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# NON-STATE ARMED GROUPS AND THE ROLE OF TRANSNATIONAL CRIMINAL LAW DURING ARMED CONFLICTS

DAN E. STIGALL\* & CHRISTOPHER L. BLAKESLEY\*\*

## I. INTRODUCTION

The non-state armed group and terrorist organization known, variously, as the Islamic State, the Islamic State of Iraq and Syria, or Islamic State of Iraq and as-Sham (ISIS) is the brutal offspring of Al Qaeda in Iraq (AQI). Rising from relative obscurity in the summer of 2014, it has since savagely torn through large swaths of Iraq and Syria, killing scores of innocent civilians in the process, while bringing misery to those who remain under its oppressive rule, and proving a daunting challenge to countries wishing to contain it.<sup>1</sup> The

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1. See Dan E. Stigall, *The Islamic State of Iraq and Syria (ISIS) is*, GLOB. BRIEF (Nov. 7, 2014, 10:09 AM), <http://globalbrief.ca/blog/2014/11/07/%e2%80%9cthe-islamic-state-of-iraq-and-syria-isis-is-%e2%80%a6%c2%a0/> (“[ISIS is] a non-state armed group that, by exploiting ungoverned spaces and state fragility in the Middle East, has asserted a degree

situation caused by ISIS has also proven to be a challenge to the international legal system, presenting difficult questions relating to the use of armed force<sup>2</sup> and appropriate state responses to non-state armed groups operating in the Middle East and North Africa.

One of these challenges is how countries in the Middle East and North Africa may effectively respond to such non-state armed groups within the context of their domestic criminal justice frameworks.<sup>3</sup> Although military force is obviously required as one element of the response to ISIS and similar groups, the nature of such groups requires a complex approach—an approach that combines military force with a variety of other elements of state power, including criminal prosecutions.<sup>4</sup> This need for a multifaceted response is emphasized by United Nations Security Council Resolution 2178, which expressly recognizes that “terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone[.]”<sup>5</sup> Any effort to counter ISIS, therefore, will necessitate international cooperation on a variety of levels.<sup>6</sup>

of control over a large swath of territory that transcends the borders of Iraq and Syria. In so doing, ISIS has become a stark reminder of the dangers posed by ungoverned spaces—lawless expanses of the globe left effectively unregulated by sovereign authority, where terrorist organizations and other transnational criminal groups are permitted to thrive.”).

2. See Louise Arimatsu & Michael Schmitt, *The Legal Basis for the War Against Isis Remains Contentious*, GUARDIAN (Oct. 6, 2014, 4:00 AM), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state>.

3. See Marlise Simons, *Spurred by ISIS Violence, Nations Mull How to Press for Justice in Conflicts*, N.Y. TIMES, Sept. 22, 2014, at A8 (“Another option now being quietly negotiated is to use courts in the relative safety of northern Iraq or elsewhere in the region where there is a reasonably well-functioning judicial system. The legal foundation to try crimes committed in Iraq or Syria by their own citizens already exists in many countries if there is a political will, legal experts say. Most countries in the region, for instance, have signed the international convention banning torture, or the one against genocide.”).

4. See Arabinda Acharya & Dharitri Dwivedy, *The ISIS Threat in Perspective*, GLOB. BRIEF (Nov. 7, 2014, 5:57 AM), <http://globalbrief.ca/blog/2014/11/07/the-isis-threat-in-perspective/> (“Ultimately, success against ISIS will depend on how the fight is conducted. Military strikes alone may win the day for the US-led coalition in the coming months, but defeating ISIS or ISIS-like groups will surely require countering their ideology and restricting their ability to amass resources (human, money and materiel). In other words, the kinetic aspects of counterterrorism—including air strikes or targeted killings—may lose their relevance as soon as the threat appears to be losing its steam, while the impact of counter-ideology and counter-financing measures can be long-term and sustaining.”).

5. S.C. Res. 2178, at 2 (Sept. 24, 2014).

6. See BRIAN KATULIS, HARDIN LANG, & VIKRAM SINGH, *DEFEATING ISIS: AN INTEGRATED STRATEGY TO ADVANCE MIDDLE EAST STABILITY 2* (Sept. 10, 2014), <https://www.americanprogress.org/issues/security/report/2014/09/10/96739/defeating-isis-an-integrated-strategy-to-advance-middle-east-stability/> (“As with efforts to counter extremism elsewhere, defeating ISIS will require a concentrated effort over time. Any successful U.S. strategy must be built on a foundation of regional cooperation that requires coordinated action from U.S. partners—a central concept of the Counterterrorism Partnership Fund that President Barack Obama proposed earlier this year. The strategy will be multifaceted,

The legal complexities that states will encounter in their attempts to cooperate in the fight against ISIS and other non-state armed groups are myriad. Confusion as to available legal bases and extant authorities remains an obstacle to effective cooperation. For example, in a publication by the United Nations Office on Drugs and Crime (UNODC) entitled *International Cooperation in Criminal Matters: Counterterrorism*, the United Nations articulates a problematic legal proposition with the potential for staggeringly negative consequences. It notes that “[t]he universal counter-terrorism conventions and protocols do not apply in situations of armed conflict.”<sup>7</sup> This sentence, and subsequent language expressing its rationale, take the view that the presence of an armed conflict mutes the legal force of the various multilateral conventions that enable international cooperation between states in criminal matters. As this Article will demonstrate, this legal conclusion—if true—would essentially prevent major cooperative efforts in criminal justice and law enforcement matters in areas experiencing armed conflict. The potential ramifications of such a legal outcome would be harmful to countries in the Middle East experiencing intense and large-scale terrorist attacks, most notably those impacted by the ISIS phenomenon. Fortunately, a closer analysis of international law reveals the legal conclusion articulated by the United Nations to be incorrect. This Article, therefore, posits that the United Nations should promptly and publicly correct its analysis and issue clear guidance stating that the terrorism suppression conventions (and transnational criminal law generally) continue to apply during armed conflicts.

While this Article does not seek to overstate the current impact of this U.N. guidance, it is worth noting that UNODC is an important United Nations entity and a key international actor in the fight against transnational crime and terrorism. Its pronouncements on the applicability of international treaties are, therefore, important and carry with them the possibility of far-reaching impact. Inaccuracies in such a context can have enormous ramifications and,

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involving intelligence cooperation, security support, vigorous regional and international diplomacy, strategic communications and public diplomacy, and political engagement.”); see also Press Release, Office of the Spokesperson, Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting (Dec. 3, 2014), <http://www.state.gov/r/pa/prs/ps/2014/12/234627.htm> (noting that “ISIL/Daesh’s finances and recruitment are also increasingly being challenged through international cooperation.”).

7. U.N. OFFICE ON DRUGS AND CRIME, *INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: COUNTERTERRORISM* 28 (2012), [https://www.unodc.org/documents/terrorism/Publications/Training\\_Curriculum\\_Module3/Module3\\_EN.pdf](https://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf).

accordingly, must be addressed. Beyond the necessary response such a pronouncement occasions, however, this particular U.N. guidance presents an opportunity for a wider (and much needed) discussion of the law of armed conflict, transnational criminal law, and the ways in which various subsets of international law interact.

In support of its analysis, this Article explores the complex international legal framework that governs international cooperation in the Middle East and North Africa, analyzing the treaties which form the basis for much of that cooperation, as well as the larger field of transnational criminal law. Transnational criminal law is defined, in general terms, as “the law that suppresses crime that transcends national frontiers,”<sup>8</sup> and it is mainly within the context of transnational criminal law’s structures that states cooperate to facilitate the investigation and prosecution of cross-border criminal activity. As described more fully below, the universal counter-terrorism conventions and protocols are part of the expansive constellations of treaties that make up the firmament of transnational criminal law. This Article will discuss their current use and potential role in addressing the security situation in the Middle East and North Africa, and will also demonstrate that, contrary to the U.N. position, the body of transnational criminal law—including universal counter-terrorism conventions and protocols—remains largely applicable amidst wars, revolutions, and other hostilities. To support this legal conclusion, this Article delves into an unfrequented area of international law which lies at the crossroads of transnational criminal law and the law of armed conflict.

## II. ISIS AND THE INTERNATIONAL SECURITY CONTEXT OF THE MIDDLE EAST AND NORTH AFRICA

It is useful at the outset to comment briefly on the geographic area central to our inquiry. The collection of countries commonly referred to as “the Middle East” consists of Bahrain, Cyprus, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, the Palestinian Territories, Qatar, Saudi Arabia, Syria, Turkey, United Arab Emirates, and Yemen. When widening that lens to North African countries—so that our referent is both the Middle East and North Africa (MENA)—the list expands to include the countries of Morocco, Algeria, Tunisia, and Libya.<sup>9</sup>

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8. NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 13 (2012).

9. See ELLEN LUST, THE MIDDLE EAST v–vi (13th ed. 2014).

With so many diverse countries and cultures, it is an obvious error to speak of the region as a monolith. As Ellen Lust notes in her excellent book on the topic, “The Middle East is as varied and complex as any other region, including the ‘West.’”<sup>10</sup> And yet, there are certain elements that lend a degree of common identity to these widely diverse countries—one that is “underpinned by the notion of a relatively common past, religion, and language.”<sup>11</sup> Additionally, certain other (more unfortunate) commonalities seem, in various degrees, to plague the region as a whole. As another U.N. publication noted, “The Middle East and North Africa region has long been marked by political instability, human rights crises and protracted humanitarian emergencies.”<sup>12</sup> Likewise, Sam Sasan Shoamanesh, Senior Special Assistant to the Prosecutor of the International Criminal Court, notes the long history of complexity and the deep, tangled roots of the region’s contemporary dysfunction:

The dysfunctional order that defines today’s Middle East has been shaped by critical events in both ancient and modern history: the Arab invasion of Persia in 633 AD, the Battle of Chaldiran and Ottoman-Safavid (Sunni-Shia) regional rivalry in the 16th century, WWI and its colonial legacy, the 2003 invasion of Iraq, the Arab Spring, and now the Arab Winter. All of these and many more have contributed to the complex regional landscape, including its myriad sectarian divisions.<sup>13</sup>

The current situation in the Middle East and North Africa is, thus, characterized by complex social and political challenges made worse by ongoing conflict and political upheaval.

Recent years have witnessed especially dramatic political and social upheaval as the reverberations of the Arab Spring<sup>14</sup> have

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10. *Id.* at xxxi.

11. *Id.* at 1.

12. UNICEF, HUMANITARIAN ACTION FOR CHILDREN: MIDDLE EAST AND NORTH AFRICA 36 (2012), [http://www.unicef.org/hac2012/files/HAC2012\\_MENA\\_LOW\\_\\_WEB\\_Final.pdf](http://www.unicef.org/hac2012/files/HAC2012_MENA_LOW__WEB_Final.pdf).

13. Sam Sasan Shoamanesh, *Can the Middle East Be Fixed?*, GLOB. BRIEF (Nov. 7, 2014, 8:30 AM), <http://globalbrief.ca/blog/2014/11/07/can-the-middle-east-be-fixed/>.

14. See MARC LYNCH, THE ARAB UPRISING: THE UNFINISHED REVOLUTIONS OF THE NEW MIDDLE EAST 7 (2012) (“The uprisings that have profoundly shaped the Middle East began in a remote outpost of southern Tunisia on December 17, 2010, with the self-immolation of an unknown young man named Mohammed Bouazizi in protest against abusive and corrupt police.”); see also Ayodeji K. Perrin, *Introduction to the Special Issue on the Arab Spring*, 34 U. PA. J. INT’L L. i, i–iv (2013) (“What quickly became known as the “Arab Spring” is a series of protest movements, reform movements, and revolutions[.]”). *But see* CHIBLI MALLAT, PHILOSOPHY OF NONVIOLENCE: REVOLUTION, CONSTITUTIONALISM, AND JUSTICE BEYOND THE MIDDLE EAST 3 (2015) (disfavoring the label “Arab Spring” as being “as inchoate as it is poetical” and preferring the label of “the Middle East nonviolent revolution.”).

made countries in the region more prone to “destabilizing ethnic and sectarian rivalries”<sup>15</sup> and “created opportunities for extremist groups to find ungoverned space from which to destabilize the new governments[.]”<sup>16</sup> Extremist groups, benefitting from the years of turmoil in the region, have thrived and metastasized.<sup>17</sup> Today, most notable among these groups is ISIS—a formidable terrorist organization that evolved from a number of previously existing terrorist groups, most significantly Al-Qa’eda in Iraq (AQ-I), which was established on October 15, 2006, as “an umbrella organization composed of and supported by a variety of insurgency groups operating in Iraq.”<sup>18</sup>

Although ISIS has only recently gained widespread public attention, commentators note that ISIS “did not suddenly become effective in early June 2014[.]”<sup>19</sup> Rather, the terrorist group “had been steadily strengthening and actively shaping the future operating environment for four years.”<sup>20</sup> Developments such as the withdrawal of U.S. forces from Iraq in 2011 and the Syrian civil war (a civil war which provided ISIS with ungoverned spaces in which to operate and “a reinvigorated pipeline of suicide bombers”)<sup>21</sup> have provided ISIS with an advantageous operational environment. In addition, Acharya and Dwivedy posit that “[p]rolonged instability, unmet promises of reform, and more general economic woes exacerbated public frustration and increased the susceptibility to radicalization. All of this the jihadists exploited.”<sup>22</sup> This created a

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15. *U.S. Intelligence: Arab Spring Generated Threats*, WOODROW WILSON CTR. (Mar. 15, 2013), <http://www.wilsoncenter.org/islamists/article/us-intelligence-arab-spring-generated-threats>.

16. *Id.*

17. See *The Islamic State of Iraq and Greater Syria: Two Arab Countries Fall Apart*, ECONOMIST (June 14, 2014) [hereinafter *Two Arab Countries Fall Apart*], <http://www.economist.com/news/middle-east-and-africa/21604230-extreme-islamist-group-seeks-create-caliphate-and-spread-jihad-across>.

18. U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), REPORT ON THE PROTECTION OF CIVILIANS IN THE NON INTERNATIONAL ARMED CONFLICT IN IRAQ 1 n.3 (June 5, 2014), [http://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_OHCHR\\_POC\\_Report\\_FINAL\\_6\\_July\\_10September2014.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6_July_10September2014.pdf). These groups include Al-Qa’eda’s predecessor, the Mujahideen Shura Council, as well as al-Qa’eda, Jeish al-Fatiheen, Jund al-Sahaba, Katbiyan Ansar Al-Tawhid wal Sunnah, Jeish al-Taiifa al-Mansoura, and other Sunni based groups. *Id.*

19. Michael Knights, *ISIS’s Political-Military Power in Iraq*, CTC SENTINEL, Aug. 27, 2014, at 2, <https://www.ctc.usma.edu/posts/isils-political-military-power-in-iraq>.

20. *Id.*

21. *Id.*

22. Acharya & Dwivedy, *supra* note 4. The domestic policies of former Prime Minister Nouri al-Maliki are also noted by many as exacerbating the frustrations of Iraq’s Sunni population. See, e.g., Priyanka Boghani, *In Their Own Words: Sunnis on Their Treatment in Maliki’s Iraq*, PBS (Oct. 28, 2014).

favorable environment for the devastating ISIS offensive of 2014. On June 10, 2014, ISIS captured the Iraqi city of Mosul (Iraq's second city) as well as a large part of the province of Nineveh,<sup>23</sup> then continued south towards Iraq's capital, Baghdad, taking control of several towns as it advanced. As an article in *The Economist* noted, "Ministers in Iraq's government admitted that a catastrophe was in the making. A decade after the American invasion, the country looks as fragile, bloody and pitiful as ever."<sup>24</sup>

Since that time, ISIS has managed to assert control over a large swath of territory that transcends the borders of Iraq and Syria, and has proclaimed that territory to be part of a new caliphate or Islamic state<sup>25</sup> in an effort to "restore the glory days of the Abbasid caliphate based in Baghdad."<sup>26</sup> The group's power and capabilities have also increased since that time, as its military advances have provided it control over resources such as abandoned army bases, weapons, ammunition, vehicles, banks, and government offices.<sup>27</sup> In that regard, one U.N. report indicates that ISIS has seized "enough assets from conventional armies to 'arm and equip more than three Iraqi conventional army divisions.'"<sup>28</sup> Notably, ISIS is also deriving significant funding—once estimated at between \$800 million and \$1 billion per year—from various other sources, including ransoms and revenues from captured oil and gas fields.<sup>29</sup>

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23. *Two Arab Countries Fall Apart*, *supra* note 17.

24. *Id.*

25. *See id.*

26. William McCants, *Why ISIS Really Wants to Conquer Baghdad*, BROOKINGS (Nov. 12, 2014, 1:15 PM), <http://www.brookings.edu/blogs/iran-at-saban/posts/2014/11/12-baghdad-of-al-rashid-mccants>.

27. *See* U.N. Security Council, Letter dated Nov. 13, 2014 from the Chair of Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities addressed to the President of the Security Council, at 19–27, U.N. Doc. S/2014-815 (Nov. 14, 2014) [hereinafter Letter], [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/815&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/815&referer=/english/&Lang=E).

28. *Id.* ¶ 39.

29. Acharya & Dwivedy, *supra* note 4; *see also* Louise Shelley, *Blood Money, How ISIS Makes Bank*, FOREIGN AFF. (Nov. 30, 2014), <https://www.foreignaffairs.com/articles/iraq/2014-11-30/blood-money>. ("The terrorist group has become the world's richest precisely because it has seized some of the world's most profitable oil fields in Iraq and Syria. Even with those fields operating below capacity due to a lack of technology and personnel, ISIS is estimated to be producing about 44,000 barrels a day in Syria and 4,000 barrels a day in Iraq. ISIS sells crude at a discount (around \$20–\$35 per barrel) to either truckers or middlemen. The crude gets to refiners at around \$60 per barrel, which is still under market price. Smugglers pay about \$5,000 in bribes at checkpoints to move the crude oil out of ISIS controlled territory. Even selling the oil at a discount via pre-invasion smuggling routes out of Iraq, ISIS can still expect over a million dollars in revenue each day."). *But see* Richard Engel & Robert Windrem, *ISIS Makes Three Times as Much from Oil Smuggling as Previously Thought: Officials*, NBC NEWS (July 24, 2015) (noting, "Two U.S. counter-terror-

With these arms and funding sources, ISIS is now considered a self-sufficient terrorist organization<sup>30</sup>—and “a continuing threat to international peace and security.”<sup>31</sup> More importantly, for purposes of this Article, it has created situations in both Iraq and Syria that have been classified as non-international armed conflicts.<sup>32</sup>

### III. DEFINING THE COMPETING LEGAL REGIMES: TRANSNATIONAL CRIMINAL LAW AND THE LAW OF NON-INTERNATIONAL ARMED CONFLICT

If ISIS and similar non-state armed groups can only be defeated by maximizing international and regional cooperation, it is critical to understand the available mechanisms that the international legal regime provides to do so. Consequently, a fulsome exploration of transnational criminal law, the law of non-international armed conflict, and the interaction between these two legal regimes, is essential.

#### A. *Transnational Criminal Law*

The subject of transnational criminal law does not lend itself to easy definition. In his book on the topic, Neil Boister notes that the term “transnational crime” was first used at the Fifth U.N. Congress on Crime Prevention and the Treatment of Offenders in

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ism officials now tell NBC News that the amount of money ISIS can earn from selling and smuggling oil and gas is roughly to \$8 to \$10 million a month. The officials said this is the most accurate information they have had so far, calling previous estimates speculation.”).

30. See Letter, *supra* note 27, ¶ 52.

31. *Id.* ¶ 51.

32. UNAMI, *supra* note 18, at i. (“The non-international armed conflict that commenced in Iraq in Anbar governorate in January 2014 and has since spread to other areas of the country since the beginning of June has inflicted untold hardship and suffering on the civilian population with large-scale killings, injuries, and destruction and damage of livelihoods and property. The minimum number of civilians killed in the first six months of 2014 is 5,576, with at least 11,665 wounded. Since the beginning of June 2014, a minimum of 1,531 civilians have been killed and 1,763 have been wounded, and some 1.2 million people have been internally displaced as a result of the violence – including over 600,000 since the beginning of June alone.”); see also LOUISE ARIMATSU & MOHBUBA CHOUDHURY, CHATHAM HOUSE, THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN AND LIBYA 16 (2014) (“Despite the level of political and material support that both the opposition groups in Syria and the FSA have been able to secure from other states, the legal experts were of the opinion that the armed conflict – at least until March 2013 – remained non-international in character since there was inadequate evidence to suggest that any of the anti-Assad armed groups were under the overall control of another state. The level and nature of external involvement in the conflict may constitute violations of international law but neither would alter the character of the armed conflict. Syria is not a signatory to APII; consequently, the NIAC is governed by CA3 and customary international law.”).

1975 “to identify certain criminal phenomenon transcending international borders, transgressing the laws of several states, or having an impact on another country.”<sup>33</sup> It is perhaps because the field of transnational criminal law is “newly emerging and rapidly growing”<sup>34</sup> that its precise definition remains somewhat unsettled. Another leading text, drawing on Phillip Jessup’s definition of “transnational law,” defines transnational criminal law as “the part of any nation’s domestic criminal law that ‘regulates actions or events that transcend national frontiers.’”<sup>35</sup> Boister takes a somewhat stricter view and posits that “[t]ransnational criminal law is limited to those offences where states use a convention designed to suppress a particular form of conduct—a ‘suppression convention’—to provide for a mutual obligation to criminalize that conduct.”<sup>36</sup>

To understand the complexity surrounding the task of defining transnational criminal law, it is helpful to briefly address its history and structure. The problem of transnational crime obviously predates the moment the idea crystallized as a distinct legal concept. Historically, states have recognized certain discrete categories of crime, which required international cooperation or collaboration due to the crime’s cross-border effect. In that regard, Boister notes that piracy “is the first historical example of a transnational crime,”<sup>37</sup> while other early examples include crimes associated with the nineteenth-century slave trade.<sup>38</sup> Part of the international response to these sorts of crimes has been the creation of multilateral treaties designed to obligate states to criminalize certain transnational conduct; to impose on states the obligation to prohibit a particular crime within their respective domestic jurisdictions; to impose on states the obligation to prosecute offenders; and to impose obligations to cooperate with other states in the prevention and suppression of the crime.<sup>39</sup> These multilateral conventions are

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33. BOISTER, *supra* note 8, at 3–4 (citing GOW Mueller, *Transnational Crime: Definitions and Concepts*, in *COMBATTING TRANSNATIONAL CRIME: CONCEPT, ACTIVITIES, RESPONSES* 13 (P. Williances & D. Vlassis eds., 2001)).

34. Erin Creegan, *National Security Crime*, 3 HARV. NAT’L SEC. J. 373, 375 (2012).

35. DAVID LUBAN, JULIE R. O’SULLIVAN, & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 3 (2014) (citing PHILLIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956)).

36. See BOISTER, *supra* note 8, at 14.

37. *Id.* at 27.

38. See *id.* at 36–38.

39. See Bruce Broomhall, *War Crimes Research Symposium: “Terrorism on Trial”: State Actors in an International Definition of Terrorism from a Human Rights Perspective*, 36 CASE W. RES. J. INT’L L. 421, 425 (2004).

called “suppression conventions.”<sup>40</sup> Examples of such conventions include the U.N. Convention Against Corruption (UNCAC),<sup>41</sup> the U.N. Convention Against Transnational Organized Crime (UNTOC),<sup>42</sup> and the 1988 Vienna Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Drug Convention).<sup>43</sup>

It is important to note, however, that while multilateral suppression conventions comprise a significant part of the fabric of transnational criminal law, bilateral conventions and the domestic law of states (either seeking or affording assistance) play an equally important role. For instance, with regard to Iraq—a country currently at the epicenter of the battle against ISIS—“mutual legal assistance relations are primarily governed by the bilateral and multi-lateral treaties to which Iraq is party. In case of the absence of such treaty or agreement, mutual legal assistance can be provided on the basis of reciprocity.”<sup>44</sup> For mutual legal assistance outside the treaty framework, Iraqi law provides that:

If a foreign state wants to take measures to pursue an investigation into any offence by means of the judicial authorities in Iraq it must send a request to this effect through diplomatic channels to the Ministry of Justice and the request must be accompanied by a complete statement of the circumstances of the offence, the evidence for the charge the paragraphs of the law which apply and a detailed specification of the measures which it wishes to take.<sup>45</sup>

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40. See BOISTER, *supra* note 8, at 14 (“From early beginnings such as Great Britain’s bilateral anti-slave-trading treaties in the early nineteenth century, through early multilateral treaties like the 1929 Anti-Counterfeiting Convention, to the large framework conventions of the late twentieth century such as the 1988 Drug Trafficking Convention, treaty obligations to criminalize distinguish transnational criminal law from national criminal law.”).

41. See United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 154, [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

42. See United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 209 U.N.T.S. 2225, [http://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](http://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf).

43. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 497, 95 U.N.T.S. 1582, <https://treaties.un.org/doc/Publication/UNTS/Volume%201582/v1582.pdf>.

44. MIDDLE EAST AND NORTH AFRICA FINANCIAL ACTION TASK FORCE (MENAFATF), MUTUAL EVALUATION REPORT: ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (IRAQ) ¶ 31 (Nov. 28, 2012) [hereinafter MENAFATF REPORT], [http://www.menafatf.org/MER/MER\\_Iraq\\_English.pdf](http://www.menafatf.org/MER/MER_Iraq_English.pdf).

45. Criminal Procedure Code No. 23 of 1971 (as amended to Mar. 14, 2010), Law No. 23 of 1971, Decree No. 230 (Iraq), art. 353.

Similarly, Iraqi law provides a means for countries to request and obtain the extradition of non-Iraqis found in the territory of Iraq.<sup>46</sup> A report by the Middle East and North Africa Financial Action Task Force (MENAFATF) notes that, under Iraqi law, “[d]ual criminality is formally required for all mutual legal assistance and extradition requests, even for less intrusive and non compulsory measures.”<sup>47</sup> Nothing in the Iraqi provisions technically requires a treaty in order for assistance to be granted, though mutual legal assistance or extradition requested in the absence of a treaty is not rooted in an international legal obligation and is, therefore, discretionary.<sup>48</sup>

Although such domestic legal provisions permit international cooperation to a degree, the important role of treaties—and the concomitant international legal obligations they create—should not be underemphasized. On that score, commentators have noted that “a lack of adequate treaty provisions regarding judicial cooperation has indeed often provided an obstacle in practice, contributing to delays or even failure to prosecute[.]”<sup>49</sup> The treaties, which comprise the major components of transnational criminal law, therefore, serve to enable much needed international cooperation. If muted, the legal bases for that cooperation are lost and cooperative efforts among states can fail, permitting criminals and terrorists to operate with impunity.<sup>50</sup>

Given the way in which these suppression treaties formed—focusing on discrete kinds of criminal activity and enabling international cooperation vis-à-vis that specific criminal activity—and the way in which states adopted discrete bilateral treaties and individually enacted domestic legislation enabling international cooperation, the configuration of transnational criminal law (as a subset of international law) resembles a solar system far more than a linear legal landscape. It is a vast, pointillistic array of international treaties and domestic statutes that are not necessarily interrelated but which, nonetheless, contain commonalities and in the aggregate combine to form a discernible area of international law.

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46. See *id.* art. 357.

47. MENAFATF REPORT, *supra* note 44, ¶ 31.

48. See *id.*

49. Ward Ferdinandusse, *Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?*, ASIL INSIGHTS (July 21, 2014).

50. See Dan E. Stigall, *Countering Convergence: “Central Authorities” and the Global Network to Combat Transnational Crime and Terrorism*, SMALL WARS J. (Mar. 11, 2015), <http://smallwarsjournal.com/jrnl/art/countering-convergence-%E2%80%9Ccentral-authorities%E2%80%9D-and-the-global-network-to-combat-transnational>.

Two core areas of practice in transnational criminal law are mutual legal assistance and extradition. Mutual legal assistance is the “process by which states seek and provide assistance in gathering evidence for use in criminal cases or in the restraint and confiscation of proceeds of crime.”<sup>51</sup> Extradition, in turn, is the mechanism by which one sovereign requests and obtains custody of a fugitive located within the jurisdiction and control of another sovereign.<sup>52</sup> Through the extradition process, a sovereign (the requesting state) typically makes a formal request to another sovereign (the requested state).<sup>53</sup> If the fugitive is found within the territory of the requested state, the requested state may arrest the fugitive and subject him or her to its extradition process.<sup>54</sup> A discussion of the historical context of both extradition and mutual legal assistance reveals critical elements of their international legal character and serves to illuminate how these functions of transnational criminal law interact with other legal regimes, such as the law of armed conflict.

## 1. Mutual Legal Assistance

Prost notes that, for many years, states relied upon traditional letters rogatory—formal documents submitted through diplomatic channels—to obtain needed evidence from foreign counterparts.<sup>55</sup> Boister indicates that letters rogatory (“a process borrowed from international civil procedure”) entailed a request from one judicial authority that was communicated through diplomatic channels to a foreign judicial authority.<sup>56</sup> As this method proved insufficient to meet “the growing demand for speedy and effective assistance, in evidence gathering,” however, new mechanisms were developed during the twentieth century.<sup>57</sup>

Letters rogatory did not provide for the scope of assistance required, nor were they efficient enough to allow for the pro-

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51. See Kimberly Prost, *The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance*, in COUNTERTERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 93 (Larissa Van Den Herik & Nico Schrijver eds., 2013).

52. See LINDA CARTER, CHRISTOPHER BLAKESLEY, & PETER HENNING, GLOBAL ISSUES IN CRIMINAL LAW 63 (2007).

53. See ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, & ELIZABETH WILLIAMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 95 (2010).

54. See *id.*

55. See Kimberly Prost, *Breaking Down the Barriers: International Cooperation in Combating Transnational Crime*, ORG. AM. STATES, [http://www.oas.org/juridico/mla/en/can/en\\_can\\_prost.en.html](http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html) (last visited Feb. 28, 2015).

56. BOISTER, *supra* note 8, at 197.

57. Prost, *supra* note 55.

duction of the evidence, within a reasonable period of time. As well, because of fundamental differences between investigative authorities and process in civil and common law states, letters rogatory were in many instances ineffective as between states of a different legal tradition.<sup>58</sup>

The new method of international cooperation that emerged in the twentieth century is known as “mutual legal assistance.”<sup>59</sup> With the emergence of this new paradigm, treaties were implemented in order to create a more streamlined, efficient approach to obtaining evidence from international partners. The first such treaty, the 1959 European Convention on Mutual Legal Assistance, was under the auspices of the Council of Europe.<sup>60</sup> Implementing an international legal obligation to grant mutual legal assistance in criminal matters, this treaty served as a model for the modern framework by articulating the scope, procedures, and conditions for mutual legal assistance.<sup>61</sup> Since that treaty was signed, both bilateral and multilateral mutual legal assistance treaties have proliferated in the international arena,<sup>62</sup> and mutual legal assistance has become a “cornerstone of global cooperation on law enforcement and one of the most widely used mechanisms for requesting foreign assistance in domestic criminal investigations and prosecutions.”<sup>63</sup>

## 2. Extradition

In contrast to mutual legal assistance, the history of extradition is far more ancient and extensive. Extradition is the international legal rendition of fugitives charged with an extraditable offense and sought for trial, or already convicted and sought for punishment.<sup>64</sup> In 1878 Fernand de Cardaillac defined extradition as “the

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58. *Id.*

59. BOISTER, *supra* note 8, at 198.

60. *See id.*

61. *See id.*

62. *See id.* at 198–99.

63. Jonah Force Hill, *Problematic Alternatives: MLAT Reform for the Digital Age*, HARV. NAT'L SEC. J. (Jan. 28, 2015, 1:05 PM), <http://harvardnsj.org/2015/01/problematic-alternatives-mlat-reform-for-the-digital-age/>.

64. The history of extradition and the debate over its use since antiquity for common crimes have been discussed by several scholars, including Christopher L. Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND. J. TRANSNAT'L L. 653, 653–59, nn.1–8 (1980); CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 173–85 (1991); those referenced in the footnotes for this section. *See also* ROGER MERLE & ANDRÉ VITU, TRAITÉ DE DROIT CRIMINEL, TOME I 426–28, §§ 317–18 (7th ed. 1997); MARJORY WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 727 (Extradition) (1968). Note, however, that some commentators have argued that the top administrative court in France, le Conseil d'Etat should

right for a State on the territory of which an accused or convicted person has taken refuge, to deliver him up to another State which has requisitioned his return and is competent to judge and punish him.”<sup>65</sup> Extradition is appropriate only when formal charges have been issued against the fugitive by a proper legal authority. Marjory Whiteman notes that under United States law and that of many countries, extradition is not appropriate upon mere suspicion or to obtain a person whose presence is desired as a witness.<sup>66</sup> Extradition is a criminal matter and not appropriate for obtaining or enforcing a civil judgment.<sup>67</sup>

The actual term “extradition” was imported to the United States from France, where the *decret-loi* of February 19, 1791, appears to be the first official document to have used it and the term is not found in treaties or conventions until 1828.<sup>68</sup> Although the actual term “extradition” was not used extensively until the late eighteenth century, the legal process has been extant since deep into antiquity, and equivalent or similar terms were not uncommon.<sup>69</sup> In fact, the earliest known diplomatic document of any type contains a section providing for the reciprocal rendition of fugitives: the Treaty of Peace between Rameses II, Pharaoh of Egypt, and the Hittite King Hattusili III, which was signed after the latter’s abortive attempt to invade and conquer Egypt.<sup>70</sup> This document, writ-

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take more prominence in the realm of extradition. The *Conseil d’Etat* protects many of the individual’s civil liberties against abuse of authority and abuse of power. See MERLE & VITU, *supra* this note, at 428.

65. FERNAND DE CARDAILLAC, DE L’EXTRADITION 3–4 (1878) (author’s translation). More recently, French commentators defined it as “[t]he procedure by which a sovereign state, the requested state, accepts to deliver an individual who is found on this latter’s territory to another state, the requesting state, to permit the latter to judge the subject or, if he has already been convicted, to have it execute its sentence.” ROGER MERLE & ANDRÉ VITU, *supra* note 64, at 426, § 317.

66. See WHITEMAN, *supra* note 64, at 727.

67. See *id.*

68. See A. BILLOT, TRAITÉ DE L’EXTRADITION 34–37 (1874); IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 12 (1971).

69. Remittere, restituer, livrer, were used more often than trader. See FAUSTIN HÉLIE, TRAITÉ DE L’INSTRUCTION CRIMINELLE Liv. II, 169–72 (2d ed. 1866); BILLOT, *supra* note 68, at 35; SHEARER, *supra* note 68, at 5 (noting article 20 of the Treaty of Amiens states that the contracting parties “are to be obligated to deliver to justice the persons accused.”) (author’s translation of: “seront tenu de livrer en justice les personnes accusées.”); Le Barron E. Descamp & Louis Renault, 1 RECUEIL INTERNATIONAL DES TRAITÉS DU XIXÈME SIÈCLE 33, 42 (1801–1825), 42 DALLOZ, RÉPERTOIRE DE LÉGISLATION, DOCTRINE ET JURISPRUDENCE 495, 579–80 (1861), Treaty of Peace Between France, Great Britain, Spain and the Batavian Republic art. 20, Mar. 27, 1802, 56 Parry’s T.S. 289, [http://www.napoleon-series.org/research/government/diplomatic/c\\_amiens.html](http://www.napoleon-series.org/research/government/diplomatic/c_amiens.html) [hereinafter Treaty of Amiens].

70. See CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: U.S. LAW & PRACTICE 2–3 (3d ed. 1996); see SHEARER, *supra* note 68, at 5–6, (citing Langdon & Gardiner, *The Treaty of*

ten in hieroglyphics, was carved onto the Temple of Ammon at Karnak and is also preserved on clay tablets in Akkodrain in the Hittite archives of Boghazkoi.<sup>71</sup> It is characteristic of most early examples of extradition or legal rendition agreements in that extradition was only part of, and incidental to, a larger document designed for a larger purpose, such as a peace treaty or treaty of friendship. This was also true for the first extradition documents of the so-called modern era.<sup>72</sup>

The French spent a significant amount of doctrinal and analytical energy considering the question of whether extradition occurred in antiquity and the Middle Ages, some arguing that extradition was part of natural law and others arguing that prior to the nineteenth century, extradition did not exist.<sup>73</sup> It was also believed that rendition was haphazard and that coercion, not the binding force of law, was the true motivator of compliance with such requests.<sup>74</sup> Hugo Grotius and Jean Bodin presented examples of “extradition” as proof that all nations had a “natural right” and “duty” either to extradite or prosecute malefactors.<sup>75</sup> The Grotius/Bodin position was based on the notion that extradition occurred

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*Alliance Between Hattusili, King of the Hittites, and the Pharaoh Rameses II of Egypt*, 6 J. EGYPTIAN ARCHAEOLOGY 179, 192–94 (1920), and W. Mettgenberg, *Von mehr als 3000 Jahren: Ein Beitrag zur Geschichte des Auslieferungsrechts*, 23 ZVölkR 23–32 (1939).

71. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 70, at 5; *see also* CHERIF BASSIOUNI, EXTRADITION AND WORLD PUBLIC ORDER 3–4 (1974); Luis Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L. J. 525 (1964).

72. *See* SHEARER, *supra* note 68, at 12–13 (discussing and citing the Treaty of Amity, Commerce and Navigation (Jay Treaty), Nov. 19, 1794 (entered into force Oct. 28, 1795), U.S.-Gr. Brit., art. 27, 8 Stat. 116, T.S. No. 105, *also collected in* I. BEVANS, 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 13, W. MALLOY, 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 590 (1910)); *see also* Treaty of Amiens, *supra* note 69, art. 20.

73. *See* BILLOT, *supra* note 68, at 35–40. Billot, the *Rédacteur* for the *Ministère des Affaires Étrangères* at the time, argued that the claimed examples of extradition in antiquity were not really extradition at all. Those arguing that the claimed examples were evidence of extradition in antiquity included FAUSTIN HÉLIE, TRAITÉ DE L'INSTRUCTION CRIMINELLE Liv. II 16-9–72 (2d ed. 1866); Faustin Hélie, *Du Droit Pénal dans ses Rapports avec le Droit des Gens*, 17 REVUE DE LÉGISLATION ET DE JURISPRUDENCE 220 (1843); and PAUL BERNARD, TRAITÉ THÉORIQUE ET PRATIQUE DE L'EXTRADITION, vol. 2, 1, 60, 65 (1883).

74. *E.g.*, A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 2 (1947); CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 243–45 (P. Corbett trans., 1957). Some commentators have made the same argument about international law today. *See* discussion on “the speciousness of the functional necessity argument,” in Christopher L. Blakesley, *Terrorism, Law, and Our Constitutional Order*, 60 U. COLO. L. REV. 471, 510 (1989).

75. *E.g.*, HUGO GROTIUS, DE JURE BELLI AC PACIS, Libri Tres, at 526–29 (Francis W. Kelsey trans., 1964); JEAN BODIN, THE SIX BOOKS OF THE COMMONWEALTH 100–11 (1962). Many of the examples proposed by these seventeenth-century scholars to indicate that

in antiquity, motivated by the participants' belief that they were obligated by natural right [and obligation] and justice. Both sides believed if extradition occurred, it had to have occurred by authority of "law," although their vision of law differed. The positivist school attacked Grotius' examples of extradition in antiquity as accidental happenings accomplished solely by force or coercion, certainly not by authority of natural right.<sup>76</sup> They also argued extradition was not done out of an obligation stemming from the solidarity of nations and the corresponding obligation to have reciprocal rendition of fugitives.<sup>77</sup> This positivistic argument rested on a view that extradition does not exist unless it is motivated solely by the will of the sovereign, which they believed was the only basis for all law.<sup>78</sup>

No doubt, extradition in antiquity and the Middle Ages was not consistent or systematic. Some, but not a great deal of extradition had "legality" (*légalité*) as its essence. However, extradition, authorized and legalized by treaties, did occur in antiquity.<sup>79</sup> Individuals were delivered up by one population at the treaty-based request of another, not only for political offenses or acts of aggression against the "sovereign," but also for murder, rape, theft, robbery, abduction, and other common crimes.<sup>80</sup>

The Treaty of 1759 between France and Wurttemberg was the prototype of the extradition treaty of the modern era.<sup>81</sup> Extradition

extradition was practiced in antiquity were presented primarily to prove that there was a natural duty to extradite or prosecute all criminals.

76. See BILLOT, *supra* note 68, at 35–36 (arguing that the claimed examples of extradition did not show that occurred in antiquity; the examples were not really extradition at all). These examples were argued to be evidence of extradition by HÉLIE, *supra* note 73, at 169–72; Hélie, *supra* note 73, at 235–36.

77. BILLOT, *supra* note 68, at 35–36; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 177, 189 (2d ed. 1861).

78. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 177, 189 (2d ed. 1861).

79. This is discussed by many commentators. See, e.g., SHEARER, *supra* note 68, at 5–7; Langdon & Gardiner, *supra* note 70, at 192–94; BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 70, at 2–3.

80. See SHEARER, *supra* note 68, at 5–6; see also Paul O'Higgins', *The History of Extradition in British Practice*, 13 *INDIAN Y.B. OF INT'L AFF.* 78, 108 (1964); 6 *BRIT. DIG. OF INT'L L.* 445 (1965).

81. 43 PARRY'S T.S. 243, discussed in SHEARER, *supra* note 68, at 7–11. This treaty is usually cited as the prime example of the nascent modern extradition treaty. E.g., SHEARER, *supra* note 68, at 10, 17, 103; BASSIOUNI, *Public Order*, *supra* note 72, at 4–5; CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 70, at 2–5, noting that the Treaty between France and Wurttemberg, on December 3, 1765, provides for the extradition of "brigands, malefactors, robbers, incendiaries, murderers, assassins, vagabonds, cavalry, infantrymen, dragoons and *housards* (light cavalry)."

tion was still possible in these early treaties, however, for political or military offenses and desertion from the armed forces as well as for common crimes. Many of the rules and procedures established in these conventions endure in the law of extradition to this day. The rules required extradition requests to be made through the diplomatic channel, or at least through specific frontier authorities. The nineteenth century appears to have brought in a new phase of extradition law and practice, especially on the Continent, where although the use of bilateral treaties did not decelerate, states also began to promulgate domestic extradition laws.<sup>82</sup>

Judicial decisions in the United States were important in the development of modern extradition law. Sir Edward Clark betrayed his bias for the Anglo-American system of judicially developed law, when he extolled the value of the American influence:

In the matter of extradition, the American law was, until 1870, better than that of any country in the world; and the decisions of the American judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilization of the world.<sup>83</sup>

The first two general treaties between the United States and Great Britain<sup>84</sup> and the first between the United States and

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82. MERLE & VITU, *supra* note 64, at 427 n.2, 428, § 319, indicating that Belgium was the first to do this, in 1833. Then came England, 1870; Holland, 1875; Argentina, 1885; Japan, 1887; Switzerland, 1892; Norway, 1907; Sweden, 1913; France, 1927; Germany, 1929. The United States promulgated its extradition law in 1848, but it does not allow extradition apart from a treaty. The French promulgated their *Loi Relative a l'Extradition des Etrangers* [1927] D.P. IV, March 10, 1927 (*la loi Renoult*), reprinted in CODE DE PROCEDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE], immediately after art. 696 (Fr.), and translated in *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. 380 (Supp. 1935).

83. SIR EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 27–28 (4th ed. 1903); SHEARER, *supra* note 68, at 16.

84. The Jay Treaty, *supra* note 72, art. XXVII; SHEARER, *supra* note 68, at 13. A general analysis of the Treaty is found in SAMUEL BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (2d ed. 1962). Article 27 reads:

It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective Ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.

*See also* Convention on Boundaries, the Slave Trade and Extradition (Webster-Ashburton Treaty) art. 10, Aug. 9, 1842, U.S.-Gr. Brit., 8 Stat. 572, T.S. 119, 12 Bevans 82, 1 Malloy 650. This Treaty extended the list of extraditable offenses from murder and forgery, as in

France<sup>85</sup> adopted the law of extradition, as developed by the French theoreticians and amended by American judges. These treaties set the trend for the development of extradition law in the United States.<sup>86</sup> A surprising amount of the original process and conceptualization of extradition persists today.<sup>87</sup>

With the emergence of the nation-state, the sovereign continued to desire the rendition of criminals and “political” offenders. As modern theories of criminal justice evolved, so did theories of extradition. The notion that the relative power of sovereigns required the extradition of fugitives gave way to the view that natural right and justice required extradition. Later, positivism served to promote the concept that the “legality” of extradition is derived from an extradition treaty, local legislation, or case law. While the reigning legal philosophy has changed, this brief historical sketch indicates that extradition has existed since antiquity and that the role of extradition in society has remained relatively constant.<sup>88</sup>

#### B. *Extradition, Mutual Legal Assistance, and Contemporary Practice*

The historical exegesis above demonstrates that extradition and mutual legal assistance have evolved over time—and through state practice—as parts of a distinct area of international law on international cooperation in law enforcement matters. It is through these two mechanisms that a great deal of international cooperation, envisioned in the suppression conventions, takes place. As previously noted, therefore, one may rightfully regard extradition and mutual legal assistance as the cornerstones of transnational criminal practice.<sup>89</sup> The necessity of these mechanisms is evident. As Prost notes, whatever informal tools for cooperation may exist, “there will remain many instances where the type of assistance

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the Jay Treaty, to include arson, piracy, robbery and uttering forged papers. SHEARER, *supra* note 68, at 14.

85. Treaty of Extradition, Nov. 9, 1843, U.S.-Fr., 8 Stat. 581, T.S. 89, Bevans 830, 1 Malloy 526. This was the first United States treaty to include a political offense clause. *Id.* art. V. As evidenced by the 1889 Supplementary Convention to the Webster-Ashburton Treaty, Extradition Convention, July 12, 1889, U.S.-Gr. Brit., 26 Stat. 1508, T.S. 139, 12 Bevans 211, the political offense clause was soon adopted as standard in United States extradition treaties, *Id.* art. II.

86. *See, e.g.*, 1978 Treaty of Extradition Between the United States and the Federal Republic of Germany art. 2, 32 U.S.T. 1485, T.I.A.S. 9785 (1978); Supplementary Extradition Treaty Between the United States and the Federal Republic of Germany, signed Oct. 21, 1986, 1120 U.N.T.S. 269 discussed in Marjory Nash Leich, “*Contemporary Practice of the United States Relating to International Law*,” 81 AM. J. INT’L L. 935 (1987).

87. SHEARER, *supra* note 68, at 14–15.

88. *See* authority in *supra* notes 63–83 and accompanying text.

89. *See* Stigall, *supra* note 50.

sought can only be obtained through the use of formal mutual assistance.”<sup>90</sup> And extradition, in turn, is the principal means of obtaining custody over a fugitive located in another territory.<sup>91</sup>

Extradition is an intrinsically formal process designed “to protect basic international law norms” such as territorial sovereignty and the basic rights of the extradited person.<sup>92</sup> Extradition and mutual legal assistance are also legally intensive areas of practice that require familiarity with the domestic law of the requesting state (to understand what evidence is needed and the form in which it is needed); the international legal regime governing the request (to understand which treaty is applicable and the requirements of that treaty); and the law of the foreign country to which the request is being made (to understand the needs of the courts in that jurisdiction and the particular way in which that country provides assistance).<sup>93</sup>

### C. *International Terrorism and Transnational Criminal Law*

Transnational criminal law applies to a broad range of crime, including terrorism. In that regard, certain acts of terrorism have also been specifically addressed by suppression conventions. This subset of suppression conventions are collectively called the terrorism suppression conventions, the universal counter-terrorism conventions, or, alternatively, the anti-terrorism conventions. The first such convention was the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the first such convention).<sup>94</sup> Numerous others developed after the enactment of that seminal instrument.<sup>95</sup> Currently, there are approximately thirteen terrorism suppression conventions, all of which oblige states to criminalize a certain manifestation of terrorist activity, ensure offenders are held accountable, and cooperate with other member states in the prevention, investigation, and prosecution of that cer-

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90. See PROST, *supra* note 51, at 93.

91. See Margaret L. Satterthwaite, *Transfer of Persons in the Fight Against terrorism*, in COUNTERTERRORISM STRATEGIES IN A FRAGMENTED LEGAL ORDER: MEETING THE CHALLENGES 608 (Larissa Van Den Herik & Nico Schrijver eds., 2013).

92. See *id.*

93. See CRYER ET AL., *supra* note 53, at 95.

94. Daniel O'Donnell, *International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces*, INT'L REV. RED CROSS, Dec. 2006, at 854, [https://www.icrc.org/eng/assets/files/other/irtc\\_864\\_odonnell.pdf](https://www.icrc.org/eng/assets/files/other/irtc_864_odonnell.pdf).

95. See U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE TO THE UNIVERSAL ANTI-TERRORISM CONVENTIONS AND PROTOCOLS 2-3, V.03-85663(E) (2003), [http://www.unodc.org/pdf/crime/terrorism/explanatory\\_english2.pdf](http://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf).

tain type of terrorist activity.<sup>96</sup> “They cover topics as disparate as detection markers in plastic explosives and the prevention and punishment of crimes against internationally protected persons.”<sup>97</sup>

Through the series of Terrorism Suppression Conventions, states have co-operated to suppress the kind of violent conduct that is criminalized in most domestic jurisdictions, coupled with an added element of (i) prohibited means or method (bombing, hostage taking, hijacking, shipjacking, or use of transport of biological, chemical, or nuclear weapons); (ii) prohibited target (internationally protected persons, civil aircraft, international airports, maritime navigation, fixed platforms on the continental shelf, or civilians); or some combination thereof.<sup>98</sup>

Iraq and many other countries in the Middle East and North Africa are parties to the majority of these terrorism suppression conventions, most of which provide for international cooperation in criminal matters. And, like other suppression conventions, the terrorism suppression conventions each require state parties to either extradite or prosecute offenders found within their territory.<sup>99</sup> For instance, the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 14, 1973, states in its preamble that one of its undergirding objectives is to “enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of [terrorist bombings].”<sup>100</sup> The Convention goes on to impose obligations to either extradite or punish those accused of terrorist bombings<sup>101</sup> and requires that states provide each other “the greatest measure of assistance” in the investigation of such crimes.<sup>102</sup>

Similarly, the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979, states in its preamble that its genesis is rooted in the belief “that it is urgently necessary to develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution, and punishment of all acts of taking hostages as manifestations of international terror-

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96. See KIMBERLEY N. TRAPP, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* 9 (2011).

97. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 95, at 5.

98. TRAPP, *supra* note 96, at 18–19.

99. See *id.* at 83.

100. International Convention for the Suppression of Terrorist Bombings pmbl., Jan. 12, 1998, S. Treaty Doc. 106-6, 2149 U.N.T.S. 256.

101. *Id.* art. 7.

102. International Convention Against the Taking of Hostages art. 11, Dec. 17, 1979, 11081 T.I.A.S. i, 1316 U.N.T.S. 205.

ism.”<sup>103</sup> The Convention goes on to impose obligations to either extradite or punish those accused of terrorist bombings and requires that states provide each other “the greatest measure of assistance” in the investigation of such crimes.<sup>104</sup>

Still, it is important to emphasize that although they are sometimes termed “universal,” not every Middle Eastern or North African country is a party to every terrorism suppression convention. For example, neither Jordan nor Lebanon is yet party to the International Convention for the Suppression of Terrorist Bombings,<sup>105</sup> leaving a lacuna in the international cooperation regime for such crimes vis-à-vis those countries. And many other such lacunae exist. For instance, Jordan has even noted, in its reservation to the International Convention for the Suppression of the Financing of Terrorism that, because it is not a party to the International Convention for the Suppression of Terrorist Bombings; the Convention on the Physical Protection of Nuclear Material; the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; or the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, “it is not bound to include, in the application of the International Convention for the Suppression of the Financing of Terrorism, the offences within the scope and as defined in such Treaties.”<sup>106</sup> Similarly, a review of the chart at Appendix A of key multilateral conventions and their status among Middle Eastern and North African countries reveals multiple gaps in adherence to the patchwork of treaties that focus on international cooperation and the suppression of terrorism.

#### D. *The League of Arab States Conventions*

Aside from the multilateral treaties outlined above, there are also regional treaties, such as those in the Middle East, which provide for international cooperation in criminal matters. Two of the most significant of these<sup>107</sup> are treaties under the auspices of the

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103. *Id.* pmb1.

104. International Convention for the Suppression of Terrorist Bombings, *supra* note 100, art. 10.

105. See International Convention for the Suppression of Terrorist Bombings, *supra* note 100, 2149 U.N.T.S. at 258–59; SARAH WILLIAMS HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 370 n.279 (2012).

106. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. 106-49, 2149 U.N.T.S. 256.

107. A number of other regional instruments on counterterrorism are also in force in the Middle East. For instance, the Cooperation Council for the Arab State of the Gulf (GCC) Convention Against Terrorism, which provides in Article 19 that “Contracting

League of Arab States. The League of Arab States (or, as it is sometimes called, the Arab League) was founded in 1945.<sup>108</sup> It is “a loose confederation of twenty-two Arab nations, including Palestine,”<sup>109</sup> whose purpose is “the strengthening of the relations between the member-states, the coordination of their policies in order to achieve co-operation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries[.]”<sup>110</sup> Member states of the Arab League transcend the geographic parameters of the Middle East and North Africa, including countries from those regions as well as in the Horn of Africa and the Sahel. The Arab League today consists of Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Tunisia, United Arab Emirates, and Yemen.<sup>111</sup>

A notable treaty that exists among members of the League of Arab States is the Riyadh Arab Agreement for Judicial Cooperation of 1983 (the Riyadh Agreement)—a multilateral agreement which provides for a broad range of international legal cooperation in both civil and criminal matters.<sup>112</sup> With regard to cooperation in

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States shall undertake to extradite persons accused or convicted of terrorist offences in a Contracting State and whose extradition is sought by that State in accordance with the provisions of this Convention,” and, in Article 25, that “Contracting States shall undertake to act, to the extent possible, on any rogatory commission relating to criminal proceedings connected with a terrorist offence, in accordance with the Convention adopted by the member States of the Cooperation Council for the Arab States of the Gulf on the enforcement of judgements, rogatory commissions and notifications.” See Cooperation Council for the Arab States of the Gulf, Convention against terrorism (2004), Articles 19 and 25. The Organization of the Islamic Conference also has a multilateral convention which, in Article 5, states that “Contracting States shall undertake to extradite those indicted or convicted of terrorist crimes, requested for extradition by any of these countries in compliance with the rules and conditions stipulated in this Convention,” and, in Article 9, states that “Each Contracting State shall request from any other Contracting State to undertake in its territory rogatory action with respect to any judicial procedures concerning an action involving a terrorist crime[.]” See Organization of the Islamic Conference, Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999), Articles 5 and 9.

108. See League of Arab States, <http://www.arableagueonline.org/> (last visited June 16, 2015).

109. Jonathan Masters & Mohammed Aly Sergie, *The Arab League*, COUNCIL ON FOREIGN REL. (Oct. 21, 2014), <http://www.cfr.org/middle-east-and-north-africa/arab-league/p25967>.

110. League of Arab States Charter, art. 2, May 7, 1999, <http://www.arableagueonline.org/charter-arab-league/>.

111. See *Presentation of the Arab League*, ARAB LEAGUE ONLINE (July 3, 2015 12:21 PM), <http://www.arableagueonline.org/hello-world/#more-1>.

112. See League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, April 6, 1983, <http://www.refworld.org/docid/3ae6b38d8.html>.

criminal matters, the Riyadh Agreement provides, among other things, for the exchange of criminal records,<sup>113</sup> the use of rogatory commissions “to undertake on its behalf in the latter’s territory any judicial procedure”<sup>114</sup> (which includes taking the testimony of witnesses),<sup>115</sup> and the extradition of fugitives.<sup>116</sup>

Another key treaty among Arab League countries is the Arab Convention on the Suppression of Terrorism. Signed in 1998 and entered into force the following year,<sup>117</sup> this convention applies to a range of conduct—beyond the conduct-specific foci of most other terrorism suppression conventions—and seeks to suppress terrorism and define it more generally. The Arab Convention for the Suppression of Terrorism defines terrorism as follows:

Any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or to seize them, or aiming to jeopardize a national resource.<sup>118</sup>

The convention further provides that parties to the treaty “shall undertake to extradite those indicted for or convicted of terrorist offences whose extradition is requested by any of these States in accordance with the rules and conditions stipulated in this Convention.”<sup>119</sup> It likewise provides that “[e]ach contracting State shall provide the other States with all possible and necessary assistance for investigations or prosecutions relating to terrorist offences.”<sup>120</sup> Accordingly, the Arab Convention for the Suppression of Terrorism contains provisions for mutual legal assistance and extradition for matters which fall within its scope.

Although the Arab League instruments have faced challenges in implementation, they are becoming an increasingly important part of the transnational criminal firmament. Though commentators

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113. *Id.* art. 5.

114. *Id.* arts. 14, 15(2).

115. *Id.* art. 19.

116. *Id.* art. 38.

117. See AMNESTY INT’L, THE ARAB CONVENTION FOR THE SUPPRESSION OF TERRORISM: A SERIOUS THREAT TO HUMAN RIGHTS 2 (2002), <http://www.amnesty.org/en/library/asset/IOR51/001/2002/en/c2325833-d8a7-11dd-ad8c-f3d4445c118e/ior510012002en.pdf> (noting the treaty entered into force on May 7, 1999, one month after the seventh ratification by a member state of the Arab League).

118. League of Arab States, The Arab Convention for the Suppression of Terrorism, art. 1(2), 1998, [https://www.unodc.org/tldb/pdf/conv\\_arab\\_terrorism.en.pdf](https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf).

119. *Id.* art. 5.

120. *Id.* art. 13.

note that bilateral cooperation between Arab countries is generally preferred to cooperation through multilateral mechanisms,<sup>121</sup> instances of cooperation among Arab League member states against terrorism (and other transnational criminal matters) have included judicial cooperation under the Riyadh Convention.<sup>122</sup>

### E. Summary

Transnational criminal law is a rapidly developing subcategory of international law which addresses crime that transcends national frontiers and the mechanisms used by states to cooperate in its investigation or prosecution. The key treaties, which comprise the core of transnational criminal law—the suppression conventions—generally contain provisions calling for the suppression of a specific crime and allowing for mutual legal assistance and extradition between states. Other conventions, however, such as the Arab League Conventions, may be more regional in focus and more expansive in scope. Others still may be bilateral conventions with applicability for a wide range of offenses, but that only apply between two countries. And, of course, domestic legislation may also permit international cooperation in the absence of a treaty. This area of law permits and shapes international cooperation across a wide range of criminal activity, including terrorism. But many acts of terrorism may also be addressed under another subcategory of international law—the law of armed conflict—and/or the even more specific subcategory of “armed conflict not of a non-international character.”<sup>123</sup> This area of law will be discussed infra.

## IV. CONFLICT AND CONVENTIONS: DETERMINING APPLICABILITY

It is worth noting that none of the terrorism suppression conventions contain language making them inapplicable during armed conflict. There is language addressing military activity, but it does not preclude the application of the conventions altogether during

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121. See James Cockayne, Jason Ipe & Alistair Millar, *Implementing the UN Global Counter-Terrorism Strategy in North Africa*, CTR. ON GLOB. COUNTERTERRORISM COOPERATION 18 (Sept. 2010), <https://www.eisf.eu/wp-content/uploads/2014/09/0072-Cockayne-Ipe-Millar-2010-Implementing-the-UN-Global-Counter-Terrorism-Strategy-in-North-Africa.pdf> (noting that the tendency of Arab regimes “to ‘jealously guard’ security management and their mutual suspicion, which generates a preference for more discrete bilateral cooperation in counterterrorism matters, [has] limited the ability of the [Arab League] to serve as a forum for stimulating critical information sharing and other forms of cooperation among countries in North Africa and the rest of the Arab world.”).

122. *Id.* at 21.

123. See David E. Graham, *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 INT'L L. STUD. 43, 44 (2012).

times of conflict. Military activity is addressed, for instance, in the 1997 International Convention for the Suppression of Terrorist Bombings, in Article 19(2):

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.<sup>124</sup>

Such provisions, however, merely exclude the applicability of the relevant convention to the activities of “armed forces during an armed conflict” and “military forces of a State in the exercise of their official duties.”<sup>125</sup> Such language does not displace the relevant provisions of a convention in their entirety during a time of armed conflict. Instead, Article 1(4) of the Convention expressly states that the military forces envisioned are those organized forces under the command of a State<sup>126</sup>—so non-state armed groups like ISIS clearly remain included among those against which its provisions can be used. Importantly, such language does not state that the conventions themselves do not apply during an armed conflict.

If the text of the treaties contains no such self-limiting provisions that would curtail their application during a time of armed conflict, then one must look elsewhere for any potential limitation of that sort. In that regard, the central legal concept to understanding when various rules are operative or suppressed is the principle of *lex specialis*. The Latin maxim *lex specialis derogat legi generali* (the more specific rule prevails over the general rule) is an interpretive method that exists in Western legal systems, most notably in continental civil law systems based on the Roman model.<sup>127</sup> This maxim, also phrased as *specialia generalibus derogant*,<sup>128</sup> is most frequently used in modern international law by its shortened form *lex specialis* and, in that context, denotes the idea that a specific rule prevails over a more general rule.<sup>129</sup>

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124. International Convention for the Suppression of Terrorist Bombings, *supra* note 100, art. 19(2).

125. *Id.*

126. *Id.* art. 1(4).

127. See EVA STEINER, *THE FRENCH LEGAL METHOD* 70 (2002).

128. *See id.*

129. See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 239 (2010).

Although a feature of civil law systems for centuries,<sup>130</sup> commentators have noted that the idea of *lex specialis* only recently gained prominence as an international legal concept.<sup>131</sup> Even so, as logical method of legal interpretation, the idea has existed in international law since its early formation<sup>132</sup> and has been present in international jurisprudence for almost a century.<sup>133</sup> Both the Permanent Court of International Justice and, later, the International Court of Justice issued rulings recognizing this canon of construction as applicable in international law.<sup>134</sup> *Lex specialis*, therefore, was imported from civil law into international jurisprudence almost contemporaneously with the advent of modern international courts.

As civil law scholar Professor R.J. Trahan observes when expounding on the core concept of *lex specialis*, this method of interpretation is one of the principal tools used in civil law systems for reconciling “legislative antinomies.”<sup>135</sup> In the context of international law, this can be extended to reconciling conflicting treaty provisions and conflicting rules of customary international law. Lubell notes that there are a number of ways to implement *lex specialis*: “[f]or instance as a conflict resolving tool for choosing

130. See THE DIGEST OF JUSTINIAN 854 (Theodor Mommsen & Paul Krueger, eds., Alan Watson trans., 2011) (quoting Papinian, a Roman jurist who wrote in the late 2nd and early 3rd Century, as describing this canon of interpretation as already being well established during his time: “There is no doubt that in all other [aspects] of the law the particular derogates from the general[.]”); see also J.R. Trahan, *Time for a Change: A Call to Reform Louisiana’s Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 LA. L. REV. 661, 707 (1999) (noting that the principle is an “ancient maxim of statutory construction[.]”).

131. See Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship Between Human Rights and International Humanitarian Law*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed., forthcoming) (manuscript available at <http://ssrn.com/abstract=2463957>) (“despite the Latin veneer of antiquity,” the principle of *lex specialis* has only come to prominence since the ICJ’s 1996 Nuclear Weapons advisory opinion”).

132. INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: TOPIC (A): THE FUNCTION AND SCOPE OF THE LEX SPECIALIS RULE AND THE QUESTION OF ‘SELF-CONTAINED REGIMES’ 4 (2004), [http://legal.un.org/ilc/sessions/55/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/fragmentation_outline.pdf) (noting that its rationale was expressed in the writings of Grotius).

133. Payment of Various Serbian Loans Issued in France, 1929 P.C.I.J. (ser. A) Nos. 20/21, at 30 (July 12) (“The special words, according to elementary principles of interpretation, control the general expressions.”); Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 44 (Apr. 12) (“Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.”).

134. Payment of Various Serbian Loans, 1929 P.C.I.J. at 30; Passage Over Indian Territory 1960 I.C.J. at 44.

135. Trahan, *supra* note 130, at 708.

one rule over another (*lex specialis derogat legi generali*), as a complementary approach (*lex specialis complementa*), or as a method advocating use of the specific rule as an interpretive tool for the general one.”<sup>136</sup> In addition, the maxim does not apply at all where the special provision covers situations not covered by the general.<sup>137</sup> The importance of this method of deconfliction becomes clear when one observes the collision course in the development of two areas of international law: international human rights law and the law of armed conflict.

A. *Lex Specialis, the Law of Armed Conflict, and International Human Rights Law*

The law of armed conflict is defined as “that part of international law that regulates the conduct of armed hostilities.”<sup>138</sup> Scholars typically divide the law of armed conflict into the subcategories of *jus ad bellum* (the law regulating when the use of military force is permissible); *jus in bello* (the law regulating how military force is employed during an armed conflict); and *jus post bellum* (the law regulating post-conflict activities).<sup>139</sup> As a general matter, the law of armed conflict permits any level of lethal and destructive force to be used for lawful military objectives (one which, by its location, nature, purpose, or use, is such that its destruction offers a military advantage),<sup>140</sup> so long as the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, [ ] would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>141</sup> As a general rule, anyone engaging in hostilities in an armed conflict on behalf of a party to that conflict may be similarly targeted.<sup>142</sup> The law of armed conflict, accordingly, permits large-scale killing and destruction—even of innocent civilians—so long as the direct target is a lawful military

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136. LUBELL, *supra* note 129, at 239.

137. Edward A. Tomlinson, *Tort Liability in France For the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299, 1356 (1988).

138. U.S. ARMY OPERATIONAL LAW HANDBOOK 11 (Maj. Andrew Gillman & Maj. William Johnson, eds. 2012), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/LOAC-Deskbook-2014.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2014.pdf).

139. See Serena K. Sharma, *Reconsidering the Jus Ad Bellum/Jus In Bello Distinction*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* (Carsten Stahn & Jann K. Kleffner, eds. 2008) at 9. See also U.S. ARMY LAW OF ARMED CONFLICT DESKBOOK 10 (Maj. Andrew Gillman & Maj. William Johnson, eds. 2012).

140. *Id.* at 137.

141. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

142. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 139, at 138–39.

target and consequent civilian deaths are incidental and “proportional.”<sup>143</sup>

International human rights law (IHRL), in some contrast to the law of armed conflict, is a field of international law which has rapidly developed since the end of World War II<sup>144</sup> and that seeks to grant individuals throughout the world certain basic rights.<sup>145</sup> Among these are “the inherent right to life,” enshrined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>146</sup> The conflict between these two areas of law—and what each requires with regard to human lives—is obvious.

The discord between these two fields of law set the stage for a defining moment for the concept of *lex specialis*. This came in 1994, when the United Nations General Assembly, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, requested that the International Court of Justice render an advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”<sup>147</sup>

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>148</sup>

Since that decision, *lex specialis*, as a canon of statutory interpretation, began to take on new meaning in the distinct context of international law, and to some extent became understood as a regime-eclipsing (as opposed to rule-eclipsing) doctrine. This had a unique impact on international human rights law, as some commentators began to assert that international human rights law had

143. *Id.* at 34–35.

144. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 590 (2006); see also DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 9–10 (2009).

145. René Provost, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 18 (2005).

146. International Covenant on Civil and Political Rights, art. 6, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

147. Request for Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1994 I.C.J. 2 (Dec. 19), <http://www.icj-cij.org/docket/files/95/7646.pdf>.

148. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 25 (July 8) [hereinafter Nuclear Weapons].

no place whatsoever during an armed conflict as it was the applicable *lex specialis* in that context. This position was temporarily adopted by the United States, which maintained for a time that the law of armed conflict, as a *lex specialis*, “applies in lieu of international human rights law.”<sup>149</sup> More recent U.S. government publications, however, acknowledge a shift in the U.S. position such that it now recognizes that certain provisions of international human rights law remain applicable during an armed conflict and that a more appropriate rule-by-rule analysis is required to determine which rule prevails. In that regard, in its Fourth Periodic Report to the U.N. Human Rights Committee on compliance with the ICCPR, the United States clarified its position as follows:

Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC]. . . . [IHRL] and [LOAC] are in many respects complementary and mutually reinforcing [and] contain many similar protections. Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts . . . .<sup>150</sup>

Per the U.S. Army Law of Armed Conflict Deskbook, this statement suggests the appropriate analysis is “rule by rule” and, in “situations of armed conflict, where the LOAC provides specific guidance, these will displace competing norms of IHRL and provide authoritative guidance for military action. Where the LOAC is silent or its guidance inadequate, specific provisions of applicable human rights law may supplement the LOAC.”<sup>151</sup> Thus, where the law of armed conflict is silent, it cannot eclipse a competing rule. And, as demonstrated below, there are many areas where the law of armed conflict is silent. Given the far-reaching nature and purpose of international law, it is no surprise that one of its more narrowly

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149. See LAW OF ARMED CONFLICT DESKBOOK, *supra* note 139, at 198.

150. *Id.* at 198–99 (quoting U.S. DEP’T OF STATE, UNITED STATES FOURTH PERIODIC REPORT TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS ¶ 507 (2011), <http://www.state.gov/g/drl/rls/179781.htm>).

151. *Id.*; see also Yoram Dinstein, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 226 (2015) (“It would nevertheless be wrong to view [the law of non-international armed conflict] and human rights law as incompatible, monolithic regimes, scanning them solely on the macro level. When considered on the micro level, it becomes apparent that a perception of [the law of non-international armed conflict] and human rights law as ‘mutually exclusive’ is a fallacy. The interaction between the two legal regimes is nuanced, and it ought to be considered in terms of coexistence, *lex specialis*, derogation and limitation.”) (citations omitted).

focused subsets does not purport to regulate every aspect of state or human conduct. Thus, far from the normal binary analysis pitting the law of armed conflict against international human rights law, the multifaceted aspect of international law and its various subsets make the analysis polychotomous in nature. Some subcategories of international law will be in conflict with others; some will be complementary to others; some will be mutually reinforcing; and yet others will neither border nor abrade other legal regimes—they simply occupy a more liminal space in the international legal universe, like tendrils which grow and curl into complex formations but never touch or intertwine.

## V. THE LAW OF NON-INTERNATIONAL ARMED CONFLICT

As noted, the conflicts in Syria and Iraq have been classified as non-international armed conflicts.<sup>152</sup> Non-international armed conflicts are defined as “armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government.”<sup>153</sup> In addition, in the words of the International Criminal Tribunal for the former Yugoslavia, a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>154</sup> As military publications, research institutions,

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152. UNAMI Report, *supra* note 18, at i. See also Dinstein, *supra* note 151, at 18 (noting that the conflict ongoing in Syria since 2011 is a non-international armed conflict).

153. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006), <http://www.ihl.org/ihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>. See also DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 73–74 (June 2015), <http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf> (“3.3.1 International Armed Conflict and Non-International Armed Conflict. The law of war treats situations of “war,” “hostilities,” or “armed conflict” differently based on the legal status of parties to the conflict. If two or more States oppose one another, then this type of armed conflict is known as an “international armed conflict” because it takes place between States. However, a state of war can exist when States are not on opposite sides of the conflict. These other types of conflict are described as “not of an international character” or “noninternational armed conflict.” For example, two non-State armed groups warring against one another or States warring against non-State armed groups may be described as “non-international armed conflict,” even if international borders are crossed in the fighting.”).

154. Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal con-

and commentators uniformly note, non-international armed conflicts comprise the bulk of global conflict in the modern world.<sup>155</sup> While the international legal rules governing such conflicts are thinner than those pertaining to international conflicts,<sup>156</sup> a core group of international legal principles still applies to non-international armed conflict. This subgroup of the law of armed conflict is known, descriptively, as the law of non-international armed conflict.<sup>157</sup>

The law of non-international armed conflict consists of both treaty and customary international law. With regard to treaty-based law, the existing body of law is substantively thin, consisting mainly of Common Article 3 and Additional Protocol II of the Geneva Conventions.<sup>158</sup> Also applicable, albeit more narrowly, are thematic conventions such as the 1954 Hague Convention for the Protection of Cultural Property.<sup>159</sup> Each of these treaty-based bodies of law, however, only becomes applicable in different, context-specific situations.

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flicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”).

155. See Dinstein, *supra* note 151, at 2 (“NIACs are certainly much more pervasive today than international armed conflicts[.]”). See also LAW OF ARMED CONFLICT DESKBOOK, *supra* note 139, at 25; see also Uppsala Universitet Conflict Encyclopedia, <http://www.ucddp.uu.se> (noting the prominence of non-international armed conflict).

156. *Id.* at 26 (noting that there is less international legal regulation of such conflicts due to their internal nature. “[T]he internal nature of these conflicts explains the limited scope of international regulation.”).

157. SCHMITT ET AL., *supra* note 153, at 2–3. See also Dinstein, *supra* note 151, at 3 (“Since [1949], the international regulation of [non-international armed conflicts] has undergone tremendous growth, becoming the fulcrum of contemporary interest. In large measure, the normative corpus apposite to [non-international armed conflicts] may be seen as an extrapolation of the more robust *jus in bello* applicable in [international armed conflicts].”).

158. Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT’L L. STUD. 696, 705 (2013).

159. Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT’L L. 219, 223 (2011), <http://ejil.oxfordjournals.org/content/22/1/219.full>; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19(1), May 14, 1954, 249 U.N.T.S. 240, 256 (“In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”). Aside from Additional Protocol II and Common Article 3, Dinstein delineates a number of other treaties which are applicable to non-international armed conflicts, such as the Convention for the Protection of Cultural Property; the Convention on Certain Chemical Weapons; the 1989 Convention on the Rights of the Child; the 2006 International Convention for the Protection of All Persons from Enforced Disappearances; the 1972 Biological Weapons Convention; and the 1993 Chemical Weapons Convention. See Dinstein, *supra* note 151, at 154–61.

Common Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,”<sup>160</sup> and establishes basic rules that govern the conduct of parties to such a conflict. These are “fundamental rules from which no derogation is permitted.”<sup>161</sup> They include requirements for humane treatment of persons not actively participating in the conflict (including armed forces which have surrendered or are hors de combat).<sup>162</sup> The article specifically prohibits, with regard to such persons, “violence to life and person,” including murder, mutilation, cruel treatment, and torture.<sup>163</sup> It also prohibits the taking of hostages,<sup>164</sup> outrages upon human dignity,<sup>165</sup> and the imposition of sentences and executions without the judgment of a regularly constituted court with appropriate judicial guarantees.<sup>166</sup> In addition, Common Article 3 provides that “the wounded and sick shall be collected and cared for,” and that “[a]n” impartial humanitarian body, such as the International Committee for the Red Cross, may offer its services to the Parties to the conflict.”<sup>167</sup>

Additional Protocol II, in turn, is a supplement to Common Article 3 and provides more specific protections for civilians. These include, like Common Article 3, protections against “violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment,” as well as “taking of hostages.”<sup>168</sup> Additional Protocol 2 also extends protections to include prohibitions against collective punishments,<sup>169</sup> acts of terrorism,<sup>170</sup> outrages upon personal dignity—in particular humiliating and degrading treatment, rape, enforced prostitution and any

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160. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

161. *The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

162. Geneva Convention III, *supra* note 160, art. 3(1).

163. *Id.* art. 3(1)(a).

164. *Id.* art. 3(1)(b).

165. *Id.* art. 3(1)(c).

166. *Id.* art. 3(1)(d).

167. *Id.* art. 3(2).

168. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

169. *Id.* art. 4(2)(b).

170. *Id.* art. 4(2)(d).

form of indecent assault,<sup>171</sup> slavery and the slave trade,<sup>172</sup> pillage,<sup>173</sup> and threats to commit any of the prohibited acts.<sup>174</sup> Sandesh Sivakumaran notes that “Additional Protocol II, still the only treaty devoted solely to the law of internal armed conflict, represents a pared-back version of what had been hoped for and its sparse text betrays its nature as a last-minute compromise.”<sup>175</sup>

Other conventions, such as the 1954 Hague Convention for the Protection of Cultural Property, serve to protect “movable or immovable property of great importance to the cultural heritage of every people”<sup>176</sup> during times of conflict (both international and non-international).<sup>177</sup>

Which of these instruments applies to the non-international armed conflict in question depends, in large part, on the circumstances of the conflict and the level of violence. For instance, in situations of low-intensity violence (protests, isolated violence, riots, or banditry), the threshold for a non-international armed conflict would not be met.<sup>178</sup> Once the requisite level of violence is attained, however, different legal obligations will apply depending on the organization of the groups involved and the extent to which such groups control territory.<sup>179</sup>

Common Article 3 merely requires that the armed conflict not be of “an international character” and occur “in the territory of one of the High Contracting Parties”. However, the threshold is higher under Additional Protocol II. By Article 1.1, the Protocol only applies to conflicts between the armed forces of a High Contracting Party “and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations” though it

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171. *Id.* art. 4(2)(e).

172. *Id.* art. 4(2)(f).

173. *Id.* art. 4(2)(g).

174. *Id.* art. 4(2)(h).

175. Sivakumaran, *supra* note 159, at 223.

176. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 240, 242.

177. *Id.* at 256 (“In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”).

178. Dinstein, *supra* note 151, at 21 (“Internal disturbances—not reaching the level of a NIAC—encompass disorderly demonstrations, rallies, and protests. These events may be large-scale and rife with violence, perhaps inflicting incalculable human fatalities and/or colossal damage to property, but they do not become a NIAC as long as they are isolated and sporadic, i.e. they are not coordinated and sustained over a stretch of time.”). *See also* LAW OF ARMED CONFLICT DESKBOOK, *supra* note 139, at 26.

179. Dinstein, *supra* note 151, at 21.

is possible for there to be an intern-connection between two separate conflicts, as in those of Liberia and Sierra Leone. The Article further requires, as does Common Article 3, that the conflict take place “in the territory of a High Contracting Party.”<sup>180</sup>

In addition, given the relatively thin body of treaty law governing non-international armed conflicts, customary international law plays a particularly important role in their regulation. Notably, some protections initially developed for international armed conflicts have now attained the status of customary international law and apply equally in both international and non-international armed conflict. For instance, the principle of proportionality applies in non-international armed conflict, such that it would be a violation of international law to carry out a disproportionate attack in such a context.<sup>181</sup> Such protections also include the prohibition on targeting civilians (individuals who are not members of the armed forces or an organized armed group);<sup>182</sup> attacking civilian objects;<sup>183</sup> indiscriminate attacks that strike both military objectives and civilians or civilian objects without distinction; the prohibition on acts designed to cause unnecessary suffering;<sup>184</sup> and the requirements of humane treatment.<sup>185</sup>

The law of non-international armed conflict, therefore, contains provisions that are significant but rudimentary when compared to the far more elaborate and expansive rules pertaining to international armed conflicts. Importantly, however, as the analysis below demonstrates, no part of the law of armed conflict purports to completely eclipse transnational criminal law or the multilateral conventions that provide for mutual legal assistance and extradi-

180. SCHMIDT, ET AL., *supra* note 153, at 3.

181. *See id.* at 22 (“An attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is recognised that incidental injury to civilians and collateral damage to civilian objects may occur as a result of a lawful attack against fighters or military objectives.”).

182. Additional Protocol I, *supra* note 141, art. 51(3); *see also* Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. & POL'Y REV. 269, 294 (2014) (explaining that the Additional Protocol I “bans attacks on civilian objects”).

183. SCHMIDT, ET AL., *supra* note 153, at 18.

184. *Id.* at 8.

185. *Id.* Dinstein notes that, “Since the 1990s we have witnessed the inexorable emergence of a new customary [law of non-international armed conflict], going well beyond existing treaty law and in fact filling some of its gaps.” *See* Dinstein, *supra* note 151, at 205. Dinstein goes on to identify a number of international legal norms which have become part of the customary law of non-international armed conflict, such as the protection of civilians; the prohibition against forced displacement of civilians; the prohibition on collective punishments; the prohibition of rape; the prohibition of slavery; and the injunction against the recruitment and use of child soldiers. *Id.* at 207–08.

tion in terrorism and other forms of transnational crime. In fact, the law of armed conflict actually envisions the two fields coexisting.

A. *Comparing Transnational Criminal Law with the Law of Armed Conflict*

As noted, multilateral suppression conventions comprise an important part of the fabric of transnational criminal law, including for cases involving international terrorism. Some of the conduct envisioned in these suppression conventions, however, address conduct similar to what one might encounter during an armed conflict. For instance, the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997 (the Terrorist Bombing Convention) applies to cases in which an offender “unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility” with the “intent to cause death or serious bodily injury”; or to cause “extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”<sup>186</sup> The treaty also applies to groups of persons acting with a common purpose to detonate an explosive or other lethal device in such a fashion.<sup>187</sup> Importantly, the treaty calls for state parties to provide international cooperation in the prosecution of such offenses<sup>188</sup> and, where applicable, provides that state parties may use the treaty as a legal basis for extradition of persons accused of offenses involving terrorist bombings.<sup>189</sup> There is, therefore, an intersection in the conduct addressed by transnational criminal instruments like the terrorism suppression conventions and conduct that is characteristic of contemporary armed conflicts.

The intersection between the law of armed conflict and transnational criminal law is not limited solely to the types of conduct each could potentially address. The law of armed conflict also contains some treaty-based provisions which call for mutual legal assistance and extradition, though only in very specific circumstances. For

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186. International Convention for the Suppression of Terrorist Bombings, *supra* note 100, art. 2(1).

187. *Id.* art. 2(3)(c).

188. *Id.* art. 10.

189. *Id.* art. 9.

instance, each of the Geneva Conventions contains a common extradition provision, which uniformly states:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>190</sup>

Although the language of these provisions focuses on extradition, the Commentary to Additional Protocol I notes that “[t]he principle of mutual assistance is certainly implied in the common article of the Conventions which makes grave breaches subject to universal jurisdiction, even though the conditions and modalities of such mutual assistance are determined by the law of the Contracting Party to whom the request is made.”<sup>191</sup> As the shared text of these articles makes clear, however, the obligations imposed by the Geneva Conventions only relate to those persons who have committed “grave breaches” of the Geneva Conventions.<sup>192</sup> Those, in turn, are generally defined as willful killing; torture or inhuman treatment (including biological experiments); willfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; willfully depriving a prisoner of war or a civilian of the rights of a fair trial; unlawful deportation, transfer, or confinement of a civilian; and taking civilians as hostages.<sup>193</sup>

To the extent the common extradition articles of the Geneva Conventions might be argued to have a preclusive effect on any

190. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [Geneva Convention I] art. 49, ¶ 2, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, ¶ 2, Aug. 12, 1949, 6.3 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention III, *supra* note 160, art. 129, ¶ 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, ¶ 2, Aug. 12, 1949, 6.3 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

191. *Commentary on the Additional Protocols to the Geneva Conventions*, INT'L COMM. RED CROSS 1028, ¶ 3573 (1987), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf) [hereinafter Commentary to AP I].

192. See Geneva Convention I, *supra* note 190, art. 49, ¶ 2; Geneva Convention II, *supra* note 190, art. 50, ¶ 2; Geneva Convention III, *supra* note 160, art. 129, ¶ 2; Geneva Convention IV, *supra* note 190, art. 146, ¶ 2.

193. See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2(a)-(h), S.C. Res. 1877 (July 7, 2009).

other treaty or legal regime, it must first be noted that nothing in the text of the relevant article states that it applies to the exclusion of any other treaty or law. Moreover, it must be remembered that the common extradition articles are all part of the “penal sanctions” portions of the Geneva Conventions, which were designed to compel member states to adapt their national laws to enable the prosecution before domestic or international courts of those who committed grave breaches of the Geneva Conventions.<sup>194</sup> These provisions also were designed to impose an “active duty”<sup>195</sup> to search for violators and impose an *aut dedere aut judicare* (extradite or prosecute) requirement on countries where offenders are found.<sup>196</sup> These are obligations that states are meant to uphold in times of peace as well as during times of armed conflict. Neither the text of the common extradition articles nor Pictet’s commentary, however, indicate that these provisions should displace any other set of rules.<sup>197</sup> In fact, as the travaux of the Geneva Conventions demonstrates, the articles relating to penal sanctions and enforcement were designed to ensure there were appropriate mechanisms inserted into the domestic laws of the High Contracting Parties so that the Conventions could be properly enforced.<sup>198</sup> The goal was to require the High Contracting parties to augment their existing penal provisions, not to supplant provisions of any other kind.

Reinforcing this analysis are the provisions of Convention IV relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) which expressly state that the rules Geneva Convention IV sets forth for civilians during a time of conflict do not

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194. Geneva Convention IV, *supra* note 190, art. 146; *Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, INT’L COMM. RED CROSS, <https://www.icrc.org/ihl/COM/380-600168?OpenDocument> (last visited July 12, 2015).

195. See JEAN DE PREAUX ET AL., COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 623 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

196. See *id.*

197. It is also worth noting that U.S. jurisprudence supports this view. See *Noriega v. Pastrana*, 564 F.3d 1290, 1298 (11th Cir. Fla. 2009) (“Nowhere, however, is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another. Nor do the stated purposes of articles 118 and 119, as reflected by their commentary, preclude detention in these circumstances: article 118 is intended to prohibit ‘prolong[ed] war captivity,’ while article 119 unambiguously reflects the intention of the drafters to permit detention of prisoners of war subject to criminal proceedings.”).

198. Fourth Report drawn up by the Special Committee of the Joint Committee, Report on penal sanctions in case of violation of the Convention, page 116 (“The Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted into the national penal laws.”).

constitute an obstacle to extradition of civilians pursuant to extradition treaties concluded before the outbreak of hostilities.<sup>199</sup>

Of course, the Geneva Conventions were authored before the ascendance of transnational criminal law and the pluriverse of bilateral and multilateral treaties that regulate transnational crime. More recent instruments, therefore, are a better lens through which to view the potential interaction between the law of armed conflict and transnational criminal law. Authored roughly two decades after the Geneva Conventions, Additional Protocol I to the Geneva Conventions provides language that more broadly addresses possible international cooperation during armed conflict. Article 88, notably entitled “Mutual assistance in criminal matters,” provides a more expansive set of rules on the matter:

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.<sup>200</sup>

While, as with the Geneva Conventions, the focus of these provisions in Additional Protocol I is on those who commit “grave breaches” of the Geneva Conventions, it is this provision that most clearly demonstrates that transnational criminal law is not displaced by the law of armed conflict. Similar to the provisions of Geneva Convention IV discussed above vis-à-vis extradition, the language of Additional Protocol I expressly states that even the more expansive article for international cooperation in Additional Protocol I does not “affect the obligations arising from the provisions of

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199. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Articles 45 and 70. *See also* DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 637 (June 2015), <http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf> (“The [Geneva Convention Relative to the Treatment of Prisoners] does not prohibit the extradition of POWs to other Parties to the [Geneva Convention Relative to the Treatment of Prisoners] to face criminal charges.”).

200. Additional Protocol I, *supra* note 141, art. 88.

any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.”<sup>201</sup> And, as the Commentary to Article 88 makes clear, this article envisions “[m]utual assistance for criminal proceedings conducted in another country, such as the notification of documents, tracing evidence, handing over files and documents, conducting searches etc. It may also concern handing over the prosecution or the execution of foreign criminal judgments.”<sup>202</sup> Accordingly, the law of armed conflict—as reflected in the Geneva Conventions and Additional Protocol I—does not serve to displace transnational criminal law or the treaties which comprise it; the two regimes are agnostic to one another in large part and, at their closest points of intersection, complementary.

Importantly, however, neither the extradition articles of the Geneva Conventions nor those in Additional Protocol I are clearly applicable during non-international armed conflict.<sup>203</sup> The evidence that the extradition and mutual legal assistance provisions have risen to the level of customary international law is scant and commentators suggest that these provisions are applicable solely to international conflicts.<sup>204</sup> This means that the weight of authority suggests that the extradition provisions of the Geneva Conventions and Additional Protocol I have no applicability whatsoever to non-international armed conflicts. Accordingly, in non-international armed conflicts, there is no regime competing against transnational criminal law at all—and not even the possibility of asserting that the law of armed conflict eclipses the extradition and mutual legal assistance provisions of another convention. Under such circumstances, transnational criminal law and multilateral treaties clearly remain applicable.

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201. *Id.*

202. Commentary to AP I, *supra* note 191, at 1028, ¶ 3572.

203. See Ferdinandusse, *supra* note 49 (“The four Geneva Conventions of 1949 stipulate an obligation to prosecute or extradite for grave breaches, which only apply in international armed conflicts, but not for other war crimes.”).

204. See *id.*; see also Miša Zgonec-Rožej & Joanne Foakes, *International Criminals: Extradite or Prosecute?*, CHATHAM HOUSE BRIEFING PAPER, July 2013, at 5, [http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp\\_prosecute.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf) (“[S]tate practice demonstrates that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes under international law has become part of customary international law. States’ implementation of this obligation seems to be primarily based on treaties to which they are parties. It is thus questionable whether state practice beyond treaties is sufficient to meet the requirements prescribed for the formation of customary international law.”).

Lastly, there is also some state practice to suggest that other transnational criminal treaties, such as bilateral extradition treaties, remain operable even during armed conflicts. For instance, a fugitive was extradited from Iraq to the United States on July 28, 2014<sup>205</sup>—over a month after ISIS invaded and took control of Mosul<sup>206</sup> and during the midst of the non-international armed conflict in Iraq. That extradition was conducted pursuant to the bilateral extradition treaty between the United States and Iraq.<sup>207</sup> Similarly, in January 2014, while French forces remained engaged in the non-international armed conflict in Mali, a fugitive was extradited from Mali to the United States in accordance with the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.<sup>208</sup> Likewise, media reports indicate that other persons captured by French forces have been transferred to Malian authorities for extradition and deportation to France.<sup>209</sup> Nothing in the fact that armed conflicts were ongoing in those regions served to eclipse the legal instruments that served as the legal bases for those extraditions. Accordingly, state practice in Europe, Africa, and North America suggests that the law of armed conflict does not serve to preclude the operation of such treaties.

This analysis demonstrates, therefore, that the law of armed conflict does not serve to eclipse transnational criminal law or its foundational treaties. The terrorism suppression conventions, the regional and other multilateral conventions, and relevant bilateral conventions all remain operative during both international and non-international armed conflicts.

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205. See Press Release, FBI, Iraq Extradites Fugitive Defense Contractor to U.S. to Face Fraud Charges (July 28, 2014), <http://www.fbi.gov/cincinnati/press-releases/2014/iraq-extradites-fugitive-defense-contractor-to-u.s.-to-face-fraud-charges>.

206. See *Iraq City of Mosul Falls to Jihadists*, CBS News (June 10, 2014), <http://www.cbsnews.com/news/iraq-city-of-mosul-falls-into-hands-of-isis-jihadists-after-police-army-abandon-posts/>.

207. See Press Release, *supra* note 205.

208. See Press Release, FBI, Malian National Indicted for Murder of U.S. Diplomat to be Arraigned Today in Brooklyn Federal Court (Mar. 13, 2014), <http://www.fbi.gov/new-york/press-releases/2014/malian-national-indicted-for-murder-of-u.s.-diplomat-to-be-arraigned-today-in-brooklyn-federal-court>.

209. See, e.g., Le Monde.fr, Le djihadiste Gilles Le Guen déféré devant la justice, May 17, 2013 (“Le djihadiste français Gilles Le Guen, arrêté au Mali fin avril, était présenté vendredi 17 mai à un juge d’instruction en vue d’une mise en examen pour association de malfaiteurs en relation avec une entreprise terroriste.”).

## VI. CONCLUSION

ISIS continues to metastasize throughout the Middle East, funding its growth through criminal enterprises and religious propaganda, while taking new territory by using force, brutality, and terrorism.<sup>210</sup> Having plunged large parts of Iraq and Syria into chaos and darkness, it now has begun expanding into other parts of the region, violently extending its grasp to places where resources might be found to feed its growth.<sup>211</sup> The international community, now attuned to the need for action against this malevolent terrorist group, has become compelled to find effective means to counter its influence and stem its growth.<sup>212</sup>

A complete response to such a threat must necessarily include all elements of state power, including the effective use of domestic criminal justice frameworks.<sup>213</sup> As United Nations Security Council Resolution 2178 notes, “terrorism will not be defeated by military force, law enforcement, and intelligence operations alone[.]”<sup>214</sup> Any effort to counter ISIS, will therefore necessitate international cooperation on a variety of levels.<sup>215</sup> Such multilayered cooperation is necessitated by the complexity of the ISIS organization and its operations. As Louise Shelley has noted, “ISIS is a diversified

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210. See Stigall, *supra* note 1 (“[ISIS is] a non-state armed group that, by exploiting ungoverned spaces and state fragility in the Middle East, has asserted a degree of control over a large swath of territory that transcends the borders of Iraq and Syria. In so doing, ISIS has become a stark reminder of the dangers posed by ungoverned spaces – lawless expanses of the globe left effectively unregulated by sovereign authority, where terrorist organizations and other transnational criminal groups are permitted to thrive.”).

211. See Geoffrey Howard, *ISIS’ Next Prize, Will Libya Join the Terrorist Group’s Caliphate?*, FOREIGN AFF. (Mar. 1, 2015) (“The Islamic State of Iraq and al-Sham is no longer just an Iraq and Syria problem. For months now, ISIS (or groups affiliated with it) has been pushing into Libya as well. The country has long been vulnerable; the vacuum created by the deepening political crisis and collapse of state institutions is an attractive arena for terrorist groups. Further, control of Libya could potentially bring access to substantial revenues through well-established smuggling networks that deal in oil, stolen cars, contraband goods, and weapons.”).

212. See Arimatsu & Schmitt, *supra* note 2.

213. See Simons, *supra* note 3.

214. See S.C. Res. 2178, *supra* note 5, at 2.

215. See KATULIS ET AL., *supra* note 6 (“As with efforts to counter extremism elsewhere, defeating ISIS will require a concentrated effort over time. Any successful U.S. strategy must be built on a foundation of regional cooperation that requires coordinated action from U.S. partners—a central concept of the Counterterrorism Partnership Fund that President Barack Obama proposed earlier this year. The strategy will be multifaceted, involving intelligence cooperation, security support, vigorous regional and international diplomacy, strategic communications and public diplomacy, and political engagement.”); Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting, *supra* note 6 (noting “that ISIL/Daesh’s finances and recruitment are also increasingly being challenged through international cooperation.”).

criminal business, and oil is only one of its several revenue streams. U.S. officials ignore that fact at their own peril.”<sup>216</sup> Consequently, international cooperation in criminal investigations will be key to dismantling ISIS and similar groups—to deprive them of their sources of funding, curb illicit proceeds, and bring terrorists to justice in a criminal forum.

As this Article has explicated, such cooperation generally requires a legal basis—usually a treaty upon which countries can base their authority to provide one another assistance. Although one U.N. publication has errantly posited that “[t]he universal counter-terrorism conventions and protocols do not apply in situations of armed conflict,”<sup>217</sup> the analysis in this Article has shown that nothing in the relevant treaties or in the law of armed conflict prevents their continuing application during a time of armed conflict. In fact, as this Article has demonstrated, the law of armed conflict envisions that the field of transnational criminal law (and the body of treaties which comprise its core) will remain applicable even amidst the din and discord of war. This is evident from analysis of the relevant legal instruments as well as state practice.<sup>218</sup>

It is critical that the United Nations promptly and publically correct its analysis so that governments in the Middle East, North Africa, and elsewhere have clear and accurate legal guidance on the applicability of the terrorism suppression conventions during times of armed conflict. The terrorism suppression conventions as well as other similar conventions—both multilateral and bilateral—remain operative and are not muted by the fact of an armed conflict (international or non-international). Thus, tools such as mutual legal assistance and extradition remain at the disposal of state actors to facilitate counterterrorism efforts. This, importantly, permits states to adopt hybrid approaches to confront hybrid threats like that posed by ISIS. In such a critical endeavor, states can and must utilize all elements of state power—including both military and law enforcement capabilities—to address this increasingly complex and malevolent phenomenon.<sup>219</sup>

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216. Shelley, *supra* note 29.

217. See U.N. OFFICE ON DRUGS AND CRIME, *supra* note 7, at 28.

218. See *supra* Parts III.A, IV.A.

219. For a discussion of the global ascendance of non-state armed groups in ungoverned spaces and fragile states, see generally Dan E. Stigall, *The French Intervention in Mali, Counterterrorism, and the Law of Armed Conflict*, 223 MIL. L. REV. 1 (2015).

## APPENDIX A: MATRIX OF MIDDLE EASTERN AND NORTH AFRICAN ADHERENCE TO TERRORISM SUPPRESSION CONVENTIONS

	Offenses Committed On Board Aircraft	Seizure of Aircraft <sup>1</sup>	Seizure of Aircraft Against Safety of Civil Aviation <sup>2</sup>	Crimes Against Internationally Protected Persons <sup>3</sup>	Taking of Hostages <sup>4</sup>	Physical Protection of Nuclear Material <sup>5</sup>	Suppression of Unlawful Acts of Violence at Airports (Protocol) <sup>6</sup>	Unlawful Acts against the Safety of Maritime Navigation <sup>7</sup>	Unlawful Acts / Safety of Fixed Platforms located on the Continental Shelf <sup>8</sup>	Marking of Plastic Explosives for the Purpose of Detection <sup>9</sup>	Suppression of Terrorist Bombings <sup>10</sup>	Suppression of the Financing of Terrorism <sup>11</sup>	Suppression of Acts of Nuclear Terrorism <sup>12</sup>
Alghaziam	YES	NO	YES	YES	YES	YES	NO	YES	YES	YES	YES	YES	
Bahrain	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	
Cyprus	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	
Egypt	YES	NO	YES	YES	NO	NO	YES	YES	YES	YES	YES	YES	
Iran	YES	NO	YES	YES	YES	NO	YES	NO	NO	NO	NO	NO	
Iraq	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Jordan	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Kuwait	YES	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES	YES	
Lebanon	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	
Oman	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES	
Palestine	*	*	*	*	*	*	*	*	*	*	*	*	
Qatar	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Saudi Arabia	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Syria	YES	NO	YES	YES	NO	NO	YES	NO	YES	NO	YES	YES	
Turkey	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
United Arab Emirates	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	
Yemen	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	
Algeria	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Libya	YES	NO	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES	
Morocco	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	
Tunisia	YES	NO	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES	
Mauritania	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	

<sup>1</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Tokyo\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Tokyo_EN.pdf).  
<sup>2</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 869 U.N.T.S. 105, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Hague\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Hague_EN.pdf).  
<sup>3</sup> Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Sept. 10, 2010, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Beijing\\_Proc\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/Beijing_Proc_EN.pdf).  
<sup>4</sup> Convention for the Prevention and Punishment of Crimes Against the Safety of Civil Aviation, Sept. 23, 1972, 24 U.S.T. 564, 974 U.N.T.S. 177, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MI071\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MI071_EN.pdf).  
<sup>5</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 107, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&lang=en>.  
<sup>6</sup> International Convention Against the Taking of Hostages, New York, Dec. 17, 1979, 1316 U.N.T.S. 985, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&lang=en>.  
<sup>7</sup> Protocol for the Suppression of Unlawful Acts of Violence Against Aircraft Serving International Civil Aviation, Feb. 24, 1988, 1389 U.N.T.S. 473, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MIA\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MIA_EN.pdf).  
<sup>8</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201, <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202015.pdf>.  
<sup>9</sup> Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304 (SUA PROT), <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202015.pdf>.  
<sup>10</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721, [http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MEX\\_EN.pdf](http://www.icao.int/secretariat/legal/Lis%2016%20Parties/MEX_EN.pdf).  
<sup>11</sup> Convention for the Suppression of Terrorist Bombings, New York, Dec. 15, 1987, 2149 U.N.T.S. 256, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&lang=en>.  
<sup>12</sup> Convention for the Suppression of Terrorism, New York, Dec. 9, 1989, T.I.A.S. No. 13075, 39 I.L.M. 270 (2000), <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&lang=en>.  
<sup>13</sup> Convention for the Suppression of Acts of Nuclear Terrorism, New York, Apr. 13, 2005, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&lang=en>.

