The ICJ and International Terrorism

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Abstract

This article critically explores the ICJ's jurisprudence on terrorism-related internationally wrongful acts, with a particular focus on the themes of State terrorism, and the interaction between various applicable legal regimes. Given the relatively small number of orders and judgments by the Court in the counter-terrorism space, the article will focus not only on the Court's approach in respect of these themes, but will also have regard for the practice of States in framing their terrorism-related arguments.

Keywords

terrorism – International Court of Justice – State responsibility – Security Council – International Humanitarian Law – use of force

1 Introduction*

As a label, 'terrorism' or 'terrorist' has a powerful stigmatizing effect, and it has long been deployed strategically to delegitimize enemies, particularly but not uniquely in contexts of armed conflict. But labels which draw on the law's power to define conduct and consequences obviously do much more than express moral condemnation. 'Terrorism' is also a legal concept –one which is addressed in a range of international law regimes. In particular (and as explored further in Section 1.1 below), terrorism is a crime to which individual responsibility attaches under international terrorism suppression conventions; an element of the broader *jus ad bellum* prohibition on the use of force under the United Nations Charter;[1] prohibited as a matter of international humanitarian

* Many thanks to Simon Collerton (UCL, LLM) for his valuable research assistance. Any errors of course remain entirely my own.

1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 ('UN Charter').

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law ('IHL'); and conduct which the Security Council ('SC') addresses in its post 9/11 efforts to maintain and restore international peace and security.[2] And yet the pejorative power of this label makes '*what, who, and when*' is covered by these legal regimes deeply contested.

This article will explore the invocation of State responsibility[3] for acts of international terrorism before the International Court of Justice ('ICJ' or 'the Court') through the prism of this contestation. Such an exploration reveals that the jurisdictional constraints under which the Court operates, coupled with the contestation around 'terrorism', have shaped the terrorism-related disputes which come before the Court. While the Court's engagement with this contestation has been relatively limited, it has been impactful – and this article will argue that the Court's single decision touching on these contested questions has limited the role the Court might play in settling disputes related to direct State responsibility for acts of terrorism (and related breaches of the obligation to 'respect and ensure respect' for IHL under Common Article 1 of the Geneva Conventions and API),[4] while potentially increasing the focus on terrorism prevention and suppression and the role that individual criminal responsibility plays in the enforcement of IHL. Insofar as terrorism is concerned, however, no invocation of State responsibility for terrorism before the Court has been successful to date, in the sense of a decision by the Court in favour of the applicant State, ordering the respondent to make reparations for a terrorism-related internationally wrongful act.[5]

Section 1.1 below begins by providing an introduction to the contested questions of '*what, who, and when*' around the legal concept of, and regimes which govern, terrorism in international law. Section 1.2 follows by defining the scope of this study – setting out precisely which ICJ cases are included, and which excluded, from the analysis of the Court's engagement with and contribution

2 See Art. 39 UN Charter.

3 The ILC, in its Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in UN ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001) GOAR 56th Session Supp. 10 (A/56/10) ('ARS'), at 31, identifies two methods for implementing State responsibility: (i) the invocation of responsibility and (ii) the adoption of countermeasures (see Part Three, ARS). A formal invocation of State responsibility includes (but is not limited to) filing an application before a competent international tribunal (see commentary to Art. 42 ARS, para. 2).

4 See, for example, Art. 1 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('GCI'); Art. 1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('API').

5 See Part Two, Chapter One, ARS.

to terrorism-related international law. The rest of this article is structured in light of the two forms that the contested questions around terrorism might take – the first in regard to the appropriate division of labour between applicable legal regimes as a matter of the primary rules of international law; the second in regard to the appropriate division of labour between available responsive regimes addressing a breach of these primary rules. In particular, Section 2 below explores the way in which questions around whether the State can be a terrorist actor, and the appropriate legal regime for addressing State conduct which might otherwise be defined as terrorist, have shaped disputes before the Court. Despite ample opportunity to engage with these contested questions, the Court has to date delivered only one judgment addressing the issue – and it will be argued that this decision seriously limits the space for the inter-State judicial settlement of disputes in the context of State violence (while potentially highlighting terrorism prevention obligations and the role individual criminal responsibility might play in enforcing both counter-terrorism law and IHL). Finally, Section 3 will explore the contestation around whether judicial settlement or Security Council peace and security apparatus is the appropriate responsive paradigm through which to address State violence which might otherwise be defined as terrorist. While the Court has robustly defended, as a matter of principle, the role of judicial settlement of disputes in the peace and security space, it has *in effect* conceded disputes regarding State terrorism to the Security Council. And the result of this concession is that such disputes may not get a fair airing at all.

1.1 *Defining Terrorism through International Counter-Terrorism Obligations*

Both the definition of terrorism and the appropriateness of relevant legal regimes to respond to State violence (when that violence meets a definition of terrorism) are contested in international law. One might evidence this claim in any number of ways. For present purposes let us first note the long-standing debate around a definition of 'terrorism' as a matter of customary international law.[6] Second, and perhaps more relevantly for present purposes, a

6 See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging Appeals Chamber* [16 February 2011] STL-11-01/I/AC/R176bis, at para. 85, in which Judge Cassese defines a peacetime customary international crime of terrorism, on the basis of UN resolutions, treaty practice and the legislative and judicial practice of States. This decision was the subject of sustained critique and has not been widely accepted. See B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 Leiden Journal of International Law 677; K. Ambos, 'Judicial Creativity at the Special Tribunal

comprehensive convention on international terrorism (CCIT) has been under negotiation for well over 20 years.[7] The CCIT is in part intended to adopt a 'universal definition of terrorism'.[8] It is also intended to manage the applicability of and interaction between the terrorism-specific regime (as addressed in Section 1.1.1 below) and other applicable regimes of international law (as addressed in Sections 1.1.2 and 1.1.3 below) in respect of State violence.[9]

Nevertheless, certain elements of a definition of 'terrorism' have emerged through the development of international law which regulates violence over the last 50 years. These primary rules of international law reflect at least two different, cross-cutting, approaches to regulating what might broadly be defined as terrorist violence. On the one hand, we might consider an approach as 'terrorism specific', insofar as it addresses terrorism as a unique form of violence. Such an approach might be distinguished from a more general approach, which regulates terrorism as a species of a broader category of violence. On the other hand, we might characterize approaches by the responsibility framework they principally address – whether that is State responsibility or individual criminal responsibility.

As explored in Section 1.1.1., one approach to regulating terrorism in international law is terrorism-specific and regards such violence as a criminal justice/enforcement challenge (focusing on prevention and individual criminal responsibility). The other approach, explored in Section 1.1.2, situates terrorism

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for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 Leiden Journal of International Law 655.

7 India first proposed a draft comprehensive convention on international terrorism in 1996 (see 'Letter dated 1 November 1996 from the Permanent Representative of India to the United Nations addressed to the Secretary-General' (1996) UN Doc. A/C.6/51/6). The General Assembly charged the 51/210 *ad hoc* Committee with consideration of a comprehensive terrorism suppression convention in 1998 (UNGA Res 53/109, 'Measures to Eliminate International Terrorism' (20 January 1999)). There has been no progress in the 51/210 *ad hoc* Committee since 2013, and the General Assembly has recommended that the Sixth Committee work on finalizing the draft (see UNGA Res 77/113, 'Measures to Eliminate International Terrorism' (20 December 2022)). See further the summary of Sixth Committee proceedings during the 77th session of the General Assembly, UNGA, 'Sixth Committee, 77th Session of the General Assembly: Measures to Eliminate International Terrorism (Agenda Item 112)', available at <https://www.un.org/en/ga/sixth/77/int_terrorism.shtml> (accessed 8 May 2023).

8 See UNODC, 'Criminal Justice Responses to Terrorism: Key Issues', available at <https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/intro.html> (accessed 8 May 2023).

9 See UNGA Sixth Committee, 'Summary Record of the 35th Meeting' (13 February 2023) UN Doc. A/C.6/77/SR.35, at 3–4, referencing UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996' (2013) UN Doc. A/68/37, at Annex III ('Informal Summary Prepared by the Chair on the Exchange of Views during the Plenary Debate and the Informal Consultations').

within broader legal frameworks which govern recourse to military force, including the UN Charter and IHL. As to the responsibility framework of this second approach, both State responsibility and individual criminal responsibility are potentially engaged. A third, relatively more recent approach, is a true mix of these two approaches, and takes the form of Security Council counter-terrorism 'legislation' (explored in Section 1.1.3). On their own, none of these approaches fully define 'terrorism', but taken together, they can be understood as outlining the answers to the '*what, who and when*' questions addressed in the Introduction above.

1.1.1 The Terrorism-Specific Criminal Justice/Enforcement Approach

The CCIT is intended to be the culmination of over 50 years of international counter-terrorism law development – perfecting and filling in the gaps of the treaty regime which addresses manifestations of terrorist violence as a principally criminal justice/enforcement challenge. This treaty regime is comprised of nineteen terrorism-related international conventions and protocols (referred to throughout this article as the 'terrorism suppression conventions' or 'TSCs')[10] which have come into force over the last 50 years. Each imposes near identical obligations to (i) criminalize a particular manifestation of violence defined within the treaty under domestic law, including on the basis of universal jurisdiction, (ii) cooperate in the prevention of that unlawful 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(s) to prosecution. It bears noting that the crimes which fall within the scope of these conventions are often defined without any reference to the term 'terrorism' at all. But over time, these conventions have nevertheless come to be understood as addressing manifestations of terrorist violence.[11]

10 See Conventions on Terrorism listed by the United Nations Treaty Collection, available at <https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml> (accessed 8 May 2023) ('UNTC Conventions on Terrorism'). In addition to international multi-lateral conventions, there are a number of regional conventions which equally address terrorism as a criminal justice/enforcement challenge.

11 See, for example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 ('Montreal Convention'), and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 ('Internationally Protected Persons Convention'), neither of which contains the word 'terrorist' or 'terrorism', and both of which are listed as Conventions on Terrorism by the United Nations Treaty Collection. See UNTC Conventions on Terrorism.

Of particular relevance for the purposes of the analysis in Sections 2 and 3 below, there are terrorism suppression conventions which address violence against civil aviation and internationally protected persons, and the financing and support of such acts.[12] Other terrorism suppression conventions address hostage takings, hijackings and shipjackings, acts of violence against international airports, maritime navigation and fixed platforms, terrorist bombings, and acts of nuclear terrorism.[13] Together, the terrorism suppression conventions might be understood broadly as defining the *actus reus* and *mens rea* elements of 'terrorism' – collectively answering the '*what*' question.[14] States have managed to find common ground on '*what*' terrorism is over time, with a narrow focus on the very particular manifestations of violence addressed in each TSC. The highly pressurized negotiation context of the TSCs, often responding to international headline-grabbing acts of violence,[15] also encouraged consensus. This common ground has held in respect of the CCIT negotiation.

The inability to reach consensus on a final text of the CCIT instead reflects long-standing contestation around remaining definitional questions, which regimes ought to apply to State conduct, and the interaction between applicable regimes. The terrorism suppression conventions (including an eventual CCIT) require States to criminalize, prevent and punish 'any person' engaging in the defined terrorist conduct[16] – which raises very acutely the contested '*who and when*' questions around terrorism. In particular, is the reference to 'any person' restricted to private actors, or do the treaties equally apply to State actors in the performance of their official functions? Do they apply to Peoples exercising their right to self-determination? And these '*who*' questions then

12 See Montreal Convention; Internationally Protected Persons Convention; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 ('ICSFT').

13 For a full list of the TSCs, see UNTC Conventions on Terrorism.

14 See K.N. Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011), at 18–19. Earlier Conventions such as the Montreal Convention and the Internationally Protected Persons Convention require States to criminalize conduct without reference to what might be characterized as a terrorist purpose. In other conventions, the definition of terrorist conduct includes a 'purpose' element, such as the ICSFT, which defines terrorist conduct as prohibited violence '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'. Ibid., 18–19.

15 See K. Trapp, 'The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression' (2016) 39 University of New South Wales Law Journal 1191 for a discussion of the organic (reactive) growth of the terrorism suppression regime.

16 See, for example, Art. 1 Montreal Convention; Art. 2 ICSFT.

bring into the frame the related '*when*' question around the circumstances or context within which an act of terrorism might be carried out: Can conduct carried out during the course of military operations – whether in the course of an international or non-international armed conflict – be characterized as terrorist for the purposes of the terrorism suppression regime? These questions may be framed as interrogations of the definition of 'terrorism' (or indeed 'terrorist'). But they also reflect deeper concerns about whether the proscription of terrorism and related criminal enforcement/justice obligations in the TSCs or CCIT are the appropriate vehicles for addressing conduct that is also addressed within the *jus ad bellum* and/or IHL. In particular, a large number of States argue that a State's use of military force should be uniquely governed by the UN Charter, and that IHL should apply exclusively to acts which may qualify as terrorist carried out in the context of an armed conflict. These States are in favour of excluding conduct addressed within the *jus ad bellum* or IHL from the scope of an eventual CCIT. Other States argue that where the TSCs (and eventual CCIT) overlap with breaches of the *jus ad bellum* and IHL, they should be available to plug any law enforcement gaps in respect of such breaches.[17]

As will be discussed further below, some of the terrorism suppression conventions attempt to respond to these '*who and when*' questions expressly. They do so by excluding conduct governed by IHL or the *jus ad bellum* from their scope, by way of ensuring that the terrorism suppression convention in question does not affect or change these regimes with which they might overlap and interact.[18] But these compromise answers to the contested '*who and when*' questions were possible in respect of a small number of TSCs in the particular context of the manifestations of violence they address. Answers are more difficult as a matter of principle and in respect of a 'universal' definition of 'terrorism'[19] – which is part of the reason for the forever negotiation of the CCIT.

17 See UNGA Sixth Committee, 'Summary Record of the 35th meeting', at 3–4, referencing UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', at Annex III.

18 See, for example, Art. 19 International Convention on the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) UN Doc. A/RES/52/164 ('Terrorist Bombing Convention'): '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'.

19 See UNODC, 'Criminal Justice Responses to Terrorism: Key Issues'; UNGA Sixth Committee, 'Summary Record of the 35th Meeting', at 3–4, referencing UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', at Annex III.

And where these '*who and when*' questions have been left *un*answered in particular TSCs, they have been the principal focus of disputing States in respect of terrorism-related cases before the ICJ, as explored in Section 2 below.

1.1.2 *The* Jus ad Bellum*/Armed Conflict Approach*

A second approach to regulating terrorist violence in international law is more general, addressing terrorism as a species of a broader category of violence. Under this approach, terrorism is addressed through the prism of Article 2(4) of the UN Charter and related customary international law, or IHL.

In particular, the Declaration on Friendly Relations frames the duty to 'refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts [when such acts involve a threat or use of force] in another State or acquiescing in organized activities within its territory directed towards the commission of such acts' as an instantiation of Article 2(4) of the UN Charter prohibition on the use of force.[20] IHL further prohibits States from taking hostages,[21] and spreading terror among civilian populations during an armed conflict.[22]

While the proscribed conduct under Article 2(4) of the UN Charter and IHL may overlap considerably with that under the TSCs, the responsibility frameworks which apply might be different. As we have seen in Section 1.1.1., the TSCs are principally criminal enforcement/justice frameworks – prevention and individual criminal responsibility are their focus. But in respect of breaches of Article 2(4) of the UN Charter, individual criminal responsibility will only rarely attach as a matter of international law – and this only to the extent that relevant States have ratified the Rome Statute of the International Criminal Court,[23] and accepted the Court's jurisdiction over the crime of

20 See Art. 2(4) UN Charter; UNGA Res 2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' (24 October 1970) ('Declaration on Friendly Relations'); Trapp, *State Responsibility for International Terrorism*, at 25, 28–30.

21 See, for example, Art. 3 GCI; Art. 34 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 7 UNTS 287 ('GCIV'); Art. 75(2) API; Art. 4(2)(c) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ('APII'). This proscription overlaps with the TSCs. See International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 ('Hostages Convention').

22 See, for example, Art. 51(2) API; Art. 13(2) APII.

23 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('Rome Statute').

aggression,[24] or an ad hoc tribunal is created for such purposes. In respect of the IHL prohibition of terrorism, criminal responsibility may apply to these breaches of IHL through the grave breaches and Rome Statute regimes in the context of an international armed conflict,[25] or in respect of non-international armed conflicts, as a matter of customary international law and in virtue of the Rome Statue.[26]

This more general approach to regulating terrorist violence in international law, characterizing it as a particular form of military force, is more focused on the '*who and when*' questions around terrorism. In particular, the Article 2(4) prohibition on the use of force is binding on States, and IHL applies uniquely to the armed conflict context. Together, the Declaration on Friendly Relations and the IHL prohibition of terrorism in international armed conflicts make it clear that international law does not only treat States as instruments of repression in respect of terrorist conduct, but equally contemplates the State as a potential terrorist actor. But the Declaration on Friendly Relations does not define the '*what*' of terrorism – in that it leaves 'terrorist acts' undefined.

Nevertheless, insofar as State acts (which might broadly be characterized as 'terrorist' to the extent that they overlap with the *actus reus* and *mens rea* elements of the TSCs) fall within the scope of Article 2(4) of the UN Charter, we might expect them to come before the Court in their 'UN Charter breach' form. And to the extent that State conduct is in breach of the IHL prohibitions on hostage taking or on 'terrorizing' a civilian population, one might expect the invocation of State responsibility to come before the Court in its 'IHL breach' form. This, however, has not been the case. Instead, as evidenced in Sections 2 and 3 below, States have relied on the TSCs and their compromissory clauses[27] to address State conduct that falls within the scope of the UN Charter prohibition on force or IHL, when it also falls within the *actus reus*/

24 ICC Doc. ICC-ASP/16/Res.5, 'Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression' (14 December 2017). See further D. Akande and A. Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29 European Journal of International Law 939.

25 Hostage taking is a grave breach subject to IHL criminal law enforcement obligations. See Art. 147 GCIV. While the prohibition of spreading terror is not a grave breach under Art. 85 API, deliberate and indiscriminate attacks on civilians are grave breaches, and these have been understood as terrorizing civilians. See also Art. 8(2)(a)(viii) Rome Statute (in respect of the taking of hostages).

26 Art. 8(2)(c)(iii) Rome Statute.

27 In respect of the international terrorism suppression conventions, each has a compromissory clause conferring jurisdiction on the Court in respect of disputes relating to the interpretation or application of the Convention. See, for example, Art. 14 Montreal Convention.

mens rea scope of these terrorism suppression conventions. The reason for this is twofold: First, the UN Charter and relevant IHL treaties do not have compromissory clauses conferring jurisdiction on the Court. Second, there is a relative dearth of optional clause declarations by most State parties to these sorts of disputes.[28] The practice of relying on criminal enforcement/justice treaties to ground direct responsibility for State or State-supported violence before the Court raises very directly the terrorism-related contestation around '*who and when*' noted in the Introduction, and is explored in Section 2 below.

1.1.3 The Mixed Approach

Finally, the Security Council has adopted a mixed approach to regulating violence that falls within the *actus reus* and *mens rea* elements of the TSCs. The Council has addressed terrorism through both criminal justice/enforcement and *jus ad bellum* lenses, as a threat to international peace and security, within the same resolution. For instance, in the resolution adopted in the immediate aftermath of the 9/11 terrorist attacks, the Security Council imposed obligations on States to both prevent and criminalize acts of terrorism and the financing of terrorism (effectively reproducing TSC obligations within a Chapter VII resolution) and to refrain from actively or passively supporting persons or entities involved in terrorist acts (picking up on the Article 2(4) UN Charter prohibition as articulated in the Declaration on Friendly Relations).[29] UNSCR 1373 (2001)

28 In respect of breaches of the UN Charter (and related General Assembly resolutions reflecting customary international law), the Court's jurisdiction would only be available if the State Parties to the dispute had each made an optional clause declaration (Art. 36(2) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832 ('ICJ Statute')) or agreed on an *ad hoc* basis to submit the case to the Court under Article 36(1) ICJ Statue. See generally Trapp, *State Responsibility for International Terrorism*, Section 4.1; and K. Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice' (2012) 3 Journal of International Dispute Settlement 279.

29 See, for example, UNSC Res 1373, 'On Threats to International Peace and Security Caused by Terrorist Acts' (28 September 2001). See further UNSC Res 1540, 'On Non-Proliferation of Nuclear, Chemical and Biological Weapons' (28 April 2004). The legitimacy of the Security Council's assumption of the role of international legislature was debated in the academic literature at the time of the adoption of UNSCR 1373 (2001); see, for example, P.C. Szasz, 'The Security Council Starts Legislating' (2002) 96 American Journal of International Law 901; M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 Leiden Journal of International Law 593; E. Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) 97 American Journal of International Law 333; S. Talmon, 'The Security Council as World Legislature' (2005) 99 American Journal of International Law 175. However, in practice, States have complied with at least the reporting obligations imposed on them pursuant to relevant Security Council Chapter VII resolutions.

did not at the time define terrorism in imposing these obligations on States, but did call on States to '[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism',[30] in effect referencing the treaties which are listed as Conventions on Terrorism by the United Nations Treaty Collection,[31] and endorsing at least the *actus reus* and *mens rea* elements of a definition of terrorism which emerge from them collectively.[32]

1.2 *Scope of the Study: Terrorism-Related Disputes*

To engage in any meaningful way with the Court's contribution to the settlement of terrorism-related disputes and the development of terrorism-related international law, we of course need to define the parameters of the study.

1.2.1 Excluded Cases

The first point to make is that this article excludes cases in which the terrorism-related question is merely incidental and does not result in any particular engagement by Parties to the dispute or decisions by the Court on the elements of terrorism or indeed the appropriate paradigm within which to address State conduct that might be characterized as 'terrorist'. As a result, this article will not address cases bearing on the broader *jus ad bellum* question regarding the right to use defensive force in foreign territory in response to armed attacks by non-State actors (whether these are characterized as terrorist or not). This is because the principal issue in such cases is the interpretation of the UN Charter and in particular whether Article 51 applies to armed attacks by non-State actors. The 'terrorism' characterization will often be incidental. This article therefore does not address the Court's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

30 UNSCR 1373, 'Threats to International Peace and Security Caused by Terrorist Acts' (2001), para. 3(d).

31 See UNTC Conventions on Terrorism.

32 A subsequent resolution (adopted by the SC with a view to assisting States in complying with their obligations under UNSCR 1373, 'Threats to International Peace and Security Caused by Terrorist Acts' (2001)) defined terrorism broadly – drawing on common elements of terrorism as defined in the TSCs, while restricting that definition to the TSCs: 'criminal acts, including against civilians, committed with intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, *which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism*'. UNSC Res 1566, 'On International Cooperation in the Fight Against Terrorism' (8 October 2004), para. 3 (emphasis added).

Territory[33] as a relevant dispute. Even though the case might be characterised as a contentious matter between two parties (Israel and Palestine), the terrorism-related questions are principally in the self-defence context.[34]

By the same measure, this article will not engage with the Court's more recent decision in *Bahrain, Egypt and United Arab Emirates v Qatar*.[35] The principal question in that case was in regard to the scope of the International Civil Aviation Organization's jurisdiction to settle disputes,[36] including the scope of its incidental jurisdiction to engage with the circumstance precluding wrongfulness of countermeasures under general international law. The countermeasures in question were adopted in response to Qatar's alleged breach of counter-terrorism obligations. The Council of the International Civil Aviation Organization ('ICAO') held that it did have jurisdiction to settle the dispute, including the countermeasures question, and the ICAO respondent States appealed this decision to the Court. The Court did not engage with the form or nature of the counter-terrorism obligations in question and upheld the ICAO's decision in respect of the scope of its incidental jurisdiction with regard to countermeasures. It might be expected that an ICAO decision on the merits (including in respect of the respondent States' argument that any breach of ICAO treaties they may have committed benefits from wrongfulness preclusion insofar as it was in the form of lawful countermeasure in response to Qatar's prior breach of counter-terrorism obligations) will again be appealed to the ICJ. Any decision by the Court on such an appeal may indeed have cause to engage with the questions herein explored, but until such time, the Court's decision in this first appeal does not assist with the analysis below.

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33 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136.

34 See the Court's discussion of objections to its exercise of advisory jurisdiction on the basis that the question put to it was 'an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters' (Ibid., at 157–159, paras 46–50).

35 *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement* (*Bahrain, Egypt and United Arab Emirates v Qatar*) (*Judgment*) [2020] ICJ Rep 172.

36 Under Art. 84 Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 ('Chicago Convention'), the ICAO Council has primary jurisdiction to decide any disagreement between State Parties relating to the interpretation or application of the Convention, which decision can be appealed to an *ad hoc* arbitral tribunal or to the Permanent Court of International Justice.

1.2.2 Included Cases

In counting the number of terrorism-related disputes which have come before the ICJ, this article adopts a purely jurisdictional approach. We will characterize cases as terrorism-related if they invoke a terrorism-related instrument or legal obligation, as explored in Section 1.1 above, as the basis for the respondent State's responsibility and the Court's jurisdiction. On a jurisdictional approach, there are nine terrorism-related disputes which, at the time of writing, are or have come before the Court,[37] all of which have relied (at least in part) on an international terrorism suppression convention to ground the Court's jurisdiction. We will drop one of these cases off the list from the outset, because the claim in respect of the terrorism suppression convention was quite rightly dismissed on the basis of its clear inapplicability to the conduct in question.[38]

37 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v United Kingdom*) ('*Lockerbie Case* (*UK*)') and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v United States of America*) ('*Lockerbie Case* (*US*)'; together with *Lockerbie Case* (*UK*), the '*Lockerbie Cases*'); *Aerial Incident of 3 July 1988* (*Islamic Republic of Iran v United States of America*) ('*Aerial Incident*'); *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Islamic Republic of Iran*) ('*Tehran Hostages*'); *Certain Questions Concerning Mutual Assistance in Criminal Matters* (*Djibouti v France*); *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) ('*DRC v Uganda*'), *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Burundi*) ('*DRC v Burundi*'), and *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Rwanda*) ('*DRC v Rwanda*'; together with *DRC v Uganda* and *DRC v Burundi*, the '*Armed Activities Cases*'); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v Russian Federation*) ('*Application of ICSFT and CERD*'). On the date this article was finalized for publication, Canada, Sweden, Ukraine and the UK filed an application against Iran in respect of the downing of PS752. See *Canada, The Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland v The Islamic Republic of Iran* (*Application Instituting Proceedings Concerning A Dispute Under The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*) [4 July 2023] ('*Dispute Concerning the Downing of PS752*'). Each of the two *Lockerbie Cases* are treated as one terrorism related case (or dispute) for present purposes because the applicant State makes precisely the same claim against each of the respondent States, and the two cases gave rise to near identical orders and judgments. The other series of cases in respect of which there are identical claims made by the applicant State against several respondent States (in particular, the three *Armed Activities Cases*) are treated separately because the path of the proceedings in each case was different.

38 *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*) (*Judgment*) [2008] ICJ Rep 177, at 234, para. 159. The applicant alleged that the issuance of an arrest warrant against a diplomat amounted to a wrongful act in breach of obligations under the Internationally Protected Persons Convention. The argument, never very clearly articulated, seems to have been that issuance of the summons was a measure 'de contrainte'

Of the eight remaining cases forming part of this study, six are principally in regard to the use of military force by a State or State-supported actors in the applicant State's territory or against its emanations.[39] But in only one of these six cases is the more directly applicable UN-Charter-based prohibition of State-sponsored and supported terrorism invoked, and even then, only by way of counter-claim.[40] As noted above, part of the reason for this reliance on the terrorism suppression conventions (and their compromissory clauses) in respect of disputes involving State or State-supported uses of force is the relative dearth of optional clause declarations by most State parties to these disputes.[41] This broad practice of relying on criminal enforcement/justice treaties to ground direct responsibility for State or State-supported violence very evidently raises the '*who and when*' questions in respect of applicable terrorism regimes, as explored in Section 2 ('The State as Terrorist Actor') below.

In respect of the eight terrorism-related cases which form part of this study, two have resulted in a judgment on the merits, one is proceeding to the merits phase following an order in respect of a request for provisional measures and a judgment on preliminary objections, and the Application instituting proceedings for the *Dispute Concerning the Downing of PS752* was filed on the date this

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which fell within the definition of, or was in some other way similar to, the violent crimes against internationally protected persons that the Convention addresses. The argument was implausible and indeed terribly wrongheaded insofar as it minimizes the serious crimes addressed by the Convention. This case is flagged here merely by way of being comprehensive, and does not form part of this study.

39 *Aerial Incident*, the *Armed Activities Cases* and *Dispute Concerning the Downing of PS752* all invoke the Montreal Convention as a basis for responsibility in respect of a use of military force against a civil aircraft. In *Application of the ICSFT and CERD*, Ukraine invokes, as the name of the case suggests, the ICSFT as a basis for Russian responsibility for 'financing' the downing of a civilian airliner (MH17), the bombing of peaceful protestors, and attacks against civilian residential areas. The Montreal Convention (in Annex to the ICSFT) is relied on to define the proscribed terrorist conduct in reference to the downing of MH17, while a general definition of terrorism in the ICSFT is relied on in reference to the attacks against civilians. As will be noted further below, the *Dispute Concerning the Downing of PS752* can be distinguished from the other cases listed herein, in that the applicant States are not claiming Iran's direct State responsibility for the downing of PS752 under the Montreal Convention, but are rather invoking Iran's responsibility for a failure to prevent and punish in reference to the downing. See *Dispute Concerning the Downing of PS752* (*Application Instituting Proceedings*) [4 July 2023].

40 *DRC v Uganda* (*Mémoire de la Republique Démocratique du Congo*) (6 July 2000), at 172, para. 4.29.

41 See generally Trapp, *State Responsibility for International Terrorism* and Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice', for a detailed discussion of the whys and wherefores.

article was finalized for publication.[42] The four remaining cases, each of which involved the invocation of responsibility in respect of an act against the safety of civil aviation on the basis of the Montreal Convention, were concluded by agreement of the Parties,[43] or because the Court held that it had no jurisdiction to entertain the application.[44] It should be said, however, that a judgment on the merits is not necessarily a harbinger for judicial engagement with, and development of, treaty-based international law related to terrorism. Indeed, in respect of the two disputes on which there is (at the time of writing) a judgment on the merits, the terrorism suppression convention claim was either not addressed by the Court in its judgment or separate and dissenting opinions at all,[45] or the Court held that it need not decide the terrorism-related

42 *Tehran Hostages* (*Judgment*) [1980] ICJ Rep 3; *DRC v Uganda* (*Judgment*) [2005] ICJ Rep 168; and at the time of writing, oral proceedings on the merits for *Application of ICSFT and CERD* have been completed. See *Application of ICSFT and CERD* (*Press Release 2023/24*) (16 May 2023), available at <https://www.icj-cij.org/sites/default/files/case-related/166/166-20230516-PRE-01-00-EN.pdf > (accessed 19 May 2023).

43 *Lockerbie Case* (*UK*) (*Order of 10 September 2003 'Removal from the List'*) and *Lockerbie Case* (*US*) (*Order of 10 September 2003 'Removal from the List'*); *Aerial Incident* (*Order of 22 February 1996 'Removal from List'*). Both *DRC v Rwanda* (*Order of 30 January 2001*) and *DRC v Burundi* (*Order of 30 January 2001*) were also discontinued, although the DRC's new application against Rwanda (in 2002), discussed in n. 44 below, did result in an order in respect of a request for provisional measures and a judgment on jurisdiction and admissibility.

44 In respect of the DRC's first application against Rwanda, the question of jurisdiction and admissibility was the subject of written pleadings, but the case was discontinued before oral proceedings (n. 43 above). In respect of the new application against Rwanda (2002), which contained an identical claim regarding the Montreal Convention as the first application, the Court issued an order on the DRC's request for provisional measures (*Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda*) ('*DRC v Rwanda* (*New Application: 2002*)') (*Provisional Measures*) (*Order of 10 July 2002*) [2002] ICJ Rep 219, at 249, para. 87) in which it noted that none of the provisional measures sought had any bearing on the claimed breach of the Montreal Convention, and that the Court was therefore 'not required, at this stage in the proceedings, to rule, even on a prima facie basis, on its jurisdiction under that Convention nor on the conditions precedent to the Court's jurisdiction contained therein'. In *DRC v Rwanda* (*New Application: 2002*) (*Jurisdiction and Admissibility*) (*Judgment*) [2006] ICJ Rep 6, at 49, paras 118–19, the Court considers that the Montreal Convention cannot serve to found its jurisdiction on the basis of a failure to meet the procedural requirements of the compromissory clause. The Court's judgment rehearses the arguments of the State Parties (including Rwanda's arguments on the broader armed conflict context and complexity of the dispute and the inappropriateness of the DRC's reliance on a terrorism suppression convention, Ibid., at 46–47, para. 112), but given the narrow basis of its decision, does not engage with these.

45 In *DRC v Uganda*, which is the only *Armed Activities Case* to proceed to a decision on the merits, the factual basis for the claimed breach of the Montreal Convention was the

claim as there were ample other co-extensive international wrongs on which it could base its decision.[46] Nevertheless, the pleadings in these two cases are of some interest insofar as they frame some of the issues regarding the State as a terrorist actor falling within the scope of TSCs, addressed in Section 2 below. In considering the pleadings in these cases, it is worth bearing in mind that States do not necessarily adopt a principled approach to the scope or interpretation of treaties, or to grounds for (in)admissibility, and that they may adopt conflicting positions depending on whether they are appearing as applicant or respondent.[47] This is indeed entirely what we might expect, given the contestation around terrorism-related legal regimes noted in the Introduction.

2 The State as a Terrorist Actor

As noted in Section 1.1, international law addresses States as both potential terrorist actors and agents of terrorism suppression. States are addressed as potential terrorist actors through the UN Charter prohibition of the use of force and associated General Assembly and Security Council Resolutions which characterise State sponsorship and various levels of State support for terrorism as a breach of the prohibition, and through the IHL prohibition on hostage taking and terrorizing civilians.[48] States are addressed as agents of

downing of a Congolese Airlines aircraft at Kindu Airport. In its judgment, the only determination the Court made with some tangential bearing on the Montreal Convention claims was that it did not have 'convincing evidence as to Kindu having been taken by Ugandan forces in October 1998' (*DRC v Uganda* (*Judgment*), at 208, para. 83).

46 *Tehran Hostages* (*Judgment*), at 28, para. 55. But see *Tehran Hostages* (*Judgment*) (*Dissenting Opinion of Judge Morozov*), at 52–53, noting that the way in which the Court decided not to engage with the US claim under the Internationally Protected Persons Convention 'does not exclude the possibility that the claim […] might in future be re-examined'. See further *Tehran Hostages* (*Judgment*) (*Dissenting Opinion of Judge Tarazi*), at 65, which rather opaquely and summarily determines that the Internationally Protected Persons Convention could not ground the Court's jurisdiction in respect of US claims against Iran.

47 For an excellent example of this, see discussion in Section 2.2 below, regarding the different positions the US has adopted (in *Tehran Hostages* as applicant and the *Lockerbie Case* (*US*) as respondent) in respect of whether a State alleged to have sponsored or supported an act of terrorism should be under an obligation / have a right to prosecute the individuals responsible. See further C. Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua' (2003) 14 European Journal of International Law 867.

48 See Art. 2(4) UN Charter; Declaration on Friendly Relations; Trapp, *State Responsibility for International Terrorism*, at 25, 28–30; UNODC, 'Criminal Justice Responses to Terrorism: Key Issues'.

terrorism suppression through the imposition of criminal enforcement/justice obligations, including the obligation to prevent and punish acts of terrorism, set out in the TSCs, IHL and Security Council resolutions.[49]

One question which has contributed to the lack of consensus on the CCIT for more than 20 years is whether these two perspectives on States vis à vis terrorism should be addressed within a single criminal enforcement/justice treaty. Indeed, there has been a great deal of contestation regarding the applicability of *particular* terrorism suppression conventions to acts of State or State-supported violence which meet the definition of terrorist conduct under the conventions. These are the '*who and when*' questions in respect of the definition of terrorist conduct in, and the scope and regime interaction of, particular TSCs. States can of course be held responsible under the terrorism suppression conventions for failing to comply with their prevention and criminal law enforcement obligations. The contested question is whether the terrorism suppression conventions also implicitly prohibit States from engaging in the very same terrorist conduct (whether through their *de jure* or *de facto* organs, or through support for or complicity in the conduct of non-State actors) which they are required to prevent and punish – effectively reproducing in the terrorism suppression conventions the obligations to refrain from engaging and supporting acts of terrorism under the UN Charter and Declaration on Friendly Relations and IHL. The contestation is most acute in respect of, but not exclusive to, the armed conflict context and military force. And the interpretive issue very evidently arises as a result of the Court's consent-based jurisdiction and the limited number of Article 36(2) declarations which might cover disputes regarding State participation in terrorism within the broader framework of the UN Charter, IHL and customary international law.[50]

The analysis below explores the Court's (non)engagement with these *'who and when*' questions in respect of the terrorism suppression conventions. The analysis is divided into cases regarding military force, in respect of which there may be an overlap between a relevant TSC and the *jus ad bellum*/IHL, and those involving non-military force by State agents, where the only overlap is with the *jus ad bellum*. In respect of the cases on the use of military force, it will be

49 See Conventions on Terrorism listed by the United Nations Treaty Collection; UNSCR 1373, 'Threats to International Peace and Security Caused by Terrorist Acts' (2001); UNSCR 1540, 'Concerning Weapons of Mass Destruction' (2004); Trapp, *State Responsibility for International Terrorism*; V.J. Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Bloomsbury Publishing 2012).

50 See Trapp, *State Responsibility for International Terrorism* and Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice'.

argued that the Court's only pronouncement on this issue unjustifiably limits the potential for judicial settlement of disputes regarding direct State responsibility for acts of terrorism, while also missing an opportunity to provide a viable basis of jurisdiction in respect of disputes regarding State responsibility for breach of the obligation to 'respect and ensure respect' under IHL. The Court's single judgment in the terrorism space does however have the effect of emphasizing the obligations to prevent and punish within the terrorism suppression regime while adding to the arsenal of enforcement machinery available to respond to breaches of the IHL 'respect and ensure respect' obligation. It does so by putting the ICSFT criminal law enforcement obligations (including the availability of universal jurisdiction) at the disposal of the international community insofar as proscribed conduct under the ICSFT is co-extensive with a breach of the IHL obligation to 'respect and ensure respect'.

In respect of non-military force, the Court did not engage substantively with the terrorism suppression conventions at issue in either of the *Lockerbie Cases* or *Tehran Hostages*. Nevertheless, the arguments in these cases regarding whether a State should or should not prosecute its own agents (or non-State actors whose conduct it has supported) for an act of State terrorism evidently raise important questions around good faith implementation of relevant criminal law enforcement obligations. These might have been live issues before the Court at the merits phase of the proceedings in *Application of ICSFT and CERD*, and will be briefly explored by way of highlighting some of the implications of the Court's decision on the scope of the ICSFT in its preliminary objections judgment in that case.

2.1 *Military Force*

In *Aerial Incident*, the *Armed Activities Cases*, and *Application of ICSFT and CERD,* a great deal of the disputing States' ink was spilt on the (in)applicability of a terrorism suppression convention to a use of State (or State-supported) military force. The first of these cases to come before the Court was Iran's suit against the US, filed in 1989. On 3 July 1988, civilian flight IR 655 was destroyed by surface-to-air missiles launched from the *USS Vincennes*, stationed in the Persian Gulf, killing all 290 passengers and crew aboard. Iran invoked the Montreal Convention as a basis for US responsibility – meeting at least the destruction 'of an aircraft in service' element of the defined crime.[51] Iran

51 In *Aerial Incident* (*Application Instituting Proceedings*) [17 May 1989], at 10, Iran contended that the US conduct violated Articles 1, 3 and 10(1) of the Montreal Convention. It should be noted that in its letter to the Security Council regarding the incident, Iran only invoked the Chicago Convention, as a basis for US responsibility, and did not claim that the

also invoked the Chicago Convention[52] and its Treaty of Amity with the US as a basis for the ICJ's jurisdiction.[53] The US, on the other hand, framed the shooting down of the civil aircraft both in terms of a mistake of fact (the space for which was created by the aircraft's failure to respond to repeated warnings and directions to turn away from the *USS Vincennes* which were broadcast on both military and civilian air distress frequencies) and the right to use force in self-defence.[54] The US contextualized and supported its claim of self-defence by reference to Iran's prior attack against the USS Stark with air-launched missiles[55] and Iran's relocation of F-14 fighter aircraft to the vicinity.[56]

In the *Armed Activities Cases*, the claimed breach of the Montreal Convention was in reference to the downing of a Congolese Airlines aircraft at Kindu Airport on 10 October 1998. The DRC claimed that each of the respondent States against which it had filed suit (Uganda, Rwanda and Burundi) bore responsibility for destroying the civil aircraft, but it was unclear whether the DRC was claiming that each State had itself (through its armed forces) shot the civil aircraft down, or whether the violation of the Montreal Convention resulted from the respondent States' alleged support for Congolese rebels who might have downed the aircraft.[57]

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downing of the aircraft was in violation of US obligations under the Montreal Convention. See 'Letter from the Acting Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (3 July 1988) UN Doc. S/19979.

52 The ICAO, in its submission to the ICJ, made it clear that Iran had not submitted its dispute with the US to the ICAO Council pursuant to Article 84 of the Chicago Convention. *Aerial Incident* (*Observations of the International Civil Aviation Organization*) [4 December 1992], at 618. Pursuant to the terms of Article 84, the ICJ would therefore not have jurisdiction with respect to the Chicago Convention.

53 *Aerial Incident* (*Application Instituting Proceedings*), at 10.

54 See 'Letter from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (6 July 1988) UN Doc. S/19989.

55 The ICAO, in its own investigation of the downing of IR 655, concluded that '[t]he incident on 17 May 1987 in which the USS Stark was severely damaged by two air-launched Exocet missiles was of particular relevance in the chain of events leading to the destruction of flight IR655'. See ICAO, 'Destruction of Iran Air Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988: Report of Fact-Finding Investigation' (November 1988) ICAO Doc. C-WP/8708, at para. 2.1.1 (as quoted in *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*) [4 March 1991], at 11).

56 *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*), at 11–12.

57 See *DRC v Rwanda* (*Application Instituting Proceedings*) [23 June 1999], at 19; *DRC v Burundi* (*Application Instituting Proceedings*) [23 June 1999], at 17–19; *DRC v Uganda* (*Application Instituting Proceedings*) [23 June 1999], at 17–19. The Court did not address

Finally, in *Application of ICSFT and CERD*, Ukraine invoked Russian responsibility under the ICSFT, which imposes criminal law enforcement obligations in reference to the financing of terrorism as defined in the Convention.[58] The underlying terrorist conduct, which Ukraine accused Russia of both financing and tolerating the financing of, took place principally in the context of an armed conflict in eastern Ukraine, and involved the downing of a civilian airliner (MH17), the bombing of peaceful protestors, and attacks against civilian residential areas by non-State armed groups acting with Russian support.[59]

The arguments put to the Court in respect of the (in)applicability of the invoked terrorism suppression convention to State (or State-supported) military force in these five cases are various, including broad arguments about the relative roles of the ICJ and the Security Council;[60] arguments about regime interaction, including the particular or exclusive relevance of the *jus ad bellum* to force used in self-defence and of IHL to hostile acts during an armed conflict;[61] arguments characterising the TSCs as instruments uniquely addressing individual criminal responsibility, and excluding direct State responsibility;[62] and very specific interpretive arguments to the effect that the relevant TSC does not apply to State actors *at all*, even in its criminal enforcement/justice guise.[63] In terms of the flavour of these arguments, some of the resistance is

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the claimed breach of the Montreal Convention in its decision on the merits in *DRC v Uganda*. See n. 45.

58 The ICSFT defines terrorism both generally (under Art. 2(1)(b)) 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' and (under Art. 2(1)(a)) as an act which constitutes an offence under listed terrorism suppression conventions, including the Montreal Convention.

59 See *Application of ICSFT and CERD* (*Application Instituting Proceedings*) [16 January 2017], at Section III.B.

60 See further Section 3 'The ICJ, the Security Council and International Peace & Security' below.

61 See *Application of ICSFT and CERD* (*Preliminary Objections Submitted by the Russian Federation*) [12 September 2018], at Section II, on Russia's arguments on the applicability of the ICSFT to conduct within the context of armed conflict. See *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*) [4 March 1991], at 149, in respect of US arguments regarding the applicability of the Montreal Convention to the actions of armed forces during an armed conflict.

62 *Application of ICSFT and CERD* (*Preliminary Objections Submitted by the Russian Federation*), at Section V; *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*), at 167–171.

63 See *Application of ICSFT and CERD* (*Preliminary Objections*) (*Verbatim Record 2019/9*) [3 June 2019], at 40–44, paras 23–47. To contrary effect, albeit outside the military context,

evidently about the power of labels and optics – insofar as States are not keen on the prospect that uses of military force might be legally qualified as 'terrorist' which fall within the scope of a regime specifically addressing terrorism.[64] But there are also of course very difficult and complicated questions of principle at stake regarding the most appropriate legal regime for regulating particular kinds or sources of violence and a number of the terrorism suppression conventions therefore include clauses which govern their relationship with other relevant regimes of international law (in particular the *jus ad bellum* and IHL).[65] In each of the cases here under discussion, however, the terrorism suppression convention that was relied on to ground State responsibility for a State or State-supported use of military force *did not* contain a separate provision specifically excluding overlap with the *jus ad bellum* or IHL.[66] And indeed

see the arguments of Libya (in the *Lockerbie Case* (*US*), answering a question put to the disputing parties by Judge Schwebel on this issue, *Lockerbie Case* (*US*) (*Answers by the Libyan Arab Jamahiriya to the questions put by Members of the Court*) [2 April 1992]) and those of the US (in *Tehran Hostages*, n. 101 below) – both arguing that the relevant terrorism suppression convention (which have identical language in this respect) does criminalize the conduct of State actors *and* requires States to prosecute their own agents, even if they carried out the proscribed act of terrorism on behalf of the State.

64 See K.N. Trapp, 'Ukraine v Russia (Provisional Measures): State "Terrorism" and IHL' EJIL:Talk! (2 May 2017).

65 See, for example, Art. 19 Terrorist Bombing Convention: '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'. For further discussion of the complicated questions of regime interaction raised by the substantive overlap of the TSCs and the *jus ad bellum* and IHL, see Trapp, *State Responsibility for International Terrorism*; Trapp, 'Ukraine v Russia (Provisional Measures)'; K.N. Trapp, 'R v Mohammed Gul: Are You a Terrorist if You Support the Syrian Insurgency?' EJIL:Talk! (14 March 2012).

66 The Montreal Convention was relied on in each of *Aerial Incident*, the *Armed Activities Cases* and *Application of ICSFT and CERD*. In the latter case, the TSC which grounds the Court's jurisdiction is the ICSFT, and the definition of underlying terrorist conduct (the financing of which is prohibited) defines terrorism partly in reference to existing TSCs (including the Montreal Convention – which was invoked by Ukraine in respect of the downing of MH17). While the Montreal Convention does not contain a provision excluding any overlap with the *jus ad bellum* and IHL, the Beijing Convention (which updates the Montreal Convention to address the 9/11 practice of using civil aircraft as weapons) does precisely that, excluding from the scope of the Convention 'activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law [...] 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' (Art. 6(2) Convention for the Suppression of Unlawful Seizure of Aircraft (adopted in Beijing 10 September 2010, entered into force 1 July 2018) ICAO

in respect of the ICSFT, the underlying definition of terrorism (the financing of which is proscribed) includes a general definition which addresses conduct within the context of an armed conflict through its reference to acts '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*'.[67] The ICSFT is unique in its express application to situations of armed conflict.[68]

2.1.1 Limits to the Potential for Judicial Settlement of Inter-State Disputes regarding Direct State Responsibility for Terrorism

In *Aerial Incident* and the *Armed Activities Cases*, the Court did not address the applicability of the invoked terrorism suppression convention directly to State conduct.[69] The first time the Court addressed this issue, which had been the subject of detailed legal attention by a great number of international lawyers over the span of more than 40 years and half a dozen cases,[70] the Court decided on *in*applicability in very short order. In its *Application of ICSFT and CERD* judgment on preliminary objections, the Court held that the 'financing by a State of acts of terrorism is not addressed by the ICSFT. It lies outside the scope of the Convention',[71] although the Court noted that other regimes

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Doc. 9960 ('Beijing Convention')). The Beijing Convention was a long way off from even being negotiated (never mind in force) at the time the applications instituting proceedings were filed in the *Aerial Incident* and the *Armed Activities Cases* noted above, and Russia became a State party to the Beijing Convention after the institution of proceedings in *Application of ICSFT and CERD*, while Ukraine is not yet a State party. See ICAO, 'Status of the Russian Federation with Regard to International Air Law Instruments', available at <https://www.icao.int/secretariat/legal/Status%20of%20individual%20States/russian_federation_en.pdf> and ICAO, 'Status of Ukraine with Regard to International Air Law Instruments', available at <https://www.icao.int/secretariat/legal/Status%20of%20individual%20States/ukraine_en.pdf>.

67 Emphasis added. Art. 2(1)(b) ICSFT.

68 The Hostages Convention implicitly recognizes its application to situations of armed conflict, but does not do so through the definition of terrorism. Rather, Article 12 of the Hostages Convention excludes its application to a hostage taking to the extent that States are bound by criminal law enforcement obligations applicable to war crimes in respect of that hostage taking. As a result, where a hostage taking is committed in the course of an armed conflict, and an IHL specific criminal law enforcement obligation does *not* apply, the Hostages Convention *will apply*. The Hostages Convention has not been the subject of any applications before the ICJ to date.

69 See ns 43–45.

70 The issue also arose in *Tehran Hostages* and the *Lockerbie Cases*, albeit in reference to non-military force (as discussed in Section 2.2 below) and was also not the subject of any order or decision by the Court.

71 *Application of ICSTF and CERD* (*Preliminary Objections*) (*Judgment*) [2019] ICJ Rep 558, at 585, para. 59. The Court relies on the preparatory work of the ICSFT to support its

of international law (like UNSCR 1373 (2001)) prohibit States from engaging in acts of terrorism.[72]

The Court decided that the ICSFT *merely* requires a State to prevent and suppress 'any person' (including its own organs or agents) from financing terrorism.[73] Of interest, in accepting that States are obliged to prevent and punish their own organs and agents from engaging in acts of terrorism financing as defined in the ICSFT, the Court implicitly addresses the contested '*who and when*' questions in respect of the definition of terrorism. And the Court's answer is that State organs *can* engage in conduct falling within the scope of the ICSFT, including where the underlying terrorist conduct occurs in the context of an armed conflict. Indeed, any other answer would have been inconsistent with the general definition of terrorism in the ICSFT, which directly addresses acts of violence *during an armed conflict* and does not expressly exclude conduct which is regulated by either the *jus ad bellum* or IHL.[74] Furthermore, in accepting that 'any person' also refers to a State's own organs and agents, the Court accepts that the universal jurisdiction which is put at the disposal of State parties to the ICSFT applies to State financing of acts committed within the context of an armed conflict (when these meet the definition of terrorism in the ICSFT).

This said, the Court's decision that a State might be responsible for failing to prevent or punish *its own organs and agents* from engaging in proscribed conduct, but that the treaty does not thereby implicitly prohibit the State from directly engaging in the proscribed conduct, is an odd result. Indeed, the result is so odd that even counsel for the respondent State (Russia) conceded that it would not make sense to hold States responsible for failing to prevent *themselves* from engaging in conduct while refusing to read a prohibition into the convention and thereby hold the State directly responsible for that same conduct under the treaty. This concession was in support of Russia's argument that the ICSFT *neither* prohibited State conduct, nor applied to State agents in respect of its criminal law enforcement obligations.[75]

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conclusion, but Judge Robinson argues very effectively for the irrelevance of the preparatory work. See Ibid., (*Declaration of Judge Robinson*), at 658.

72 *Application of ICSTF and CERD* (*Preliminary Objections*) (*Judgment*), at 585, para. 60.

73 Ibid., at paras 59–61.

74 See Trapp, 'Ukraine v Russia (Provisional Measures)'.

75 See *Application of ICSTF and CERD* (*Preliminary Objections*) (*Judgment*), at 583, para. 53. The Court's (odd) position in this respect was first articulated by the US in *Tehran Hostages*. The US claimed that *both* Iran's failure to take measures to protect the US Embassy in Tehran *and* its sponsorship and endorsement of the commission of crimes within the scope of the Convention amounted to a breach of the obligation to prevent.

Judge Donahue, in her declaration, also comments on the incongruence.[76]

In reaching this conclusion, the ICJ has undone an important part of the legacy of its judgment in the *Bosnia Genocide Case*, in which it held that the Genocide Convention, through its obligation to prevent, implicitly prohibits States from engaging in genocide.[77] The *Bosnia Genocide Case* decision, and its implications for a criminal law enforcement treaty in the terrorism space, was the subject of a great deal of attention in both the applicant and respondent States' pleadings in *Application of ICSFT and CERD*,[78] and has been the subject of academic commentary (admittedly some of it by this author).[79] While there are some bases on which to distinguish the Genocide Convention from the ICSFT, including that the Genocide Convention expressly addresses international crimes within its preamble and that its compromissory clause mentions State responsibility, and the ICSFT does neither, this author has previously argued that these differences only strengthen (rather than weaken) the *Bosnia Genocide Case* implicit prohibition conclusion in the TSC context.[80] In any event, the Court does not even mention its *Bosnia Genocide* decision. Nor does it address the applicant and respondent States' arguments for and against adopting a consistent approach between the obligation to prevent under the Genocide Convention and that under the ICSFT.[81] This is all a great shame, partly because the Court has seemingly closed off future reliance on the TSCs

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Tehran Hostages (*Memorial of the United States*) [12 January 1980], at 178. See further n. 101 for some context to the US argument.

76 *Application of ICSTF and CERD* (*Preliminary Objections*) (*Judgment*) (*Declaration of Judge Donoghue*), at 651, para. 19.

77 *Case Concerning the 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, at para. 166.

78 See, for example, *Application of ICSFT and CERD* (*Preliminary Objections Submitted by the Russian Federation*), at Section VI; (*Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation Submitted by Ukraine*) [14 January 2019], at 90–93, paras 174–179.

79 For a discussion of the pleadings in *Application of ICSFT and CERD*, see Trapp, 'Ukraine v Russia (Provisional Measures)'; V.J. Proulx, '"Terrorism" at the World Court: Ukraine v Russia as an Opportunity for Greater Guidance on Relevant Obligations?' EJIL:Talk! (17 April 2017). See further Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice'.

80 See Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice'.

81 See *Application of ICSFT and CERD* (*Preliminary Objections Submitted by the Russian Federation*), at Section VI; (*Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation Submitted by Ukraine*), at 90–93, paras 174–179.

as a basis for its jurisdiction in cases of State terrorism. This leaves injured States with more limited choices. They can either invoke responsibility for the in some respects less serious internationally wrongful acts of failing to prevent and punish (including in respect of their own organs and agents) under a relevant TSC, or leave these disputes to be addressed through the politicised UN Security Council apparatus (whose engagement with State terrorism is uneven at best, as addressed in Section 3 below).

Indeed, the limiting effect of the Court's decision in *Application of ICSFT and CERD* can be seen in the most recent case to come before the Court. On 4 July 2023, Canada, Sweden, Ukraine and the UK filed an application against Iran in respect of the downing of PS752. The civil aircraft, en route from Tehran to Kyiv, was struck by two surface-to-air missiles. These missiles were fired at the aircraft by Iran's military forces soon after it took off from Tehran's international airport. The applicant States have relied on the Montreal Convention as a basis of jurisdiction, but have eschewed the long-standing practice before the Court of invoking the Convention as a basis for direct State responsibility. Instead, presumably picking up on the Court's interpretation of the obligation to prevent and punish as applicable to the conduct of a State's own organs and agents, the applicant States have invoked responsibility for a failure to prevent and punish.[82] While the applicant States will not have the satisfaction of a finding of direct responsibility for the downing of PS752, this case has the potential to clarify the important obligations of prevention and punishment within the terrorism suppression framework – including what prevention looks like in reference to a State's own conduct. If the effect of such a shift in emphasis is to detail the measures States have to take, particularly in armed conflict situations, to protect civil aviation from uses of military force, this would certainly be a positive development.

2.1.2 Responsibility for Breach of the IHL Obligation to 'Respect and Ensure Respect'

The Court's approach to the scope of the ICSFT in its judgment on preliminary objections is also a missed opportunity to provide an important jurisdictional hook for disputes regarding State responsibility for breaches of the foundational obligation to 'respect and ensure respect' for IHL – in a way which would have contributed to the protection of the most vulnerable in armed conflict. As set out further below, an interpretation of the ICSFT which gives rise to direct

82 See *Dispute Concerning the Downing of PS752* (*Application Instituting Proceedings*) [4 July 2023].

State responsibility for financing acts of terrorism would have been broadly co-extensive with the direct State responsibility which arises in cases of breach of the obligation to 'respect and ensure respect' under Common Article 1 of the Geneva Conventions/API. Such an interpretation would have been consistent with the regime interaction principles which States have sought to uphold in negotiating the TSCs, and would have provided a sound basis for settling disputes regarding State responsibility for the financing of acts of terrorism which also amount to war crimes when committed in the context of armed conflicts. This said, the Court's decision on preliminary objections in *Application of ICSFT and CERD*, insofar as it subjects terrorist financing by State organs and agents to criminal law enforcement obligations and to universal jurisdiction, does potentially add a layer of responsibility to breaches of the obligation to 'respect and ensure respect' which IHL does not itself expressly provide for. Whether this is consistent with the regime interaction principles which States have sought to uphold in their negotiation of the TSCs and the CCIT, however, is not entirely obvious.

Let us begin with relevant regime interaction principles: States have been careful not to undo the balances inherent in the *jus ad bellum* and IHL[83] in their negotiation of the TSCs and the ICCT. They have done so by ensuring that conduct which is lawful as a matter of the *jus ad bellum* or IHL is not rendered unlawful or subject to universal jurisdiction prosecutions under the terrorism suppression conventions. Any decision by the Court which resulted in the TSCs prohibiting or criminalizing conduct which was otherwise lawful under the *jus ad bellum* or IHL would fly in the face of such efforts. The regime interaction principle which is more contested, particularly in the negotiation of the CCIT, is whether the terrorism suppression regime should be available to plug any real or perceived law enforcement gaps in IHL. Put another way, it is contested whether the terrorism suppression regime should provide a basis for the prosecution of *breaches* of IHL (to the extent these are co-extensive with proscribed conduct under a TSC) where IHL does not itself provide for individual criminal responsibility in respect of such a breach. This contested point is only relevant if the conduct in question is *otherwise prohibited* by IHL (such that there is substantive overlap with the proscribed conduct addressed by a TSC), but the conduct is not subject to criminal law enforcement obligations under IHL.

83 See n. 9 above. See further Trapp, *State Responsibility for International Terrorism*, Section 4.2.2.

The financing of war crimes during an armed conflict is not something IHL *expressly* regulates. Having said which, the ICRC takes the view that the obligation to 'respect and ensure respect' for IHL set out in Common Article 1 to the Geneva Conventions and API[84] imposes a negative obligation on States to refrain from encouraging, aiding or assisting in violations of the Geneva Conventions and API by Parties to a conflict.[85] As a result, there is indeed substantive overlap between the ICSFT and IHL. The ICSFT and IHL broadly prohibit the same conduct – the financing of activities characterized as terrorist, which would also be in breach of IHL if committed in the context of an armed conflict.[86] For instance, the general Article 2(1)(b) definition under the ICSFT 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'. This is broadly consistent with the prohibition on targeting civilians, and engaging in acts or threats of violence the primary purpose of which is to spread terror during an armed conflict, under IHL.[87] The *financing* of such activities would be a crime under the ICSFT and a breach of Common Article 1 to the Geneva Conventions/API. The ICSFT equally defines terrorism in reference to the existing TSCs (listed in Annex to the ICSFT).[88] The listed TSCs either address conduct which would amount to a breach of IHL if committed in the context of an armed conflict,[89] or their scope of application does not extend

84 See, for example, Art. 1 GCI; Art. 1 API.

85 For an interpretation of 'respect and ensure respect', see Art. 1 GCI, Commentary of 2016, available at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016>, at para. 154.

86 The ICSFT evidently criminalizes the conduct of a broader range of actors insofar as it also applies to private actors (in addition to the State organs and agents which the Court has held fall within the scope of the ICSFT in its judgment on preliminary objections in *Application of ICSFT and CERD*).

87 See Art. 51 API. The prohibition on attacking civilians applies equally in the non-international armed conflict context. See Art. 13 APII.

88 Art. 2(1)(a) and Annex ICSFT.

89 Consider, for example, hostage taking, which is proscribed under the Hostages Convention and is equally a breach of IHL (Art. 3 GC I, Arts 34 and 147 GCIV, Art. 75 API); the intentional destruction of a civil aircraft in flight, which is proscribed under the Montreal Convention and would equally be in breach of the prohibition on attacking civilians (n. 87); crimes against diplomats, which is proscribed under the Internationally Protected Persons Convention and would equally be in breach of the prohibition on attacking civilians (n. 87).

to situations of armed conflict (in order to ensure that relevant TSCs do not criminalize conduct that is otherwise permissible under IHL).[90] To the extent that an existing TSC does apply to situations of armed conflict, the *financing* of the terrorist activities proscribed therein would be a crime under the ICSFT and a breach of Common Article 1 to the Geneva Conventions/API.

In failing to read an implicit prohibition on State financing of terrorism into the ICSFT, the Court missed an opportunity to create an important jurisdictional hook for the judicial settlement of disputes relating to State responsibility for financing coextensive breaches of IHL. Such financing is prohibited under Common Article 1 of the Geneva Conventions/API even if responsibility under the ICSFT would evidently have cloaked the Common Article 1 breach in a terrorism guise. Given the lack of a compromissory clause in the Geneva Conventions and API, and the dearth of optional clause declarations,[91] this would have been an important legal development supporting the enforcement of a foundational norm of IHL. An interpretation of the ICSFT which provided a jurisdictional hook for disputes relating to direct State responsibility for breaches of Common Article 1 of the Geneva Conventions/API (to the extent co-extensive with the prohibition on financing terrorism under the ICSFT) would also have been entirely consistent with States' and the ICRC's approach to the relationship between terrorism suppression and IHL. States negotiating terrorism suppression conventions and the ICRC take the position that the TSCs, when applied to situations of armed conflict, should not prohibit conduct which is not itself prohibited by IHL.[92] A *Bosnia Genocide Case* consistent interpretation of the ICSFT would have upheld direct State responsibility for breach of the Common Article 1 obligation to 'respect and ensure respect' for IHL, not undermined it.

What the Court's decision in *Application of ICSFT and CERD* has done, however, is to create a new layer of responsibility for breaches of Common Article 1 which does not clearly exist as a matter of IHL. On the Court's interpretation, the ICSFT *criminalizes* the financing of underlying terrorist conduct (which is broadly co-extensive with breaches of IHL when such terrorist conduct occurs

90 See, for example, Art. 19 Terrorist Bombing Convention. See further Trapp, *State Responsibility for International Terrorism*, at 147–153, for a discussion of exclusions from the Terrorist Bombing Convention and the regime interaction principles these give effect to.

91 See n. 28.

92 See ICRC, 'The Applicability of IHL to Terrorism and Counterterrorism' (1 October 2015), available at <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism> (accessed 8 May 2023).

in the context of an armed conflict) by State organs and agents and makes it subject to universal jurisdiction – with individual criminal responsibility attaching to their financing conduct. But as a matter of IHL, State financing of IHL breaches (in breach of Common Article 1 of the Geneva Conventions/API) is a matter of State responsibility. It is not a war crime to which individual criminal responsibility attaches.[93] The Court's interpretation of the ICSFT, which subjects the financing of proscribed conduct by State organs and agents to prosecution (including on the basis of universal jurisdiction) for the State's *own* financing puts this difference squarely in contention.

In many quarters, this development may well be viewed as a triumph – adding to the arsenal of enforcement possibilities in respect of IHL breaches (even if in a terrorism guise), ultimately to protective effect insofar as victims of armed conflict are concerned. But the question of whether the terrorism suppression regime should be available to plug any real or perceived enforcement gaps in respect of co-extensive IHL breaches (which are not themselves subject to criminal law enforcement obligations as a matter of IHL) is a contested issue in the negotiation of the CCIT.[94] The Court's preliminary objections decision in the *Application of the ICSFT and CERD* has answered this question in the affirmative, at least insofar as the ICSFT is concerned.

In the merits phase of *Applications of ICSFT and CERD*, Ukraine and Russia have addressed the elements of underlying terrorist conduct under the ICSFT, and the relationship of these elements with their IHL counterparts,[95] but have not addressed the additional layer of individual criminal responsibility the Court's interpretation of the ICSFT imposes in respect of breaches of Common Article 1 of the Geneva Conventions/API in any detail.[96] Russia has however

93 See generally L.A. Jonas, *Individual Criminal Responsibility for the Financing of Entities involved in Core Crimes* (Brill 2022).

94 This question only arises where the definition of terrorist conduct in a relevant TSC criminalizes acts which are prohibited by IHL, but are not subject to prosecution as a matter of IHL. See UNGA Sixth Committee, 'Summary Record of the 35th Meeting', at 3–4, referencing UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', at Annex III. See further Trapp, *State Responsibility for International Terrorism*, Section 4.2.2.

95 In its oral pleadings, Russia has argued that the elements of underlying terrorist offences in the ICSFT ought to be interpreted consistently with IHL (*Application of ICSFT and CERD* (*Counter-Memorial on the Case Concerning Application of the International Convention for the Suppression of the Financing of Terrorism submitted by the Russian Federation*) [9 August 2021], at 53–54, paras 196–97), while Ukraine has argued that the ICSFT and IHL are distinct bodies of law to be interpreted on their own terms (*Application of ICSFT and CERD* (*Reply Submitted by Ukraine*) [29 April 2022], at 71, para. 154).

96 Russia briefly addresses the potential overlap between the ICSFT and the obligation to 'respect and ensure respect' IHL thusly: 'Furthermore, the general obligation of States

suggested a broad interpretation of Article 21 ICSFT, which provides that '[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular [...] international humanitarian law'.[97]

The Court's interpretation of Article 21 ICSFT, and whether it responds to the concerns of some State Parties to the TSCs that the terrorism suppression regime not upset balances achieved in IHL (including policy choices as to the scope of individual criminal responsibility for IHL breaches) remains to be seen. If the Court adopts the broad approach to Article 21 ICSFT proposed by Russia, its interpretation of the ICSFT – requiring the prosecution of State organs and agents for financing acts of terrorism (which also amount to war crimes when carried out in the context of an armed conflict) – will be for nothing. In particular, if Article 21 is interpreted to preclude additional modes of responsibility for individuals beyond those provided for by IHL, to the extent that the ICSFT and IHL apply co-extensively, then the ICSFT cannot oblige States to prosecute individuals for financing breaches of IHL given that IHL does not do so. Such an interpretation would be entirely consistent with Russia's pleadings at the stage of preliminary objections (to the effect that the ICSFT applies to 'private persons only'),[98] and consistent with the position of at least some States that the TSCs should not impose criminal sanction for conduct that is not criminalized under IHL, but wildly inconsistent with the ordinary meaning of 'any person'[99] and the Court's own judgment on preliminary objections.

2.2 *Non-military Force*

In respect of whether non-military State-sponsored or supported violence should fall within the scope of the terrorism suppression conventions, the US has argued both that it does and that it does not (in part reflecting the different strategic interests in respect of a broad jurisdictional approach for an applicant versus a respondent State). In *Tehran Hostages*, where the US

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to ensure respect for international humanitarian law may also be interpreted as prohibiting financing of war crimes of terror, as the ICRC says [footnote omitted], and we may conclude that international humanitarian law also addresses financing of war crimes of terror in a general way'. *Application of ICSFT and CERD* (*Verbatim Record*) [14 June 2023], at 31, para. 9.

97 On Russia's interpretation, Article 21 is a 'a clear do not affect clause'. *Application of ICSFT and CERD* (*Verbatim Record*) [14 June 2023], at 20, para. 53.

98 *Application of ICSFT and CERD* (*Preliminary Objections Submitted by the Russian Federation*), at 105, para. 212.

99 See Trapp, *State Responsibility for International Terrorism*, at 161–62.

was the applicant, it argued that Iran was *directly* responsible for complicity in the Embassy hostage crisis (amounting to a breach of the Internationally Protected Persons Convention)[100] and that Iran should be held to its criminal law enforcement obligations under that Convention (despite its complicity in the very hostage taking which would be the subject of prosecution).[101]

In the *Lockerbie Cases*, the US and UK (as respondents) argued that the Montreal Convention was not the appropriate framework for addressing the bombing of flight Pan Am 103 by Libyan secret service agents. In this case, however, it bears noting that the arguments were framed specifically in response to Libya's assertion of a *right* to prosecute its own nationals (despite the allegations of Libyan complicity in the acts of terrorism against the safety of civil aviation that its nationals were accused of) and the claimed division of labour between the Court and the Security Council (insofar as international peace and security was implicated and the Security Council had adopted resolutions bearing directly on the prosecution of the accused Libyan nationals).[102] Uniquely, the applicant State was not the victim State of an act of violence which fell within the parameters of a terrorism suppression convention in the *Lockerbie Cases*, but was instead the State alleged to have carried out an act of terrorism.

With respect to the *Lockerbie Cases* (which were discontinued), the Court did not engage with these arguments; and in respect of *Tehran Hostages*, the Court held that it need not engage with the US claims under the Internationally Protected Persons Convention.[103] Nevertheless, the arguments in *Tehran Hostages* and the *Lockerbie Cases* regarding whether a State should or should

100 In the oral proceedings of *Tehran Hostages*, the US charges Iran with the violation of Article 2 of the Internationally Protected Persons Convention – under which 'it is a criminal act to participate as an accomplice in an attack on the person or liberty of an internationally protected person or in a violent attack on official premises' (*Tehran Hostages* (*Verbatim Record*) [18–20 March and 24 May 1980], at 23–24). Of note, Article 2 requires States to create accomplice liability for the proscribed crimes within its domestic jurisdiction. The US at no stage was alleging that Iran had failed to criminalize being an accomplice. Rather, the US was claiming a breach of Article 2 insofar as Iran *was the accomplice*.

101 The US discussion of the obligation of a terrorism-sponsoring State to prosecute its own organs for that act of terrorism was prompted by a question from the Court during the oral phase of the proceedings. The US suggested that, despite Iran's complicity in the hostage crisis, the Court should nevertheless re-affirm Iran's criminal law enforcement obligations to ensure a deterrent effect on the community of States. *Tehran Hostages* (*Verbatim Record*), at 306–7.

102 See, for example, *Lockerbie Case* (*UK*) (*Counter-Memorial of the United Kingdom*) [March 1999], at Section 3.E and 4.

103 See n. 46.

not prosecute its own agents (or non-State actors whose conduct it has supported) for an act of State terrorism evidently raise important questions of effective or good/bad faith compliance with criminal law enforcement obligations[104] and highlights the risk of *sham* prosecutions mounted with a view to shielding State agents from responsibility. Such show prosecutions would very evidently undermine the purpose of the terrorism suppression conventions.[105] The arguments on these points set out in *Tehran Hostages* and the *Lockerbie Cases* are of present interest insofar as they seem directly relevant to the approach the Court took to the (in)applicability of the ICSFT to State financing of terrorism in *Application of ICSFT and CERD*.

Having held that the ICSFT is not applicable to State financing of terrorism, the Court nevertheless held that 'all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise'.[106] The Court is here re-affirming a State's obligation to prosecute 'any person', including organs and agents acting on its behalf, for proscribed terrorism financing. One might have expected the stage to be set for a round of argument in respect of the good faith obligation to prosecute, the independence of domestic judiciaries (where the accused acted on behalf of or with the complicity of the executive) and the 'no impunity' object and purpose of the terrorism suppression conventions. This is particularly so given there is evidently a question to be asked concerning the independence of the Russian judiciary,[107] and consequently whether any Russian prosecution of its own organs and agents for the financing of terrorist conduct pursuant to the ICSFT would be effective or good faith compliance with its criminal law

104 See *Lockerbie* (*US*) (*Provisional Measures*) (*Order of 14 April 1992*) (*Dissenting Opinion of Judge Bedjaoui*) [1992] ICJ Rep 143, at 147, para. 10: 'The most that can be said is that if the person that committed the offence acted as the organ of a State, the Convention could prove to be, not inapplicable, but rather ineffectual to the extent that the State that would opt not for extraditing but for prosecuting the suspects itself, before its own courts, would be judging itself, which, obviously, would not be a satisfactory solution'. Cf. the US position in *Tehran Hostages* on this point, n. 101.

105 The Court held that the purpose of the ICSFT is in part to adopt 'effective measures for the suppression [of terrorism] through the prosecution and punishment of its perpetrators'. See *Application of the ICSFT and CERD* (*Preliminary Objections*) (*Judgment*), at 585, para. 59.

106 Ibid., at 585, para. 61.

107 See, for example, Council of Europe, Commissioner for Human Rights, 'As Long as the Judicial System of the Russian Federation Does Not Become More Independent, Doubts About its Effectiveness Remain' (5 February 2016).

enforcement obligations. At the merits phase, Ukraine's arguments proceed on the basis that good faith compliance with an obligation to prosecute oneself is *possible*, while evidently raising issues with Russia's total lack of compliance more generally.[108] The Court would not go wrong if it reminded States that good faith compliance with criminal law enforcement obligations, in respect of prosecutions of State organs and agents, requires independence and impartiality on the part of investigating, prosecuting and judicial authorities. Indeed, the good faith compliance issue are raised very particularly in the newest terrorism-related case before the Court. Canada, Sweden, Ukraine and the UK, in their case against Iran for the downing of PS752, have expressly noted 'concern[s] over the lack of independence and impartiality of the judiciary in Iran, and repeatedly urging Iran to ensure that international fair trial standards are met in its criminal justice system alleged'.[109]

2.3 *Conclusions*

Whether States (or their organs/agents) should be held responsible for terrorist conduct defined in a terrorism suppression convention, as a matter of that convention, has been a highly contested question in disputes before the Court. The question has been asked in respect of both whether the TSCs contemplate *direct* State responsibility for an act of terrorism, and whether the TSC criminal justice/enforcement obligations apply to acts carried out by State organs or agents. Some of this contestation has been the combined result of the consensual basis of the ICJ's jurisdiction, the dearth of Article 36(2) optional clause declarations accepting the general jurisdiction of the Court, and the substantive overlap between regimes which specifically regulate the use of force by States (such as the *jus ad bellum* and IHL) and the elements of terrorist crimes defined in relevant TSCs. But some of the contestation is as a matter of principle – in particular whether States are potential terrorist actors in the sense of the TSCs and whether the proscription of terrorism and related criminal enforcement/justice obligations in the TSCs are the appropriate vehicle for addressing State breaches of the *jus ad bellum* and IHL.

There are proposals with respect to the comprehensive convention on international terrorism to exclude acts carried out by or on behalf of a State from its scope,[110] effectively answering both of the contested questions explored

108 See *Application of ICSFT and CERD* (*Reply Submitted by Ukraine*) [29 April 2022], at 108, para. 216; 164–65, para. 314; 166, para. 318.

109 *Dispute Concerning the Downing of PS752* (*Application Instituting Proceedings*) [4 July 2023].

110 See Trapp, *State Responsibility for International Terrorism*, at 156–58.

above in the negative. These proposals are principally with a view to preserving the policy objectives and balances achieved by the *jus ad bellum* and IHL and managing any potential conflict with the terrorism suppression regime. And there is increasing consensus on such a result – which would leave direct State responsibility for acts of terrorism, and any criminal law enforcement obligations which might apply to State actors, to *other* applicable regimes of international law (like the *jus ad bellum* and IHL). But the proposals are subject to agreement on an overall regime interaction package (which includes complicated questions around the definition of terrorism and the right of peoples to struggle for self-determination).[111] And by way of negotiation strategy, there are States which take the position that the CCIT *should* apply to acts of State terrorism where these *also* amount to breaches of the *jus ad bellum* or IHL – preserving the balances of these bodies of law while increasing the arsenal of international law tools available for ensuring some form of responsibility attaches.

However these contested legal questions are finally decided in respect of the CCIT, they are to be the subject of intensively negotiated provisions which achieve the precise regime interaction sought.[112] In the absence of such provisions, these questions have been the principal subject of disagreement between disputing States before the ICJ in cases relying on the TSCs as a basis for jurisdiction. Accounting for the fact that States have not yet settled on an answer to these questions as a matter of principle in respect of the CCIT – with negotiations spanning more than 20 years – one might well understand (sympathize even) with the Court's decision not to enter the fray in *Application of ICSFT and CERD*. But given its Judgment in *Bosnia Genocide*, and the even more compelling application of the arguments in that case regarding logical and necessary implications to the terrorism suppression convention context – the Court's decision is at the very least unreasoned. Moreover, this decision seems to close off the possibility that other terrorism suppression conventions might ground the Court's jurisdiction in respect of direct State responsibility for acts of terrorism (even where such direct responsibility is

111 See UNGA Sixth Committee, 'Summary Record of the 35th Meeting', at 3–4, referencing UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', at Annex III. See further Trapp, *State Responsibility for International Terrorism*, at Section 3.3.

112 UNGA, 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', at Annex II ('Written Proposals in Relation to the Outstanding Issues Surrounding the Draft Comprehensive Convention'), Draft Article 3(18) (Bureau), at 16.

not excluded by a clause which precludes any overlap with the *jus ad bellum* or IHL). This said, the Court's interpretation of the obligation to prevent and punish under the ICSFT, such that it applies to the conduct of a State's own organs and agents, has already had the effect of shining a spotlight on these obligations.[113] While findings of direct State responsibility, and the reparations that such a finding might give rise to, would be of some comfort to the victims of acts of terrorism, prevention of these acts would very evidently be much preferred. And where diligent preventive efforts are nevertheless not successful, good faith prosecutions by independent and impartial authorities are an essential element of access to justice for victims. The Court will have an opportunity to address the substantive content of the obligation to prevent and punish under the TSCs in both the merits phase of *Application of ICSFT and CERD* and the *Dispute Concerning the Downing of PS752* – one hopes to clarifying effect.

The Court's decision on preliminary objections in *Application of ICSFT and CERD* has also limited the potential for judicial settlement of disputes regarding State responsibility for breaches of Common Article 1 of the Geneva Conventions/API, while creating a new layer of (individual criminal) responsibility for such breaches. On the one hand, the Court has missed an important opportunity to create more space for the judicial settlement of disputes at the inter-State level which threaten international peace and security.[114] On the other hand, the Court has seemingly increased the criminal law enforcement possibilities in respect of the same. The expression 'you win some you lose some' springs to mind.

113 See discussion of *Dispute Concerning the Downing of PS752* (*Application Instituting Proceedings*) [4 July 2023] above.

114 This opportunity would not be available in respect of State conduct falling within the scope of every TSC – particularly those which expressly exclude overlap with IHL or the jus ad bellum. But the opportunity would have been available in respect of the ICSFT and the other TSCs which have been the subject of disputes before the Court, where the conduct in question was unlawful under both the TSC and other applicable regimes (in particular the Internationally Protected Persons Convention and the Montreal Convention). It bears noting however that the Beijing Convention (which updates the Montreal Convention) does contain a clause identical to Article 19 of the Terrorist Bombing Convention (see n. 66 above). The Beijing Convention, however, has less than 50 State Parties at the time of writing.

3 The ICJ, Security Council and International Peace and Security

As we have seen, '*what, who, and when*' is covered by each of the terrorism-related legal regimes addressed in Section 1.1 above is a highly contested question. And as Section 2 explores, *respondent* States have consistently rejected the application of the terrorism-specific criminal enforcement/justice framework to State conduct, not least when this conduct occurs within the context of an armed conflict. This contestation has been framed in reference to the appropriate division of labour between applicable legal regimes as a matter of the primary rules of international law – with respondent States arguing in favour of the exclusive application of the *jus ad bellum* and IHL to acts of State violence. This same contestation has also taken the form of debates regarding the appropriate division of labour (if any) between available responsive regimes addressing a breach of these primary rules. The focus of this second form of contestation is on the relevant roles of judicial settlement and the UN Charter peace and security apparatus in respect of disputes which threaten international peace and security.

In respect of the seven contentious cases which are the subject of this study, the factual matrix which formed part of the terrorism-related claim before the ICJ was also addressed as a threat to international peace and security before the Security Council.[115] And in their pleadings before the Court, respondent States have argued that judicial settlement is not the appropriate responsive regime for addressing these disputes.[116] The arguments have taken a number

115 In respect of the *Lockerbie Cases*, see 'Letter from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General' (20 December 1991) UN Doc. A/46/828; S/23309. In respect of *Aerial Incident*, see 'Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council' (5 July 1988) UN Doc. S/19981. In respect of *Tehran Hostages*, see 'Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (9 November 1979) UN Doc. S/13615. In respect of the *Armed Activities Cases*, see 'Letter from the Chargé D'affaires A.I. of the Democratic Republic of the Congo to the United Nations Addressed to the President of the Security Council' (13 October 1998) UN Doc. S/1998/945. In respect of *Application of ICSFT and CERD*, and over the course of 2014, the 'Letter from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council' (28 February 2014) UN Doc. S/2014/136 was repeatedly on the Security Council's agenda. See United Nations, *Index to Proceedings of the Security Council: 69th Year* (United Nations 2015).

116 See D. Akande, 'The Role of the International Court of Justice in the Maintenance of International Peace' (1996) 8 African Journal of International and Comparative Law 592, at 616. In reviewing the Court's role in the maintenance of international peace

of forms, including suggestions that dispute settlement is not appropriate for complex armed conflict contexts which cannot be fully addressed within the confines of relevant jurisdictional limitations;[117] and arguments for a division of labour between the Court and the Security Council (in favour of the latter) in cases where the Court may come into conflict or interfere with the SC's primary responsibility for international peace and security.[118] While these arguments and debates are of course not unique to the terrorism context, in that they have featured equally in broader *jus ad bellum* disputes,[119] they have been particularly pervasive in respect of acts of State terrorism.

The Court's response to the suggestion that judicial settlement is not appropriate in respect of acts of State violence which occur within complex conflict contexts, and threaten international peace and security, has been consistent. It has robustly defended, as a matter of principle, the role of judicial settlement of disputes in the peace and security space. In particular, the Court has quite rightly held that it should not 'decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important'.[120] And the Court has never held (or accepted) that its judicial function should be

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and security at the point of the Court's 50th Anniversary, Professor Akande notes that in respect of the vast majority of cases which engage such issues, the respondent State challenges the Court's jurisdiction or the admissibility of the case. He argues that the 'reluctance of States to engage in international litigation of this kind reflects an attitude among States that resort to judicial procedures only has a limited role in the settlement of international disputes'.

117 By way of example, see *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*), at 3, 14–40. In respect of *Tehran Hostages*, see Iran's suggestion that the Court – on the basis of the broader context of the dispute – should not decide the case put before it by the US (*Tehran Hostages* (*Verbatim Record*) [15 December 1979], at 18–19). See further the question put to the US by Judge Gros during the oral phase of the proceedings as to whether an applicant State can unilaterally define the nature of a dispute, when the opposing Party defines it otherwise (and evidently more broadly) (*Tehran Hostages* (*Questions of Jurisdiction and/or Admissibility*) (*Verbatim Record*) (18–20 March and 24 May)), at 268. Christine Gray refers to this complex dispute issue as an 'inseparability argument'. See Gray, 'The Use and Abuse of the International Court of Justice', at 875.

118 See *Lockerbie Case* (*US*) (*Verbatim Record 1992/4*) [27 March 1991], at 11, 13, 71.

119 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ('*Nicaragua*') (*Questions of Jurisdiction and Admissibility*) (*Counter-Memorial of the United States of America*) [17 August 1984], at paras 454–68; 507–9.

120 *Tehran Hostages* (*Judgment*), at 14, para. 24. The Court's pronouncement in that case (in response to Iran's argument around complexity, n. 117) was partly sustained by the self-contained nature of regimes of diplomatic and consular protection, which accommodate complexity in a jurisdictionally limited space (insofar as the Court's judgment would not therefore distort the nature of the dispute or questions of responsibility under other applicable regimes) (Ibid., at 40, para. 86).

displaced by the parallel engagement of the SC with a dispute.[121] Indeed, the potential for a synergetic relationship between the SC and the ICJ has been recognized since the very first terrorism-related case to come before the Court. In respect of the 1979 hostage crises in Tehran, the SC deplored the continuation of a situation threatening international peace and security, and particularly noted Iran's failure to comply with an order for provisional measures by the Court in this regard.[122] And the Court was of course aware of the mutually reinforcing role that its own engagement with a dispute threatening international peace and security might play vis à vis the SC.[123]

Despite this synergy, and the Court's consistent championing of judicial settlement in the peace and security space as a matter of principle, the Court's most recent decision in *Application of ICSFT and CERD* effectively embeds such a division of labour. Given the dearth of optional clause declarations which might ground the Court's jurisdiction in respect of inter-State conflicts or acts of State terrorism which are committed within the context of such conflicts, and the Court's rejection of a sound basis of jurisdiction in the terrorism suppression conventions (as explored in Section 2 above) – disputes in respect of these terrorism-related breaches of international law and peace and security are *in effect* left to the Security Council. But this may well mean that there is no responsive regime within which these breaches of fundamental norms of international law might be addressed. This is not least because the framework within which the SC exercises its responsibilities is intensely political and will often involve compromises, particularly where the interests of the Permanent Five members (or their allies) are at stake.[124]

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121 For example, in *Tehran Hostages* (*Judgment*), at 21, para. 44, the Court notes expressly that the SC has addressed the hostage crisis and concludes that this cannot 'be considered as constituting any obstacle to the exercise of the Court's jurisdiction in the present case'. See further, *Nicaragua* (*Jurisdiction and Admissibility*) (*Judgment*) [1984] ICJ Rep 392, at 432, para. 90; 435, para. 95 – emphasizing repeatedly the separate but complementary nature of the functions exercised by the SC and the Court.

122 In respect of the Court's order for provisional measures in *Tehran Hostages*, see UNSC Res 461, 'On Detention of Persons of United States Nationality in Iran' (31 December 1979), para. 2.

123 See *Tehran Hostages* (*Judgment*), at 22, para. 40. Indeed, the Court wanted to hear submissions on the relationship between the SC and the Court, as evidenced by the question put to US counsel during the oral phase of the provisional measure proceedings: 'What significance should be attached by the Court, for the purpose of the present proceedings, to Resolution 457 adopted by the Security Council on 4 December 1979?' (*Tehran Hostages* (*Provisional Measures*) (*Verbatim Record*) [15 December 1979], at 19).

124 See V. Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88 American Journal of International Law 643, at 654.

Indeed, we can see this from the Security Council's record in respect of the terrorism-related disputes which have come before the Court. The Security Council very evidently did not engage with each of these in the same depth, with the P-5 status of involved States being relatively decisive. For example, in respect of the *Lockerbie Cases*, the Security Council effectively took up the cause of the US and UK in seeking the extradition of Libyan nationals, alleged to be Libyan secret service.[125] In respect of the facts underlying the *Tehran Hostages* dispute, the SC's engagement with the US complaint was again robust.[126] This robust engagement with complaints submitted by P-5 members might be distinguished from the SC's engagement with the DRC's putting the facts underlying its claims in *DRC v Uganda* before the Council. The DRC described its entreaties as 'to no avail' and qualified the resolution finally adopted by the SC 'demanding an immediate halt to the hostilities and calling for the withdrawal of "uninvited" forces from Congolese territory' as 'a dead letter'.[127] On the flip side, there are threats to international peace and security for which P-5 members are alleged to be responsible. For instance, the US acknowledged in its pleadings in *Aerial Incident* that the SC did not engage terribly robustly with Iranian demands that the Council condemn the US for its downing of IR 655,[128] adopting instead a resolution expressing its 'deep distress' at the downing of aircraft.[129] And of course Ukraine brought

125 See UNSC Res 731, 'On the Destruction of Pan American Flight 103 and Union des transports aériens Flights 772' (21 January 1992); UNSC Res 748, 'On Sanctions Against the Libyan Arab Jamahiriya' (31 March 1992). Indeed, one might read Libya's pleadings in the *Lockerbie Cases* as an implicit critique that the Security Council was acting as an agent of P-5 members rather than an independent UN organ with responsibilities for international peace and security. See *Lockerbie Case* (*US*) (*Mémoire soumis par la Grande Jamahiriya Arabe Libyenne Populaire et Socialiste*) [20 September 1993]; *Lockerbie Case* (*US*) (*Réplique de la Grande Jamahiriy Arabe Libyenne Populaire et Socialiste*) [29 June 2000].

126 See UNSC Res 457, 'On Diplomatic Relations between Iran and the United States' (4 December 1979); UNSC Res 461, 'On Detention of Persons of United States Nationality in Iran' (31 December 1979).

127 *DRC v Uganda* (*Application Instituting Proceedings*) [23 June 1999], at 11.

128 See 'Letter from the Acting Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council' (4 July 1988) UN Doc. S/19979; 'Letter from the Acting Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council' (5 July 1988) UN Doc. S/19981; UNSC, 'Provisional Verbatim Record of the Two Thousand Eight Hundred and Eighteenth Meeting' (14 July 1988) UN Doc. S/PV.2818, at 6–48.

129 See UNSC Res 616, 'On the Downing of an Iranian Airliner by a United States Naval Vessel' (20 July 1988). See the US characterization of the SC's engagement with Iranian demands, *Aerial Incident* (*Preliminary Objections Submitted by the United States of America*) [4 March 1991], at 45. See further the Iranian statement before the Security Council, noting '[w]hen my Government decided to call on the Security Council to consider this heinous

the egregious breaches of IHL (in particular the downing of MH17) committed in the 2014 conflict in eastern Ukraine by armed separatists supported by Russia to the attention of the Security Council.[130] During the Security Council debates, States called on Russia to use its influence on armed groups operating in eastern Ukraine, or to re-examine its policy of supporting, training and arming violent separatist armed groups in eastern Ukraine.[131] And indeed, subsequent investigations clearly revealed Russia's responsibility in respect of the downing of MH17.[132] For obvious reasons, the Security Council only addressed responsibility neutrally – calling on 'all parties' to ensure the dignified and professional recovery of bodies and to comply with rules regarding the safety of civil aviation.[133] And following the Court's judgment in *Application of ICSFT and CERD*, Russia's responsibility for the financing of those breaches (insofar as they meet the definition of terrorism under Article 2(1)(b) ICSFT) is not susceptible to judicial settlement.

4 Conclusion

The terrorism-related disputes submitted to the Court have either been highly politicized situations with a serious risk of escalation that would further threaten international peace and security,[134] or have been part of a broader and continuing context of armed conflict.[135] In each case, given the relatively

act we were not under any illusions in respect of the decision-making process in this body. We were aware that the culprit would also be the ultimate judge. The degree of justice we expected in respect of the final decision was accordingly very limited' (UNSC, 'Provisional Verbatim Record of the Two Thousand Eight Hundred and Twenty-First Meeting' (20 July 1988) UN Doc. S/PV.2821, at 7).

130 See 'Letter from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council' (28 February 2014) UN Doc. S/2014/136.

131 See UNSC, 'Provisional Verbatim Record of the Seven Thousand Two Hundred and Twenty-First Meeting' (21 July 2014) UN Doc. S/PV.7221.

132 See in reference to the downing of MH17 over eastern Ukraine, Netherlands, Public Prosecution Service, 'Update in Criminal Investigation MH17 disaster' (24 May 2018); M. Milanovic, 'The Netherlands and Australia Attribute the Downing of MH17 to Russia' EJIL:Talk! (25 May 2018).

133 UNSC Res 2166, 'On Downing of Malaysia Airlines Flight MH17 on 17 July in Donetsk Oblast, Ukraine' (21 July 2014), at paras 8 and 12.

134 Note in particular the Court's discussion of the attempted US incursion into Iranian territory while the case was before the Court. *Tehran Hostages* (*Judgment*), at 43, para. 93.

135 This is in particular the case in respect of *Aerial Incidence*, the *Armed Activities Cases*, and *Application of ICSFT and CERD*. In respect of the newest case to be filed before the Court (*Dispute Concerning the Downing of PS752* (*Application Instituting Proceedings*) [4

small number of optional clause (Article 36(2)) declarations under the ICJ Statute, the Court's jurisdiction was grounded in a terrorism suppression convention which required States to prevent, criminalize and punish the underlying conduct which was the subject of the Application.

The Court's engagement with these cases presents somewhat of a contradiction. On the one hand, the Court has resisted, as a matter of principle, arguments that it has no (or a very limited) role to play in respect of disputes which form a part of broader conflict contexts or that touch on international peace and security. And this is quite as it should be. The Court can have a 'pacifying effect' on disputes[136] in that the judicial process itself, whether resisted or not, legalizes a dispute and thereby limits the need for the kind of sabre rattling which results in escalation. There is something important to be said for States having to frame and defend violence (including in armed conflict contexts) in legal terms, supported by evidence, insofar as this limits the space for propaganda wars based on 'alternative facts'.

On the other hand, where the Court has had jurisdiction in this space, its exercise of that authority has been minimalist – particularly evident in its non-engagement with relevant issues in *Tehran Hostages* and *DRC v Uganda*.[137] While there is something to be said for judicial economy, the resulting failure to build up a terrorism-related jurisprudence over time is to be lamented. In addition, the Court has *effectively* relegated cases regarding direct State responsibility for terrorism (whether in the context of an armed conflict or not) to the exclusive remit of the Security Council, through its interpretation of the scope of the ICSFT in *Application of ICSFT and CERD*. While that decision has also had the positive effect of highlighting the obligations to prevent and punish acts of terrorism, leaving direct responsibility beyond judicial settlement is not to be celebrated. This is not least given that the SC's political capacity for dealing with threats to international peace and security occasioned by P-5 conduct is, for obvious reasons, limited at best.

While there are evidently a great number of contested questions, including difficult regime interaction issues, involved in applying a criminal enforcement/justice convention to State conduct which is also governed by other legal regimes, there are ample tools to manage this complexity in a jurisdictionally

July 2023]) – there was a context of hostilities between Iran and the US at the time the surface-to-air missiles were fired from Iranian territory.

136 M. Bedjaoui, 'Presentation' in C. Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Nijhoff 1997) 16, at 22.

137 See ns 45–46 and 70, and accompanying text.

limited space – both in reliance on the general interpretive approaches the Court has employed in other cases (like the *Bosnia Genocide Case*) and the regime interaction clauses in relevant terrorism suppression conventions. In the final analysis, one might have hoped the Court's approach to the terrorism space would have been more reflective of Judge Simma's appeal in the *Oil Platforms* case: that the Court should use every possible opportunity to address unlawful uses of force by States, to 'secure that the voice of the law of the Charter [and IHL] rise above the current cacophony'.[138]

138 Language in square brackets added. *Oil Platforms* (*Islamic Republic of Iran v United States of America*) (*Judgment*) [2003] ICJ Rep 161; Ibid. (*Separate Opinion of Judge Simma*), at 324, para. 6.