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Basic Aspects of International Cooperation in Criminal Matters against Terrorism

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1. The concept of ‘international cooperation’ in criminal matters

- Concept of ‘international cooperation’ used regularly, but no definition in international instruments.
- For the scholarship:
 - ‘Coordinated action by two or more States with a view to with a view to achieving results that they consider desirable’ (Pérez González).
 - ‘The coordinated action of two or more States that takes place under a legal under a legal regime and seeks to achieve a specific objective’ and ‘marks the effort of States to achieve an objective through common action in those areas where the activity of a single State cannot achieve the same result’ (Wolfrum).
- So, in our case: ‘the coordinated action of two or more states taking place under a legal regime with the objective of preventing and suppressing international terrorism’.



2. Forms of international cooperation

- How does international cooperation in criminal matters take place?
 - International criminal law has so far developed six modalities for international cooperation in penal matters. Agreements, in some form, exist covering extradition, legal assistance, transfer of criminal proceedings, recognition of foreign penal judgments, transfer of sentenced persons, and freezing and seizing of assets (Bassiouni).
 - extradition, mutual legal assistance, transfer of criminal proceedings, execution of foreign judgments, recognition of foreign criminal judgments, confiscation of the proceeds from crime, collection and exchange of information between intelligence and law enforcement services, regional and subregional legal forums, access to justice (UNODC).
- We will pay special attention here to: principles of jurisdiction and extradition.



2. Forms of international cooperation

2.1 Principles of jurisdiction: territoriality

- The State in whose territory territory - i.e., land, sea and airspace - the crime has occurred or in which it has been committed has criminal jurisdiction over it, regardless of the nationality of the suspect (Ambos).
- Two advantages:
 - Closer to the crime, best possibilities of investigation and prosecution.
 - Prevention of jurisdictional conflicts with other States.
- Not an absolute principle, as almost every State also has principles to extend their jurisdiction outside of their territory.



2. Forms of international cooperation

2.1 Principles of jurisdiction: territoriality

- What do we mean by place of commission of the crime? What happens when the act takes place in one State but the effects are reflected in another State?
- Test of the effects: the crime as a whole may be considered to have been committed in the place where only a part of it was actually committed (EU, Council of Europe).
- Necessary to distinguish this extraterritoriality in International Criminal Law from that of Human Rights instruments:
 - While in PIL and International Criminal Law extraterritoriality is used to establish criminal jurisdiction over an act.
 - In Human Rights (ECTHR) is 'intended to regulate relationships between the contracting parties and the category of persons to whom the state must provide the rights enumerated under the Convention' (Salinas de Frías).
- If confusion: a State could avoid responsibilities under human rights if it acts outside of its jurisdiction.



2. Forms of international cooperation

2.1 Principles of jurisdiction: nationality of the aggressor

- Commission of crimes by nationals abroad.
- Specifically contemplated in Article 12(2)(b) of the Rome Statute.
- Potential conflict between the active nationality principle and the territoriality principle.

2.1 Principles of jurisdiction: nationality of the victim

- Extension of criminal jurisdiction to crimes committed against your nationals abroad.
- Widely criticized because of potential abuses of jurisdiction (for instance, Helms Burton Law).
- As we will see, common in Anti-terrorist conventions because of the focus on western citizens abroad.



2. Forms of international cooperation

2.1 Principles of jurisdiction: protective principle

- It allows a State to extraterritorially prosecute conduct that harms its national security or other vital interests.
- It is included in the vast majority of the sectoral agreements of cooperation in the fight against terrorism under the formula of a State which, under the threat of an act of terrorism, is obligated to an act or omission.

2.1 Principles of jurisdiction: representation

- It serves to establish jurisdiction when a request of extradition has been refused: consequence of *aut dedere aut iudicare*.
- Not to be confused with universal jurisdiction: it serves to establish jurisdiction over a suspect who is in the territory of a State but whose extradition to a third State has been refused.



2. Forms of international cooperation

2.2 Extradition

- Mechanism to avoid impunity when there are transnational elements: ‘the surrender by one State to another of an individual, accused or convicted of a crime, so that in that country he may be criminally prosecuted or execution of the sentence, carried out in accordance with **pre-existing domestic or international pre-existing rules** of internal or international validity’ (Quintano Ripollés).
- Principle *aut dedere aut iudicare*: to extradite or to prosecute. Modern expression of the principle *aut dedere aut punire*:

‘But since for one State to admit within its Territories another foreign Power upon the Score of exacting Punishment is never practised, nor indeed convenient, it seems reasonable, that that State where the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demanded Person according to his Demerits, or else deliver him up to be treated at the Discretion of the injured Party. This is that delivering up so commonly to be met with in History’ (Grotius)



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SECTION II



1. First steps in bilateral conventions against terrorism

- Internationalization of terrorism in the beginning of the XX century, obstacle to cooperation because of the 'political exception' clause: it is extraordinary that a crime is a crime in a country, but not when it is committed in the neighboring country (Caloyanni, 1935; Sottile, 1938).
- Change of Belgian Extradition Law after the 1854 attempt against Napoleon III, to cover crimes against heads of State ('Belgian clause').
- Romania's extradition conventions with Portugal and Spain:
 - List of acts of terrorism excluded from the 'political exception' clause.
 - Obligation of *aut dedere aut iudicare*.



2. First steps in multilateral conventions against terrorism

- 1935: Assassination of Alexander I of Yugoslavia and Foreign Affairs Minister Barthou.
- Rejection of extradition from Italy to France, political exception clause.
- 1936: Creation of a Committee in the League of Nations for a universal convention against terrorism.
- 1937: two draft conventions
 - Convention for the Prevention and Punishment of Terrorism.
 - Convention for the Creation of an International Criminal Court.



2. First steps in multilateral conventions against terrorism

2.1 Convention for the Prevention and Punishment of Terrorism

- Obligation to cooperate against international terrorism.
- Definition of terrorism: 'crime directed against a State and whose objective or nature is to provoke terror in specific personalities, groups of persons or the general public'.
- Obligation to extradite or prosecute.



2. First steps in multilateral conventions against terrorism

2.2 Convention for the Creation of an International Criminal Court

- Criminal court with competence over the crimes included in the 1937 Convention for the Prevention and Punishment of Terrorism.
- Subsidiarity: only States with jurisdiction over the crime not willing to extradite or prosecute internally the case may defer the case to the Court.
- Applicable law: the law of the State deferring the case or the law of the State where the crime was committed (less severe one).



3. Obstacles against an international definition of terrorism

- Due to the failure of the League of Nations, the 1937 Conventions against terrorism never came into force.
- Only one definition (very criticized) by the Special Tribunal for Lebanon.
- Since 1996, negotiations in the UNGA for a Comprehensive Convention on International Terrorism.
- Main political obstacles:
 - Application to liberation movements
 - Application to State terrorism



4. The sectorial approach in the UN

- General Assembly, role art. 13 (1) UN Charter: ‘promoting international co-operation in the political field and encouraging the progressive development of international law and its codification’.
- Organizations in the UN family: International Civil Aviation Organization and International Maritime Organization.
- Due to obstacles to a comprehensive convention, sectorial approach: ‘unsystematic hodge-podge of treaties concerning specific modes of terrorism’.



4. The sectorial approach in the UN

- 19 universal legal instruments against terrorism.
- Topics:
 - Aviation security.
 - Maritime Security.
 - Internationally protected persons and hostages.
 - Terrorist bombings.
 - Weapons of mass destruction.
 - Financing of terrorism.



4. The sectorial approach in the UN

4.1 Criminalization

- Obligation of States to criminalize (actus reus):
 - Acts of aircraft hijacking
 - Acts of aviation sabotage
 - Acts of violence at airports
 - Acts against the safety of maritime navigation
 - Acts against the safety of fixed platforms located on the continental shelf
 - Crimes against internationally protected persons (such as the kidnapping of diplomats)
 - Acts of unlawful taking and possession of nuclear material
 - Acts of hostage-taking
 - Acts of terrorist bombings
 - Acts of funding of the commission of terrorist acts and terrorist organizations
 - The use of an aircraft as a weapon.



4. The sectorial approach in the UN

4.1 Criminalization

- In most of them, only basic subjective element (*mens rea*): ‘willfully or intentionally’ cause damages to properties or injuries/death to persons.
- However, no specific *mens rea* to distinguish terrorism from other crimes. Only one exception, article 2 of the Convention for the Suppression of the Financing of Terrorism:
 - (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
 - (b) 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.**



2. The sectorial approach in the UN

4.2 Principles of jurisdiction

- Compulsory principles: territoriality, active nationality and representation.
- Voluntary principles: protective principle and passive nationality.
- Lack of a system to resolve conflicts of jurisdiction.



2. The sectorial approach in the UN

4.3 Extradition

- Mechanism present in every instrument.
- The convention as such serve as a legal basis to activate extradition.
- Dominance of 'The Hague formula' in the principle *aut dedere aut iudicare*:

'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 offense of a serious nature under the law of that State'.



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SECTION III



1. Basic aspects

- Level of organization and intensity of Daesh violence in territories of Syria, Iraq and the Philippines: armed conflict (Koutroulis).
- Participation of foreign nationals in international armed conflicts abroad on the side of terrorist groups: foreign terrorist fighters (UNSC 2178).
- Security risks from foreign involvement: need for a response beyond the use of force, law enforcement (UNSC 2178).
- What are the criminal cooperation mechanisms for the investigation and prosecution of acts of terrorism in armed conflict?



2. International law in armed conflicts

- Paradigm different from peacetime: does not prohibit certain uses of violence.
- United Nations Office on Drugs and Crime: exclusive application of international humanitarian law (IHL), excluding international criminal cooperation treaties.
- “Law and order” paradigm vs. “law of armed conflict” paradigm (Shany).
- Criticism of resolution 2178 (Geneva Academy), obligation to criminalize “persons who travel to a State other than their State of residence or nationality for the purpose of committing, planning, preparing or participating in terrorist acts or providing or receiving training for the purpose of terrorism, **including in connection with armed conflict**”.



3. Prohibition of terrorism in IHL

- Art. 33 of the IV Geneva Convention.
- Art. 51.2 AP I: acts or threats of violence the primary purpose of which is to terrorize the civilian population.
- 4.2 of AP I: acts of terrorism against civilians are and shall be prohibited at any time and in any place.
- 13.2 of AP II: acts or threats of violence the primary purpose of which is to terrorize the civilian population are prohibited.



4. IHL and criminal cooperation

International armed conflicts

- Art. 49.1 I Geneva Convention: criminalization of acts.
- Art. 49.2 II Geneva Convention: obligation to extradite or prosecute.
- Art. 85 AP I: mutual legal assistance in criminal matters.
- BUT applicable only to grave breaches, which do not include terrorism.



4. IHL and criminal cooperation

Non-international armed conflicts

- Art. 3 common: respect for due process.
- Art. 2, 5 and 6 of AP II: rules for the protection of human rights of detainees.
- But no criminal cooperation mechanisms. Customary extension of IAC (International Committee of the Red Cross).



5. Interplay between IHL and cooperation treaties

Refusal 1: by express exclusion of IHL?

- Preparatory work Geneva Conventions: the Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted into the national penal laws.
- Art. 88 AP I: the provisions of the preceding paragraphs shall not affect the obligations arising from the provisions contained in any other treaty of a bilateral or multilateral nature governing or to be governed, in whole or in part, in the field of mutual legal assistance in criminal matters.



5. Interplay between IHL and cooperation treaties

Refusal 1: by express exclusion of IHL?

- International Court of Justice: possible joint application of IHL and other regimes such as international human rights law (Use of nuclear weapons and the Wall in Palestine cases).
- CJEU: it should be added that the existence of an armed conflict within the meaning of international humanitarian law **does not appear to exclude**, in the case of an act of terrorism committed in the context of that conflict, **the application**, over and above the provisions of that humanitarian law on breaches of the law of war, **of the provisions of international law specifically relating to terrorism** (T-208/11).



5. Interplay between IHL and cooperation treaties

Refusal 2: by exclusion in criminal cooperation treaties?

- Air and maritime security:
 - Tokyo (1963), Hague (1970), Montreal (1971) and Rome (1988) Conventions: no exclusion, although the target must be civilian.
 - Beijing and subsequent Conventions (2010): same case as bombings.
- Argument of the Dutch government for the investigation and prosecution of those allegedly responsible for the bombing of flight MH17: article 1 of the Montreal Convention.



5. Interplay between IHL and cooperation treaties

Refusal 2: by exclusion in criminal cooperation treaties?

- Convention against attacks with bombs and nuclear weapons (art. 19.2): excludes its application to armed forces and IAC. Possibility of application to acts of non-state groups in NIAC:

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



5. Interplay between IHL and cooperation treaties

Refusal 2: by exclusion in criminal cooperation treaties?

- Convention against the taking of hostages (art. 12). Despite its complexity, it follows that it can be applied when:
 - There are no obligations of cooperation under the Geneva Conventions: this is the case of terrorism.
 - The acts do not occur within the framework of the right to self-determination.



5. Interplay between IHL and cooperation treaties

Refusal 2: by exclusion in criminal cooperation treaties?

- Convention for the suppression of the financing of terrorism, art. 2(1)(b):

‘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’.
- Therefore, it allows its application against the financing of acts prohibited by IHL (attacks against the civilian population with the objective of spreading fear), although it does not apply to financing against military objectives.



Final remarks on IHL and counter-terrorism cooperation

- Difficulty in determining legal bases for criminal cooperation in armed conflicts.
- Inapplicability of most IHL criminal cooperation rules to acts of terrorism as such.
- IHL as *lex specialis*, but excluding only when the result is incompatible with other regimes.
- Joint application, with the above requirements, of the counter-terrorism Conventions. Advantages: avoidance of impunity, more detailed cooperation than in IHL and a wider range of acts susceptible to prosecution and trial.
- The UN Conventions can function as "its jurisdictional champions, supporting the prohibitions of IHL" (Trapp).



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Thank you very much for your attention