

RUNNER-UP OF THE JAMES CRAWFORD PRIZE

## *Holding States Responsible for Terrorism before the International Court of Justice*

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State sponsored or supported terrorism has long been a feature of modern international relations, but responsibility for such activities is rarely invoked or established successfully. One reason for this is the international community's heavy reliance on a security paradigm in response to state involvement in terrorism over recent decades. The aim of this article is to examine an alternative response to State terrorism based on judicially determined legal responsibility rather than (to date unsuccessful) reliance on Article 51 of the UN Charter. This article will examine the possible bases of the ICJ's jurisdiction in cases of state terrorism and argue that the series of terrorism suppression conventions—adopted by the international community with a view to ensuring the criminal responsibility of individual terrorist actors—could also be the vehicle for securing determinations of state responsibility for terrorism before the International Court of Justice.

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The Lockerbie bombing. The assassination of former Lebanese Prime Minister Hariri.<sup>1</sup> Most recently, alleged Iranian involvement in diplomatic assassination plots in the United States and Thailand.<sup>2</sup> State sponsored or supported terrorism has long been a feature of modern international relations—States have relied on it to accomplish their foreign policy objectives in deniable fashion, as a clandestine and low-level alternative to an outright use of force. Most allegations of State involvement in terrorism are met with indignant

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<sup>1</sup> The UN International Independent Investigation Commission, charged by the Security Council to assist the Lebanese authorities in their investigation of Hariri's assassination, noted the improbability that a third party could have undertaken the necessary surveillance of Mr Hariri and maintained the resources, logistics and capacity needed to initiate, plan and carry out the assassination without the knowledge of the Lebanese security services and their Syrian counterparts. UN Doc S/2005/662, 31, paras 123–24. The Security Council, in its Chapter VII Resolution 1636 (2005), took note of the Commission's conclusions; determined that 'the involvement of any state in the assassination would constitute a serious violation by that state of its obligations to prevent and refrain from supporting terrorism and that it would amount to a serious violation of its obligation to respect the sovereignty and political independence of Lebanon'; and decided that 'Syria must detain those Syrian officials or individuals whom the Commission considers as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, and make them fully available to the Commission'.

<sup>2</sup> BBC, 'US to pressure Iran over "plot" to kill Saudi envoy', 12 October 2011, <<http://www.bbc.co.uk/news/world-us-canada-15269348>> accessed 22 May 2012; BBC, 'Bangkok blast suspects "targeting Israeli diplomats"', 16 February 2012 <<http://www.bbc.co.uk/news/world-asia-17055367>> accessed 22 May 2012.

denials,<sup>3</sup> and state responsibility for international terrorism has therefore rarely been successfully implemented. Even in respect of perhaps the most famous example of the 'successful' implementation of state responsibility for international terrorism—the Lockerbie bombing—Libya retained a certain measure of deniability. After 7 years of Security Council enforcement measures,<sup>4</sup> Libya's final settlement of the dispute regarding its responsibility for the Lockerbie bombing included a letter to the Security Council in which it accepted 'civil responsibility for the actions of its officials in the Lockerbie affair, in conformity with international civil law' and agreed to pay compensation to the victims.<sup>5</sup> In a later interview with the *BBC*, however, Colonel Ghaddafi's son made it clear that acceptance of responsibility was purely for the purposes of having Security Council measures lifted, and that the wording in the letter was intentionally ambiguous in order to preserve Libya's denial of involvement.<sup>6</sup> The Lockerbie experience suggests that there is little satisfaction in this form of dispute settlement—financial compensation does not lighten the burden of ambiguous admissions of responsibility and un-established facts.

With increasing debate over the effectiveness of trade sanctions and countermeasures in response to state terrorism, particularly where alternative trading partners are available, different mechanisms for implementing State responsibility need to be explored. The aim of this article is to examine one such mechanism which (to an extent) would avoid Lockerbie type deniability: the judicial settlement of disputes. The role of the International Court of Justice (ICJ or the 'Court') is of course a matter of debate, or perhaps perspective. But whether the Court fashions itself as a settler of particular legal disputes, as a mediator, or as the voice of international law—it certainly has some role to play in establishing a historical record, or at least a historical record of contested facts. The Court can also have a 'pacifying effect' on disputes<sup>7</sup> 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. Appearing before the Court can give states the opportunity to

<sup>3</sup> In regard to the Lockerbie bombing, see n 6 below. Syria has consistently denied any involvement in the Hariri assassination. *BBC*, 'UN Hariri probe implicates Syria', 21 October 2005 <[http://news.bbc.co.uk/1/hi/world/middle\\_east/4362698.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4362698.stm)>. Most recently, Iran has demanded an apology from the United States in regard to accusations of Iranian involvement in a plot to assassinate Saudi diplomats in US territory. See Saeed Kamali Dehghan, 'Tehran issues formal complaint over allegations that Iranian regime was involved in plot to kill Saudi's ambassador to US' 31 October 2011, *The Guardian*, <<http://www.guardian.co.uk/world/2011/oct/31/iran-demands-apology-assassination-plot>> accessed 22 May 2012.

<sup>4</sup> When Libya would not accommodate the US and UK requests for the surrender of the Lockerbie bombing suspects, the Security Council adopted resolutions first urging Libya to comply with the requests (UNSC Resolution 748 (1992)), and then requiring Libya to do so under Chapter VII, in addition to imposing sanctions (UNSC Resolution 731 (1992), para 3). All of the Security Council measures against Libya were suspended when Libya delivered the two suspects to a Scottish Court sitting in the Netherlands. See Statement made on behalf of the Security Council, 9 July 1999, UN Doc S/PRST/1999/22.

<sup>5</sup> Letter dated 15 August 2003 from the Chargé D'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, UN Doc S/2003/818.

<sup>6</sup> In an interview with the *BBC*, Colonel Gaddafi's son confessed that '[y]es, we wrote a letter to the Security Council saying we are responsible for the acts of our employees . . . , but it doesn't mean that we did it in fact . . . I admit that we played with words – we had to . . . What can you do? Without writing that letter we would not be able to get rid of sanctions'. *BBC*, 'Lockerbie Evidence not disclosed', 28 August 2008, <[http://news.bbc.co.uk/1/hi/scotland/south\\_of\\_scotland/7573244.stm](http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/7573244.stm)> accessed 22 May 2012.

<sup>7</sup> M. Bedjaoui, 'Presentation' in Peck and 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* (Martinus Nijhoff 1997) 16, 22.

address each other from across the aisle in the Great Hall, rather than through heated diplomatic exchanges which fuel media propaganda wars (if not worse). This is of course not always the case. There was no evidence, for instance, of the potential civilizing effect of appearing before the Court and being reminded of the obligation to peacefully settle disputes in the recent conflict between Russia and Georgia. In other cases, however, the judicial settlement of a dispute has put an end to an ongoing conflict or served as a catalyst for further negotiations that put an end to the conflict.<sup>8</sup>

There has been heavy reliance on a security paradigm in response to state involvement in terrorism over the last decades. While the availability of an alternative approach—one based on judicially determined legal responsibility rather than (to date unsuccessful) reliance on Article 51 of the UN Charter—is not expected to put an end to military reactions, it should at least give state department and foreign affairs lawyers a further moment's pause. In order that the judicial settlement of disputes regarding state responsibility for international terrorism amount to a realistic alternative, however, there needs to be a sound basis for the ICJ to exercise jurisdiction over such disputes. This article will examine the possible bases of the Court's jurisdiction in cases of state terrorism and argue that the series of terrorism suppression conventions—adopted by the international community with a view to ensuring the criminal responsibility of individual terrorist actors—could also be the vehicle for securing determinations of state responsibility for international terrorism before the ICJ.

Section 1 of this article will explore the substantive obligations bearing on states in regard to terrorism, distinguishing between those obligations which address terrorism as a criminal law enforcement challenge and those which address terrorism through the prism of Article 2(4) of the UN Charter. Section 2 will briefly sketch the applicable legal framework of state responsibility (noting in particular judicial settlement as a mechanism for its implementation), and Section 3 will then map the potential bases of the ICJ's jurisdiction. Section 4 will argue that the ICJ's decision in the *Bosnia Genocide* case,<sup>9</sup> to the effect that the obligation to prevent genocide under the Genocide Convention<sup>10</sup> implies a prohibition of state genocide, should be the vehicle for securing the ICJ as a forum for dispute settlement in cases of state terrorism.

<sup>8</sup> Most recently, the ICJ's July 2011 order that Thai and Cambodian forces be 'provisionally excluded from a zone around the area of the Temple [of Preah Vihear]' resulted in both states agreeing to withdraw their troops from the disputed border region in the presence of Indonesian observers. *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Request for the Indication of Provisional Measures, Order of 18 July 2011. See BBC, 'Thailand and Cambodia reach deal on temple border', 21 December 2011, <<http://www.bbc.co.uk/news/world-asia-pacific-16294309>> accessed 22 May 2012. See also Llamzon's discussion of the territorial dispute between Libya and Chad (settled by the ICJ in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, [1994] ICJ Rep 6); and the land and maritime dispute between Cameroon and Nigeria (settled in part by the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Judgment, [2002] ICJ Rep 303). A.P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *European Journal of International Law* 815, 829–38.

<sup>9</sup> *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 (hereinafter *Bosnia Genocide* case).

<sup>10</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (hereinafter the 'Genocide Convention').

In particular, were the Court's expansive interpretation of the obligation to prevent applied to the terrorism suppression conventions, their wide ratification and compromissory clauses would ensure that there is at least some basis for the Court's jurisdiction in most cases of alleged state terrorism. Finally, Section 5 will assess the Court's limited practice of relying on alternative and more directly applicable regimes of international law in deciding disputes touching on state terrorism and conclude that where there is no other basis of jurisdiction, the Court should rely on its *Bosnia Genocide* case analysis to secure the availability of judicial settlement in disputes over state terrorism.

### 1. *Substantive Obligations Regarding Terrorism*

The international community has long addressed terrorism as a criminal phenomenon through the adoption of treaties that aim to secure the individual responsibility of terrorist actors. The first international suppression terrorism convention was adopted under the auspices of the League of Nations in response to the assassination of King Alexander of Yugoslavia and Mr. Louis Barthou, Foreign Minister of the French Republic, in Marseilles on 9 October 1934.<sup>11</sup> While the League convention never entered into force, the 'habitude' of adopting international conventions on terrorism in response to particularly egregious terrorist crimes has continued throughout the 20th century. To date, there are 13 international conventions and protocols that require state parties to (i) criminalize a particular manifestation of international terrorism under domestic law; (ii) co-operate in the prevention of that terrorist act, and (iii) take action to ensure that alleged offenders are held responsible for their crime (through the imposition of an obligation to extradite or submit the alleged offender to prosecution).<sup>12</sup> Collectively, these conventions are referred to in this article as the 'Terrorism Suppression Conventions' (TSCs).

<sup>11</sup> League of Nations, Official Journal 1934 (July–December) 1712, 1713–1716. See also M. Liais, 'L'affaire Hungaro-Yugoslave devant le Conseil de la Société des Nations', 42 *Revue Générale de Droit International Public* (1935) 125.

<sup>12</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970, 860 UNTS 105 (hereinafter 'Hague Convention'); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, done at Beijing on 10 September 2010 (hereinafter '2010 Protocol to the Hague Convention' (not yet in force)); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, 974 UNTS 177 (hereinafter 'Montreal Convention'); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988, ICAO Doc 9518; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, done at Beijing on 10 September 2010 (hereinafter 'Beijing Convention' (not yet in force)); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973, 1035 UNTS 167 (hereinafter 'Internationally Protected Persons Convention'); International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979, 1316 UNTS 205 (hereinafter 'Hostages Convention'); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, IMO Doc SUA/CONF/15/Rev.1 (hereinafter 'SUA Convention'); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located in the Continental Shelf, done at Rome on 10 March 1988, IMO Doc SUA/CONF/16/Rev.2; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation, done at Rome on 14 October 2005, IMO. Doc LEG/CONF.15/21 (2005) (hereinafter '2005 Protocol to the SUA Convention'); International Convention on the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, UN Doc A/RES/52/164 (1997) (hereinafter 'Terrorist Bombing Convention'); International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999, UN Doc A/RES/54/109 (1997); International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by

The TSCs view the state as a mechanism of control through which individual terrorist conduct is addressed. The responsibility they envision is punitive in nature and the mechanisms available under the TSCs for giving effect to this form of responsibility are well developed. Ensuring that individual actors are held criminally responsible for their terrorist conduct, however, does not fully address the problem of international terrorism. Terrorism is not merely a tool of the dispossessed. It is equally, if not (considering the examples discussed above) more dangerously, a tool used by states to achieve their foreign policy objectives in deniable fashion. Holding states responsible for their part in terrorist conduct can play an important role in maintaining respect for international law,<sup>13</sup> 'confirm the validity of fundamental international norms'<sup>14</sup> relating to terrorism, and might even prevent the escalation of threats to international security by promoting the reconciliation of the relevant states and restoring 'confidence in a continuing relationship'.<sup>15</sup>

As a result, international law also addresses the state as a potential terrorist actor, and states are subject to an obligation to refrain from participating in, supporting, or acquiescing in acts of international terrorism. These obligations are specific instantiations of the more general prohibition on the use of force in international relations under Article 2(4) of the UN Charter and customary international law, breach of which engages the international responsibility of the wrongdoing state.<sup>16</sup>

## 2. *Implementation of State Responsibility*

A breach of the primary rules of international law related to terrorism gives rise to a state's responsibility for an internationally wrongful act by operation of the law.<sup>17</sup> As a result of such responsibility, the wrongdoing state is under a secondary obligation to cease the wrongful conduct and to make full reparation for any injury caused thereby.<sup>18</sup> Following initial protests by an injured state, however, wrongdoing states generally refuse to acknowledge responsibility for

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the General Assembly of the United Nations on 13 April 2005, UN Doc A/59/766 (2005) (hereinafter 'Nuclear Terrorism Convention').

<sup>13</sup> See Commentary to Part Two, Chapter I, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the work of its 53rd session, UN Doc A/56/10 (2001), 31 (hereinafter 'ILC Articles on State Responsibility'), para 1.

<sup>14</sup> I. Scobbie, 'Assumptions and presuppositions: state responsibility for system crimes' in Nollkaemper and van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 270, 283.

<sup>15</sup> See J. Crawford, 'Third Report on State Responsibility', UN Doc A/CN.4/507 (2000), para 57, discussing the secondary obligations of cessation and assurances of non-repetition.

<sup>16</sup> The UN Declaration on Friendly Relations characterizes the prohibition of state terrorism as an instantiation of the general prohibition of the use of force, and affirms that it is the duty of every state to 'refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'. 1st Principle, UN Declaration on Friendly Relations, UNGA Resolution 2625 (1970). See also UN Declaration on International Terrorism, UNGA Resolution 49/60 (1994), para 4; Supplement to the UN Declaration on International Terrorism, UNGA Resolution 51/210 (1996), Annex, para 5; World Summit Outcome Document, UN Doc UNGA Resolution 60/1 (2005), para 86, all reiterating the prohibition on state terrorism (without defining terrorism) through the prism of the UN Charter and the prohibition on the use of force.

<sup>17</sup> Commentary to art 43, ILC Articles on State Responsibility (n 13) para 2.

<sup>18</sup> Arts 30(a) and 31, ILC Articles on State Responsibility (n 13).

international terrorism.<sup>19</sup> To the extent that a wrongdoing state does not acknowledge its responsibility for an internationally wrongful act related to terrorism and therefore fails to comply with the secondary obligations resulting from that responsibility, the injured state will have to rely on the mechanisms available under international law to ‘enforce’ or implement the wrongdoing state’s responsibility.

The two methods of implementing state responsibility contemplated in the ILC Articles are (i) the invocation of responsibility and (ii) the adoption of countermeasures.<sup>20</sup> A formal invocation of state responsibility includes (but is not limited to) filing an application before a competent international tribunal.<sup>21</sup> While the ICJ’s precise compliance record is a matter of dispute among commentators,<sup>22</sup> there is little room to doubt the important role it plays in resolving disputes—with substantial compliance in the majority of cases in the post-*Nicaragua* era.<sup>23</sup> The same cannot be said for the adoption of countermeasures, at least in the terrorism context. Absent Security Council enforcement action (which, to date, has only been relied on quasi-effectively in response to the Lockerbie bombing), the adoption of countermeasures by injured states has not clearly resulted in cessation and reparation by the wrongdoing state—in final settlement of a dispute about state terrorism.<sup>24</sup> Indeed, it may have quite the opposite effect. Countermeasures are a self-help remedy. They are not a mechanism for states to resolve disputes, but a means for states to unilaterally pressure other states to comply with international law. The adoption of countermeasures can therefore escalate a dispute, particularly where facts are contested and the target state refuses to accept responsibility for any wrongdoing (as is often the case in the terrorism context). While the success of judicial settlement in implementing state responsibility for international terrorism remains untested,<sup>25</sup> experience in other highly contested contexts suggests that there is more chance of implementation via the ICJ than there is through the adoption of countermeasures.

### 3. *The Jurisdiction of the International Court of Justice*

In order that the judicial settlement of disputes amount to a potential mechanism for implementing a state’s responsibility for international terrorism,

<sup>19</sup> See n 3 above.

<sup>20</sup> See Part Three, ILC Articles on State Responsibility (n 13).

<sup>21</sup> See Commentary to art 42, ILC Articles on State Responsibility (n 13) para 2. In the collection of essays entitled *The Law of International Responsibility* edited by (among others) former Special Rapporteur Crawford, the judicial settlement of disputes in matters of state responsibility is considered in Part V of the collection, entitled ‘The Implementation of International Responsibility’. See J. Crawford and others (eds), *The Law of International Responsibility* (OUP 2010). In that edited collection, see also G. Cottreau, ‘Resort to International Courts in Matters of Responsibility’, 1115, referring to the pacific settlement of disputes as a means of implementing international responsibility.

<sup>22</sup> See E.A. Posner and J.C. Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 1; C. Paulson, ‘Compliance with Final Judgments of the International Court of Justice since 1987’ (2004) 98 *American Journal of International Law* 434; C. Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004).

<sup>23</sup> See A.P. Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2008) 18 *European Journal of International Law* 815.

<sup>24</sup> See K.N. Trapp, *State Responsibility for International Terrorism* (OUP 2011), ch 5, for a review of state practice in adopting countermeasures in response to a state’s participation in international terrorism.

<sup>25</sup> See Section 5 below.

there must be an available forum for such settlement. Despite the proliferation of international courts and tribunals,<sup>26</sup> the ICJ remains the only international court with a general jurisdiction that might cover disputes relating to a state's responsibility for international terrorism. The ICJ's jurisdiction, however, is not compulsory and is based on the consent of the applicant and respondent states. Consent can be expressed in an *ad hoc* fashion with reference to a particular dispute,<sup>27</sup> pursuant to an optional clause declaration,<sup>28</sup> or through compromissory clauses.<sup>29</sup>

Most disputes over which the ICJ has asserted jurisdiction have been on the basis of compromissory clauses, rather than *ad hoc* consent or Article 36(2) declarations. *Ad Hoc* consent in the terrorism context is very unlikely. And while the predicted demise of Article 36(2) jurisdiction following the Court's controversial *Nicaragua* decision hasn't materialized, in that the number of Article 36(2) declarations has held steady,<sup>30</sup> it is also not the most likely source of the Court's jurisdiction in cases of state responsibility for international terrorism. Part of the reason for this is the limited number of Article 36(2) declarations and the capacity to carve out certain disputes or disputants from acceptance of the ICJ's jurisdiction. Of the 66 states that have accepted the ICJ's compulsory jurisdiction under Article 36(2) of the ICJ Statute, more than one-third have reserved against the ICJ having jurisdiction over certain types of dispute (for instance, disputes related in some way to the use of armed force)<sup>31</sup> or particular disputants.<sup>32</sup> The ICJ has given the fullest possible effect to these reservations, emphasizing that declarations under Article 36(2) of the ICJ Statute are different from compromissory clauses in that the ICJ must place a particular emphasis on the intention of the declaring state.<sup>33</sup>

In addition, very few states that are habitually charged with sponsorship of or support for international terrorism have made Article 36(2) declarations. With

<sup>26</sup> See generally Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2004).

<sup>27</sup> Art 36(1), Statute of the International Court of Justice, 26 June 1945, [1946–47] United Nations Yearbook 843 (hereinafter 'ICJ Statute').

<sup>28</sup> Under art 36(2) of the ICJ Statute, states may recognize the compulsory jurisdiction of the ICJ, in advance, for all legal disputes they have with any other state which has also accepted the ICJ's jurisdiction (subject to any reservations made to their declaration, often referred to as an optional clause declaration).

<sup>29</sup> Art 36(1), ICJ Statute.

<sup>30</sup> See L. Damrosch, 'The Impact of the Nicaragua Case on the Court and Its Role: Harmful, Helpful, or In Between?' (2012) 25 *Leiden Journal of International Law* 135.

<sup>31</sup> Twelve states have made such a reservation to their art 36(2) declarations. <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-4&chapter=1&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en)> accessed 22 May 2012.

<sup>32</sup> Eight states have excluded disputes with Commonwealth countries from their optional clause declarations. <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-4&chapter=1&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en)> accessed 22 May 2012. For an application of the Commonwealth reservation by the ICJ, see *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction, Judgment, [2000] ICJ Rep 12. Seventeen states have reserved against the Court's having jurisdiction over disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the ICJ only in relation to or for the purpose of the dispute, or where that party's acceptance of the ICJ's compulsory jurisdiction was deposited less than 12 months before the filing of the application. <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-4&chapter=1&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en)> accessed 22 May 2012. The Court held that it lacked jurisdiction on the basis of such a reservation in *Legality of Use of Force (Yugoslavia v Spain)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep 761, and *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep 826.

<sup>33</sup> See *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment, [1978] ICJ Rep 3, para 69; *Anglo-Iranian Oil Co. Case (UK v Iran)*, Jurisdiction, Judgment, [1952] ICJ Rep 93, 104; *Fisheries Jurisdiction Case (Spain v Canada)*, Jurisdiction, Judgment, [1998] ICJ Rep 432, para 48; *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction, Judgment, [2000] ICJ Rep 12, paras 42–44.

the exception of the Sudan (which has made a relevant reservation to its Article 36(2) declaration),<sup>34</sup> none of the current United States designated 'State Sponsors of Terrorism' have filed optional clause declarations.<sup>35</sup> Libya and North Korea have recently been removed from the US State Sponsors list, but were ever-present members of the list throughout the 1980s and 1990s.<sup>36</sup> Neither has made an optional declaration accepting the ICJ's compulsory jurisdiction. Finally, a number of states with terrorist organizations operating from their territory, including Yemen, Algeria, Lebanon and Afghanistan, have not accepted the compulsory jurisdiction of the Court under Article 36(2) of the ICJ Statute.<sup>37</sup> Of the remaining four states identified as terrorist safe havens by the US Department of State that have made an optional clause declaration,<sup>38</sup> one has done so subject to a reservation.<sup>39</sup>

The ICJ's jurisdiction under Article 36(2) is generally limited as a result of the small number of optional clause declarations and the high number of reservations thereto, and is even more limited in the terrorism context given the likely identity of disputants (as discussed above). Compromissory clauses may therefore be the best chance of securing the Court's jurisdiction over disputes involving state responsibility for international terrorism.

#### 4. *TSC Compromissory Clauses and the Bosnia Genocide Case Analysis*

The TSCs all have a compromissory clause conferring jurisdiction on the Court in cases of a dispute regarding the interpretation or application of the convention. As discussed above, however, the TSCs do not directly contemplate state sponsorship or support for terrorism. Rather, they view the state as the mechanism through which control over non-state terrorist conduct is asserted and impose obligations to criminalize, extradite or prosecute and prevent terrorism on states. The ICJ's decision in the *Bosnia Genocide* case suggests that the two types of obligations regarding terrorism (one prohibiting the state itself from engaging in terrorism, the other regarding the state as the enforcer of prohibitions imposed against non-state actors) overlap in the obligation to prevent. In its judgment on the merits, the ICJ held that a state's obligation to prevent genocide under the Genocide Convention necessarily

<sup>34</sup> The Sudan's optional clause declaration contains a reservation regarding disputes arising out of hostilities in which it is a belligerent, which will make its art 36(2) declaration an improbable source of the ICJ's jurisdiction in reference to acts of state terrorism.

<sup>35</sup> Cuba, Iran and Syria are the other states designated as state sponsors of terrorism in the US Department of State Country Reports on Terrorism (2008), available at <<http://www.state.gov/documents/organization/122599.pdf>> accessed 22 May 2012.

<sup>36</sup> Libya last appeared on the list in the US Department of State Country Reports on Terrorism (2005) and North Korea was removed from the list in 2008. See <<http://www.state.gov/j/ct/rls/crt/>> accessed 22 May 2012.

<sup>37</sup> See <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=I-4&chapter=1&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=I-4&chapter=1&lang=en)> accessed 22 May 2012.

<sup>38</sup> Pakistan, Somalia, Colombia and the Philippines, US Department of State Country Reports on Terrorism (2008), ch 5.

<sup>39</sup> Of relevance, Pakistan has made a multilateral treaty reservation to its optional clause declaration. <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=I-4&chapter=1&lang=en#5](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=I-4&chapter=1&lang=en#5)> accessed 22 May 2012.

implies a prohibition of the commission of genocide by the state itself<sup>40</sup> and that a dispute regarding breach of the prohibition by a state is thereby decidable by the Court pursuant to the compromissory clause of the Genocide Convention.

The ICJ's decision in the *Bosnia Genocide* case raises an obvious question: can the TSCs, which require states to prevent defined acts of terrorism, be interpreted as impliedly prohibiting states from engaging in those same acts, thereby securing the Court as a forum for settling disputes over state terrorism under the TSC compromissory clauses?<sup>41</sup> While states are clearly prohibited from engaging in the acts of violence defined in the TSCs as a matter of customary international law,<sup>42</sup> the question examined in this section is whether that obligation is duplicated in the TSCs. In its *Bosnia Genocide* case decision, the ICJ was very careful to restrict its reasoning to the particular circumstances of the Genocide Convention, and later in the judgment expressly stated that it did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for states to prevent certain acts'.<sup>43</sup> Nevertheless, and despite some difficulties with the ICJ's reasoning discussed below, the *Bosnia Genocide* case decision will figure heavily in any attempt to establish the Court's jurisdiction over disputes relating to State terrorism under the TSCs.

The ICJ's decision that there is an implied prohibition of state genocide in the Genocide Convention was based on two separate arguments, which will be considered in turn.

### A. The Argument from 'International Criminality'

The first argument relied on the Genocide Convention's characterization of genocide as an 'international crime'—from which the Court derived, by logical implication, states' undertaking not to commit acts falling within the scope of the Convention.<sup>44</sup> While the Court was perfectly clear in its understanding of responsibility under the Genocide Convention (ie that individual responsibility was criminal in nature, while the state responsibility impliedly contemplated was not),<sup>45</sup> its reasoning skated over the history of the debate as to the nature

<sup>40</sup> *Bosnia Genocide* case (n 9) para 166.

<sup>41</sup> In the *Lockerbie* case, the United States and the UK both argued that the Montreal Convention did not apply to disputes bearing on an act of state sponsored terrorism. See eg *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Counter-Memorial of the United Kingdom. While the Court decided that it had jurisdiction to consider the dispute between Libya and the United States and the UK (which ultimately turned on the applicability of the Montreal Convention to acts of state sponsored terrorism), it did not resolve the issue owing to a settlement between the state parties, and the discontinuance of the case. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Removal from List, Order of 10 September 2003, [2003] ICJ Rep 149.

<sup>42</sup> See n 16 above.

<sup>43</sup> *Bosnia Genocide* case (n 9) para 429.

<sup>44</sup> *ibid* para 166. See also C. Dominicé, 'La question de la double responsabilité de l'Etat et de son agent', in Yakpo and Boumdera (eds), *Liber Amicorum—Mohammed Bedjaoui* (Kluwer Law International 1999) 143, 150–51, arguing that the consequence of this unique feature of the Convention is that it prohibits both states and individuals from committing acts of genocide.

<sup>45</sup> *Bosnia Genocide* case (n 9) para 170. Whether holding a state directly responsible for the commission of genocide under the Genocide Convention amounts to holding it criminally responsible (as opposed to delictually responsible for the commission of an international crime) was the source of some confusion in the separate opinions. See eg *Bosnia Genocide* case, Judgment, Joint Declaration of Judges Shi and Koroma, para 4; Declaration of Judge Skotnikov, 371.

of responsibility for genocide. The General Assembly first requested the Economic and Social Council (ECOSOC) to draw up a convention on genocide in its Resolution 96(I) of 1946<sup>46</sup> and the text of the Convention was unanimously adopted by the General Assembly in 1948.<sup>47</sup> During this very brief period, there was a good deal of disagreement surrounding the extent or nature of state responsibility for the international crime of genocide. For instance, in its survey of international law for the purposes of codification, the International Law Commission (ILC) reported that the Secretary General characterized the new issues of state responsibility that arose as a result of the Nuremberg experience as ‘the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State’.<sup>48</sup> The *travaux préparatoires* of the Genocide Convention also clearly evidence some disagreement regarding whether state responsibility for genocide should be criminal or delictual in nature—a disagreement which resulted in the failure to include any substantive provision regarding state responsibility for the commission of genocide in the Convention.<sup>49</sup> At the very least these debates suggest that, *at the time of adoption*, delictual state responsibility did not follow logically from the characterization of genocide as an international crime.

The Court’s powers of interpretation are not, however, restricted by a doctrine of original intent. The rules of treaty interpretation are flexible and Article 31 of the Vienna Convention on the Law of Treaties (VCLT) evidences the interpretive power to ‘update’ international agreements by reading treaty terms in their modern contexts.<sup>50</sup> This said, by the time the *Bosnia Genocide* case was decided, the long-running debate within the ILC as to the desirability of a special regime of aggravated state responsibility for international crimes had come and gone. The concept of crimes of state had been dropped from the Articles on State Responsibility under Special Rapporteur Crawford’s stewardship, and the ILC addressed responsibility for such crimes under the rubric of serious breaches of obligations arising under peremptory norms and *erga omnes* invocations of responsibility.<sup>51</sup> Given the state responsibility project’s very deliberate break with the language of criminal law, there again seems to be no *logical* reason why characterizing conduct as an international crime should inform the scope of a state’s direct delictual responsibility with regard thereto.

<sup>46</sup> ECOSOC carried out its mandate in co-operation with the Secretary General, experts in the field of international law, an *Ad Hoc* Committee on Genocide, and the Sixth Committee of the GA. See ECOSOC Resolution 47 (IV) (1947); ECOSOC Resolution 117 (VI) (1947); UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, UN Doc A/C.6/289/Rev.1 (1948).

<sup>47</sup> UNGA Resolution 260A (1948).

<sup>48</sup> UN Doc A/CN.4/1/Rev.1 (1949), 57.

<sup>49</sup> See the rejected UK proposal to extend criminal responsibility for genocide to states under the Convention (UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, UN Doc A/C.6/236 and Corr 1 (1948); UNGA, Sixth Committee, UN Doc A/C.6/SR.96 (1948)). See also H.B. Jorgensen, *The Responsibility of States for International Crimes* (OUP 2000) 35–41; A. Seibert-Fohr, ‘State Responsibility for Genocide under the Genocide Convention’ in Gaeta (ed), *The UN Genocide Convention; A Commentary* (OUP 2009), 355–56.

<sup>50</sup> See, for eg the Court’s decision in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, [2009] ICJ Rep 213, paras 70–71, in which it interpreted navigational rights ‘for the purposes of commerce’ (art VI, Treaty of Limits (1858)) to include the relatively recent development of tourism.

<sup>51</sup> Arts 40 and 48, ILC Articles on State Responsibility (n 13). See also J. Crawford and S. Olleson, ‘The Nature and Forms of International Responsibility’ in Evans (ed), *International Law* (2nd edn, OUP 2006) 464.

The difficulty with the Court's reasoning results from the particularities of the concept of 'international crime' both in 1948 and following the ILC's adoption of the Articles on State Responsibility. The TSCs do not characterize the crimes defined therein as 'international crimes'—the phrase was deliberately left out of the conventions in order to avoid the 'crimes of state' debate in the ILC.<sup>52</sup> Instead, the terrorist offences criminalized in the TSCs were characterized as 'a matter of grave concern to the international community'. The question remains—can the Court's argument as to logical implication from the characterization of the offence be used to better effect in the terrorism context?

Drawing on language in the Court's 1970 *Barcelona Traction* decision,<sup>53</sup> the phrase 'a matter of grave concern to the international community' was used in all TSCs adopted from 1973 onward.<sup>54</sup> The TSC reference to obligations *erga omnes* unambiguously and exclusively evokes the realm of state responsibility, and the collective interest basis of standing set forth in Article 48 of the ILC's Articles on State Responsibility. This is to be distinguished from the reference to 'international crime' in the Genocide Convention, given that the concept of 'international crime' long straddled the realms of individual criminal responsibility and state responsibility. An argument could be made that—given the contemplation of a state's responsibility for terrorist crimes—the logical implication argument the Court relies on in the *Bosnia Genocide* case is stronger in the terrorism context. The state responsibility contemplated may, however, be in reference to a state's failure to comply with its criminal law enforcement obligations under the TSCs. As a result, the argument from the obligation to prevent explored below may be a better basis for reading an implied prohibition of state terrorism into the TSCs.

### B. *The Argument from the Obligation to Prevent*

The ICJ's second argument in the *Bosnia Genocide* case was that a state's obligation of prevention necessarily implies a prohibition of the commission of genocide.<sup>55</sup> While this argument has intuitive appeal, it ignores to an extent the distinctly criminal law enforcement framework of the Genocide Convention. The obligations set out in the Genocide Convention are virtually all concerned with the prosecution and punishment of genocide, suggesting that the state is viewed (at least for the purposes of the convention) as a mechanism of control through which individual behaviour is addressed rather than as a subject of

<sup>52</sup> ILC, summary record of meeting, UN Doc A/CN.4/SR.1151 (1972), [1972] YBILC, Vol 1, 11, para 26.

<sup>53</sup> The Court held that '[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'. *Barcelona Traction, Light and Power Company, Limited*, Judgment, [1970] ICJ Rep 3, para 33.

<sup>54</sup> Internationally Protected Persons Convention, preamble; Hostages Convention, preamble; 1988 Protocol to the Montreal Convention, preamble; SUA Convention, preamble. Beginning with the Terrorist Bombing Convention, the preamble characterized the defined crimes as a 'matter of grave concern to the international community as a whole' (emphasis added), more clearly evoking the *Barcelona Traction* dictum. Terrorist Bombing Convention, preamble; Terrorism Financing Convention, preamble; Nuclear Terrorism Convention, preamble.

<sup>55</sup> *Bosnia Genocide* case (n 9) para 166.

prohibitions in its own right. But the Court was not convinced that the criminal law 'vibe' of the Genocide Convention excluded state responsibility.<sup>56</sup> In support of its necessary implication conclusion, the Court noted that it would be paradoxical if states were under an obligation to prevent the commission of genocide, but were not forbidden from committing such acts themselves.<sup>57</sup> Indeed that would be paradoxical. There is however nothing paradoxical in those two obligations taking distinct legal forms. States are under an obligation to refrain from committing genocide *as a matter of customary international law*. The paradox the Court is concerned with is resolvable if one takes into account the *source* of the distinct obligations. Given that the prohibition of state genocide existed at customary international law at the time of the conclusion of the Genocide Convention,<sup>58</sup> there was no particular need to include the prohibition in a convention, which addressed prevention and criminal law enforcement obligations.<sup>59</sup>

The Court's interpretation of the Genocide Convention in the *Bosnia Genocide* case might therefore be criticized on the basis that it was driven purely by jurisdictional considerations. There is, however, an argument to be made that the Court's approach wasn't merely a jurisdictional device, but rather reflects established approaches to treaty interpretation which are likely to find application in other contexts. The practice of 'interpreting' an unexpressed treaty right or obligation into existence is indeed common in the human rights context and in reference to the constitutive treaties of International Organizations, as explored below. To the extent that the ICJ's interpretation of the obligation to prevent genocide is consistent with this practice, even if it must be recognized that the Court's interpretation *also* has jurisdictional consequences, there should be little objection in relying on the reasoning for the purposes of securing the Court as a forum for settling disputes over state terrorism in reliance on the TSC compromissory clauses.

In the human rights context, courts and tribunals have used their powers of interpretation to read positive obligations into human rights treaties. While most human rights treaties are framed in negative terms, (such that a State's obligation to respect human rights is based on a model of non-interference with those rights), the European Court of Human Rights (ECHR) and UN Human Rights Committee (HRC) have inferred a duty to act from provisions which do not expressly impose positive obligations.<sup>60</sup> The 'principle of

<sup>56</sup> The Court rejected Serbia's arguments that (i) state responsibility under the Convention was limited to responsibility for a failure to prevent or punish (see *Bosnia Genocide* case, Preliminary Objections, Judgment, [1996] ICJ Rep, para 32), and (ii) the emphasis on criminal repression in the Genocide Convention suggests that the obligation of prevention is subsumed in the obligation to punish (see *Bosnia Genocide* case (n 9) para 162).

<sup>57</sup> *ibid* para 166.

<sup>58</sup> See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15, 23.

<sup>59</sup> See Schabas, *Genocide in International Law: the Crime of Crimes* (CUP 2000), 3–4. See also UNGA Resolution 96(I) (1946) in which the GA affirms that genocide is a crime under international law, but invites states to enact legislation to prevent and punish the crime; and recommends international co-operation for the prevention and punishment of genocide. Were it clear that customary international law at the time required states to prevent and punish genocide, the GA would surely have used less tentative language.

<sup>60</sup> See D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Hart Publishing 2001), 53, characterizing most of the rights under the European Convention as 'negative rights, or rights to freedom from interference' but noting that an extensive (yet less clearly defined) set of positive obligations have been implied by the Court.

effectiveness' is the interpretive tool relied on to develop positive obligations under the European Convention of Human Rights, and has been described as 'a means of giving the provisions of the treaty the fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning'.<sup>61</sup> Oft cited examples of positive obligations being read into a human rights treaty are the obligation to institute some form of official investigation when individuals are killed by agents of the State in order to render the prohibition of arbitrary killing effective;<sup>62</sup> or the obligation to adopt measures to secure respect for private life, even in the sphere of relations amongst individuals.<sup>63</sup> The Human Rights Committee has equally read the obligation of non-refoulement into the Article 2 obligation requiring that States Parties respect and ensure respect for the International Covenant on Civil and Political Rights (ICCPR) (in particular the right to life and the prohibition on torture or cruel, inhuman or degrading treatment or punishment).<sup>64</sup> In each case, the implied obligation plays a supportive role in rendering the expressly stated rights and obligations in the human rights treaty more effective, but is nevertheless an independent obligation, breach of which can be its own source of state responsibility.

In the context of International Organizations, the ICJ has developed an implied powers doctrine in order to give effect to an international organization's purposes and functions. The ICJ first gave voice to this doctrine in its *Reparation* case advisory opinion, holding that 'the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.<sup>65</sup> The Court later held, in the *Effect of Awards* case that the power to establish a tribunal to settle disputes between the UN and its staff was essential to ensure the efficient working of the Secretariat, and arises 'by necessary intendment out of the Charter'.<sup>66</sup> Unlike in the human rights context, the implied powers are not derived from other rights or powers expressly set forth in the relevant treaty, but are instead based on a conception of the proper functioning of the International Organization and the powers

<sup>61</sup> J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993), 98. Dinah Shelton also considers implied positive obligations to be the result of the ECHR's 'doctrine of effectiveness.' 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *Duke J Comp & Int'l L* 95, 137.

<sup>62</sup> See for eg *McCann and Others*, Judgment of 27 September 1995, ECHR, Ser A, No 324, para 161, in reference to art 2 of the European Convention on Human Rights. The same positive obligation has been read into the ICCPR by the Human Rights Committee. *Hugo Rodriguez v Uruguay*, 2 *International Human Rights Reports* (1995) 112.

<sup>63</sup> See for eg *X. And Y. v The Netherlands*, Judgment of 26 March 1985, ECHR, Ser A, No 91, paras 23–28, holding that the absence of an effective criminal law remedy for the sexual abuse suffered by the Applicant violated the right to respect for private life under art 8.

<sup>64</sup> See HRC, General Comment 20: art 7, UN Doc A/47/40, Annex VI (1992), para 9; HRC, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 12. While the HRC's interpretations of the ICCPR are not binding on State Parties, the European Court of Human Rights has similarly held that the prohibition of torture implies an obligation of non-refoulement. See *Soering v United Kingdom*, Judgment of 7 July 1989, ECHR, Ser A, No 161, para 88.

<sup>65</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174, 182. The Court held in particular that the capacity to exercise a measure of functional protection of its agents arises by necessary intendment out of the character of the functions entrusted to the UN in the Charter.

<sup>66</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of July 13, [1954] ICJ Rep 47, 57.

relevant to achieving its purposes—the approach is teleological, but is still aimed at maximizing effectiveness.

The Court's approach to implied obligations in the *Genocide* case is entirely consistent with this interpretive practice in the human rights and International Organization contexts. Considering the obligation of prevention as one that is intended to target a factual circumstance (i.e. eliminate the occurrence of genocide), an implied prohibition certainly renders that obligation of prevention more effective—in that a State which is engaging in genocide is undermining the elimination of genocide occurrence. On that basis, the Court's interpretation of the obligation to prevent under the Genocide Convention suggests that the TSCs should also be interpreted as impliedly prohibiting state conduct. The TSCs require states to prevent particular terrorist offences with a view both to eliminating the occurrence of those offences and to ensuring there is no impunity for such offences. A state's sponsorship or support of a particular terrorist offence increases its incidence—thereby limiting the effectiveness of the obligation to prevent. Furthermore, a state's sponsorship of or support for an act of terrorism covered by a TSC undermines the effectiveness of that state's potential compliance with its criminal law enforcement obligations under the TSCs. This was one of the issues raised in the *Lockerbie* case. Libya had no extradition treaties with the US or UK, was prohibited under its domestic law from extraditing absent such a treaty, and its domestic law precluded the extradition of Libyan nationals. As a result, Libya would not extradite the two men accused of the Lockerbie bombing to the US or the UK.<sup>67</sup> But the US and UK did not consider Libya to have a right to prosecute under the Montreal Convention on the basis of its alleged complicity in the very act it proposed to prosecute.<sup>68</sup> To allow for such a right, at the complicit state's option, was considered to undermine the very purpose of the Montreal Convention—which was in part to ensure the effective prosecution of acts of international terrorism against civil aviation.<sup>69</sup> If the TSCs are not read as prohibiting acts of state terrorism, the criminal law enforcement prosecution obligations are rendered ineffective in cases of prosecution by the terrorism sponsoring or supporting state.

There are other features of the Genocide Convention and the TSCs that support giving the obligation to prevent its fullest weight 'in such a way that

<sup>67</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Application Instituting Proceedings filed in the Registry of the Court on 3 March 1992.

<sup>68</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)*, Provisional Measures, Oral Proceedings, CR 1992/3 (1991) 22; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US)*, Provisional Measures, Oral Proceedings, CR 1992/4 (1991) 62.

<sup>69</sup> Some commentators have argued that the Security Council's adoption of Resolution 748 (1992) in support of the US and the UK's demand that Libya surrender the two accused parties for trial suggests that the Council did not consider the Montreal Convention, and its *aut dedere aut judicare* obligation, to be workable in circumstances of alleged custodial state complicity. See M. Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' 12 *European Journal of International Law* (2001) 125, 129; C. Joyner and W.P. Rothbaum, 'Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law' 14 *Michigan Journal of International Law* (1992) 222, 254; M. Morris, 'Arresting Terrorism: Criminal Jurisdiction and International Relations', in Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004) 63, 65.

every part of [the Convention] can be given meaning'.<sup>70</sup> Article IX of the Genocide Convention confers jurisdiction on the Court over disputes 'relating to the responsibility of a State for genocide or for any other acts enumerated in Article III'. The Court correctly refused to read substantive obligations into the compromissory clause,<sup>71</sup> but did rely on Article IX in support of reading an implied prohibition of state genocide into the Convention. Unless the obligation to prevent genocide had been interpreted broadly, the reference in Article IX to state responsibility (however understood at the time) would have had no legal effect. While the TSCs do not *expressly* contemplate direct state responsibility for terrorism in their compromissory clauses, they do so implicitly. The TSCs, which contemplate conduct that a state's military forces might engage in expressly, exclude such conduct from their scope.<sup>72</sup> As a result, a number of the TSCs implicitly contemplate certain acts of state terrorism (for instance acts of terrorism carried out by non-military state organs or by non-state actors on behalf of or supported by a state) by expressly excluding others.<sup>73</sup> In addition, the exclusion clauses in the Terrorist Bombing Convention, Nuclear Terrorism Convention, 2005 Protocol to the SUA Convention, Hague Convention Protocol and Beijing Convention are each prefaced by a 'without prejudice' clause that reads as follows:

Nothing in this Convention shall affect *other* rights, obligations and *responsibilities* of states and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.<sup>74</sup>

Were the Court minded to apply a *Bosnia Genocide* case analysis to the TSCs, it could certainly consider that the exclusion of *other responsibilities* of states under international law from the scope of the Convention (in particular those regarding the military forces of a state referenced in the next paragraph of the exclusion clause) suggests that at least *some* responsibilities of states are contemplated (for instance state responsibility for an act of terrorism carried out by non-military actors). Such an interpretation would be consistent with the approach the ICJ took to Article IX of the Genocide Convention, giving references to state responsibility their fullest effect.

### C. Implications of the Bosnia Genocide Case Analysis

As argued above, the Court's reasoning as to logical implication from the characterization of the offence is more convincing in the terrorism context than it is in the *Bosnia Genocide* case. This is because the TSCs do not rely on language which evokes individual criminal responsibility (as does the 'international crime' characterization of genocide), but rather characterize terrorist

<sup>70</sup> Merrills (n 61) 98.

<sup>71</sup> *Bosnia Genocide* case (n 9) para 166.

<sup>72</sup> See art 19, Terrorist Bombing Convention; art 3, 2005 protocol to the SUA Convention; art 4, Nuclear Terrorism Convention; art VI, 2010 Protocol to the Hague Convention; art 6(3), Beijing Convention.

<sup>73</sup> This principle of treaty interpretation is the converse of the maxim *expressio unius est exclusio alterius*, and has been applied by international courts and tribunals, like the WTO Appellate Body. See Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 130.

<sup>74</sup> Emphasis added. Art 19(1), Terrorist Bombing Convention; art 4(1), Nuclear Terrorism Convention.

offences in the language of state responsibility. Nevertheless, the argument is not the strongest basis for arguing that criminal law enforcement treaties impliedly prohibit states from engaging in the defined offences. The Court's argument from the obligation to prevent is a much more compelling basis for reading implied obligations into the Genocide Convention and is largely, if not equally, applicable to the terrorism context. There is therefore good reason to expect that, if an act of state terrorism came before the Court, the interpretation of the obligation to prevent in the TSCs would be consistent with that in the *Bosnia Genocide* case. As a result of such an interpretation, the TSCs would prohibit both state sponsorship and state support of terrorism.

State sponsorship would be covered by the TSCs because the state would be prohibited from carrying out, through its organs or through non-state actors whose conduct is attributable to the state, the very terrorist acts it is required to prevent.<sup>75</sup> And in deciding that the obligation to prevent in the Genocide Convention impliedly prohibits states from committing genocide, the ICJ also concluded that states are prohibited (*mutatis mutandis*) from engaging in all accessory activities defined as punishable offences under Article III of the Genocide Convention. While this conclusion did have the Court stretching the principles of state responsibility so as to encompass the modes of accessory criminal responsibility covered by the Genocide Convention, a similar approach could certainly be taken to the TSCs. For instance, most of the TSCs define being an accomplice to a person who commits a relevant terrorist offence as falling within the scope of the Conventions.<sup>76</sup> Accomplice liability is not usually a matter for state responsibility, but on a somewhat strained interpretation, the ICJ considered Article 16 of the ILC Articles on State Responsibility (aid or assistance to another state) to be a relevant state responsibility model for complicity in genocide committed by non-state actors.<sup>77</sup> The Court might well apply the same reasoning to accomplice liability under the TSCs. On the basis of such reasoning, aid or assistance provided by a state to non-state actors carrying out a TSC-covered offence, where the state 'acted knowingly, that is to say... was aware of the... intent of the principal perpetrator',<sup>78</sup> would give rise to state responsibility for a breach of the implied prohibition of a state's 'participating as an accomplice' in the TSC-covered offence. The SUA Convention criminalizes abetting the commission of the defined offences,<sup>79</sup> analysis of which could equally be modelled on Article 16 of the ILC Articles on State Responsibility.<sup>80</sup> Some of the TSCs

<sup>75</sup> Some of the more recent TSCs also define 'direct[ing] others to commit [the defined] offence[s]' as an offence. See art 2(3)(b), Terrorist Bombing Convention; art 2(5)(b), Terrorism Financing Convention; art 2(4)(b), Nuclear Terrorism Convention. This mode of accessory liability under the TSCs adds nothing to the prohibition of state sponsorship of terrorism, because directing the commission of terrorist crimes would fulfil the standard of attribution under Article 8 of the ILC Articles on State Responsibility.

<sup>76</sup> Art 1(b), Hague Convention; art 1(2)(b), Montreal Convention; art 2(1)(e), Internationally Protected Persons Convention; art 1(2)(b), Hostages Convention; art 3(2)(b), SUA Convention; art 2(3)(a), Terrorist Bombing Convention; art 2(5)(a), Terrorism Financing Convention; art 2(4)(a), Nuclear Terrorism Convention; art 1(3)(c), Beijing Convention.

<sup>77</sup> See *Bosnia Genocide* case (n 9) paras 420–21.

<sup>78</sup> *ibid* para 421.

<sup>79</sup> Art 3(2)(b), SUA Convention.

<sup>80</sup> In the individual criminal responsibility context, see the ICTY's analysis in *Krstić* (ICTY-98-33-A), Judgment of the Appeals Chamber, 19 April 2004, para 139, in which the Appeals Chamber held that aiding and abetting is an included offence in complicity.

also require states to criminalize ‘intentionally and knowingly contributing to the commission of the [defined] offence[s]’.<sup>81</sup> On a *Bosnia Genocide* case analysis, this accessory offence would cover most types of support a state knowingly provided to non-state terrorist actors with the aim of furthering the general terrorist activity of those non-state actors.

### 5. The Court’s Approach to the TSCs as a Basis of Jurisdiction

The International Court of Justice has yet to decide a dispute regarding a State’s involvement in acts of international terrorism on the basis of the TSCs. This is not because such claims have not been made before the Court, but is principally because alternative and more directly applicable regimes of international law, over which the Court also exercised jurisdiction, applied to the alleged wrongdoing.<sup>82</sup> For instance, in the *Tehran Hostages* case, the United States argued that Iran was in breach of the Internationally Protected Persons Convention, in particular the obligation to prevent crimes against internationally protected persons. The United States 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.<sup>83</sup> Given the other bases of the Court’s jurisdiction (and Iranian responsibility for attacks against the US Embassy), in particular the Vienna Conventions on Diplomatic and Consular Relations,<sup>84</sup> the ICJ did not ‘find it necessary...to enter into the question whether, in the particular circumstances of the case, Article 13 of the [Internationally Protected Persons] Convention provides a basis for the exercise of the ICJ’s jurisdiction with respect to those claims’.<sup>85</sup>

A similar (albeit less compelling) argument was made by Djibouti in its suit against France. Djibouti argued that France, by sending witness summonses to

<sup>81</sup> Art 2(3)(c), Terrorist Bombing Convention; art 2(5)(c), Terrorism Financing Convention; art 2(4)(c), Nuclear Terrorism Convention.

<sup>82</sup> The Court has also been called on to apply the Montreal Convention, which requires states to prevent and punish acts against the safety of civil aviation, to the military downing of aircraft. The date, the applicability of the Montreal Convention to military activities has not been decided on the merits because the disputes were either discontinued (*Aerial Incident of 3 July 1988 (Iran v US)*, Removal from List, Order of 22 February 1996, [1996] ICJ Rep 6; *Armed Activities on the Territory of the Congo (DRC v Burundi)*, Removal from List, Order of 30 January 2001, [2001] ICJ Rep 3), the Montreal Convention was not pleaded on the merits (*Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, [2005] ICJ Rep 168) or the ICJ determined that it did not have jurisdiction based on the Applicant’s failure to meet the procedural requirements of seisin under art 14(1) of the Montreal Convention (*Armed Activities on the Territory of the Congo (DRC v Rwanda)* (New Application: 2002), Jurisdiction and Admissibility, Judgment, [2006] ICJ Rep 6, para 118). The in-applicability of the Montreal Convention to uses of military force by a state against the safety of civil aviation has been clarified in the Beijing Convention (adopted in 2010, not yet in force), which reproduces the military exclusion clauses from the Terrorist Bombing and Nuclear Terrorism Conventions. Until the Beijing Convention is in force, however, the Court may well accept the applicability of the Montreal Convention to military force against civil aircraft in reliance on a *Bosnia Genocide* case analysis.

<sup>83</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Islamic Republic of Iran)*, Memorial of the United States, Pleadings, Oral Arguments, Documents, vol I, 123, 178.

<sup>84</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95; Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261.

<sup>85</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Islamic Republic of Iran)*, Judgment, [1980] ICJ Rep 3, para 55.

the head of state of Djibouti and to senior Djiboutian officials, had failed to prevent attacks on their person, freedom and dignity, in breach of the Internationally Protected Persons Convention. Djibouti further argued that the obligation to prevent attacks in the Convention was not only a positive obligation to take all appropriate measures to prevent attacks by third parties, but also a negative obligation on the state to refrain from committing acts that are likely to prejudice the protection of these persons.<sup>86</sup> The Court dismissed Djibouti's claim, holding that the purpose of the Convention:

is to prevent serious crimes against internationally protected persons and to ensure the criminal prosecution of presumed perpetrators of such crimes. It is consequently not applicable to the specific question of immunity from jurisdiction in respect of a witness summons addressed to certain persons in connection with a criminal investigation, and the Court cannot take account of it in this case.<sup>87</sup>

The Court certainly emphasized the obligation to prevent and the individual criminal responsibility focus of the Internationally Protected Persons Convention in its decision. But the Court rejected Djibouti's argument on the basis that issuing summons does not amount to the commission of a serious crime (in particular the 'murder, kidnapping or other attack upon the person or liberty of an internationally protected person', which are the offences defined in the Internationally Protected Persons Convention).<sup>88</sup> The Court did not reject Djibouti's argument (expressly or implicitly) on the basis of the inapplicability of the *Bosnia Genocide* case analysis to the Convention. As in the *Tehran Hostages* case, the Court had a clear alternative basis of jurisdiction under which it could decide the dispute.<sup>89</sup> There was therefore no need for the Court to rely on implied obligations in the Internationally Protected Persons Convention or to address Djibouti's implicit reliance on the *Bosnia Genocide* case analysis.

But where there is no alternative regime of international law applicable to a state's conduct (which also confers jurisdiction on the Court), and that conduct meets the elements of an offence defined in a TSC, the Court should apply its *Bosnia Genocide* case analysis. The issue could well come up in reference to recent allegations that Iran has sponsored the assassination of Saudi diplomats in Pakistan, and that it has sponsored assassination attempts against diplomats accredited to the United States and Thailand.<sup>90</sup> Consider the US allegations. The United States no longer accepts the compulsory jurisdiction of the ICJ under Article 36(2) and has withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations.<sup>91</sup> Both the United

<sup>86</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, [2008] ICJ Rep 177, para 157.

<sup>87</sup> *ibid*, para 159.

<sup>88</sup> Art 2(1), Internationally Protected Persons Convention.

<sup>89</sup> The Court was exercising jurisdiction over the dispute under art 38(5) of the ICJ Statute and held that it had jurisdiction to entertain all claims raised in Djibouti's Application. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, [2008] ICJ Rep 177, paras 83–84.

<sup>90</sup> See n 2 above.

<sup>91</sup> Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 UNTS 487. The United States notified its withdrawal the UN Secretary General of its withdrawal. <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg\\_no=III-8&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=III-8&chapter=3&lang=en)> accessed 22 May 2012.

States and Iran are parties to the Optional Protocol to Vienna Convention on Diplomatic Relations and the Internationally Protected Persons Convention (without reservation to its compromissory clause).<sup>92</sup>

Even with Optional Protocol jurisdiction under the Vienna Convention on Diplomatic Relations, the Vienna Convention does not apply to a state's attempts to assassinate diplomats in foreign territory. The Vienna Convention imposes obligations on states as receiving states—obligations regarding the inviolability of diplomatic representatives are limited to territory within the receiving state's jurisdiction or control. The Vienna Convention does not impose obligations on Iran with respect to the treatment of Saudi diplomats accredited to the United States, but only those accredited to Iran itself.<sup>93</sup> As a result, there are gaps in coverage in the Vienna Convention that could well be filled by a broad interpretation of the obligation to prevent under the Internationally Protected Persons Convention. Employing a *Bosnia Genocide* case analysis, the Internationally Protected Persons Convention would impose obligations on states directly to refrain from uses of force against protected persons. Through this implied prohibition, the Internationally Protected Persons Convention could form the basis of the Court's jurisdiction, and serve as a mechanism for implementing Iranian responsibility for acts of state terrorism.

## 6. Conclusion

In the absence of relevant Article 36(2) declarations, the extent of the ICJ's jurisdiction over state responsibility for international terrorism will generally depend on the scope of the TSCs. While the ICJ's decision in the *Bosnia Genocide* case is not perfect, it has established a promising basis for the Court's jurisdiction in cases of state-sponsored or supported terrorism. As a result of the Court's expansive interpretation of the obligation to prevent, the TSCs—drafted with a view to ending impunity for international terrorism committed by natural persons—might also be the vehicle for judicial determinations of a state's responsibility for such offences. As the TSCs are very widely ratified, including by states consistently associated with sponsorship and support of international terrorism,<sup>94</sup> the promise of peaceful settlement of disputes inherent in the Court's jurisdiction is more likely to be actualized under the

<sup>92</sup> Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 18 April 1961, 500 UNTS 241. See <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-5&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&lang=en)> accessed 22 May 2012 and <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-7&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&lang=en)> accessed 22 May 2012.

<sup>93</sup> The Internationally Protected Persons Convention also applies more broadly to heads of state and other internationally protected persons (including diplomatic agents), as defined under general international law. Art 1, Internationally Protected Persons Convention.

<sup>94</sup> Each of the TSCs in force has at least 150 state parties, and a relatively small proportion of those state parties have made reservations to the TSC compromissory clauses. At the time of writing, reservations have been made by 25/185 states parties to the Hague Convention, and 27/188 state parties to the Montreal Convention, <<http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx>> accessed 22 May 2012; 38/173 state parties to the Internationally Protected Persons Convention, 25/168 state parties of the Hostages Convention, 27/164 state parties to the Terrorist Bombing Convention, 37/173 state parties to the Terrorism Financing Convention, <<http://treaties.un.org/pages/Treaties.aspx?id=18&subid=A&lang=en>> accessed 22 May 2012; and 20/150 state parties to the SUA Convention (status of SUA Convention on file with the author).

TSCs than if the injured state were required to rely on jurisdiction pursuant to an optional clause declaration. The importance of the Court's availability to resolve disputes involving state responsibility for international terrorism should not be underestimated. State involvement in terrorism is a threat to international peace and security and victim states are put under heavy domestic pressure to respond. A legal response—one which results in an impartial determination of responsibility—may well satisfy the call for justice and obviate any perceived need to escalate tensions through resort to a security paradigm. This will be particularly true where the act of state sponsored or supported terrorism is isolated and forceful responses would not pass 'necessity' muster.

On this basis, the Court *should* interpret the obligation to prevent in the TSCs broadly when its jurisdiction hangs in the balance. Judge Simma, in his separate opinion in the *Oil Platforms* case, made a compelling argument 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 rise above the current cacophony'.<sup>95</sup> There is obviously some concern that jurisdictionally expansionist treaty interpretation by the Court in individual cases may well have a long-term impact on states' willingness to accept compromissory clauses. This concern should however not be overstated—particularly in the terrorism context, where the vast majority of States which have ratified the TSCs have done so without reservation to their compromissory clauses. And there is something to be said for the Court making the most of its capacity to peacefully settle disputes in cases where flagrant breaches of the peace are alleged to have been committed. The Court may need to save its reputational (and jurisdictional) currency for rainy days, but certainly a case of state-sponsored terrorism in which the only basis of the Court's jurisdiction was a TSC would be such a day.

<sup>95</sup> *Oil Platforms (Iran v US)*, Judgment, Separate Opinion of Judge Simma, 328.