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The role of international criminal law in responding to the crime–terror nexus

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journals.sagepub.com/home/euc**Harmen van der Wilt**

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Abstract

This article seeks to map the possible bottlenecks for international legal cooperation in the context of terrorism and/or organized crime. The assumption is that – because of the crime–terror nexus – any obstacle encountered in that area with respect to the suppression of one form of criminality will backfire on the other form as well. After addressing the indefinite concept of terrorism, and its connection with organized crime, we will look at extraterritorial jurisdiction and international cooperation in criminal matters. In the final section, we will offer a number of concluding observations.

Keywords

Crime–terror nexus, extraterritorial jurisdiction, international cooperation in criminal matters, international criminal law

Introduction

Although the crime–terror nexus has recently received increasing attention, references to (alleged) connections between terrorism and (transnational) organized crime have been made before. In March 1982, Peruvian President Fernando Belaúnde Terry used the term ‘narco-terrorism’ to describe ‘the union of the vice of narcotics with the violence of terrorism’ (United Press International, 1982). The most well-known ‘narco-terrorist’ is

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probably Colombian national Pablo Escobar, not only the head of the powerful Medellín drug cartel, but also (or perhaps even especially so)¹ the mastermind behind a terrorism campaign that killed and injured hundreds of people.²

In 1994, the United Nations (UN) General Assembly (1994: Preamble) expressed its concern 'at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs' and, in 2001, the UN Security Council (2001: para. 4) made a more general reference to the nexus, when it noted 'with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials' and emphasized 'the need to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security'.

One of the earliest scholarly works on the nexus is by Alex Schmid (1996: 66), who noted that, even though there are similarities between terrorism and organized crime (for example when it comes to tactics), there are also clear differences, with terrorist groups usually being 'ideologically highly motivated' and with organized crime groups being more interested in having 'a bigger share of (illegal) markets'. For that same reason, he also found the term 'narco-terrorism' vague and problematic (Schmid, 2004: 11).³

Even though the nexus between terrorism and (transnational) organized crime has thus been made and discussed at least since the 1980s, especially in the last few years there has been an increased interest in the topic by scholars, practitioners and international/regional organizations alike. The conflicts in Syria and Iraq, including the so-called foreign (terrorist) fighters they have attracted from more than 100 countries around the world (see also UN Security Council Counter-Terrorism Committee, n.d.), have contributed to this. Four examples will be provided here.

First, in its Resolution 2195 of 2014, the UN Security Council (2014: Preamble), also referring to the phenomenon of foreign terrorist fighters, expressed its concern

that terrorists benefit from transnational organized crime in some regions, including from the trafficking of arms, persons, drugs, and artefacts and from the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil, as well as from kidnapping for ransom and other crimes including extortion and bank robbery.

Second, the International Centre for the Study of Radicalisation and Political Violence (ICSR) 2016 report *Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus* (Basra et al., 2016: 3), which looked at the profiles of 79 recent European jihadists with criminal pasts, concluded:

[W]ith Islamic State and the ongoing mobilisation of European jihadists, the phenomenon [that is, the presence of former criminals in terrorist groups] has become more pronounced, more visible, and more relevant to the ways in which jihadist groups operate. In many European countries, the majority of jihadist foreign fighters are former criminals.⁴

Third, in January 2017, the Dutch National Coordinator for Security and Counterterrorism Dick Schoof (Groenendijk and Rosman, 2017) stated that the connections

between jihadists and criminals are getting stronger, thus worrying Dutch intelligence and prosecution services, because it will be easier for terrorists to obtain weapons (see also Pieters, 2016).⁵

And fourth, during his speech to the plenary meeting of the Foreign Terrorist Fighters Working Group of the Global Counterterrorism Forum in May 2017, the Dutch Minister of Foreign Affairs Bert Koenders (2017: 6) noted that the nexus is ‘growing’, that this is ‘an alarming development’ and that it constitutes ‘an area we’ll need to focus on more in the coming period.’ He further said that:

The more we succeed in taking back territory from ISIS, cutting off its funds from the sale of oil and artefacts and preventing weapons from reaching them, the more they will seek cooperation with criminal networks. ISIS is now embracing the criminals they once despised, because they can deliver the weapons, money, drugs and personnel that ISIS needs. This is a toxic partnership that we need to detect early and stop in its tracks.

This article will look at the role of international criminal law in responding to the crime–terror nexus. This is not only because of our own expertise and background, but also because criminality, even though it is one consistent element of the crime–terror nexus, has not been paid sufficient attention so far. In the words of Tamara Makarenko (2004: 141):

Considering the various components of the crime–terror continuum, one consistent and relatively easily identifiable factor is criminality. Regardless of where a group sits along the continuum (apart for each extreme end), every point necessitates some degree of involvement with criminal activities. As a result, the continuum inherently implies that focusing on criminal activity, as opposed to political aims and motivations, in formulating policy responses to – especially to terrorism – has been under-utilised. Thus, for example, although it is important to understand the political motivations of terrorist groups, on a practical level counterterrorist policy and initiatives would likely meet with greater initial success in locating group weaknesses and vulnerabilities if they focused on criminal aspects.

The central research question this article seeks to examine is: ‘What are the possible bottlenecks for international legal cooperation in the context of terrorism and/or organized crime?’ The assumption is that – because of the crime–terror nexus – any obstacle encountered in that area with respect to the suppression of one form of criminality will backfire on the other form as well. This does not mean the following sections, or the case law presented, will always demonstrate such a clear connection *themselves*. However, given the overlap of the two forms of criminality, the challenges and opportunities this article will identify in the context of one form of criminality may also be relevant to the other form, and hence to the general crime–terror nexus discussion. The following sections touch upon a number of these issues, illustrating them by relevant case law. In the next section, the indefinite concept of terrorism, and its connection with organized crime, will be addressed. After that, we will look at extraterritorial jurisdiction and international cooperation in criminal matters. In the final section, we will offer a number of concluding observations.

The indefinite concept of terrorism

The question of what constitutes terrorism for criminal law purposes is highly contested. Notwithstanding all efforts, there is still no comprehensive convention on terrorism, only so-called sectoral conventions that address particular manifestations of political violence. This is not surprising. Criminal law has always treated political crime differently from ordinary crime. National power-holders tend to repress political violence more severely because it threatens their position or existence. Other states show more reticence, because they do not wish to be embroiled in internal power struggles. Basically, this reluctance can be attributed to value-pluralism, which is adequately expressed by the commonplace that 'one man's terrorist is another man's freedom fighter'. Consequently, there exists lingering semantic confusion around the concept of terrorism. Fletcher (2006: 894–911) even doubts whether it can be qualified as a crime at all. Obviously, this lack of conceptual precision affects criminal law enforcement with its strong emphasis on the legality principle (requiring the existence of an accessible and foreseeable criminal provision before the commission of the offence).

For example, in the 2011 *Chiquita Brands* case the District Court of the Southern District of Florida (2011: para. 51) questioned the existence of a well-defined, universally accepted norm of international law against terrorism,⁶ pointing to the contested provisions of the International Convention for the Suppression of the Financing of Terrorism.

Confusion about the proper limits of the concept of terrorism, especially in the case of blurring borders with legitimate acts under international humanitarian law, may also prompt the courts to question whether suspects are actually guilty of a criminal offence (Naples Appellate Court, 2014). For instance, counsel for the defence in the Dutch *Kesbir* case argued that her client had fought against adversaries as a combatant in an internal armed conflict, rather than having engaged in terrorism. The Supreme Court (Dutch Supreme Court, 2004) rejected the defence, holding that civilians had been intentionally targeted as well. In a recent judgment, the Dutch Supreme Court (2017) corroborated its findings in the *Kesbir* case by holding that internecine warfare is not only governed by international humanitarian law, but that it also does not exclude the application of common criminal law. In other situations, national courts (District Court for the District of New Jersey, 2010; Appeals Court for the District of Columbia, 1984) have confounded terrorism with other international crimes.

Whereas terrorism as a legal category is thus clearly difficult to pin down, the conceptual distinctions between terrorism and organized crime are likewise fuzzy. At the international level, contradictory statements abound. On the one hand, the UN General Assembly in its Resolution by which the UN Convention against Transnational Organized Crime (hereafter, the Palermo Convention) was adopted noted '*with deep concern* the growing links between transnational organized crime and terrorist crimes' (UN General Assembly, 2000: Preamble) and called upon all states 'to recognize the links between transnational organized criminal activities and acts of terrorism' (UN General Assembly, 2000: para. 6). In other words, the Assembly acknowledged the nexus between terrorism and organized crime. However, on the other hand the very definition of an organized

criminal group in the Palermo Convention seems to suggest that terrorism and organized crime are mutually exclusive. After all, Article 2 (a) of the Convention specifies an ‘organized criminal group’ as ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, *in order to obtain, directly or indirectly, a financial or material benefit* [emphasis added]’.

The definition would thus exclude terrorists who merely act out of non-profit – ideological or political – motives. This does not imply, of course, that terrorists and organized crime may not collaborate, but it suggests a rigid functional division, in which both are governed by different legal regimes. However, in a recent article, Ben Saul convincingly argues that the provision in the Palermo Convention covers terrorists who commit serious ‘ordinary’ crimes such as robbery, drug trafficking and kidnapping for ransom, in order to fund their operations. The aim refers to the commission of a ‘serious crime’, the proximate objective being the obtaining of a financial or material benefit. It does not require that the primary or predominant purpose is material gain. The ulterior motive may still be political (Saul, 2017: 3).

Most conventions on the suppression of terrorism are silent about the ultimate political motive and simply refer to the objective of intimidating the public or coercing public authorities to do something or to abstain from doing something.⁷ In these situations it is relevant to assess the further aim of, for instance, the kidnapper. If they intend to obtain a ransom, the hostage-taking will be covered by both the 1979 Convention against the Taking of Hostages and the Palermo Convention (provided that the other requirements of the latter convention are met), even if the perpetrator plans to spend the money on committing terrorist crimes. If the objective is exclusively political – such as, for instance, the resignation of the government – and the hostage-taker does not seek a ransom as a lever to achieve that goal, only the Hostage Convention will apply.

The latter example demonstrates that the concurrence of applicable treaties and criminal provisions in the case of a nexus between terrorism and organized crimes might not only create confusion but also yield opportunities. Even though terrorism investigations may bring in more resources and terrorism cases more exposure – owing to the high profile of the case – prosecutors will be inclined to opt for the easy road and charge terrorists who engage in organized crime with the latter offence, thereby relieving themselves of the burden of proving cumbersome elements.⁸

Extraterritorial jurisdiction

Although the indefinite content of terrorism may sometimes be conducive to acquittals or may cause confusion as to the proper delineation between terrorism and other (international) crimes, usually domestic courts will have the necessary legal tools to convict home-grown terrorists by resorting to ordinary criminal law. The special tag of ‘terrorism’ is crucial, however, in the case of law enforcement in respect of extraterritorial crimes, because it creates opportunities on the basis of the *aut dedere, aut judicare* principle.⁹ Whenever an alleged terrorist is found on their territory, states parties have the choice to either extradite (*aut dedere*) or prosecute (*aut judicare*) the suspect, but they are under an obligation to execute one of the two options.¹⁰

The relevance of a proper classification of offences as international or transnational crimes also plays a role in opening up jurisdictional possibilities. For example, universal jurisdiction, that is, 'criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction' (Princeton University Program in Law and Public Affairs, 2001: Principle 1, para. 1), may be contingent on the question of whether the conduct amounts to an international crime. The case of *Spain v. Alvaro* centred around whether Spanish courts had jurisdiction over the crime of smuggling migrants by sea when the vessels were boarded in international waters, on the basis of universal jurisdiction. The Spanish Supreme Court (2007: para. 4) confirmed that this would be the case.

Moreover, the consideration that certain crimes can be qualified as violations of *jus cogens* (literally, compelling law, that is, peremptory norms of general international law, namely certain fundamental, overriding principles of international law, from which no derogation is ever permitted) can be a determining factor in assessing whether a state can exercise extraterritorial (universal) jurisdiction. A US District Court (District Court for the Southern District of Texas Houston Division, 2009: para. 19) reached that conclusion in respect of human trafficking and forced labour, irrespective whether these crimes were committed by state agents or by private actors.

Such examples in case law exhibit an increasing tendency to establish and exercise extraterritorial jurisdiction in respect of both terrorism and transnational (organized) crime, which at least extends the scope of criminal law enforcement.

International cooperation in criminal matters

Owing to their volatile nature, adequate international cooperation enabling criminal law enforcement in respect of terrorism and organized crime is obviously indispensable. This cooperation encompasses a broad array of measures, including the physical transfer of suspects or convicted persons, the hearing of witnesses, investigation of telecommunications, the confiscation of assets and the execution of foreign judgments. In this article, we will focus on the challenges that are encountered in the realm of extradition and mutual legal assistance. These challenges may inform the crime–terror nexus as well.

Extradition

Political offence. One of the issues that have emerged in the case of the extradition of alleged terrorists is whether terrorist acts would qualify as 'political offences', which are traditionally exempt from extradition. States have made attempts to narrow the scope of 'political offence' and have succeeded in excluding war crimes, torture and genocide. Nonetheless, even in respect of those crimes, domestic courts (District Court for South Dakota, 2005) are often seized to answer the question of whether or not they would fall within the ambit of 'political offences'.

Every assessment of the political nature of an offence in the context of extradition is a delicate affair. Declarations by the requesting state that the fugitives belong to a terrorist organization, implying that they are outside the purview of 'legitimate' political

offences, are often counter-productive, as the very designation of the organization in pejorative terms is proof that the requesting state is 'at (political) odds' with that organization. That was at least the finding of an Australian court in the case of *Santhirarajah v. Attorney-General for the Commonwealth* (Federal Court of Australia, 2012: paras. 253–255), which involved the extradition of a member of the Tamil Tigers on the charge of – and here an interesting crime–terror nexus becomes visible – having been involved in a conspiracy to export weapons for use against government forces in the civil war in Sri Lanka.¹¹

In general, states have succeeded in plugging the terrorist loophole by concluding conventions on the suppression of terrorism that explicitly exclude the application of the political offence exception in the case of terrorist crimes.

Human rights. Nonetheless, such measures do by no means guarantee an easy surrender of terrorists. In view of the severe antagonism, after being extradited or deported terrorists face a greater risk of violations of due process, being tortured and being exposed to capital punishment. The topic has been well known since the landmark *Soering* decision of the European Court of Human Rights in 1989 and a detailed discussion exceeds the scope of this article.¹² However, it is important to acknowledge that domestic courts (Constitutional Court of South Africa, 2001: para. 49) have rightly showed apprehension about exposing suspects of terrorism to grave violations of their human rights. Yet diplomatic assurances that a fair trial meeting the requirements of Article 6 of the European Convention on Human Rights is guaranteed after extradition or that capital punishment will not be imposed often persuade the court of the requested state to grant the extradition (UK High Court, 2006: para. 61).

However, in the case of the risk of torture, domestic courts are for obvious reasons more reluctant. After all, torture is administered surreptitiously and states will not confess its occurrence. The impossibility of extraditing or deporting a fugitive suspected of having committed terrorist acts because of a torture risk may be conducive to prolonged or indefinite detention in the requested state. This inevitably raises the question of at what moment the person would qualify for judicial release (Federal Court of Australia, 2005: paras. 132–133).

Although courts are generally inclined, whenever assurances are not forthcoming, to refuse extradition or deportation, it is the absence of appropriate alternatives that creates a predicament. Should the fugitive be released forthwith and escape punishment if they cannot be surrendered? It could be argued that states should attempt to resolve these problems more actively by taking over the criminal proceedings (the *aut judicare* limb) – thereby possibly making use of the already discussed opportunity of prosecuting an alleged terrorist for organized crime offences – or the execution of a foreign judgment.

Double jeopardy/non bis in idem. The nexus between organized crime and terrorism might yield specific problems in the context of international cooperation in criminal matters. A concurrence between a common (organized) crime and a terrorist act could raise the question of whether separate prosecutions and trials for the distinct crimes in several legal systems would not be precluded under the double jeopardy rule (the *non bis in idem* principle). Would, for instance, a prosecution in State B of a person on charges of the

financing of terrorism be barred if that person had stood trial in State A on charges of having been involved in drug smuggling, while only at a later date had it transpired that they had committed the smuggling for a terrorist purpose? For several reasons, the double jeopardy rule does not furnish huge obstacles to international cooperation in criminal matters in such situations. First of all, the principle of *non bis in idem* has a limited scope and usually only applies within a legal system.¹³ International law does not require states to recognize the effects of a foreign judgment. Secondly, the principle serves to protect the rights of each person separately. One person would not be able to successfully invoke the *non bis in idem* principle if their partner in crime had stood trial on similar charges. Even if the functional division of tasks between organized crime and terrorists may sometimes be blurred (see the earlier argument by Ben Saul, 2017), this does not do away with the fact that, within a group, there may still be clear divisions of tasks, for instance between the bomb maker and the person robbing banks to ensure the bomb maker has funding. In the case of such clear divisions, this will obviously constitute an important limitation of the principle of *non bis in idem*. And, finally, the rule of double jeopardy is triggered only if a subsequent trial really concerns ‘the same act’ in material and legal terms. In the example just given, courts would be inclined to identify distinct legal interests and conclude that the second prosecution would not relate to the ‘same act’.

Case law confirms the limited influence of the double jeopardy rule on international cooperation in criminal matters. The case of *United States v. Rezaq* concerned the hijacking in 1985 of an Egyptian aircraft by the Palestinian Omar Mohammad Ali Rezaq, who had forced the pilot to land in Malta. During the incident, Rezaq had shot three Americans and two Israelis. One American citizen and one Israeli citizen had succumbed to their wounds. A Maltese court had convicted Rezaq of murder, attempted murder and hostage-taking, but he was released after having served only 7 years of his 25-year sentence. Nigerian authorities surrendered Rezaq to the USA where he stood trial and was found guilty by a jury of aircraft piracy in violation of the US Antihijacking Act, which implemented the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970. One of the central issues during appellate proceedings was whether Article 4, paragraph 2, of the Hague Convention, stipulating that a state either prosecute or extradite offenders, precluded subsequent prosecutions for the same conduct in separate legal systems. Counsel for the defence had suggested that the two options were mutually exclusive and reinforced protection against double jeopardy. The Court of Appeals (United States Court of Appeals for the District of Columbia Circuit, 1998: paras. 20–21) did not agree:

20. A reading under which the options of prosecution and extradition are mutually exclusive could also undermine the Convention’s goal of ensuring ‘punishment of offenders.’ For instance, if a person is extradited from state A to state B, and B then discovers that a technical obstacle prevents it from prosecuting her, B should be able to return her to A for prosecution; any other reading of the treaty might allow a suspect to escape prosecution altogether. Or, to choose an example closer to the facts of this case, if state A tries and convicts a defendant for certain crimes associated with a hijacking (as Malta tried Rezaq for murder, attempted murder, and hostage-taking), there is no indication that A is barred from then extraditing her to B once she has served her sentence, so that B may try the defendant for different crimes associated with the same hijacking (as the United States tried Rezaq for air piracy).

21. The travaux préparatoires for the Hague Convention reinforce our conclusion that the treaty does not incorporate a special bar on sequential prosecution. They show that the treaty's negotiators considered and rejected the possibility of expressly barring sequential prosecutions through a *ne bis in idem* provision (a term for double-jeopardy provisions in international instruments; another term is *non bis in idem*). The states opposed to this idea, whose views carried the day, argued that 'the principle was not applied in exactly the same manner in all States,' and that '[i]n taking a decision whether to prosecute, and, similarly, a decision whether to extradite, the State concerned will, in each case, apply its own rule on the subject of *ne bis in idem*.' ... This is, of course, exactly what the United States has done in applying its own double jeopardy rules [original footnote omitted].

The judgment illustrates the combined effect of a narrow interpretation of 'the same act' and the functioning of the double jeopardy rule at an international level. The *non bis in idem* principle is not likely to hamper considerably the prosecution of alliances between terrorism and organized crime.

Double criminality. The rule of double criminality postulates that a person can be extradited only if the act for which the extradition is sought constitutes a criminal offence in both the requesting state and the requested state. The former condition is obvious, because any deviation from the rule would constitute an infringement on the legality principle. The latter essentially conveys the idea that no state can be expected to cooperate in respect of the criminal enforcement of conduct that it does not consider as reprehensible or criminal itself and expresses the concept of sovereignty. The principle is generally incorporated in extradition treaties and can possibly be qualified as a rule of customary international law (see, for example, Swart, 1986: 135).

Kindred states have endeavored to mitigate the rule, the most conspicuous and spectacular result being the Framework Decision on the European Arrest Warrant, Article 2, paragraph 2 (Council of the European Union, 2002: 3) of which abolishes the verification of double criminality for no fewer than 33 offences.¹⁴ For the purpose of this article, it is relevant to point out that the following offences feature on this list: participation in a criminal organization, terrorism, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, laundering of the proceeds of crime, computer-related crime, environmental crime, murder/grievous bodily injury, illicit trade in human organs and tissue, hostage-taking, organized or armed robbery, illicit trafficking in cultural goods, illicit trafficking in nuclear or radioactive materials, unlawful seizure of aircraft/ships and sabotage.

The European Arrest Warrant applies only between member states of the European Union. Beyond that context, states are usually bound by the rule of double criminality, unless they allow extradition without a treaty and explicitly renounce the condition. Treaties on the suppression of terrorism or organized crime usually start with more or less precise definitions of the crimes and enjoin states parties to incorporate these definitions in their own legislation. Such harmonization of substantive criminal law also serves to facilitate international cooperation by ensuring that the double criminality condition is met.

Although it would obviously exceed the scope of this article to give a comprehensive account of the extent to which the requirement of double criminality affects international

cooperation in respect of terrorism and organized crime, it is enlightening to give an example that demonstrates a more flexible interpretation of the rule.

The Italian Supreme Court of Cassation (2014) considered in the case of *TGG* whether the extradition of a fugitive to Brazil on the basis of a bilateral extradition treaty would be allowed, despite the fact that the offence for which the extradition was sought did not exactly match with a corresponding offence in the requested state (that is, Italy). The requested person, the Brazilian national 'TGG', had been convicted on charges of criminal conspiracy and human organ trafficking and sentenced to 11 years and 9 months of imprisonment. However, he managed to escape and subsequently Brazil issued an international arrest warrant against him. He was arrested in Italy on 6 June 2013 and imprisoned. During extradition proceedings, the competent Court of Appeal established that the request of the Brazilian authorities complied with the conditions contained in the Bilateral Extradition Treaty between Italy and Brazil, finding that the dual criminality requirement was fulfilled. TGG appealed the decision granting his extradition to Brazil to the Supreme Court of Cassation, contending, amongst others, that the dual criminality requirement was not fulfilled for the crime of human organ trafficking because it was not provided for by the Italian legal system, and that he had already served the corresponding sentence in Brazil for the crime of conspiracy. The Supreme Court of Cassation agreed with the Court of Appeal that the double criminality condition had been met. It did not require a 'complete and exact overlap' between the offences in the two legal systems; it was sufficient that there was an 'equivalence of the repressive elements' between them. The Court added that, although the offence of 'human organ trafficking' was not provided for in the Italian legal system, its repressive elements could be identified in the crimes of 'aggravated personal injury' and 'human trafficking'. And even if the double criminality condition was not completely met, the extradition would be allowed on the count of conspiracy (Italian Supreme Court of Cassation, 2014: para. 2.4):

On the other hand, one cannot ignore that, in accordance with Art. 2, paragraph 3 of the Italy-Brazil Bilateral Extradition Treaty, 'Where the application for extradition concerns a number of distinct offences to which the conditions set out in paragraph 1 do not apply, if the extradition is granted for an offence to which the above-mentioned conditions do apply, it may also apply to the other offences. In addition, where the extradition is requested for the execution of sentences involving the deprivation of personal liberty imposed by different crimes, it shall be granted if the total time of the sentences left to serve exceeds nine months'. It follows that, even if the requirement of double jeopardy [read, double criminality] were not to apply to the crime of organ trafficking – and this cannot be the case based on the reasons set out above –, the conditions to allow the extradition still apply in relation to the crime of conspiracy, to which the above-mentioned condition definitely applies.

The case displays a flexible approach towards the double criminality rule, conceding a dual relaxation of the principle. First, the criminal provisions in the two states covering the conduct (the *nomen juris*) need not be exactly the same. Secondly, if extradition can be obtained for one act that meets the requirement of double criminality, prosecution after extradition for another act that did not entirely fit the criminal legislation of the requested state would still be permissible.

Mutual legal assistance

International cooperation in criminal matters is not confined to the physical rendition of suspects of criminal offences. It also comprises a myriad of criminal enforcement measures that are usually classified under the tag of ‘mutual legal assistance’. The main objective of these arrangements is the obtaining of criminal evidence that resides in another state. Conventions on the suppression of terrorism habitually contain provisions enjoining states parties to afford one another the greatest measure of assistance in connection with investigations or criminal proceedings, including assistance in obtaining evidence at their disposal necessary for such proceedings.¹⁵ Article 18 of the Palermo Convention (the provision addressing mutual legal assistance) is remarkably detailed, counting no fewer than 30 paragraphs. Paragraph 3 identifies – non-exhaustively – a number of criminal law measures that may be afforded, reflecting the relevance of obtaining evidence: taking evidence or statements from persons, executing searches and seizures and freezing, examining objects and sites, providing information, evidentiary items and expert evaluations, identifying or tracing proceeds of crime, etc.

It appears from this enumeration that the requested state is not only expected to transfer available and existing evidence and information but might be prompted to actively apply enforcement measures. The state thus deploys its criminal law system at the service and to the benefit of law enforcement in another state, which may cause exasperation and reluctance amongst hard-pressed police officials and prosecutors who may be loath to give priority to ‘foreign’ requests. Moreover, it may not always be clear which legal regime governs the execution of the request. Traditionally, requests are considered to be executed in accordance with the domestic law of the requested state, although any procedures specified in the request should be taken into account as long as they are not contrary to the domestic law of the requested state (see, for example, UN General Assembly, 2000: Article 18, para. 17). A stronger preference for the application of the law of the forum state emanates from Article 4, paragraph 1 of the EU Convention in Criminal Matters of 2000, which stipulates that ‘the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State’.¹⁶ In view of the fact that the evidence must be ‘injected’ into the criminal procedure of the requesting state, such arrangements make sense, but they presuppose considerable knowledge of foreign law on the part of the responsible police officials and prosecutors.

Still growing in importance is the identification, tracing, freezing and confiscation of the proceeds of crime as a mode of mutual legal assistance, especially in the context of the suppression of money-laundering and the financing of terrorism. These modalities were introduced in the 1960s and 1970s and were initially hampered by states that were anxious to guard bank secrecy and protect innocent parties.¹⁷ The urgency to confront the challenges of organized crime and terrorism has prompted the erstwhile adamant states to give in.¹⁸

In contrast to extradition, which requires a special procedure, practical executions of requests for assistance in criminal matters remain largely undetected in case law. A

conspicuous and important exception to the rule constitutes the situations in which the use of evidence obtained abroad seriously affects the due process rights of the suspect. One of the most controversial cases concerned the designation of suspected terrorists to prolonged detention without a trial on the basis of the Anti-terrorism, Crime and Security Act (2001) in the UK. Eight of the 10 suspected terrorists who opted to remain in Britain sought to challenge their designation, claiming that it was sustained by evidence that was obtained by torture abroad. Initially, the Special Immigration Appeals Commission and the Court of Appeal had accepted the admissibility of the evidence, because the UK had not been involved in, nor was it otherwise to blame for, the torture. However, the House of Lords (2005) unanimously overturned the decision (for a seminal discussion, see Thienel, 2006: 349–67). The Lords assessed the scope of Article 15 of the Convention against Torture, which stipulates that '[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made', and investigated whether the provision was 'self-executing'. Next, they unanimously found that it would be unfair to put the burden of proof on the person against whom the evidence is used, because they have very few means of investigation (as succinctly put by Thienel, 2006: 354). And they concluded that a British court would be obliged to exclude evidence obtained by torture, whether or not the UK would be complicit in the act itself or not. Lord Bingham of Cornhill (House of Lords, 2005: paras. 51–52) invoked both common law and the European Convention on Human Rights to support that outcome:

51. ... The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

52. I accept the broad thrust of the appellants' argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention. The answer to the central question posed at the outset of this opinion is to be found not in a governmental policy, which may change, but in law.

The outcome in this case, which also corroborates the findings in the section on extradition, demonstrates that (some) courts are not prepared to sacrifice human rights and due process for the sake of greater efficiency in criminal law enforcement. Such pronouncements will undoubtedly be heard in the developing crime–terror context as well, whose complexity may likewise lead to calls to focus on efficiency.

Concluding observations

This article has looked at the role of international criminal law in responding to the crime–terror nexus, because criminality, even though it is one consistent element of the crime–terror

nexus, has not had sufficient attention paid to it so far. We have sought to map possible challenges to and opportunities for international legal cooperation in the context of terrorism and/or organized crime. As the reader has observed, and as also announced at the beginning of this article, not all sections, or the case law presented, have demonstrated a clear crime–terror nexus *themselves*. However, given the overlap of the two forms of criminality, the challenges and opportunities this article has identified in the context of one form of criminality may also be relevant to the other form, and hence to the general crime–terror nexus discussion.

One of these challenges had to do with definitional matters. This can be to some extent overcome by ratifying and implementing the Palermo Convention and its Protocols, as well as the different Terrorism Conventions, which will likely streamline the substantive law on these crimes. This will facilitate the prosecution of terrorism and organized crime but is especially relevant for the purpose of international cooperation in view of the double criminality rule.

In the event of terrorists engaging in organized crime or criminal organizations applying terrorist tactics, prosecutors often have a choice between charging terrorist offences and common criminal offences. They would be well advised to try the second option, because it enables them to evade the onerous proof of difficult elements, such as terrorist motive (and circumvents the awkward question of what terrorism actually is).

The brief analysis of case law in the previous sections has revealed that time-honoured principles of international cooperation in criminal matters and extradition – such as the political offence doctrine, the rule of double jeopardy and the principle of dual criminality – may not be the prime obstacles to law enforcement. Arguably the greatest hurdle is that states are reluctant to extradite a person to a state that is likely to deny them due process or to violate their fundamental human rights. Moreover, states are not prepared to rely on tainted evidence that has been obtained by means of torture – and rightly so. Although courts should obviously not deflect from this honorable course, states are encouraged to ponder on appropriate alternatives, such as taking over criminal proceedings or the execution of foreign judgments whenever extradition is out of the question. Arguably, these considerations are relevant, not only for the specific forms of criminality in whose context they have been discussed, but also for the crime–terror nexus in general.

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Notes

1. According to Mark Eiler, an intelligence analyst with the Drug Enforcement Administration and an expert on Colombia (Chepesiuk, 2006), '[t]he Colombian government hunted down and killed Pablo Escobar because he was a terrorist, not a drug trafficker'.
2. For example, in December 1994, an alleged assassin of the Medellín drug cartel was convicted of blowing up a Colombian airliner in 1989, killing 107 people. *The New York Times* (McFadden, 1994) called this 'one of the worst acts of drug-trade terrorism'.

3. 'The vague narco-terrorism formula with its implicit call to fuse the "war on drugs" and the "war on terror" might offer a misleading intellectual roadmap to address the problem of terrorism' (Schmid, 2004: 11).
4. See, for example, also Ban (2016: para. 22): 'Many [foreign terrorist fighters] were previously involved in criminality and already have links to criminal organizations that can help provide access to weapons and explosives.'
5. In this interview, Dick Schoof mentioned the example of the arrest of French foreign fighter Anis B. in Rotterdam on 27 March 2016. During the raid, 45 kilograms of ammunition were discovered in Anis's home. Allegedly, the suspect had bought the munitions from Antillean criminals. Schoof remarked that he could not remember such a big weapons find ever having been made in relation to terrorism – 'a disturbing development'.
6. But note that the Special Tribunal for Lebanon (2011: para. 85) has concluded that a definition of terrorism under customary international law has emerged, at least in times of peace. Terrorism can be identified by the following three key elements: '(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element'. However, it should be mentioned that this finding has been widely criticized.
7. An example is Article 1 of the International Convention against the Taking of Hostages, New York, 17 December 1979, which defines a hostage-taker as '[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person ... in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage'.
8. See also Saul (2017: 3): 'From the standpoint of law enforcement, in many cases it may be easier to prosecute such conduct as organized crime than as terrorism, where doing so avoids the need to prove the additional definitional elements of terrorism offences (such as special intent to intimidate a population or coerce a government, and/or a political, religious or ideological motive).'
9. Note that it has been submitted (Paulussen, 2012: 14) that the obligation to extradite or prosecute probably does not apply to terrorism 'across the board', but only 'to those specific terrorism-related offences as can be found in the sectoral terrorism treaties that contain this obligation [original footnote omitted].'
10. See, for example, International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, Article 8, para. 1: 'The State Party in the territory of which the alleged offender is present shall ..., if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.' In a similar vein, the US Aliens Torts Claims Act arrogates universal – civil – jurisdiction for violations of the law of nations, begging the question of whether terrorism would be included in that category.
11. '253. No doubt the struggle in Sri Lanka was a political confrontation. The contending parties were seeking the power to govern Tamils in Sri Lanka. 254. The designation of the LTTE [Liberation Tigers of Tamil Eelam] by the US Secretary of State was directed to that struggle. It made some dealings in support of one side of the political struggle illegal. When the US criminalised dealing with the LTTE it took a political stand. 255. When the applicant took

- the actions alleged against him it should be inferred from the circumstances that he did so in support of the political struggle of the LTTE. That is to say, he was at odds with the US over the political issue of support for the LTTE against the government of Sri Lanka in the civil war. These circumstances fall within the ordinary understanding of the expression “political offence” (*Santhirarajah v. Attorney-General for the Commonwealth*, Federal Court of Australia, 2012).
12. In the *Soering* case, the European Court of Human Rights (1989) held the UK accountable for a breach of Article 3 of the European Convention on Human Rights, because that state had, by extraditing the fugitive to the USA, exposed him to a real risk of being subjected to inhuman or degrading treatment or punishment. The USA did not wish to guarantee that the death penalty would not be imposed and Soering was held on death row, pending proceedings that served to avert the execution.
 13. Article 14, para. 7, of the International Covenant on Civil and Political Rights provides that ‘[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’. The Human Rights Committee (1987) has decided that the provision applies only within national legal systems.
 14. The only prerequisite is that the offence is punishable in the issuing (read, requesting) member state by a custodial sentence or a detention order for a maximum period of at least 3 years.
 15. See, for example, Article 10 of the International Convention for the Suppression of Terrorist Bombings.
 16. Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000), Brussels, 29 May 2000, OJ C 197, 12 July 2000, p. 5.
 17. For an early and very vivid account of the tortuous negotiations on the bilateral mutual legal assistance treaty between the USA and Switzerland, see Nadelmann (1993: 324–341).
 18. It is noteworthy that Article 18, para. 8, of the Palermo Convention stipulates that ‘States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy’.

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