

THE POTENTIALITIES AND LIMITATIONS OF REACTIVE LAW MAKING: A CASE STUDY IN INTERNATIONAL TERRORISM SUPPRESSION

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I INTRODUCTION

The September 11 attacks may have popularised the phrase ‘the war on terror’, but the international community has co-operated to address the threat of terrorism since at least 1937. In one of its aspects, co-operation has taken the form of a series of treaties requiring states to criminalise and suppress particular manifestations of transnational terrorism. This regime has developed in a piecemeal fashion, each treaty adopted in response to a specific act of ‘headline-grabbing’ terrorism committed by non-state actors (‘NSAs’), and with a view to ensuring there is no impunity for such type of terrorist conduct in the future. The scope of the treaty regime has also been shaped by the rights of NSAs (in particular the rights of peoples) to self-determination. As a result, the terrorism suppression regime is somewhat unique in that the focus of the treaties (the particular manifestation of terrorism which each addresses) is driven by the conduct of NSAs. While states decided to create a treaty regime to address the criminal law enforcement challenges inherent in transnational terrorism, the ‘terrorism suppression agenda’ was in fact set by the criminals themselves.

The question examined in this article is: ‘To what extent can international law which “responds” to the conduct of NSAs be “responsive”?’ Put another way, as viewed through the particular prism of terrorism suppression, what are the potentialities and limitations of reactive law making? The answer to this question in the terrorism suppression context is heavily conditioned by the historical and political context within which the treaties were negotiated, not least because these treaties are at the crossroads of criminal responsibility for non-state conduct and the rights of peoples to self-determination. As a result, the conclusions regarding the potentialities and limitations of reactive law making may not be generalisable, but they certainly highlight features and issues that states negotiating reactive treaties in other contexts may want to avoid or emulate.

This article will first sketch the development of international law related to terrorism suppression, starting with League of Nations and International Law

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Commission ('ILC') efforts, and culminating in the now familiar pattern of an act of 'headline-grabbing' terrorism followed by the negotiation of a treaty addressing that particular manifestation of terrorism (often referred to as the 'sectoral approach'). This article will then explore the implications of this pattern of international law making, beginning with some of its potentialities in addressing the interaction between rights and criminal responsibility of NSAs, and concluding with its limitations in terms of the coherence of the treaty regime addressing terrorism, in particular as regards the principles of regime interaction to which the treaty regime gives effect.

II THE BIRTH OF THE SECTORAL APPROACH TO TERRORISM SUPPRESSION

There are two distinct vantage points from which to view international law development vis-à-vis terrorism, each resting on the nature of the terrorist actor whose conduct is regulated. One view of terrorism considers the state as a potential terrorist actor. Given that a state's active participation in international terrorism amounts to a threat to international peace and security, this form of terrorist conduct is addressed through the prism of the *jus ad bellum* – the state itself is the subject of the prohibition on state terrorism as an instantiation of the general prohibition on the use of force in international relations. The *Charter of the United Nations* is the springboard for related customary international law development in regard to state terrorism.¹

Terrorism, however, is also a tool of the dispossessed. Efforts to suppress international terrorism have therefore equally addressed threats emanating from the terrorist conduct of NSAs. In response to these threats, co-operation in the suppression of terrorism has taken the form of criminal law enforcement treaties that aim to secure individual responsibility.² As and when terrorist actors began to use transnational violence in new ways, the international community responded to these developments through the adoption of a new terrorism suppression convention which addressed that particular manifestation of

1 See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Agenda Item 85, Supp No 28, UN Doc A/RES/25/2625 (24 October 1970) ('*UN Declaration on Friendly Relations 1970*').

2 Security Council 'legislation' has also been a source of criminal law enforcement obligations in respect of terrorism. See, eg, SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). The legitimacy of the Security Council assuming the role of international legislature was hotly debated in the academic literature: see, eg, Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96 *American Journal of International Law* 901; Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593; Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *American Journal of International Law* 333; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175; but in practice, states have complied with at least the reporting obligations imposed on them pursuant to relevant resolutions. Given that the Security Council drew to a large extent on existing criminal law enforcement treaty obligations, this article will focus on law development through treaty negotiation.

terrorism. From this vantage point, international law development in respect of terrorism is driven principally by the activities of NSAs. This article examines terrorism suppression from this second vantage point.

The first multilateral effort to suppress transnational terrorism was triggered by the assassination of King Alexander I of Yugoslavia and Mr Louis Barthou, Foreign Minister of the French Republic, in Marseilles on 9 October 1934, by Yugoslav *émigrés* operating from Hungary. The matter was brought to the attention of the Council of the League of Nations – in particular, Yugoslavia accused Hungary of complicity in the terrorist activities of the assassins.³ The Council adopted a resolution (unanimously) in which it decided that ‘certain Hungarian authorities may have assumed, at any rate through negligence, certain responsibilities relative to acts having a connection with the preparation of the crime of Marseilles’.⁴

Despite the allegations of state supported terrorism, the League of Nations did not limit itself to a condemnation of Hungarian conduct. It also established a committee to draft a treaty addressing crimes committed with political or terrorist purposes – with a view to ensuring there is no impunity for the physical actors committing such crimes (even if committing them on behalf of a state).⁵ In particular, the treaty addressed some of the difficulties in bringing terrorists to justice resulting from their transnational existence and the limitations imposed by international law on the exercise of jurisdiction. These difficulties had been on the League’s agenda since at least 1926,⁶ and had been considered at a number of conferences for the unification of criminal law,⁷ but the assassination of King Alexander I was the catalyst – galvanising political will – for the adoption of the League of Nations *Convention for the Prevention and Punishment of Terrorism* (*‘League of Nations Terrorism Convention’*) in 1937.⁸ While the *League of Nations Terrorism Convention* is different in scope from its modern terrorism suppression siblings (as discussed further below), reactive law making was

3 League of Nations Council, ‘Third Meeting (Public): Held on Friday, December 7th, 1934, at 3pm’ (1934) 15 *League of Nations Official Journal* 1712, 1713–14. See also Michel Liais, ‘L’affaire Hungaro-Yougoslave devant le Conseil de la Société des Nations’ (1935) 42 *Revue Générale de Droit International Public* 127.

4 League of Nations Council, ‘Sixth Meeting (Public): Held on Monday, December 10th, 1934, at 10.30pm’ (1934) 15 *League of Nations Official Journal* 1758, 1760.

5 Committee for the International Repression of Terrorism, LN Doc CRT.1 (10 April 1935).

6 Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation*, 3rd sess, LN Doc C.196.M.70.1927.V (20 April 1927) annex II (*‘Letter from Romania to Committee of Experts for the Progressive Codification of International Law, 20 November 1926’*) 196, 221.

7 *Troisième conférence Internationale pour l’unification du droit pénal* (Bruxelles, 26–30 juin 1930) (Office de Publicité, 1931); *Quatrième conférence Internationale pour l’unification du droit pénal* (Paris, 27–30 décembre 1931) (Librairie du Recueil Sirey, 1933); *Cinquième conférence Internationale pour l’unification du droit pénal* (Madrid, 14–20 octobre 1933) (A Pedone, 1935); *Sixième conférence internationale pour l’unification du droit pénal* (Copenhague, 31 août – 3 septembre 1935) (A Pedone, 1938).

8 *Convention for the Prevention and Punishment of Terrorism*, opened for signature 16 November 1937, LN Doc C.546(I).M.383.1937.V (never entered into force) reproduced in ‘Instruments of the International Conference on the Repression of Terrorism (Geneva, November 1st–16th, 1937)’ (1938) 19 *League of Nations Official Journal* 23.

thereafter to become a fixture of the international community's counter-terrorism efforts. In part due to the political situation in Europe in the late 1930s, the *League of Nations Terrorism Convention* did not receive sufficient ratifications and never entered into force.

The international community returned to matters of terrorism after the bulk of Nazi war crimes trials were complete – this time, however, terrorism was to be dealt with as one of a group of international crimes. The ILC, in its first and second drafts of the Code of Offences against the Peace and Security of Mankind, dealt only with the *jus ad bellum* aspects of state involvement in terrorism.⁹ But influenced by the famous Nuremberg judgment pronouncement that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced',¹⁰ the ILC's framework for addressing state involvement in terrorism was that of individual criminal responsibility. Work on the ILC Draft Code was suspended in 1954, pending progress on the definition of aggression.¹¹

Between 1954 and 1974 (when aggression was finally defined by the General Assembly¹²), the face of terrorism changed somewhat. While states continued to sponsor and support terrorist conduct (allowing them to accomplish their foreign policy objectives in deniable fashion, as a clandestine and low-level alternative to an outright use of force), NSAs began to use transnational violence to accomplish their own political objectives. In particular, the international community's focus on non-state terrorism sharpened in the late 1960s with the surge in airplane hijackings and acts of violence against civil aviation committed by NSAs for political purposes.¹³ The response of the International Civil Aviation

9 See *Draft Code of Offences against the Peace and Security of Mankind* in 'Report of the International Law Commission to the General Assembly' [1951] II *Yearbook of the International Law Commission* 123, 133 art 2(6) and commentary. The commentary notes that the crime of terrorism can only be committed by a state although individual criminal responsibility can arise regarding conspiracy, complicity or direct incitement.

10 'Judgment of 1 October 1946' in *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947) 171, 223.

11 *Draft Code of Offences against the Peace and Security of Mankind*, GA Res 897 (IX), UN GAOR, 9th sess, 504th plen mtg, Supp No 21, UN Doc A/RES/9/897 (4 December 1954); John F Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1990) 19 *Israel Yearbook on Human Rights* 13, 15.

12 *Definition of Aggression*, GA Res 3314 (XXIX), UN GAOR, 6th Comm, 29th sess, 2319th plen mtg, Agenda Item 86, UN Doc A/RES/29/3314 (14 December 1974) annex.

13 Between 1960 and 1967, there were an average of five hijackings per year. That number increased to 35 in 1968 and reached an overwhelming 89 in 1969: Alona E Evans, 'Aircraft and Aviation Facilities' in Alona E Evans and John F Murphy (eds), *Legal Aspects of International Terrorism* (Lexington Books, 1978) 3, 4–6. See also Grant Wardlaw, 'State Response to International Terrorism: Some Cautionary Comments' in Robert O Slater and Michael Stohl (eds), *Current Perspectives on International Terrorism* (Macmillan Press, 1988) 206, 206–7; *Measures to Prevent International Terrorism: Study Prepared by the Secretariat*, UN GAOR, 6th Comm, 27th sess, Agenda Item 92, UN Doc A/C.6/418 (2 November 1972) 32–4 [47]–[50] (the Sixth Committee Secretariat sets forth the chain of events leading up to the ICAO's sponsoring of the *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) ('Hague Convention'), and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) ('Montreal

Organization ('ICAO') to this turn in terrorist events was to adopt two conventions aimed specifically at suppressing these forms of violence: the *Hague Convention*¹⁴ and the *Montreal Convention*.¹⁵ As the specialised UN agency tasked with promoting the safe and orderly development of international civil aviation throughout the world, it was entirely appropriate that the surge in hijackings and violence against civil aviation should be addressed within the framework of the ICAO. But given the ICAO's limited mandate, the conventions could do no more than address terrorist violence in that one limited (aviation) context. There was obviously no question of the ICAO addressing terrorist violence more broadly. The *Hague Convention* and the *Montreal Convention* were also drafted with the problem of non-state terrorism in its 1960s/1970s incarnation in mind – the earlier League of Nations and ILC Draft Code link between state terrorism and individual criminal responsibility was severed and replaced by a focus on NSAs and state co-operation in suppressing their conduct.¹⁶ With these first two terrorism suppression conventions – and their narrow application to specific acts of terrorism in isolation from other terrorist crimes, and contemplation of non-state conduct – the sectoral approach to terrorism suppression was born.

From 1970 on, the treaty regime addressing international terrorism has followed the ICAO model. In the case of each terrorism suppression convention,¹⁷ the catalyst for addressing a particular manifestation of terrorism

Convention'), including the increase in hijacking, and General Assembly and Security Council resolutions expressing concern over the unlawful interference with international aviation).

14 See below n 17.

15 Ibid.

16 This is not to say that the terrorism suppression conventions *only* apply to non-state conduct, (see Kimberley N Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice' (2012) 3 *Journal of International Dispute Settlement* 279), but it is to say that the galvanising acts of 'headline-grabbing' terrorism by NSAs focused attention in particular on non-state terrorism. In respect of the comprehensive convention, discussed below (see below n 46 et seq), whether 'state terrorism' should be covered by the Convention remains a controversial issue. See, eg, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 68th sess, Supp No 37, UN Doc A/68/37 (15 May 2013) annex II, 18–19 ('2013 Report'). The two main circulated drafts of the relevant provision differ in that the one circulated by the coordinator and supported mainly by Western states seeks to exclude the activities of state forces in exercise of their official duties from the scope of a comprehensive convention all together, while the Organisation of Islamic Cooperation's draft qualifies this, seeking for any exclusion to apply only insofar as such acts are in conformity with other international law obligations: See at annex II, 18–19.

17 To date, there are 13 international conventions and protocols that require states parties to (i) criminalise a particular manifestation of international terrorism under domestic law; (ii) co-operate in the prevention of that terrorist act; and (iii) take action to ensure that alleged offenders are held responsible for their crime (through the imposition of an obligation to extradite or submit the alleged offender to prosecution): *Hague Convention* arts 1, 2, 7 (the obligation to co-operate in the prevention of the proscribed terrorist conduct is absent in this Convention); *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 10 September 2010, DCAS Doc No 22 (not yet in force) arts II–III ('2010 Protocol to the Hague Convention'); *Montreal Convention* arts 1, 3, 7, 10; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, opened for signature 24 February 1988, 1589 UNTS 474 (entered into force 6 August 1989) art II; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, opened for signature 10 September 2010, DCAS Doc No 21 (not yet in force) arts 1, 3, 10, 16 ('Beijing Convention'); *Convention on the Prevention and Punishment of Crimes against Internationally Protected*

was a ‘headline-grabbing’ act of terrorism (or a series of such acts) – crimes which ‘shocked the conscience of mankind’ and called for action.¹⁸ The reactionary nature of this form of law making, and the galvanising effect of ‘headline-grabbing’ crimes on political will, can be illustrated by a few examples.

Following the Munich Olympics hostage crisis and other similar hostage-takings, Germany proposed the adoption of an international convention for the suppression of hostage takings.¹⁹ Negotiation of the convention was protracted, not least because of the association between the catalysing hostage event and struggles for self-determination (discussed further below), but the Iran/US hostage crisis in November 1979 pushed states to act and there was some compromise on the relationship between terrorism suppression and self-determination.²⁰ The *Hostages Convention* was finally adopted on 17 December 1979 and required states to criminalise hostage takings with a transnational element and to extradite or submit alleged offenders to prosecution.²¹

On 7 October 1985, an Italian flag cruise ship (the ‘Achille Lauro’) sailing from Alexandria to Port Said was seized by members of the Palestinian Liberation Front (‘PLF’) posing as tourists. The PLF held the crew and

Persons, including Diplomatic Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977) arts 2, 4, 7 (‘*Internationally Protected Persons Convention*’); *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) arts 1, 2, 4, 8 (‘*Hostages Convention*’); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992) arts 3, 5, 10, 13 (‘*SUA Convention*’); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992) arts 1–2; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010) (‘*2005 Protocol to the SUA Convention*’) arts 4, 5, 12; *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001) arts 2, 4, 8, 15 (‘*Terrorist Bombing Convention*’); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) arts 2, 4, 10, 18 (‘*Terrorism Financing Convention*’); *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 13 April 2005, 2445 UNTS 89 (entered into force 7 July 2007) arts 2, 5, 7, 11 (‘*Nuclear Terrorism Convention*’). Collectively, these conventions are referred to in this article as the ‘terrorism suppression conventions’ or the ‘TSCs’.

- 18 That terrorist crimes might ‘shock the conscience of mankind’ was also one of the reasons certain states argued in favour of including international terrorism in the International Criminal Court’s jurisdiction. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st sess, Supp No 22, UN Doc A/51/22 (13 September 1996) vol 1, 26 [106]. Similarly, see, eg, Vice-Chancellor and Minister for Foreign Affairs of the Republic of Germany, *Request for the Inclusion of an Additional Item in the Agenda of the Thirty-First Session: Drafting of an International Convention against the Taking of Hostages*, 31st sess, UN Doc A/31/242 (28 September 1976) annex 1 [5] (‘*Letter from Germany*’).
- 19 *Letter from Germany*, UN Doc A/31/242, annex. Germany’s request was acknowledged by the General Assembly and an ad hoc committee was tasked with producing a draft. See *Report of the Sixth Committee: Drafting of an International Convention against the Taking of Hostages*, 6th Comm, 31st sess, Agenda Item 123, UN Doc A/31/430 (14 December 1976) 1 [1]–[3]; *Drafting of an International Convention against the Taking of Hostages*, GA Res 31/103, UN GAOR, 31st sess, 99th plen mtg, Supp No 39, UN Doc A/RES/31/103 (15 December 1976).
- 20 See below nn 75–9 and accompanying text.
- 21 *Hostages Convention* arts 1, 2, 8.

passengers hostage, demanding the release of 50 Palestinians from Israeli custody. The ship was refused permission to dock in Syria – following which the PLF shipjackers killed a disabled American passenger. The ship was thereafter granted permission to dock at its destination port and the PLF released all hostages in return for a promise of safe passage out of the country.²² On 10 October 1985, the shipjackers and two accomplices were flown out of Egypt on a government-chartered airliner. The American government, learning of the agreement between Egypt and the shipjackers, intercepted the aircraft over international waters, forced it to land at Sigonella Air Base in Sicily,²³ and turned the shipjackers over to the Italian government.²⁴ In defence of their action, American officials cited Egypt's obligation under the *Hostages Convention* to either prosecute or extradite the hijackers.²⁵ The *Hostages Convention*, however, was not considered specific enough to address the particular jurisdictional issues raised by shipjackings, given the possibility that the hostage-taking might be undertaken in international waters. As a result, states began negotiating a shipjacking convention under the auspices of the UN specialised agency mandated with the safety and security of maritime shipping (the International Maritime Organization). Negotiations resulted in the adoption of the 1988 *SUA Convention*, which obliges states to criminalise shipjackings and to extradite or submit alleged offenders to prosecution.²⁶

On 26 February 1993, a 1200 pound car bomb was detonated in the underground parking structure of the North Tower of the New York City World Trade Centre.²⁷ The explosion was intended to knock the North Tower into the South Tower, bringing both down.²⁸ The explosion did neither, but did kill six people and injured a further 1000. A little over a year later (on 18 July 1994), a van packed with explosives was driven into a seven-storey Jewish-Argentine community centre in Buenos Aires. The explosion reduced the building to rubble and killed 96 people, injuring another 300.²⁹ The Buenos Aires attack was widely

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- 22 Judith Miller, '2-Day Drama Ends: 4 Surrender to PLO – New Yorker Reported Killed by Gunmen', *The New York Times* (New York), 10 October 1985, A1, A11.
- 23 Bernard Gwertzman, 'Flown from Cairo: 4 in Custody in Sicily – Washington Says It Wants Extradition', *The New York Times* (New York), 11 October 1985, A1, A10.
- 24 Don A Schanche, 'Italy Convicts 11 Men in Achille Lauro Hijacking: None Singled Out as Leon Klinghoffer Murderer; Victim's Daughters Say Sentences Are Too Lenient', *Los Angeles Times* (Los Angeles), 11 July 1986, 1.
- 25 Stuart Taylor Jr, 'Plane Diversion Raises Legal Issues', *The New York Times* (New York), 11 October 1985, A11. Egypt claimed that it had fulfilled its international obligation to extradite or prosecute by turning the suspected terrorists over to the Palestinian Liberation Organisation authorities for prosecution. See Judith Miller, 'Egypt Says It Gave Gunmen to PLO: Disputes US Account on How Long Terrorists Remained in Custody of Cairo', *The New York Times* (New York), 11 October 1985, A11.
- 26 *SUA Convention* arts 3, 5, 10(1).
- 27 Jesse Greenspan, 'Remembering the 1993 World Trade Center Bombing', *History* (online), 26 February 2013 <<http://www.history.com/news/remembering-the-1993-world-trade-center-bombing>>.
- 28 The failed attempt to bring the towers down from below, executed by Ramzi Yousef (Khalid Shaikh Mohammed's nephew), is widely credited with the 'idea' of bringing them down from above as carried out on 9/11.
- 29 *Keesing's Record of World Events*, vol 40 (July 1994) 120–1.

believed to have been carried out by Palestinian affiliated groups.³⁰ During the next two years, several headline bombings and similar terrorist attacks took place in Saudi Arabia, Tokyo, Sri Lanka, Israel and Manchester.³¹ Following these incidents, the General Assembly noted ‘that terrorist attacks by means of bombs, explosives or other incendiary or lethal devices have become increasingly widespread’, stressed ‘the need to supplement the existing legal instruments in order to address specifically the problem of terrorist attacks carried out by such means’, and decided to ‘establish an Ad Hoc Committee ... to elaborate an international convention for the suppression of terrorist bombings’.³² The *Terrorist Bombing Convention*, incorporating the core set of obligations set out in the previous terrorism suppression conventions but limited in scope to terrorist bombings, was adopted in 1997.³³

III POTENTIALITIES OF REACTIVE LAW MAKING?

Reactive treaty making in the form of the terrorism suppression treaty regime – driven by the conduct of NSAs and as a result always lagging behind it – is often qualified in negative (or at least not positive) terms.³⁴ But there are potentialities to this form of international law making. Of particular relevance in respect of the terrorism suppression regime, reactive law making has created the space for targeted compromise where there was little hope of such compromise as a matter of general principle (as explored in Part III(A) below) and has provided the opportunity to fine tune the terrorism suppression regime in a way that is responsive to developments in international law over time (as explored in Part III(B) below).

30 See Sergio Kiernan, ‘Why Argentina’s Jewish Center Bombing Remains Unsolved’, *The New York Times* (online), 28 August 1996 <<http://www.nytimes.com/1996/08/28/opinion/28iht-edserg.t.html>>. Initial investigations were seriously mismanaged and marred by corruption. It was only in November 2005 that a joint effort by Argentinean intelligence and the FBI resulted in the identification of the suicide bomber responsible for the attack on the community centre as Ibrahim Hussein Berro, a member of Hezbollah: ‘Buenos Aires Bomber “Identified”’, *BBC* (online), 10 November 2005 <<http://news.bbc.co.uk/2/hi/americas/4423612.stm>>. Hezbollah issued a statement denying allegations that it had been involved in the Jewish community centre attack: *Keesing’s Record of World Events*, vol 51 (November 2005) 46 927.

31 US Department of State, *Patterns of Global Terrorism: 1995* (1996) 5, 22; US Department of State, *Patterns of Global Terrorism: 1996* (1997) 28–9, 32–3, 35.

32 *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51st sess, 88th plen mtg, Agenda Item 151, Supp No 49, UN Doc A/RES/51/210 (17 December 1996) Preamble, para 9 (‘*GA Establishment of Ad Hoc Committee of 51/210*’).

33 *Terrorist Bombing Convention* arts 2, 4, 8.

34 See, eg, Ben Saul, ‘Terrorism as a Legal Concept’ in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, 2015) 19, 24; G Gilbert, ‘The “Law” and “Transnational Terrorism”’ (1995) 26 *Netherlands Yearbook of International Law* 3, 14; John Murphy, ‘International Law and the War on Terrorism: The Road Ahead’ (2002) 79 *International Law Studies* 391, 399.

A The Politics of Avoidance or the Avoidance of Politics – The Interaction between the Rights and ‘Responsibilities’ of NSAs

A treaty regime which is driven by particular instances of terrorist crime has a very precise focal point – and the precision of a focal point has the potential to distract or shift attention from broader intractable debates. In the terrorism suppression context, one of those intractable debates has been in reference to the limitations (if any) on the right of a people to use violence in their struggle for self-determination. The sectoral approach to terrorism suppression has in effect (if not by design) freed up the space for co-operation in a targeted way, while leaving this very difficult debate to be resolved in the content of a comprehensive terrorism suppression convention. This section examines the terrorism/self-determination debate and its impact on the (to date failed) efforts to tackle terrorism suppression generally, and concludes that tackling terrorism suppression on a reactive, crime by crime, basis has been an advantage in securing agreement and co-operation.

The *League of Nations Terrorism Convention* defined ‘acts of terrorism’ generally as ‘criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’,³⁵ and required states to criminalise enumerated acts to the extent that they met the elements of that general definition.³⁶ The enumerated acts were broadly defined, focusing on targets rather than particular manifestations of violence. This approach was adopted in order to avoid excluding as yet unanticipated ways and means of harming public interests in a way that would limit the capacity of the treaty to address terrorist violence in whatever future form it might take.³⁷ The concern with comprehensiveness is prescient – highlighting as it does one of the pitfalls of an overly reactive approach to terrorism suppression.³⁸

A comprehensive approach to terrorism suppression, however, was not to be the way forward in the post-WWII era. This is principally the result of the interaction between rights and criminal responsibilities of NSAs: the emergence of non-state terrorism (and the international community’s criminal law enforcement approach thereto) coincided with developments in post-colonial governance and a long overdue focus on the right to self-determination.³⁹ The

35 *League of Nations Terrorism Convention* art 1(2).

36 The enumerated acts of violence included acts which endangered the life or liberty of protected persons (heads of state etc); acts which endangered the life of members of the public; wilful destruction of public property; and the procurement of weapons for the purposes of committing any of the enumerated offences: see *League of Nations Terrorism Convention* art 2.

37 The Convention was intended to ‘prohibit any form of preparation or execution of terrorist outrages’: League of Nations, Resolution Adopted by the Assembly on October 10th, 1936 in *Proceedings of the International Conference on the Repression of Terrorism: Geneva, November 1st to 16th, 1937*, LN Doc C.94.M.47.1938.V (1 June 1938) annex 1, 183 (emphasis added) (*‘Proceedings of the International Conference on the Repression of Terrorism’*).

38 See Part III(B), ‘Responsiveness of the Treaty Regime’, below.

39 The principle of equal rights and self-determination of peoples was recognised in the *Charter of the United Nations* art 1(2), and has been re-affirmed in several General Assembly resolutions and

relationship between terrorism suppression and the right of self-determination has been a site of contestation since the Secretary-General first placed international terrorism on the General Assembly's agenda in 1972.⁴⁰ The early position of the Non-aligned Movement ('NAM')⁴¹ members in this debate was to emphasise the *right* to struggle for self-determination and to argue that the means used in such struggles should not be restricted (and should certainly not be qualified as 'terrorist').⁴² NAM's position took the form of a definitional claim – that 'terrorism' should be *defined* so as to exclude any acts carried out in furtherance of a struggle for self-determination.

The flipside of this position, advanced principally by Western states, was to object to an 'ends justify the means' approach – and in particular to argue that the legitimacy of a cause could not justify violence against the 'innocent'.⁴³ NAM's conflation of limitations on the *means and methods of exercising a right* (which is permissible), and limiting the right itself (which is impermissible) was rejected.

declarations since then, including the *UN Declaration on Friendly Relations 1970*, UN Doc A/RES/25/2625, adopted in the same year as the *Hague Convention*.

- 40 The Secretary-General tried to avoid the political quagmire of characterisation (freedom fighter vs terrorist) by claiming that he had the general issue of terrorism, and no specific acts or actors, in mind: see 'Questions Related to International Terrorism' (1972) 26 *Yearbook of the United Nations* 639, 640. It is nevertheless widely accepted that the Secretary-General was reacting to the massacre of Israeli athletes by Black September at the Munich Olympics on 5 September 1972 and the attack against civilian passengers at Lod Airport in Israel by Japanese terrorists (working with the PLO) on 30 May 1972. See especially Abraham D Sofaer, 'Terrorism and the Law' (1986) 64 *Foreign Affairs* 901, 903; Joseph J Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Grotius Publications, 1990), 32; Valentin A Romanov, 'The United Nations and the Problem of Combatting International Terrorism' (1990) 2 *Terrorism and Political Violence* 289, 295.
- 41 For a full list of members, see Non-aligned Movement, *Background – The Non-aligned Movement: Member States* (23 January 2002) <<http://www.nam.gov.za/background/members.htm>>.
- 42 Nigeria, eg, stated that 'people struggling to liberate themselves from oppression and exploitation have the right to use all methods at their disposal, including force': Ad Hoc Committee on International Terrorism, *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII): Addendum*, UN Doc A/AC.160/1/Add.1 (12 June 1973) 26 ('*Observations of States Addendum 1*'). See also at 28 (USSR), 29 (Yemen); Ad Hoc Committee, *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII)*, UN Doc A/AC.160/1 (16 May 1973) 14 (Iran), 17 (Lebanon), 34 (Syrian Arab Republic) ('*Observations of States*'); Ad Hoc Committee, *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII): Analytical Study Prepared by the Secretary General*, UN Doc A/AC.160/2 (22 June 1973) 7–8 [13]–[14] ('*Analytical Study*'). This position was an important feature of the *Hostages Convention* negotiations. NAM members highlighted that, in condemning practices of apartheid, the UN could not tie the hands of the victims of those practices in their attempts to recover their freedom. See below n 71.
- 43 See *Report of the Ad Hoc Committee on International Terrorism*, UN GAOR, 28th sess, Supp No 28, UN Doc A/9028 (1973) 7–8 [22]–[23]; *Observations of States*, UN Doc A/AC.160/1, 5 (Austria), 11 (Germany), 23 (Portugal), 24–6 (South Africa), 42 (UK), 44 (USA); *Observations of States Addendum 1*, UN Doc A/AC.160/1/Add.1, 12 (Holy See), 27 (Switzerland); *Analytical Study*, UN Doc A/AC.160/2, 8 [15]; *Report of the Ad Hoc Committee on International Terrorism*, UN GAOR, 32nd sess, Supp No 37, UN Doc A/32/37 (28 April 1977) ('*1977 Report*') annex, 16 ('6th Meeting', UN Doc A/AC.160/SR.6 (22 March 1977) [3] (Austria)), 19 ('7th Meeting', UN Doc A/AC.160/SR.7 (23 March 1977) [21] (USA)). For arguments in support of this position during the negotiation of the *Hostages Convention*, see, eg, *Report of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages*, UN GAOR, 32nd sess, Supp No 39, UN Doc A/32/39 (1977) annex 1, 17 ('4th Meeting', UN Doc A/AC.188/SR.4 (4 August 1977) [8] (Chile)), 51 ('11th Meeting', UN Doc A/AC.188/SR.11 (12 August 1977) [26] (USA)) ('*Hostages Records*').

And on any reading of international humanitarian law ('IHL'), as it applied during the negotiation of the *Hostages Convention* (the first terrorism suppression convention ('TSC')) to be adopted outside the context of specialised UN agencies like the ICAO), this latter position has to be correct. Armed conflicts in which a people is fighting in exercise of its right to self-determination were recognised as international armed conflicts to which the full body of IHL applies from 1977 onwards with the adoption of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* ('API').⁴⁴ Article 1(4) of the API incorporates factually non-international armed conflicts (those between NSAs – or a people fighting in exercise of their right of self-determination – and a state) into the legal definition of international armed conflict (which had until API been defined as a conflict between two states).⁴⁵

Given that article 1(4) of the API obliges a people fighting in exercise of its right of self-determination to conduct hostilities in compliance with restrictions on means and methods of warfare imposed by IHL, the terrorism/self-determination debate is one which ought to be understood in terms of regime interaction, *not* the *definition* of terrorism. What is at stake is the applicability of two separate regimes, and the issue is whether conduct in furtherance of a struggle for self-determination should fall within the scope (and be evaluated on the basis) of the terrorism suppression regime or IHL.

Nevertheless, there are still some states that insist on characterising the matter as a question of definition.⁴⁶ In part, it is this insistence which precludes consensus on the adoption of a comprehensive terrorism suppression convention

44 Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

45 The circumstances under which a non-international armed conflict will amount to an international armed conflict because a people is fighting in exercise of a right of self-determination, as envisioned in API art 1(4), is not defined clearly in the *Additional Protocol*. The Commentary to API suggests optimistically that it is a question of 'common sense': see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) 56 [118].

46 *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 59th sess, Supp No 37, UN Doc A/59/37 (2 July 2004) annex I, 7–8 [15]–[17]. See in particular, proposals that self-determination be excluded from the definition of terrorism: *Summary Record*, UN GAOR, 6th Comm, 55th sess, 27th mtg, Agenda Items 164 and 155, UN Doc A/C.6/55/SR.27 (24 November 2000) 8 [41]–[43] (Qatar), 8–9 [44]–[45] (Egypt); *Report of the Working Group on Measures to Eliminate International Terrorism*, UN GAOR, 6th Comm, 55th sess, Agenda Item 164, UN Doc A/C.6/55/L.2 (19 October 2000) annex III, 37–8 [30] (Malaysia). See also *Report of the Working Group: Measures to Eliminate International Terrorism*, UN GAOR, 6th Comm, 60th sess, Agenda Item 108, UN Doc A/C.6/60/L.6 (14 October 2005) annex, 4–7 [2]–[17]. No progress has been made on this issue: see the *Reports of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*: UN GAOR, 61st sess, Supp No 37, UN Doc A/61/37 (2006) annex I, 4 [2]; UN GAOR, 62nd sess, Supp No 37, UN Doc A/62/37 (2007) annex, 6 [5], 7–9 [11]–[21]; UN GAOR, 63rd sess, Supp No 37, UN Doc A/63/37 (2008) annex I, 6 [5]–[6]; UN GAOR, 64th sess, Supp No 37, UN Doc A/64/37 (2009) annex I, 6 [6]; UN GAOR, 65th sess, Supp No 37, UN Doc A/65/37 (2010) annex I, 5 [3], 6–7 [11]; UN GAOR, 66th sess, Supp No 37, UN Doc A/66/37 (2011) annex I, 5 [2], 7 [10], 8–9 [18]; *2013 Report*, UN Doc A/68/37 annex III, 20 [4], 22 [13]. See also *Summary Record*, UN GAOR, 6th Comm, 69th sess, 1st mtg, Agenda Item 107, UN Doc A/C.6/69/SR.1 (20 October 2014) 3 [20] (Iran), 12 [81] (UAE); *Summary Record*, UN GAOR, 6th Comm, 70th sess, 1st mtg, Agenda Item 108, UN Doc A/C.6/70/SR.1 (23 October 2015) 4 [29] (Iran).

(to sit alongside the sectoral regime and fill in its gaps), given that a general definition of terrorism would be a necessary element thereof. UN efforts to elaborate such a comprehensive convention have been ongoing for over 10 years.⁴⁷ To date, there has been no consensus on whether acts committed in furtherance of a people's right of self-determination should be defined and criminalised as terrorism under the draft comprehensive convention.⁴⁸

A regime interaction approach, however, is indeed taken in the existing TSCs, given that self-determination has not been addressed as a matter of definition, but purely as a matter of exclusion from the scope of the TSCs on the basis that other regimes, like IHL, apply.⁴⁹ This is not to say that the

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- 47 Prior to Germany's proposal for the *Hostages Convention*, the USA had submitted a comprehensive *Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, UN GAOR, 6th Comm, 27th sess, Agenda Item 92, UN Doc A/C.6/L.850 (25 September 1972). However, due to widespread opposition, the General Assembly voted instead to establish an Ad Hoc Committee tasked with making 'recommendations for possible co-operation for the speedy elimination of [international terrorism]': *Measures to Prevent International Terrorism*, GA Res 3034 (XXVII), UN GAOR, 6th Comm, 27th sess, 21 14th plen mtg, Agenda Item 92, Supp No 30, UN Doc A/RES/27/3034 (18 December 1972) paras 9–10. The Committee's work was suspended as a result of significant political disagreement: see *Measures to Prevent International Terrorism*, GA Res 31/102, UN GAOR, 6th Comm, 31st sess, 99th plen mtg, Agenda Item 113, Supp No 39, UN Doc A/RES/21/102 (15 December 1976) Preamble; *1977 Report*, UN Doc A/32/37, [4]. In 1996, a draft comprehensive terrorism suppression convention was proposed again, this time by India: Permanent Representative of India, *Measures to Eliminate International Terrorism*, UN GAOR, 6th Comm, 51st sess, Agenda Item 151, UN Doc A/C.6/51/6 (11 November 1996) annex. Pursuant to the *GA Establishment of Ad Hoc Committee of 51/210*, UN Doc A/RES/51/210, para 9 another Ad Hoc Committee was established with a view to 'developing a comprehensive legal framework of conventions dealing with international terrorism'. It was clarified soon after, that this included 'the elaboration of a comprehensive convention on international terrorism': *Measures to Eliminate International Terrorism*, GA Res 53/108, UN GAOR, 53rd sess, 83rd plen mtg, Agenda Item 155, UN Doc A/RES/53/108 (26 January 1999) para 11. In 2013, when the Ad Hoc Committee last convened, it noted that 'more time was required to achieve substantive progress on the outstanding issues': *2013 Report*, UN Doc A/68/37 3 [12]. Since disagreement persists, the General Assembly recommended that the Sixth Committee establish a Working Group in 2016 to finalise the drafting process: *Measures to Eliminate International Terrorism*, GA Res 70/120, UN GAOR, 70th sess, 75th plen mtg, Agenda Item 108, UN Doc A/RES/70/120 (18 December 2015) para 24. The call to finalise the comprehensive convention, however, is one that has been made before. See, eg, *Measures to Eliminate International Terrorism*, GA Res 67/99, UN GAOR, 67th sess, 56th plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/67/99 (14 December 2012) para 24; *Measures to Eliminate International Terrorism*, GA Res 68/119, UN GAOR, 68th sess, 68th plen mtg, Agenda Item 110, Supp No 49, UN Doc A/RES/68/119 (18 December 2013) para 24. And it is doubtful that the likelihood of reaching final agreement on the relationship between terrorism and self-determination for the purposes of finalising a comprehensive terrorism suppression convention will increase in the foreseeable future: see Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015) 272.
- 48 One of the main points of contention that prevented agreement in the 1970s attempts to make comprehensive progress on the suppression of terrorism through the Ad Hoc Committee was the self-determination issue: see, eg, *Report of the Ad Hoc Committee on International Terrorism*, UN GAOR, 34th sess, Supp No 37, UN Doc A/34/37 (17 April 1979) 9–10 [28]–[31]; Jörg Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69, 73. Since the start of the second attempt to draft a comprehensive terrorism suppression convention, the self-determination issue remains a source of disagreement: see, eg, UN GAOR, 56th sess, 12th plen mtg, Agenda Item 166, UN Doc A/56/PV.12 (1 October 2001) 3; see above n 46.
- 49 On the TSC regime interaction principles, see Part IV below.

self-determination issue was absent from negotiations of the TSCs.⁵⁰ But with attention focused on particularly egregious crimes (rather than a general definition which encapsulates a wide spectrum of violence), states have managed to agree to disagree on terrorism generally for the sake of bringing a targeted criminal law enforcement framework into effect. Acts of international terrorism which capture the attention of the international press and domestic constituencies both provide the opportunity for compromise and pressure states to come to a settlement which facilitates action. States need to be seen to be doing something – and reactive treaty making, driven by ‘headline-grabbing’ terrorism, satisfies that need while also developing a genuine platform for counter-terrorism co-operation. States parties have been more willing to compromise on the self-determination issue in respect of particular crimes than they would be willing to do as a matter of general principle. The result is at least some co-operation on terrorism suppression – even if not as comprehensive as might be hoped.

B Responsiveness of the Treaty Regime

As we have seen, the political will to address a specific manifestation of terrorism has emerged either in response to a particularly egregious use of terrorist violence by NSAs or a sharp increase in that ‘type’ of terrorist violence. Given the time it thereafter takes to finalise a convention addressing the particular violence, the international legal regime on terrorism suppression lags behind the realities of terrorist conduct. In this sense, a reactive criminal law enforcement treaty regime, responding to the ever evolving conduct of NSAs, is seemingly ‘passive’. The resulting gaps in treaty coverage, and the concomitant failure to concentrate the terrorism prevention efforts of states on as yet unanticipated terrorist activities, make the regime vulnerable and less effective in its broad aims of terrorism suppression.⁵¹

In other respects, however, a reactive treaty regime – spinning out TSCs over time – enables terrorism suppression efforts to respond to developments in international law. The adoption of treaties by consensus through negotiation at multi-lateral conferences (at which the vast majority of states will have some representation) is somewhat of a miracle of compromise. States will naturally be reluctant to open these miracles up to subsequent amendment – even to respond to important developments in international law which bear on the treaty obligations (and which it may not be possible to accommodate through systemic interpretation in reliance on article 31(3)(c) of the *Vienna Convention on the Law of Treaties* (*VCLT*)⁵² in the face of clear contrary language). The terrorism suppression regime, with its newly tweaked iterations of the same treaty (different focus) adopted over time, provides an interesting opportunity to incorporate these developments.

Let us consider the *League of Nations Terrorism Convention* by way of illustrating the added responsiveness of a treaty regime which emerges over time.

50 See Part IV below.

51 See above n 34.

52 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

While the *Convention* never entered into force, it nevertheless served as a model for the modern TSCs. Having said so, it contained a rather ineffective obligation to extradite or prosecute, which reflected some of the limitations of international law at the time.⁵³ In particular, the *League of Nations Terrorism Convention* admitted the possibility of impunity for acts of terrorism through its contemplation of situations in which a state could not extradite a foreigner,⁵⁴ but could not prosecute because it had not exercised its prescriptive jurisdiction over offences committed abroad by foreigners.⁵⁵ This jurisdictional gap reflects the absence of a broad conception of universal jurisdiction (customary or treaty based) at the time the *Convention* was adopted.⁵⁶ This first attempt to address the difficulties in bringing transnational terrorists to justice, limited by the stage of development of the international legal system at the time, has been improved upon. The modern version of the obligation to extradite or submit to prosecution in the TSCs is supported by an obligation to establish universal jurisdiction over defined offences, and to exercise that jurisdiction (whether through extradition or submission to prosecution) whenever an alleged offender is in a state party's territory.⁵⁷ Subject to the extent of ratification of the TSCs, the result should be

53 *League of Nations Terrorism Convention* arts 8–9.

54 Initial proposals were to make the 'extradite or prosecute' obligation mandatory and without exception (but subject to some form of complementarity of jurisdiction, in that prosecution before an international criminal court with jurisdiction over terrorist offences was envisaged). Such proposals were unsuccessful, principally because the political climate reigning at the time meant that states sought to retain the flexibility to refuse extradition on the basis of the political offence exception: see, eg, *Proceedings of the International Conference on the Repression of Terrorism*, LN Doc C.94.M.47.1938.V, 52–4, 62; League of Nations Assembly, 'Records of the Seventeenth Ordinary Session of the Assembly: Minutes of the First Committee' (1936) Special Supplement No 156 *League of Nations Official Journal* 1, 33, 37, 39–41, 43, 48; League of Nations, *International Repression of Terrorism: Observations by Governments on Draft Convention for the Prevention and Punishment of Terrorism; Draft Convention for the Creation of an International Criminal Court*, Series I, LN Doc A.24.1936.V (1936), 11; Geoffrey Marston, 'Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937' [2002] *British Yearbook of International Law* 293, 311; Saul, above n 34, 21–2; Lambert, above n 40, 29. As a result, extradition was 'subject to any conditions and limitations recognised by the law or the practice of the country to which application is made': *League of Nations Terrorism Convention* art 8(4). See also Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 86–7.

55 *League of Nations Terrorism Convention* art 10. See in particular Poland's comments during negotiation of the Convention, highlighting these potential 'loop-holes which would make it possible for acts of terrorism to go unpunished, contrary to the intention of the Convention': League of Nations, *International Repression of Terrorism: Observations by Governments on Draft Convention for the Prevention and Punishment of Terrorism; Draft Convention for the Creation of an International Criminal Court*, Series II, LN Doc A.24(a).1936.V (1936).

56 Universal jurisdiction was, at the time, only recognised vis-à-vis piracy. See American Law Institute, *Restatement of the Law – Second: Foreign Relations Law of the United States* (American Law Institute, 1965) 94–7; *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 69–71 (Dissenting Opinion of Judge Moore); *United States v Layton*, 509 F Supp 212, 223 (Chief Judge Peckham) (ND Cal 1981).

57 The TSCs require states to establish prescriptive jurisdiction over relevant terrorist crimes – even in the absence of any other jurisdictional nexus: *Hague Convention* art 4(2); *Montreal Convention* art 5(2); *Internationally Protected Persons Convention* art 3(2); *Hostages Conventions* art 5(2); *SUA Convention* art 6(4); *Terrorist Bombing Convention* art 6(4); *Terrorism Financing Convention* art 7(4); *Nuclear Terrorism Convention* art 9(4). On whether the TSCs require the exercise of 'universal jurisdiction' properly so called, or merely 'jurisdiction to establish a territorial jurisdiction over persons for

that there are no safe havens, because (having exercised prescriptive jurisdiction on a universal basis) states parties will always be in a position to extradite (in a way that meets the double criminality rule) or to submit to prosecution, irrespective of the transnational nature of the crime and even in the absence of any other jurisdictional nexus.

This one example illustrates the benefit of the sectoral approach to treaty making here under discussion. If a comprehensive terrorism suppression convention is adopted, it will limit the need to adopt further treaties, or at least make their adoption more difficult to justify – but it will of course be a creature of its time, as the *League of Nations Terrorism Convention* would have been. In the last 40 years (from when the first of the modern TSCs was adopted), international law has developed (perhaps even exponentially) – in the increasingly central role of human rights, shifts in the *jus in bello* which convert self-determination conflicts into international armed conflicts to which the full body of IHL applies, and the emergence of a body of law which shifts the balance from absolute state discretion in criminal matters towards an end to impunity for international crimes (in the form of international criminal law). Had a comprehensive terrorism suppression convention been adopted when non-state terrorism first called for international co-operation (in 1970), it would have been responsive to potential developments in the use of terrorist violence, but would not have been responsive to human rights, *jus in bello* and international criminal law developments.

It is true that TSCs negotiated since the first ICAO TSCs have not changed in their core obligations. All the TSCs include an obligation to criminalise a particular manifestation of terrorist conduct; the obligation to establish jurisdiction over such terrorist crimes (including universal jurisdiction in the absence of any other connection to the crime); the obligation to extradite or submit alleged offenders to prosecution; and the obligation to co-operate in the prevention of that terrorist crime.⁵⁸ The relative endurance of these core obligations, and the premium states parties place on consistency in language and core approach within the TSC regime, is a credit to those who negotiated the ICAO TSCs. But, as discussed above, there has been a great deal of ‘collateral’ international law development in the last 40 years. These developments are at the margins of the core TSC obligations – they do not affect the nature or substance of the core obligations per se, but colour the way in which those core obligations are to be complied with. The fact that the terrorism suppression regime has been adopted over time has enabled states to respond to these developments in each new incarnation of the first ICAO TSC.

extraterritorial events’, see Kimberley N Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford University Press, 2011) 83 n 107.

58 See *Hague Convention* arts 1, 2, 4, 7 (the obligation to co-operate in the prevention of the proscribed terrorist conduct is absent in this *Convention*); *Montreal Convention* arts 1, 3, 5, 7, 10; *Internationally Protected Persons Convention* arts 2–4, 7; *Hostages Convention* arts 1, 2, 4, 5, 8; *SUA Convention* arts 3, 5, 6, 10, 13; *Terrorist Bombing Convention* arts 2, 4, 6, 8, 15; *Terrorism Financing Convention* arts 2, 4, 7, 10, 18; *Nuclear Terrorism Convention* arts 2, 5, 7, 9, 11.

A very good example of this advantage to reactive treaty making in the terrorism context is in reference to the obligation to extradite or submit to prosecution. The obligation has remained stable in its formulation – requiring states to do so ‘without exception whatsoever’, yet also expressly subjecting extradition to the national laws of states parties⁵⁹ (which may include an exception for political offences). As a result, absent more express language, a state’s discretion to refuse extradition on the basis of (for instance) the political offence exception should not be presumed to be limited. This freedom to refuse extradition was of course much debated in regard to each TSC, and the positions adopted by states tracked the broader debates on the relationship between terrorism suppression and the right of self-determination. Slowly, however, as qualifications to the ways and means of exercising the rights of self-determination were accepted (in the form of regime interaction between terrorism suppression and self-determination through the *jus in bello*, discussed further below), so too were qualifications to the sovereign discretion of each state to refuse extradition.

This changing relationship between terrorism suppression on the one hand, and a broad ‘any means to a justified end’ approach to self-determination and the concomitant insistence on a broad right to refuse extradition (on the basis of the political offence exception in support of such a means/end approach) on the other, can be tracked through General Assembly resolutions.⁶⁰ The General Assembly’s later and much stricter approach to ensuring there was no possibility for impunity in the terrorism context, itself a reflection of broader developments in international criminal law, greatly influenced the negotiation of the TSCs adopted after 1996, in particular as regards the obligation to extradite or submit to prosecution and the political offence exception. Because the balance between ending impunity for terrorists and protecting the right of peoples to use whatever means available in their struggle for self-determination had shifted, the *Terrorist Bombing Convention* (and all TSCs negotiated thereafter) includes an explicit

59 See *Hague Convention* arts 7, 8; *Montreal Convention* arts 7, 8; *Internationally Protected Persons Convention* arts 7, 8; *Hostages Convention* arts 8, 10; *SUA Convention* arts 10, 11; *Terrorist Bombing Convention* arts 8, 9; *Terrorism Financing Convention* arts 10, 11; *Nuclear Terrorism Convention* arts 11, 13. States negotiating the *Hague Convention* (the TSC which first used this language, replicated in all subsequent TSCs) were divided regarding its effect on the availability of the political offence exception as a basis for refusing extradition – both sides considered the language a victory: ICAO, *International Conference on Private Air Law (1970–1971): Sixteenth Meeting of the Commission of the Whole*, ICAO Doc 8979-LC/165-1 (11 December 1970) vol 1 [8]–[47].

60 The General Assembly’s earliest resolutions addressing terrorism suppression did not unequivocally condemn acts of terrorism, but did clearly reaffirm the inalienable right to self-determination. See, eg, *Measures to Prevent International Terrorism*, GA Res 32/147, UN GAOR, 32nd sess, 105th plen mtg, Agenda Item 118, Supp No 45, UN Doc A/RES/32/147 (16 December 1977) paras 3–4. By 1996, however, in a supplement to its *Declaration to Eliminate Terrorism*, the General Assembly encouraged states,

when concluding or applying extradition agreements, *not to regard as political offences excluded from the scope of those agreements offences connected with terrorism which endanger or represent a physical threat to the safety and security of persons, whatever the motives which may be invoked to justify them.*

Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, GA Res 51/210, UN GAOR, 51st sess, 88th plen mtg, Agenda Item 151, Supp No 49, UN Doc A/RES/51/210 (17 December 1996) annex, para 6 (emphasis added).

provision that the offences set forth in the Convention *shall not* be regarded, for the purposes of extradition or mutual legal assistance, as political offences – and a request for extradition may not be refused on the sole ground that it concerns a political offence.⁶¹ In addition, the *Terrorist Bombing Convention* and subsequent TSCs provide that:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention [...] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial ethnic, religious or other similar nature [...].⁶³

This is not to say that all controversy regarding the political offence exception, or the distinction between terrorism and self-determination, vanished. There were proposals on self-determination⁶⁴ and on specifically preserving a state's right to refuse extradition for political offences during negotiation of the

61 *Terrorist Bombing Convention* art 11; *Terrorism Financing Convention* art 14; *Nuclear Terrorism Convention* art 15.

62 The *Terrorist Bombing Convention* and *Nuclear Terrorism Convention* contain language which art 6 of the *Terrorism Financing Convention* does not: 'in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons'. *Terrorist Bombing Convention* art 5; *Nuclear Terrorism Convention* art 6.

63 See, eg, *Terrorist Bombing Convention* art 5; *Terrorism Financing Convention* art 6; *Nuclear Terrorism Convention* art 5. While the language is new to the TSCs, it has long been part of the General Assembly's discourse on international terrorism: see *Declaration on Measures to Eliminate International Terrorism*, GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, Agenda Item 142, Supp No 49, UN Doc A/RES/49/60 (9 December 1994) annex, art I(3); *GA Establishment of Ad Hoc Committee of 51/210*, UN Doc A/RES/51/210, para 2; GA Res 55/158, UN GAOR, 55th sess, 84th plen mtg, Agenda Item 164, Supp No 49, UN Doc A/RES/55/158 (12 December 2000) para 2; *Measures to Eliminate International Terrorism*, GA Res 57/27, UN GAOR, 57th sess, 52nd plen mtg, Agenda Item 160, Supp No 49, UN Doc A/RES/57/27 (19 November 2002) para 2; *Measures to Eliminate International Terrorism*, GA Res 58/81, UN GAOR, 58th sess, 72nd plen mtg, Agenda Item 156, Supp No 49, UN Doc A/RES/58/81 (9 December 2003) para 2; and has recently made its way into Security Council resolutions. The Security Council adopted language unequivocally condemning all acts of terrorism regardless of irrespective of their motivation in SC Res 1269, UN SCOR, 4053rd mtg, UN Doc S/RES/1269 (19 October 1999) Preamble para 1; SC Res 1377, UN SCOR, 4413th mtg, UN Doc S/RES/1377 (12 November 2001) annex, Preamble; SC Res 1456, UN SCOR, 4688th mtg, UN Doc S/RES/1456 (20 January 2003) annex, Preamble. Later, the Security Council adopted the language of the GA resolutions verbatim by recalling that terrorist acts 'are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature' (emphasis added): see, eg, SC Res 1566, UN SCOR, 5053rd mtg, UN Doc S/RES/1566 (8 October 2004) para 3. Since then, it has gone back to stating that 'acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed': see, eg, SC Res 1617, UN SCOR, 5244th mtg, UN Doc S/RES/1617 (29 July 2005) Preamble; SC Res 2133, UN SCOR, 7101st mtg, UN Doc S/RES/2133 (27 January 2014) Preamble; SC Res 2249, UN SCOR, 7565th mtg, UN Doc S/RES/2249 (20 November 2015) Preamble.

64 *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of December 1996*, UN GAOR, 52nd sess, Supp No 37, UN Doc A/52/37 (31 March 1997) annex III, 38 ('Proposal by Pakistan', UN Doc A/AC.252/1997/WP.16, [10]) ('1997 Report'). See also *Report of the Working Group: Measures to Eliminate International Terrorism*, UN GAOR, 6th Comm, 52nd sess, Agenda Item 152, UN Doc A/C.6/52/L.3 (10 October 1997) annex II, 19 ('Proposal Submitted by the Syrian Arab Republic', UN Doc A/C.6/52/WG.1/CRP.4, [5]) ('1997 Working Group Report'). After the fact, the Libyan Arab Jamahiriya noted its position that nothing in the *Terrorist Bombing Convention* could be interpreted as prejudicial to those who were struggling against foreign occupation: *Summary Record*, UN GAOR, 6th Comm, 52nd sess, 33rd mtg, Agenda Items 152 and 149, UN Doc A/C.6/52/SR.33 (2 December 1997) 8 [69] ('1997 Summary Record').

Terrorist Bombing Convention.⁶⁵ These proposals were simply not reflected in the final *Convention* – which was nevertheless adopted by consensus.

The new language regarding the political offence exception was adopted with a view to ensuring there is no impunity for defined terrorist crimes. But the broader concerns underlying the development of the exception – namely that domestic prosecutions not be targeted selectively against a government's political enemies – still remained. This concern, however, has been addressed in TSCs from the adoption of the *Hostages Convention* – which includes a proviso that the request for extradition shall not be granted if the requested state has substantial grounds for believing that the request was made for the purpose of prosecuting or punishing on account of race, religion, nationality, ethnic origin or political opinion.⁶⁶ The initial ICAO TSCs (the *Hague Convention* and *Montreal Convention*) and the *SUA Convention* (modelled very closely on the ICAO TSCs) did not contain this provision – negotiated as they were in specialised UN agencies and outside of the intensely political context of the UN (with its focus on the relationship between terrorism and self-determination). The 21st century Protocols which amend the ICAO TSCs and *SUA Convention*, however, do contain this provision⁶⁷ – emphasising the premium placed on consistency within the terrorism suppression regime and the progressive iterations of obligations that are collateral to the core extradite or submit to prosecution obligation.

This reactive sectoral approach has allowed for the evolution of international attitudes towards the scope of a state's discretion in regard to the obligation to extradite or submit to prosecution to be reflected in treaty obligations. In particular, had a comprehensive terrorism suppression convention been adopted from the outset of the international community's focus on non-state terrorism (in 1970), it is unlikely that it would have denied states the right to refuse extradition on the basis of the political offence exception. While treaties can be interpreted in light of developments in international law, most particularly in reliance on article 31(3)(c) of the *VLCT*, the capacity to modernise treaties through interpretation is restricted in the face of clear language which preserves a state's discretion (as do the TSCs adopted prior to the *Terrorist Bombing Convention*). Similarly, reliance on subsequent state practice in the application of a treaty⁶⁸ would have been of little assistance in updating a comprehensive terrorism suppression convention to

65 1997 Report, UN Doc A/52/37, annex III, 40–1 ('Proposal Submitted by France', UN Doc A/AC.252/1997/WP.21). France's proposal is surprising given that France submitted the initial draft of the *Terrorist Bombing Convention* on behalf of the Group of Seven major industrialised countries and the Russian Federation: see at annex II, 20–8 ('Preliminary Working Document Submitted by France on Behalf of the Group of Seven Major Industrialized Countries on Behalf of the Russian Federation', UN Doc A/AC.252/L.2), without any carve-out from the *aut dedere aut judicare* obligations for the political offence exception.

66 *Hostages Convention* art 9(1); *Terrorist Bombing Convention* art 12; *Terrorism Financing Convention* art 15; *Nuclear Terrorism Convention* art 16. This proviso tracks the language in art 3(b) of the *Model Treaty on Extradition*, GA Res 45/116, UN GAOR, 45th sess, 68th plen mtg, Agenda Item 100, Supp No 49, UN Doc A/RES/45/116 (14 December 1990) annex.

67 *SUA Convention* art 11ter, as inserted by *2005 Protocol to the SUA Convention* art 10(3); *Beijing Convention* art 14; *Hague Convention* art 8ter, as inserted by *2010 Protocol to the Hague Convention* art 13.

68 *VLCT* art 31(3)(b).

reflect the modern shift away from state discretion where such discretion undermines the increasingly pervasive ‘no impunity’ project. This is particularly the case because practice would be in the form of an omission (the absence of an invocation of the political offence exception as a basis for refusing extradition) and a state’s failure to act, on its own, might be considered insufficient to constitute evidence of *opinio juris* as to the existence of a prohibition.⁶⁹ In other respects, however, treaty interpretation might well have been the vehicle for updating a comprehensive terrorism suppression convention adopted in 1970, limiting the extent to which the benefits of a sectoral approach – in its capacity to reinvent a core set of obligations over time in keeping with the development of international law – is worth the costs of such an approach (both in terms of the lack of comprehensive coverage and in terms of the coherence of the regime, as discussed further below). For instance the non-persecution obligations in regard to extradition, as an instantiation of customary international human rights law, could well have been read into a comprehensive convention in reliance on article 31(3)(c) of the *VCLT*.

IV COHERENCE OF THE TERRORISM SUPPRESSION REGIME?

As discussed above, the benefit of a sectoral treaty regime is that it facilitates the progressive development of treaty obligations over time. The flipside of that benefit is, of course, measured in terms of the coherence of the regime. The overall aim of the terrorism suppression regime – to impose criminal liability for transnational terrorist crimes of concern to the international community – is met in varying degrees, depending on the nature of the terrorist conduct in question and the stage of international law development at the time of a particular TSC’s adoption. For instance, a state might refuse to extradite a non-state actor accused of hostage taking on the basis of the political offence exception (because a state’s discretion is not limited in this regard under the *Hostages Convention*), where it could not do so in regard to a terrorist bombing (because the *Terrorist Bombing Convention* prohibits invocation of the political offence exception as a basis for refusing extradition).

This lack of coherence is also evident in regard to the regime interaction principles which the TSCs give effect to. The crimes addressed in some of the TSCs are crimes that non-state or state actors might engage in during armed conflicts (to which humanitarian law would also apply), and that state actors might engage in as a matter of the *jus ad bellum*. As a result of this overlap in potentially applicable legal regimes, the TSCs designate which regime of international law should apply to conduct which meets the elements of the terrorist offences defined therein but is carried out in different factual contexts.

69 The approach taken in *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 19–21 was reaffirmed by the Court in its *Kosovo Advisory Opinion*: see Judge Simma’s critique of the majority opinion on this point: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 478 [2] (Declaration of Judge Simma).

As each TSC was modelled on those adopted before it, but was responsive to the particular nature of the terrorist conduct being addressed and the international legal framework in existence at the time of negotiation, the TSCs reflect very different approaches to regime interaction.

The approach of any particular TSC to regime interaction results in part from the different nature of the activities addressed – hostage-taking for instance is absolutely prohibited during armed conflict; whereas a particular bombing may or may not be prohibited under IHL (depending on the circumstances and nature of the target). That some conduct is absolutely prohibited in both armed conflicts and peacetime, while other conduct may be lawful during an armed conflict while it would nevertheless be an act of terrorism in peacetime, naturally affects the approach to regime interaction, as discussed further below. The differences in approach to regime interaction also result, however, from the focus of negotiations – ranging from a focus on no impunity (in respect of conduct that is absolutely prohibited whatever the factual context within which it occurs) to one whereby states seek to protect their own armed forces from potential prosecutions abroad (in respect of conduct that may or may not be lawful, calling for one state's assessment of another's international law compliance). As a result of these differences, the TSCs achieve the aim of imposing criminal liability for transnational terrorist crimes (whether carried out by NSAs or state actors)⁷⁰ to varying degrees. Comparing the *Hostages Convention* with the *Terrorist Bombing Convention* serves to illustrate the issue.

The *Hostages Convention* was the first of the TSCs to address regime interaction issues – in particular whether criminal responsibility should be imposed on NSAs exercising their right to self-determination. As discussed above, this debate was framed in terms of the definition of 'hostage-taking',⁷¹ but

70 It can be argued that the TSCs apply to state conduct (to the extent not excluded from the relevant TSC by a regime interaction clause, as discussed in this Part) on the basis of a *Bosnia Genocide Case* analysis: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43; see Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice', above n 16.

71 Several NAM delegates proposed that the *definition* of hostage-taking excludes 'any acts carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations': *Hostages Records*, UN Doc A/32/39, annex II, 111 ('Working Paper Submitted by Lesotho and the United Republic of Tanzania, Later Joined by Algeria, Egypt, Guinea, the Libyan Arab Jamahiriya and Nigeria', UN Doc A/AC.188/L.5). See also Tanzania's comment: 'The oppressed peoples and colonial peoples who were held in perpetual bondage could not be stopped from taking [their] oppressors hostage, if that became inevitable': at annex I, 35–6 ('8th Meeting', UN Doc A/AC.188/SR.8 (10 August 1977) [28]–[29] (Tanzania)). See also at 30–1, 35–7 ('8th Meeting', UN Doc A/AC.188/SR.8 (10 August 1977) [1]–[6] (Algeria), [24] (Lesotho), [31] (Syrian Arab Republic)), 28 ('7th Meeting', UN Doc A/AC.188/SR.7 (9 August 1977) [12] (Yugoslavia)), 39 ('9th Meeting', UN Doc A/AC.188/SR.9 (11 August 1977) [10] (Libyan Arab Jamahiriya)), 54 (11th Meeting', UN Doc A/AC.188/SR.11 (12 August 1977) [16] (Lesotho)), 95 ('17th Meeting', UN Doc A/AC.188/SR.17 (17 August 1977) [21] (USSR)). Some states, however, understood well that the self-determination question was one about regime interaction. In particular, Yemen stated that 'either there would be an internationally accepted convention against the taking of hostages *which did not apply* to acts carried out by recognized national liberation movements in the course of their struggle, or there would be no convention at all': at 83–4 ('15th Meeting', UN Doc A/AC.188/SR.15 (16 August 1977) [5] (Yemen)) (emphasis added). In characterising the question as one regarding the scope of application,

was in fact both in substance and in the compromise adopted about regime interaction. The position finally adopted in the *Hostages Convention* was intimately linked to the negotiated settlement of an IHL treaty only a few years earlier – in particular *API*. In extending the legal definition of international armed conflict (as set out in Common Article 2 of the *1949 Geneva Conventions*) to armed conflicts in which peoples are fighting in exercise of their right of self-determination,⁷² *API* imposes the full range of obligations applicable in international armed conflicts on freedom fighters (including the prohibition of taking hostages).⁷³ Indeed *GCIV* defines hostage-taking as a grave breach – resulting in the applicability of the criminal law enforcement obligations of the *Geneva Conventions* (including obligations to establish universal jurisdiction and extradite or prosecute) to such conduct.⁷⁴ Were the *Hostages Convention* to carve out the conduct of those exercising their right of self-determination from the scope of the definition of ‘hostage-taking’ (or the scope of the *Convention* itself), it would have adopted a very different approach to the individual criminal responsibility of hostage takers to that reflected in *API*.⁷⁵ Instead, it was accepted that hostage taking was a prohibited method under international law⁷⁶ to which individual criminal responsibility should attach.

As a result, the principal issue during negotiation became which criminal law enforcement regime (that of the *Geneva Conventions* and *API*, or that of

Yemen’s approach looks more like one about regime interaction (as discussed further below) than one about definition.

72 The extension of the definition of international armed conflict in *API* art 1(4) is subject to a declaration by the authority representing a people: *API* art 96(3).

73 *API* art 75(2)(c). The prohibition on taking protected persons (in particular civilians and combatants who are *hors de combat* but otherwise not protected by the first three *Geneva Conventions*) hostage is also set out in *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 7 UNTS 287 (entered into force 21 October 1950) art 34 (‘*GCIV*’).

74 *GCIV* arts 146–7.

75 *Hostages Records*, UN Doc A/32/39, annex I, 16 (‘3rd Meeting’, UN Doc A/AC.188/SR.3 (3 August 1977) [25] (Germany)), 41–2 (‘9th Meeting’, UN Doc A/AC.188/SR.9 (11 August 1977) [24] (USA)), 60–2 (‘12th Meeting’, UN Doc A/AC.188/SR.12 (12 August 1977) [4] (UK), [11] (USA)), 70 (‘13th Meeting’, UN Doc A/AC.188/SR.13 (15 August 1977) [9] (Germany)), 80–1 (‘14th Meeting’, UN Doc A/AC.188/SR.14 (15 August 1977) [43] (Mexico)); *Report of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages*, UN GAOR, 33rd sess, Supp No 39, UN Doc A/33/39 (4 May 1978) annex, 68 (‘28th Meeting’, UN Doc A/AC.188/SR.28 (24 February 1978) [10] (Italy)) (‘*Hostages Records 2*’).

76 As stated by the Chairman of one of the negotiating Ad Hoc Committee’s meetings:

even the proponents of safeguards for the rights of national liberation movements had maintained that they were in no way suggesting that those movements should be granted an open licence to take hostages. However, it had been pointed out that a clear distinction should be drawn in the convention between genuine activities of national liberation movements and acts of terrorist groups which had nothing in common with them.

See *Hostages Records 2*, UN Doc A/33/39 annex, 58 (‘26th Meeting’, UN Doc A/AC.188/SR.26 (15 February 1978) [3]). Similarly, Algeria clarified that it ‘had no intention of giving a blank cheque for hostage-taking to any group or entity whatever. As parties to international armed conflicts, national liberation movements were subject to the law of war, which in essence prohibited acts of hostage-taking’: see at 66 (‘28th Meeting’, UN Doc A/AC.188/SR.28 (24 February 1978) [4]); *Hostages Records*, UN Doc A/32/39, annex, 51–2 (‘11th Meeting’, UN Doc A/AC.188/SR.11 (12 August 1977) [5]–[6] (Mexico)).

terrorism suppression) should apply. Compromise on the self-determination issue therefore took the form of a regime interaction clause:

In so far as the *Geneva Conventions of 1949* for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the *Geneva Conventions of 1949* and the Protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of *Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination ...*⁷⁷

Article 12 of the *Hostages Convention* does not in any way exclude the criminal responsibility of hostage-takers engaged in a struggle for self-determination; rather, the compromise shifts the source of the state's obligation to prosecute or extradite such a person.⁷⁸ To the extent that a state is under an obligation to prosecute or extradite a hostage-taker under the *1949 Geneva Conventions* or *API*,⁷⁹ they will not also have an obligation to do so under the *Hostages Convention*. To the extent that IHL does not impose an *aut dedere aut judicare* obligation in respect of a particular hostage-taking (most likely because the hostage-taking is committed during the course of a non-international armed conflict to which the grave breaches regime does not apply, or during a struggle for self-determination in a state which is not party to *API*), the *Hostages Convention* will be the source of the *aut dedere aut judicare* obligation. As such, no instance of hostage-taking is exempt from the obligation to extradite or prosecute. This regime interaction clause, premised on the absolute nature of the prohibition and conceptions of the appropriate regime for criminal responsibility, is in keeping with a terrorism suppression regime defined in terms of 'no impunity'.

77 *Hostages Convention* art 12 (emphasis added) (citations omitted). For a further discussion of art 12 of the *Hostages Convention*, see Wil D Verwey, 'The International Hostages Convention and National Liberation Movements' (1981) 75 *American Journal of International Law* 69, 76.

78 Some commentators have nevertheless interpreted art 12 of the *Hostages Convention* as legitimising hostage-takings committed in furtherance of a struggle for self-determination: see Grant Wardlaw, *Political Terrorism: Theory, Tactics, and Counter-Measures* (Cambridge University Press, 1982); Clive C Aston, 'The United Nations Convention against the Taking of Hostages: Realistic or Rhetoric?' (1982) 5 *Terrorism* 139, 156.

79 The obligation to prosecute or extradite persons accused of grave breaches of the *Geneva Conventions* can be found in: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) arts 49–50; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 129; *GCIV* art 146 (together with the other treaties in this note, the '*1949 Geneva Conventions*'). The extradite or prosecute obligation will only apply to hostage-takings committed by NSAs in the course of an armed conflict involving a struggle for self-determination to the extent that the state party to the armed conflict is a party to *API* (and the resulting legal re-characterisation of the non-international self-determination armed conflict into an international armed conflict under *API* to which the *1949 Geneva Conventions* then apply: *API* art 1(4)).

Subsequent TSC regime interaction clauses, however, were less focused on the ‘no impunity’ project and the appropriate regime for the imposition of criminal responsibility for unlawful conduct, and more focused on states’ efforts to ensure that their own armed forces were not caught up in the terrorism suppression framework of criminal law enforcement. In particular, the *Terrorist Bombing Convention*, addressing as it does *actus reus* elements that a state’s military forces might engage in, reflects an entirely different negotiated settlement on regime interaction.

As with all of the TSCs, and indeed the comprehensive terrorism suppression convention,⁸⁰ there were of course proposals to exclude acts committed in furtherance of a people’s right of self-determination from the scope of the *Terrorist Bombing Convention*.⁸¹ The principal focus of negotiation, however, was on the conduct of a state’s military forces.⁸² NAM states generally held the view that only the activities of a state’s armed forces carried out *in compliance* with international law should be excluded from the scope of the *Terrorist Bombing Convention*,⁸³ the result of which would have been that all state military activity within the scope of the *Convention* in breach of IHL would *also* fall within the scope of the terrorism suppression regime. Any state party to the *Terrorist Bombing Convention* could therefore exercise universal jurisdiction in respect of members of the armed forces of another state where there were credible allegations that they had detonated a bomb in breach of IHL obligations. There was much resistance to this proposal by Western states, who exerted a great deal of pressure during the negotiations, not least because it was being negotiated in a crisis context of increasingly serious transnational bombings carried out by NSAs. Ultimately the urgency of the need to address terrorist bombings⁸⁴ resulted in the *Terrorist Bombing Convention* being adopted without reflecting either the self-determination or the ‘lawful State conduct’ exclusion proposals. The *Terrorist Bombing Convention* does however exclude the activities of armed forces during an armed conflict (as such terms are understood

80 For a discussion of comprehensive terrorism suppression conventions, see above nn 47–8 and accompanying text.

81 *1997 Working Group Report*, UN Doc A/C.6/52/L.3, annex II, 19 (‘Proposal Submitted by the Syrian Arab Republic’, UN Doc A/C.6/52/WG.1/CRP.4, [5(b)]), 31 (‘Proposal Submitted by Egypt’, UN Doc A/C.6/52/WG.1/CRP.28).

82 *1997 Report*, UN Doc A/52/37, annex IV, 53–5 [38]–[56].

83 *Ibid* annex IV, 53 [44]. See, eg, *1997 Summary Record*, UN Doc A/C.6/52/SR.33, 5 [45] (Pakistan), 6 [52] (Iran), 6 [54] (Iraq), 8 [70] (Libya), 8 [74] (Lebanon). See also *1997 Working Group Report*, UN Doc A/C.6/52/L.3, annex II, 19 (‘Proposal Submitted by the Syrian Arab Republic’, UN Doc A/C.6/52/WG.1/CRP.4, [5]).

84 See, eg, *1997 Report*, UN Doc A/52/37, annex II, 22 (‘Preliminary Working Document Submitted by France on Behalf of the Group of Seven Major Industrialized Countries and the Russian Federation’, UN Doc A/AC.252/L.2, annex, art 3), annex III, 33–4 (‘Revised Proposal Submitted on Behalf of the Group of Seven Major Industrialized Countries and the Russian Federation’, UN Doc A/AC.252/1997/WP.12); *1997 Summary Record*, UN Doc A/C.6/52/SR.33, 2 [4] (Australia), 3 [16] (Italy), 3 [17] (Czech Republic), 3 [18] (USA), 3–4 [23] (Finland).

in IHL⁸⁵) from the scope of the Convention. The exclusion clause in article of the 19(2) of the *Terrorist Bombing Convention*, reads as follows:

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

The exclusion is not conditioned on the applicability of an alternative criminal law enforcement regime. As a result, the mere existence of international law touching on the conduct (even if the applicable rules designate the conduct as unlawful, but do not impose any criminal law enforcement obligations with respect thereto) is sufficient to exclude it from the scope of the *Terrorist Bombing Convention*. And as long as the bombing is carried out in the context of (and connected to) an international or non-international armed conflict, there will indeed be international law touching on the conduct.

Bombings which are in compliance with IHL⁸⁶ are excluded from the scope of the *Terrorist Bombing Convention*, and will *not* be subject to any *aut dedere aut judicare* obligation (under the *Terrorist Bombing Convention* because of the exclusion, and under IHL because of its compliance) – and this is exactly as it should be. If international law is to preserve the integrity of IHL and its balance between military necessity and considerations of humanity, the negotiated settlement of the 1949 Geneva Conventions and API should not be reopened under the guise of terrorism suppression. Had there been no Article 19 exclusion from the scope of the *Terrorist Bombing Convention*, it would have imposed obligations on states parties which are inconsistent with their obligation to respect combatant's immunity vis-à-vis state armed forces in international armed conflicts, or would potentially disincentivise organised armed forces of NSAs from complying with IHL.⁸⁷

However, bombings which are in breach of IHL, carried out by an organised armed group of NSAs or a state's armed forces in the course of a non-international armed conflict, are *not* subject to an *aut dedere aut judicare* obligation under IHL. Nor are bombings in breach of IHL carried out by a people fighting in exercise of its right of self-determination (*unless* the territorial state

85 While art 12 of the *Hostages Convention* defines its terms in reference to the *Geneva Conventions and Additional Protocols*, the *Terrorist Bombing Convention* defines 'armed conflict' and 'armed forces' in reference to IHL generally, and thereby incorporates by reference (for definitional purposes) customary international humanitarian law as well.

86 For instance, if the bombing is justified by military necessity (*GCIV* art 53), or only targets objects which make an effective contribution to military action (*API* arts 52, 85(3)(a)) or any incidental loss of civilian life or damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated from the bombing (*API* arts 50, 52, 57(2)(iii), 85(3)(b)–(c)), it is not in breach of IHL, is therefore (obviously) not a grave breach of the 1949 Geneva Conventions or API, and is not subject to an extradite or prosecute obligation.

87 See Kimberley N Trapp, 'R v Mohammed Gul: Are You a Terrorist if You Support the Syrian Insurgency?' on *EJIL: Talk!* (14 March 2012) <<http://www.ejiltalk.org/r-v-mohammed-gul-are-you-a-terrorist-if-you-support-the-syrian-insurgency/>>.

has ratified *API*,⁸⁸ and most bombings in breach of IHL carried out by states that are not party to *API*.⁸⁹ As a result, in cases where IHL targeting obligations are

88 The grave breaches regime of the 1949 *Geneva Conventions* and *API* (imposing an *aut dedere aut judicare* obligation on states in respect of conduct defined as a grave breach of those conventions) only applies to international armed conflicts. There is no grave breaches regime in respect of breaches to common article 3 of the 1949 *Geneva Conventions* (the only provision to apply to non-international armed conflicts) or the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978). Finally, a conflict of self-determination, in which a people is fighting against a government, is a non-international armed conflict unless the state in whose territory the conflict is being fought has ratified *API* (and the representative of the people has made an art 96 *API* declaration). While there is increasing evidence that states claim a *right* to prosecute breaches of IHL committed during non-international armed conflicts (see Thomas Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts' (1998) 38 *International Review of the Red Cross* 29; *Jugement en la cause Fulgence Niyonteze*, Tribunal Militaire de Division 2, Armée Suisse Justice Militaire (Lausanne, 30 April 1999); *The Four from Butare Case*, Court of Cassation (Belgium, 9 January 2002)), there is as of yet no customary international law *obligation* to prosecute breaches of IHL committed in the context of non-international armed conflicts on the basis of universal jurisdiction: see *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) [80]; Liesbeth Zegfeld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002) 175; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 235; Lindsay Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) 7 *Journal of International Criminal Justice* 763. In relation to the inexistence of such a customary obligation for international crimes more generally, see *Report of the International Law Commission: Sixty-Sixth Session (5 May – 6 June and 7 July – 8 August 2014)*, UN GAOR, 69th sess, Supp No 10, UN Doc A/69/10 (2014) 160–1; *Summary Record*, UN GAOR, 6th Comm, 62nd sess, 22nd mtg, Agenda Item 82, UN Doc A/C.6/62/SR.22 (4 December 2007) 11 [55] (Austria), 11 [58] (Argentina), 16 [82] (Germany); *Summary Record*, UN GAOR, 6th Comm, 62nd sess, 23rd mtg, Agenda Item 82, UN Doc A/C.6/62/SR.23 (6 December 2007) 3 [14] (Malaysia); *Summary Record*, UN GAOR, 6th Comm, 62nd sess, 24th mtg, Agenda Item 82, UN Doc A/C.6/62/SR.24 (13 December 2007) 7 [35] (Greece), 11 [63] (UK), 14 [82]–[84] (Russian Federation); *Summary Record*, UN GAOR, 6th Comm, 64th sess, 22nd mtg, Agenda Items 81 and 79, UN Doc A/C.6/64/SR.22 (8 February 2010) 15 [85] (Thailand); *Summary Record*, UN GAOR, 6th Comm, 64th sess, 23rd mtg, Agenda Item 81, UN Doc A/C.6/64/SR.23 (18 December 2009) 9 [50] (USA); Zdzislaw Galicki, Special Rapporteur, International Law Commission, *The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare): Second Report on the Obligation to Extradite or Prosecute*, 59th sess, Agenda Item 6, UN Docs A/CN.4/585 and Corr.1 (11 June 2007) 74 [54]. Both empirical and policy reasons can be identified for this. Not only is there insufficient state practice, but states are also concerned that their sovereign discretion in matters of extradition and extraterritorial jurisdiction would be limited in an undesirable manner should such an obligation apply to purely domestic situations: see Raphaël van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying Its Nature' (2011) 9 *Journal of International Criminal Justice* 1089, 1103.

89 Most of the regulation of methods and means of warfare – which would define the lawfulness of a particular bombing – are found in *API* (and not the *Geneva Conventions*). But the grave breaches criminal law enforcement obligations of *API* are not binding as a matter of customary international law, even if the substantive obligations (which would apply to bombings) are. See Claire Mitchell, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law* (Graduate Institute, 2009) ch 1; Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 25–8 (rule 7), 37–40 (rule 11), 58–60 (rule 18); Jean-François Quéguiner, 'Precautions under the Law Governing the Conduct of Hostilities' (2006) 88 *International Review of the Red Cross* 793. The one exception is in reference to a bombing by state armed forces which results in 'extensive destruction ... of property [protected by *GCIV*], not justified by military necessity and carried out unlawfully and wantonly' – which will be subject to an *aut dedere aut judicare* obligation under art 147 of *GCIV*. As the *Geneva Conventions* are

breached (which breach is co-extensive with the definition of a terrorist bombing under the *Terrorism Bombing Convention*), there will be no IHL criminal law enforcement obligations applicable thereto when that breach is committed by the armed forces of a non-party state to *API* or by a people in a non-party state to *API*. As any such bombings are nevertheless ‘governed by’ IHL, therefore falling outside the scope of the *Terrorism Bombing Convention*, they would not be subject to any *aut dedere aut judicare* obligation. In effect, the focus on the conduct of a state’s armed forces in the negotiation of the *Terrorism Bombing Convention* exclusion clause has created gaps in the criminal law enforcement framework as it applies to *international law breaching* bombings.⁹⁰ There are potentially very good reasons for this – for instance leaving these matters to be addressed within the more specialised IHL regime, and that it should perhaps not be for the terrorism suppression regime to ‘fix’ or ‘plug holes’ in another regime’s criminal law enforcement framework. Even so, the result is potentially one of impunity, and is certainly at odds with the approach taken under the *Hostages Convention* – which ensured that defined (unlawful and criminal) conduct was always subject to a criminal law enforcement regime, even if that regime was one related to terrorism suppression where the conduct was also governed by IHL.⁹¹

V CONCLUSION

The modern story of terrorism suppression is one written by the conduct of NSAs. But the sub-plots of this story are about interaction – interaction between the rights of NSAs to self-determination and the criminal responsibility of NSAs for conduct that affects civilians; the interaction between a treaty regime focused on an end to impunity and states’ efforts to exempt their own armed forces from foreign criminal law enforcement; the interaction between the general and the specific. The reactive nature of the TSCs and the results of these interactions have created a terrorism suppression regime which cannot respond to ‘evolutions’ in terrorist violence in advance, but which can respond to the evolution of international law – although perhaps at the price of a certain degree of coherence.

universally ratified, such unlawful bombings in the context of an international armed conflict will always be subject to a criminal law enforcement regime.

90 There is no gap in respect of unlawful bombings carried out by the armed forces of a state party to the *1949 Geneva Conventions* and *API* participating in an international armed conflict. While their conduct is excluded from the scope of the *Terrorism Bombing Convention*, it will be subject to an alternative *aut dedere aut judicare* obligation to the extent that the bombing amounts to a grave breach of IHL treaties.

91 Several states have expressly recognised that ‘[t]ogether with the principle of universal jurisdiction, the obligation to extradite or prosecute served to ensure that there would be no safe haven for the perpetrators of international crimes’: *Summary Record*, UN GAOR, 6th Comm, 66th sess, 26th mtg, Agenda Items 81 and 143, UN Doc A/C.6/66/SR.26 (7 December 2011) 4 [10] (Denmark, Finland, Iceland, Norway and Sweden). See also at 5 [18] (Switzerland), 6 [24] (El Salvador), 9 [42] (Italy), 13 [64] (Peru). See also *Summary Record*, UN GAOR, 6th Comm, 66th sess, 27th mtg, Agenda Items 81, 143, 78 and 82, UN Doc A/C.6/66/SR.27 (8 December 2011) 9 [64] (Russian Federation), 12 [81] (India).

And therein lies the potentialities and limitations of reactive law making in the terrorism context. In terms of limitations, the international community's continuing failure to address terrorism in a comprehensive convention creates real dangers, both in terms of the 'no-impunity' project and in terms of prevention. As regards the 'no-impunity' project, the TSCs are essential if transnational terrorists are to be brought to justice, not least because of the absence of criminal law enforcement obligations in respect of terrorism at customary international law and current international law limitations on the exercise of jurisdiction over crimes with which the prosecuting state has no connection. In default of a treaty obligation to establish universal jurisdiction over acts of terrorism and to extradite or prosecute, transnational terrorism would be (for the most part) un-prosecutable. Acts of terrorism which are not (or not yet) addressed within the terrorism suppression regime are therefore likely to go unpunished. As regards prevention, the terrorism suppression regime (and the Security Council resolutions which have emerged out of it) create a focal point for international co-operation. And a focus on particular manifestations of terrorism in the prevention sphere very naturally risks a lack of attention to others.

Equally, the focus on particular manifestations of terrorism potentially invites an unprincipled approach to regime interaction. Is the terrorism suppression regime about ensuring that there is no impunity for conduct that is criminal and unlawful under international law (in particular conduct which affects civilians⁹²), or is the terrorism suppression regime a vehicle for criminalising our enemy's conduct while protecting our own from prosecution? And should the answer to that question depend on whether the relevant act 'merely' deprives a civilian of her liberty, or whether the conduct deprives her of her life (through the use of a bomb or a nuclear device for instance)?

But in terms of potentialities, the sectoral approach to terrorism suppression has given treaty expression to significant developments in international law, in particular as regards international law on jurisdiction, international human rights law and international criminal law. Some of these developments, for instance the availability of universal jurisdiction and the political offence exception, would not easily be interpreted into existing treaties through systemic interpretation. Reactive law making, which in the terrorism context also involves law making over time, has provided an opportunity to fine tune the terrorism suppression regime so that it is in keeping with at least some of the values underlying the modern international legal system.

A comprehensive terrorism suppression convention, long under negotiation, could be the best of both worlds – benefitting from its parentage and the incremental development of international law collateral to the core criminal law

92 The only general definition of terrorism in the TSCs defines terrorism as an 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.

Terrorism Financing Convention art 2(1)(b).

enforcement obligations, while capturing terrorist conduct whatever its future and as yet unanticipated incarnations. This author's concern, however, is that the sub-plots of terrorism suppression, in particular as regards the interactions between the terrorism regime, self-determination, and the responsibilities of state actors under the *jus in bello*, have their role to play in the comprehensive story as well. And given that catalysing terrorist events can always be responded to through the sectoral approach, it is far from clear where the political will to compromise on these interactions for the sake of a comprehensive approach will come from.