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John P. Grant

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BEYOND THE MONTREAL CONVENTION*

John P. Grant[†]

I. Introduction

The Lockerbie trial holds a dazzling number of “firsts.”¹ Besides being the longest and most expensive criminal trial in Scottish legal history, it was the first time a Scottish criminal court had sat outside Scotland and the first time the jury in the trial of serious crime had been replaced with three experienced judges as fact finders. The destruction of Pan Am 103 over Lockerbie on 21 December 1988, resulting in 270 deaths, was one of the largest terrorist atrocities of its day and some might say the start of the “new” terrorism, where all restraints on the scale of destruction and death are abandoned. For the first time, the Security Council imposed sanctions on a State to induce it to surrender two of its nationals for trial abroad. The case brought by Libya against the United States and United Kingdom to have the strict letter of the Montreal Convention applied was the first direct invocation of the claim that the International Court of Justice has the power of judicial review and the first direct challenge to the Security Council’s powers to take decisions on any matter.

The lessons to be drawn from the Lockerbie trial cannot be seen in isolation and must be viewed through the lens of the 9/11 atrocities. If the destruction of Pan Am 103 marks the beginning of the “new” terrorism, then 9/11 marks its (current) zenith. Viewed together, these atrocities raise questions about the adequacy of the terrorism conventions in suppressing terrorist acts and the role of the UN Security Council, and even States individually or collectively, in taking more forceful, even forcible, measures against terrorists and those States that sponsor, shield or succor them.

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[†] Professor of Law, Lewis & Clark School of Law, Portland, OR and Emeritus Professor of International Law, University of Glasgow, Scotland.

¹ JOHN P. GRANT, *THE LOCKERBIE TRIAL BRIEFING HANDBOOK* 1-4 (2nd ed. 2000).

II. The Montreal Convention

The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971² is the third convention in an international terrorism régime that has evolved piecemeal, usually as a response to particular terrorist activities.³ So, the first concern was with offences against civil aviation, originally in the form of hijacking⁴ and then in the form of sabotage of aircraft⁵ and airports.⁶ This régime was later extended to ships⁷ and offshore installations.⁸ When the international community became apprehensive about attacks on diplomatic and international personnel, two further international conventions were adopted, dealing with internationally protected persons, essentially diplomats,⁹ and with the taking of hostages.¹⁰ The transportation of nuclear material has been the subject of a separate agreement,¹¹ as has the "marking" of plastic explosives for the purpose of detection.¹² More recently, the international

² Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

³ For example, the Montreal Convention was adopted as a response to the bombings of three aircraft in September 1970, two hijacked to Dawson's Field in Jordan and exploded on the ground, a third bombed on the ground at Cairo.

⁴ Tokyo 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; *See also* Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

⁵ Montreal Convention, *supra* note 2.

⁶ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474, 27 I.L.M. 627 (supplementary to Montreal Convention, *supra* note 2).

⁷ Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 672.

⁸ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304, 27 I.L.M. 685.

⁹ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167, 13 I.L.M. 41.

¹⁰ International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

¹¹ Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 18 I.L.M. 1419.

¹² Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721.

focus has broadened into terrorist bombings¹³ and the fundamental issue of the financing of terrorism.¹⁴ This makes a staggering total of twelve global conventions,¹⁵ all of which have secured a respectable number of ratifications.¹⁶ There are, for example, 176 parties to the Montreal Convention, including Libya, the United States and the United Kingdom.¹⁷

As yet, there is no comprehensive or omnibus terrorism convention. It is often said that the term “terrorism” defies definition and, as a consequence, it would be impossible or impracticable to elaborate a convention against terrorism in the round.¹⁸ Certainly, largely because of the subjective and politicized nature of terrorism, one person’s terrorist being another person’s freedom fighter, a generally agreed definition of terrorism in international law “remains elusive.”¹⁹ There is merit in the argument that attempting to define terrorism serves no real purpose²⁰ and the adoption of piecemeal conventions to cope with particular terrorist acts has avoided the need for a definition of terrorism. The international community, not needing to define international terrorism as a phenomenon, has nonetheless been able to address terrorists’ acts as and when they reach a level, qualitatively or quantitatively, that is unacceptable.

The Sixth Committee of the UN General Assembly, its legal committee, is presently in the process of drafting what it is pleased to call a

¹³ International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, G.A. Res. 52/164, U.N. GAOR, 52d Sess., 72d mtg., U.N. Doc. A/RES/52/164 (1997), reprinted in 37 I.L.M. 249 (1998).

¹⁴ International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, G.A. Res. 54/109, U.N. GAOR 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (2000), reprinted in 39 I.L.M. 268 (2000).

¹⁵ See *International Instruments Related to the Prevention and Suppression of International Terrorism*, U.N. Sales No. E.01.V.3 (2001) (providing the official texts of the foregoing treaties).

¹⁶ See United Nations Treaty Collection – Conventions on Terrorism, at <http://untreaty.un.org/English/Terrorism.asp> (providing the current status of the foregoing treaties).

¹⁷ Libya acceded to the Montreal Convention on February 19, 1974, and the United States and United Kingdom ratified the Convention on November 1, 1972 and October 25, 1973 respectively. *Id.*

¹⁸ ROSALYN HIGGINS & MAURICE FLORY, *TERRORISM AND INTERNATIONAL LAW* 27-28 (1997).

¹⁹ 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).

²⁰ Geoffrey Levin, *Is “Terrorism” Worth Defining?*, 13 Ohio N.U. L..Rev. 97 (1986). See also John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISRAEL Y.B. HUM. RTS. 13 (1989); Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and the Fight Against Its Financing*, 14 EUR. J. INT’L L. 365 (2003).

“comprehensive” convention on international terrorism,²¹ as well as a convention on the suppression of nuclear terrorism.²² The draft comprehensive convention is only comprehensive in that it creates generic terrorist offences involving death, serious injury and serious property damage against a State or public facilities “when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”²³ Apart from that, and the fact that the draft comprehensive convention follows the earlier global agreements in its provisions on prosecution, extradition and cooperation, it does not in any way replace the existing conventional régime. Nor is it intended to. It is expressly provided that any conflict between the comprehensive convention and the existing agreements is to be resolved in favor of the existing agreements.²⁴ Thus, the existing régime is to stay in place and, as it were, be supplemented by the new convention, but only for those States that ratify it.

What is significant about the existing conventional régime for present purposes is the fact that the agreements share a number of common, key elements. These common elements fall into five broad areas. The first common area is the identification of the particular terrorist offence or offences covered by the agreement. So, the Montreal Convention specifies as criminal, if done unlawfully and intentionally, a number of acts that sabotage or are likely to sabotage a civilian aircraft.²⁵ Thus, the destruction of Pan Am 103 falls under art. 1(1)(c), making it an offence to “place or cause 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 . . .” Invariably, as in the Montreal Convention, criminal liability for such acts extends beyond the actual perpetrators to those who attempt these offences or who are accomplices.²⁶

Secondly, the agreements require each State party to ensure that the offences covered by the agreements are offences under its domestic law and punishable by appropriate penalties recognizing the gravity of the offences. The Montreal Convention, for example, obliges each State party “to make

²¹ Draft Comprehensive Convention on International Terrorism, U.N.GAOR 6th Comm., U.N. Doc. A/57/35, Annexes I-IV. The Ad Hoc Committee established to elaborate the convention has its own website where progress and textual revisions can be monitored at www.un.or/law/terrorism/index.html.

²² Draft International Convention for the Suppression of Acts of Nuclear Terrorism, U.N. GAOR 6th Comm., U.N. Doc. A/57/37, Annex I.

²³ Draft Comprehensive Convention on International Terrorism, *supra* note 21, art. 2(1).

²⁴ *Id.* art. 2.bis.

²⁵ Montreal Convention, *supra* note 2, art. 1(1).

²⁶ *Id.* art. 1.

the offences mentioned in Article 1 punishable by severe penalties.”²⁷ The third common area relates to jurisdiction. At a basic level, as in the Montreal Convention, each State party is required to establish its jurisdiction over offences committed in its territory or against or on board an aircraft registered in that State or where the aircraft lands in its territory.²⁸ Later conventions in the régime adopt more detailed and extensive, and in some cases bifurcated, rules on jurisdiction. The Terrorist Bombings Convention of 1997, for example, requires each State party to establish jurisdiction over offences committed in its territory, on board its ships and aircraft and by its nationals²⁹; and then additionally permits – and encourages – each State to establish jurisdiction in five other situations, including situations in which the offences are committed against a national of the State or a State facility abroad or are committed to compel the State to do or abstain from doing some act.³⁰

The critical common area in the terrorism régime is the core obligation to extradite or prosecute, often referred to as the *aut dedere aut judicare* principle. It amounts to the duty to investigate and then to either report the offender for prosecution or extradite the offender to a State that will prosecute. Thus, the Montreal Convention demands that a State in whose territory an alleged offender is present conduct a preliminary enquiry³¹ and, if the circumstances so warrant, take the offender into custody.³² Then, the State must apply the *aut dedere aut judicare* principle: in terms of art. 7 of the Montreal Convention, “if it does not extradite him, [the custodial State is] obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”

²⁷ *Id.* art. 3. The later conventions employ a slightly different formulation, e.g. International Convention for the Suppression of Terrorist Bombings, *supra* note 13, art. 4(b), which requires a State to make the offences punishable by “appropriate penalties which take into account the grave nature of those offences.” The United Kingdom gave effect to its obligations under the Montreal Convention in the Aviation Security Act, 1982, c. 36, pt. 1, §1(13) (Eng.), with a maximum penalty of life imprisonment; the United States gave effect to its obligations in the Aircraft Sabotage Act 1982, 18 U.S.C. §§ 31-32 (1982), with a maximum penalty of 20 years imprisonment.

²⁸ Montreal Convention, *supra* note 2, art. 5(1).

²⁹ International Convention for the Suppression of Terrorist Bombings, *supra* note 13, art. 6(1).

³⁰ *Id.* art. 6(2).

³¹ Montreal Convention, *supra* note 2, art. 6(2)..

³² *Id.* art. 6(1). Where the detained offender is a foreign national the national State must be informed. *Id.* art. 6(4).

It should be noted that nothing requires a State to extradite an alleged offender.³³ If a State cannot extradite an offender, either because extradition is forbidden by its constitution or laws or because it does not wish to do so, it can satisfy the requirements of art. 7 by reporting the case to its prosecution authorities. Also, the obligation is to submit the case to its prosecution authorities, not to actually prosecute the case in court.³⁴ It is expected that the prosecution authorities will process terrorist crimes as they would any other serious crimes.³⁵ Art. 7 must be read with art. 11, requiring other States to provide "the greatest measure of assistance in connection with criminal proceedings . . ."³⁶ Perhaps naively, it is assumed in the Montreal Convention and the other terrorism conventions that a custodial State exercising its right to prosecute an alleged offender will refer the case to its prosecution authorities in good faith, that its prosecution authorities will in turn investigate and, if there is sufficient evidence, prosecute in good faith and that other States will honor their obligations of assistance in the conduct of the investigation and any prosecution in good faith. While nowhere explicitly set down in any of the terrorism conventions, the principle of good faith underpins all treaties.³⁷ Despite all that, there is little doubt that *aut dedere aut judicare*, the cornerstone of the international conventional régime, "may ensure little more than a facade of justice."³⁸

Supplementary to the principle of *aut dedere aut judicare* are common rules in the terrorism conventions concerning extradition. Typically, these rules stipulate that the terrorist offences are deemed to be included within existing extradition treaties and to be explicitly included in future treaties; that the individual terrorism convention may be regarded as an extradition treaty in the absence of an actual bilateral treaty; and that the terrorist offences are not to be regarded as falling within the "political offence"

³³ Sami Shubber, *The Destruction of Aircraft in Flight over Scotland and Niger: The Questions of Jurisdiction and Extradition Under International Law*, 1995 BRIT. Y.B. INT'L L. 239, 281-82.

³⁴ See generally Alona E. Evans, *The Apprehension and Prosecution of Offenders: Some Current Problems*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 493-503 (Alona E. Evans & John F. Murphy eds., 1978) (discussing the concept of "submit to prosecution").

³⁵ Montreal Convention, *supra* note 2, art. 7.

³⁶ Later conventions are more explicit as to this obligation. See International Convention for the Suppression of Terrorist Bombings, *supra* note 13, art. 10 (adding that this cooperation is to include "assistance in obtaining evidence in their possession necessary for the proceedings"); *Id.* art. 13 (stating that even the transfer of detained or convicted people abroad to assist in the investigation and prosecution).

³⁷ Vienna Convention on the Law of Treaties, May 22 1969, art. 26, 144 U.N.T.S. 331; 8 I.L.M. 679.

³⁸ Joyner & Rothbaum, *supra* note 19, at 248.

exception common to extradition treaties. The Montreal Convention provides explicitly only for the first two of these rules.³⁹

The fifth common area among the global terrorism conventions⁴⁰ concerns other measures of cooperation required of the States parties. These vary as between the various agreements and are both general and subject specific. The most common general cooperative obligation is to take all practicable measures to prevent the terrorist offences.⁴¹ Specifically, the Montreal Convention requires the continuation for the passengers and crew of any journey affected by an act of sabotage and speedy return of any aircraft and cargo.⁴²

The international terrorism régime in general, and the Montreal Convention in particular, are predicated on domestic prosecution of terrorist crimes, either in the country in which the alleged offenders are found or in another country to which these alleged offenders have been extradited. The Lockerbie trial was a domestic prosecution, albeit with some adaptations of normal procedure necessitated by the location of the trial outside Scotland.

While there is no doubt that Scotland had jurisdiction,⁴³ under both international and domestic law, over those accused of destroying Pan Am 103, as the bodies of all 270 victims were found in Scotland, as was the debris of the aircraft. However, the government of the United Kingdom, instead of letting the prosecution proceed on the basis of the normal rules of criminal jurisdiction, proceeded under the authority of the Security Council. The Order in Council which governed the Lockerbie trial was expressly

³⁹ Montreal Convention, *supra* note 2, art. 8.

⁴⁰ There are, however, other common areas beyond those enumerated in the text, but they are of little importance to the present discussion, *e.g.* Montreal Convention, *supra* note 2, art. 7 (discussing fair trials); *id.* art. 14(1) (discussing settlement of disputes); *id.* arts. 15-16 (discussing the final provisions on signature, ratification, accession, entry into force, denunciation and registration).

⁴¹ *See* Montreal Convention, *supra* note 2, art. 10(1); *see* International Convention for the Suppression of Terrorist Bombings, *supra* note 13, art. 15(b-c) (discussing the necessity of exchanging intelligence and research findings).

⁴² Montreal Convention, *supra* note 2, art. 10(2).

⁴³ Within the United Kingdom there are three civil and criminal jurisdictions: England (which extends to Wales), Northern Ireland and Scotland. The independence of Scots private law, though not Scots public law, and the Scottish court system survived the union of Scotland with England in 1707 through the express terms of Articles XVIII and XIX of the Treaty of Union. Scots law and the Scottish judicial system survive to this day separate from the law and courts of its larger southern neighbor. Thus, the trial of the two Libyans indicted in the destruction of Pan Am 103 was conducted using Scots criminal law (and therefore Scottish legal definitions of murder and conspiracy to murder) in the (Scottish) High Court of Justiciary, before judges known as Lords Commissioners of Justiciary, with appeal to the Appeal Court of the High Court of Justiciary, presided over by the senior Scottish judge, the Lord Justice General. The procedure and the rules of evidence used in these proceedings were those of Scotland.

stated to have been adopted under the (U.K.) United Nations Act 1946,⁴⁴ a statute which regulates the effect to be given in the United Kingdom to mandatory resolutions of the Security Council. Resolution 1192 (1998), adopted on 27 August 1998 by the Security Council as a unanimous response to the United States/United Kingdom call for a trial in a neutral venue,⁴⁵ acting under its mandatory powers under Chapter VII of the UN Charter, demanded that "all States . . . cooperate" with the joint United States/United Kingdom trial "initiative," as the resolution described it. The Order in Council is therefore to be seen as an implementation, through the United Nations Act 1946, of Security Council Resolution 1192 (1998); and the trial as authorized by, though not necessarily proceeding under, the mandate of the Security Council.

The reason for using the Security Council resolution as authority for the trial, rather than the inherent jurisdiction of the Scottish courts in such cases, was, one assumes, to keep the pressure on Libya to surrender the two accused. In August 1998, partially because of the fact that the sanctions régime against Libya was being increasingly flouted,⁴⁶ it was by no means certain that the accused, Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, would be surrendered for trial. It was clearly expedient to utilize a binding resolution of the Security Council as the basis for the trial, given that the same resolution obligated all States, including, of course, Libya, to cooperate; and specifically demanded that Libya make available to the court "any evidence or witnesses in Libya."⁴⁷

The trial proceeded as a normal trial on indictment in the High Court in Scotland. In terms of the Order in Council, except as provided for in the Order, the Lockerbie trial was to "be conducted in accordance with the law relating to proceedings on indictment before the High Court of Justiciary in Scotland."⁴⁸ This was, then, a domestic assertion of jurisdiction over terrorist crimes. Neither the genesis of the trial in a Security Council resolution, nor the attendance at the trial of United Nations observers,⁴⁹ nor

⁴⁴ The High Court of the Justiciary (Proceedings in the Netherlands) Order 1998, S.I. No. 1998/2251, U.N. Doc. S/1998/795 (1998), Preamble [hereinafter "Order 1998"].

⁴⁵ Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary General, UN Doc. S/1998/795.

⁴⁶ Anthony Aust, *Lockerbie: The Other Case*, 49 INT'L & COMP. L. Q. 278, 283 (2000).

⁴⁷ S.C. Res. 1192, U.N. SCOR, 54th Sess., 3920th mtg. ¶ 4, U.N. Doc. S/RES/1192 (1998).

⁴⁸ Order 1998, *supra* note 44, art. 3(2).

⁴⁹ S.C. Res. 1192 (1998), *supra* note 47, ¶ 6 (authorizing international observers to attend the trial).

the location of the trial in the Netherlands,⁵⁰ converts the Lockerbie trial into some kind of international proceeding.

It is equally clear that the Lockerbie trial was not a criminal proceeding under the Montreal Convention. That convention, like the other terrorism conventions, provides for prosecution only in a State in which the offenders are found or a State to which they may be extradited.⁵¹ Megrahi and Fhimah were, from the date of their indictment until their appearance in the Netherlands on 5 April 1999, located in Libya. Libya asserted its right, under art. 7 of the Montreal Convention to prosecute them.⁵² This claim was rejected by the governments of the United Kingdom and United States, which demanded prosecution in either Scotland or the United States. At all times, the demand of the United Kingdom and United States was for the *surrender* of the two accused. The demand was not for their extradition, which could not have stood in law: no State, under the Montreal Convention or otherwise, can be required to extradite its nationals.⁵³ From the outset of the Security Council's involvement in early 1992, notwithstanding its customary use of circular and opaque language, the Council demanded the *surrender* of the two Libyan accused, not their extradition.⁵⁴ The United States/United Kingdom "initiative" in August 1998, the Security Council's resolutions and Libya's eventual response all prove that the transfer of Megrahi and Fhimah from Libya to the Netherlands was not an extradition. Ironically, on the arrival of the two Libyans on Dutch territory, the only way under Dutch law to transfer them to the jurisdiction of the Scottish Court at Camp Zeist was by extradition (from one part of the Netherlands to another).⁵⁵

It is significant that none of the terrorism conventions, not even the new Comprehensive Terrorism Convention, makes provision for trial other

⁵⁰ See *id.* ¶ 4, as fleshed out in Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands, Sept. 18, 1998, Neth.-U.K., N. Ir., 38 I.L.M. 926 and Order 1998, *supra* note 44.

⁵¹ Montreal Convention, *supra* note 2, art. 7.

⁵² See JOHN P. GRANT, THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY 106 (2004).

⁵³ See, e.g., Joyner & Rothbaum, *supra* note 19, at 241; Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L LAW 289, 306 (2000).

⁵⁴ S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg. ¶ 3, U.N. Doc. S/RES/731 (1992) (requesting that Libya "provide a full and effective response" to the United States/United Kingdom demands, these demands being contained in communications to the Council (UN Doc. A/46/825-S/23306 and UN Doc. A/46/828-S/23309)); S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. ¶ 1, U.N. Doc. S/RES/748 (1992) (transforming that request into an obligation by requiring Libya to comply with the operative part of Resolution 731); S.C. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg. ¶ 1, U.N. Doc. S/RES/883 (1993), (repeating that Libya must comply with resolutions 731 and 748).

⁵⁵ Aust, *supra* note 46, at 287.

than in the State in which the alleged offenders are located or a State to which they may be extradited. Nowhere is there reference to the type of arrangement made for the Lockerbie trial. More surprisingly, particularly in light of the current vogue for international tribunals, nowhere is there reference to the possibility of terrorist crimes, not even those of the political leaders of States that sponsor terrorism or provide safe havens or succor for terrorists, coming before some international tribunal.

III. International Justice

The vogue for international tribunals began in 1945 with the establishment of international military tribunals to try major German and Japanese military and political leaders for crimes arising out of the Second World War. Tribunals were set up at Nuremberg⁵⁶ and Tokyo⁵⁷ on very similar lines, each with jurisdiction in respect of crimes against peace, war crimes and crimes against humanity. The novelty of these tribunals was their recognition that individuals could be subject to prosecution for crimes under international law,⁵⁸ that the political status of the individuals was irrelevant⁵⁹ and that superior orders were not a defense.⁶⁰ For the first time, 24 individuals at Nuremberg and 28 individuals at Tokyo were tried by an international tribunal for crimes under international law. These were, admittedly, exceptional times and exceptional crimes, but an important principle had been established. In 1946, the UN General Assembly expressly affirmed "the principles of international law" of the Nuremberg Charter and the judgment of the tribunal.⁶¹

Since that time, various attempts have been made to establish an international criminal court on a permanent basis. Early optimism is apparent from the Genocide Convention of 1948 that, in addition to providing for jurisdiction over offenders in domestic courts, also provided for jurisdiction in an "international penal tribunal."⁶² However, the

⁵⁶ The Charter is an annex to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁵⁷ The Charter is embodied in a Special Proclamation of the Supreme Allied Commander, T.I.A.S. No. 1589, 4 Bevens 20 (1970).

⁵⁸ See The Charter of the Nuremberg International Military Tribunal, *supra* note 56, art. 6.

⁵⁹ See *id.* art. 7.

⁶⁰ See *id.* art. 8.

⁶¹ G.A. Res. 95 (I), U.N. GOAR, 1st Sess., U.N. Doc. A/RES/1/95 (1948). These principles were later articulated by the 2 UNITED NATIONS INTERNATIONAL LAW COMMISSION, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 374-78 (1950).

⁶² Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 6, 78 U.N.T.S. 277.

difficulties in getting agreement had been underestimated and it was not until 1998 that the Statute of the International Criminal Court was agreed;⁶³ that Statute came into force in July 2002. In the interim, special ad hoc criminal tribunals were created by the Security Council for international crimes committed in the former Yugoslavia⁶⁴ and Rwanda.⁶⁵ But these, like the Nuremberg and Tokyo Tribunals, reflected egregious crimes committed in exceptional circumstances. They are not permanent and both may be consigned to history by the end of this decade. Their substantive jurisdiction reflects the events that occurred in two geographical areas. But perhaps most critically, they run the risk of being accused of bias and partiality: why should individuals in two parts of the world be subject to international justice when individuals committing identical acts in other parts are not?

The *ad hocery* inherent in all the earlier tribunals has now been replaced by a permanent international criminal court, with jurisdiction over genocide (at last), crimes against humanity, war crimes and the crime of aggression.⁶⁶ As at Nuremberg, individuals are criminally responsible for international crimes,⁶⁷ the status of individuals is irrelevant to their criminal responsibility⁶⁸ and superior orders are no defense.⁶⁹

There are, of course, attractions in having an international tribunal or the ICC as the primary, or at least the secondary, forum for the prosecution of terrorist offences. International tribunals, it is said, are free from the taint of prejudice.⁷⁰ Prior to 1998, Libya frequently refused to surrender the

⁶³ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc.A/CONF.183/9; 37 I.L.M. 999 [hereinafter Statute of the ICC].

⁶⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993) as amended by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) and S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/RES/1329 (2000). See also www.un.org/icty.

⁶⁵ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). See also www.icttr.org.

⁶⁶ Statute of the ICC, *supra* note 63, art. 5.

⁶⁷ *Id.* art. 25.

⁶⁸ *Id.* art. 27.

⁶⁹ *Id.* art. 33.

⁷⁰ STEVEN R. RATNER & JASON S. ABRAHAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 184 (2nd ed. 2001); Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1, 27 (1998).

two Lockerbie suspects to Scotland or the United States on the ground that they could not possibly receive a fair trial as a result of the extensive publicity identifying the pair as the Lockerbie bombers.⁷¹ It was only through the Security Council-endorsed proposal for trial in a neutral venue, coupled with whatever was contained in the secret agreement/understanding reached between the United Kingdom and Libya⁷² that secured the appearance in the Netherlands of Megrahi and Fhimah on 5 April 1999: all intended and designed to be assurances of a fair trial.

While the absence of prejudice in an international tribunal may be somewhat overstated, it is undoubtedly true that a State may be much more willing to extradite or surrender individuals accused of terrorism who are within its territory, particularly its own nationals, to an international tribunal than a foreign domestic court. Alleged terrorists may have more confidence in a fair trial before international judges than the juries and/or judges of the State that has suffered the terrorist offences.⁷³ Reference to an international tribunal also allows the "heat" to be taken out of terrorist trials, allowing the States concerned—the State which has suffered the terrorism and the State with custody of the alleged terrorists—to continue relations in a more normal manner than trial in a domestic court.

International justice, rather than domestic justice, is said to realize better the expectations of the victims of international crimes and their families.⁷⁴ In relation to the Pan Am 103 bombing, it is plump and plain that the victims' families demanded nothing other than domestic justice—and, for the majority of them, American justice at that. Furthermore, it is argued that international tribunals give the impression that the international community is taking international crimes seriously,⁷⁵ these crimes being of a nature that should not be left to the whims of domestic prosecution.⁷⁶ This may apply to international crimes of a particularly widespread, systematic and heinous nature – genocide or crimes against humanity – but is a singularly peculiar idea if applied to terrorist crimes. By not seeking to establish some international tribunal for Megrahi and Fhimah, were the United Kingdom and United States indicating that they did not take the sabotage of Pan Am 103 seriously? Even more bizarrely, is the United

⁷¹ See the Statement of the Lockerbie Suspects Defence Group of 25 December 1997 (annexed to UN Doc. S/1997/1015) and the Position Paper of the Libyan Permanent Mission to the UN of December 1997. GRANT, *supra* note 52, at 135.

⁷² See GRANT, *supra* note 52, at 170.

⁷³ Elagab, *supra* note 53, at 304.

⁷⁴ Justice Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 238 (1997).

⁷⁵ Antonio Cassese, *On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2 (1998).

⁷⁶ Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L.REV. 1, 6 (1998).

States insistence on domestic prosecution an indication that it does not take the events of 9/11 seriously? The reality is that States invariably wish to manage issues for themselves and will only seek international involvement when there is no option or the issues involve no vital national interest.⁷⁷

Of course, the fundamental and enduring problem with utilizing the ICC to deal with international terrorist offences is that these offences are excluded from the substantive jurisdiction of the Court. This is not an accident, but it is as strange as it is absurd. International terrorism is *the* issue in international criminal law—and has been since 9/11, if not before—and excluding international terrorists, and particularly those who sponsor terrorism or provide safe havens or succor to terrorists, from the ICC's jurisdiction flies in the face of contemporary realities

Terrorism, as a “treaty crime,” was excluded from the jurisdiction of the ICC, largely because it was already proscribed under existing conventional arrangements.⁷⁸ Attempts at the 1998 Rome conference to revive terrorism as a crime within the jurisdiction of the ICC failed for lack of agreement; it was not considered to be as serious as the crimes within the ICC's jurisdiction.⁷⁹ From the outset of the deliberations to establish the Court, there was clear consensus that the Court would deal with only the most serious offences: “unimaginable atrocities that deeply shock the conscience of humanity” being “grave crimes [that] threaten the peace, security and well-being of the world.”⁸⁰ These are expressed as genocide, crimes against humanity and war crimes.⁸¹ These crimes are then defined⁸² and have subsequently been the subject of further elaboration.⁸³ Terrorism, in the manifestations we have witnessed in the last 50 years, is not genocide as that term is generally understood; and it is difficult to see it being a war crime, a category of international offences that has a long history and clear parameters.

But could acts of terrorism constitute a crime against humanity? Certainly, the events of 21 December 1988—and a fortiori the events of 11

⁷⁷ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 285-86 (1997).

⁷⁸ *Compare Report of the Preparatory Committee on the Establishment of an International Criminal Court*, addendum pt. 1, at 2, art. 5, U.N. Doc. A/CONF.183/2/Add.1 (1998), with Statute of the ICC, *supra* note 63.

⁷⁹ See Neil Boister, *The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics*, 3 J. ARMED CONFLICT L. 27 (1998).

⁸⁰ Statute of the ICC, *supra* note 63, Preamble.

⁸¹ *Id.* art. 5.

⁸² *Id.* arts. 6-8.

⁸³ *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes*, addendum pt. 2, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

September 2001—would strike most people as crimes against humanity. The definition of the term “crimes against humanity” contained in the ICC Statute hardly supports this contention as a matter of law.⁸⁴ The closest the ICC’s substantive jurisdiction comes to the facts of the Lockerbie bombing is murder, but to qualify as a crime against humanity the murder must be committed “as part of a widespread or systematic attack directed against any civilian population . . .”⁸⁵ However egregious the events of 21 December 1988 were—and they were egregious—they arguably do not qualify under the demanding test prescribed by the ICC Statute. That does not mean that they should not qualify, simply that they do not qualify as the Statute is presently framed. Again, it is worth bearing in mind that the drafters of the Rome Statute did not intend to include international terrorism within the ICC’s substantive jurisdiction. International terrorism is, after all, subject to an extensive and detailed régime of its own.

In addition, the jurisdiction of the ICC is complementary to that of domestic courts.⁸⁶ Any State party to the ICC Statute has primary jurisdiction and the jurisdiction of the ICC only kicks in if it is “unwilling or unable genuinely to carry out the investigation or prosecution.”⁸⁷ The drafters of the Statute were not naive and recognized that this State preference would not apply when the State was shielding the alleged offender⁸⁸ or when the proceedings are not being conducted independently or impartially.⁸⁹ Assuming that all the parties to the Lockerbie case were parties to the ICC Statute—a huge assumption given that the United States (with a vengeance) and Libya are not parties to the Statute—would Libya have lost its jurisdictional preference because it was shielding Megrahi and Fhimah? Would the United Kingdom and United States forfeit their claims to jurisdiction because neither could guarantee a fair trial?

There are other, more technical, problems relating to prosecutions before the ICC.⁹⁰ The overall result must be that, however desirable it may

⁸⁴ See Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *FORDHAM INT'L L.J.* 457 (1998).

⁸⁵ Statute of the ICC, *supra* note 63, art. 7(1); *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes*, *supra* note 83, art. 7, Introduction, paras. 2, 3.

⁸⁶ Statute of the ICC, *supra* note 63, Preamble, arts. 1, 17.

⁸⁷ *Id.* art. 17(1).

⁸⁸ *Id.* art. 17(2)(a).

⁸⁹ *Id.* art. 17(2)(c).

⁹⁰ See, e.g., Daniel D. Ntanda Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 *CRIM. L.F.* 87 (1999); Ruth B. Phillips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 *CRIM. L.F.* 61 (1999); Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 *DENV. J. INT'L L. & POL'Y* 233 (1997); John P. Grant & Rupert E. Dickinson, *The Lockerbie Stalemate: Is an International Criminal Court the Answer?*, 1996 *JURID. REV.* 250.

appear to have terrorist offences prosecuted before some international tribunal, there is no tribunal with a clear mandate to undertake such a task. That being the case, the prosecution of alleged terrorists in the future will, in conformity with the manifest intention and clear wording of the twelve conventions in the international terrorism régime (not counting the draft Comprehensive Terrorism and Nuclear Terrorism Conventions) remain with States. Essentially, in terms of the régime, that means that any prosecution will take place in either the State in whose territory (or against whose interests) the terrorist acts have been committed or the State with custody of the alleged offenders—in short, the States with the most direct interest in actually prosecuting the alleged offenders, and which also have the bulk of the physical evidence and the majority of the witnesses.

IV. Enter the Security Council

The Lockerbie bombing is noteworthy in the annals of United Nations history as the first time that the Security Council has used its not inconsiderable powers to order a member State to surrender two of its nationals for trial in the territory of another member State. While Lockerbie may have been the first such exercise of power, it has not been the only such exercise of power. In October 1999, the Security Council imposed sanctions on Afghanistan, in part for its failure to surrender Osama bin Laden for trial on terrorism charges.⁹¹ It is tragically ironic that the failure of the Taliban to honor, and of the Security Council and its members to enforce, this demand allowed bin Laden, the accepted prime instigator, to orchestrate the events of 11 September 2001.

While the sequence of Security Council activity in relation to the Lockerbie bombing is easily and widely understood, the import of the various resolutions is much less so. First, at the behest of the United States, United Kingdom and French governments, the Security Council adopted a resolution on 21 January 1992 urging, not demanding, that Libya respond to the requests of the three governments.⁹² Two months later, on 31 March 1992, the Security Council adopted a further resolution, this time demanding a Libyan response and authorizing the imposition of a range of

⁹¹ S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999). While the Preamble cites as concerns the Taliban treatment of women and girls and the production of opium, it is in respect of the surrender of bin Laden that sanctions were imposed (para. 4). The Security Council subsequently returned to bin Laden's surrender in S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053d mtg., U.N. Doc. S/RES/1269 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251th mtg., U.N. Doc. S/RES/1333 (2000); and, after the 9/11 attacks, S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

⁹² S.C. Res. 731, *supra* note 54.

sanctions in the event that Libya did not comply within two weeks.⁹³ On 11 November 1993, the Security Council adopted a further resolution repeating the demands and extending the range of sanctions.⁹⁴ A full five years later, on 27 August 1998, the Security Council, responding to the United Kingdom/United States initiative for a trial in a neutral venue,⁹⁵ adopted a resolution endorsing and mandating that initiative and providing that sanctions would be "suspended immediately" on the surrender for trial of the two Libyan suspects.⁹⁶

So, the resolutions are predicated on certain demands made by the governments of the United States, United Kingdom and France. Unfortunately, these demands are not incorporated in terms into the resolutions; they are merely incorporated by reference. The demands, to which Libya is exhorted to respond in Resolution 731 (1998), became mandatory as of 31 March 1992, because Resolution 748 (1992), adopted under Chapter VII of the UN Charter, was a legally binding instrument.⁹⁷ Briefly stated, the demands were for the surrender of Megrahi and Fhimah for trial, the admission by Libya of responsibility for the Pan Am 103 atrocity, the payment of acceptable compensation and the renunciation of terrorism. The sanctions imposed in respect of all the demands were, according to Resolution 1192 (1998), to be suspended on the satisfaction of one of them, viz. the surrender for trial in the Netherlands of the Megrahi and Fhimah.

Just as Security Council Resolution 748 (1992) was the first occasion on which the Council had used its powers under Chapter VII of the UN Charter to compel a member State to surrender two of its nationals indicted on terrorism charges for trial abroad, so Resolution 1373 (2001) of 28 September 2001 marked another new departure for the Security Council in combating terrorism. Adopted in the immediate aftermath of the 9/11 atrocities and based on the Financing of Terrorism Convention of 1999,⁹⁸ the resolution sought to prevent and suppress the financing of terrorist acts⁹⁹ by requiring States to "criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their

⁹³ S.C. Res. 748, *supra* note 54.

⁹⁴ See S.C. Res. 883, *supra* note 54.

⁹⁵ See S.C. Res. 1192, *supra* note 47.

⁹⁶ *Id.*

⁹⁷ Decisions of the Security Council adopted under Chapter VII, which deals with "threats to the peace, breaches of the peace, and acts of aggression" are binding on all members by virtue of Article 25 of the Charter of the United Nations. U.N. CHARTER. ch. VII & art. 25.

⁹⁸ International Convention for the Suppression of the Financing of Terrorism, *supra* note 14.

⁹⁹ S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 1(a), U.N. Doc. S/RES/1373 (2001).

territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”¹⁰⁰

While the Financing of Terrorism Convention has 106 parties, Resolution 1373 (2001), adopted under Chapter VII, is binding on all 191 members of the United Nations. While the Financing of Terrorism Convention incorporates the *aut dedere aut judicare* principle,¹⁰¹ Resolution 1373 (2001) contains no reference to extradition, placing responsibility for implementing the resolution and enforcing that implementation exclusively in each and every State.¹⁰² While the Financing of Terrorism Convention provides for jurisdiction in a number of States,¹⁰³ Resolution 1373 (2001) mandates jurisdiction exclusively in each and every UN member.¹⁰⁴ While the Financing of Terrorism Convention contains no international monitoring body, Resolution 1373 (2001) provides for the establishment of a Counter Terrorism Committee, consisting of all Security Council members, to “monitor implementation” of the resolution.¹⁰⁵

Does this mark a new approach to dealing with terrorist crimes, an approach that seeks to overcome the limitations of conventional arrangements with options as to the State of prosecution and an overall monitoring body? Core terrorism conventions—for example, the Terrorist Bombings Convention of 1997,¹⁰⁶ and the Comprehensive Terrorism Convention¹⁰⁷ and Nuclear Terrorism Convention¹⁰⁸ when adopted—could be converted into universal obligations by resolution of the Security Council. Indeed, the Nuclear Weapons Convention may have been pre-universalized, at least in part, by Security Council Resolution 1540 (2004) of 24 April 2004 which demands cooperation among States preventing the proliferation, through prosecution if necessary, of nuclear (and chemical

¹⁰⁰ *Id.* ¶1(b); *see also id.* ¶ 1(c) (freezing funds and assets); *id.* ¶ 1(d) (prohibiting donations).

¹⁰¹ *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 14, art. 10.

¹⁰² *See* S.C. Res. 1373, *supra* note 99, ¶ 1.

¹⁰³ *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 14, art. 7.

¹⁰⁴ *See* S.C. Res. 1373, *supra* note 99, ¶ 1.

¹⁰⁵ *Id.* ¶ 6; *see also* Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT’L. L. 333 (2003); Counter-Terrorism Committee Website at <http://www.un.org/Docs/sc/committees/1373>.

¹⁰⁶ International Convention for the Suppression of Terrorist Bombings, *supra* note 13.

¹⁰⁷ Draft Comprehensive Convention on International Terrorism, *supra* note 21.

¹⁰⁸ Draft International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 22.

and biological) weapons and their means of delivery.¹⁰⁹ A further Security Council Resolution, Resolution 1566 (2004), adopted on 8 October 2004, "calls upon all States to prevent [a range of acts already included in the Terrorist Bombings Convention and others] and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."¹¹⁰ The term "Calls upon" is hardly the language of obligation, but it is not that far short, particularly in a resolution expressly adopted under Chapter VII of the Charter. One suspects that this trend will continue, perhaps not systematically (that is hardly the way of political bodies), but rather in response to particular real or perceived threats.

The response to 9/11 went beyond any invocation of the relevant terrorism convention—indeed, it has to be doubted that any of the sectoral conventions applied. Such was the strength of feeling, both in the United States and in the international community, that the Security Council, in adopting Resolution 1368 (2001) on 12 September 2001, expressly "recogniz[ed] the inherent right of individual or collective self-defense in accordance with the Charter."¹¹¹ The use of force in contemporary international law being *prima facie* unlawful under art. 2(4) of the UN Charter, the justification for the use of force by the United States/United Kingdom coalition in Afghanistan to root out terrorist suspects and destroy terrorist bases and training camps can only be found in the concept of self-defense. Self-defense requires, in terms of art. 51 of the Charter, an "armed attack," meaning an armed attack by another State. The legality of the Afghan operation therefore depends on linking the acts of a non-State terrorist group, Al Qaeda, with the Taliban, the governmental authority in Afghanistan. Taliban complicity in Al Qaeda and its activities, it can be asserted, implicated the Afghan State, thereby making the 9/11 atrocities arguably an armed attack, therefore permitting a proportionate response.

This is not the place to debate the legality of the Afghan operation, though it is the place to emphasize that the operation was a response to terrorism. Does this mark yet another new approach to dealing with terrorist crimes? In the future, are we to expect that a State, subject to some egregious terrorist act, will invoke the right of self-defense to enter another State forcibly in order to capture terrorist suspects? Or were the circumstances at the time—the chaotic misrule of the Taliban and the Taliban's manifest links with Al Qaeda—unique and unlikely to recur?

¹⁰⁹ See S.C. Res. 1540, U.N. SCOR, 59th Sess., 4956th mtg. ¶ 3, U.N. Doc. S/RES/1540 (2004); cf. Draft International Convention for the Suppression of acts of Nuclear Terrorism, *supra* note 22, art. 2, 7, 9-11.

¹¹⁰ S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053d mtg. ¶ 3, U.N. Doc. S/RES/1566 (2004).

¹¹¹ S.C. Res. 1368, *supra* note 91.

V. Conclusions

Whether the Security Council adopts resolutions to universalize terrorist crimes and whether States seek to replicate the Afghan operation, one thing is clear. At the international level, terrorist crime is no longer the exclusive province of the twelve terrorism conventions. Beginning on 31 March 1992 with Resolution 748 (1992), the Security Council has assumed an active role in combating terrorism, a role that is unlikely to diminish and likely to expand. That being the case, we are perhaps moving to a multi-faceted approach to terrorism, where some terrorist crimes falls within the terrorism conventions, while other terrorist crimes are subject to Security Council involvement in imposing sanctions and, even, authorizing military force.¹¹²

In the Lockerbie trial, Scotland “was given the opportunity to demonstrate to an on-looking world that Scottish criminal justice is indeed independent, dignified and scrupulously fair to the accused.”¹¹³ While all might not agree with that assessment,¹¹⁴ the trial at least demonstrated that domestic criminal justice systems are perfectly able to investigate, prosecute (and successfully at that) and adjudicate complicated and egregious acts of terrorism.

While the Lockerbie trial was not strictly an application of the Montreal Convention, the underlying and core philosophy of the convention and the other terrorism conventions mandating domestic prosecution and adjudication of terrorist crimes was vindicated by the flexibility agreed by the parties, and endorsed by the Security Council, of trial in a neutral venue with a panel of judges replacing a jury.¹¹⁵ The flexibility demonstrated in the arrangements for the Lockerbie trial can provide a model for future terrorism prosecutions where the *aut dedere aut judicare* principle cannot, for whatever reason, be utilized, thus allowing the surrender for trial of terrorist suspects through agreement with the custodial State or with the involvement, either coercive or benign, of the Security Council.

The international terrorism régime, including the Montreal Convention and the draft Comprehensive Terrorism Convention, fail to address directly the issues of State-sponsored terrorism and the harboring of terrorists and colluding in terrorist crimes by States. While almost forgivable at the time

¹¹² See Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT’L L. 1 (2002).

¹¹³ Donna E. Arzt, *The Lockerbie “Extradition by Analogy” Agreement: “Exceptional Measure” or Template for Transnational Criminal Justice*, 18 AM. U. INT’L L. REV. 163 at 226 (2002).

¹¹⁴ See Grant, *supra* note 52 at 280, 434 (recounting the reports of Dr. Hans Kochler, one of the U.N. observers at the trial and appeal).

¹¹⁵ See Arzt, *supra* note 113 (the definitive account of the arrangements agreed for the surrender of Megrahi and Fhimah for trial).

of the adoption of the Montreal Convention in 1971, experience since that time, not least the whole Lockerbie experience, makes it difficult to justify how any terrorism convention now can fail to even mention these issues. In the conventional world of the suppression of terrorism, it is as if 9/11 never happened. Almost as a consequence, a role has opened for the United Nations to mandate terrorism suppression measures, as the Security Council did in Resolution 1373 (2001), in Resolutions 1540 (2004) and 1566 (2004) and, of course, to induce the surrender of terrorists for trial, as the Security Council did in Resolutions 731 (1992), 748 (1992) and 883 (1993).

These developments, coupled with the use of force in 2002 to root out terrorist bases in Afghanistan and capture terrorist suspects, point to the emergence of a multi-faceted approach to terrorism, whereby the terrorism régime is utilized for “regular” terrorist crimes, with direct and forcible action utilized against terrorists and the countries in which they are located for particularly egregious terrorist acts. Under that scenario, the destruction of Pan Am 103 would fall at a level where Security Council support is required to secure compliance with the spirit of the Montreal Convention, while 9/11 falls beyond the purview of the terrorism régime and requires the use of force. If that is the pattern for the future, and not merely particular reactions to particular circumstances, then two questions arise. What is the level of egregiousness that moves matters beyond the terrorism régime? And, who decides?

There is a case for extending the jurisdiction of the International Criminal Court to include the political leaders of States that sponsor or collude in terrorist crimes, not least because the complementarity principle recognized in the ICC Statute maintains the essential integrity of the terrorism conventions by allowing primacy of domestic prosecution, yet providing back-stop international prosecution where domestic prosecution cannot or does not operate. Also, the ICC already has jurisdiction over a range on international crimes, some of which, on any scale of judgment, are less serious and less threatening to security in the contemporary world.

The clarion call—and the ultimate lesson of the Lockerbie trial—is that, in the war on terrorism, the international community needs to adopt a multi-faceted approach to what is, after all, a multi-faceted problem. For the future, particularly egregious terrorist acts need to be thought of as subject not only to the Montreal Convention, but also amenable to the other rights and remedies available to States under international law, provided for, yet regulated by, the UN Charter.