied in international extradition law provide a basis for a state to refuse extradition for the same offenses.¹³¹ Consequently, states do not need to circumvent or refrain from participation in the multilateral conventions in order to provide safe harbor for international terrorists—the law does it for them.

C. *Pan Am Flight 103: The Landmark Case*

On December 21, 1988, Pan American Flight 103, carrying 243 passengers and sixteen crew members, took off from London’s Heathrow Airport en route to New York’s JFK Airport.¹³² At approximately 7:03 pm EST, the plane, traveling at an altitude of 31,000 feet, exploded in midair over Lockerbie, Scotland.¹³³ All on board

126. *Id.*

127. Vienna Convention, *supra* note 34, at art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); see also John P. Grant, *Beyond the Montreal Convention*, 36 CASE W. RES. J. INT’L L. 453, 458 (2004) (noting the operational presence of good faith in all treaties, but acknowledging a possible “naive” assumption of good faith with regard to prosecution).

128. Joyner & Rothbaum, *supra* note 65, at 248.

129. See *infra* Part III.C (case study involving allegations of state-sponsored terrorism).

130. See, e.g., International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at arts. 4, 5.

131. Joyner & Rothbaum, *supra* note 65, at 240–41.

132. *Id.* at 222–23.

133. See *id.* at 223.

and an additional eleven townspeople on the ground were killed.¹³⁴ Due to the nature of the explosion and the far ranging debris distribution, there “was immediate speculation that the flight had been sabotaged.”¹³⁵ After nearly three years of extensive international investigation, the United States indicted two Libyan intelligence officers, Lamén Khalifa Fhimah and Abdel Basset Ali al-Megrahi.¹³⁶

At the time of the incident, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, also known as the Montreal Convention or the Civil Aviation Convention, was in effect.¹³⁷ Libya, the United States, and the United Kingdom were parties to it.¹³⁸ The Montreal Convention specifies the general offenses that jeopardize the safety of civil aviation.¹³⁹ It states in relevant part that:

Any person commits an offense if he unlawfully and intentionally places or causes to be placed on an aircraft in service, by any means whatsoever, a device, or substance, which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.¹⁴⁰

Since a formal bilateral extradition treaty did not exist between the United States and Libya,¹⁴¹ the Montreal Convention served as the legal basis for the requested extradition of the alleged terrorists arrested in Libya.¹⁴²

In response to the indictment, both the United States and the United Kingdom sought informal extradition requests for the two suspects from Libya.¹⁴³ However, pursuant to its rights under the Montreal Convention, Libya refused extradition, and

134. *Id.*

135. Nancy Jean Strantz, *Aviation Security and Pan Am Flight 103: What Have We Learned?*, 56 J. AIR L. & COM. 413, 415 (1990).

136. Joyner & Rothbaum, *supra* note 65, at 225–27 (discussing in greater detail the investigation and the evidence).

137. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32 (entered into force on Jan. 26, 1973).

138. See Status of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, <http://www.icao.int/icao/en/leb/Mtl71.pdf> (last visited Nov. 10, 2009) (Ratification/Accession: Libya (Feb. 19, 1974); United States (Nov. 1, 1972); United Kingdom (Oct. 25, 1973)).

139. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 1.

140. *Id.* at art. 1, ¶ 1(c).

141. Joyner & Rothbaum, *supra* note 65, at 227; see also U.S. DEP'T OF STATE, TREATIES IN FORCE, *supra* note 8, at 164.

142. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 8. However, the extradition process is still governed by laws of the requested state—the state where the alleged terrorist is present. See *id.*

143. Joyner & Rothbaum, *supra* note 65, at n.26. (“The U.S. extradition request demanded Libya surrender the two suspects to the United States for prosecution.”). At least one legal scholar has noted the difference between a formal extradition process and a demand for surrender of alleged suspects, which may have influenced the Security Council’s involvement. See Grant, *supra* note 127, at 461.

instead elected to prosecute the suspects in its own courts.¹⁴⁴ Given the suspects' alleged ties to Libyan intelligence, the United States and the United Kingdom doubted the legitimacy of a Libyan prosecution.¹⁴⁵ For this reason, the two countries went before the U.N. Security Council to seek an international inducement of the suspects' surrender.¹⁴⁶ In January 1992, the Security Council adopted Resolution 731, which urged Libya to comply with the requests for surrender.¹⁴⁷ In March of 1992, the Security Council adopted Resolution 748, which declared that Libya's failure to comply with Resolution 731 constituted a threat to international peace and security and imposed various economic sanctions on Libya.¹⁴⁸

During this time, Libya sought to protect its rights under the Montreal Convention by filing claims against both the United States and the United Kingdom with the International Court of Justice ("I.C.J.").¹⁴⁹ In its application, Libya claimed that the United States and the United Kingdom could not compel extradition under the Montreal Convention because Libya was willing to prosecute the suspects itself.¹⁵⁰ Libya also sought interim measures to prevent the United States or the United Kingdom from taking action to compel Libya to surrender the suspects.¹⁵¹ In response to the claim for interim measures, the I.C.J. ruled that Security Council Resolution 748 effectively took precedence over the Montreal Convention by means of Article 103 of the Charter of the United Nations.¹⁵² The I.C.J. did eventually rule that it had jurisdiction to hear the cases under Article 14, paragraph 1 of the Montreal Convention.¹⁵³ However, prior to the hearing on the merits, the proceedings were

144. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 7, which states:

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 offense 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.

Id.

145. Stephens, *supra* note 7, at 475.

146. *See id.*

147. S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan. 21, 1992).

148. *See* S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

149. Stephens, *supra* note 7, at 475.

150. *Id.*

151. *Id.*

152. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incidents at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126 (April 14); (Libya v. U.K.), 1992 I.C.J. 3, 15 (April 14).

153. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incidents at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 135 (Feb. 27); (Libya v. U.K.), 1998 I.C.J. 9, 30 (Feb. 27).

discontinued with prejudice¹⁵⁴ after negotiations between the parties resulted in the suspects being tried under Scottish law by a Scottish court sitting in the Netherlands.¹⁵⁵ In 2001, the court found al-Megrahi guilty of murder and sentenced him to life in prison, and acquitted Fhimah.¹⁵⁶ Soon after, Libya agreed to pay \$2.7 billion in compensation to the families of the victims in order to lift the economic sanctions imposed by the U.N. Security Council.¹⁵⁷ However, this apparent successful conviction attained via other legal and political mechanisms would be short-lived.

On August 20, 2009, just eight years after his conviction, Scottish Justice Secretary Kenny MacAskill authorized al-Megrahi's release on compassionate grounds due to al-Megrahi's diagnosis of terminal prostate cancer.¹⁵⁸ Despite apparent promises to the contrary, Libya welcomed al-Megrahi home with open arms and cheering hearts, likening to more of a hero's welcome rather than the return of a convicted terrorist.¹⁵⁹ Similarly, at a meeting in Tripoli marking the tenth anniversary

154. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incidents at Lockerbie (Libya v. U.S.), 2003 I.C.J. 152, 153 (Sept. 10); (Libya v. U.K.), 2003 I.C.J. 149, 151 (Sept. 10).

155. Caryn L. Daum, *The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Pan Am Flight 103 Bombing Over Lockerbie, Scotland*, 23 SUFFOLK TRANSNAT'L L. REV. 131, 141-45 (1999).

156. Donald G. McNeil Jr., *The Lockerbie Verdict: The Overview; Libyan Convicted by Scottish Court in '88 Pan Am Blast*, N.Y. TIMES, Feb. 1, 2001, at A1. In 2003, a Scottish court ruled that al-Megrahi must serve at least 27 years before he can apply for parole. Lizette Alvarez, *World Briefing Europe: Scotland: Lockerbie Bomber Must Serve 27 Years*, N.Y. TIMES, Nov. 25, 2003, at A6. Al-Megrahi appealed his conviction for a second time, and the Scottish Criminal Cases Review Commission granted al-Megrahi a right to appeal after observing that "a miscarriage of justice may have occurred" due to, *inter alia*, the credibility of testimony of a witness who had apparently been shown the defendant's picture prior to a police lineup. See *Lockerbie Appeal*, LONDON TIMES, May 22, 2009, at 4. During this time, Libya also requested that al-Megrahi be transferred to Libya to finish his sentence under a prisoner-transfer scheme. See *id.* In August 2009, al-Megrahi dropped his appeal and was released on compassionate grounds due to a terminal illness. Torcuil Crichton, *Lockerbie Relatives' Cautious Welcome for Review*, HERALD (Glasgow), Oct. 26 2009, at 1; see also discussion *infra* note 158 and accompanying text.

157. See Felicity Barringer, *Pan Am 103's Bereaved Watch U.N. Lift Libya Sanctions*, N.Y. TIMES, Sept. 13, 2003, at A2 (of the \$2.7 billion, awards to victims' families were up to \$10 million per victim); see also S.C. Res. 1506, U.N. Doc S/RES/1506 (Sept. 12, 2003); Press Release, Security Council, Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772, U.N. Doc. SC/7868 (Sept. 12, 2003) (the vote was 13-0 with France and the United States abstaining).

158. *Lockerbie Bomber Freed From Jail*, BBC NEWS, Aug. 20, 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/south_of_scotland/8197370.stm. Although MacAskill rejected al-Megrahi's request for a prison transfer to Libya, he did heed the medical advice that al-Megrahi only has about three months left to live. *Id.* Prior to his release, al-Megrahi dropped his second appeal so that such grounds for release could be considered and eventually granted. Alan Cowell, *Lockerbie Convict Drops Appeal, Seeking Early Transfer*, N.Y. TIMES, Aug. 1, 2009, <http://www.nytimes.com/2009/08/15/world/europe/15lockerbie.html> (noting that in order for a prisoner transfer agreement to be authorized, there must be no outstanding legal matters). See generally *Read the Lockerbie Files*, BBC NEWS, Sept. 1, 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/8232423.stm (providing links to relevant materials that have been released in relation to al-Megrahi's release).

159. Alan Cowell & A.G. Sulzberger, *Lockerbie Convict Returns to Jubilant Welcome*, N.Y. TIMES, Aug. 21, 2009, at A4; see also *Minister Stands by Bomber Release*, BBC NEWS, Aug. 24, 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/8216897.stm. MacAskill claimed that "assurances had been given by the

of the creation of the African Union, the African members of parliament gave al-Megrahi a standing ovation, with the consensus that “he is the victim of international injustice and a policy of double standards.”¹⁶⁰ However, reactions beyond Libya have been ones of agitation and disappointment by both governments and the family members of victims alike.¹⁶¹ Essentially, al-Megrahi’s sentence roughly equals just eleven days in prison for each victim.¹⁶² Immediately after his release, it was suggested that al-Megrahi was a bargaining chip between Libya and the United Kingdom in their dealings for oil and commerce.¹⁶³ Although MacAskill and British Prime Minister Gordon Brown vehemently denied any “double dealing” and maintained the independence of the Scottish government in its decision, U.K. Justice Secretary Jack Straw admitted that al-Megrahi’s potential release under a prisoner transfer agreement did play a part in oil and trade negotiations with Libya.¹⁶⁴ Even though al-Megrahi’s request under the prisoner transfer agreement was ultimately denied by MacAskill, apparently due to U.S. objections and perhaps due to this alleged tainting, it is fair to infer that the Scottish government may have nonetheless felt pressure to release him on other grounds, namely compassionate release.¹⁶⁵ If the prisoner transfer agreement with Libya did in fact help ensure a £550 million (approximately \$900 million) oil deal with BP, Britain’s largest company, then there would have likely been untold political and economic repercussions upon the denial of the prisoner transfer agreement absent other grounds for release.¹⁶⁶ Thus, the mere

Libyan government that any return would be dealt with in a low-key and sensitive fashion.” *Id.* In response to criticism that the celebration of al-Megrahi’s return was expected, Scotland’s First Minister Alex Salmond “denied it was naive of the government to think Mr. Megrahi would not be given a rapturous reception in Libya.” *Id.* (“I think when people offer assurances they should be taken and when they don’t keep these assurances, that’s not the fault of the Scottish government.”). However, U.S. Attorney General Eric Holder allegedly warned MacAskill that he “could get a hero’s welcome.” Associated Press, *U.S. Warned Scotland Bomber Could get Hero’s Welcome*, BOSTON GLOBE, Aug. 29, 2009, http://www.boston.com/news/nation/washington/articles/2009/08/29/us_warned_of_heros_welcome_for_pan_am_103_bomber/.

160. *Africa MPs Cheer Lockerbie Bomber*, BBC NEWS, Sept. 9, 2009, <http://news.bbc.co.uk/2/hi/africa/8247006.stm>. The double policy standards are in relation to the pardon and reception by the European Parliament of the Bulgarian nurses who were convicted of infecting babies with HIV in Libya. *See id.*
161. *See, e.g., Lockerbie Bomber Freed From Jail*, *supra* note 158; *Majority ‘Oppose’ Megrahi Release*, BBC NEWS, Aug. 28, 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/8226585.stm; *Obama Tackles UK PM on Lockerbie*, BBC NEWS, Sept. 10, 2009, <http://news.bbc.co.uk/2/hi/americas/8249474.stm>.
162. Eight years served of a life sentence divided by 270 victims. *See Minister Stands by Bomber Release*, *supra* note 159.
163. *See* John F. Burns, *New Questions in Lockerbie Bomber’s Release*, N.Y. TIMES, Aug. 22, 2009, at A4.
164. *See* John F. Burns, *Bomber Release Involved Oil, British Minister Says*, N.Y. TIMES, Sept. 6, 2009, at A13; *Minister Stands by Bomber Release*, *supra* note 159 (MacAskill: “It was my decision and my decision alone.”); “No Double Dealing” Over Megrahi, BBC NEWS, Sept. 2, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/8233009.stm; *Straw Admits Lockerbie Trade Link*, BBC NEWS, Sept. 5, 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/8239572.stm.
165. *See* Burns, *supra* note 164; *Straw Admits Lockerbie Trade Link*, *supra* note 164.
166. *See Straw Admits Lockerbie Trade Link*, *supra* note 164.

possibility and apparent probability that al-Megrahi's release may have been for ulterior motives not only taints the fragile rule of law concerning international terrorism, it calls into question the ability of alternative legal and political mechanisms that could be utilized when the multilateral conventions fail.¹⁶⁷

Although Libya may have been within its legal rights under the Montreal Convention to elect prosecution over extradition or surrender, the validity of such a prosecution called into question the legitimacy of *aut dedere aut judicare*. As aforementioned, the suspects allegedly had ties with Libyan intelligence.¹⁶⁸ Essentially, the bombing of Pan Am Flight 103 was seen as an act of state-sponsored terrorism.¹⁶⁹ Hence, this was not simply an issue of trying one's own nationals in its own courts; rather, it was an issue of the state trying individuals for acts committed on its behalf, and in reality, at its behest. In addition, Libya's reaction to the allegations suggested that the prosecution would not have made it past the investigative stages.¹⁷⁰ Based on this evidence, it is fair to infer that but for the U.N. Security Resolutions and international pressure, Libya's exercise of its rights under the Montreal Convention would have effectively barred the extradition of the terrorists to the United States or the United Kingdom. This would have made Libya a safe harbor state for the suspected terrorists. Furthermore, in regard to *aut dedere aut judicare*, international extradition practice suggests that the I.C.J. may have been more willing to side with Libya. First, "[s]tates are generally not required to surrender their own nationals for extradition in the absence of a bilateral treaty to that effect."¹⁷¹ Second,

167. Perhaps FBI Director Robert Mueller stated it best:

Your action in releasing Megrahi is as inexplicable as it is detrimental to the cause of justice. Indeed your action makes a mockery of the rule of law. Your action gives comfort to terrorists around the world who now believe that regardless of the quality of the investigation, the conviction by jury after the defendant is given all due process, and sentence appropriate to the crime, the terrorist will be freed by one man's exercise of 'compassion.'

Letter from Robert S. Mueller, III, FBI Dir., U.S. Dep't of Justice, to Kenny MacAskill, Scot. Justice Sec'y (Aug. 21, 2009), <http://www.fbi.gov/pressrel/pressrel09/macaskill.pdf>.

168. See Stephens, *supra* note 7, at 475.

169. See Joyner & Rothbaum, *supra* note 65, at 231. State-sponsored terrorism is "distinguished from other categories of terrorism by the premeditated use of State agents for clandestine international activity that has been instigated, supported, or authorized by a legitimate national government." *Id.* at 229 (citing STATE SPONSORED TERRORISM, REPORT PREPARED FOR THE SUBCOMM. ON SECURITY AND TERRORISM, FOR THE USE OF THE COMM. ON THE JUDICIARY, 99th Cong., 1st sess., at 58 (June 1985)). Even prior to the Pan Am Flight 103 incident, Libyan's sponsorship for terrorism was well documented. See, e.g., Jane Chace Sweeney, *State-Sponsored Terrorism: Libya's Abuse of Diplomatic Privileges and Immunities*, 5 DICK. J. INT'L L. 133 (1986).

170. See Joyner & Rothbaum, *supra* note 65, at 248 ("Colonel Qadhafi has opined that the indictments of the two bombing suspects rely on evidence 'less than a laughable piece of fingernail.' He even suggested that Flight 103 was a victim of bad weather and happened to crash into a gas station.") (quoting *Qaddafi Scoffs at Demands for Bombing Suspects*, N.Y. TIMES, Nov. 29, 1991, at A11).

171. *Id.* at 241 (citing GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 289-90 (6th ed. 1992)).

Libya's domestic law apparently prevented the extradition of Libyan nationals.¹⁷² Third, under the option given in Article 7 of the Montreal Convention, Libya elected to prosecute the alleged offenders, rather than to extradite them.¹⁷³ Because Libya had been willing to prosecute the alleged terrorists, the I.C.J. may have found the requirements of the Montreal Convention satisfied.¹⁷⁴

Although this case exemplifies the most objectionable application of *aut dedere aut judicare*—true state-sponsored terrorism—it demonstrates the seriousness of a state using its own specific normative values to justify acts of international terrorism. Even if a state does not actually sponsor terrorism by supplying resources such as funding and weapons, its specific normative values justifying certain acts of terrorism provides the rhetorical support and protection that goes much deeper and much farther than money and weapons ever could.¹⁷⁵ While state sponsorship of terrorism is a legitimate concern for the international community with regard to safe harbor states, any justification of an act of terrorism by any member state should create an equally serious concern for the resulting threat to international peace and security—legitimate safe harbor states. Furthermore, the fact that state sponsorship of terrorism acted as a basis for the U.N. Security Council's actions suggests that but for the element of state sponsorship, these other legal mechanisms may be futile.¹⁷⁶ This paints an even more frightening picture: If a state's justification of certain acts of international terrorism is not enough to constitute state sponsorship of such acts, then the international community may lack sufficient legal and political means to enforce the multilateral conventions on terrorism.

IV. SOLUTION—UTOPIA VS. REALITY

Finding an effective solution to the legitimization of safe harbor states in international law, as well as to the constant threat posed by international terrorism to international peace and security may, at times, seem quixotic or utopian. Nevertheless, the difficulty of eliminating legally legitimate safe-harbor states for international

172. *Id.* at 251. If state law prohibits the extradition of nationals, the only permitted option under a relevant multilateral convention appears to be prosecution.

173. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 7.

174. This inference has caused some to speculate on the tactic of seeking Security Council resolutions utilized by the United States and the United Kingdom in order to avoid disagreeable I.C.J. jurisprudence on this topic. *See, e.g.,* Joyner & Rothbaum, *supra* note 65, at 251–52.

175. *See, e.g., On-Line NewsHour: Taliban Won't Hand Over Osama Bin Laden*, PBS, May 29, 2001, http://www.pbs.org/newshour/updates/may01/embassy_5-30.html. Abdul Anan Himat, a senior official at the Taliban's information ministry, described bin Laden as “a great holy warrior of Islam and a great benefactor of the Afghan people.” *Id.* He also declared that “[w]e [the Taliban] won't hand him over to America under any circumstances. It is our stated policy.” *Id.* The comments were made in relation to U.S. and international efforts to apprehend bin Laden for his role in the 1998 U.S. embassy bombings in Kenya and Tanzania. *See id.*

176. *See* S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan. 21, 1992) (noting concern over the implication of the Libyan government in Pan Am Flight 103).

terrorists should not deter the international community from taking the necessary steps to address this serious problem.

A. A Universal Definition of International Terrorism: A Nearly Utopian Concept, at Least for Now

Codifying a universal definition of international terrorism is not a new solution.¹⁷⁷ Based on the voluminous literature on this topic, it seems that legal and political scholars alike have been working to identify the compromises necessary to break the international impasse.¹⁷⁸ Yet, it appears that the international community is already moving in the right direction via the Draft Comprehensive Convention on Terrorism (“Draft Convention”). The Draft Convention essentially proscribes international terrorism as a criminal offense via a motivational qualification. It states in relevant part:

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; *when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.*¹⁷⁹

This qualification is meant to serve as a comprehensive definition.¹⁸⁰ Unlike some of the multilateral conventions, the compulsion element is now the offense, while the results of the offense (*i.e.* death and destruction) are now elements of the

177. See, e.g., discussion of the 1937 Convention for the Prevention and Punishment of Terrorism *supra* Part III.A. Codification of a universal definition in an international convention is preferred over codification or attempted codification via customary international law. While the convention may eventually serve as evidence of a custom so as to legally bind non-party states, the immediate impact of such a convention (once it has entered into force) will be to provide a legal mechanism for state parties: (1) to realize the possibility for prosecutions of such an international terrorism offense at the international level; and (2) perhaps more importantly, to minimize the aforementioned issues of *aut dedere aut iudicare*. While a state may exercise its sovereignty and refrain from ratifying the convention, a state can also persistently object to a custom, which in turn limits its legal obligation. As such, a convention would provide a stronger legal foundation, particularly when disputes arise.

178. See, e.g., Cyrille Begorre-Bret, *Terrorism, Globalization and the Rule of Law: The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987 (2006); Dugard, *supra* note 71; George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT'L CRIM. JUST. 894 (2006); Ben Golder & George Williams, *What is 'Terrorism'? Problems of Legal Definition*, 27 U.N.S.W. L.J. 270 (2004); Schmid, *supra* note 70; Gabriel Soll, *Terrorism: The Known Element No One Can Define*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 123 (2004); Thomas Weigend, *The International Community Grappling With a Definition*, 4 J. INT'L CRIM. JUST. 912 (2006); Zeidan, *supra* note 66.

179. Draft Convention, *supra* note 42, at art. 2, ¶ 1 (emphasis added).

180. See Stephens, *supra* note 7, at 462.

offense (as opposed to the offense itself). Despite this advancement, concerns remain regarding acts of self-determination, situations of armed conflict, and state-sponsored terrorism.¹⁸¹ Currently, the Draft Convention acknowledges the right to self-determination: “Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.”¹⁸² However, a recent statement by Pakistani Ambassador Farukh Amil, on behalf of the Organization of Islamic Conference, illustrates that there is still an ongoing debate as to the existence of this exception as well as its explicit acknowledgement in any resulting convention.¹⁸³ Work on the Draft Convention has been ongoing for nearly a decade, even despite major terrorist attacks and the increased calls to combat international terrorism.¹⁸⁴

In order for international terrorism to be universally defined, the international community must be sensitive to the diverging specific normative values of different

181. See Hmdou, *supra* note 45 (noting that Organization of Islamic Conference negotiators sought “to ensure that the Comprehensive Convention contains a legal statement that its provisions shall not infringe on the right to self-determination”).

182. Draft Convention, *supra* note 42, at art. 20, ¶ 1. See U.N. Charter art. 1, para. 2 (“The [p]urposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).

183. See EyeontheUN.org, OIC Group Statement on Agenda Item 99: Measures to Eliminate International Terrorism, at ¶ 7 (Oct. 8, 2008), http://www.eyeontheun.org/assets/attachments/documents/7087_OIC_terrorism_10-8-08.pdf (“The Group reiterates the need to make a distinction between terrorism and the exercise of legitimate right of peoples to resist foreign occupation and would like to stress that this distinction is duly observed in International Law, International Humanitarian Law, Article 51 of the Charter of the United Nations, and the General Assembly resolution 46/51 which endorses this position.”). However, if individuals are exercising this right to self-determination, they would still likely be bound by the confines of international law, including international humanitarian law and the prohibition of violence against innocent civilians. See, e.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Entry into force: Oct. 21, 1950; 194 state parties; U.S. ratification with reservation: Aug. 2, 1955). This article is also known as “common article 3” as it is present in all four of the Geneva Conventions and applies in the case of an armed conflict not of an international character. See also, e.g., Protocol Additional to Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), June 8, 1977, 1125 U.N.T.S. 3 (Entry into force: Dec. 7, 1978; 168 state parties; U.S. signature: Dec. 12, 1977) (“The situations [that are considered armed conflicts of an international character] . . . include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .”). It must be noted that the Geneva Conventions apply to situations of armed conflict and do not apply during times of peace.

184. See Stephens, *supra* note 7, at 462. As a result, it is now common to see, either in the preamble or body of U.N. General Assembly resolutions countering international terrorism, recognition of the need for an agreement on a legal definition either explicitly or implicitly through an effective legal framework. See, e.g., G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 8, 2006) (“*Reaffirming further Member States’ determination to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism . . .*”).

states as well as to the need for such a definition to legitimately criminalize terrorism.¹⁸⁵ This is not to suggest that states should cower and give into the demand for exceptions to the general normative value; rather, states need to acknowledge such specific normative values so that there is legitimacy in the process as well as the definition and any ensuing convention. If a state feels that the definition is prejudicial to its specific normative value, the state may work to block the creation of any comprehensive convention. Even if such a convention were to be formally adopted over that state's objection, that state retains its sovereign right to refrain from signing or ratifying the convention—resulting in a non-binding effect for that particular state. The successful solution to universally defining international terrorism hinges on the mutual respect between states regarding each state's specific normative values, even if they disagree as to the extent the specific normative value should be applied.

B. Tweaking Aut Dedere Aut Judicare to Work as Intended: A Step Closer to Reality

The fact that international terrorism still remains undefined after several decades suggests that the international community should not delay in addressing the second catalyst of legally legitimate safe harbor states—the principle of *aut dedere aut judicare*. Simply because the option to extradite or prosecute has proven unworkable under the current legal framework governing international terrorism, there is no reason for the international community to completely dispose of the principle as inadequate. The fact that there is an ongoing debate about it achieving customary international law status suggests that this principle is here to stay, and that once that status is achieved it will then be applicable to international terrorism and will be binding on all states.¹⁸⁶ Regardless of the source of *aut dedere aut judicare*—whether treaty based or as customary international law—the fundamental problem still remains the same in instances of international terrorism: a state's option to extradite or prosecute can still provide a legitimate safe harbor. Thus, it is in the international community's best interest to adjust the principle of *aut dedere aut judicare* in the international terrorism context, rather than to simply create new avenues of prosecution, as the principle may still be applicable in those situations.¹⁸⁷ The following proposed model suggests a

185. When defining terrorism, there is an inherent risk that the definition may be too broad and encompass acts that are not legitimately terrorism as there is a lack of motivation for third party compulsion. See, e.g., Organization of African Unity (OAU) Convention on the Prevention and Combating Terrorism, *supra* note 53, at art. 1, ¶ 3(a)(iii) (“[A]ny act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: . . . create general insurrection in a State.”).

186. See Kelly, *supra* note 110, at 497.

187. Several authors have proposed different avenues of prosecution as a way to reach international terrorists. The propositions predominantly focus on the International Criminal Court (“ICC”), despite no clear jurisdiction over the crime of terrorism, or another equally competent international tribunal to prosecute international terrorists. See, e.g., Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT’L L. REV. 1009 (2004); Todd M. Sailer, *The International Criminal Court: An Argument*

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way for the international community to tweak this principle so as to delegitimize safe harbor states and renew its effectiveness in combating international terrorism. This model is based on the dual notions of dispute resolution and the underlying principle of good faith in all the conventions.¹⁸⁸

All thirteen multilateral conventions contain a provision for dispute resolution if a conflict of interpretation or application arises between contracting state parties.¹⁸⁹ For example, the Terrorist Bombing Convention states:

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.¹⁹⁰

States may seek the assistance of a neutral third party to properly enforce any part of a multilateral convention. This mechanism creates a model for dealing with contracting states who are questionably applying *aut dedere aut judicare* under the multilateral conventions.¹⁹¹ As such, the objective of this model is not to define international terrorism or to determine whether such an act qualifies as terrorism. Rather, the goal is to hold states accountable for improperly fulfilling their international legal obligations, as determined by their participation in the various multilateral conventions and the binding effect of U.N. Security Council resolutions.¹⁹² Moreover, this model necessarily provides a neutral intermediate step prior to the involvement of the much politicized U.N. Security Council, whose members may have diverging normative values in regard

to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections, 13 TEMP. INT'L & COMP. L.J. 311 (1999); Stephens, *supra* note 7. However, the supranational nature of international tribunals may deter sympathetic custodial states from extraditing alleged terrorists and may in fact spur the state to elect prosecution, which comes right back to the initial issue of *aut dedere aut judicare*.

188. The principle of good faith underlying treaty obligations is codified and is arguably customary international law. See Vienna Convention, *supra* note 34, at art. 26.

189. See Multilateral Conventions Against Terrorism, *supra* note 32.

190. International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art 20, ¶ 1.

191. The proposed model should be limited in its application to instances of international terrorism and if implemented, should not be extended by analogy to other international offenses. This model differs from a previous suggestion of creating international tort liability (for wrongful death, personal injury, and property damage) for those states who fail to extradite or prosecute. See William R. Slomanson, *I.C.J. Damages: Tort Remedy for Failure to Punish or Extradite International Terrorists*, 5 CAL. W. INT'L. L.J. 121 (1974). While damages may provide a civil remedy for inaction, it does not address the security threats posed by international terrorism. Furthermore, the proposed model is dealing with those states that exercise their rights in bad faith, rather than those states that simply do nothing.

192. A state must be a contracting state to the multilateral convention for which enforcement is sought. If a state is not a contracting state to a convention or has not signed on to the proposed dispute resolution model, it is not bound by either, though enforcement of Resolution 1373 could still be sought via the U.N. Security Council. See U.N. Charter art. 35, para. 1 (permitting member states to bring disputes to the Security Council if such a dispute could threaten international peace and security).

to what constitutes international terrorism. Thus, a neutral third party provides guidance in terms of violations of treaty obligations, as opposed to politicizing an international terrorist act and the custodial-state party.

This proposed dispute resolution model has a number of steps to ensure its legitimacy. First, it shall require a hearing by a neutral third party—an international judicial body such as the I.C.J.¹⁹³ This hearing would examine a custodial state's choice of prosecution over extradition *if* the requesting party alleges bad faith as the reason for the custodial state's choice or subsequent inaction. The burden of establishing a claim of bad faith would be on the requesting party. It would be satisfied by putting forth evidence including, but not necessarily limited to: (1) the custodial state's failure to fulfill its obligations under the relevant convention;¹⁹⁴ (2) the custodial state's clear sanction of the terrorist attack as the basis for extradition, or a general sanction over time of analogous terrorist acts;¹⁹⁵ (3) as in the case of Pan Am Flight 103, evidence of the custodial state's direct involvement in the immediate terrorist attack;¹⁹⁶ or (4) evidence of the custodial state's indiscriminate application of state law to avoid extradition.¹⁹⁷ This burden should require the standard of clear and convincing evidence.¹⁹⁸ The lower standard, a preponderance of the evidence, may deter states from signing onto this model as it could be too easily overcome, while proof beyond a reasonable doubt is not applicable as the judicial body is not actually hearing the criminal case.¹⁹⁹ Once all the evidence is presented, the judicial body shall issue a ruling and subsequent remedial relief.

193. While the current dispute resolution mechanism gives jurisdiction to the I.C.J., it is not necessarily recommended that the I.C.J. act as the judicial authority due to the presumptively high number of cases—it may draw necessary resources from more pressing cases. Similarly, the I.C.J. has jurisdiction over a variety of cases. A specialized judicial body will offer the expertise and precision necessary for this highly charged issue. Thus, it is recommended that a new judicial body be created and its jurisdiction modeled after the I.C.J. See U.N. Charter art. 94.

194. See, e.g., International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 5 (prohibiting justification or defenses to the Convention's proscribed offenses).

195. See, e.g., *On-Line NewsHour*, *supra* note 175. This is a general example of sanctioning terrorist conduct and not a specific example of the Taliban due to the intricacies of any pertinent conventions and Afghanistan's party status.

196. See *supra* Part III.C (discussing Pan Am Flight 103).

197. Although a state's law may prevent the extradition of certain individuals, particularly that state's nationals, arbitrarily applying this law to avoid extradition may be seen as bad faith. For instance, in the Pan Am case, it was noted that Libyan law prevented the extradition of Libyan nationals. See Joyner & Rothbaum, *supra* note 65, at 251. If, however, Libya only applied this law to terrorism-related cases and not to other extradition requests, it would be an indiscriminate application.

198. The hearing would be analogous to a civil or administrative case as it is a hearing based on a state's alleged violation of international law laid out in its treaty obligations, as opposed to a violation of a criminal offense. Clear and convincing evidence is defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY 596 (8th ed. 2004).

199. Preponderance of the evidence can be applied as:

[T]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force;

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If the judicial body finds that there is no presence of bad faith, the custodial state shall continue its investigation and/or prosecution of the alleged terrorist according to its domestic laws.²⁰⁰ While the requesting state is still free to use other legal and political mechanisms to exert pressure for extradition, this is not recommended as it would undermine the legitimacy of the proposed model. However, if the judicial body finds that there is bad faith, there are two options available. First, the judicial body shall *request* that the custodial state surrender the alleged terrorist to the requesting state or to a neutral state that has established jurisdiction over the case.²⁰¹ Thus, the custodial state still retains its sovereign right to refuse the judicial body's request, and prosecute those criminals found within its borders. Second, if the custodial state refuses to surrender the alleged terrorist, the judicial body or the requesting state shall convey this refusal either directly to the U.N. Security Council or to the Counter-Terrorism Committee.²⁰² Upon review, the C.T.C. may make a recommendation on whether the custodial state is in violation of Resolution 1373, particularly the provision of safe harbor to international terrorists.²⁰³ The Security Council shall then consider whether sanctions or other legal or political actions for violations of Resolution 1373 are necessary.²⁰⁴

superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

BLACK'S LAW DICTIONARY 1220 (8th ed. 2004). Reasonable doubt can be applied as "the doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty." *Id.* at 1293.

200. This is obligatory unless the custodial state extradites the alleged offender. *See* Multilateral Conventions Against Terrorism, *supra* note 32.
201. There is no universal rule binding states to extradite accused offenders. *See* Joyner, *supra* note 100, at 500.
202. *See, e.g.*, U.N. Charter art. 94, para. 2 ("If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.").
203. *See* Resolution 1373, *supra* note 59, at ¶ 6. Resolution 1373 prohibits member states from providing safe harbor to international terrorists. *Id.* at ¶ 2(c). The fact that Resolution 1373 proscribes the provision of safe harbor does not undermine the contention of this Note. Resolution 1373 calls upon member states to ratify the multilateral conventions, if they have not already done so. *See id.* at ¶ 3(d). The multilateral conventions impose various obligations and duties, including the duty to extradite or prosecute. *See* Multilateral Conventions Against Terrorism, *supra* note 32. Hence, it is arguable that a state's submission of a case for prosecution would be seen as denying safe harbor. However, the aforementioned deficiencies of *aut dedere aut judicare* dictate that this may be a "façade of justice." Joyner & Rothbaum, *supra* note 65, at 248. Finally, as the Security Council resolutions are binding upon members, regardless of their contractual status with the multilateral conventions, it would seem that the focus is on member states that have not ratified the multilateral conventions as well as states that sponsor international terrorism.
204. *See* U.N. Charter art. 41, 42. This would be analogous to Security Council action in the case of Pan Am Flight 103. *See supra* Part III.C (discussing Pan Am Flight 103). In situations where the custodial state that is acting in bad faith is a permanent member of the U.N. Security Council (*i.e.* could veto any move for sanctions against itself thereby preventing such action) and that permanent member has vetoed any such action, the international community could exert pressure, either collectively or individually, via other political and legal mechanisms, namely a U.N. General Assembly resolution admonishing the

This model should be adopted as a protocol to the multilateral conventions, as opposed to a binding Security Council resolution.²⁰⁵ First, the state would be subjecting itself to an international judicial body; such a grant should be made voluntarily.²⁰⁶ Second, all the multilateral conventions permit contracting states to absolve their obligations by withdrawing.²⁰⁷ If the Security Council were to adopt such a resolution, circumventing the need for consent, many states may withdraw from the multilateral conventions, which would do more harm than good.²⁰⁸ Similarly, states may react by becoming explicitly acquiescent to the presence of alleged offenders within their territories rather than pursuing and arresting them if they believe that they are being subjected to illegitimate and non-consensual jurisdiction.²⁰⁹

member state and noting that states may take appropriate measures, not including self-defense. *See* U.N. Charter art. 10, which reads:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Id. Though such a resolution would not be legally binding, it would provide a basis for member states to impose sanctions. Furthermore, such recommendations would arguably not violate Article 12 of the Charter as the Security Council would not be seized of that particular matter due to a permanent member's veto. *See* U.N. Charter art. 12, para. 1 ("While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.").

205. In order for a state to ratify the protocol, it must be a member to at least one of the multilateral conventions and is limited to seeking enforcement of the conventions to those to which it is a member.
206. This is a general practice in international law. *See, e.g.*, U.N. Charter art. 93 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."). Thus, since states had to voluntarily ratify the U.N. Charter, their consent to I.C.J. jurisdiction was voluntary as well. *See* U.N. Charter art. 110. Similarly, all of the multilateral conventions permit states to ratify with reservation its submission to the dispute resolution mechanism contained in the convention, likely due to the possibility that such a dispute will end up in the I.C.J.; some states do not submit to the I.C.J.'s compulsory jurisdiction. *See* Multilateral Conventions on Terrorism, *supra* note 32. A state's reservation on compulsory I.C.J. jurisdiction is not presumptively conclusive that the state will not voluntarily consent to the proposed dispute resolution mechanism.
207. *See* Multilateral Conventions Against Terrorism, *supra* note 32. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 23, ¶ 1 ("Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.").
208. As long as a state is a contracting party to a convention, it is legally bound to fulfill the convention's obligations, including the resolution of disputes via the I.C.J., unless it has reserved itself from such compulsory jurisdiction in which case jurisdiction may be sought on a case specific basis. This is particularly apt when there is no bilateral extradition treaty and the convention is providing the legal basis for an extradition request. Thus, it is basically the lesser of two evils.
209. Under the multilateral conventions, a state has an obligation to detain, according to its domestic laws, an alleged offender found within its territory for prosecution or extradition if it believes the alleged offender perpetrated a proscribed offense. *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 32, at art. 6, ¶ 1. Under the Terrorist Bombing Convention, the state party also has a duty to investigate any information that an alleged offender may

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Finally, should states elect not to consent to this new protocol, they would still be bound by the relevant multilateral conventions and/or Resolution 1373.²¹⁰ Ultimately, the successful creation and implementation of such a dispute resolution mechanism will be determined by the international community's willingness to make *aut dedere aut judicare* functional in the context of international terrorism.

V. CONCLUSION

Despite efforts by the international community to minimize the threat of international terrorism, the current legal framework has fallen short. At present, states do not need to circumvent international law to provide safe harbor—the multilateral conventions provide them with the mechanism to do so. The failure to universally define international terrorism, as well as the principle of *aut dedere aut judicare*, have coalesced to permit contracting states to combat international terrorism only rhetorically, while providing safe harbor procedurally. Effectively solving this problem involves both idealistic and realistic solutions, including a universal definition of international terrorism and a dispute resolution mechanism. While these solutions will take time and significant effort to implement, it will be well worth the effort as international terrorism is not a new phenomenon, nor is it a fading one. International terrorism will remain a threat to international peace and security as individuals and groups (and even states) will persist in the use of violence as a means to achieve their ends, whatever they may be. The international community must find the will to effectively tackle the problem of international terrorism in order to diminish the threat that faces us all.

be present in its territory. See International Convention for the Suppression of Terrorist Bombings, *supra* note 32, at art. 7, ¶ 1.

210. Although this would essentially be the current status quo for a state party that refrains from ratifying the protocol, such a state may still be subject to the more general dispute resolution mechanism contained in the conventions for which it may still be subject to an unfavorable decision. And other states could use this decision as an inference that a state does not want the conventions to be legitimately enforced. As such, a state's decision to refrain from participation in the protocol may provide impetus for other states to more forcibly apply other legal and political mechanisms.