TAKING TERRORISM TREATIES TO THE NEXT LEVEL?:

Rethinking How Terrorism Treaties Place Duties on Non-State Actors

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Deadline for submission: …..December 1, 2011:

Number of words: 14,804 (max. 18.000)

22.05.2012
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1 Introduction

For most of its history, international law has been concerned with the actions of states. Thus, the rights and duties it detailed were the rights of and duties placed upon states. In the aftermath of the atrocities of World War II, international law shifted toward granting more extensive rights to non-state actors while placing limited duties upon them as well. These new rights blossomed into modern human rights law, with its core treaties and widespread theoretical support. On the other hand, these new duties were mainly confined to international criminal law. For example, the Universal Declaration of Human Rights detailed many rights but crammed only a few vague duties into the end of the document. Until the latter part of the 20th Century, this new situation continued. Non-state actors—mostly individuals—held rights against states, but had very few duties in return.

With the rise of globalization and the end of the Cold War, interest increased in defining more duties for non-state actors. In contrast to rights, however, these proposed duties were to be placed mostly on non-individuals including, inter alia, corporations, non-governmental organizations, and intergovernmental organizations. After the attacks of September 11, 2001, the fight against terrorism has brought a new perspective to the potential duties to be placed on non-state actors. While much has been written about the dynamic legal framework related to terrorism, very little has focused on the theoretical foundations for, and practical implications of, how international law places terrorism-related duties on non-state actors.

I aim to place the modern international regulations relating to terrorism in a theoretical framework of how international law places duties on non-state actors. This framework is built upon the pyramid of duties established in a lead article in the American Journal of International Law by John H. Knox,1 hereafter referred to as the “Knox Pyramid.” In the rest of Part 1, I will clarify the scope of the laws I will analyze and the method I will use. In Part 2, I will briefly present the Knox Pyramid of duties. In Part 3, I will analyze the state of the current law and how it fits within this pyramid. In Part 4, I will offer suggestions on where the law should fit within the pyramid. Finally, in Part 5, I will suggest some conclusions.

1 See generally Knox
In order to appreciate how the laws on terrorism place duties on non-state actors, it’s important to understand exactly which non-state actors are being discussed. At its heart, this is an idea that is both clear and unclear. It's clear because “non-state” is a negative definition that it refers to any type of actor other than a state.\(^2\) In common usage, however, it can mean a variety of things in different contexts. Additionally, the phrase is often used by authors only in the context of their article without realization of the wide-ranging ramifications of the phrase. In many pieces, it is used almost exclusively for multinational corporations, but individuals, international organizations, and guerilla groups come under its scope as well.\(^3\)

In this paper, I will focus on non-state actors as individuals and, in particular, how the thirteen modern, multilateral terrorism treaties (“the treaties” or “the terrorism treaties”) place duties on individuals.\(^4\) These widely ratified treaties were chosen because

\(^2\) See, for example, Alston, *The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? in Non-state Actors and Human Rights*

\(^3\) See, for example, Kaleck, Wolfgang and Saage-Maaß, p. 719-720

\(^4\) The treaties in force are:


I chose not to include the draft *Comprehensive Convention Against International Terrorism* because of its unfinished nature. If it is ever completed, however, it would be included in a list of this type. Additionally, I did not include treaties not yet in force, such as the *Convention on the Suppression of Unlawful Acts Relating to Civil Aviation*, done at Beijing on 10 September 2010, updating the Montreal Convention.
they represent the core of the international response to terrorism and are classified as “the United Nations Conventions on Terrorism” by the United Nations itself. While there are a few United Nations Security Council resolutions related to terrorism, several regional conventions against terrorism, and a plethora of domestic laws against terrorism, this paper’s scope covers only these core multilateral treaties. Additionally, I will only be examining the treaties themselves, not customary international law related to terrorism, regardless of whether or not it derived from the treaties. As a result of this focus on the treaties, this paper also will not cover state-sponsored terrorism or domestic terrorism, as the scope of the treaties does not include these two types of terrorism.

Finally, I want to emphasize that, while the word “duties” carries a variety of meanings, for the purposes of this paper, the focus is only on legal duties. The types of potential duties related to terrorism—philosophical, ethical, moral, etc.—pose intriguing questions, but are outside the scope of this paper.

The primary methodology I will be employing is a textual based analysis of the terrorism treaties, using the Vienna Convention on the Law of Treaties and customary international law related to treaty interpretation. As mentioned, I will be applying the framework of the Knox Pyramid in analyzing the treaties. Additionally, I have consulted legal articles related to the treaties, both contemporaneous to the treaties and more recent analysis, in order to aid treaty interpretation and I have also utilized legal articles related to international duties and non-state actors in general. Finally, I have also cited a few cases and non-treaty based primary sources.

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6 See Vienna Convention on the Law of Treaties
2 The Knox Pyramid

2.1 Background

John H. Knox developed his pyramid of duties in response to arguments in favor of expanding the duties of non-state actors under international human rights law. In his view, any proposed expansion is a potentially dangerous and radical departure from the tenets upon which human rights law developed, as these duties could be used to limit human rights.\(^7\)

Knox argues that the existing international human rights law incorporates the delicate balance achieved by the negotiators of the Universal Declaration of Human Rights between rights and duties. These negotiators, after considerable debate, refused to list any duties that individuals owe to society\(^8\) (but did acknowledge that such competing interests exist) and instead focused on limiting how the state can use these duties to curb rights. The negotiators agreed upon this approach because they “saw the danger that governments might otherwise rely on those duties to limit human rights in unpredictable, unacceptable ways.”\(^9\) By refusing to list duties to limit rights, they indicated that rights were more than mere interests while, at the same time, they acknowledged that duties to society and to others do exist. This approach, however, left open the question of which societal interests outweigh rights.

The framework created by the negotiators of the Universal Declaration leaves an implicit distinction between those private duties owed to society and those owed to individual right holders. As presented by Knox, these are the two main types of private duties: *converse* and *correlative*. Converse duties are:

- duties owed by the individual to the society or state, such as a duty to obey the laws of the state. Although these duties may appear to be horizontal, in the sense that they are owed to others in the duty holder's society, in practice they are vertical, enforced by the government acting on behalf of

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\(^7\) Knox, p. 2

\(^8\) “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Universal Declaration of Human Rights, Article 29(2).

\(^9\) Knox, p. 9
the society. They run conversely to the vertical duties of the government to promote and protect the individual's human rights.\textsuperscript{10}

In contrast, correlative duties, private duties to respect the human rights of others, are truly horizontal “in the sense that they run between actors on the same legal plane.”\textsuperscript{11}

This division of private duties into two groups is necessary because of the practical impact of the type of duty. Converse duties are dangerous because they provide governments with a ready-made counter argument for violations of human rights. After all, if an individual owes duties to the state and the individual has not fulfilled his or her duties, then the state can argue that it is relieved from fulfilling its duties to protect the individual’s converse right. Correlative duties, in contrast, “appear to further, rather than undermine, the enjoyment of human rights,” because they protect the human rights of another individual.\textsuperscript{12} As a result, international human rights law rarely lists converse duties but is much more willing to list correlative duties.\textsuperscript{13}

The Knox pyramid focuses on these correlative duties, attempting to illustrate how the manner in which the duty is placed is significant. Knox’s theory looks at each duty as the flip side of a corresponding right. While the rights are traditionally categorized under one coherent body of law (\textit{i.e.}, human rights law), the duties are often scattered among human rights law, humanitarian law, and criminal law. Regardless of which legal area the duty resides in, however, the right it correlates to is a human right. For example, the duty not to commit genocide relates to the right to life.\textsuperscript{14}

Similarly, the duties in the terrorism treaties, although rarely recognized as such, all relate to human rights. Most notably, these duties also correlate, at minimum, to the right to life. Thus, although it may appear odd at first glance to use a human rights based framework when analyzing terrorism treaties, the nature of these private duties ensures their direct link to human rights law.

2.2 Structure of the Knox Pyramid

The Knox pyramid recognizes that international law addresses these duties placed upon non-state actors in four ways:

\textsuperscript{10} Knox, p. 1-2
\textsuperscript{11} Knox, p. 2
\textsuperscript{12} Knox, p. 2
\textsuperscript{13} The African Charter on Human and Peoples’ Rights is a notable exception to the general rule as it includes numerous converse duties in its text. The African Commission on Human and Peoples’ Rights, however, has interpreted the import of these duties to be so minimal as to delete them from the Charter.
\textsuperscript{14} International Covenant on Civil and Political Rights, Art 6(1)
At its lowest level of involvement, human rights law *contemplates* that states have general duties to restrict private actions that interfere with the enjoyment of human rights, but leaves to governments the task of specifying the resulting private duties. At the next level, human rights law itself *specifies* the private duties that governments are obligated to impose. At both of these levels, international law imposes private duties indirectly, as a secondary effect of the duties it places directly on states. At a higher level of involvement, human rights law directly *places* duties on private actors but continues to leave enforcement of those duties to domestic law. Finally, at the highest level of involvement, human rights law *enforces* private duties at the international level, through international tribunals or other institutions.\(^{15}\) (emphasis in original).

These levels form a pyramid as international law “contemplates more correlative duties than it specifies” and “specifies many more duties than it directly places and enforces.”\(^{16}\)

At the lowest level of the pyramid (level one), human rights law only *contemplates* the duties that non-state actors face; all specification and enforcement is left to states. The actual obligation placed upon states at this level is also quite low, “merely that governments use due diligence to ensure that human rights are protected from private interference.”\(^{17}\) This is counterbalanced somewhat by its breadth because the due diligence obligation encompasses every right capable of being violated by non-state actors. The most important example of this obligation, as Knox notes, is Article 2 of the International Covenant on Civil and Political Rights (CCPR), which states, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”\(^{18}\) This obligation for state parties to ensure to all individuals the rights in the CCPR does not specify in any greater detail what governments must do to meet this standard, but rather leaves specification and enforcement to states. This is the baseline position of human rights law.\(^{19}\)

At the next level of the pyramid (level two), human rights law *specifies* the duties that non-state actors face through either international agreements or interpretations by

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\(^{15}\) Knox, p. 18  
\(^{16}\) Knox, p. 18  
\(^{17}\) Knox, p. 21  
\(^{18}\) *International Covenant on Civil and Political Rights*, Art 2(1)  
\(^{19}\) For a more detailed analysis assessing bystander responsibility under international human rights law, see Hakimi’s *State Bystander Responsibility*. Hakimi focuses on state responsibility rather than individual responsibility, but many issues overlap with the structure presented by Knox as both attempt to assess how international human rights law can and should interact with non-state actors.
international institutions.\textsuperscript{20} The obligation placed upon states at this level is a bit more onerous as they are no longer granted the freedom of level one. While there is often still some room for creativity in implementation, the level of specificity here is much greater. For example, Article 13 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires state parties to “take all appropriate measures to eliminate discrimination against women in other areas of economic and social life,” including, \textit{inter alia}, equal rights “to bank loans, mortgages and other forms of financial credit.”\textsuperscript{21} Although this provision is rather specific—and thus high level two—it leaves the remainder of the specification and all of the enforcement to states.

At the next level of the pyramid (level three), human rights law \textit{places} duties directly on non-state actors. The key distinction is that, at this level, private actors are bound as a matter of international law as opposed to being bound through the operation of domestic laws. Almost all of the duties at this level are found in international criminal law.\textsuperscript{22} The clearest example is the \textit{Convention on the Prevention and Punishment of the Crime of Genocide} (Genocide Convention) whose Article 1 states, “The Contracting Parties confirm that genocide […] is a crime under international law which they undertake to prevent and to punish.”\textsuperscript{23} At this level, the duty is specified and placed by international law, with only enforcement left to the states.\textsuperscript{24}

At the top level of the pyramid (level four), human rights law \textit{enforces} duties directly against non-state actors. Knox notes, “Since the creation of the International Criminal Court, most of the duties directly placed on private actors may be enforced, under certain circumstances, at the international level.”\textsuperscript{25} These types of duties may also be enforced by international tribunals, but it is important not to overstate the likelihood that level three duties will migrate to level four. Although most of these duties can be enforced at the international level, most often they are not. For instance, the \textit{Rome Statute of the International Criminal Court} (Rome Statute) requires that a state be unwilling or unable to

\begin{footnotesize}
\begin{enumerate}
  \item In spite of the fact that most of these interpretations are non-binding, Knox defends their inclusion, noting that these “non-legally binding views can have persuasive effect, setting out interpretive positions around which state practice may coalesce.” Knox, p. 25
  \item Convention on the Elimination of All Forms of Discrimination Against Women, Art 13(b)
  \item Knox, p. 28
  \item Convention on the Prevention and Punishment of the Crime of Genocide, Art 1
  \item Of course, under a dualist system, states must still implement the international law within their domestic legal systems. Private actors within a given state, however, are bound once the state becomes a party to the treaty.
  \item Knox, p. 30
\end{enumerate}
\end{footnotesize}
prosecute an individual before a case is admissible before it. In general, there is a strong reluctance to enforce private duties directly under international law. Thus, the vast majority of correlative duties under human rights law remain in the bottom half of the Knox pyramid.

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26 Rome Statute of the International Criminal Court, Art 17(1)
3 Analysis of how the United Nations Conventions on Terrorism fit within the Knox Pyramid

3.1 An analysis of the structure of the treaties

The thirteen widely ratified conventions related to terrorism are broadly similar in structure, in spite of both the lengthy period over which they were drafted and the variety of actions they cover. The earliest convention is from 1963, while the latest is from 2005. The scope of the conventions includes several aviation and maritime related acts, hostage taking and threats against diplomats, bombings and nuclear terrorism, and the financing of terrorism. The conventions emerged through the international community identifying specific terrorist threats and responding with specific treaties to combat those threats. For example, in light of the increasing amount of aircraft hijackings in the late 1960s, the Hague Convention for the unlawful seizure of aircraft was completed in 1970.

Notwithstanding the variety of actions covered and decades over which the treaties were written, aside from features found in almost all treaties (rules on entry into force, duration of time for signature and ratification, depository information, etc.), these multilateral terrorism treaties are remarkably similar. The treaties share five primary features. First, they recognize a particular terrorist offence or set of offenses. Second, they require state parties to criminalize these offenses under domestic law. Third, they require state parties to establish jurisdiction over these offenses. Fourth, they require state parties to extradite or prosecute offenders. Fifth, they require state parties to cooperate with one another in respect to actions covered by the treaty. Overall, the treaties are highly similar in structure and language. Because of these similarities, I will analyze one representative treaty comprehensively while using illustrative examples from each of the other treaties.

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27 Convention on Offences and Certain Other Acts Committed On Board Aircraft
28 International Convention for the Suppression of Acts of Nuclear Terrorism
29 Worldwide aircraft hijackings increased from six in 1967 to 91 in 1969. Fiorita p. 285. Additionally, the Hague Convention’s preamble notes that there is “an urgent need to provide appropriate measures for punishment of offenders.”
30 The categorization for this section expands on the work of John P. Grant in Beyond the Montreal Convention, p. 456-59.
The Plastic Explosives Convention, however, is an exception. Unlike the other twelve treaties, its language is directed at states rather than individuals. Additionally, the five commonalities from the other treaties are absent or not clearly delineated in the convention. As a result, for reasons of scope and analytical clarity, I will not include this treaty in my structural analysis.

The Hostages Convention, in the context of the conventions on terrorism, is one of the most straightforward of the treaties, yet still illustrates the five areas of commonality. Chronologically, the treaty is the fifth to be signed, having been completed in 1979. By the time of its signature, the language used to describe each of these commonalities had become more standardized with merely the text surrounding the core commonalities changing from treaty to treaty.

After the success of the piecemeal approaches to combating international terrorism as evidenced by the first four treaties, the international community—and, in particular, some Western powers—searched for other discrete areas in which a multilateral treaty might be feasible. In light of the Munich Massacre during the 1972 Summer Olympics, West Germany pressed for such a treaty against the taking of hostages. As the drafting process closed and the convention was presented for a vote by the General Assembly of the United Nations, in view of many states, the still unfolding Iran-United States hostage crisis further amplified the need for a convention detailing the illegality of hostage taking.

This historical background manifests itself in the treaty’s preamble, which has much stronger language than most of the other treaties, stating that the state parties are “convinced that it is urgently necessary to develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking hostages as manifestations of terrorism” (emphasis added). Unlike most of the other terrorism treaties, the preamble here explicitly mentions the human rights that correlate to the duties that the convention imposes. “[E]veryone has

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31 For a comprehensive analysis of this treaty with a focus on its drafting history, see Tswanya’s *Analysis of the Convention on the Marking of Plastic Explosives for the Purpose of Detection*.
32 For example, Art. III(1) states, “Each State Party shall take the necessary and effective measures to prohibit and prevent the movement into and out of its territory of unmarked explosives.”
34 Rosenstock, p. 173
35 See Rosenstock, p. 170, citing the statements of Liberia, Egypt, Australia, the Netherlands, Yugoslavia, Singapore, and Nigeria.
36 Hostages Convention, preamble.
the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”

3.1.1 Offenses covered

The first area of commonality among the treaties is that they each specify which terrorist offenses are covered by the treaty. Like any definition of a crime, they contain both an act and a mental element, although the mental element is often not explicitly specified in international crimes. The Hostages Convention begins with the physical act. “Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the ‘hostage’)” fulfills the conditions of the physical element. The mental element is slightly more complex. The act must be “in order to compel a third party… to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.” In addition, attempting to commit an act of hostage-taking and working as an accomplice to an act of hostage-taking are also criminalized.

In contrast, the second convention to be signed, the Hague Convention, focuses on the physical act in its description of the crime, criminalizing any person on an aircraft in flight who unlawfully “seizes, or exercises control of” that aircraft. Like the Hostages Convention, the Hague Convention also criminalizes attempting the crime. The mental element is absent though. Any reasonable reading of the text, however, must infer that the mental state required is intent.

The seventh convention, the Montreal Protocol, alters the original Montreal Convention (the third treaty) by adding airports into the scope of unlawful acts against the safety of civil aviation. The added offenses track, almost word for word, the original offenses of the Montreal Convention with “airport” substituted for “aircraft.” The offenses prohibited by the Montreal Protocol (and the convention) are more detailed than the two older treaties. The physical act in the protocol adds that any person commits an offense if he “performs an act of violence against a person at an airport which causes or is likely to cause serious injury or death” or “destroys or seriously damages the facilities of an airport…or aircraft…or disrupts the services of the airport,” so long as those acts endanger

37 Hostages Convention, preamble.
38 Cassese, International Criminal Law, p. 56
39 Hostages Convention, Art 1.1
40 Hostages Convention, Art 1.1
41 Hostages Convention, Art 1.2
42 Hague Convention, Art 1(a)
or are likely to endanger the safety at the airport.\textsuperscript{43} In addition, although the Montreal Convention was written only a year later than the Hague Convention, it explicitly includes the mental element by requiring the conduct to be done “intentionally.”\textsuperscript{44}

The twelfth treaty, the Terrorist Financing Convention of 1999, provides a good example of the increasing specificity among the treaties as the decades passed. The physical act covered by the convention is more complex than those found in the earlier treaties and the mental element is more detailed. An individual satisfies the physical element under the convention if he or she “by any means, directly or indirectly…provides or collects funds” that are used to carry out either (a) an offense covered by the previous terrorism treaties 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.\textsuperscript{45}

In contrast to the Montreal Protocol’s use of “intentionally” as the mental element, the Terrorist Financing Convention states that the act of providing or collecting the funds must be performed “willfully” and with either “the intention that they should be used or in the knowledge that they are to be used” to carry out the offenses listed above.\textsuperscript{46} This bifurcated mental element allows for a more nuanced offense than those listed in earlier treaties. Additionally, the treaty contains more comprehensive language for inchoate versions of the primary offense, covering attempt,\textsuperscript{47} acting as an accomplice,\textsuperscript{48} solicitation,\textsuperscript{49} and a basic form of conspiracy.\textsuperscript{50}

\begin{footnotes}
\item[43] Montreal Protocol, Art II(1)
\item[44] Montreal Protocol, Art II(1)
\item[45] Terrorist Financing Convention, Art 2(1)
\item[46] Terrorist Financing Convention, Art 2(1)
\item[47] Terrorist Financing Convention, Art 2(4)
\item[48] Terrorist Financing Convention, Art 2(5)(a)
\item[49] Terrorist Financing Convention, Art 2(5)(b)
\item[50] Terrorist Financing Convention, Art 2(5)(c), But see Laborde and DeFeo arguing that this offense is not a form of conspiracy but a new category that covers “non-violent financial preparations” p. 1091
\end{footnotes}
3.1.2 Enactment in domestic law

The second area of commonality among the treaties is that they each require state parties to criminalize the offenses under domestic law. The Hostages Convention states this clearly, “Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.”\(^{51}\) This formulation is slightly changed from the earliest treaties. For example, the third treaty, the Montreal Convention states, “Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties.”\(^{52}\) The two key changes are the switch from “undertakes” to “shall,” eliminating any undesired ingenuity for the state in implementation and replacing “severe penalties” with “appropriate penalties which take into account the grave nature” of the offenses. This latter change more explicitly connects the character of the penalties with the character of the offense. Almost ten years later, by the time of the drafting of the eighth treaty, the Maritime Convention, the formulation set forth in the Hostages Convention proved to be non-controversial\(^{53}\) and the new convention replicated its language save for the change in antecedent article number.\(^{54}\)

After another ten years, the formulation did change in the eleventh treaty, the Terrorist Bombing Convention of 1998. Its Article 4 splits the Hostages Convention’s single clause into two sub-clauses.\(^{55}\) Additionally, it adds text not seen in any of the prior treaties. Article 5 forces states to adopt measures to ensure that the offenses covered by the convention, particularly when they are intended to cause terror, are not justifiable by “political, philosophical, ideological, racial, ethnic, religious” or other similar considerations.\(^{56}\) This article was included because some delegations believed in the importance of highlighting that the conduct prohibited by the treaty can cause terror and to emphasize that the motivations of this conduct are not relevant in punishing offenders.\(^{57}\) The two latest conventions also incorporated similar clauses.\(^{58}\)

3.1.3 Jurisdiction

The third area of commonality among the treaties is that they each require state parties to establish jurisdiction over the offenses. The Hostages Convention obliges state

\(^{51}\) Hostages Convention, Art 2  
\(^{52}\) Montreal Convention, Art 3  
\(^{53}\) Plant, p. 44  
\(^{54}\) Maritime Convention, Art 5  
\(^{55}\) Terrorist Bombing Convention, Art 4  
\(^{56}\) Terrorist Bombing Convention, Art 5  
\(^{57}\) Witten, p. 777, fn. 22  
\(^{58}\) See Terrorist Financing Convention, Art 6; Nuclear Terrorism Convention, Art 6
parties to “take such measures as may be necessary” to establish jurisdiction over the any of the offences listed in Article 1 that are committed:

(a) In its territory or on board a ship or aircraft registered in that State;
(b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
(c) In order to compel that State to do or abstain from doing any act; or
(d) With respect to a hostage who is a national of that State, if that State considers it appropriate.59

Sub-section a, the territorial principle, is the most classic claim of jurisdiction and without controversy. Sub-section b, the nationality principle, is also well accepted under international law. Sub-section c, the protective principle, is also uncontroversial. Sub-section d, the passive personality principle, as illustrated by its optional nature, had been more controversial but has been receiving greater acceptance recently. While the terminology used to describe these types of jurisdiction varies by author and other authors may have other names for these categories, this is the structure the treaties use to establish jurisdiction. Notably, none of the treaties includes universal jurisdiction.

Although all the treaties contain a clause requiring state parties to establish jurisdiction over the offenses, they vary in respect to not only which of these principles they include, but also which are mandatory and which are optional. For instance, the first treaty, the Tokyo Convention, requires a state to take necessary measures to establish jurisdiction if it is the state of registration for the aircraft on which the offenses are committed—essentially the aviation version of the territorial principle.60 In contrast, states are permitted, but not required, to exercise jurisdiction using the objective territorial principle,61 the nationality principle,62 the passive personality principle,63 the protective principle,64 or when they are obligated to do so by prior international agreement.65

The ninth treaty, the Fixed Platform Protocol to the Maritime Convention, obliges a state to take necessary measures to establish jurisdiction if that state is the location of the fixed platform where the offense took place or a national of that state committed the offense (nationality principle).66 The protocol also gives states the option to establish

59 Hostages Convention, Art 5(1)
60 Tokyo Convention, Art 3(2)
61 Tokyo Convention, Art 4(a)
62 Tokyo Convention, Art 4(b)
63 Tokyo Convention, Art 4(b)
64 Tokyo Convention, Art 4(c)
65 Tokyo Convention, Art 4(e)
66 Fixed Platform Protocol, Art 3(1)
jurisdiction using the passive personality principle,\textsuperscript{67} the protective principle,\textsuperscript{68} and over stateless persons who habitually reside in the state.\textsuperscript{69}

The Terrorist Bombing Convention also obliges a state to take necessary measures to establish jurisdiction if that state is the location of the offense or is the state of registration for a vessel or aircraft where the offense occurred.\textsuperscript{70} Additionally, a state is required to establish jurisdiction using the nationality principle.\textsuperscript{71} In contrast, a state may establish jurisdiction using the passive personality principle,\textsuperscript{72} the protective principle,\textsuperscript{73} over offenses committed against its facilities abroad,\textsuperscript{74} over stateless persons who habitually reside in the state,\textsuperscript{75} and over offenses committed on board aircraft operated by the state.\textsuperscript{76}

3.1.4 Extradite or prosecute

The fourth area of commonality among the treaties is that they each require state parties to extradite or prosecute offenders.\textsuperscript{77} The requirement “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.”\textsuperscript{78} The state does not actually have to prosecute the offender, but must merely report him or her to the authorities for prosecution. The decision on whether or not to prosecute must, however, be made in good faith.\textsuperscript{79}

Although the formulation of this requirement varies slightly among the treaties, the Hostages Convention’s articulation is typical of one version:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities

\begin{itemize}
  \item Fixed Platform Protocol, Art 3(2)(b)
  \item Fixed Platform Protocol, Art 3(2)(c)
  \item Fixed Platform Protocol, Art 3(2)(a)
  \item Terrorist Bombing Convention, Art 6(1)(a-b)
  \item Terrorist Bombing Convention, Art 6(1)(c)
  \item Terrorist Bombing Convention, Art 6(2)(a)
  \item Terrorist Bombing Convention, Art 6(2)(d)
  \item Terrorist Bombing Convention, Art 6(2)(b)
  \item Terrorist Bombing Convention, Art 6(2)(c)
  \item Terrorist Bombing Convention, Art 6(2)(e)
  \item The first treaty, the Tokyo Convention, does not include this provision, but its omission is likely a result of chronology rather than intent. If the treaty had been written later, it almost certainly would have included this provision as well.
  \item Grant, p. 457
  \item Vienna Convention on the Law of Treaties, Art 26
\end{itemize}
shall take their decision in the same manner as in the case of any ordinary
defence of a grave nature under the law of that State. 80

Some of the treaties that use this version change the text for where the alleged offender “is
found” to “is present” 81 and others also add that the state party must submit the case for
prosecution “without delay” 82 or “without undue delay.” 83

The other version of the requirement drops both “whether or not the offence was
committed in its territory” and the entire last sentence. 84 Because the articles covering
jurisdiction already include offenses not committed in a state party’s territory, the phrase
was viewed as unnecessary and superfluous. 85 The last sentence of the first version has no
corresponding clause in this version. In spite of this omission, a good faith interpretation
of the article would require that the state party treat the decision in a manner consistent
with the last sentence of the first version.

In addition to the main extradite or prosecute provision, the treaties also include
articles designed to supplement the extradition process.

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’ exception common to extradition treaties. 86

These articles are too long and detailed to be included in full here, but they can be found in
each convention. In the Hostages Convention, for example, they are Article 9 and Article
10.

Overall, although the “extradite or prosecute” requirement can be circumvented
somewhat easily, it gives some teeth to the treaties, pushing them from aspirational to
functional. For this reason, it remains the cornerstone of the terrorism treaty regime.

80 Hostages Convention, Art 8(1)
81 Nuclear Terrorism Convention, Art 11(1)
82 Maritime Convention, Art 10(1)
83 Terrorist Bombing Convention, Art 8(1)
84 Diplomatic Agents Convention, Art 7; Nuclear Materials Convention, Art 10
85 Wood, p. 811
86 Grant, p. 458-59, discussing how areas of commonality among prior treaties relate to the Montreal
Convention. But note that the first convention, the Tokyo Convention, contains a political offense exception.
See Art 2.
3.1.5 State cooperation

The fifth area of commonality among the treaties is that they each require state parties to cooperate with one another in respect to actions covered by the treaty. Although some treaties add further details, the crux of the requirement is found in the general article on cooperation. In the Hostages Convention, this article states, “States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences set forth in article 1, including the supply of all evidence at their disposal necessary for the proceedings.”87 In contrast to the formulations in earlier treaties such as the Montreal Convention and Hague Convention, this language varies in that it explicitly adds that the supply of evidence is included in the requirement.88 The latter series of treaties also expands the scope of what state parties must assist each other with, adding investigations and extradition proceedings to the criminal proceedings of the earlier treaties.89

The general article in each treaty also contains a secondary section designed to ensure that existing treaty obligations related to mutual assistance in criminal matters will not be disturbed by each new convention.90 The latter series of treaties adds that “in the absence of such treaties, States Parties shall afford each other assistance in accordance with their national law.”91

The twelfth treaty, the Terrorist Financing Convention, adds specific finance-related requirements to the general provisions found in the other treaties. These requirements include not refusing requests for assistance on the ground of bank secrecy,92 not using information or evidence received for proceedings other than those it for which it was requested,93 and giving “consideration to establishing mechanisms” to share information with other parties to the treaty.94

87 Hostages Convention, Art 11(1)
88 See Hague Convention, Art 10(1) and Montreal Convention, Art 11(1)
89 See, for example, Terrorist Bombing Convention, Art 10(1) and Nuclear Terrorism Convention, Art 14(1)
90 See, for example, Hostages Convention, Art 11(2)
91 See, for example, Nuclear Terrorism Convention, Art 14(2)
92 Terrorist Financing Convention, Art 12(2)
93 Terrorist Financing Convention, Art 12(3)
94 Terrorist Financing Convention, Art 12(4)
3.2 How the duties have changes over time

3.2.1 In general

As alluded to in the previous section, there has been a slight shift in the duties over time. In general, the later treaties are more specific in their requirements than the earlier treaties. This change has been most evident in the areas of offenses covered and jurisdiction. In contrast to earlier treaties, the three most recent treaties—the Terrorist Bombing Convention, the Terrorist Financing Convention, and the Nuclear Terrorism Convention—include highly detailed descriptions of the offenses, including definitions articles. These articles further flesh out the already thorough primary articles describing the offenses covered. In terms of jurisdiction, the early treaties have simple rules on jurisdiction, while later conventions “adopt more detailed and extensive, and in some cases bifurcated, rules on jurisdiction.” As mentioned in the section on jurisdiction, the Terrorist Bombing Convention obligates states to take jurisdiction in some circumstances, while offering states the option to take jurisdiction in five others.

In addition, some later treaties have increased the scope of coverage. While the earlier treaties target a specific action, such as the seizure of aircraft or the taking of hostages, these later treaties come closer to encompassing entire areas of terrorist activity. Although the Terrorist Bombing Convention and the Nuclear Terrorism Convention are both somewhat more expansive than the earlier treaties, the Terrorist Financing Convention goes the farthest in enlarging the coverage area. As noted above in the section on offenses covered, the convention contains actions that occur well before any injury takes place, including actions that only indirectly provide or collect funds to be used to further acts of terrorism. Additionally, unlike with most of the other treaties, an act of violence never actually has to occur for a violation to take place. Taken as a whole, the Terrorist Financing Convention covers all willful funding of potential terrorist acts.

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95 However, the Nuclear Materials Convention, only the sixth convention to be opened for signature, is extremely detailed and even includes two technical annexes relating to the protection and categorization of nuclear material.
96 Terrorist Bombing Convention, Art 1; Terrorist Financing Convention, Art 1; and Nuclear Terrorism Convention, Art 1
97 See Terrorist Bombing Convention, Art 2; Terrorist Financing Convention, Art 2; and Nuclear Terrorism Convention, Art 2.
98 Grant, p. 457
99 See section 3.1.3 above
100 The Hague Convention, Art 1
101 Hostages Convention, Art 1
102 Terrorist Financing Convention, Art 2(1)
103 Terrorist Financing Convention, Art 2(3)
Compared to merely covering the seizure of an aircraft, the Terrorist Financing Convention greatly increases the reach of international law in the field of terrorism.104

3.2.2 Prevention

The earliest treaties came about as a response to terrorist activities in specific areas and were designed to criminalize those types of actions in the future. For example, the Hague Convention was developed as a response to increases in aircraft hijacking and criminalizes the act of hijacking or attempting to hijack an aircraft.105 As is typical in these early treaties, any requirement to prevent the act from occurring was not included.

Over time, however, the conventions have increasingly included more preventative aspects. The Nuclear Materials Convention, opened for signature in 1980 as the sixth treaty, was the first to include preventative features. The convention criminalizes actions well before any damage has occurred and includes significant regulatory provisions for the transport of nuclear materials.106 The 1991 Plastic Explosives Convention continued this development by regulating both the movement of unmarked explosives and requiring “strict and effective” inventory controls over unmarked explosives within a state party’s territory.107 The Terrorist Financing Convention of 1999, as discussed in the previous section, does not require a violent offense to occur, but instead criminalizes the financial preparations supporting planned violent acts.108 The most recent treaty in force, the Nuclear Terrorism Convention of 2005, also includes preventative elements, such as criminalizing possession of radioactive material with “the intent to cause death or serious bodily injury.”109 Thus, it appears that states are growing somewhat more comfortable with using conventional law to address terrorism before violence occurs.

3.2.3 Changes after September 11th

Although the attacks of September 11, 2001 dramatically increased the attention paid to terrorism around the world, they, surprisingly, did not significantly alter the international legal approach to combating terrorism.110 Since the attacks, the fragmented style of targeting specific actions with a convention to address those actions has not

104 This shift in the treaties, increasing the reach of international law in the field of terrorism, is emblematic of the larger “regulatory turn” described by Cogan in The Regulatory Turn in International Law.
105 See section 3.1.3 above
106 Nuclear Materials Convention, Art 3-7
107 Plastic Explosives Convention, Art II-IV
108 Terrorist Financing Convention, Art 2
109 Nuclear Terrorism Convention, Art 2
110 See generally Fry
changed. Only one convention in force, the Nuclear Terrorism Convention, was written after September 11th. Aside from the slight changes mentioned in the previous two subsections, it follows the algorithm established over the previous 40 years for tackling a given problem.

The recent Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation [Beijing Convention], completed in 2010, has yet to enter into force.\textsuperscript{111} Although speculating on a treaty’s ratification chances is always little more than offering an educated guess, the treaty should eventually enter into force as the fourteenth terrorism treaty. As the full title implies, the Beijing Convention is intended as an update to the Montreal Convention and Montreal Protocol. Article 24 ensures that there is clarity on that point, stating that “this Convention shall prevail” over those two instruments.\textsuperscript{112}

While not stating so explicitly in the text, the Beijing Convention was influenced by the attacks of September 11th as those attacks prompted an initial review of the Montreal Convention.\textsuperscript{113} This review led to the conclusion that “the existing international regime did not cover notable aspects of these attacks—for instance, the use of an aircraft to cause death and destruction.”\textsuperscript{114} As a result, the treaty that emerged maintains the same structure as the earlier treaties\textsuperscript{115} and, in its listing of the offenses covered, it includes using an aircraft as a weapon. “Any person commits an offense if that person unlawfully and intentionally...uses an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment.”\textsuperscript{116} This new offense would cover actions mimicking those of the September 11th hijackers.

In short, while attitudes toward terrorism changed in the aftermath of September 11th, the conventional legal approach did not.\textsuperscript{117} With the exception of one offense in the Beijing Convention designed to target the specific behavior that the hijackers exhibited,\textsuperscript{118} September 11th had little impact on the terrorism treaties. And, even the offense that was added was done so as a specific, targeted action within the broader framework of five common features of the terrorism treaty regime.

\textsuperscript{111} See Beijing Convention
\textsuperscript{112} Beijing Convention, Art 24
\textsuperscript{113} Van der Toorn, p. 1
\textsuperscript{114} Van der Toorn, p. 1
\textsuperscript{115} The five areas of commonality can be found in the following articles: offenses covered, Art 1; enactment in domestic law, Art 3-4; jurisdiction, Art 8; extradite or prosecute, Art 10; state cooperation, Art 17.
\textsuperscript{116} Beijing Convention, Art 1(f)
\textsuperscript{117} See Fry, p. 434-35
\textsuperscript{118} Beijing Convention, Art 1(f)
3.3 Where the duties fit within the Knox Pyramid

Of the five features common to the multilateral terrorism treaties, the core duty that each places is found in the offenses covered section. In contrast to most human rights treaties, however, each of the terrorism treaties is essentially a very detailed explanation of one duty or offense. Thus, almost all of the other articles in each treaty exist to flesh out and help implement that core duty.

In terms of the Knox Pyramid, all of the offenses covered by the terrorism treaties fall under level two—specification. As detailed in section 3.1.2 above, the treaties require state parties to make the offenses punishable under the domestic laws of the state. Because the treaties require this domestic action, these offenses are not directly placed by the treaties at the international level and, therefore, cannot be level three or four. In addition, the level of detail for each offense is well past mere contemplation as required by level one.

Knox notes that it “may be more accurate to think of specification as a range (from “less specific” to “more specific”) rather than a switch (from “not specific” to “specific”).”119 Within this range, less specific duties would be near the bottom of level two while more specific duties would be near the top. While there is some variation within the terrorism treaties in terms of specificity, all of them are fairly high level two as the extradite or prosecute requirement itself is quite specific. In particular though, the last two treaties to be signed, the Terrorist Financing Convention and the Nuclear Terrorism Convention, are extremely high level two.

The Terrorist Financing Convention, for example, requires state parties to “take necessary measures” to hold legal entities liable criminally, civilly, or administratively when a person controlling the legal entity commits an offense under the convention.120 It also stipulates that the liability shall be incurred “without prejudice to the criminal liability of individuals having committed the offences.”121 Furthermore, the sanctions that the legal entities incur must be “effective, proportionate and dissuasive.”122 The convention has similarly detailed requirements regarding, among others, the seizure or freezing of funds,123 the forfeiture of funds,124 identification and monitoring of customers’ activity,125

119 Knox, p. 18, fn. 84
120 Terrorist Financing Convention, Art 5(1)
121 Terrorist Financing Convention, Art 5(2)
122 Terrorist Financing Convention, Art 5(3)
123 Terrorist Financing Convention, Art 8(1)
124 Terrorist Financing Convention, Art 8(2)
and measures to detect and monitor the physical cross-border transportation of cash and negotiable instruments.\textsuperscript{126}

Signed just six years later, the Nuclear Terrorism Convention continued this shift towards even more specific requirements. Like the Terrorist Financing Convention, the Nuclear Terrorism Convention includes a very detailed definitions section. The definition for radioactive material is illustrative:

“Radioactive material” means nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owning to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment.”\textsuperscript{127}

Additionally, the Nuclear Terrorism Convention provides extremely detailed requirements regarding how state parties must cooperate with each other, such as taking “all practicable measures” to prevent and counter preparations for the commission of the listed offenses, “including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or provide technical assistance or information or engage in the perpetration of those offences.”\textsuperscript{128} Moreover, the convention continues with exceptionally in depth requirements regarding what state parties must do upon seizing or taking control of radioactive material following the commission of an offense.\textsuperscript{129}

Although these treaties do not go so far as to provide the exact wording that state parties must use to enact these provisions, they leave minimal room for state creativity. They are highly intrusive to state parties, taking away nearly all actual decision making authority related to the subjects they cover. Yet, they stop short of making the offenses crimes under international law and pushing the duties incurred to level three.

\textsuperscript{125} Terrorist Financing Convention, Art 18(1)(b)
\textsuperscript{126} Terrorist Financing Convention, Art 18(2)(b)
\textsuperscript{127} Nuclear Terrorism Convention, Art 1(1)
\textsuperscript{128} Nuclear Terrorism Convention, Art 7(1)(a)
\textsuperscript{129} Nuclear Terrorism Convention, Art 18
4 Analysis of the how the law related to the terrorism treaties should be

While the multilateral terrorism treaties currently specify duties on private actors at a very high level two on the Knox Pyramid, there has not been any commentary, even commentary prior to or ignoring the Knox framework, about whether or not this duty level is appropriate. With the variety of options available to treaty drafters, it begs the question of how the law should be in these types of treaties. Lex ferenda analyses of this sort can mistakenly focus heavily on legal considerations while assuming away practical ones. Just as terrorism itself cannot be assumed away, the intense negotiation process of both treaty drafting and ratification also cannot be assumed away. As a result, I will attempt to balance a variety of considerations, with legal ones serving as only a factor.

Although the Knox Pyramid is comprised of four distinct levels—contemplation, specification, placement, and enforcement—the divisions between levels may not always be precise. Additionally, duties can fall higher or lower within a given level. Therefore, it may be more accurate to envision the pyramid as “smooth-sided rather than a ziggurat.” Regardless of level, however, the conceptual basis for private duties is the same: “the enjoyment of many human rights may be interfered with by private actors, not just by governments; private actions must therefore be addressed to protect human rights fully.”

Because the conceptual basis is the same, why does human rights law place duties at these four levels? What benefits are there to a multi-level system as opposed to placing and enforcing all duties directly (level four) or as opposed to allowing only states to regulate private conduct? In order to reach a satisfactory answer regarding what level the duties placed by the terrorism treaties should be, it is necessary to discuss why there are different levels first.

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130 There has been increased interest in international law’s relationship to non-state actors in recent years, but none of these articles focuses on the manner in which international law levies these duties to quite the same extent as Knox’s Horizontal Human Rights. Additionally, none of these articles prioritizes treatment of the terrorism treaties. Of these articles, Cogan’s The Regulatory Turn in International Law, arguing that the international system has fundamentally shifted toward greater authority for national and international governance over individuals, is the most relevant. Cogan offers both a challenge to idea that decision makers are considering how they place obligations on individuals and a tacit endorsement of the structure of the Knox Pyramid in the realm of human rights.

131 Knox, p. 18, fn. 84

132 Knox, p. 18
Why the multi-level system for private duties exists

The disparity between how duties are placed upon non-state actors and how they are placed upon states under human rights law is clear from the Knox Pyramid. Such a pyramid does not exist for the duties placed upon states because all of those duties are placed and enforced directly or, in Knox Pyramid terms, placed at level four.

In terms of power, there is a stark difference between governments and private actors. As Knox notes, “Even a relatively weak government probably wields more power over the human beings within its jurisdiction than any other single entity.” Consequently, governments have a greater capacity to violate human rights. In spite of this, however, private actors can cumulatively cause widespread violations of human rights, necessitating protection from the actions of private actors as well. The question is where this protection should come from. The contrast in answers between the multi-level system for private duties and the single-level system for state duties can be attributed to several factors.

International law lacks “the practical and political capacity” to enforce all private duties. From a practical perspective, there are vastly more resources available for enforcement at the domestic level. International institutions are tiny by bureaucratic standards and there seems to be little political will for the type of expansion that enforcing all private duties would require. Additionally, oppressive governments can potentially push for and use international duties as a ploy for restricting human rights.

Although the factors in the prior paragraph point toward leaving private duties to domestic law, there are opposing factors that indicate why it is not left entirely to domestic law. In some cases, a non-state actor may acting “so much like a government, or in such close complicity with it, that it should be treated according to the same standards that apply to governments.” Even when the non-state actor is not acting like a government, however, structural considerations within a state can mean that the government ignores human rights violations. Governments that are beholden to elites with little concern for

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133 Knox, p. 18-19
134 A prime example, as Knox notes, is violence against women. These actions are almost always committed by husbands, fathers, and brothers rather than by government agents. Knox, p. 19
135 Knox, p. 19
136 The UN budget for the biennium 2010-11 is $5.16 billion. United Nations budget. In comparison, the budget for the US state of South Carolina, with a population of 4.5 million people, was $5 billion for the 2011 fiscal year. South Carolina state budget.
137 Knox, p. 20
138 Knox, p. 20
139 Knox, p. 20
average citizens or minority groups cannot be trusted to protect the rights of those non-elites. Therefore, international human rights law has at least some role to play.  

The structure of private duties under international human rights law, and correspondingly the structure of the Knox Pyramid, is the result of “these two cross-cutting pressures: on the one hand, the practical and political need to use domestic institutions wherever possible; and on the other, the need to use international law where domestic institutions are inadequate.” The primary reason for the difference in treatment between duties placed upon governments and those placed upon private actors—why these pressures are resolved so strongly in favor of international involvement—is because domestic laws cannot effectively safeguard violations by governments. Although constitutions can make it more difficult, governments can change the laws that constrain them in a manner unavailable to private actors. The multi-level approach used for violations by private actors combines the benefits of both the fully domestic and the fully international approach. As stated by Knox in his defense of the more complex structure, “It addresses private violations of human rights without opening the door to converse duties to the state; where possible, it draws on the resources of national governments; and, where necessary, it provides international human rights law with a crucial, albeit limited, role in specifying, placing, and enforcing private duties.”

4.2 What level the terrorism laws should be

As noted above, the duties placed by the terrorism treaties are currently a very high level two in the Knox Pyramid. In order to discuss what level they should be, I will present arguments both in favor and against placing them at each level.

4.2.1 Level one

Unlike for the other levels, there are few reasonable arguments for placing the terrorism laws at level one. At this level, international law contemplates the duties imposed, leaving great discretion over specificity, implementation, and enforcement to states. Although this deference to states can offer some benefits, such as allowing a state

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140 Knox, p. 20
141 Knox, p. 20. For an alternative theory on how international law reached this point, see Cogan, arguing that the failure of states as providers and the rise of threats from non-state actors made both states and human rights activists increasingly more amenable to international regulation over non-state actors. Cogan, p. 344-46.
142 Knox, p. 20
143 Knox, p. 20
greater creativity in crafting laws tailored precisely to its needs and being less likely to upset the delicate balance of existing legislation, the costs are high.

With the rise of modern transnational terrorism and the lack of an agreed upon comprehensive definition of terrorism, providing states with no more framework than a due diligence obligation is asking for a return to the days before the terrorism treaties were signed. The cliché about one man’s terrorist being another’s freedom fighter would come into much sharper focus. States could never be sure whether a suspect would be arrested, interrogated, or extradited. The increased creativity would allow states to draft exclusions for almost anything—political offenses, fighting for self-determination, denying extradition to states with crosses in their flags. In short, if it can be imagined, states would likely come up with it as an excuse not to treat terrorism allegations seriously for those perpetrators with whom they might have sympathy.

Therefore, it appears to be more effective to at least specify particular actions that make up a terrorist act. This changes the focus from whether or not the perpetrator is a terrorist to whether or not he committed the actions of the offense. Merely contemplating the duties that states have in combating terrorism would leave too much discretion to states.

4.2.2 Level two

At this level, international law specifies the duties imposed, leaving implementation and enforcement to states. In general, private duties are “more apt to be specified the more susceptible they are to violation by private actors and the more unable domestic law is to address them satisfactorily.”\textsuperscript{144} There is some variation within the level as lower level two duties are specified, but little else. They are light on details and still leave a lot of margin for state creativity. In contrast, higher level two duties are highly specific, leaving almost no space for anything more than state implementation.

Duties are also often specified “in areas that are difficult or impossible for the domestic law of any single state to tackle effectively.”\textsuperscript{145} Knox uses the “prosecute or extradite” provisions of the terrorism treaties as an illustrative example of how specification was used to solve the problem of establishing jurisdiction over these actors that routinely cross borders.\textsuperscript{146} Just because specification was used does not mean that it is

\textsuperscript{144} Knox, p. 24
\textsuperscript{145} Knox, p. 24
\textsuperscript{146} Knox, p. 24
necessarily the best choice to solve this type of problem, though, only that the solution must be at least level two.

4.2.2.1 Advantages

That being said, one of the most convincing reasons for placing the terrorism laws at level two is that they are already there. The treaties have gone through the meat grinder of international relations, having been negotiated, signed, and widely ratified. These processes can take years at best. I do not wish to overstate this point, however, as its advantages are not overwhelming. After all, the existing terrorism treaties were signed and ratified, and the political landscape varied drastically from 1963 to 2005. There is no reason to think that, if an offense were considered an important enough problem, a treaty could not get signed and ratified today. This would, however, take considerable time.

Another practical benefit of placing the terrorism laws at level two is that space for creativity in implementation can lead to better domestic laws. Unlike duties at higher levels where the duty is placed directly by international law, all states must create domestic legislation at level two. Although the offense itself is often tightly specified, much of the supporting language is not. States can write their laws as they see fit. If one state notices that another state’s manner of implementation appears to be more effective, the first state can copy the more effective law. While the space for experimentation is limited due to the specificity of the treaties, placing the duties at level two at least allows some experimentation, which is impossible as international requirements become more restrictive at higher levels.

In addition, individuals are used to looking to their domestic governments for criminal laws, not to international bodies. Knox explains this advantage well:

“[I]ndividuals and other private actors are more likely to accept the legitimacy of international norms when they have been incorporated into domestic law. Individuals acknowledge that their governments have jurisdiction to determine and enforce their rights and duties; they are less likely to accept that international bodies controlled by foreign governments have such jurisdiction.”147

This is not to say that individuals cannot overcome this preference, such has been the case for genocide or crimes against humanity, but merely that the preference is structural and an advantage of level two.

147 Knox, p. 30
Finally, duties that are placed at level two are more democratic than those placed directly by international law. Individuals can protest, lobby, and influence their own government much more effectively than they can an international body. This problem is most evident in the European Union where supranational law making has increased the democratic deficit felt by many Europeans.\textsuperscript{148} While labeling the terrorism offenses a crime under international law is not directly comparable, it shares the same fundamental problem: in order to change laws, individuals must convince not only their own governments, but those in other countries as well. This extra layer would stifle the democratic process, whereas keeping the terrorism laws at level two somewhat alleviates these concerns. Again, though, the highly specific nature of terrorism treaties lessens this advantage.

4.2.2.2 Disadvantages

In spite of the many advantages to placing the terrorism laws at level two, there are several significant drawbacks. First, although creativity in implementation can lead to better national laws over time, this type of experimentation, combined with latent issues such as lack of resources or will, only increases the likelihood that some domestic laws will be poorly implemented at best or, at worst, serve as a vehicle for human rights violations. While this variation leads to better results in the long run, in any particular state or in any particular case, it may lead to unacceptable consequences.

Tying into this concern, the second problem is the lack of feedback during the domestic legislative process. Instead of hearing critique from the diverse array of states as in a rule set at the international level, drafters will, at best, only receive criticism from domestic opposition parties. In states with no viable opposition, drafting will take place in a vacuum, likely leading to less effective legislation. Nonetheless, this disadvantage is tempered by the highly specific nature of the treaties and their more limited space for creativity.

A third problem relates to the procedure behind creating obligations on non-state actors. At level two, this is a two-step process. First, the treaty itself must be ratified.

\textsuperscript{148} See generally the official European Union website, which acknowledges, addresses, and defines the term, http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm. Additionally, see generally Snell.
Second, the domestic legislation must be written and passed. While this extra step might appear innocuous, both treaties and laws take time to be enacted and, during that timeframe, governments can change, making the passage of the subsequent law less assured.

In sum, there are significant advantages to placing the terrorism laws at level two. These need to be balanced against the disadvantages, but duties at this level appear to be viable.

4.2.3 Level three

At this level, international law specifies and places the duties imposed, leaving only enforcement to states. The only distinction between levels two and three is that the obligation is imposed directly at level three rather than indirectly at level two. Although this distinction might appear semantic, at level three, “the international community as a whole exercises prescriptive jurisdiction over individuals in a way that makes them directly subject to international law apart from the mediating intervention of domestic law.” At level two, states retain domestic jurisdiction over individuals.

Very few obligations are placed directly by international law. There seems to be a strong presumption that almost all duties placed on non-state actors should be done via domestic law, rather than directly by international law. Knox notes that, to necessitate “direct imposition by international law, violations must be considered both of extraordinary international significance and extraordinarily ill-suited to domestic enforcement.” Does terrorism meet the requirements?

There is little doubt that, over the last twenty years and particularly since September 11, 2001, terrorism has become one of the major concerns of the international community. For example, shortly after the attacks of September 11th, the United Nations Security Council formed a permanent Counter-Terrorism Committee. Additionally, the

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149 The order of these steps can easily be reversed and, in fact, states should have the domestic legislation in place before they ratify a treaty. Otherwise, a state would be in violation of its international duties until the domestic law is enacted.
150 A signal example of this problem is the relationship of the United States to the Rome Treaty and the subsequent International Criminal Court (ICC). At the end of his administration, President Bill Clinton signed the treaty, but did not submit it for domestic ratification. The next president, George W. Bush withdrew the United States’ signature and any obligations the United States had under the treaty. Finally, the following president, Barack Obama announced an intent to cooperate with the ICC, but no intention to accede to the treaty.
151 Knox, p. 29
152 Knox, p. 30
153 See Security Council resolution 1373 (2001) and the resulting Counter-Terrorism Committee
NATO military action in Afghanistan stemmed directly from those attacks. Major terrorist attacks continued throughout the decade including, among others, the 2003 bombings in Istanbul, the 2004 train bombings in Madrid, the 2004 Beslan school hostage crisis, the 2005 London transport bombings, the 2008 Mumbai attacks, and the 2011 Norway attacks. These continued attacks have proved that terrorism is a worldwide concern that is not disappearing soon. Therefore, it does seem accurate to say terrorism is of “extraordinary international significance.”

At first glance, in analyzing the second requirement, it appears that Knox confused the threshold of level three (international placement) with the threshold of level four (international enforcement); either the suitability of domestic enforcement should not be a factor or it should be a factor leading to placement at level four. Yet, this binary criticism suffers from a lack of nuance.

One of the primary advantages of placing a duty at level three is that it provides the foundation for later enforcement at level four. While there is no requirement that a duty placed at level three ever be enforced at the international level, the opportunity to do so only becomes available once it is placed directly by international law. The nature and understanding of international law develop over time and, as such, enforcement at the international level can emerge over time as well. It is in this sense that the suitability of domestic enforcement is relevant, as a violation that is extraordinarily ill-suited to domestic enforcement would be a much stronger candidate for eventual enforcement at the international level.

Additionally, obligations at level three, placed directly by international law, are not just of international significance, but are also of grave seriousness. These types of obligations—prohibitions against genocide, crimes against humanity, and apartheid—are difficult to enforce domestically. State prosecutors likely have little to no experience in trying such cases. Perpetrators are likely high ranking or formerly high ranking officials within the state. These cases are invariably high profile, expensive, and time consuming. States that have recently recovered from one of these offenses might be in no position to prosecute a case of this type. In spite of the reasons making it unlikely, it is possible for states to enforce these obligations domestically. This means that the obligations’ lack of

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154 Statement by NATO Secretary General, Lord Robertson, NATO Press Release 138, 8 October 2001.
155 A prime example is the Adolf Eichmann trial in Israel. Although he did not commit the crimes in Israel, it was nevertheless a purely domestic prosecution. See Israel v. Eichmann.
suitability for domestic enforcement can inform as to the manner of a crime directly placed by international law rather than necessarily forcing such a crime to rise to level four.

It is difficult to argue that terrorism is as “extraordinarily ill-suited to domestic enforcement” as the other level three crimes, as the other crimes almost always involve high ranking officials within a state. Terrorism, in contrast, almost never involves high ranking officials within a state. Instead, perpetrators are usually actors who either are from outside a state or view themselves as from outside the society of a state in spite of their common passport. Thus, domestic enforcement is often somewhat easier as compared to that related to other level three offenses. Nevertheless, it is often much more difficult as compared to that related to any other type of crime.

The United States’ handling of the trial of alleged September 11th mastermind, Khalid Sheikh Mohammed is an illustrative example. In that case, Mohammed was originally to be tried by a military commission, but a change in administrations from one party to another brought an announcement that he was to be tried in a standard civilian trial. After a subsequent election changed the composition of the U.S. Congress again, the trial was shifted back to a military commission. As of November 2011, Mohammed has yet to be tried. While not all terrorism prosecutions will be this difficult, the political wrangling behind Mohammed’s prosecution shows that terrorism prosecutions can be extraordinarily ill-suited for domestic enforcement. If an international tribunal existed, Mohammed likely would have been tried already.

Therefore, it appears that terrorism violations can at least meet the two-part theoretical threshold for placing the obligations at level three. Although theory could support placing the terrorism obligations directly by international law, the advantages to doing so would have to outweigh the costs.

4.2.3.1 Advantages

One signal advantage to placing the obligations directly is that doing so would assign a much greater normative weight to the terrorism offenses. Because international law places so few obligations directly on non-state actors, those that it does are given heightened emphasis. Obligations not to commit offenses such as war crimes and genocide resonate not just because of the gruesome nature of the offenses, but also because of their elevated position. Mass murder is bad, but genocide rises to another level of immorality.

156 Attorney General Announces Forum Decisions for Guantanamo Detainees
157 Statement of the Attorney General on the Prosecution of the 9/11 Conspirators
even though both violate the right to life of the victims. To associate terrorism with these offenses would emphasize the incredibly serious nature of its acts.

Another crucial benefit to placing the obligations at level three is inherent in the difference between levels two and three: the obligations are placed directly by international law without any need for domestic filtering. This means what it says; the laws are in place the second the treaty is ratified. There is no delay for domestic legislation to implement the law. There is no need to negotiate within a state over how it will implement the duties. In short, the offenses are crimes and private actors are bound by them.

A side benefit of placing the obligations directly under international law is that the laws would be more uniform. While more vague duties could lead to laws that are uniform merely on their face, the highly specific nature of the terrorism laws leaves little room for arguments as to their meaning. This uniformity would create less room for human rights violations by unscrupulous governments using implementing legislation as an excuse for illegal behavior. This advantage is the flip side of the creativity offered to states at level two and discussed above. Neither greater creativity nor greater uniformity appears to offer overwhelming arguments in its favor, but it is essential to understand the benefits and drawbacks of each approach.

In comparison to level four, enforcement is far more manageable at the domestic level. The discussion above about whether terrorism was “extraordinarily ill-suited to domestic enforcement” accurately conveyed that it can often be ill-suited to domestic enforcement in theory. This poor theoretical fit, however, must be reconciled with the resources available in practice. International enforcement can and does exist, but it is very limited in scope. As mentioned earlier, the budgets of international institutions are miniscule and the political will for the considerable expansion does not seem to exist. In contrast, police forces currently operate in every country in the world. These forces detain, interrogate, and arrest suspects every day. Domestic court systems routinely process criminal cases and often have experience prosecuting high profile cases. Thus, states have both the capability and the capacity to handle terrorism suspects more readily than any international institution.

4.2.3.2 Disadvantages

In spite of the advantages of placing the terrorism laws at level three, there are considerable drawbacks. The biggest disadvantage to moving the duties to this level is likely the act of moving itself. No mechanism exists for changing the thirteen treaties in
one fell swoop. If they were to be changed, each treaty would have to be amended with a new protocol. For bilateral or trilateral treaties, this process can be time consuming, but for widely ratified multilateral treaties such as the terrorism treaties, it can be nearly impossible to get all of the states to agree. Some states would undoubtedly disagree that a shift to level three is even necessary. Others might use the occasion to reopen discussions of previously agreed upon issues within the treaties. As discussed above, this problem is surmountable, but it would require a major logistical and organizational effort.

Another way of approaching this problem would be to amend the Rome Statute to explicitly include the offenses covered by the terrorism treaties. However, this only partially alleviates the difficulties involved in changing all thirteen treaties. An amendment to the crimes section of the Rome Statute would only require a two-thirds majority vote instead of unanimity, but the newly listed crimes would only apply to nationals of state parties that had ratified or accepted the amendment. During the negotiations for the Rome Statute, a potential crime of terrorism was discussed at length but ultimately could not garner the support of enough states to merit inclusion.

One of the major reasons why states might attempt to reopen closed discussions and why states could not agree on the inclusion of a crime of terrorism is because their views on terrorism are divergent. This is most evident in the lack of a unified definition of terrorism. The terrorism treaties currently take a piecemeal approach to get around this problem, but states could be more reluctant to elevate the terrorism offenses to level three if they cannot agree what terrorism itself is. Providing the added weight and seriousness of having an obligation imposed directly by international law might not be desirable if a state is worried that another might use the extra gravitas as excuse to meddle in what the first state sees as terrorist activity but the second state sees as a legitimate expression in the struggle for self-determination. In spite of these differences, the international community has routinely attempted to create a definition of terrorism for over fifty years, but consensus seems unlikely at present.

Another potential problem with raising the terrorism duties to level three is the increased potential for defiance by suspects and states. At lower levels, the duties can be

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158 Rome Statute of the International Criminal Court, Art 121
159 See Van der Vyver, p. 534-541
160 Setty, p. 9-10. Setty also notes a hole in the fragmentary approach that would not be fixed by merely shifting the terrorism laws to a different level. The lack of a “uniform and universally accepted definition, coupled with a mandate for strong counterrorism laws and policies, has opened the door for potential abuse by member states in those areas in which the piecemeal international definition does not provide clarity.” Setty, p. 8
viewed as more akin to domestic criminal legislation. States will often have no qualms about locating and extraditing individuals for theft, for example. At higher levels, in contrast, the duties can be viewed as more akin to legalized ethics. The greater gravitas of international placement and the types of crimes that exist at levels three and four can lead to official and unofficial reluctance to prosecute or extradite individuals. Sudan’s refusal to arrest Omar al-Bashir in light of warrants for war crimes, crimes against humanity, and genocide is an example of the former type, while Serbia’s fifteen year delay between Ratko Mladic’s alleged commission of genocide and his eventual arrest is debatably an example of the latter type. If the terrorism obligations were raised to level three, the extra seriousness that the level connotes could lead to an increase in these types of defiance.

Overall, there are significant advantages to moving the terrorism laws to level three, but the practical disadvantages likely outweigh them. If a unified definition of terrorism could be agreed upon, however, many of these concerns would dissipate.

4.2.4 Level four

At this level, international law specifies, places, and enforces the duties imposed, leaving little to states. The difference between this level and level three is that international law also enforces the obligations at this level. As Knox notes, this is the “most intrusive possible role human rights law can play with respect to domestic jurisdiction over private actors.” Although a fifth level in which the duties must be enforced internationally is possible in theory, the limits placed on international enforcement currently make it impossible in practice. Essentially, the main avenue for international enforcement, the International Criminal Court, may only enforce obligations if domestic enforcement has failed.

Additionally, only three private duties may currently be enforced at the international level: genocide, crimes against humanity, and war crimes. In order to add others, either the Rome Statute would have to be amended or an ad hoc tribunal would have to be created. As mentioned in the previous sections, while amending the Rome Statute would have to be created. As mentioned in the previous sections, while amending the Rome Statute
Statute is feasible,\textsuperscript{166} it would be difficult to do so. Assuming it would be possible, there are several advantages to placing the obligations at level four.

4.2.4.1 Advantages

First, levels three and four have the direct international placement of the duties in common. Therefore, the advantages of shifting the duties from level two to level three also apply with respect to level four. The remainder of the benefits relate to enforcement, as that is the only difference between levels three and four.

Second, and most importantly, permitting enforcement through international institutions would lead to more uniform handling than allowing it to remain purely domestic. This benefit derives from the variations in quality of criminal justice systems around the world. Although many states have functional and modern systems, even variations among these states can be dramatic. For instance, depending upon the offense, one could be put to death in the United States but receive only thirty years imprisonment in Norway.\textsuperscript{167} While this sort of divergence could lead better long term solutions, it is less uniform. If terrorism were to be made a crime under international law, these types of variations in enforcement are undesirable. Yet, the variations would not be confined to terrorism, as genocide prosecutions under domestic law can vary from those under international institutions.\textsuperscript{168} Any prosecutions handled by international institutions, though, follow the standardized rules and procedures of those institutions and the variations among them are fewer than those among the states of the world.

Third, this more uniform enforcement would also ensure that arrests and trials would be more equitable for alleged perpetrators who would be tried at an international institution. In some states, arrests can be arbitrary and trials less than fair. Shifting enforcement to an international body helps to eliminate these problems, as alleged terrorists deserve to have their human rights respected as well.

4.2.4.2 Disadvantages

In spite of the benefits to moving the terrorism laws to level four, there are significant drawbacks, the biggest of which might be the act of amending the treaties. As

\textsuperscript{166} See Rome Statute of the International Criminal Court, Art 121
\textsuperscript{167} This is the case regarding genocide, for example. For the U.S. law, see 18 U.S.C. § 1091(b)(1). For the Norwegian law (in Norwegian), see LOV 2005-05-20, nr 28: Lov om straff (straffeloven) § 101.
\textsuperscript{168} For example, there was debate over where perpetrators should be tried after the genocide in Rwanda in 1994 because Rwanda allowed the death penalty, while the international tribunal did not. Kirkby, p. 98
mentioned in the section on level three, there is no easy solution to changing all of the terrorism treaties at once. Shifting the obligations to level four would be even more work, however, as not just the terrorism treaties would need to be amended. In order make it possible to enforce the duties at the international level, either the Rome Statute would need to be amended or another tribunal would need to be established for terrorism related crimes. Either process would be difficult and require tremendous amounts of political capital to achieve.

As if achieving that were not difficult enough legally and politically, enforcement itself would be a nightmare with the limited resources of the United Nations. Unless there were a new international enforcement body solely dedicated to combating terrorism, this would be nothing more than a pipe dream. Even the idea of states agreeing to such a body is likely a pipe dream. A more limited model utilizing domestic police and investigative services is more realistic, but still highly unlikely because of the frequency of terrorist acts compared with the other three level four crimes. If terrorism prosecutions were to be of the same standard of quality as those for genocide, crimes against humanity, and war crimes, the budget for and staff of the United Nations would need to be drastically expanded.

In conclusion, while there are significant advantages to allowing for international enforcement of the terrorist offenses, the practical costs outweigh them. With the limited resources of the United Nations and the frequency of terrorist acts, level four appears to be an inappropriately high location for the terrorism duties in the Knox Pyramid.
5 Conclusion

As I sat in Oslo in the days after the terrorist attacks of July 22\textsuperscript{nd}, 2011 struggling to finish the draft for this paper, I was forced to think about just how severe the psychological impacts of terrorism can be. Although none of my friends and family were directly affected by the tragedy, focusing on or thinking about anything other the horrific events proved impossible for days. It was a stark reminder of how limited the law is in effecting change. In spite of this, the law can and does create a framework for how societies handle acts of terrorism.

This article has shown how international law has grappled with these problems to date. It has argued that the Knox Pyramid is an excellent tool for analysis of correlative duties placed on non-state actors. The Pyramid sheds light on the manner in which international law creates these duties while protecting the human rights that correlate to them.

Furthermore, this article has analyzed the terrorism treaties currently in force, showing their structural similarities. In spite of the variety of offenses covered, the treaties share five key areas of commonality, with all of the treaties creating duties on non-state actors at level two of the Knox Pyramid.

In addition, this article has weighed the costs and benefits of placing these duties at each level of the Knox Pyramid. Levels one and four can be ruled out easily, but levels two and three both contain compelling arguments in their favor. There are legitimate reasons for shifting these duties to level three, but it is difficult to say that the duties are misplaced in their current implementation.

A shift to level three or four, however, could potentially offer a dramatic spillover effect; an effect that could be seen as either an advantage or a disadvantage depending on one’s perspective. This potential effect stems from the reach of the United States’ Alien Tort Statute, which grants jurisdiction to aliens for torts committed in violation of the law of nations.\textsuperscript{169} The United States Supreme Court has clarified that the statute will only allow suit for some violations of international law, but if the terrorism duties were to shift

\textsuperscript{169} Alien Tort Statute, 28 U.S.C. § 1350. See also \textit{Sosa v. Alvarez-Machain}.  

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to level three, there is a strong argument that they would meet this standard. In that case, the doors would be open for victims of acts of terrorism covered by the treaties to bring suit for damages in the plaintiff friendly courts of the United States. Neither the victim nor the perpetrator would need to have any further connection to the United States, turning the victims of almost all acts of terrorism covered by the treaties into potential plaintiffs. While the United States could change this law at any time, until it actually does so, the law’s effects must be considered.

As detailed above, a shift to level three would present numerous advantages, but such a shift faces one primary obstacle: the lack of an agreed upon definition of “terrorism” itself. The juxtaposition of the widespread commonalities among the treaties and the absence of a universal definition of terrorism is telling, however, in that states tend to agree on almost all aspects of acts of terrorism, but cannot come to a generic consensus. If a definition of “terrorism” could be agreed upon and this lacuna filled, many of the disadvantages of shifting the obligations to level three would be minimized. The arguments in favor of shifting the duties to level three would then likely outweigh those in favor of keeping the duties at level two. At that point, the Comprehensive Convention Against International Terrorism could almost certainly be completed, as defining “terrorism” remains the major sticking point in negotiations. Until and if this occurs, however, there are not compelling enough grounds for rewriting the now widely ratified anti-terrorism treaty regime.

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170 The standard set out by the Supreme Court in Sosa is that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [rules related to piracy, ambassadors, and safe conduct] we have recognized.” Sosa, p. 725. The main features of those paradigms were universality, obligatoriness, and specificity. A widely ratified shift of the terrorism duties to level three would likely meet all three requirements as the treaties already satisfy the latter two requirements.
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