# THE UNITED NATIONS AND TERRORISM: A LONG TERM ASSESSMENT OF CHANGES AND CONTINUITIES

Johannes-Alexander Müller

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# The United Nations and Terrorism: A long term assessment of changes and continuities

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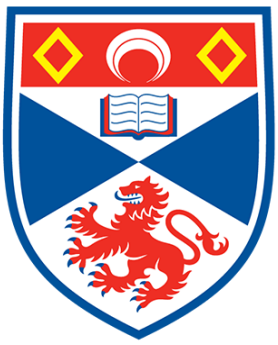

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*Mein Dank gilt vor allem meiner Mutter Claudia und meinen Großeltern, Maria E. Schmitz und Johannes G. Schmitz. Ohne Euch wäre diese Arbeit nicht entstanden.*

# Abstract

Although terrorism continues to retain its localised nature in some respects, the threat has taken on an international character for some time now. Consequently, national efforts to curb terrorism are not sufficient in dealing with the threat, underscoring the importance of multilateral counterterrorism cooperation. The United Nations (UN) is perhaps the most visible and predominant international organisation for security issues and has thus built the prime case study for this research endeavour. The aim of this thesis has been to examine how the UN's response to terrorism has changed since the 1970s. In doing so, the project has provided an empirical overview of 50 years of UN counterterrorism efforts and has analysed the empirical data to identify patterns, continuities, and disruptions in the UN's response. The findings suggest that the United Nations has seen both change and continuity in its efforts to quell terrorist violence and it has been demonstrated that, while multilateral counterterrorism cooperation is possible at the UN, it is cumbersome and progress is best done away from the political limelight. The obstacles that have prevented swift action when the UN General Assembly first took up the issue in 1972 have remained remarkably consistent and are unlikely to be solved quickly. The step-by-step criminalisation of certain offences through treaty-making has however allowed the Assembly to make some progress. Following the Cold War, the Security Council has — although not spared from definitional short-comings — responded to terrorism in a more assertive (e.g. sanctions) and at times forceful manner. Finally, it has been highlighted that the politised nature of terrorism can greatly limit counterterrorism responses. Therefore, it has been suggested that future academic inquiry must explore the extent to which less politised organisations, those that are technical and regional in nature, might be better suited to address terrorism within their framework.

# Acknowledgments

While it is commonly presumed that academic research is a solitary and independent endeavour, a research project of this nature is only made possible with the help of a number of people. Thanks to the support of my supervisors, family and friends, I did not once feel like I was facing this task alone. I would thus like to express my sincere appreciation and gratitude to all those who have accompanied me along the way. First and foremost, I would like to thank Dr Blumenau for his patience and above all, for his enduring belief in my potential and his generosity with his time. I also owe Dr McConaghy a great debt of gratitude for his positive reassurance throughout the whole thesis-writing process and for his celebratory words of encouragement with each milestone.

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Finally, while this thesis has been a collective effort in many ways, any mistakes or errors are purely of my own doing.

# List of Abbreviations

| | |
|---|---|
| AL | Arab League |
| ANC | African National Congress |
| ASEAN | Association of Southeast Asian Nations |
| AU | African Union |
| CT | Counterterrorism |
| CTC | Counter-Terrorism Committee |
| CTED | Counter-Terrorism Committee Executive Directorate |
| EIJ | Egyptian Islamic Jihad |
| EU | The European Union |
| FLN | Algerian Liberation Front |
| FTFs | Foreign Terrorist Fighters |
| G7 | Group of 7 |
| ICAO | International Civil Aviation Organisation |
| IDF | Israeli Defence Force |
| IOs | International Organisations |
| IRA | Irish Republican Army |
| ISIL | Islamic State of Iraq and the Levant |
| LoN | League of Nations |
| NAM | Non-Aligned Movement |
| NATO | North Atlantic Treaty Organisation |
| OPCW | Organisation for the Prohibition of Chemical Weapons |
| OPEC | Organisation of Petroleum Exporting Countries |
| PFLP | Popular Front for the Liberation of Palestine |
| PLO | Palestine Liberation Organisation (PLO) |
| RAF | Red Army Fraction |
| SC | Security Council |
| UNC | Charter of the United Nations |
| UNESCO | United Nations Educational, Scientific and Cultural Org. |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |

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# CHAPTER ONE – INTRODUCTION

After almost twenty years since the attacks on the World Trade Centre and the Pentagon, terrorism remains a significant threat to the international community and its citizens. The events of September 11th, 2001 set off a new era in counterterrorism (CT) (Hoffman: 2002); governments and commercial enterprises alike considerably increased counterterrorism-expenditures, and through international and regional forums countries entertained verbal and political – and at times even legal – counterterrorism commitments at the highest diplomatic level. If any doubt remained as to the danger posed by both international and domestic terrorism after 9/11, such doubts surely subsided in light of the attacks in Madrid and London in 2004 and 2005, respectively. The occurrences in Paris in 2015 and Brussels in the early months of 2016 attest to the persistent yet changing nature of the global threat posed by terrorism, partially due to the lone wolf nature of the attacks. Recent terrorist incidents across the globe have exposed the enduring vulnerability of all countries to terrorist attacks and they have reaffirmed the notion that interstate cooperation is indispensable.

Evolving over time, terrorism has taken on many forms and shapes, from anarchist terrorism in the 1880s to non-state terrorism (e.g. Red Army Fraction) and state terrorism[1] (e.g. in Nazi Germany and the Soviet Union) as well as the state-sponsored terrorism of the 1940s and 1980s. Terrorism has also been used as a tactic by decolonisation and self-determination movements and continues to be drawn on by the decentralised and network-like movements of present-day terrorist groups, namely al-Qaeda and the Islamic State of Iraq and the Levant (ISIL). While this list is neither exhaustive nor suggestive of a chronological or linear development of the phenomenon, it is meant to serve as evidence to help refute any claims in favour of the novelty of terrorism, and to demonstrate the changing nature of both the perpetrators and the victims of terrorism. In spite of periods with relatively little terrorist activity, terrorism has remained a reoccurring theme throughout history, one that has made it onto the agenda of the United Nations and other international organisations in the 1970s and has remained there since.

Some of the earliest terrorists were the Zealots-Sicarri and the Assassins, dating back to the time of the Roman Empire. Born out of a desire for true religious independence and mounting discontent regarding the Roman occupation, the Sicarris used terrorism as a systematic weapon of disruption. Attacking its victims in broad daylight and preferably in crowded areas in Jerusalem, the group used *Sica's* (short knifes) to murder Romans and those whom they perceived to be Roman collaborators. While their struggle did not bear much fruit – on the contrary, leading to the destruction of

[1] While state terrorism and state-sponsored terrorism continues to be a real threat, this thesis will exclude it from further analysis. It is important to however acknowledge, that such terrorism, whether direct or indirect, has the most victims and should garner attention in future research. Brief examples include, the Libyan government involvement in the Lockerbie Airplane bombing in 1988, the Serbian governments support for the Black Hand that significantly contributed to the outbreak of the First World War and Iraq's support for the Palestinian resistance group Abu Nidal. Other examples include the US support for the Contras in Nicaragua in the 1980s and the Iraqi support of terrorist groups leading up to and during the Iran-Iraq war.

the Second Jewish Temple by the Romans under Titus' leadership in 70 CE – the group is often recognised as the first terrorist organisation one thousand years on (Chalian & Blin: 2007, 55-58).[2] As an offshoot of the Ismailis, the Assassins are another prime example of early terrorism. Based in Persia, and later expanding into Syria, the Assassins targeted prefects and local governors, and assassinated prominent crusaders, like King Conrad of Montferrat. Hassan Sibai, the first leader of the organisation, understood that given the rather limited size of his organisation, an open-field, war-like battle would do little in helping the group achieve its objectives. Rather, he recognised that the group could only be successful if it engaged in a drawn-out and enduring campaign of terror (Laqueur: 2012, 8).

From the anarchist movements of the late 1880s[3] to the violent resistance movements that arose out of the struggles of the First and Second World War, terrorism has indeed been a faithful companion of mankind.[4] The end of the First World War saw the rise of right-wing and fascist organisations like the Croatian Ustacha, the German Freikorps and the Romanian Iron Guard – groups whose appeal lasted well into the 1930s. As decolonisation gathered traction after the Second World War, terrorism became a useful weapon for a number of groups seeking independence. While the French faced an uphill battle against the *Front de Libération Nationale* (FLN) in Algeria from 1954 to 1960, the British were (re)confronted with the Irgun Jewish Resistance Movement in Mandate Palestine. From Algeria to Kenya, (colonial) governments across the globe were challenged by the growing number of calls for independence, many of which drew on terrorism as one weapon in their struggle. The post-war period also saw the rise of the Mau Mau in Kenya in 1952 and the Basque Euskadi Ta Askatasuna (ETA) in Spain seven years later, where the former fostered anti-colonial ambitions and the latter separatist objectives.

Since 1968, the world has witnessed the rise of violent Palestinian self-determination movements and left-wing terrorism across Europe; it has experienced Shiite Islamism ensuing the Iranian revolution of 1979; and it has felt the ruthless resolve of *Jihadists*[5] in Afghanistan throughout the Soviet-Afghan war. The period from 1980 up until the end of the 20th century bore witness to the campaigns of the Shi'a Hezbollah, the brutal terrorist campaigns in Chechnya and Kashmir, and the First World Trade Centre bombings in 1993. Other parts of Europe have witnessed the re-emergence of neo-Nazi groups, including *inter alia* the Danish Green Jacket movement of the 1980s and the more recent German National Socialist Underground (NSU) organisation that emerged in the early years of the 2000s (Law: 2005).

[2] For further reading on the Sicarris and other earlier forms of terrorism see Laquer's "A History of Terrorism."
[3] The 1890s were marked by the rise of Armenian and Macedonian terrorism. While seeking independence, Armenian nationalists directed their violence against the Turkish government. Their struggle continued well into the 1970s, with the assassination of the Turkish Ambassadors to Vienna and Paris in 1975 as prime examples. The Macedonian International Macedonian Revolutionary Organisation (IMRO) is a further example in point. See "A History of Terrorism" by Laqueur.
[4] The French Revolution (1789-1799) witnessed the rise of what can be coined as state-terrorism. However, this thesis has chosen to focus on non-state actors and will therefore omit state-terrorism from this study.
[5] A term used to describe a militant Islamist.

The end of the 20th century was likewise no stranger to political violence; al-Qaeda bombed the diplomatic missions of the United States in both Kenya and Tanzania in 1998, and over a year later the group attempted to sink the US Navy Vessel *USS Cole* while it was refuelling in Yemen. The events in 2001, the re-emergence of ISIL in Iraq and Syria in 2013, and recent events in Europe remain sobering reminders of the eternal and devastating imprint of terrorism, as well as its transboundary nature.

The aims and origins of certain terrorist groups echo localised grievances. There is, however, little disagreement over the internationalised nature of contemporary and past terrorist movements (Schweitzer & Ferber: 2005, Hoffman: 2006, Bapat: 2007, Jensen: 2013 and Brown: 2017). While globalisation has shrunk the prominence of national borders, helped bridge cultural differences, revolutionised both travel and global communication, and facilitated the accumulation of unprecedented economic wealth, terrorists have equally taken advantage of emerging opportunities. They have re-calibrated their organisational structure, amended their aims, and attuned their message so as to reflect the transnational and interlocked nature of today's globalised order. More importantly, terrorists have weaponised the vehicles of globalisation, in particular making use of TV broadcasting and the opportunities presented by the internet. It nevertheless remains important to acknowledge that the internationalisation of terrorism is not a phenomenon limited to the current epoch.

The Popular Front for the Liberation of Palestine (PFLP), an umbrella organisation of the Palestine Liberation Organisation (PLO), remains one of the most practical examples in demonstrating the internationalised nature of terrorism in the late '60s and early '70s. The El Al aircraft hijacking of flight 426 in 1968 and the Olympic Munich massacre in 1972 are two cases in point. Flight 426 was en route from London Heathrow Airport to Lod Airport in Israel via Rome, when members of the PFLP took control of the aircraft and forced the plane to divert to Algiers. The hostages were released five weeks later in exchange for Arab prisoners. What is interesting about this case is not the fact that the plane was hijacked on its way from Europe to Israel, although this does reaffirm the international dimension of terrorism at the time. Rather, the point of interest is the global media echo that followed. As one spectator observed, the event "…aroused the consciousness of the world and awakened the media and world opinion much more - and more effectively - than 20 years of pleading at the United Nations" (Quoted in Hoffmann: 2006, 64). The Munich Olympic massacre in 1972 was likewise able to capture the world's attention in an unprecedented manner. The Olympics in Munich presented West Germany with an opportunity to "reflect the new age in their [West German] rehabilitated land that had made a commitment to the ideal of peace and brotherhood among nations" (Melcer: 2018, 1). In the early hours of September 5th, 1972, members of a Palestinian terrorist organisation known as the Black September evaded security and stormed the Olympic village to take nine Israeli athletes hostage and immediately kill two. During a disastrous rescue operation, all nine athletes perished and the three surviving terrorists were taken into custody. In spite of world-wide condemnation of the attack, the terrorists were able to propel their grievances onto the international stage, most tellingly conveyed by Yasser Arafat being invited to speak at the United Nations

eighteen months later (Hofmann: 1974, 1). The Palestinian conflict is deeply rooted in nationalist sentiment and its struggle against the state of Israel; however, since the 1970s Palestinian terrorism truly entered the international arena.

Hatched from the global student protests at the end of the 1960s, the West German Red Army Fraction (RAF) founded by Andreas Baader and Ulrike Meinhof, amongst others, posed a considerable challenge for the West German government, while other countries certainly faced their own struggles with revolutionary terrorism. In spite of the RAF's West German origins, the group turned to movements of the PLO for both training and funding. As early as 1969, the PLO welcomed West German members of the group to their training camps in Jordan, and in the years that followed, RAF members are said to have been involved, for example, in the hijacking of the Air France Flight to Entebbe in Uganda.[6] Certainly, the 1970s will be remembered as "the decade of the terrorists" (Jensen: 1980, 1) and it ought also to be remembered as the start of a new era of truly international terrorist activity. In this respect, Jensen rightly observed that "[t]he ten years [1970-1980] brought us the Lod Airport massacre, the murder of Olympic athletes at Munich, the takeover of the OPEC headquarters in Vienna, the daring rescues of hostages in Entebbe and Mogadishu…and, almost at the end of the decade, the frustrating and continuing crisis that began with the seizure of our embassy in Tehran" (Jensen: 1980, 1).

Despite the continued threat posed by non-state terrorist actors, the 1980s and '90s were also shaped by state-sponsored terrorism, examples of which include Libya's involvement in the West Berlin Discotheque bombing of 1986 and the Pan Am Flight 103 bombing over Lockerbie Scotland in 1988 (BBC: 2018). A further example includes Sudan's overt support for terrorism up until the expulsion of Bin Laden in 1996 (Bhattacharji: 2008). Organisations such as Hamas, al-Qaeda, and the Egyptian Islamic Jihad (EIJ) had found a home in Sudan after the end of the Afghan-Soviet war in 1989, leading to the imposition of UN Security Council (UNSC) sanctions against the country in 1996.

ISIL and al-Qaeda and its affiliates have also internationalised; technological advances and the understanding that radicalisation is no longer limited to the confines of remote caves in Afghanistan or the closed quarters of radical *madrassas*[7] has changed the international character of contemporary terrorist movements. With the franchise-like nature of al-Qaeda, for example, the organisation was able to promote a "global ideology that linked local causes together via an image of world politics that presented Muslims worldwide as victims of Western oppression. These components enabled them to function and replicate on a global scale" (Brown: 2017, 153). Despite being predominantly entrenched in Afghanistan (up until the US-led invasion in 2001), al-Qaeda has evolved into an international movement that remains global in action, thought, and impact. The al-Qaeda attacks, from the US embassy bombings in Kenya and Tanzania in 1998 to September 11$^{th}$, echoed far and initiated lengthy military

[6] See Blumenau's "The United Nations and Terrorism: Germany, Multilateralism, and Antiterrorism efforts in the 1970s" for further reading on the hijackings and their consequences.
[7] A name at times given to Islamic religious schools.

counter-operations across the globe. At the same time, ISIL has taken the fight to Europe. The ISIL-inspired and executed attacks in Paris in 2015, the Nice truck bombing in 2016, and the Berlin Christmas market attack in the same year, serve as sad examples for the transnational targeting practises of the group.[8]

More recently, the global community has become faced with a rapidly and constantly changing threat. It is becoming increasingly difficult to track self-radicalised individuals and to curtail their activities. This challenge is further compounded by the growing number of foreign terrorist fighters (FTFs) returning home from conflicts in Syria and Iraq with military training and ideological indoctrination. Indeed, the organisational structure of terrorism has changed – taking on an unprecedented network-like form – and so too have the weapons used by terrorists. The London Bridge attacks in 2017 have demonstrated that a single knife has the potential of inflicting bodily harm and can terrorise an entire community. Today, terrorism remains unpredictable, individualised, and international. And as terrorism remains a global and interconnected phenomenon, responses to it cannot successfully be designed on the national level either. As terrorism became more international in the early 1970s, the response to it had to be international, too.

[8] Although ISIL has claimed responsibility for most attacks in Europe in recent years, it is well-advised to acknowledge the differences between those acts committed in the name of the group, and to which the group served as an inspiration; and those acts that were directly sanctioned by the group, and that were executed by a formal member of the organisation. The line between these two differences may be ambiguous, and the outcome of the attacks render derivation moot, however, I wish to draw a distinction to demonstrate the non-hierarchical and network-like structure of terrorism today.

# CHAPTER TWO - PRELIMINARIES

## Research purpose and question

The aim of this thesis is to examine how the United Nations counterterrorism response has evolved from the 1970s until 2019 and to thus provide an empirical overview of 50 years of UN counterterrorism efforts. This project will also analyse the empirical data to identify patterns, continuities, and disruptions in how the United Nations has dealt with terrorism. To put it as a question: *How has the United Nations' response to terrorism changed since the 1970s?* An implicit aim of this research endeavour is to furthermore explore, to the extent the subject allows, what factors have influenced the organisation's response to terrorism. Over the past 50 years, the UN has evolved into one of the most visible counterterrorism actors, with its activities taking an exponential hike after 9/11. The crux of the matter, however, remains that a full assessment of the organisation's efforts in this issue area are better understood with a historical context in mind. A historical approach can provide the necessary depth in identifying long-term patterns and trends and can place specific developments in their appropriate contexts, thereby isolating lessons for the present and the future. Additionally, the focused natured of this research project intends to produce rich empirical data for comparison, as well as provide a basis for future research. This project is moreover an attempt to provide a succinct synopsis on the literature on the topic. The literature on the matter is fragmented and in many instances limited to certain time periods as well as disciplinary fields (e.g. law). Following the attacks on 9/11, the interest of academics in UN-counterterrorism accelerated, yet many works neglect to consider pre-9/11 initiatives in detail. Doing so fails to provide a complete picture – a gap this thesis intends to bridge. It is also briefly worth noting that, while individual countries certainly influence policies within the United Nations, this is not a country-specific study. It is the UN as a whole that remains the main focus.

## Case selection

The decision to put the focus on the United Nations was driven by a number of factors. Given the pertinence of the comparison element of this thesis, the author only considered cases that had a long enough history to provide sufficient material for analysis. And thus, the United Nations is a worthy case study. Indeed, it is the only truly global organisation, both in terms of scope and reach, and its impact reaches from Albania to Zimbabwe. With the growing proliferation of international terrorism, global, regional, and sectoral organisations have all been compelled to take action against terrorism but the United Nations has remained the predominant international organisation for security issues. For instance, the Organisation for the Prevention of Chemical Weapons (OPCW) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) have both taken up counterterrorism-related work. Whereas the former addressed the threat posed by the proliferation of chemical weapons and terrorism, the latter speaks to the role of culture in preventing

radicalisation. Yet, their counterterrorism mandate remains rather peripheral and would not have provided the amount of historical (lasting mandate) and output data required for in-depth case study scrutiny.

The case study selection process does, however, have a number of shortcomings. Amongst others, the process has neglected to consider non-western organisations like the African Union (AU), the Arab League (AL), or the Association of Southeast Asian Nations (ASEAN), a decision that was not taken lightly. However, the researcher's prior knowledge and understanding of the United Nations contributes to the robustness and depth of the study. Additionally, the potential language barriers associated with researching such organisations, both in terms of conducting interviews and document analysis, would have proven difficult and could have jeopardised the integrity of this study. More so, case study nomination was also dictated by the availability of sufficient material for examination. For example, the ASEAN Convention on Counter-Terrorism only entered into force in 2011 and therefore the lack of historical material to explore would have made a long-term analysis difficult. These organisations, as well as regional and sectoral counterparts, play a growing role in counterterrorism and future research ought to endeavour to understand their responses in more detail.

It is also worth mentioning that this research project has intentionally neglected to consider not only the European Union (EU) but also less permanent and ad hoc entities, like the Group of 8 (currently G7). The EU is a special case as one of its bodies, the European Commission, has unparalleled exclusive rights to initiate legislation and has far-reaching implementation powers (e.g. infringement proceedings). The EU's counterterrorism efforts can be the subject of its own PhD project and would thus also reach beyond the scope of this thesis.[9] The G7 has been excluded as it does not have a proper bureaucratic structure and deals with issues on a more ad hoc basis. Therefore, the United Nations is an ideal case study as it is arguably the most important organisation the world over and has dedicated much of its time to security issues. The UN is also a symbol of the international community and has dealt with terrorism long enough to allow the identification of long-term trends.

## Methodological approach and data collection

The thesis combines exploratory, descriptive, historical, analytical, and comparative elements under a qualitative research agenda. A qualitative research process provides the most promising answers to the research question, namely, *how has the United Nations' response to terrorism changed since the 1970s?* A further aim of this research project is to stimulate further discussion on multilateral organisations and counterterrorism, an objective that requires thick and in-depth detail that can only be

[9] See Hlavac's "Less than a State, More than an International Organisation: The Sui Generis Nature of the European Union" and Phelan's essay "What is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained
Regime" for further discussion on the matter.

generated by a qualitative approach. A quantitative approach would not produce the rich and thick detail and context necessary for a comprehensive assessment.[10]

This research is exploratory as the response taken by the United Nations' in more recent years is still underexplored. The research is also descriptive as the thesis intends to portray and illustrate the response taken by the organisation, a task that requires in-depth narrating and recounting of major initiatives within the respective periods. This is necessary because other attempts at delivering an analysis on international organisations and counterterrorism have been legal and practitioner-oriented, with only a few exceptions considering a historical dimension (e.g. Luck: 2006a and Blumenau: 2014b). Consequently, a complete, long-term empirical study of the UN's counterterrorism efforts since the 1970s does not yet exist and this PhD intends to contribute to this task. The empirical basis provided in this study is also essential to accomplish the second goal of this thesis: To provide a comparative and analytical exploration of patterns, continuities, and disruptions in the organisation's attempts to tackle terrorism.

Building on the above, the research will make use of content analysis, whereby documents are analysed in a replicable and structured manner. This analysis is based on a detailed study of primary documents produced by the UN over the past 50 years, such as resolutions, press releases, meeting records, and multilateral treaties. Academic scholarship will also contribute to the basis upon which this project is built. Over the course of the research process, the author has undertaken numerous visits to the United Nations Headquarters in New York and has had the opportunity to discuss the research matter with individuals engaged in counterterrorism work. These background discussions have further directed this research endeavour.

This thesis will focus on the time between the early 1970s until 2019. This time period was chosen as the United Nations formally placed terrorism on the agenda of the organisation in 1972, making the early 1970s a rational starting point. The end date of 2019 was chosen as it was important to not only consider the immediate response of the organisation to ISIL in 2015 but to moreover track the response over a number of years. Also, the timeframe available for this project does not extend beyond 2019, and therefore the end date could not exceed beyond 2019.

## Limitations

Despite having made every effort to design and execute a research project as rigorous as possible, certain limitations persist. At the heart of the limitations lies the problem of generalisation. Although the findings of the study generate fruitful thoughts for multilateral counterterrorism efforts by international organisations, the conclusions drawn are essentially limited to the United Nations and cannot be extrapolated to the work of other organisations. This thesis is also limited by a word count. Consequently,

[10] See for example Tallberg & Sommerer et al.'s "The performance of international organisations: a policy output approach" for a quantitative approach.

this project will not account for every measure taken by the United Nations but will rather focus on the major efforts as identified in the literature, by the author, and discussions with individuals familiar with the subject. This nevertheless remains a severely subjective endeavour. A further limitation of this thesis relates to the allocated timeframe. The research for this project was conducted from January 2017 to November 2019, and could not take into account new developments and scholarship after this date. Finally, the researcher has not undertaken research in national archives or UN archives. Exploring the internal workings of national delegations to the United Nations and how country positions have taken shape, or the position taken by UN-diplomats, would yield great insights, however many archives have an embargo that would limit the research timeframe to the 1970s. More so, archival research is country-specific and conducting such time-consuming research would only marginally help in answering the research question at hand, that is, the general process and outcomes of UN counterterrorism efforts. Notwithstanding the limitations, the historical and comparative approach taken here will nevertheless fill a research void.

## Definitions and conceptualisations

What is terrorism? Academics, practitioners, and policy-makers have yet to reach a consensus on what terrorism is and its intended scope. Disagreements arise over the aim and purpose of terrorism, as well as the culprits and victims. As Brown observes, the label given to terrorism and those branded as terrorists "…gives states considerable power to act and use violence against a group and it significantly guides how a state should act" (Brown: 2017, 152). For any academic inquiry, a clear definition is hence essential. In the context of terrorist violence, there also remains a lack of consensus over the suitability of equating the violence perpetrated by the state with that of non-state actors. In other words, many scholars disagree with the notion of including state terrorism within the general study of terrorism. Walter Laqueur, for instance, holds that the "…motives, functions and effect between oppression by the states and political terrorism" are fundamentally different, and considering these as a single phenomenon would cause considerable irritation amongst scholars (Blakeley: 2012, 2). It may also be argued that differentiating between state and non-state terrorism may legitimise the use of violence that is in itself illegitimate. Jörg Föh puts forward an interesting differentiation when he argues in favour of distinguishing between terrorist acts that are perpetrated by the state and those committed by non-state actors, but he does so by using distinct terminology; 'terror' versus 'terrorism'. Inspired by the French Revolution beginning in 1789, Föh maintains that the term 'terror' should be associated with political violence committed by the state (from above), whereas the term 'terrorism' should be used to describe violence perpetrated by non-state entities (from below) (Föh: 2010, 43). Considering the different dynamics involved in state terrorism (e.g. state apparatus behind the violence) this thesis will argue that a differentiation is in order. Violence committed by the state – that which is not endorsed by the legitimate monopoly of power doctrine – deserves to be considered as a separate phenomenon not only due to the high number of victims that result but also the problems it creates at the United Nations.

While acknowledging the complexities of defining terrorism and to provide conceptual clarity, this dissertation will use the definition put forward by Richard English.[11] For English, terrorism

> " ...involves heterogeneous violence used or threatened with a political aim; it can involve a variety of acts, targets, and actors; it possesses an important psychological dimension, producing terror or fear among a directly threatened group and also a wider implied audience in the hope of maximizing political communication and achievement; it embodies the exerting and implementing of power, and the attempted redressing of power relations; it represents a subspecies of warfare, and as such it can form part of a wider campaign of violent and non-violent attempts at political leverage" (English: 2009, 24).

English's definition, while surely not flawless, is a good starting point. His explicit emphasis on the political nature of terrorism and the element of instilling fear in an audience beyond that of the immediate victims, as well as the inclusion of a psychological dimension, aids in distinguishing the phenomenon from other forms of violence, such as violence committed by organised crime syndicates. His definition moreover covers common elements that are mirrored in other definitions put forward by a wide variety of scholars (e.g. Schmid: 2004 and Hoffman: 2006).

A student of Terrorism Studies can also not help but notice the ambiguous relationship that both governments and individuals have adopted with the issue of terrorism. As the ensuing chapters will highlight in more detail, the use of political violence is not always considered a threat in all and any circumstances. On the contrary, many former anti-colonial movements that have made use of violence as part of their liberation process – acts that could certainly be classified as terrorism – enjoyed wide support. For instance, while one can surely muster support for Nelson Mandela's struggle in freeing South Africa from the horrors of an apartheid regime, the African National Congress' use of violence could in certain cases also be characterised as terrorism (Little: 2018). A further dilemma as relates to the issue of definition is that the terms 'international terrorism', 'terrorism' and 'political violence/crime' are at times used synonymously. In the case of the United Nations, for example, the General Assembly has refered to 'terrorism' and 'international terrorism' in what seems to be an interchangeable manner. For example, General Assembly resolution 62/71 under agenda item 'measures to eliminate international terrorism' condemns "the heinous acts of terrorism" and soon after reiterates the importance of international cooperation in "effectively [suppressing] international terrorism" (UNGA Res. 62/71: 2008, para. 10 & 15). In contrast, the Security Council has been more consistent in only using the term 'terrorism', especially after 9/11, yet it is not clear where the Council draws the distinction between terrorism and international terrorism.[12] What is more, while

[11] See Hoffman's "Inside Terrorism," English's "How to Respond," Schmid and Jongman's "Political Terrorism" and Bjorgo's "Root Causes of Terrorism" for further reading on the definition of terrorism, its complexities as well as its changing nature.
[12] See for example UNSC resolutions 1624, 2396 and 2462.

terrorism is a type of political crime not all political crimes can be identified as terrorism. In this respect, Helfgott differentiates between two types of political crimes: oppositional crime and state crime. While the former focuses on violent offenses such as terrorism, the latter is focused on state crimes (e.g. human rights violations by governments) (Helfgott: 2008, 331).

The debate is endless and would reach far beyond the allocated scope of this thesis; however, suffice it to say that as long as governments and individuals continue to perceive politically motivated violence as a necessary evil to reach their objectives, a definition of terrorism and auxiliary terms will be difficult to reach. In addition, while there are merits in differentiating between 'terrorism', 'international terrorism' and 'political crimes' this thesis will use these terms interchangeably so as draw on the terminology used by UN member states and to avoid repetition. This is however only for the purpose of this thesis and in no way should indicate that these terms are completely identical.

Counterterrorism is another complex term to define and there is yet to be a consensus on what it encompasses. Counterterrorism, for the purpose of this thesis, will thus be defined as "…devising methods and policies to cause nonstate groups that employ this [terrorism] technique to stop using violence to achieve their political objectives" (Art & Richardson: 2007, 1). Although this definition is neglectful of state actors as terrorist entities and does not sufficiently consider the misuse of the counterterrorism label, it provides sufficient parameters to proceed for the purpose of this study.

## The Lie of the Land- the literature

Over the past decades, international organisations have been the subject of extensive scholarly debate. Academics have approached the question of why and under what circumstances IOs are formed (Abbott & Snidal: 2005 and Anand: 2010); in what circumstances states are likely to draw on tools of multilateral cooperation (Mitchell: 2006 and Cai: 2011); how organisations have evolved in the 19$^{th}$, 20$^{th}$, and 21$^{st}$ centuries (Mazower: 2012); and, the reasons behind the respective changes (Reinalda: 2009, Gest & Armstrong et al.: 2013 and Klabbers: 2015). Much of the literature has attempted to address the role and function of international organisations in the international system (Heinescz et al.: 2005, Archer: 2011, Oestereich et al.: 2012, Martin & Simmons: 2013 and Abbott et al.: 2015). Using both theoretical and empirical insights, researchers have pondered over the significance of international organisations in world politics, and depending on their theoretical preferences, have come to rather different conclusions. A more recent strand of the literature (Bianchi: 2007, Lawrence: 2007, Gabriele: 2013) has also embarked on the difficult task of quantifying IO contributions by using categories such as efficiency, effectiveness, and performance (Helm & Sprinz: 2000, Young: 2011, Ohanyan (2015), Talberg et al: 2016 and Lall: 2017). Despite the valuable insights created, there remains a need to better understand – empirically – how the responses of organisations, like the United Nations, have changed over time. This is important as a historical analysis allows one to better understand what the

main points of contention have been and what responses have received most support over time. In essence: What has worked and what has not? This project contributes to a number of different research areas. In particular, it touches upon the discussion on the role and function of the United Nations, and international organisations more generally, as well as the general literature on terrorism and the United Nations.

Numerous works (Angell: 1965, Feld: 1972, Sheets & Maarer: 2000, Archer: 2001, Joachim et al.: 2008, Martin & Simmons: 2012, Oesterich: 2012, Helm & Sprinz: 2000, Cooper: 2002, Lawrence: 2007, Gabriela: 2013 and Lall: 2017) have established that international organisations have a role and consequently a function to play in the international system. Yet, in spite of such studies, a number of mainstream approaches to international relations theory dismiss IOs as actors in their own right, continuing to assume that states use IOs as a means to pursue foreign policy instruments.[13] As Barkin observes, "[h]aving no ability to tax, they [international organisations] depend on states to fund them. Having no territory, they [international organisations] depend on states to host them … As such, it makes more sense to understand IOs as tools in the power struggles of states, than as independent actors or independent effects" (Barkin: 2006, 8). In the wider literature on the role of international organisations one can indeed find a number of impressive works. Archer's "International Organisations", Abbott's "International Organisations and Orchestrators", Martin and Simmons' chapter on international organisation and institutions, as well as Oestereich et al.'s "International Organisations as Self-Directed Actors" are only a few of many studies that provide compelling scholarship on the role of international organisations in a wide variety of policy fields. That being acknowledged, there is a scarcity of comparative research and, equally important, there is also a noticeable dearth of studies which address counterterrorism in particular.

More important to the purpose of this thesis is the scholarship on the United Nations and counterterrorism. Indeed, there has been a remarkable amount of literature on the UN and terrorism, especially in the post-9/11 era (Romaniuk: 2010, 2). That being said, there are however a number of gaps that make a research project of this nature necessary. The United Nations is the most well-known and certainly one of the most influential organisations on the world stage. It is hence evident that the UN has been the subject of important analysis in most academic fields, ranging from law to social sciences. While there has been a wealth of literature addressing, for example, the legal issues surrounding the UN and terrorism (Scharf: 2016, Terry: 2016 and Elgebeily: 2016), there have only been a few studies that have drawn on other disciplines. This is important as many concepts, such as the use of force in response to terrorism in the context of the UN, have primarily been examined from a legal perspective (Byers: 2002

[13] Theories of International Relations have different stipulations about the role that IOs have in international relations and their actorness (or agency). See for example Simmons & Martin's chapter "International Organisations and Institutions" in the "Handbook of International Relations" or Bayeh's "Theories on the role of international organisations in maintaining peace and security" for a more detailed treatment of this discussion

or Cirkovic: 2017), although they have implications for the broader field of political science and international relations.

Over the past decades, academics have turned to examining the counterterrorism contributions of specialized agencies (Mackenzie: 2010), the early efforts in the General Assembly to curtail terrorist activities (Hoveyda: 1977, McWhinney: 1984, Halberstam: 2003, Peterson: 2004, Boulden: 2014 and Blumenau: 2014a, 2014b) and such efforts have also included inquiries into the work of the Security Council in responding to terrorism from the 1980s onwards. While these publications have certainly contributed to a better understanding of what the UN has done in response to terrorism, these works have in many instances remained time-specific (Blumenau: 2014a), general in nature (Boulden & Weiss: 2004), and only a few of the long-term and more general ones have taken a historical approach (Peterson: 2004 Luck: 2006a, 2006b and Kramer & Yetic: 2007). While there was a spike in academic interest and systematic scrutiny in the post-9/11 era (Rosand: 2003, Luck: 2006a, Nesi: 2006, Stiles: 2006, Boulden: 2008, Rosenow: 2011), this interest seems to have stagnated as early as 2010, with a few exceptions (e.g. Romaniuk: 2016). This is indeed a considerable shortcoming considering that the emergence of ISIL compelled the international community to take action in 2015. In essence, it remains to be determined if the findings of previous studies remain accurate given the amount of time passed and to explore the extent to which the organisation has adapted its response vis-à-vis previous years. It is also worth noting that given the legally-binding and assertive character of the Security Council's response to terrorism post-9/11, academics have neglected to place appropriate focus on the General Assembly (with a few exceptions: Boulden: 2014). Although there is a general understanding that the output (besides treaties) produced by the UNGA are recommendations only, this is a significant gap. As it gathers almost all states on this planet, the General Assembly carries high moral weight that makes its resolutions an important contribution to international efforts to quell terrorist violence and an indicator of global opinion and directions. Also, while the discussions in the Sixth Committee of the General Assembly are a valuable indication of the progress made on advancing a coherent approach to terrorism, it is a forum that has only received marginal attention by academia (with few exceptions: e.g. Hafner: 2003).

In examining the development of the UN's response to terrorism from 1972 (and earlier) onwards, this thesis attempts to fill some of the research gaps briefly alluded to above. First, the findings of this thesis will inform the debate on the place of international organisations in international affairs and the broader roles and functions of IOs. Second, this research project will draw on works from a wide-array of academic fields (e.g. law and political science), and will thirdly refocus attention on the General Assembly. Fourth, by exploring the historical dimension of the United Nations' response to terrorism as early as the late 1960s, leaning on primary sources from the Sixth Committee of the General Assembly, this work will take an unprecedented historical and detailed approach to the study of terrorism and the United Nations. It would however be ill-advised to dismiss and disparage the work that has been done thus far on the UN and terrorism. Indeed, academics have gone to great lengths to

provide a valuable basis for the future study of the UN in this issue area. To a large extent, a project of this kind is only possible because others have provided the foundation on which one can build and expand. As has been said elsewhere: We all stand on the shoulders of giants.

## Research structure

Chapter one has placed this thesis into its appropriate context. Doing so, the chapter has emphasised the historical background and international scope of terrorism. Chapter two has discussed the research purpose, methodology, case selection, and this study's limitations. Specifically, the chapter has explained the case selection process, highlighting its limitations, and has further alluded to the explorative, historical, and comparative aspects of this thesis. The chapter has moreover defined some of the key terms and has provided a brief overview of the available literature on the subject, as well as emphasized the gap this project intends to fill. While not going into great detail, this current chapter will close by emphasising that multilateral counterterrorism efforts predate the United Nations, briefly alluding to the Conference of Rome and the early attempts to deal with terrorism within the League of Nations (LoN).

Chapter three will address the initial steps taken by the United Nations to respond to terrorism, from the early 1970s, including the adoption of the organisation's first terrorism-related conventions starting in 1973. The chapter will yield considerable analytical benefits, allowing conclusions to be drawn as to why the UN responded in the manner that it did and how this has changed through the respective time period, closing just before the start of the end of the Cold War. Particular emphasis will be put on the main points of contention between states and why governments had great difficulty in finding common ground.

Chapter four will set out to trace the organisation's response to terrorism from the mid-1980s up until 2001. Particular focus will rest on identifying the most prevalent changes and the driving factors behind the respective changes. Most importantly, the chapter will seek to outline how the end of the Cold War helped materialise counterterrorism cooperation in the Security Council and will highlight how this differed from action taken in the General Assembly. Chapter five is the final substantive portion of this thesis and will examine how the organisation tackled the issue of terrorism following the attacks on September 11$^{th}$. With a sharp rise in counterterrorism initiatives at the United Nations following 2001, this chapter will restrict its focus on major trends, namely the far-reaching and binding obligations placed on member states by the Security Council as well as changes to the use of force against non-state terrorist actors.

Finally, this thesis will conclude by reiterating some of the main conclusions drawn in the respective chapters and will subsequently embark on providing an answer to the research question at hand, that is, *how has the United Nations' response to terrorism changed since the 1970s?* The final portion of this project intends to identify the major changes and when they have occurred and to highlight the relevance of the findings

to broader international efforts to counter terrorism. Concluding remarks will moreover identify further lines of inquiries and the importance of further research into the subject area, including a particular focus on regional and sectoral responses to terrorism and how these might be different.

## Background: Early international counterterrorism

The multilateral counterterrorism efforts that have emerged at the United Nations since the early 1970s – although unprecedented in scope – are not the first of their kind. In fact, international struggles to combat terrorism predate the United Nations; countries had struggled to curtail terrorist activity in the 19th century, and the League of Nations (LoN) undertook early efforts in the 1930s. Throughout the 19th century terrorism perpetrated by anarchists was a great burden to many countries. Indeed, 'propaganda by the deed', as anarchist terror was frequently referred to, was a worldwide threat that was able to spread across the globe, not least due to expanding shipping and communication networks (Shpayer-Makov: 1988, 513). In response to a number of politically sensitive assassinations, like that of Austrian Empress Elisabeth in 1898, the international community convened the first international conference to address the threat posed by anarchists in Rome in the same year. The murder of the empress triggered widespread condemnation, and the fact that the Austrian empress was murdered by an Italian anarchist, who intended to kill a French duke on Swiss soil, provided tangible proof that anarchist terror was far- and wide-reaching and that it had taken on a truly international character. It was within the scope of the Conference of Rome that countries agreed on regular exchanges of information, the application of the 'Belgian [or *attentat]* clause[14] and a common identification method, namely the *portrait parlé* (Criminocorpus: 2014, 1). The assassinations of King Umberto of Italy in 1900 and the American President, McKinley, in 1901 once more demonstrated the continued threat posed by international terrorism. As a result, a select group of countries convened to adopt the St. Petersburg Anti-Anarchist Protocol in 1904, specifying expulsion procedures, establishing anti-anarchist offices in each country, and further regularising police communication and cooperation (Jensen: 2013, 23). The United States did not become party to the protocol, a fact owed to the continued absence of a centralised police (Jensen: 1981, 337) and its reluctance to get involved in what they perceived to be European affairs (Rapoport: 2002, 12). Equally so, Italy refused to sign the protocol amidst concern that the expulsion provisions were in fact disguised extraditions. From an Italian perspective, the return of anarchists to their home country could potentially lead to considerable domestic troubles (Ibid: 2002, 12). With countries disagreeing politically (e.g. conflicts in the Balkans) and ideologically (e.g. German expansionism) cooperation became increasingly suspicious in the lead up to the First World War. However, the attempt to create a formal anti-anarchist alliance not only failed due to the outbreak of the war. Certainly, it was also the

[14] The Belgian *attentat* clause was a common exemption to an obligation of extradition. If a state received an extradition request, it could deny such a request on the grounds that the offence for which the alleged offender is sought is political in character.

absence of some great powers (e.g. America and Italy) in the alliance, which rendered it incomplete and left a tremendous gap. Measures directed against the transboundary threat of international terrorism would remain incomplete as long as countries vital to the process refused to join the efforts, allowing terrorists to find safe havens.

The First World War that raged across Europe until 1918 left the continent in ruins and at the same time marked the end of the international system created by the Congress of Vienna[15] some hundred years earlier. The League of Nations was created in 1920 based on the principle of collective security to re-establish peace and maintain international order. Despite initial attempts to quell anarchist violence, efforts remained ad hoc and the only slowly developing centralised law enforcement system in many countries (e.g. the United States of America) prevented any consequential advances. Even though the First World War left the European continent in ruins, terrorism resurfaced as a threat. It was after all terrorism – the terrorist attack that killed the Austrian heir – which was largely responsible for the outbreak of the war. When Croatian nationalists assassinated King Alexander I of Yugoslavia and French Minister Louis Barthou in Marseille in 1934, the League of Nations was promoted to engage in efforts to address terrorism. The assassination in Marseille demonstrated that terrorism continued to pose a significant threat to international peace and security. Indeed, the proven complicity of either Italy or Hungary, or both, in the terrorist attack could have had the potential to lead to war between Italy, Hungary, and Yugoslavia (Dubin: 1993, 4). There was thus real danger that the assassination could lead to a broader war between nations again and jeopardise peace on the European continent. As a result, members of the League set out to negotiate the 1937 Draft Convention for the Prevention and Punishment of Terrorism. The convention defined terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public" (Draft Terrorist Convention: 1937, Art. 1(2)). To that end, the convention obliged state parties to criminalise specific acts, including, *inter alia*, (1) [a]ny wilful act causing death or grievous bodily harm or loss of liberty to: (a) Heads of States, persons exercising the prerogatives of the head of State, their hereditary or designated successors; (b) [t]he wives or husbands of the above-mentioned persons; (c) [p]ersons charged with public functions or holding public positions when the act is directed against them in their public capacity" (Article 2). To a considerable degree, the 1937 draft convention provided the foundation for later conventions (see chapters four and five). Indeed, the instrument asserted, that the crimes laid out in Article 2 are made extradition crimes, although Article 8 further stipulates that "[t]he obligation to grant extradition under the present article shall be subject to any conditions and limitations recognised by the law or the practise of the country which application is made" (Ibid: 1937, Art. 8(4)). Similar to other conventions discussed in further detail below, the 1937 draft convention however asserted that "[w]hen the principle of the extradition of nationals is not recognised … nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned

[15] The Congress of Vienna system aimed at providing lasting peace in Europe and to establish borders so as to ensure a balance of power and stability.

in Articles 2 or 3 shall be prosecuted and punished in the same manner as if the offence had been committed on that territory" (Ibid: 1937, Art. 9(1)). Article 10 of the Convention moreover stipulates that if an individual has committed a crime in a country party to the treaty, the country in which the offender is found should prosecute and punish the individual as if the crime was committed in its own country. Although the convention-text has a number of loopholes, it was the beginning of efforts to prevent terrorists from escaping punishment. The agreement understood terrorism, although it is political in nature, to be an extraditable offence, yet it did not force extradition and left countries with wide discretion in implementation.

States accepted the seriousness of the dangers posed by international terrorism as early as the 19th century. Multilateral counterterrorism – whether in the context of the Conference of Rome, the St. Petersburg Protocol, or the permanently established League of Nations – was very much subject to geopolitical considerations. More specifically, the assassinations of 1934 were not merely a matter of bringing to justice the perpetrators, but given the alleged and perceived involvement of states, the events had far-reaching ramifications for the maintenance of international peace and for the relations between states. By the time the Terrorism Convention was open for signature in 1937, the LoN was in disarray. Spain was engaged in civil war, Japanese aggression against China increased, and Europe was challenged by German revanchism and the rise of Adolf Hitler. Amidst such developments, the urgency attached to multilateral counterterrorism subsided and would not reappear as a serious multilateral agenda item at the UN until the Secretary-General placed it onto the agenda of the United Nations in 1972. The forthcoming chapters will explore how the international community has responded to terrorism after WWII. In tracing this trajectory, it will become possible to determine if countries were able to overcome the obstacles that have prevented meaningful progress in the 19th and 20th centuries.

## The United Nations: The General Assembly and the Security Council

The main organs of the United Nations include the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. The two bodies that will be the focus of this study, however, are the General Assembly and the Security Council and therefore, before proceeding, it is important to have a better understanding of the bodies' institutional capacities and how they work, or at least to the extent the word count allows.

### *The General Assembly*

The General Assembly is the most inclusive body of the United Nations considering that all of the 193 member states are represented. Over the past decades the General Assembly has come to fulfil the function of organising what has been termed "collective legitimisation or collective delegitimisation" (Claude in Voeten: 1995, 527). Despite the General Assembly's rather restricted institutional authority to command

member states to take or abstain from particular actions, the workings of the UN body have certainly influenced how member states perceive a particular set of issues and carry political weight. While the body does not have the ability to sanction – beyond political condemnation and "naming and shaming" – the Assembly has come to "guide the activity of governments in some general-issue areas, and it influences the statements, policies, or behaviour of individual governments and other actors in particular situations" (Peterson: 2004, 173). The power of the General Assembly also derives itself from the very public stage that it provides and its ability to attract global spotlight (e.g. see annual GA session and media coverage). It is perhaps also fair to conclude that General Assembly resolutions remain recommendations in nature, and although the convention-regimes adopted are binding for those party to it (as opposed to Security Council resolutions under Ch. VII which bind all) they require ratification and implementation. For this reason, countries are prone to seek unanimity – although majority voting is possible[16] – and attempt to incorporate the views of as many nations as possible. In light of the absence of broad implementation powers or the ability to impose sanctions, member states draw on consensus to overcome this short-coming. In many instances, the outcomes may also be watered down and may include broad provisions that governments can interpret in many different ways. It is important to keep the institutional authority of the Assembly in mind, particularly when comparing it to the Security Council. As a matter of fact, the institutional capabilities of the General Assembly help understand the complexities faced by member states when responding to terrorism and provide insight into why the body has responded in the manner that it has. In simpler terms, the structural deficiencies, although intended by the founding drafters, go a long way in helping understand the absence of action and the content of decisions.

### *The Security Council*

The Security Council has the primary responsibility to maintain international peace and security and is comprised of fifteen member states, five of which are the so-called permanent members, which includes the United States, the United Kingdom, France, Russia, and China, reflecting the great powers of the post-WWII era. The ten remaining are the so called non-permanent members and are elected by the General Assembly for a period of two years using a formula that considers the major geographic regions of the world (Sarooshi: 2019). Therefore, the permanent members retain the greatest influence in the Council. This influence is not only due to the veto power of the permanent members but also due to their size and capabilities (e.g. militarily) (Greenstock: 2008, 251). In practise, action taken by the Security Council is directed by the strongest members (e.g. the United States) or through country coalitions (e.g. Non-Aligned Movement). Although the United Nations has increasingly developed a practise and authority of its own, the organisation remains significantly dependent on

[16] The majoritarian voting that is possible in the General Assembly worked well to the advantage of the Western countries until the 1970s. The rapid decolonisation and the growing influence of the non-aligned countries and the Soviet Bloc however soon changed this development (see Chapter 5).

the military capabilities of its members and on the resources allocated to the organisation by member states. When examining the role of the United Nations and the Security Council in particular, one must hence be wary of the political dynamics and the might of the powerful nations involved.

As the Security Council is the primary organ tasked with the maintenance of international peace and security, it has been granted broad powers to respond to threats to peace and security. Pursuant to Chapter VII Article 41 (measures not involving the use of armed force), members of the Security Council have at their disposal a range of sanctions, including both general sanctions (e.g. economic or trade) and targeted sanctions (e.g. arms embargoes, travel bans and diplomatic restrictions). If the Council determines that non-military measures are coming up short, Chapter VII Article 42 enables the body to use force to respond to aggression and to restore peace. In the absence of a UN army, the Security Council draws on Article 42 to authorize the use of multilateral force through peacekeeping missions or other forms of collective force. Chapter I – purposes and principles – of the UN Charter calls on member states to settle disputes through peaceful means. Article 2 (4) is perhaps the most well-known provision of the Charter, reminding member states of their obligation to "refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (UN Charter: 1945, Chapter I, Art. 2(4)). Article 51 of Chapter VII however provides an exception to this obligation inasmuch by reaffirming the right of individual or collective self-defence in the event of an armed attack. This right is only afforded until the Security Council takes action, in which case the state party is to discontinue its efforts (UNC, Article 51). In consequence, the Security Council is well-equipped to take action against international terrorism, both through the use of force and by non-forceful coercive measures.

# CHAPTER THREE – THE UN AND TERRORISM: THE BEGINNING

The League of Nations (LoN) was formally dissolved by its 23 remaining members on April 20th 1946 and the remaining mandates were transferred onto the newly formed United Nations. In the aftermath of the Second World War, there was a consensus that there ought to be some sort of post-war global order. The LoN failed to prevent war, but the Allies understood the importance of an institution that would uphold global order. Specifically, the 1941 Atlantic Charter already intended for a "permanent system of general security" and Franklin Roosevelt, Winston Churchill, and Joseph Stalin planned for some sort of "general organisation, based on the principle of sovereign equality of all peace-loving states" (Sayward: 2017, 19). The future organisation's main task would be to safeguard future generations from the scourge of war. Delegates at the founding conference of 1945 did not envisage that terrorism would become a serious threat to international peace and security (Comras: 2010, 8). However, diplomats at the conference made sure that the United Nations was given the flexibility to adapt to changing circumstances, a courtesy that the League was not afforded. As Luck observes, "[r]ather than listing the kinds of security issues that the new organisation should tackle, the founders wisely gave its principle organs unprecedented powers and flexibility and authority to respond to emerging threats to international peace and security as they would arise over the years" (Luck: 2006a, 338). Understandably, the main focus of the founding conference was on creating a system of cooperation that would prevent war between states, and at that stage, the menace that was international terrorism was largely neglected. This was certainly due to the absence of significant terrorist activities during the founding moments of the organisation.

However, since 1945 terrorism has not only come to threaten civilians and governments domestically, but on many occasions has drawn a wedge between countries (e.g. Entebbe 1976), thus truly deserving the label 'threat to international peace.' Perhaps the murder of the Austrian Archduke by terrorists, leading to the First World War, is a telling example of the devastating impact terrorism can have on international peace. The Charter of the United Nations (UNC) does not explicitly mention terrorism and in consequence it depends on the political will of the institution and its member states to tackle the issue. As a matter of record, in the past 74 years there has been a rise of numerous terrorist organisations that have engaged in transboundary operational practises, in respect to both targeting and sanctuary. Prominent examples include the Irish Republican Army (IRA), the Basque Fatherland and Liberty (ETA) and various factions of Palestinian terrorist organisations, like the PLO. Yet, the United Nations has not always been chosen as a venue to deal with these groups. It is plausible that this is also due to national interests and the unpredictability of outcomes of UN consultations. Even after the end of the Cold War, certain conflicts

have not, or have only marginally, been addressed within the United Nations framework.

The early years of the United Nations were marked by the difficulty of the decolonisation process and by what Sayward coined "[e]arly Cold War wrangling" (Sayward: 2017, 29). A set of developing crises in Iran, Germany, and Korea increasingly played out in front of a global audience at the United Nations. It was in the halls of the UN where Indian South Africans brought their complaint against an apartheid regime; where independent movements garnered support;[17] where decolonisation took its course; and where the Third World changed the dynamics of world order. By the end of the Second World War, three-quarters of the world were under colonial rule in one form or another, but the global colonial system was rapidly crumbling. The emergence of a bipolar international system (United States on the one side and the Soviet Union on the other) and the establishment of two military blocks in the form of the North Atlantic Treaty Organisation (NATO) and the Warsaw Pact "brought about a new international context that led to the necessity of multilateral coordination between the countries of the South" (Ministry of External Affairs Government of India: 2012, 3). By the late 1950s, former colonial countries became independent members of the UN and started to pivot the balance of power in favour of Arab, Asian and African states, who would soon gain a majority in the General Assembly. At the Fifteenth Ordinary Session of the General Assembly from 1960-1961, seventeen new African and Asian states joined the ranks of UN member states, boosting the Global South's influence at the organisation significantly. But even before the Fifteenth Session, countries of the so-called Third World – who later organised into the Non-Aligned Movement (NAM)[18] – asserted growing influence. This development is best demonstrated by way of illustration: When the United Nations General Assembly opened the debate on the Algerian Problem (and its independence from France) in the late 1950s, the French were irritated by UN involvement in a matter that De Gaulle's government understood to be a *matière intern,* particularly considering that Algeria was *de facto* part of French territory. As the Algerian struggle for independence continued and no end to the bloodshed was in sight, twenty-two Afro-Asian countries, many of which were former colonies themselves, requested for the Algerian question to be placed on the General Assembly's agenda (Dossier 37/01/10: 1959, 2). Growing anti-French sentiment was only strengthened when former colonies Cambodia, Jordan, Laos, Libya, Morocco, Tunisia, and Sudan joined the organisation in 1955 and 1956. In particular, the heads of state of Morocco and Tunisia underscored their support for Algerian independence and offered their "good offices to open bilateral peace talks on *the basis of the recognition of Algerian sovereignty* [emphasis added]" (Ibid, 1959, 2-3). Despite the

[17] See Matthew Connelly's "A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era" for further reading of how independence movements made use of the United Nations early on.

[18] Without wanting to go into too much detail at this time, the Non-Aligned Movement (NAM) was created by and for former colonial nations from Africa, Asia, Latin America and other regions to coordinate policies and to fight what seemed to be an endless battle to ensure that oppressed people could exercise their right to self-determination and independence. See Morphet ad Vieira's "The South in World Politics" for further reading on emergence and role of the NAM.

French government's continued reiteration of the internal nature of the problem, the General Assembly adopted a resolution in which it echoed the longing for negotiations. By September 1958 the Algerian Liberation Front (FLN) declared its independence and established itself as the Gouvernement Provisoire de la Republique Algerienne (GPRA). In 1960 Nikita Khrushchev, then-leader of the Soviet Union, "extended *de facto* recognition to the GPRA, and the Americans started pressuring the French to announce a nationwide referendum on Algerian self-determination by January 1961" (Sayward: 2017, 41).[19] This serves as an example of how a growing body of countries, predominantly made up of former colonies in the Southern hemisphere, exercised growing political global influence. The use of majoritarianism and the consensus-based procedure in the General Assembly worked well to the advantage of countries of the global north in the 1940s and 1950s. By the 1960s and the 1970s this advantage subsided and shifted in favour of the Soviet bloc and countries belonging to the Non-Aligned Movement who were increasingly able to dictate the agenda (Stiles: 2006, 39).

In the meantime, the wartime alliance of the Great Powers was also rapidly crumbling and conflicts along a number of cleavages emerged (e.g. Korean war in 1950 and Berlin Crisis in 1961).[20] The aversion between the United States and the Soviet Union had ramifications for the extent to which terrorism could be addressed at the UN. With both powers holding veto prerogatives in the Security Council a stalemate emerged and no meaningful action could be taken in that forum.[21] As a result, it was the General Assembly that emerged as the key actor for counterterrorism-related action. Even so, the General Assembly, as will be reflected below, was not entirely free from the burdens of Cold War politics and the anti-colonial movement either.

## Counterterrorism at the United Nations: An early history

Terrorism did not find its way onto the agenda of the United Nations permanently until 1972. It is, however, worth reflecting on how the organisation responded to terrorism before that. In September 1948, the United Nations Security Council made its first reference to terrorism in resolution 57. Deeply shocked by the murder of Count Folke Bernadotte[22] (the UN Mediator in Palestine), the Security Council unanimously condemned the act "which appears to have been committed by a criminal group of terrorists in Jerusalem while the United Nations representative was fulfilling his peace-seeking mission in the Holy Land" (UNSC res. 57: 1948, para. 1). Besides instructing the Secretary-General to take ceremonial preparations (e.g. flying the UN flag at half-mast), the Council took no further action. In the 1950s, the report "Draft Code on Offences against Peace and Security of Mankind" drafted by the International Law

[19] A further project that demonstrates the Third World Bloc's growing influence was the adoption of Resolution on 1515 on the Declaration on Granting Independence to Colonial Countries and Peoples and the establishment of Committee 24 to advance the furtherance of people's right to self-determination.
[20] See Sayward's "United Nation in International History" for an insightful reading on the organisations early years and political divergences that came to light.
[21] This conclusion will be further discussed in subsequent sections of the thesis.
[22] Count Bernadotte was the UN chargé d'affaires tasked with brokering peace between Palestine and Israel. He was assassinated by members of the Jewish Zionist group Lehi.

Commission (ILC) made a few passing references to terrorism. In its third session in 1951, the ILC made note of terrorism in Article 2 (6), stipulating that an act of aggression includes, *inter alia*, "[t]he undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organised activities calculated to carry out terrorist acts in another State" (ILC: 1951, Article 2 (6)). Eventually the issue of terrorism was again raised in the 1960s in "the context of the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States" (Romaniuk: 2010, 33). The declaration settling the friendly relations between states compels governments to refrain from engaging in terrorist acts or participating in related activities in another state, as well as encouragement of such activities (UNGA resolution 2626: 1970, Annex, para. 9 & 21). General Assembly resolution 2625 that followed in 1970 made no mention of the term terrorism but merely asserted: "[e]very State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force" (UNGA res. 2626: 1970, para. 10).

With the proliferation of airplane hijackings in the 1960s, UN involvement in counterterrorism gained new momentum, although action was filtered through UN specialized organisations (Luck: 2006, Carlton: 2005 and Hegemann: 2014). In fact, the International Civil Aviation Organisation (ICAO) became the centrepiece to the UN's counterterrorism efforts in the 1960s. By then, the hijacking of aircraft was a global concern. Skyjackings started as a means to escape communist controlled territory in Eastern Europe and Cuba (Comras: 2010, 10). By the end of the 1960s, terrorists – a significant number of whom declared themselves part of the Palestinian movement – however increasingly hijacked planes and pressed their political demands onto Western governments (e.g. Dawson's Field 1970). Terrorists would now threaten the hostages and would use the passengers (e.g. threatening to kill them) if their demands were not met. Indeed, passengers were usually just a by-product of individuals trying to escape from one country to another, yet this changed by the end of the 1960s (Ibid: 2010, 11). Consequently, states adopted the 1963 Convention on Offences and Certain Other Acts Committed aboard Aircraft (the Tokyo Convention), and seven years later approved the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention). The Tokyo Convention was the first UN instrument to establish jurisdiction, not only in the state of registration, but furthermore obliged parties to "take measures necessary to establish jurisdiction over the offences as the state of registration" (Joyner: 2003, 509).

Although the 1963 Tokyo Convention does have application in cases related to terrorist offences it is not a counterterrorism instrument. The main objective of the convention was to ensure that offenders could not escape justice on the basis of a jurisdiction, or the ability to establish jurisdiction. In essence, jurisdiction can be established both by the state of registration as well as by the state in whose territory the offence occurred (Articles 3 & 4). On that score, it is also worth highlighting that the Tokyo Convention

does not define the crime of 'air piracy' and it does not explicitly criminalise the offence of 'aircraft hijacking.' In practise, perpetrators would not necessarily face punishment and countries could justify a lack of action with the principle of *nulla poena sine lege* – no penalty without a law. The convention also specifically notes, "nothing in this Convention shall be deemed to create an obligation to grant extradition" (Tokyo Convention: 1963, Art. 16). As Robert Boyle, the American negotiator in Tokyo, bluntly remarks: "it is obvious that the Tokyo convention left major gaps in the international legal system in attempting to cope with the scope of aircraft hijacking. There were no undertakings by anyone to make aircraft hijacking a crime under international law, no undertakings to see to it that the crime was one punishable by severe penalties and most importantly, no undertaking to either submit the case for prosecution or to extradite the offender to a State which would wish to prosecute" (Boyle in MacKenzie: 2010, 254). This conclusion is not surprising considering that "[i]t was clear to all…that in this particular matter [adoption of the Tokyo Convention] the Bloc delegations were merely going through the motion of opposition without any real intention of disrupting the work of the Conference" (Ibid: 2010, 252). As such, the conclusion can be drawn that political rivalries were not a main obstacle, perhaps owed to the fact that the convention did not really impose any obligations on parties.

The Hague Convention enacted in 1970 built on its predecessor and represents a noteworthy development insofar that it defines the act of 'unlawful seizure' and contains a relatively detailed provision on the extradition of alleged offenders. In particular, Article 1 outlines the scope of the crime, whereas Article 2 places an obligation on countries to "make the offence punishable by severe penalties" (Hague Convention: 1970, Art. 2).[23] The critical elements of the convention were however articles 7 and 8. Whereas the former obliges a state, if it does not extradite the alleged offender, to submit the case to its authorities for the purpose of prosecution, the latter provides both an obligation and a legal basis for extradition (e.g. the offence is made an extraditable offence). The provisions contained in both articles 7 and 8 were indeed novel. In respect to the offence of aircraft hijacking, terrorists could no longer evade punishment because of the political character of the crime, which was an obstacle to extradition in many extradition treaties at the time. However, the Hague Convention does not place an obligation on states to prosecute, but merely to present the case to the authorities who will then decide if the factual evidence warrants further criminal proceedings. Yet, the convention laid the ground for the UN's *aut dedere aut judicare* – extradite or prosecute – principle, which was to become a constant in future conventions.

While aircraft hijacking was a central concern to the international community, the destruction of airliners was also increasingly becoming a problem. "Between 1967 and 1979, terrorists destroyed several airplanes be placings bombs on board" (Joyner: 2003, 513), an observation that is sufficiently illustrated by the Dawson's Field Hijacking in

[23] Proceeding Article 4 also establishes jurisdiction, Article 6 obliges states to take into custody an alleged offender or at a minimum to ensure the presence of the individual for and other articles settle arbitration (Article 12).

September of 1970 when terrorists blew up airlines in anticipation of a raid (BBC: 1970, 1). To address this concern, the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Civil Aviation (Montreal Convention) was adopted in 1971. Similar to The Hague and Tokyo conventions, the Montreal Convention contains obligations regarding jurisdiction, prosecution, and extradition. The convention moreover criminalises certain acts. In the definition of the convention, a person commits a crime "if he unlawfully and intentionally (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircrafts; or (b) destroys an aircraft in service or causes damage to such an aircraft, which renders it incapably of flight or which is likely to endanger its safety in flight" (Montreal Convention: 1971, Art. 1). Article 3 of the convention places an obligation on states to make such offences punishable by severe penalties and requires states to establish jurisdiction over the offence (Article 5). Articles 7 and 8 mirror those in the Hague Convention and require a state to submit the case, in the absence of extradition, to competent authorities for the purpose of prosecution. Concurrently, the Montreal Convention establishes these crimes as extraditable offences and provides legal basis for extradition (Article 8). Once again, however, the convention only goes so far in ensuring that terrorists are brought to justice. Despite obligations to submit the case to authorities it does not oblige states to initiate judgement.[24]

[24] In subsequent years, the ICAO approved a number of amendments and annexes, as well as institutional mechanisms to strengthen the convention-regime[24]. Such efforts included the establishment of the Committee on Unlawful Interferences in 1969 and the approval of the Security Manual for the Safeguarding of Civil Aviation against Acts of Unlawful Interferences. In the Annex to the Chicago Convention, ICAO member states also adopted an amendment that set out standard practises on unlawful interferences (Romaniuk: 2010, 36).

## The General Assembly takes action: A divided UN

Between 1972 and the mid-1980s the United Nations addressed terrorism along two distinct tracks. While the first is best characterised as a holistic response, the latter was problem-centric. On the one hand, the holistic approach "concentrated on elaborating a single, comprehensive standard as a basis for agreeing on a legal mechanism to suppress terrorism" (Levitt: 1989, 542) and intended to outlaw terrorism in all its manifestations. On the other, the sectoral response focused on the criminalisation of an activity that terrorists made use of (e.g. hostage-taking) and could as such avoid any definition of the phenomenon. This chapter will deliver an overview of the two tracks and will provide a short legislative history as relevant for the purpose of this thesis. The initiative of a comprehensive convention on terrorism was in deadlock by 1979 and continues to evade member states to this day. The adoption of the Diplomats (1973) and Hostages (1979) conventions yielded greater success, yet provide illustrative evidence for the politicised and contested nature of the issue at the United Nations. Importantly, the ensuing chapter will furthermore highlight the geopolitical considerations and the changes in the manifestation of international terrorism as key developments in affecting how the organisation responded to terrorism.

From the outset it became evident that member states fostered significantly different understandings of what terrorism is and what would be the best course of action to counter it. Nevertheless, amidst the growing manifestations of international terrorism, UN Secretary-General Kurt Waldheim formally recommended placing terrorism on the agenda of the General Assembly in 1972. Waldheim was well-aware of the controversies of the agenda item, yet he insisted, also as a matter of credibility, that the United Nations could no longer shy away from addressing the difficult political problems of the time (Press Release SG/SM/1753: 1972, 1-2). Consequently, on the 8th of September 1972 Waldheim requested that the General Assembly include in its agenda for the forthcoming twenty-seventh session the item "[m]easures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardise fundamental freedoms" (Ruperez: 2006, 3). Although the murder of the Israeli athletes in the course of the Munich attacks in 1972 certainly provided an immediate impetus for action, the Secretary-General emphasised that the initiative was in response to the increasing acts of violence perpetrated in recent years, not the result of any specific act of terrorism. Specifically, Waldheim cautiously noted, "[i]t [the agenda item] does not refer to a specific act of violence. It refers to, and should cover, all acts of violence and terrorism against innocent people" (Press Release SG/SM/1747: 1972, 3). A few days later, Waldheim observed, "[o]bviously it is not good to consider this very complex phenomenon without at the same time considering the underlying situations which give rise to terrorism and violence in many parts of the world" (Press Release SG/SM/1970: 1972, 3). The roots of terrorism, and their causes which make the problem so difficult to tackle, in the words of the Secretary-General, "lie in misery, frustration, grievance and despair so deep that men are prepared to sacrifice human lives, including their own, in an attempt to effect radical changes" (Ibid.: 1972, 3).

On September 20th 1972 the General Committee of the General Assembly took up Waldheim's request. At the opening of the first meeting of the committee, Waldheim once again echoed the complexity of the issue at hand and this time also reaffirmed the importance of considering the underlying circumstances that give rise to terrorism (Waldheim SG/SM/1953: 1973, 2). From Waldheim's shift in emphasis it becomes clear that Third World countries approached him in the interim, expressing their discontent with the focus of the agenda item as it stood. When Waldheim met with "key Arab representatives, including Amb. Jamil Baroody of Saudi Arabia, they told him bluntly they would not accept" (Comras: 2010, 19) the agenda item as originally proposed. Fereydoun Hoveyda, Permanent Representative of the Republic of Iran, confirmed as much when he maintained "[t]he altered tone of his [Waldheim's] remarks suggests that there had been some exchanges with those who thought their interests might adversely be affected" (Hoveyda: 1977, 72).

When the General Committee took up Waldheim's initiative, the diverging outlooks on terrorism promptly came to light. The 25-member committee struggled with the decision of whether to recommend the inclusion of the item on the Assembly's agenda.[25] In no uncertain terms, then-American representative to the United Nations, George H.W. Bush senior, made it clear that it was time for the UN to address terrorism. This was well-reflected in the remarks he made to the committee:

> "The proper and indeed the only forum for dealing with global problems of this magnitude is the United Nations. And to oppose discussion of this problem is to strike at the very raison d'etre of the United Nations itself. And if the nations of the world here assembled in general session cannot debate the pressing global problems of the day and seek their solution, what in heavens name can we do? What purpose do we serve here?" (Bush in Perspective Seventy-two (no.39): 1972, 5).

Other Western countries agreed. Both the United Kingdom and France asserted that it is indeed time for the organisation to approach the subject of international terrorism. However, in the same vein they acknowledged the 'dual responsibility' of not only devising measures to prevent and punish, but also to find solutions to the roots of the problem and the underlying causes that give rise to such violence (Perspective Seventy-two (no.39): 1972, 7). Notably, they did not intend to use the root causes argument in an attempt to stall concrete counter measures. There were nevertheless a number of countries that argued against the inclusion of the item. Chen Chu, China's Deputy Permanent representative emphasised that "[i]mperialism, colonialism, neo-colonialism, racism and Israeli Zionism are the chief culprits of terrorism and reactionary violence in the present world. *It is perfectly just for aggressed and oppressed nations and the people to take up arms under compulsion to resist counter-revolutionary violence with revolutionary violence* [emphasis added]" (Chu in

[25] See United Nations Office of Public Information Radio and Visual Services document No.39 for a full list of statements by countries in the Steering Committee.

Perspective Seventy-two (no.39): 1972, 5). A further opponent was the Soviet Union. Yakov Malik, the Soviet Ambassador to the UN, put forth the idea that "[i]t is quite clear that no one is entitled to deprive the people of their right to struggle, to fight for their freedom and independence, for their legitimate rights and interests against colonial domination", further contending that member states should refrain from taking any measures that endanger the legitimate fight of the "peoples of the occupied territories against foreign annexationists" (Malik in Perspective Seventy-two (no.39): 1972, 6). Arguing less on an ideological basis, Jamil Baroody, the Saudi Arabian ambassador, suggested that Waldheim was jumping the gun and that the item ought to be adjourned until the twenty-eighth session (Hoveyda: 1977, 73). Baroody further advised the committee to establish a separate commission that would prepare a "dispassionate and objective study of the question" (Ibid.: 1977, 73). The discussions in the General Committee were indicative of the elements of contention that would face the member states in the coming years. And although much disagreement still persisted, the General Committee moved to include the item with 15 votes in favour, 7 against and with abstentions from the Soviet Union and Czechoslovakia. The abstention from the Soviet Union indicated the state's willingness to engage in counterterrorism deliberations at the United Nations. Yet, the remarks by the Soviet ambassador also reflect the political tensions between the West and the East.

Upon approval by the General Committee the discussions moved to the General Assembly's Sixth (legal) Committee. It was here that the then-132 members of the United Nations continued their discussions on the agenda item. There was a general minimal consensus that terrorism is indeed a complex phenomenon. As anticipated however, there was significant push back from a number of countries. The representative from Senegal characterised the initiatives as "a pretext for allowing racist and colonialists opportunists to take severe measures and sanctions against those seeking radical changes to the current order of things" (Senegal quoted in Comras: 2010, 22). Drawing on the explanation made by Waldheim in his speech to the General Committee, the Saudi representative suggested that the title of the item should include additional phrasing. The wording that Saudi Arabia suggested would redirect focus to the root causes of terrorism. The additional amendment would alter the title as to include "…and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes" (Quoted in Romaniuk: 2010, 38). Saudi Arabia's motion was adopted with 42 votes in favour, 35 against, and 44 abstentions, with many Western countries troubled with this amendment. The very title of the item exposed the philosophical and ideological divides. In suggesting the amendment, Saudi Arabia, with plenty support from other Arab, African, and Asian countries, aimed to preserve the legitimacy of national liberation movements. Indeed, it can be argued that the objective of the addendum was to divert attention away from the actual acts of violence and redirect focus towards the grievances that give rise and provide impetus for such violence. The new title as carried could be understood as suggesting that the injustices and grievances must first be eased before the any counter measures can be

taken. The title has to also be understood in a broader context. As Rosen and Frank remark,

> "[o]n the one side of the question in the United Nations General Assembly are the American and Federal German representatives, to whom it is obvious that the international community cannot tolerate the slaughter of innocent athletes at an international sporting competition or condone 'senseless' acts of violence against airline passengers….On the other side of the question there is the Kenyan delegate, who remembers the profound contributions of Mau Mau violence to the liberation of his country from the British, or the Algerian delegate, who may have participated in unconventional and spectacular acts of terror in the resistance to France…" (Rosen & Frank in Carlton: 2005, 43).

With a number of national liberation movements still struggling for independence and self-determination in the 1970s, the Third World was reluctant to admit to the agenda an item that would, in their view, undermine such struggles and place limits on the use of violence in the course of national liberation. Despite Western opposition, the agenda item as amended was carried with 66 votes in support, 27 against, and 33 abstentions and was assigned to the Sixth (legal) Committee of the General Assembly.

## The quest for a resolution: Challenges in principle and procedure

Entrusted with the agenda item, 'measures to prevent international terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes' (UNGA: 1972, res. 27/3034), the Sixth Committee set out to find a common ground to dealing with terrorism. Early on in the consultations, the Secretariat was mandated with the preparation of a comprehensive study on terrorism, including consideration of its origins. Over the course of the deliberations it became apparent that disagreement between states remained insuperable. One of the most pressing questions was whether the United Nations should condemn the use terrorism in all circumstances and to what extent (Hoveyda: 1977, 76). The debate in the Sixth Committee is particularly informative as it "reveal[s] the extent to which the legitimacy of wars of national liberation has been accepted by states" (Dugard: 1974, 73). As a matter of fact, some delegates, mainly from developing nations, found difficulty in condemning international terrorism without sufficiently having considered the principles of self-determination and the legitimacy of national liberation movements in their struggles against colonial and repressive regimes. In this context, the committee pondered over the question of whether terrorism can be justified in pursuit of independence and what role the United Nations should play in this regard. In other words, can "activities undertaken in the context of the right of peoples to self-determination not be regarded as international terrorism?" (Hoveyda: 1977, 76). A further dilemma faced by the committee from the beginning was *a propos*

the modalities of how the UN should approach the subject. A number of states supported a proposal that would lead to the establishment of an intersessional committee with the task of investigating the causes of terrorism, subsequently developing preventative measures. The dissenting opinion – a view predominantly held by Western countries – however, contended that a thorough investigation of the origins is a long-term endeavour that ought to be entrusted to a separate committee. The fear expressed by the West was that a sequence as proposed by the developing countries would only stand in the way of immediate action (UN Doc. A/9028: 1973, 6).

There was general agreement that all states should be encouraged to become parties to already existing counterterrorism-related conventions (e.g. Tokyo, Hague, and Montreal) and to introduce measures into national legislation to counter international terrorism. A number of findings published in the course of the study prepared by the Secretariat caused some countries a great deal of trouble. The Secretariat concluded, "even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which must not be used; *the legitimacy of a cause does not in itself legitimise the use of certain forms of violence, especially against the innocent*" [emphasis added] (UN Doc. A/C.6/418: 1972, 7). The study further observed, "terrorism threatens, endangers or destroys the lives and fundamental freedom of the innocent, and it would not be just to leave them to wait for protection until the causes have been remedied and the purpose and the principles of the Charter have been given full effect. There is present need for measures of international co-operation to protect their interests as far as possible" (Ibid: 1972, 41). This observation did not resonate well with Third World countries, which continued to insist on the legitimacy of violence against colonial and repressive regimes. The aforementioned conclusion by the Secretariat filtered into the debate on the modalities of how the organisation should approach international terrorism. Particularly, there was a debate about whether the UN should first set out to remedy the root causes and then address the elimination of terrorist acts, or should the organisation take immediate preventative action in the absence of a comprehensive understanding of the origins that give rise to terrorist violence? As neither of the contending groups was willing to compromise, the legal committee had before it three distinct draft resolutions and a draft convention submitted by the United States (Romaniuk: 2010, 39).[26] The proposals ranged from expressions of condemnation to statements of mere concern, and from paying little attention to root causes to linking preventative measures to the study of underlying causes.

In its draft resolution, the United States aimed to adopt a Convention for the Prevention and Punishment of Certain Acts of International Terrorism.[27] The draft convention was dismissed right from the beginning as infringing on the right to self-determination, with Arab and African countries favouring an Ad Hoc Committee that would carefully consider propositions for a convention in the future (Dugard: 1974, 73). The opposition by the Arab and African countries must be understood in the context

[26] See the Department of State's Bulletin 431 from October 16 1972 (pages 431-433) for further reading on the draft Convention introduced by the United States in the Sixth Committee consultations.
[27] Ibid.

of neo-colonialism. For many countries, their independence was a hard-won struggle that, at the time, only recently manifested itself. Article 13 of the draft convention explicitly suggests that "[n]othing in this Convention shall make an offence of any act which is permissible under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War or any other international law applicable in armed conflicts" (American draft Convention: 1972, Article 13). It must therefore inevitably have been American endeavours in Vietnam in the 1970s and its continued support for Israel in the perceived suppression of the Palestinian people that fostered anti-American sentiment and the rejection of the draft convention (Dugard: 1974, 81). Many countries in the Third World were stage grounds for proxy wars (e.g. Libya) and countries which recently gained their independence certainly seemed sceptical of Western counterterrorism initiatives.

The draft resolution put forth by the United States urged states to become parties to existing counterterrorism-related conventions, and called on the ICAO to prepare an agreement obliging states to enforce and implement the obligations contained in the ICAO convention-regime. Further, states were urged to address the "political problems which may, in some instances, provide a pretext for acts of international terrorism" (Hoveyda: 1977, 79). Afro-Asian countries, however, sought more attention on the root causes (e.g. colonialism) and conversely rejected the American proposal as a mere "prescription to talk" (Ibid: 1977, 79).

A second proposal (compromise draft) was introduced by Italy and had the support of Iran, the only non-western country to accede (Romaniuk: 2010, 39). The draft reaffirmed the right to self-determination, urged the search for solutions to the origins of terrorism, and more notably condemned international terrorism. The compromise proposal would petition states for the developing of a draft convention on measures to prevent international terrorism in the context of a diplomatic conference and advocated for the ICAO to take further action in mitigating the continued threat to civil aviation. Contrary to the draft resolution put forth by the United States, the compromise draft requested the establishment of an Ad Hoc Committee for the study of origins and root causes of international terrorism.

The final draft proposal was introduced by Arab and Asian states, and was supported by the Soviet Union. The Soviet Union had "suffered hijackings of domestic flights, [and] the Soviets had taken a relatively strong position in ICAO debates. But they also perceived that support for Palestinian groups in the Middle East could advance Soviet interests against the West" (Romaniuk: 2010, 39). The Soviet support for the proposal was thus a strategic one, and ought to be understood in the wider context of the Cold War. The Soviets' support was certainly an attempt to garner support in the Middle East and to keep American influence at the United Nations at bay. Despite the fact that the General Assembly was able to adopt a resolution on international terrorism, a consensus was far from reached. The draft resolution proposed by developing countries was adopted with 76 votes in favour, 35 against, and with 17 abstentions. And so, although resolution 3034 was the first general resolution on international terrorism

adopted by the General Assembly, it did not reflect a general agreement but rather the growing political influence of the Third World in the organisation.

## Resolution 3034: A weak beginning

In its preambulatory paragraphs, the General Assembly underscored that it was "*[d]eeply perturbed* over acts of international terrorism" (UNGA res. 3034: 1972, preambular), whereas the second preambular paragraph once again reiterates the significance of finding solutions to the underlying causes. In the first operative paragraph the United Nations "*[e]xpresses* deep concern over the increasing acts of violence which endanger or take innocent human lives or jeopardise fundamental freedoms" (UNGA res. 3034: 1972, para. 1). Notably, instead of condemning terrorist acts, states merely agreed on expressions of concern. It was however operative paragraphs 2, 3, 4, and 6 that troubled Western countries the most. Paragraph 2 urged "states to devote immediate attention to finding just and peaceful solutions to the underlying causes which give rise to such acts of violence" (UNGA res. 27/3034, para. 2). Paragraph 3 "*[r]eaffirms* the inalienable right to self-determination and independence of all people under colonial and racist regimes … and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements…" (Ibid., para. 3). In part, the General Assembly did turn to the elimination of international terrorism, but it did so by explicitly "bearing in mind the provisions of paragraph 3 above" (UNGA res. 3034: 1972, para. 6). Thus, Romanov accurately observes that the reference to the elimination of international terrorism (paragraph 6) was made with reservations in favour of the inalienable right to self-determination (Romanov: 1990, 295). The resolution further decided to set up an Ad Hoc Committee on International Terrorism and tasked the committee to deal with terrorism in a comprehensive manner (operative para. 9).

With their growing presence and power, the countries of the Third World successfully moved the debate away from concrete measures and managed to put terrorism's origins centre stage. Condemnation was not explicitly voiced in respect to non-state terrorist actors but towards "repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence…" (UNGA res. 3034: 1972, para. 4). Resolution 3034 was unsettling for the West, with most Western states voting against it. Both the American draft and the compromise alternative failed to garner sufficient support, compelling the United States to concede that its counterterrorism endeavours at the UN were unlikely to yield any success in the foreseeable future (Blumenau: 2014b, 74). Western countries initiated a process which they now, given the shifting majorities in the General Assembly, no longer controlled. They were increasingly faced with a response they did not want and the elimination of terrorism discourse was replaced with the continued condemnation of "racism, colonialism, and Zionism" (Comras: 2010, 24). Western governments, such as West Germany, were increasingly worried that the United Nations was gradually becoming an instrument abused for the legitimisation of politically motivated violence (Blumenau: 2014a, 98).

The Ad Hoc Committee established by resolution 3034 consisted of 35 members[28] and met from July to August 1973. The developments in the committee were very much a *déjà vu* and on many levels a continuation of preceding discussions.[29] When the members met for the last time in August of '73, the committee found itself unable to come to an agreement on how to eliminate terrorism. After a general debate, member states established three sub-committees[30] to further examine (1) the definition of international terrorism, (2) the underlying causes and (3) the elaboration of concrete measures for the prevention of international terrorism.

In respect to the sub-committee on the definition, a number of delegates maintained that an abstract definition of the phenomenon was not entirely necessary and would prove to be a time-consuming and unproductive task (UN Doc. A/9028: 1973, 6). An attempt to define terrorism seemed rather unrealistic and would only deepen the divide. Disagreement also arose with respect to the type of definition. Should the committee adopt an abstract conceptualisation, an enumerative approach, or a mix of both? For instance, the draft proposal introduced by the non-aligned group took on an enumerative approach and argued that international terrorism is best defined as acts of violence "by colonial, racist and alien regimes against peoples struggling for their liberation, for their legitimate right to self-determination, independence…" and that have been "committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardise fundamental freedoms" (Ibid: 1973, 21). Contrarily, France put forth a draft proposal that remained rather general. France defined terrorism as a "heinous act of barbarism committed in the territory of a third state by a foreigner against a person possessing a nationality other than that of the offender for the purpose of exerting pressure in a conflict not strictly internal in nature" (Ibid.: 1973, 21). Then there was also the question of scope. Is the definition of terrorism limited to individuals and non-state actors, or should a definition extend to acts committed by the state? In observations made in respect to resolution 3034, Syria's conceptualisation of international terrorism is usefully telling and indicative of the views of many Third World nations at the time. The Arab Republic contended that any consideration of the phenomenon ought to begin with reflection of state terrorism. Accordingly, the "civilized international community shall not forget the terrorism practised by the United States' imperialism….against the people of Viet-Nam aspiring to freedom and unity. The international community is indeed called upon…to put an end to the Zionist terrorism practised by Israel against the people of Palestine and

[28] The 35 members of the Ad Hoc Committee included: Algeria, Austria, Barbados, Canada, Congo, Czechoslovakia, Democratic Yemen, France, Greece, Guinea, Haiti, Hungary, India, Iran, Italy, Japan, Mauritania, Nicaragua, Nigeria, Panama, Sweden, Syrian Arab Republic, Tunisia, Turkey, Ukrainian Soviet Socialist Republic) Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire, and Zambia.

[29] See "Report of the Ad Hoc Committee on International Terrorism" for a detailed reading on a detailed summary of the developments in the Ad Hoc Committee leading up to the 28th Session of the General Assembly.

[30] See Report Ad Hoc Committee (1973) for a detailed reading on the observations made and proposals submitted in regards to the respective sub-committees. Only a general account can be given at this time.

against the Arab States, portions of whose territories are occupied by Israel" (Syria in A/AC.160/1: 1973, 36). Syria further argued that crimes committed by states, in particular Israel, are the severest forms of terrorism of its time. State terrorism as defined by Syria would include such incidences as the "Israeli diversion of a Lebanese aircraft from Beirut[31] … and the Israeli killing of an Arab in Norway" (Franck & Lockwood: 1974, 73), whereas such incidents fall under the rubric for 'counterterrorism operations' in Israel. The Syrian definition would also extend to American involvement in Vietnam and would moreover be applicable to the actions of apartheid regimes and colonial powers. In this regard, other delegates pointedly remarked that acts committed "by the citizens of States which were in a state of war and who were resisting the aggressor in the occupied territory or who were fighting for their national liberation could not be considered as acts of international terrorism" (UN Doc. A/9028: 1973, 12). Yet, actions taken to counteract the efforts of those resisting the aggressors (e.g. by Israel against Palestinians) would be considered terrorist acts.

Although states (mostly from the West) agreed with the heinous nature of state terrorism, they maintained that international law already settled the use of force and issues relating to aggression and terrorist violence involving the state (UN Doc. A/9028: 1973, 8). For instance, the UNC Chapter 1, Article 2(4) settles the use of force by states when it calls on states to refrain from using (or threatening) force against "the territorial integrity or political independence of any state" (UNC: 1945, Art. 2(4)). More concretely, with the adoption of UNGA resolution 2625 in 1970, the Assembly lent its support for the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. This instrument upholds that "[e]very State has the duty to refrain from organising, instigating, assisting or participating in the acts of civil war or terrorist acts in any other State" (Declaration Annex: 1970, para. 9). It is however important to note that, while Western reluctance to address state terrorism in connection with non-state terrorism is certainly the result of not wanting to duplicate efforts, it ought nevertheless also to be understood in the context of political alliances. Indeed, Western governments were unyielding in supporting any efforts that would open their allies, namely Israel and South Africa, to international condemnation legitimised by the United Nations.

In the second sub-committee, on the underlying causes of terrorism, the disagreeable character of negotiations emerged as well. There were once again two contending camps. The first, which included numerous countries from the then-developing world, was convinced that "the study of underlying causes was a pre-condition of the study on measures" (UN Doc. A/9028: 1973, 13). Delegates were convinced that the only way to eliminate the evil that is terrorism was to place focus on its causes and find ways to solve the circumstances that give rise to terrorist violence (Becker: 2006, 91). Suggestions submitted by Algeria, with the support of other Arab-Afro countries, are indicative of this view. For Algeria, state terrorism was one of the root problems. The use of terrorism by a state manifested itself through "mass imprisonments, the use of torture, the massacre of whole groups, widespread reprisals, the bombing of civilian

[31] In an attempt to arrest four leaders of the PLO and put them on trial, Israel forced the plane to land in Israel.

population…" and emerges in the course of "[f]oreign occupation of a territory whose population is forced to leave it; [and in the] [a]pplication of a policy of racial discrimination and apartheid" (Algeria in UN Doc. A/9028: 1973, 24). Terrorists thus resort to acts of violence "[w]hen they are victims of political, social, or economic injustices; when all legal remedies for obtaining justice are of no avail" (Ibid.: 1973, 25).

Western governments, on the contrary, reiterated that the study of underlying causes is a long-term endeavour and that it is at a minimum "unrealistic to expect that, upon completion of that study, the underlying causes could be so eradicated as to lead to the prompt elimination of acts of international terrorism" (Ibid.: 1973, 14). The position taken by West Germany is usefully illuminating. In an official letter from the Federal Republic of Germany (FGR) to the Secretary-General, the Germans acknowledged that the work of the committee should not place restrictions on the right of any people to determine its own fate. The letter went on to note that a study of the underlying causes should however not "obstruct the speedy implementation of urgent concrete measures to check the alarming spread of international violence" (FGR in Blumenau: 2014a, 97). In this context, member states debated whether it was desirable to continue the committee's work on the basis of a general knowledge of the problem, including its root causes, or whether it would be best to proceed with the drafting of an international legal instrument for specific acts of terrorism (a sectoral approach). The committee particularly considered attacks against airplanes, the taking of hostages, and attacks against diplomatic agents, the latter of which was already being negotiated at the United Nations in 1973 (UN Doc. A/9028: 1973, 14).

The deliberations in the third sub-committee on devising preventative measures against terrorism faced similar obstacles. Disagreement arose in respect to the relationship between definition and origins and the extent to which one could adopt countermeasures without having adequately studied the roots of the problem. Additionally, the committee deliberated whether it should recommend the adoption of measures to combat state terrorism as, allegedly, "it was this form of terrorism which led to the others" (UN Doc. A/9028: 1973, 18). Indeed, the draft proposal introduced by the non-aligned group stipulated that measures against terrorism could include "[t]he definitive elimination of situations of colonial domination; Intensification of the campaign against racial discrimination and apartheid" as well as provisions that prohibit the support to any state which engages a policy of territorial occupation and discrimination (NAG UN Doc. A/9028: 1973, 25). Notably, the group moreover suggested the use of Chapter VII[32] against colonial and racist regimes and urged the committee to recommend the objection to any measures that would undermine violence aimed at resisting suppression. Contrarily, the United Kingdom urged members to condemn acts of terrorism and recalled the responsibility to refrain from engaging in terrorist action in another country, an obligation enshrined in the

[32] Chapter VII of the UN Charter sets out the UN's powers to maintain and restore peace and security. The Chapter not only allows the Security Council to establish that there is a threat to international peace (Art.39) but moreover grants the body powers to take non-forceful (Art. 41) and forceful (Art. 42) action to restore peace and security.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. The proposal furthermore called on states to strengthen national counterterrorism measures and for states to work in co-operation and "to intensify their efforts towards a solution of that problem" (United Kingdom in UN Doc. A/9028: 1973, 28). Besides urging states to become parties to already existing conventions with counterterrorism relevance (e.g. ICAO convention-regime), Britain advocated for the adoption of a convention "for the suppression of certain acts of international terrorism, based, inter alia, on the principle that a State should either extradite the offender or submit his case for prosecution…" (Ibid.: 1973, 28). Notably absent from the United Kingdom's proposal was any reference to the roots of terrorism, or to the notion that one ought first to remedy the causes before preventative action could be taken.

Finally, the sentiment that future work should be based on the drafting and adoption of conventions dealing with a specific type of terrorism (e.g. letter bombs or hostage-taking) gained traction. Over the course of the discussions in the Ad Hoc Committee , if not before that, it became quite clear that diverging outlooks on how to deal with terrorism would not be settled quickly. A sectoral approach gradually seemed more and more appealing. The work of the Ad Hoc Committee was suspended and did not resume until the thirty-first session of the General Assembly in 1976. In the meantime, terrorists attacked the meeting of OPEC leaders in December of 1975, killing three, and in the summer of 1976 the Israeli Defence Force (IDF) carried out a counterterrorist operation at Entebbe Airport in Uganda in response to an Air France plane hijacking.[33] When the committee thus reconvened in 1976 terrorism continued to remain a threat to members of the international community but also posed a threat to the friendly relations between countries (see aftermath of Entebbe raid). In the 1970s, "[t]here was growing evidence … that terrorists groups were much better organised and more adept at securing funding and supplies. There was also a marked increase in the financial and material contributions, and direction, terrorist groups were receiving from certain UN member countries … Pakistan was increasing fomenting terrorist attacks in India's Kashmir province and elsewhere in the South Asia subcontinent" (Comras: 2010, 26).

After four years of inaction, the General Assembly reactivated the committee, albeit with little practical outcome. Following the consideration of the Committee Report in 1977,[34] the General Assembly adopted resolution 32/147. The resolution was very much a repetition of resolution 3034, although operative paragraph 7 passingly invited states to first study the underlying causes of terrorism and then recommended "practical measures to combat terrorism" (UNGA res. 32/147: 1977, para. 7). Also, the General Assembly no longer invited states to become parties to existing conventions but rather "[a]ppeals to States which have not yet done so to examine the possibility of becoming parties…," (UNGA res. 3034, para. 8 and 32/147, para. 5). When the committee met

[33] See chapter 2 "Case studies in International Terrorism: Hostages Crisis and Hijackings" in Blumenau's "The United Nations & Terrorism", specifically pages 52-74.
[34] See Ad Hoc Committee Report (UN Doc. A/9028: 1973) on International Terrorism for the UN General Assembly with summary records for further reading.

again two years later in 1979 it was able to forge agreement around a set of recommendations. [35] These recommendations were incorporated into General Assembly resolution 34/145, with 118 countries voting in favour and 22 abstaining. Abstentions were, amongst others, made by the United States and Western European countries. Western countries abstained because although the resolution only made little progress it contained a general condemnation of terrorism, thus not warranting a negative vote. Indeed, the 1979 resolution reaffirmed the right of self-determination and independence, yet for the first time condemned "all acts of international terrorism which endanger or take human lives…" (UNGA res. 34/145: 1979, para. 3). The inclusion of "all acts of international terrorism" is a significant development. The addition of such a provision indicated the gradual willingness of governments to condemn terrorism in principle, although the right to self-determination continued to remain an integral principle to the discussion on terrorism.

When trying to understand why member states were willing to gradually condemn terrorism in principle one ought to also consider the changes in the manifestation of international terrorism. In the 1960s and in the early 1970s terrorists avoided attacks against countries of the Third World Bloc in an effort to avoid losing the backing of supportive governments and diaspora. This trend started to change in 1973 when Arab diplomats were taken hostage, although they were not the focus of the attack and evaded any harm (Blumenau: 2014b, 50). However, by 1975 Arab countries increasingly became targets of terrorist attacks starting with OPEC ministers held at gunpoint (Farnsworth: 1975, 1). In 1978 terrorists murdered an editor of a prominent newspaper in Egypt and hijacked a plane with a dozen of Arab delegates attending a conference in Cyprus (Kane: 2017). Similar to previous resolutions, the 1979 version reaffirmed the condemnation of repressive acts by colonial regimes (paragraph 5) and accentuated the importance of root causes (operative para. 5 & 6). Resolutions 36/109 and 38/130 adopted in 1981 and 1983, respectively, reflect somewhat of a novelty. Despite the usual tribute to the reaffirmation of the inalienable right to self-determination, the resolutions no longer contained provisions condemning acts by colonial or racist regimes. Importantly however resolution 36/109 only contained a general expression of concern regarding the "continuing acts of international terrorism which take a toll on innocent human lives" (UNGA res. 36/109, para. 1), whereas the 1983 resolution 'deeply deplored' the loss of life and highlighted the potential impacts of terrorism on relationships amongst states (UNGA res. 28/109, operative para. 1). One ought to also not forget that both resolutions make reference to the recommendations adopted by the Ad Hoc Committee in 1979, which, *inter alia*, urged the Security Council and the General Assembly to pay attention to situations (e.g. colonialism and racism) that give rise to terrorist violence (Recommendations Ad Hoc Committee : 1979, para. 11). Consequently, it becomes difficult to determine the extent to which the absence of any condemnation in the 1981 and 1983 resolutions represent a true break with past practises or if these are merely half-hearted gestures.

[35] See Yoder's "United Nations resolutions against international terrorism" for a more detailed reading on the proceeds that led to the adoption of the recommendations by the Ad Hoc Committee , particularly pages 506-508.

While there was a general consensus that terrorism was not acceptable, the absence of any agreed upon conceptualisation made this practise of condemnation fruitless. It is fair to conclude that the committee entrusted with finding a common approach to dealing with terrorism was not successful. In little under a decade, members had failed to find common ground and consultations were leading nowhere. Too big remained the ideological and regional differences between countries of the West and the Third World Bloc. Although there were a number of recommendations that emerged from the committee in 1979, member states remained chained to their positions and the elaboration of a comprehensive approach (or convention) against terrorism remained a diplomatic nightmare. The ongoing struggle to put an end to colonialism and repressive regimes made any real progress challenging. On that score, it is also submitted that the General Assembly has taken a rather ambiguous approach to the subject of terrorism. Tellingly, in its later resolutions, particularly those enacted in 1981 and 1983, the Assembly appears to have no longer included references to the condemnation of acts committed by colonial and repressive regimes; yet it continued to endorse the recommendations which expressed such condemnation. Equally important, the previous discussion also allows for the conclusion that although members certainly agreed to some extent on the wrongfulness of terrorism, they were only willing to express so explicitly in resolution 34/145, only showing themselves concerned over acts of terrorism in its later resolutions.

With the committee in gridlock two observations can be made. The committee held the potential to become dangerous to Western interests; the Third World used the committee as an instrument to justify violence under certain circumstances; and the Soviet Union abused the committee to pay lip service to its support for the Third World, fostering relationships at the expense of the United States and its standing in the global order. That said, despite the understanding that the committee had lost all practical relevance, "it still had a certain general use as a stage for radical Third World countries to make noise to impress their domestic audience without causing too much damage" (Blumenau: 2014b, 100). The West German UN mission observed that such a stage would make it "easier for them [the Third World] to make silent concessions on certain aspects such as the fight against hostage-taking" (Blumenau: 2014b, 100). Perhaps it is helpful to conclude that although countries were engaging in counterterrorism consultations at the UN, any meaningful step towards counterterrorism cooperation remained absent and for the West these consultations were taking a dangerous direction as the UN had the potential of becoming a forum through which countries could legitimise terrorism. Fortunately, the resolutions drafted in the Ad Hoc Committee and adopted by the General Assembly did not remain the only response to terrorism. Amidst increasing political violence directed at diplomatic agents and the continued threat posed by hostage-takings, the focus shifted towards a problem-specific response. Focus gradually shifted towards achieving agreement on the criminalisation of specific terrorism-related offences. The main advantage of this form of response was that the organisation could circumvent any abstract philosophical debate on what terrorism is and agree on the outlawing of

a specific crime. It is for this reason that the two resulting conventions were a significant success.

## The United Nations' problem-specific response

The focus of the remaining chapter will be on the process[36] which led to the elaboration of both the Diplomats and the Hostages conventions. Although neither the Diplomats Convention nor the convention on the Taking of Hostages were adopted without contention, these two agreements can nevertheless be regarded as successful outcomes. The ensuing sections will address the main areas of disagreement and will comment on the central provisions of the respective conventions to the extent that they are relevant to the research objective at hand.

Aviation terrorism and hostage-taking certainly remained a prominent threat to the international community in the early 1970s. There was nevertheless another manifestation of terrorist violence that troubled countries of the West (and later of the Arab world) and that provided an impetus for the United Nations to take action. In fact, the United States was concerned that the kidnapping of diplomats, especially in Latin America, could become as "…epidemic a problem as air plane hijackings" (Onis: 1970, 1). Terrorist organisations, from Marxist extremists in Latin America to Palestinian terrorists in Khartoum, quickly understood that the kidnapping of diplomats as a political weapon was an effective means to get attention. In 1968, United States Ambassador John Gordon Mein "…was machinegunned in the back when he tried to run from his official automobile during a kidnap attempt" (Onis: 1970, 2), and in September 1969 the US Ambassador to Brazil, Burke Elbrick, was kidnapped and released only after fifteen prisoners were discharged (Stechel: 1972, 203). The Mein and Elbrick kidnappings were only the first of what became a dangerous time for diplomats abroad. "Within little more than a year after the ransoming of Elbrick, three other diplomats representing Switzerland, Japan and the United States, were kidnapped by Brazilian terrorists. The diplomats were only freed after 130 left-wing guerrillas held by Brazilian authorities were released" (Stechel: 1972, 203). The case that arguably received most attention from a Western perspective was the kidnapping of the West German ambassador to Guatemala in March 1970, leading to considerable diplomatic tensions between West Germany and the Guatemalan governments.[37] More so, in December of 1970 the West German consul to Spain was kidnapped by ETA terrorists and in October of the same year members of a Canadian revolutionary cell kidnapped the British Trade Commissioner. And in May of 1971 members of the Turkish People's Liberation Army kidnapped the Israeli Consul-General, who was later executed due to the Turkish government's refusal to release imprisoned members of the group (NYT: 1971, 1).

[36] See Green's "Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons: An Analysis" for further reading on the adoption procedure. Footnotes 10-15 on pages 706-708 are especially informative in this regard.

[37] See pages 41-44 in Blumenau's "The United Nations & Terrorism Germany, Multilateralism & Antiterrorism Efforts in the 1970s" for a more detailed treatment of the case and its diplomatic consequences.

*The Diplomats Convention*

The adoption of the Diplomats Convention was rather unique inasmuch that the deliberations were swift and relatively uncontentious. Granted, the rapid adoption of the Diplomats Convention was largely owed to the sharp rise in attacks against diplomats the world over.[38] "[T]he fact that this Convention [Diplomats Convention] would principally benefit the very people who were negotiating it [also] contributed to its speedy and successful adoption" (Blumenau: 2014b, 77). Although the adoption of the convention was not without its setbacks, the acknowledgment that countries of the West, the East, and the developing world alike were afflicted united the negotiation efforts in the drafting committee. Attacks against diplomats proved problematic for a number of reasons. For one, attempts on the life of a diplomat or an attack against a diplomatic facility yielded great symbolic value to the terrorists, and for another, such acts often resulted in embarrassment to the government in which the attack occurred (Levitt: 1989, 542). The hostage-taking and assassination of diplomats also had broader implications for the peaceful relations among states. The kidnapping of the German Ambassador Karl von Spreti in Guatemala in 1970 serves as a telling example. The West German government was frustrated at how the Guatemalan authorities handled the case and in consequence expelled the Guatemalan ambassador from Bonn, deteriorating relations between the two countries (Blumenau: 2014b, 43). It was against this backdrop that the international community set out to adopt a legal instrument that, on paper at least, would ensure the safety of diplomats in the future.

Over the course of two years, the ILC, the Sixth Committee, and a drafting group set out to elaborate the provisions that would later be adopted in the General Assembly by consensus. The efforts taken by the ILC in respect to the protection of diplomats were considered in the broader context of international counterterrorism cooperation. The International Law Commission recognised "…that the question of crimes committed against such persons, is but one of the aspects of a wider question, the commission of acts of terrorism. The elaboration of a legal instrument with the limited coverage of the present draft [Draft Diplomats Convention] is an essential step in the process of formulation of legal rules to effectuate international co-operation in the prevention, suppression and punishment of terrorism" (ILC Report A/C.4/L.191: 1972, para. 65). The ILC thus understood that the Diplomats Convention was only a stepping stone in the organisation's larger efforts to respond to terrorism. In their submission to the ILC there were several countries that considered existing instruments, such as the Vienna Convention on Diplomatic Relations, ample in dealing with the threat to

[38] Some examples of which included: The US Ambassador John Gordon Mein in Guatemala, US Ambassador Burke Elbrick in Brazil, West German Ambassador Karl von Spreti in Guatemala, Swiss Ambassador Giovanni Bucher in Brazil, the First Secretary at the US Embassy in Amman, the West German Consul Eugen Beihl in Spain and the kidnapping of four US airmen in Ankara. It was truly a global concern. See Baumann's "The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism" for further reading on attacks against diplomats.

diplomats.[39] France and Australia in particular maintained that existing international instruments placed obligations on the host state to protect diplomats and as a consequence the problem could be controlled without the adoption of additional conventions (Green: 1974, 706 (footnote 10)). It is, however, correct to argue that given the continued kidnapping of diplomats existing instruments were insufficient, and what is more, existing instruments did not adequately address the matter of safe havens and extradition as well as mutual judicial cooperation and international cooperation in general. With this in mind, the draft elaborated by the ILC built on the principles adopted by the ICAO's Hague and Montreal conventions, tackling the issue of safe havens through the principle of *aut dedere aut judicare* and accentuated the importance of cooperation in counter-terrorist activities. The draft was then submitted to the drafting group of the Sixth Legal Committee, where, as discussed in further detail below, familiar points of contention arose. In particular, divergences of outlook appeared in regard to the right to asylum, extradition obligations, the definition of the crime and the extent to which, if at all, the convention should be applicable to crimes committed against diplomats in the course of self-determination and in response to foreign subjugation.

The success of the convention can be traced back to the common interests of the West, East, and the Third World in protecting diplomats and conversely relations between states, no matter how strained they might be. The main objective of the convention was to provide a legal basis for the punishing of terrorists and bringing them to justice. In the aftermath of the Khartoum crisis in 1973, there was mounting evidence that suggested that the culprits managed to flee to Egypt and were never seen again (Blumenau: 2014b, 51). Likewise, the terrorists responsible for the hostage-taking at the OPEC Headquarters in Vienna in 1975 initially escaped with impunity and were only arrested years later.[40] And so, bringing terrorists to justice as an attempt to deter the proliferation of terrorism was certainly a central concern to the negotiators of the Diplomats Convention. Article 1 defines the term "international protected persons" to mean heads of state, any representative or official of a state, including an agent of an intergovernmental organisation. Article 2(2) is a key provision as it not only outlines the relevant crimes but moreover obliges parties to "make these crimes punishable by appropriate penalties which take into account their grave nature" (Diplomats Convention: 1973, Art. 2(2)). It was *a propos* the first portion of Article 2 that states decided to remove the phrasing 'regardless of motive.' Indeed, the draft articles were initially written in such a way that "the intentional commission, *regardless of motive* [emphasis added] [of] [a] violent attack upon the official premises, the private accommodation or the means of transport of an international protected persons likely to endanger his person or liberty" (Draft Convention considered in Green: 1974, 710). As the article was however later adopted, member states could only agree to

[39] See Wouters & Duquet's insightful commentary "The Vienna Conventions on Diplomatic and Consular Relations" for further reading. See also Maria Tokey's "Fight against Terrorism in the Light of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents" on further reading on Article 22 and 29 and the obligation to protection foreign diplomats.

[40] Hans-Joachim Klein was not arrested (or better yet turned himself in) until 1998 and Carlos "The Jackal" (Orginally Ramirez Sanchez) was 'extradited' from the Sudan to France in 1994.

criminalise "the international commission of…" (Diplomats Convention: 1973, Art. 2), without excluding exceptions based on motives. It is plausible to conclude that the ILC intended to remove the intention of the crime from consideration. If the motive of the crime becomes irrelevant it would be more difficult for a state to declare a crime a political act and the right to asylum would not provide a pretext for offenders to escape with impunity. In including the phrase 'regardless of motives,' governments would limit the extent to which terrorists can evade justice by escaping to a country that might be favourable to their cause and by requesting asylum in that country. As the text was adopted without the explicit emphasis on 'regardless of motive' the conclusion can be drawn that member states were unwilling to distance themselves from terrorism in all circumstances. In more practical terms, the convention would continue to provide governments with the basis for refusing to punish a terrorist by emphasising the political motive of the perpetrator.

Article 3 of the convention deals with the matter of jurisdiction and requires countries to take "such measures as may be necessary to establish its jurisdiction over the crime set forth in article 2" (Ibid: 1973, Art. 3), listing a number cases in which jurisdiction is to be established. Jurisdiction is thus recognised irrespective of whether the crime was committed on a state's territory, if the offender or the victim was a national of a respective state or if the act was directed against the state itself. In practise, the obligation to apply jurisdiction would prevent countries from claiming that the crime was not committed on their territory or that it does not concern them. At a minimum, it would provide the legal basis for countries to act despite the crime not having been committed on their territory or directly against their state.[41] The convention further established a state's obligation to ensure the presence of the alleged offender for extradition or prosecution (Article 6) and a party's obligation to submit the case to competent authorities for the purpose of prosecution (Article 7). The provisions contained in Article 6 are indeed vital to efforts aimed at curtailing the use of safe havens by terrorists. Only when a country is obliged to ensure that an alleged offender that is within its territory is present can extradition or prosecution follow. It is however Article 7 that is perhaps the most important provision of the convention as it places an obligation on states to either extradite an alleged offender or to submit the case to its authorities for the purpose of prosecution. While a state may deny extradition on the basis of a number reasons, including national traditions, a terrorist can – in theory – no longer evade justice. Yet, one ought to concede that the provision remains limited in one essential point: Similar to the short-coming outlined in respect to the Hague and Montreal conventions above, the Diplomats Convention only requires that the case be submitted to authorities for the *purpose* of prosecution. There is thus no duty to proceed to trial or let alone to a judgment. In practise, a country could thus refuse to extradite and *pro forma* submit the case to its authorities who in turn decide to adjourn criminal prosecution based, *inter alia*, on lack of evidence. Nevertheless, Article 2 obliges states to make the crimes outlined punishable, taking into account

[41] Article 4 and 5 set out obligations for countries to co-operate in preventing the crimes laid out in Article 2 from taking place and requires states to share "all the pertinent facts regarding the crime committee and all available information regarding the identity of the alleged offender" (Diplomats Convention: 1973, Art. 5(2)).

the grave nature of the crime, hence closing any loopholes that would allow the offender to escape unpunished.

Equally important, the crimes listed in Article 2 were classified as an extraditable offence (Article 8). This provision is useful as it provides the necessary legal basis for extraditing an alleged offender. As the previous discussion has indicated, states have domestic traditions (e.g. not extraditing nationals) and bilateral arrangements (e.g. political offence exception) that may have in the past prevented the extradition of an offender. This article attempts to close this gap by determining that the offences laid out in the convention do not fall under these exceptions. In respect to the rights of an alleged offender, Article 9 stipulates that "[a]ny person regarding whom proceedings are being carried out in connection with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings" (Diplomats Convention: 1973, Art. 9). Despite not including a further description on what is meant with 'fair treatment,' the provision is nevertheless noteworthy as it indicates member states' unwillingness to compromise the rule of law in the fight against terrorism. Above all else, it is a provision that helps highlight the criminal justice nature of the General Assembly's response to counterterrorism.[42]

In the course of the discussions on the draft articles on the right to asylum (Article 12) and extradition, several members insisted on the crimes in the draft to be considered political in nature (Green: 1974, 709).[43] Keeping in mind that many extradition treaties treated political crimes as non-extraditable offences (Peterson: 1992, 773-778), an inclusion of such a provision would render the Diplomats Convention rather meaningless. If the right to asylum were to be included, the core principle of extradite or prosecute would no longer hold and the system of deterrence that built the foundation and the rationale behind the convention would be weakened. Latin American countries were in particular troubled by the prospect of any omission to the right to asylum. Indeed, it was especially in Latin America that efforts "to suppress and punish acts of international terrorism have run into problems arising from the complex matrix of asylum, extradition, and the political offence exception. Under the Latin American view, a decision to grant asylum to an accused is necessarily incompatible with the imposition of criminal penalties for offences committed prior to the grant" (Murphy: 1985, 40). There was a long-standing tradition of political asylum in these countries and considering the precedent set by a similar convention by the regional Organisation of American States (OAS),[44] Latin American countries

[42] Other provisions settle a party's obligation to providing all available evidence and afforded one another judicial assistance (Art. 10), the right to asylum discussed in further detail above (Art. 12), conflict and arbitration (Art. 13) and other provisions of a more administrative nature.

[43] There was also disagreement regarding the question of arbitration. In particular the question arose whether the convention should include mandatory dispute settlement mechanisms or if arbitration at the request for one party of the dispute is sufficient to trigger a settlement proceeding. See Green's work in this regard.

[44] Despite the Diplomats Convention having been the first on this matter at the United Nations, the regional Organisation of American States (OAS) adopted a similar convention in February of 1971[44]. The convention to Prevent and Punish the Acts of Terrorism taking the Form of crimes Against Persons Related to Extortion that are of International Significance[44] set out to criminalise a set of crimes (e.g. Kidnapping, murder) directed against those individuals whom a government has a distinct responsibility to protect (e.g. heads of states or

were unsettled by any provision that would infringe on their right to decide when to grant political sanctuary and when to reject it. This was indeed a problematic predicament. If countries retained sole control over whether the crime was political or ordinary in nature, the cohesiveness of the convention was at risk. More so, the "extradite or prosecute" provision would lose weight and safe havens for terrorists would persist. In practical terms, this would also mean that immunity from prosecution would become a likely consequence. Although no clear agreement could be reached, a limited provision on the use of asylum was incorporated into the final convention. Corresponding Article 12 stipulates that the convention will not infringe on existing treaties on asylum that are in force at the date of the adoption of this Convention. Notably however, "…a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not party to those Treaties" (Diplomats Convention: 1973, Art. 12), essentially limiting the scope of applicability to Latin American countries.

Another particular difficulty that member states faced was in respect to scope. As deliberations on this subject unfolded, an old set of patterns emerged. The West wanted a convention that was as comprehensive as possible and the Third World Bloc again sought the exclusion of acts committed by national liberation movements and in the course of self-determination. On the eve of the adoption of the convention, countries from the developing world[45] proposed a new article that would "make the convention inapplicable to acts committed by 'people struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid.'" (Levitt: 1989, 544). There are however two observations to be made. First, as the negotiations were unravelling terrorists seized the Saudi Embassy in Sudan in March of 1973, notably also holding, amongst others, Saudi and Sudanese diplomats hostage (Blumenau: 2014b, 50). Although the attack on the embassy unfolded a few months prior to the adoption of the convention in the General Assembly, the events certainly impelled countries who have previously been spared from terrorist violence to take the threat more seriously while drafting the convention. Equally significant was Moscow's evident interest in protecting its diplomats and ensuring regulated international relations. Granted, the Soviet Union frequently positioned itself with countries from the developing world, presumably also in an attempt to undermine American influence; they would not capitulate to the Third World's endeavour to exclude national liberation movements from the scope of the convention (Blumenau: 2014b, 77).

The solution to the problem was eventually reached in the form of compromise resolution 3166. The General Assembly adopted the Diplomats Convention in the annex to resolution 3166, which in operative paragraph 4 decided that the provisions

diplomatic agents). Such crimes were also made extraditable offences under the OAS Convention, the purpose of which was to "exclude violent attacks against diplomats from the political offence exception in extradition law and practise" (Murphy: 1985, 12)[44].

[45] States that supported the last-minute amendment include *inter alia*: Afghanistan, Algeria, Chad, Congo, Yemen, Egypt, Liberia, Libyan Arab Republic, Malia, Mauritania, and Syrian Arab Republic. For a full list see UN Document A/9407.

of the convention "could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid" (UNGA resolution 3166: 1973, para. 4). Operative paragraph 6 moreover conceded to publishing the convention only in conjunction with the resolution. Doing so did not place countries under any legal obligation but provided a rather confusing context for the interpretation of the Diplomats Convention. It is perhaps due to the fact that the reference made in paragraph 4 of the resolution was not part of the actual convention-text that Western countries were willing to accept resolution 3166 as it was finally worded. The manner in which governments understood the relationship between the resolution and the convention was by no means a forgone conclusion. Upon adoption of the resolution and the convention a number of countries took the floor and provided more context on their position. For example, Portugal reiterated that it did not recognise the resolution as a pretext for the "practise of acts of violence and terrorism condemned by the convention" (Portugal in Green: 1974, 726) based on the principle of the exercise of the right to self-determination. Portugal further contended that "the Portuguese delegation believes that operative paragraph 4 is poorly conceived and misplaced in the resolution approving the text of the convention" (Ibid: 1974, 726). Upon adoption, the West German government also expressed its understanding of the peaceful right to self-determination and further stressed that the prohibition on the use of force engraved in the United Nations Charter, and referenced in operative paragraph 4 of resolution 3166, also applies to the right of self-determination (Blumenau: 2014b, 110). [46] Similar to states, national liberation movements would thus be bound by the prohibition of the use of force stipulated by the UN Charter. By the same token, Algeria, Iraq, and Cuba maintained that the provisions of the convention cannot be understood as infringing on the struggles of peoples for their liberation, or as the Algerian delegate put it, "the affirmation of their national identity or the preservation of their dignity" (Algeria in Green: 1974, 727). It is certainly far from evident, that countries had a common understanding of the scope of the convention. In this regard one scholar observes, "…the accompanying resolution could be seen as a further vehicle for allowing an examination of the motivations of an act of terrorism directed against a diplomatic agent. Then, if the State Party undertaking such an examination found it to be a political act, motivated by the 'exercise of the legitimate right to self-determination…by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination, and *apartheid*' it could refuse to abide by its obligations under the convention – which would usually mean a refusal either to extradite or prosecute the offender" (Green:

[46] Other delegations made similar observations. For instance, the representative from the United Kingdom asserted that there cannot be any conflict between the obligation on the prohibition on the use of force the exercise of independence and self-determination. See UN Document A/P2202 for further reading on the respective country statements.

1974, 727).[47] Although countries were able to forge an agreement that culminated in the adoption of the Diplomats Convention in December 1973 there remained very different interpretations of its applicability, which was further compounded by the adoption of provisions that highlighted the continued insistence on the right to self-determination (para. 4) in resolution 3166.[48] Member states therefore continued to remain rather ambiguous in their condemnation of terrorism in any and all circumstances.

The successful adoption of the Diplomats Convention would not serve as a model for future conventions as the adoption of the convention was made possible by a shared interest in upholding proper diplomatic relations between countries. The negotiation process has highlighted that many of the problems faced in earlier UN efforts (e.g. adoption of a resolution in 1972) recurred. This conclusion is best related by the adoption of resolution 3166, which asserted that "the convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence … by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid" (UNGA res. 3166: 1973, operative para. 4). It was also of no less significance that the Assembly decided that the resolution should always be published together with the convention (operative para. 6), providing an interpretative framework to the instrument. Although the Diplomats Convention was certainly adopted with terrorist-related activities in mind, it does not mention the term in any of its provisions. To this end, it has counterterrorism application, but it is not an explicit counterterrorism instrument.

*The Hostages Convention: A cumbersome success*

The next significant convention that was negotiated was the International Convention Against the Taking of Hostages (Hostages Convention) in 1979. The taking of hostages

[47] Article 31 of the Vienna Convention on the Law of Treaties (VCLT) is a useful point of reference here. In addition to the treaty text, "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (VCLT: 1969, Art. 31) is to be drawn on for the purpose of interpretation and context.

[48] The disagreement on the extent to which offenders belonging to national liberation movements are subject to the provisions of the convention remains relevant to this day. When both Burundi and Iraq, to name two examples, were acceding to the convention they made reservations in that regard. Burundi reserved itself the right to not abide by the provisions of Article 2 paragraph 2. Article 2 enumerates the offences which paragraph 2 obliges states to criminalise (e.g. murder or kidnapping). A further reservation made by Burundi was in relation to Article 6 paragraph 1, ensuring the presence of the offender for the purpose of prosecution or extradition. In effect, Burundi maintained that an offender belonging to a NLM recognised by the country or an international organisation to which it is a member should not automatically be subject to extradition or prosecution (Tokey: 2005, 61). As of 2018 the reservation made by Burundi still stands (UN Treaty Depository Declarations and Reservations: 2018, 3-4)[48]. Iraq considers Resolution 3166 an integral part of the convention. Moreover, Iraq considers Article 1, paragraph 1 sub-paragraph b to cover representatives of national liberation movements recognised by Iraq or the Arab League (AL) or the Organisation of African Unity (OAU). The relevant article stipulates that "Any representative or official of a State or any official or other agent of an international organisation….is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household" (Diplomats Convention: 1973, Art. 1, para. 1, sub-para. b). In practise, members of NLM would be entitled to diplomatic protection under international law and would unlikely be faced with extradition or prosecution.

as a means of coercing governments to concede to political demands became a favoured weapon of terrorists by the mid-1970s. With the successful adoption of legal mechanisms dealing with terrorism against civil aviation and internationally protected persons, there certainly was growing optimism that a sectoral response would yield the most success. Terrorism as a tactic presents groups with a number of advantages, which in consequence becomes a challenge to governments. Hostage-taking is a rather inexpensive endeavour that requires little start-up costs. By taking an individual(s) hostage, organisations lacking a wealth of resources are able to force the hand of powerful governments into making a concession they would otherwise not do. Conversely, it becomes increasingly difficult for governments to give in to the demands, as success breeds imitation. In many cases – those which do not involve an aircraft or a boat or another form of mobility – hostage-taking is however a static effort, making both the terrorists and hostages sitting ducks. If nothing else, the taking of hostages is a rather public act that helps terrorists' work towards their goal of intimidating an audience beyond the immediate victims and can thus garner awareness and support from those favourable to the cause, providing a terrorist organisation with new recruits.

Some prominent examples of hostage-takings include the seizure of the Israeli Olympic headquarters in Munich in 1972, the OPEC 1975 incident, the hijacking of an Air France flight to Entebbe airport in 1976, and the three-year-long seizure of the American embassy and its staff in Tehran starting in 1979. Indeed, in respect to the Munich hostage-taking in 1972 a few observations ought to be made. When the hostage-takers demanded free passage out of Munich, German police saw an opening to try to free the hostages. It came to a fatal shoot out at *Fürstenfeldbruck,* the nine Israeli athletes were killed, and the surviving terrorists were taken into custody. The bodies of the dead terrorists were transported to Libya, where they were welcomed as heroes and laid to rest with military honours (Sonneborn: 2003, 52). And then there was the question of the terrorists taken into custody at the airport. With three Palestinian terrorists in German custody, the government feared reprisal, a fear that was not unfounded. Little over a month after the Munich Olympic incident, Lufthansa flight 615 heading from Beirut to Ankara was hijacked by Palestinian terrorists. The hijackers demanded the release of the three terrorists held by West German authorities and requested for the plane be flown to Zagreb. Despite calls by the Israeli government to not release the prisoners, "the German government was quick to transport the three prisoners to a plane of the Lufthansa subsidiary Condor, which was waiting in Munich…" (Blumenau: 2014b, 48). Herbert Culmann, the Chief Operating Officer (CEO) of Lufthansa ordered the plane to land in Zagreb, where the terrorists were handed over. The hijacked plane was flown to Tripoli, Libya, where the hostages were released and the terrorists escaped any criminal prosecution (Sibley: 1973, 3). It was the hostage crisis in Munich in 1972 that propelled the issue onto the world stage and gave the cause a global voice. Indeed, as one commentator recalled, Munich "awakened the media and world opinion much more - and more effectively - than 20 years of pleading at the United Nations" (Quoted in Hoffmann: 2006, 64).

There are a number of concerns that made an instrument that deals with hostage-taking a necessary enterprise. If the act takes place within one state and the perpetrator is found in that state, then the question of jurisdiction is settled. Yet, if the offence takes place in one state and the alleged offender is found in another because he or she was granted passage or managed to flee, it becomes more difficult to establish jurisdiction. In cases where an offender is taking into custody in a country where he has committed no crime, there is no obligation to submit the case for prosecution, meaning that the offender is able to evade justice. In the absence of an extradition treaty there is also no obligation to extradite, allowing terrorists to escape with impunity. Where an extradition agreement exists, the offender could be extradited to face punishment in the country where the act was committed. There are however two problems that present themselves. First, a common requirement of extradition treaties is that the act is a crime in both countries – that is, in the host country (where the offender is located) and in the requesting state (where the act was committed). Second, a common reason for denying extradition is the political offence exception included in most extradition treaties. If the offence for which a country requests extradition is political in nature, extradition treaties historically afford the possibility of denying extradition, in effect letting the offender escape unpunished.

The predicament is further compounded in cases where no bilateral extradition treaty exists, in which case extradition is left to the individual country to decide upon. In such cases, even if the country is willing to extradite, it may have no legal basis to do so. Granted, this certainly did not take practical shape and remained more of a theoretical reality. In practical terms, it is also difficult to believe that in the mid-1970s a country of the Non-Aligned Movement would have granted extradition of an offender to Israel, even if a legal basis for extradition existed. While hostage-taking was an offence under international humanitarian law, this was limited to hostage-taking within the context of armed conflict. Compounding the gap further, the already existing UN Conventions (ICAO convention-regime and Diplomats Convention) were limited in applicability. Simply put, hostage-taking aboard an aircraft or against internationally protected persons was a crime, but hostage-taking in the absence of an armed conflict and not involving civil aviation remained somewhat of a legal loophole internationally. The legal structure was therefore inadequate in dealing with the demands of the time. By 1976 it also became apparent that the Ad Hoc Committee on International Terrorism, which first took up its work in 1973, would make little progress (see above). Conversely, governments took steps to address the scourge of hostage-taking and set out to negotiate the Hostages Convention.

Having fallen victim to frequent hostage-taking both internationally and domestically (e.g. Stockholm embassy siege in 1975), the West German government proposed the inclusion of an agenda item that would deal with the question of adopting a convention against the taking of hostages (Saul: 2014, 1). In a letter to the Secretary-General in September of 1976, the Federal Republic of Germany recalled the adverse impacts that hostage-taking has had on the friendly relations between states and urged countries to take steps to adopt an appropriate legal instrument to counteract the

problem (West Germany in A/31/242: 1976). Germany argued that hostage-taking was "intolerable and incompatible with universally accepted standards of human conduct" and that both the Universal Declaration of Human Rights and the International Covenant on Civil Political Rights were at risk (Ibid: 1976, para. 5). After four years of cumbersome negotiations, member states adopted the Hostages Convention in December of 1979. Although the convention closely follows the patterns established by the ICAO convention-regime and the Diplomats Convention, there are a number of innovations that will be examined in due course. More so, a review of the adoption process demonstrates that countries continued to favour different responses to curb terrorism, the basis of which stem, *inter alia,* from the perception of the (il)legality of violence in the course of national liberation movements. These points of contention will likewise receive considerable attention below.

The General Assembly added the item of hostage-taking to its agenda and entrusted the Sixth Committee with organising the drafting of the convention.[49] Considering that the ILC had resolved the technical legal problems when it drafted the Diplomats Convention, the Federal Republic of Germany suggested the establishment of an Ad Hoc Committee to deal with the drafting and not the ILC (Rosenstock: 1980, 174).[50] It was indeed not the legal problems that would prove most contentious but rather the diverging political positions, a reality that would best be accommodated by a committee able to address political concerns such as an ad hoc committee . As the countries of the Third World were now holding a two-thirds majority, neither the Western bloc nor the socialist countries, on their own, would be successful if it came to a vote. As a consequence, the drafters would have to aim for a broad consensus to avoid the convention being voted down in the General Assembly.

From the very beginning the familiar disagreements between member states emerged. Libya, for instance, introduced the idea of innocent versus guilty hostages. Early on in the discussions in the Ad Hoc Committee, Libya – with the support of other Arab countries – sought to expand the definition as to include the detention of masses under colonial rule (Romero: 1997, footnote 27). Other suggestions favoured a definition of hostage-taking that would exclude crimes committed in the course of national liberation.[51] The addendum was later dropped, yet the philosophical thought behind it foreshadowed the difficulty of finding a consensus among states. A victim could become guilt simply by association. If such a concept would be included in the text, then a highly subjective and interpretative sentiment would have been included in the convention – one that would, as Kaye argues, render the convention "utterly useless" (Kaye: 1978, 454). In the context of national liberation such a distinction would indeed be troubling as an incident of hostage-taking could be justified on the basis that the

[49] Given protracted and detailed-focused nature of the legislative process, this thesis can only provide a synopsis of the developments. See Kaye's "The United Nations Effort to Draft a Convention on the Taking of Hostages," Commonwealth Secretariat's Chapter Seven "International Convention Against the Taking of Hostages 1979" and Platz's "International Konvention gegen Geiselnahme" for more comprehensive reading on the legislative history of the Hostages Convention.
[50] See also UN Doc. A/AC.188/L.9.
[51] See Rosenstock's analysis and UN Doc. A/AC.188/L5 for more detailed discussions on this subject.

victim is guilty merely by being a citizen of a country, to name one example. Upon the recommendation of the Sixth Committee, the General Assembly adopted resolution 31/103 and established an ad hoc committee. The committee[52] was tasked with drafting a convention text and submitting the text to the General Assembly for consideration at the earliest possible date. In August 1977, the Ad Hoc Committee held its first session in which it considered the fourteen-article draft submitted by West Germany. During its first session, the committee was limited to discussions on the importance of such a convention, the legitimacy of national liberation movements and Libya's categorization of innocent and guilty hostages became an issue once again and bore witness to discussions on mass hostage-taking by the state (Platz: 1980, 279). The suggestions of distinguishing between innocent hostages and guilty ones, as well as the proposal to include states as potential hostage-takers, did not attract wide support and were subsequently dropped (Saul: 2014, 3).

The General Assembly extended the mandate of the Ad Hoc Committee at its 32nd session and established two sub-working groups, one of which was to deal with the more contentious questions whereas the other formalized the draft articles where agreement had already been reached[53] (United Nations: 2012, 1). On the basis of the German draft, the committee was able to forge a consensus on most of the provisions. Yet, the politically sensitive provisions would remain fundamental points of contention, such as the exact definition of the crime, the place of national liberation movements within the scope of the convention, the question of national sovereignty in the context of hostage-rescue (e.g. Entebbe 1976), and how the right to asylum can be accommodated with the obligation to extradite alleged offenders (Platz: 1980, 279).[54] The Ad Hoc Committee held its final session in Geneva in January and February of 1979 where it was able to forge agreement on the applicability of the convention to national liberation movements and on the matter of safeguarding territorial integrity in the course of hostage-rescue operations (United Nations 2012, 2). In short, the Third World bloc and the West agreed on a formulation that would uphold the concept of extradition or prosecution without infringing on the right of people in their struggle for self-determination. Member states agreed, in Article 12, that the convention "shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols hereto, including armed conflicts…in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Hostages Convention: 1979, 210). In practise, the exception for national liberation movements that Arab and African states attempted to exclude from the Hostages Convention would not go unpunished. The legal basis for prosecuting such acts would not necessarily have to be the Hostages Convention but could originate from the Geneva Conventions and its 1977 Additional Protocols. In simpler

[52] The first session was held from the 1st to the 19th of August in 1977 in New York and the second session was held in Geneva from the 6th to the 24th of February of 1978.
[53] See Ad Hoc Committee Reports A/33/39 for a detailed reading on the work of the Committee and the recommendations made.
[54] See the reports of the Working Group I (A/33/39 and A/34/39) from 1977 and 1978 for further reading on the progress made and where the membership was unable to find agreement.

terms, terrorists would face justice either under the provisions of the Hostages Convention or under International Humanitarian Law, in effect diminishing loopholes and exceptions. In return, the West agreed to include a provision that protects the political independence and territorial integrity of every country (Saul: 2014, 4). Article 14 thus stipulates that this convention shall not be misunderstood as a pretext to violate the provisions of the UN Charter, which prohibit the use of force against another state. There was, however, no agreement forged on the right to asylum, a provision strongly favoured by Latin American countries, and on the exclusion of extradition under certain circumstances. In consequence, consultations continued into the 34th session of the General Assembly. Consequently, governments established a working group that would consider the draft articles for a final time (United Nations: 2012, 2). Finally, on December 17th 1979 the Sixth Committee adopted a draft resolution with the final draft of the International Convention against the Taking of Hostages annexed. On the matter of asylum, the members agreed to stick to the text adopted in the Diplomats Convention and decided that the "[c]onvention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between States which are parties to those Treaties; but a Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those treaties" (Hostages Convention: 1979, Art. 15). On the matter of extradition (Article 9), it came to a vote. States were consequently permitted to deny extradition in cases where the alleged offender is believed to be persecuted due to his race, religion, nationality, ethnic origin, or political opinion, or in cases when any other prejudice might be determined (discussed further below).

Similar to the Diplomats Convention, the Hostages Convention defines the scope of the crime (Article 1) and obliges parties to the convention to "make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences" (Hostages Convention: 1979, Art. 2). The criminalisation of the offence was not new considering that The Hague, Montreal, and Diplomats conventions contained similar provisions.[55] In terms of prevention, Article 4 is similar to its predecessors and obliges parties to "take all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories…including measures to prohibit in their territories illegal activities…" (Hostages Convention: 1979, Art. 4(a)). This preventative clause follows almost verbatim what the members agreed in Article 4 of the Diplomats Convention. Each state is required to establish jurisdiction when the act occurs within its territory, when the offender is a national, when the state is the subject of compulsion, or when the hostage is a national of the respective state (Ibid.:1979, Art. 5). The only difference between the two conventions is *a propos* jurisdiction and relates to the expansion of the Hostages Convention to include the passive personality principle – that is, a state can establish jurisdiction when the *victim* is a national of that state.

[55] There was also heated discussion on the role of intent and motivation in the definition of the crime and hostage-taking by states. See Kaye's "The United Nations Effort to Draft a Convention on the Taking of Hostages" for further reading on the respective proposals introduced.

The Hostages Convention further places an obligation on states to cooperate in the prevention of the crimes and furthermore compels parties to take all "practical measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organisations encourage, instigate….acts of takings of hostages" (Hostages Convention: 1979, Article 4 (a)). Besides the familiar obligation of states to ensure the presence of the alleged offender for the purpose of criminal proceeding or extradition, the convention furthermore details the rights of the alleged offender (Article 6). Accordingly, an offender is afforded the right to communicate with the appropriate representative of his state (Art. 6 para 3). There is, however, a noticeable expansion to the due process obligations placed on parties. Article 6, paragraph 5 mandates the right of countries to invite the International Committee of the Red Cross to visit the alleged offender. Although minor, the rights afforded to an alleged offender are safeguarded and counterterrorism is not an excuse to violate due process rights. The corresponding article in the Diplomats Convention does not afford this right and only extends visiting rights to state entities (Diplomats Convention: 1973, operative para. 6(a)). The Hostages Convention thus provides the alleged offender with access to a third-party representative in cases where no diplomatic relations between the two involved states exist or if the offender is in any way prejudiced by his own state. It is an early attempt that endeavours to protect the rights of the offender and one that considers cases where an offender might have an unfavourable relationship with his or her own state.

The cornerstone of the Hostages Convention is, however, Article 8. If an alleged offender is found in the territory of a party to the convention, he or she is either extradited or the case is submitted to the competent authorities for prosecution, without exception whatsoever (Ferreira & Carvalho et al.: 2013, 204). While it is perhaps fair to conclude that states favour extradition, the aim of the conventions thus far has been to close any legal loopholes that would allow an alleged offender to evade justice and punishment regardless of whether he is extradited or prosecuted domestically (Saul: 2014, 6). Similar to the Diplomats Convention, Article 8 guarantees the alleged offender "fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present" (Hostages Convention: 1979, art. 8 (2)), again representing an intrusion of sorts into a country's domestic affairs. Together with Article 6 paragraph 3 (right to communicate with a state representative or the Red Cross) this article illustrates the UN's early efforts to safeguard the right of the offender, adhering to the rule of law and initial efforts at upholding the principle of due process in its counterterrorism endeavours. Some governments have tended to "cloak their most repressive laws under the title of antiterrorism and it is reasonable to ensure that actions of the international community are drafted in such a manner as not to permit them to be used, or more accurately, abused, as an instrument of repression rather than a tool for protecting such basic rights as life, liberty, and security of person" (Rosenstock: 1980, 175). Although this observation was made in respect to the preambular portion of the convention, the inclusion of the 'fair treatment' clauses can

certainly also be understood with Rosenstock's comment in mind. Article 8, however, contains a troubling short-coming. The article does not guarantee that justice will be served. The only obligation placed on parties is that the case be submitted to competent authorities for the purpose of prosecution. As previously alluded to, an alleged offender may still evade punishment if the authorities determine that there is insufficient evidence to proceed to trial, to name one example (Platz: 1980, 293). The foregoing discussions, especially those in the Sixth Committee, suggest that there was a clear divergence on what member states considered to constitute an act of terrorism. Conversely, a state favourable to a certain terrorist cause can still get around bringing terrorists to justice as there was no obligation to punish but only one to seek punishment. Equally important, the second portion of the article on the topic of affording an alleged offender the right to a fair treatment remains vague and leaves parties considerable room to determine what 'fair treatment' looks like. Any reference to existing instruments, like the International Covenant on Civil and Political Rights[56] adopted in 1976, remain absent.

A significant novelty introduced by the Hostages Convention is Article 9, providing parties an opportunity to deny extradition when a state has grounds to believe that the request is made for the purpose of prosecuting or punishing an individual based on his race, religion, nationality, ethnic origin, or political opinion. Granted, a first reading of the article would give rise to the conclusion that exceptions can be made based on the political nature of the crime. Yet, a holistic reading of the convention suggests that in cases where extradition is denied, the state remains obliged to submit the case for prosecution, ensuring that the principle of *aut dedere aut judicare* is upheld. However, the focus is not on the offence itself but rather on the motives of the requesting state (Commonwealth Secretariat: 2002, 145). In any case, extradition cannot be refused if the hostage-taker was motivated by his political views but only if the extradition request was made for the purpose of prosecuting someone because of his/her views (Ibid.: 2002, 145). It is also useful to consider the broader implications of the article. Indeed, while the convention continues the practise of trying to bring terrorists to justice, Article 9 further demonstrates the United Nations' attempts to protect the rights of alleged offenders and due process. The rights to a fair trial and impartiality are also implied by the provisions laid out. Where there is concern that the legal system of a requesting state is such that due process and the right to a fair trial are not guaranteed, possibly also as a result of the political inclination of the alleged offender. Arguably, Article 9 does leave room for abuse. A government can refuse to extradite an alleged terrorist by claiming that he or she is persecuted based on race, religion or a political opinion while the truth of the matter is that the refusing government is supportive of the respective cause. Granted, the case would still have to be submitted to the prosecuting authorities, but such efforts could remain to no avail.

[56] Part 3 of the Covenant outlines the procedural fairness of law, the rights of due process and the principle of presumption of innocence. These concepts are enshrined within Articles 14, 15 and 16 of the Covenant, yet it remains speculation to what extent these are considered in the context of the Hostages Convention.

The right to granting asylum proved to be another provision with the potential of jeopardising the *aut dedere aut judicare* principle that many Western countries were striving for. At its core, the right to asylum provides a state with the basis to refuse the extradition of an offender for a crime that is political in nature. The original proposal introduced by Mexico suggested including the phrasing "none of the provisions of this Convention shall be interpreted as impairing the right of asylum" (UN Doc. A/34/39: 1978, 6). This formulation would have put the principle of extradition or prosecution at risk as it opened the opportunity to prevent extradition based on the fact that asylum was granted. This would indeed have impaired the principle of *aut dedere aut judicare,* as the Mexican proposal did not make it abundantly evident whether, in the absence of extradition, the case would have to be submitted to competent authorities for prosecution (Platz: 1980, 297). In practise, Article 15 (see above) is limited in scope to Latin American countries, and as Wood dully noted in respect to the Diplomats Convention, it does not relieve a party from its obligation to submit the case to competent authorities for the purpose of prosecution (Wood: 2008).

Article 12 was a further provision that provoked a great deal of discussion between Third World countries and the West. After numerous negotiation attempts, members finally agreed to exclude acts committed in armed conflicts from the scope of the convention (Saul: 2014, 3). Article 12 was only made possible by the then-recently adopted Additional Protocols in 1977 to the Geneva Convention of 1949. There was considerable debate whether hostage-taking committed by national liberation movements should be subject to the scope of the convention. Seeing that this altercation was already addressed above and will be the subject of discussion in subsequent chapters, only a short synopsis remains necessary here. Early on, the delegate from the United Republic of Tanzania made it clear that the convention "must under no circumstances be capable of being invoked against national liberation movements which took their oppressors hostage in the course of a struggle against colonial government or a racist foreign regime" (Tanzania in Verwey: 1981, 72). With the support of Algeria, Egypt, Libya, and Nigeria, amongst others, the following amendment to the convention was suggested: "[f]or the purpose of this Convention, the term 'taking of hostages' shall not include any act or acts carried out in the process of national liberation against colonial rule, racist and foreign regimes," by liberation movements recognised by the United Nations or regional organisations" (Ibid.; 1981, 73).[57] In their effort to safeguard the position of the NLM, the Third World Bloc insisted on the categorization of innocent versus guilty victims, the need to focus on the question of motive as a reason to deny extradition (see discussion on Article 9 above) and more abstractly the concept of just cause (*justa causa*). Verwey aptly puts it by saying "…it is submitted that acceptance of the idea of *justa causa* would entail two risks, escalation and proliferation. On the one hand, once the self-appointed defender of a just cause is permitted to commit a specific, otherwise prohibited, act like hostage taking, why should he not subsequently claim to be entitled to commit

[57] At later sessions of the Ad Hoc Committee other countries made similar demands. See UN Docs. A/32/39 (1978) and A/33/39 (1979), as well as the earlier records UN Doc. A/AC.188/L.4 for a detailed reading on this matter.

other prohibited acts, like using poison gas?" (Verwey: 1981, 75). He further maintains that "…once one political movement is identified as a defender of a just cause, why should others not subsequently claim to be defenders of other just causes, and thus to be entitled to the same exception rights?" (Ibid.: 1981, 75). The maxim 'one man's terrorist is another man's freedom fighter' thus fittingly summarizes the discussion on this article. The Western countries were however adamant in not allowing any exclusions to the scope of the convention (Blumenau: 2014a, 172). The idea of just causes as a potential exemption would have rendered it completely meaningless. Indeed, as one commentator puts it: "…once one political movement is identified as a defender of a just cause, why should others not subsequently claim to be defenders of other just causes, and thus to be entitled to the same exception rights?" (Verwey: 1981, 75). However, after lengthy negotiations, a compromise was reached by the final session of the Ad Hoc Committee in 1979; Article 12 of the convention would refer to international humanitarian law to cover hostage-taking in cases where the Hostages Convention fails to apply. More precisely, if a state has an obligation to extradite or prosecute an offender under one of the Geneva Conventions and its Protocols, then the Hostages Convention would not take effect. If, however, no such obligation exists, a state party is obligated to draw on the Hostages Convention as legal basis and take action (O'Donnell: 2006, 864). The article achieves the objective of ensuring that the principle of *aut dedere aut judicare* is upheld. A state is required to prosecute or extradite either by the provisions of the Hostages Convention or equally so under the obligations placed on contracting parties by the 1949 Geneva Conventions and Additional Protocols of 1977. In practise, a perpetrator could not escape justice or rely on safe havens on the grounds that no international instrument finds application.

On July 4th 1976, 248 passengers of an Air France flight were taken hostage by members of the PFLP and the German Revolutionary Cells. Over the course of the hostage-taking the non-Jewish passengers were released and the remaining passengers remained in detention in a Ugandan airport building. In response, Israeli commandos planned and executed a rescue operation that freed 102 hostages; however, the operation also led to the death of over a dozen Ugandan service men (Blumenau: 2014b, 68). The raid greatly divided member states. In an attempt to show support, Western countries congratulated Israel on a successful rescue mission, whereas other countries, mainly from the Arab world, condemned the operation as a blatant violation of international law.[58] As these developments occurred during the negotiation of the Hostages Convention, the issue of territorial integrity and political independence quickly became an urgent matter to address. It was highlighted that the convention cannot become a pretext for the violation of another country's sovereignty (Rosenstock: 1980, 186). Conversely, member states decided that "[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State" (Hostages Convention: 1979, Art. 14).[59]

[58] See "Excerpts from the United Nations Security Council Debate on the Entebbe Incident" for an overview on the discussions in the Council and the positions taken.

[59] The remaining Articles of the Hostages Convention, as well as the ones not addressed, are less important for the purpose of this research endeavour. The articles not addressed outline the requirements of establishing

On a final note, it is worth briefly reflecting on the preambulatory portion of the convention. The third paragraph reaffirms the principle of both equal rights and self-determination. The reference to the principle of self-determination reflects the power of the Third World at the United Nations and is specific to the Hostages Convention. Indeed, although the issue of self-determination and foreign subjugation was a topic of discussion in the consultations leading to the adoption of the Diplomats Convention in 1973, no such reference was made in the preamble, which is likely the result of a common interest in upholding the safety of diplomats among all member states. One ought, however, to be cautious to conclude that paragraph 3 on self-determination provides justification for the use of violence. To be sure, the taking of hostages has been identified as a crime of great concern to the international community (Hostages Convention: 1979, para. 4) and one that the members ought to prevent, prosecute, and punish (Ibid: 1979, para. 4). By extension, and as already alluded to above, the convention places an obligation on a state to extradite an alleged offender or to submit the case to prosecution (Article 8). The preamble, although not part of the legally-binding portion of the text, is nevertheless imperative when it comes to the interpretation of a given resolution or, in this case, a convention. Rosenstock usefully concludes in this context, that the "reason for including language of equal rights and self-determination of peoples is the perception that the legitimacy of the use of force in the cause of self-determination is strengthened by the inclusion of this language and would be weakened by its absence" (Rosenstock: 1980. 175). Therefore, while no explicit reference is made to the justification of violence in the course of self-determination, the inclusion of such a provision within the introductory remarks demonstrates the unwillingness of member states to condemn all forms of political violence in any and all circumstances. In the absence of a clear consensus, states are likely to interpret the provisions of the convention with their own experiences and ideological inclination in mind.

Terrorism has been on the agenda of the United Nations permanently since 1972. Kurt Waldheim requested the inclusion of the agenda item as a result of a series of terrorist attacks, including in Munich in 1972 and at the Israeli airport of Lod in the same year. The General Assembly adopted resolution 3034, emphasising the importance of analysing the root causes of terrorism, and established an Ad Hoc Committee of the Sixth Committee. The Ad Hoc Committee was to deal with terrorism in a general and comprehensive manner and to help countries find common ground. It soon, however, became clear that countries fostered fundamentally different outlooks on how to deal with terrorism; in some cases justification was made for terrorism when committed in situations of national liberation or foreign subjugation. By 1979, the committee was unable to produce any tangible outcome and "decided to abandon the idea of a

jurisdiction (Article 5), informing interested parties on the outcomes of the proceedings (Article 7) and on the effects that the convention would have on existing bilateral extradition treaties (Article 10). The remainder of the convention further outlines dispute settlement proceedings (Article 16), how the Treaty will enter into force (Article 18), as well as other procedural aspects (articles 17, 19 and 20). See Saul's "International Convention Against The Taking of Hostages" for a more detail analysis on these provisions.

comprehensive assessment of terrorism and to focus on different aspects of the phenomenon" (Blumenau: 2014b, 103). To be sure, the United Nations has continued to address terrorism in a comprehensive manner throughout its trajectory, as will be discussed further in subsequent chapters; nevertheless, it is important to understand that it was clear early on that such efforts would only have little chance of success.

By 1979, the United Nations had also adopted a series of instruments that criminalise offences which can be applied to counterterrorism-related activities. They are however not purely counterterrorism instruments and only the Hostages Convention mentions terrorism in its preambulatory paragraphs, certainly also as an attempt to avoid familiar disagreements that may have arisen if the term was included in the operative portion of the text. It is important to note, that the preambular likewise fell short of any definition of the term. The conventions discussed above have set out to not only criminalise certain behaviour but have moreover placed obligations on contracting parties in relation to establishing jurisdiction and extradition or prosecution. It can also be observed that the provisions contained in the respective conventions predate the United Nations. Indeed, although the 1937 draft convention never entered into force, many of the provisions in respect to extradition or prosecution find their basic origins in the League of Nations text. Over the course of the 1970s, governments have developed international instruments that have highlighted the criminal justice response taken by the organisation. At the heart of this approach lies the *aut dedere aut judicare* principle, imposing an obligation on parties to either extradite an individual or to submit the case to prosecution. It has also become clear that although the political offence exception has been significantly narrowed, extradition can still be denied on a number of grounds. At the same time, countries would still have to submit the case to their competent authorities for the purpose of prosecution, and that is where the crux of matter lies. If a government is unwilling or unable to cooperate in bringing terrorists to justice, these instruments fail (Joyner: 2003, 540). To a considerable extent, states must rely on one another to ensure that offenders are brought to justice. Certainly, when governments have the political will to enforce the provisions of the conventions as they were intended, a perpetrator will either face extradition or will face trial and subsequently punishment. Yet, governments that are unwilling, as in some cases they are sympathetic to a specific terrorist movement, offenders can evade punishment if domestic authorities decide that there are no grounds for criminal proceedings. In the end, it is critical for states to understand that these instruments will only bring terrorists to justice if they are implemented properly without drawing on the given loopholes.

The proceeding analysis thus allows for the conclusion that countries agreed that international terrorism was indeed a challenge that had to be dealt with within the confines of the United Nations. In this respect, the Diplomats Convention has specifically demonstrated that when states have similar interest (e.g. the protection of its diplomats and their relations with other states), the international community would be able to find common ground quite quickly. The Hostages Convention, on the other hand, has also made evident that compromise is difficult and cumbersome,

yet external circumstances (e.g. adoption of the 1977 Geneva Protocols) make compromise possible. Above all, it is fair to assert that the issue of terrorism remained deeply political and the UN's response to terrorism can only be fully appreciated when taking into account geopolitical realties and the nature of the international system at a specific time. When Mikhail Gorbachev became the new leader of the Soviet Union in 1985, the relationship between the West and the Soviet Union slowly entered into a more peaceful and cooperative era (Marantz: 1989, 19). Hence, with the relationship between the East and West slowly taking on a more conducive shape – and the process of decolonisation coming to end – western countries were certainly hopeful that this would manifest itself at the United Nations. It is therefore with this context in mind that the proceeding chapters will embark on exploring the response taken against terrorism by the United Nations from the demise of the Cold War (as early as 1986) until 2001.

# CHAPTER FOUR – THE UN AND TERRORISM BETWEEN MID-1980S AND 2001.

The end of the East-West conflict created a political environment in which the super-powers – namely the United States and the Soviet Union – progressively disengaged from confrontation and their method of proxy warfare (Schmid: 2013). Concurrently, the post-Cold War era also established an environment more conducive to cooperation in terrorism-related matters at the United Nations. It was also of significance that the now-independent former colonies started to see terrorism as a threat to their own power. In fact, "[t]he newly independent states saw their new role as defenders of the status quo and found terrorist organisations particularly threatening" (Stilles: 2006, 42). Former supporters of terrorist movements eventually found themselves the target, a process that had already started at OPEC in 1975. Indeed, although al-Qaeda was born out of the remnants of the Soviet-Afghan war and initially depended on Saudi and American support, they increasingly directed their wrath at the Americans and later the Saudi governments (as well as other Middle Eastern regimes). Al-Qaeda, and the fighters it produced, eventually flocked to conflicts in Chechnya and Kashmir (Wright: 2006, 297). What's more, with the USSR being in demise and communism discredited there was a "shift to a pro-Western orientation [and an inclination] to accept the West's interpretation of international law and terrorism" (Stilles: 2006, 42). By 1990 thirty new countries made the transition to democracies, and the withdrawal of Soviet forces from Eastern Europe likewise in 1990, "made possible democratisation in Eastern Europe" (Huntington: 1991, 14).

## The General Assembly

By the time the General Assembly[60] approached international terrorism in 1986, the UN body had adopted five problem-specific counterterrorism conventions.[61] Equally so, the Assembly had developed a normative framework through which countries were encouraged to take action when responding to terrorism. The previous chapter took a detailed look at how the General Assembly structured its debate on the phenomenon and over what issues member states were unable to reach consensus. Chapter three also concluded that the General Assembly's response to terrorism was very much characterised by its criminal justice orientation, as well as by its marginal focus on prevention. More precisely, the conventions of the previous decade evolved around the criminalisation of a specific offence, the extradition or prosecution of alleged

[60] See the introduction for an overview of the General Assembly's institutional capacities.

[61] The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1972 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1973 convention on the Prevention and Punishment of Crime against Internationally Protected Persons, including Diplomatic Agents and the 1979 International Convention against the Taking of Hostages. The General Assembly also adopted the 1979 Convention on the Physical Protection of Nuclear Material (this convention was not addressed in the previous chapter).

offenders and thus notably on the time after an attack (e.g. prosecuting terrorists). The General Assembly hence provided a basic international legal framework for aspects relating to terrorism, something that did not exist before. A commendable attempt was also made to incorporate rule of law principles and human rights concerns into the UN's counterterrorism endeavours, albeit with a great deal of ambiguity left behind. The ensuing section will consider how, if at all, the General Assembly's response to terrorism changed between 1985 and 2001.

## United Nations General Assembly resolutions from 1985-2001

The position of the United Nations on terrorism took a turn with the adoption of resolution 40/61 in 1985. Whereas earlier resolutions 'deeply deplored' and found themselves concerned with the rise in terrorist violence, the resolution adopted in 1985, for the first time, "[u]nequivocally condemn[ed], as criminal, all acts, methods and practises of terrorism wherever and by whomever committed, including those which jeopardise friendly relations among States and their security" (UNGA res. 40/61, op. para. 1). Indeed, the increasing frequency of terrorist violence as well as the lethality prompted expressions of condemnation and the use of political violence was increasingly seen as an illegitimate form of political participation, no matter the context. Although terrorism remained localised in ambition, it was perceivably becoming more global in nature. It is also noteworthy to mention that attacks were increasingly targeted against American facilities and citizen,[62] one of the most powerful countries at the time. Hence, resolutions adopted biannually until 1991 mirrored this sentiment.[63] Despite the reiteration of condemnation in General Assembly resolutions after 1985, member states however continued to insist on the inclusion of preambular references to the principle of self-determination and maintained the notion of the inalienable right of independence from colonial and racist rule. Particularly noteworthy in this regard was the insertion of 'legitimately' in the provisions that reaffirmed such rights. For instance, resolution 46/51 (1991) avowed that nothing could prejudice the right of a people to seek self-determination and "the right of these peoples to struggle *legitimately* to this end…" [emphasis added] (Res. 46/51: 1991, preambular para. 15). This certainly was the result of the fact that previous resolutions established this practise and for another, while member states were slowly condemning terrorism in all circumstances, they were reluctant to completely remove all references to anti-colonial struggles. The insistence on the self-determination principle must also be understood by way of considering that some countries were not yet independent (e.g. Namibia was not independent until 1990) and Eastern Europe was still under Soviet rule, hence even the West arguably fostered an interest in the notion of self-determination. Also, considering that struggles for self-determination were not too far in the distant past, Third World countries may have wanted to

[62] Some notable attacks include: the April 1983 bombing of the US embassy in Lebanon, the October 1983 bombings of Marine barracks in Beirut and the Hijacking of TWA Flight 847 in June 1985.
[63] Resolutions 42/159 (1987), 44/29 (1989) and 46/51 (1991) all condemned terrorism in all its form and irrespective of perpetrator. The resolutions however likewise continued to reaffirm the right to self-determination.

incorporate the principle as a 'safety-net' of sorts against neo-colonialism and foreign interventions in the future. A further significant change adopted with resolution 46/51 was the rephrasing of the title. The subject of international terrorism would no longer be referred to and placed on the agenda as including explicit reference to the study of the underlying causes that give rise to terrorist activities, but was rather shortened to 'measures to eliminate international terrorism.' The alteration to the name suggests that there was an agreement that the existence of root causes could not be an excuse for political violence, nor was the need to study the root causes an excuse to delaying concrete counterterrorism measures (Peterson: 2004, 176). The explicit reference to the root causes in the title did indeed have dangerous implications. As one commentator suggests, "[i]f emphasis was given to 'underlying causes,' if 'misery' and 'frustration' were the evils and not the overt acts of terror, then terrorism, instead of being discouraged, could be tolerated, justified, and even legitimised" (Schoenberg in Comras: 2010, 19). In spite of continued differences in outlook on how the organisation ought to respond to international terrorism, these changes certainly pointed to a slowly emerging consensus that terrorism cannot be justified under any circumstances, no matter how noble the cause (Ruperez: 2006, 4). By the mid-1980s the issue of the root causes was no longer placed at the centre of the General Assembly's counterterrorism endeavours and represents a considerable change in General Assembly practise. That said, resolutions adopted from 1985 until 1991 continued to urge states to "pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and foreign occupation, that my give rise to international terrorism and may endanger international peace and security" (UNGA res. 46/51, op. para. 6).

Resolutions adopted until 1991 also remained rather similar to one another and repetitive; *inter alia*, calling on states to adopt existing multilateral agreements, refrain from organising and instigating terrorist acts in another state, and to cooperate closely with one another concerning the prevention of terrorist activity, and included provisions on extradition and prosecution, which were also to be included in bilateral and multilateral treaties. The resolutions furthermore accentuated the need for UN specialized organisations, such as the International Maritime Organisation[64] and the ICAO, to take up the issue of international terrorism and present recommendations to the United Nations (Romanov: 1990, 299). One can also not help but notice that the resolutions adopted by the General Assembly until 1991 remained vague as to the preventative element of the organisation's work. For instance, resolution 44/29 urges governments to "prevent the preparation and organisation … of terrorist and subversive acts directs against other states and their citizens [and to]co-operate with one another in exchanging relevant information concerning the prevention and combating of terrorism" (UNGA res. 44/29: 1989, operative para. 4(a) & (d)). Similar

[64] The seizure of *Achille Lauro*, a vessel seized by Palestinian terrorists, in 1985 promoted member governments to consider the threat of maritime terrorism. The hostage-taking and the killing of an American wheel chair bound American certainly provided sufficient impetus for the General Assembly to entrust the IMO with considering instruments against terrorist activities on the water.

to the resolutions adopted in the 1970s, it remained uncertain how the General Assembly intended member states to prevent terrorism. Its inclusion, one might argue, was more of a habit than a substantive practise as the Assembly did not provide comprehensive instructions on how to prevent terrorism. In 1993 the General Assembly broke with its process of adopting a resolution biannually. During the Sixth Committee meeting that year, member states found themselves unable to agree on the need to further pursue a comprehensive convention against terrorism. Indeed, member countries concluded that "any broad discussion of terrorism would be counter-productive, [which was] in sharp contrast to the relative success of the piecemeal approach" (Romaniuk: 2010, 56).[65] It appeared that a piecemeal approach had yielded the most success to date and was considered a good starting point for further action.

The General Assembly's trend of lending support in its resolutions in the 1970s onwards- although not explicitly legitimising- for the use of terrorism in the course of self-determination would come to an end in 1994 when member states adopted resolution 49/60 and in its annex the Declaration on Measures to Eliminate International Terrorism. The 1994 Declaration gave light to a number of noteworthy novelties in how the General Assembly – and in consequence the United Nations – responded to terrorism. The declaration was unique in detail and contained stronger language of absolute condemnation. More significant, however, was the General Assembly's position that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" (UNGA res. 49/60: 1994, op. para. 3). Although the resolution likewise condemned all acts and practises of terrorism wherever and by whomever, as resolutions 40/61 (1985) 44/29 (1989) and 46/51 (1991) have previously done, exclusion of violent acts as unjustifiable no matter what nature (e.g. political) was new. It is also worth highlighting that a careful reading of the declaration furthermore allows for the conclusion that language reaffirming the right to self-determination is absent. Indeed, resolutions 44/29 (1989) and 46/51 (1991) contained provisions that reaffirmed the right to self-determination and that this right should not be curtailed in any respect. Halberstam, for instance, observes that if any reference to the right to self-determination was interpreted as a justification for the use of violence, "the omission of any such reference in the later resolutions [1994 onwards] and the broad language condemning terrorism 'wherever and by whomever' committed are a clear rejection of that position" (Halberstam: 2003, 577). While one can only speculate, this change in response can, in part, be attributed to the fact that most countries were gradually becoming afflicted by terrorism and given the coming

[65] In the meantime, the United Nations adopted a series of resolutions on the 'human rights and terrorism'. Consultations to this stream of resolutions took place in the Third Committee and culminated in the adoption of resolution 48/122 in 1993 resolutions 49/185 (1994), 50/186 (1995), 52/133 (1998) and 54/164 (2000). While these are certainly important to the UN's response to terrorism, space restrains do not permit a more detail discussion.

to an end of the decolonisation process (e.g. Namibian independence in 1990), former colonies vested no interest in catering to terrorist organisations, many of which could turn on their former supporters.

General Assembly resolutions adopted thereafter leading up to 9/11 did not significantly deviate from the provisions of resolution 49/60 adopted in 1994, nor from the declaration in its annex. Later resolutions reaffirmed the Declaration to Eliminate International Terrorism and called upon states to intensify cooperation in matters relating to preventing terrorist acts from unfolding. Specifically, governments were urged to "refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities" (UNGA res. 53/108: 1999, op. para. 5). A people's struggle for self-determination was no longer grounds for the use of violence, and the condemnation of terrorist activities by whomever and whenever became an engrained credo in the General Assembly's response. Resolution 51/210 (1996) is however worth exploring in further detail. In 1996 member states recommended the "accelerat[ion] [of] research and development regarding methods of detection of explosives and other harmful substances that can cause death or injury…identify[ing] their origin in post-blast investigations" (UNGA res. 51/210:1996, op. para. 3(a)). Although the 1994 declaration already made reference to the importance of preventing terrorist acts from taking place, it was the 1996 resolution that urged governments to take concrete steps in preventing the financing of terrorist organisations as well as the use of explosives for terrorist purposes (Ibid: 1996, op. para. 3(b)). Adding further context, member states acknowledged the use of organisations who claim to have charitable, social, or cultural objectives for the purpose of terrorist financing (Ibid: 1996, op. para. 3(f)). The increasing transnationalisation of terrorist financing by 1996 (Brzoska: 2011, 5) must have also played a significant role in the adoption of resolution 51/210. Perhaps one can conclude that with the adoption of resolution 51/210 the General Assembly was unprecedently descriptive in how it expected governments to respond to terrorism and that it contained the most detailed language on the issue of terrorism financing in the pre-9/11 era.[66] On a final note, resolution 51/210 established an Ad Hoc Committee with the objective of developing a convention on terrorists' use of bombs and to further its work on elaborating a comprehensive convention (UNGA res. 51/210: 1996, operative para. 9).

Action taken by the General Assembly against terrorism in the mid-1980s until 2001 culminated in a series of resolutions that "[u]nequivocally condemn[ed], as criminal, all acts, methods and practises of terrorism wherever and by whomever committed (UNGA res. 40/61: 1985, op. para. 1). Henceforth, the General Assembly would identify all criminal acts as "unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" (UNGA 49/60: 1994, operative para. 3), essentially narrowing the extent to which terrorists (and governments) can justify violence. With the adoption of resolution 51/210 in 1996 the Assembly amended the declaration and

[66] The General Assembly however did not repeat the instructive nature of the 1996 resolutions in subsequent resolutions.

adopted unusually detailed language on the urgency to prevent the financing of terrorism, encouraging governments to also review, *inter alia*, 'charitable organisations' and their abuse for terrorist purposes. Later resolutions adopted in 1998, 1999,[67] 2000, and early 2001 follow this practise and reaffirm the 1994 declaration. Most importantly however, while the General Assembly provided that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" are not justifiable in any circumstances, the body has fallen short of a concrete definition of terrorism. The lack of a definition continued to remain the result of differences of opinion of what constitutes an act of terrorism (see chapter four for the cleavages on definition). As such, member states are left with a broad discretion on what constitutes an act of terrorism. Conversely, the provisions within the respective resolutions will be interpreted with country-specific experiences (and interests) in mind. This ambiguity was arguably an attempt to try to get as many countries as possible to sign on to the resolutions on terrorism. Nevertheless, the period from 1985 until 2001 represents a rather radical shift in the General Assembly's response to terrorism.

## The UN's problem-specific response: Innovation or continuity?

By the late 1990s the General Assembly had adopted an impressive series of multilateral treaties.[68] Complementing the work of the General Assembly through its resolutions and declarations, these treaties were focused on depriving terrorists of a geographic and political sanctuary, bringing terrorists to justice either through extradition or prosecution, and committing states to taking preventive action. Each of these treaties addressed a specific terrorist activity, continuously leaving a gap as terrorists groups developed and changed their methods, becoming more innovative over time. With the adoption of resolution 51/210 in 1996, the General Assembly would yet again turn its attention to advancing international law through its convention-regime. By way of illustration, the subsequent section will argue that the General Assembly continued to make progress in broadening its response to terrorism. Similar to the previous timeframe reviewed, the Assembly advanced its convention-regime along two tracks: A sectoral and a comprehensive one. The Comprehensive Convention on International Terrorism was (and remains to this day) an attempt by the United Nations to criminalise all forms of international terrorism. Following the apparent failure by the Sixth Committee to adopt such a convention throughout the 1970s, the General Assembly renewed its efforts in 1996, certainly also as a result of the rise in global terrorism towards the end of the 1990s (Oudraat: 2004, 30). Yet, by 2001 any real progress remained elusive. It became clear early on that negotiations on a

[67] Starting in 1999 with resolution 53/108 the UNGA inserted a preambular reference to the outcome document of a conference of the Non-Aligned Movement. The impact of this provision will be discussed in further detail in chapter seven.

[68] These include *inter alia* the Diplomats Convention (1973), the Hostages Convention (1979), the Convention on the Physical Protection of Nuclear Material (1980), the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991).

comprehensive convention would be difficult. The definition of the term 'terrorism' and the scope of application were particularly challenging. In contrast, the organisation's efforts to add two further sectoral conventions to its repertoire of treaties – the International Convention for the Suppression of Terrorist Bombings (Bombing Convention) in 1997 and the International Convention for the Suppression of Terrorist Financing (Terrorist Financing Convention) in 1999 [69] – were more successful. On a general level, the Bombings Convention adopted in 1997 is directed towards a particular area of terrorist activity, while the Terrorist Financing Convention is the first to address the phenomenon in a more general manner. Also, the latter convention addresses terrorism at a much earlier stage, preventing terrorists from acquiring the funds to get the material to make a bomb, to name one example. The provisions in both conventions follow the pattern of previous agreements, yet a number of innovative elements can be identified and are worth reflecting upon further. It is also noteworthy that both conventions are explicitly addressed as what they are: Conventions for the suppression of terrorism. This was indeed a novel development considering that terrorism was not mentioned in the Diplomats Convention and only in the preambles to the Hostages Convention, demonstrating member states' earlier reluctance to address terrorism as a special offence. Both conventions, adopted in 1997 and 1999, respectively, hence reflect the organisation's consistency in proceeding along a problem-specific track.

*Terrorist Bombing Convention 1997*

It was not until the United States promoted the idea of a convention on terrorist bombings in 1996 that member states turned their attention to such terrorist acts. Despite the series of bombings in the 1980s, predominantly against American targets in Lebanon, it was the bombing of a housing complex hosting American forces in the city of Khobar, Saudi Arabia, in 1996 that broke the camel's back (Boulden: 2014, 561). The United States first made its proposal at a G7 (plus Russia) ministerial meeting in Paris, where it garnered support from the other major industrialised nations (G7/G8 Ministerial Conference on Terrorism: 1996, para. 17). In a subsequent letter addressed to the Secretary-General of the United Nations, France – on behalf of the G7 and Russia – highlighted the urgency of strengthening international cooperation in tackling terrorism, placing particular focus on bringing terrorists to justice and curtailing terrorist fundraising activities (UN Doc. A/51/261: 1996, 3 & 5). The ministers also agreed on the promotion of an international instrument on terrorist bombings.[70] The United States formally submitted its proposal of a convention to the Sixth Committee in October 1996 (Diaz-Paniagua: 2008, 226). As the basis for its work, the Ad Hoc

[69] Negotiations on an international instrument for the suppression of nuclear terrorism were also underway, yet it was not until 2005 that the Nuclear Terrorism Convention was open for signature.

[70] The criminalisation of terrorists' use of explosives and other lethal devices was indeed an urgent matter by 1996. In his speech to the General Assembly in September of 1996 President Clinton urged the membership to do more to fight terrorism. He believed that the international community had not done enough in denying terrorists' a safe haven (explicitly calling out Libya, Iraq and Iran). He closed his remarks by calling on member governments to "punish terrorism and to criminalise the use of explosives in terrorist attacks" (A/51/PV.6: 1996, 4).

Committee used the draft working document submitted by France on behalf of the G7 and Russia, although later amendments by the bureau were also considered.[71] What ensued was a number of informal meetings, a drafting and re-drafting process, and consultations within the committee and the respective Working Group. Despite diverging opinions, the General Assembly adopted the Bombing Convention in December 1997.[72] It is easy to get trapped in the details of the discussions that forewent the adoption process. And while brief remarks on the challenges faced during the drafting process are certainly in order, focus will rest on the main provisions of the convention and the extent to which these represent novelties.

The convention is structured around the obligation to criminalise terrorist bombings (Article 4), the requirement to establish jurisdiction (Article 6) and extradite or prosecute alleged offenders (Article 8), as well as a duty to assist in investigating (Article 10) criminal acts that fall under the scope of the agreement. Most notably, the convention does not try to define 'terrorism,' although, unlike the previous treaties, the title implies its specific application to a terrorist context. The preambulatory paragraphs of international treaties are insightful when trying to grasp the spirit of the final outcome. In some cases, they even demonstrate compromise. Unlike the Diplomats and Hostages conventions, the Bombing Agreement explicitly condemned all acts, methods and practises of terrorism, no matter what the context or perpetrators (preambulatory para. 4). As a matter of fact, the convention adopted in 1973 made no mention of terrorism and the Hostages Convention (1979) only made passing reference, noting the connection between the taking of hostages and terrorism in preambulatory paragraph 6. The insistence on a reference to terrorism was however only "an attempt [by Soviet diplomats] to reopen old wounds and re-enter into the negotiations about NLM and terrorism as such" (Blumenau: 2014a, 186). The reference in the preambular was thus a compromise. The latter (Hostages Convention) also reaffirmed the principle of self-determination in preambulatory paragraph 3. Interestingly enough, the previous conventions addressed their subject matters as a generic crime. By adopting the Bombing Convention by consensus, "the General Assembly appeared to be taking a clear stand against the indiscriminate violence against civilians" (Cortright & Lopez: 2007, 53). Yet, as Cortright et al. note in this regard, [m]embers of the Organisation of the Islamic Conference (IOC) subsequently adopted their own terrorism convention that explicitly contradicted provisions of both the bombings and financing conventions by distinguishing between acts of terrorism and acts committed in the fight for self-determination or against foreign occupation" (Ibid: 2007, 53).[73]

[71] The United Nations Audiovisual Library of International Law provides a more detailed account on the drafting process and the committees and the subcommittees involved.

[72] Diaz-Paniagua's work "Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005 is particularly useful in understanding the intricacies, both during the actual negotiations and leading up to them.

[73] See Organisation of the Islamic Conference, Convention on Combating International Terrorism, annex to Resolution no. 59/26P, completed at the Organisation of the Islamic Conference Convention Terrorism, in July of 1999.

The OIC Convention text entails a number of contradictory provisions worthy of brief attention. For one, the preambular text confirms the "legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence" (Annex OIC res. 59/26: 1999, preambular para. 9). For another, Article 2 of the convention stipulates "[p]eople's struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed a liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime" (Ibid: 1999, Article 2(a)).[74] Additionally, the African Union (AU) likewise adopted a regional counterterrorism convention 1999 taking on a similar approach. Several countries also expressed their discontent with the provisions of the UN Bombing Convention upon signing and ratification. Pakistan for example declared that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of self-determination launched against any alien or foreign occupation or domination…" rendering, as one could argue, the convention utterly useless. It is consequently unlikely that all member states, although party to the same convention, have an identical, let alone common understanding, of the provisions in the Bombing Convention.

Article 1 of the Bombing Convention defines key terms, including amongst others, "State or government facility", "[i]nfrastructure facility" "explosive or other lethal devices" and no lesser important "[m]ilitary forces of a state." Article 2 sets out to define the offence. A person commits an offence within the meaning of the convention "if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device…(a) [w]ith the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction of such a place" (Bombing Convention: 1997, Art. 2). The attempt to commit such an offence, or to participate in the organisation thereof was also criminalised.[75] Indeed, the ancillary offences were more comprehensive than before and were intended to "strengthen the ability of the international community to investigate, prosecute, and extradite conspirators or those who otherwise direct or contribute to the commission of offences defined in the convention" (Witten: 1998, 776). Article 5 was rather new insofar that it explicitly called on state parties to adopt, "where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention … are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial … nature" (Bombing Convention: 1997, Art. 5). Unparalleled, this article would universally criminalise and condemn terrorism regardless of the offenders' motives, in theory no longer legitimising the use of violence by national liberation movements.

On numerous occasions, terrorists have bombed states' overseas facilities. In Lebanon (in 1983) and Saudi Arabia (in 1996), the United States became the victim of a number

[74] Space restrains do not allow for further elaboration. However, to fully understand why the OIC Convention was adopted with such a text one ought to consider that the Second Intifada (Palestinian uprising against Israel) was slowly gaining traction and Palestine was yet again becoming a hotspot for political violence.

[75] Article 3 excludes the application of the convention to offences committee within a domestic context, whereas Article 4 obliges member governments to establish jurisdiction over such crimes and to levy appropriate penalties that reflect the nature of the crime.

of terrorist attacks on its military instillations and personnel, and so Article 6 extends jurisdiction to when an offence is committed against a facility of a state abroad. The United States, for example, could use the convention as a basis for establishing jurisdiction over the 1996 bombing in Dharan, as well as the 1998 Embassy Bombings in Kenya and Tanzania. Article 7 of the Bombing Convention is comprehensive, defining a state's obligation to investigate crimes that occurred on its territory, to ensure the presence of the alleged offender for the purpose of prosecution or extradition and to afford the offender a number of basis rights (e.g. communication with a representative of the home state). This article is however not entirely new, and a similar provision was placed in Article 6 of the Hostages Convention. A rather marginal evolution to this commitment was paragraph 3(c) in which the alleged offender is to be explicitly informed of his right to communicate and to be visited by a representative of his state of origin. In the likely event that an alleged offender is unwilling or unable (e.g. due to absence of diplomatic relations between two states) to communicate with a state-representative, the International Committee of the Red Cross can take on that role (Article 7, paragraph 5). Article 8 contains the usual obligation of *aut dedere aut judicare,* this time however extending the possibility of extradition only for the duration of the trial. This is was done so as to accommodate states' reluctance to extradite own nationals permanently. Upon sentencing the offender will return to the state of origin to serve his sentence (Article 8, paragraph 2).[76]

Unlike its predecessors, the Bombing Convention explicitly addresses the problem of the political offence exception.[77] The inclusion of Article 11 is no coincidence, nor is its sequence. A request for extradition cannot be refused on the grounds of the political nature of the crime. Indeed, Article 9 provides that the offence laid out in Article 2 of the convention are deemed extraditable offences. Although the Hostages Convention, in Article 9, stipulates that extradition can be refused on the grounds that a request was made for the purpose of prosecuting an individual based on his or her political opinion, the Bombing Convention evidently attempts to narrow this gap. Granted, the Bombing Convention includes a similar provision in Article 12- not placing an obligation on countries to extradite under certain circumstances- yet the sequence of the articles and the explicit rejection of the use of a political offence exemption is evident.[78] In fact, Article 11 makes clear that extradition cannot be rejected based on the motives of the perpetrator and Article 12 only provides an exception based on the

[76] It is not worth dwelling on Article 9 and 10 as these closely mirror articles 10 and 11 of the Hostages Convention. Whereas Article 9 deemed the offences of the convention as extraditable and establishes the Agreement as the basis of any extradition arrangement, Article 10 requires states to afford one another the greatest courtesy in matters of mutual judicial assistance (e.g. extradition proceedings).

[77] This terms refers to a states' right to refuse extradition on the grounds that the offence for which an alleged offender is requested is political in nature. For instance, a government who is favourable to the cause of a communist or anarchist, many of which used terrorism to achieve their objectives, could refuse extradition on the grounds that the crime was political. As this thesis has however described, the political offence exception was increasingly becoming more narrow as UN-conventions were gradually excluding certain crimes from the list of exceptions (e.g. Aircraft hijacking with The Hague Convention 1970).

[78] Article 13 is new inasmuch that it outlines the procedure for the extradition of an individual already serving a sentence for the purpose of providing testimony. This is a novel development, yet not one entirely relevant to our purposes.

motives of the requesting state (e.g. prosecuting someone based on ethnicity). Article 14, while in substance not entirely a novelty, is worth reflecting upon briefly. The Hostages Convention, in Article 8(2), guarantees the fair treatment of an alleged offender. The Bombing Convention confirms this right and at the same time extends it by making explicit mention of the provisions of international human rights law. While Article 14 is certainly not a detailed prescription of what a fair treatment of an alleged offender would look like, the reference to existing international human rights law provides unprecedented criteria.

Finally, parties were also required to take steps to "prohibit in their territories illegal activities of persons, groups and organisations that encourage, instigate, organise, knowingly finance…" [emphasis added] activities related to the use of explosives or other lethal devices (Bombing Convention: 1997, Art. 15, para. a). Admittingly a marginal evolution, yet the specific mentioning of financing was not included in the corresponding article of the Hostages Convention (Article 4). Perhaps it is plausible to assume that member states were growing concerned with terrorist fundraising activities, to which the subsequent adoption of the Terrorist Financing Convention surely provides sufficient evidence. The Bombing Convention certainly extended the United Nations' preventive efforts, although focus predominantly remained on bringing terrorists to justice by closing jurisdictional gaps and reaffirming the principle of *aut dedere aut judicare*.[79] Particular attention also continued to rest on the post attack element of a terrorist act. Article 15 sub paragraph (c) is noteworthy in this regard. Member states were called upon to consult on the "development of standards for marking explosives in order to identify their origin in post-blast investigations [emphasis added], exchange information on preventative measures, cooperation and transfer of technology" (Bombing Convention: 1997, Art. 15, para. c). Notwithstanding member parties' obligation to prevent preparations and to prohibit activities that encourage, instigate, organise or finance terrorist bombings, the convention is emblematic for the lack of instructive detail on preventing terrorist acts from occurring.

The remarkable swiftness with which countries were able to forge agreement should not mislead. The usual points of contention found their way into the UN's negotiations on the Bombing Convention; Syria submitted a proposal (A/C.6/52/WG.1/CRP.9) in which it urged the consideration of the elimination of the underlying causes, again paying special attention to circumstances of colonialism, racism and violations of human rights. Syria moreover advocated for the insertion of a preambular paragraph that would reaffirm the right to self-determination. It likewise attempted to include a separate article within the operative portion of the convention that would confirm that nothing in the agreement could be interpreted as affecting the rights of "people forcibly deprived of that right [self-determination]…particularly peoples under

[79] The convention also affirms the inapplicable nature of the Agreement to activities of armed forces during armed conflict (Article 19), if they are governed by the law of war. Also, all activities undertaken by military forces as part of their official duties is excluded from scope. The rest of the conventions settles dispute settlement mechanisms (Article 20), the ratification process (Article 21), when it will enter into force (Article 22) and how countries can go about removing themselves as parties (Article 23).

colonial and racist regimes or other forms of alien domination" (Report Working Group: 1997, 30). Syria's attempt to exclude certain elements of the convention must certainly be seen as an effort to safeguard the use of violence by Palestinian groups against Israel. At the fifty-second sessions of the Sixth Committee in 1997, Pakistan proposed similar amendments. In particular, a preambular paragraph reaffirming the inalienable right of self-determination and independence movements of people under colonial and racist regimes was suggested (UN Doc. A/C.6/52/L.19:1997). In general terms, Pakistan "strongly condemns the use of State power to subjugate and brutalize people under foreign occupation, depriving them of their most basic rights, including the legitimate right to self-determination … [and Pakistan] would not compromise on its fundamental belief that the legitimate struggle of people under foreign occupation or alien domination did not constitute terrorism" (Summary Record 28th Meeting Sixth Committee: 1997, 7).

With the territorial conflict over Kashmir raging between Pakistan and India since 1947, and the Israeli-Palestinian conflict unresolved, any negotiation of an international instrument against terrorism needs to be considered with this historical context in mind. And so, while political differences persisted in both the Sixth Committee and within the Working Group, the successful conclusion of the convention gives rise to the conclusion that countries were coming to terms with the criminalisation of terrorists' use of bombings. The sectoral approach to international terrorism has proven successful, evidently setting aside the most controversial item, that is, the definition of 'terrorism'.

*The Terrorist Financing Convention 1999: A new way forward?*

Over the course of its then fifty-four-year history, the UNGA adopted a number of agreements with counterterrorism relevance. Up until the adoption of the Terrorist Financing Convention in 1999 these treaties took on a strong post-attack character and have predominantly focused on closing jurisdictional gaps and bringing terrorists to justice. As noted, the Financing Convention would become an exception and would address the phenomenon in more general terms and in essence focused on preventing terrorist from acquiring the funds to execute an attack. For some observers (e.g. Forget: 2002, Nesi: 2005), the convention even includes a definition of terrorism. Indeed, the convention does not concern itself with the criminalisation of specific activities, such as the taking of hostages or the planting of a bomb, but rather turns its attention to the financing of such acts and intends to prevent terrorism from even occurring. And it was this element that presented the negotiators with unfamiliar obstacles (Aust: 2001, 286). Since the financing of terrorism was not a terrorist act in and of itself, the delegates were tasked with defining the exact scope of the offence and how to deal with institutional non-state actors, such as banks and remittance services. The adoption of the convention was not particularly contentious, and the provisions that did give rise to discussion, were mostly of a technical and legal nature.

Already in 1998 the French Foreign Minister, Hubert Vedrike, urged the international community to criminalise terrorist financing (Diaz-Paniaqua: 2008, 434). As innovative as the French proposal may have seemed at the time, the idea was not new. In 1996 the Secretary-General "had determined that the collection of funds for terrorist purposes was one of the topics not covered by the existing legal framework against terrorism, and he had invited the General Assembly to consider the possibility of adopting a new treaty" (Ibid.: 2008, 434). Prior to the French Minister's statement, terrorist attacks hit the American embassies in Kenya and Tanzania in August of 1998, bringing al-Qaeda to the attention of most capitals and the global public. It was time for member states to turn to tackling the seeds (resources) that allowed terrorism to flourish. Originally, the Ad Hoc Committee on International Terrorism, as established by the General Assembly in 1996, was tasked with elaborating a convention on the use of terrorist bombings and nuclear terrorism. It, however, was resolution 53/108 adopted in 1998 that extended the committee's mandate to include a convention on the financing of terrorism (Turney-Harris: 2002, 6). On the basis of a working document submitted by France, the third session of the Ad Hoc Committee took up its work (UN Audiovisual library: 2019, 1). In subsequent sessions of the committee, the Working Group and in informal consultations, member states were able to find common ground and in the end adopted the Terrorist Financing Convention in 1999.[80] Although the agreement did not enter into force until 2002, due to slow rates of ratification, the short time span in which the convention was negotiated, does however also show the importance the international community attributed to an instrument of this kind.

Similar to the Bombing Convention, the Terrorist Financing Agreement made note of the 1994 General Assembly Declaration and its 1996 amendment in resolution 51/210. Both the declaration and the resolution, besides unequivocally condemning terrorism in all its manifestations, also rejected any justification for terrorism on the grounds of its political, religious or ideological intent. This was not an easily won achievement; in a proposal submitted[81] in the Working Group, Pakistan and Syria, with support expressed by Kuwait, advocated for the inclusion of a new fifth preambular paragraph in which the General Assembly recalled resolution 40/61 adopted in 1985 (Report Working Group: 1999, 44). The reference to the 1985 resolution was a considerable set-back considering that the resolution urged states to contribute to the progressive elimination of the underlying causes of terrorism by paying, amongst others, specific attention to colonialism, racism and circumstances involving alien occupation (UNGA res. 40/61: 1985, op. para. 9). It is certainly not too far from the mark to see this as a renewed attempt to justify acts of violence in the course of self-determination. As a matter of record, delegates remained reluctant to extend the scope of the United Nation's counterterrorism endeavours to armed resistance in the face of national

[80] For a comprehensive review of the negotiation process see "Diaz-Paniagua's "Negotiating Terrorism: The negotiation dynamics of four UN counter-terrorism treaties, 1997-2005." See also the United Nations Audiovisual Library of International Law for a more comprehensive analysis.
[81] See UN Document A/C.6/54/WG.1/CRP.34 for a detailed reading.

liberation (Report Working Group: 1999, 55).[82] The matter was however put to rest, when a majority of countries highlighted that the preambular portion of the treaty already made reference to "all relevant General Assembly resolution on the matter [terrorism]" (Ibid.:1999, 57).

The convention contains a number of standard provisions that are similar, if not identical, to the Bombing Convention;[83] state parties laid out the definition of its principal terms (e.g. Funds) (Article 1); defined the offence (Article 2); restricted the scope of the convention to international criminal activity (Article 3); required states to criminalise the offence (and ancillary offences) and impose penalties that reflect the severity of the crime (Article 4); outlined the cases in which states *should* establish jurisdiction, as well as the circumstances under which they *can* establish jurisdiction (Article 7). The cornerstone of the UN's convention-regime remained the obligation to extradite or prosecute an alleged offender (Article 10), including a number of ancillary requirements to investigate the facts of the incident and to ensure the presence of the alleged offender for the purpose of extradition or prosecution (Article 9). Similar to previous convention texts, states were also obliged to respect the right of the alleged offender, enabling the communication, without delay, with a representative of the state of origin (Article 9). Like the Bombing Convention, the Terrorist Financing Convention explicitly rejected any suggestions that support a political offence exception for the offence 'terrorist financing' (Article 14).[84] Both the Bombing Convention (Article 12) and the Financing Convention (Article 15) (and the Hostages Convention in Article 9) do not impose an obligation to extradite if there is grounds to believe that the request has been made for the purpose of prosecuting an individual on the account of its race or political opinion, yet the case would still have to be submitted to domestic authorities for the purpose of prosecution (Article 10 in Terrorist Financing Convention), essentially upholding *the aut dedere aut judicar*e principle. Closing provisions also include "certain miscellaneous provisions, such as savings, dispute settlement and final clauses, as well as a few other sundry provisions" (Lavalle: 2000, 494).

Perhaps the most novel feature of the 1999 convention is Article 2, which defines that a person commits an offence if that individual "directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed [e.g. Hostages and Diplomats conventions]in the annex" Terrorist Financing Convention: 1999, Art. 2(a)). Although, Article 2(2a) continues to confirm a state's right to exclude any convention in the annex that it is not a party to (Forget: 2002, 6),

[82] Iraq also regretted the absence of the problem of state terrorism from the scope of the convention and furthermore underscored the importance of taking the right of peoples to self-determination into consideration (Report Ad Hoc Committee : 1999, 9).
[83] Some of the provisions, like the obligation to extradite or prosecute, are also identical to the Diplomats Convention and the convention of the Taking of Hostages of 1973 and 1979, respectively.
[84] Further narrowing the political offence exception was Article 6, which provided that state parties should adopt, when necessary, domestic legislation that make sure that no justification (e.g. political nature) can be provided for the crimes laid out in the convention.

in a way limiting the reach of the convention and its annex. The most noteworthy element of Article 2 is, however, that a person also commits an offence if the "act [is ]intended to cause death or seriously bodily injury to a civilian, or to any other person not taking active part in the hostilities in a situation or armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act" (Terrorist Financing Convention: 1999, Art. 2(b)). As Lavalle reflects, "any attempt at kidnapping … in order to create terror in the general public, indiscriminately use firearms against a crowd in a public place (other than an airport) of any city or a rural area. This act (assuming that no explosive bullets are used) would be covered neither by the Bombing Convention, nor by any other of the counterterrorism treaties listed in the Annex to the Financing Convention" (Lavalle: 2000, 497). Conversely, sub-paragraph b was needed to extend the scope of the convention beyond those crimes not already covered by previous treaties.

To get a better understanding of the scope and implications of the offence, attention must also specifically be drawn to the word 'funds' as outlined in Article 1. Here, funds' is identified as "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital…including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities…"(Terrorist Financing Convention: 1999, Art.1(1)). The meaning of the term is thus stretched broadly enough to include all assets and represents an unprecedented intrusion into the domestic arena, although it does not explicitly extend to states as potential offenders of terrorist financing. This was indeed necessary as objects of value, like diamonds, were smuggled and sold for the purpose of financing terrorism (Ndumbe & Cole: 2008). Further, it is not necessary for the funds to actually have been used for a terrorist attack (Art. 2, paragraph 3); it is sufficient to participate as an accomplice (Art. 2 paragraph 5) and attempt (Art. 2 paragraph 4) to committee such an attack for an act to fall under the scope of the convention. Article 5 of the convention is innovative inasmuch that it imposes liability, albeit not necessarily criminal, on legal entities. It is therefore worth highlighting that the Terrorist Financing Convention not only instructs countries on how to deal with individual terrorists but also with organisations and other entities that may be involved in the financing of terrorism, a development that previous conventions had not addressed. This is certainly a broadening of the UN's approach to dealing with terrorism.

In Article 8, parties are obligated to take appropriate steps to detect, freeze and/or seize any funds allocated for the purpose of committing crimes, and paragraph 4 of the article moreover stipulates that countries should "establish a mechanism whereby the funds derived from the forfeitures [e.g. seizures]…are utilized to compensate the victims" (Terrorist Financing Convention: 1999, Art. 8, para. 4). In particular, previous conventions have not been victim focused. And although the agreement predominantly remains perpetrator-focused, Article 8 is an initial effort to address the plight of the victims of terrorism. The Terrorist Financing Convention not only highlights the need to prevent terrorism from occurring by draining groups of their

resources but furthermore also addresses how victims of a terrorist attack can be helped after the fact. Articles 12 (mutual assistance) and 18 (cooperation) represent further novelties. Surely enough, elements of Article 12 can be found in the Diplomats Convention (Article 10), the Hostages Convention (Article 11), and the Bombing Convention (Article 10), requiring countries to 'afford one another the greatest measure of assistance in connection with criminal investigations'. Nevertheless, the Terrorist Financing Convention is new insofar that it prevents countries from drawing on banking secrecy as a justification to refuse assistance (Article 12(2)). This was indeed significant as typical fiscal offences (e.g. tax evasion) were considered as non-extraditable offences (Aust: 2001, 304) and the provision reached far into the domestic financial laws and practises of state parties. This was an important step as the UN was increasingly placing obligations on member states that until then exclusively fell within national competencies (besides European Union obligations). In turn the global body was increasingly standardising countries' response to terrorism financing globally.

Article 18 is perhaps the most comprehensive and instructive provision in the preventive segment of UN conventions. Governments are obligated, if necessary, to adopt national legislation, to prevent the commission of an offence as laid out in Article 2. Specifically, if not already in place, governments are obliged to adopt measures that in turn place an obligation on "financial institutions and other professions involved in financial transactions…to pay special attention to unusual or suspicions transactions and report transactions suspected of stemming from criminal activity" (Terrorist Financing Convention: 1999, Art. 18 1(b)). To put this rather broad provision into practise, "State Parties shall consider: [a]dopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions" (Article 18 1(bi)), or other measures that establish the identity of an account holder.[85]

The adoption of the Bombing Convention and the Terrorist Financing Convention is a continuation of the United Nations' piecemeal response to terrorism. It is certainly fair to say that the conventions follow the patterns of previous documents, yet a number of novelties were identified. On a general note, both conventions mention 'terrorism' and were adopted primarily as counterterrorism instruments. More specifically, the Terrorist Financing Convention was the first successful attempt by the UN to advance international counterterrorism law by addressing terrorism in a more general manner. Yet, the piecemeal approach would not criminalise terrorism in all its manifestations and therefore a comprehensive convention remained necessary, nevertheless.

[85] The convention also contains a number of provisions laying out a countries obligation to cooperate in the detection of physical cross-border transportation of cash (Article 18(2)), articles on non-intervention (Articles 20 and 22) and dispute settlement clauses (Article 24).

## The UN's wavering desire for comprehensiveness

Resolution 51/210 in 1996 gave precedence to the elaboration of an international convention for the suppression of terrorist bombings (and nuclear terrorism), so it was not until 1999 that member states, again, decided that the General Assembly "shall address means of further developing a comprehensive legal framework of conventions dealing with international terrorism, including considering the elaboration of a comprehensive convention on international terrorism" (UNGA res: 54/110: 1999, op. para. 12).[86] Consequently, an Indian draft convention was circulated in 2000[87] which would build the basis for future discussion (Hmoud: 2006, 1032). What ensued was a tedious drafting and re-drafting process that continues to this day and that remained rather similar to previous attempts. From the onset, the discussions on a comprehensive convention remained familiarly controversial. The deliberations in the Working Group and the Ad Hoc Committee revealed that the definitional parameters – that is, to what extent state-terrorism should be considered – and the scope of the convention (should the convention apply to terrorist acts in the course of foreign occupation?) remained key points of contention (Einsiedel: 2016, 1). The endless divide on "who has the right to use force without being described as a terrorist have surfaced in the negotiations of the Comprehensive Convention from the beginning" (Hmoud: 2006, 1033). A proposal submitted by Malaysia on behalf of the Organisation of Islamic Cooperation (OIC) is a telling example. In rephrasing Article 1 (definition), the OIC states, on the one hand, advocated for terrorism to be defined as "any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights…" (Report Working Group: 2000, 37). On the other hand, Western European states were intent on avoiding "broader political issues such as self-determination" (Singh: 2017, 4).

With respect to Article 2, the Malaysian text further promoted the position that "[p]eoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime" (Ibid.: 2000, 38). The proposal introduced by OIC states can only be seen as inconsistent with General Assembly resolutions adopted since 1994, which no longer made explicit reference to the legitimacy of self-determination movements. The OIC proposal is however not entirely novel and reflects the OIC's own convention 'Combating International Terrorism' adopted in 1999. In its second article, the OIC Convention excludes people's "struggle including armed struggle against foreign occupation, aggression, colonialism…aimed at liberation and self-determination in accordance with the principles of international law" as terrorist crimes (OIC Convention: 1999, Art. 2). The proposed Malaysian text also stands in stark contradiction to the provisions in the conventions adopted in 1990s (see above), both of which categorically reject the

[86] Resolution 53/108 (1998) also already underscored the priority of elaborating a comprehensive convention on international terrorism and resolution 55/158 reaffirmed this priority in December of 2000.
[87] See UN Document A/C.6/55/1 for further reading on the draft. The working document is also annexed to the Report of the Working Group dated 2000.

use of force under any circumstances, even by consideration of "political, philosophical, ideological, racial, ethnic, religious or other similar nature" (Bombing Convention: 1998, Art. 5). In retrospect, the OIC countries were very much discontented with the provisions incorporated into the Bombing Convention and the UN's agreement on Terrorist Financing, particularly the limitations placed on the use of violence in the course of self-determination (Stilles: 2006, 43). It is consequently plausible to conclude that the Comprehensive Convention was considered as a means of retracting past concessions and gaining more this time around, and consequently, a comprehensive agreement should replace existing unfavourable provisions (Ibid: 2006, 43). More pointedly, it was an attempt to undo the progress made since the 1980s.

Other familiar disagreements also surfaced. To name another example, "[i]n the 1999 meeting of the Working Group, Syria and Pakistan proposed a paragraph in the draft Convention incorporating anti-racism politics" (Ekwo: 2010, 101). Both Pakistan and Syria suggested the inclusion of a fifth preambular paragraph which would recall Assembly resolution 40/61 (1985) which urged all states "to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security" (Report Working Group: 1999, 44). To this end, one can at a minimum agree that member states continued to hold diverging outlooks on where the focus of the convention should lie. Mindful of the sectoral conventions, disagreement also arose in respect to the relationship between the comprehensive convention and the UN's problem-oriented agreements (Hafner: 2003, 156); should it add to existing agreements or become more of an umbrella convention? Should there be a hierarchy, and if so, what sequence would apply? One side of the debate intended for a comprehensive convention to close any existing gaps, considering and preserving existing achievements. Other views expressed however maintained "that the comprehensive convention should reinforce, complement and complete existing legal framework, and therefore would necessarily overlap with existing treaties (Report Working Group: 2000, 43).

It would be premature to consider the different draft articles of the draft Comprehensive Convention, particularly when keeping in mind the various country-specific amendments. Suffice to say, the working document put forth by India very much followed the schemata of the sectoral conventions; establishing the offence; obliging member states to criminalise the offence and imposing penalties that reflect the severity of the crime; instituting and extending jurisdiction; and encouraging cooperation in an attempt to prevent terrorist acts from unfolding (UN Doc. A/C.6/55/1: 2000). The draft also reiterated the principle of *aut dedere aut judicare* (extradite or prosecute), highlighted the rights of the alleged offenders (e.g. visitation by a representative of the state of nationality) and accentuated the broader importance of respecting human rights in counterterrorism activities.[88] It is also interesting to

[88] See UN document A/C.6/55/L.2.

note that the working document categorically condemned all acts of terrorism as unjustifiable, committed wherever and by whomever, very much mirroring the language adopted in the UNGA resolutions on the subject as early as 1994. By the time the United States was attacked by al-Qaeda in 2001 no apparent consensus could be found, and political issues continued to dominate discussions. With considerable pressure to finalize an agreement that would criminalise terrorism in all its manifestations, the Working Group resumed its work in October 2001, one month after the attacks. How the UN proceeded on this matter will be discussed in chapter six.

## The Security Council

With the end of the Cold War, the United Nations Security Council[89] found itself no longer restrained by an East-West stalemate. The rivalry and animosity between the United States and the Soviet Union considerably restricted the Council's counterterrorism action until approximately 1990 (although relations improved as early as 1986). Initially, the body took a rather ambiguous approach to terrorism, unable to adopt a resolution in the aftermath of the Munich massacre in 1972. Nevertheless, by 1985 the Security Council's stance on terrorism left little ambiguity and its response was gradually becoming more assertive. The previous chapters have purposely excluded the work of the Council prior to the 1990s, as meaningful action was prevented by Cold War dynamics and greatly limited by interests of the great powers in regional conflicts. Thus, before proceeding, a brief review of the Council's response to counterterrorism prior to the end of Cold War is necessary. Both the United States and the Soviet Union "cast nearly two hundred vetoes prior to 1990 on substantive questions of peace and security. In some years, the number of resolutions that were vetoed outnumbered those that were passed" (Stiles: 2006, 39).[90] Terrorism in Northern Ireland, Vietnam and in Kashmir was not placed on the agenda of the Council and Palestinian terrorism was a contentious topic. This was the result of the involvement (to varying degrees) of the permanent members to the respective conflicts (e.g. USA in Vietnam). In addition, two permanent members – the Soviet Union and China – remained committed to supporting the Palestinian cause and the United States fought off any attempt to condemn or sanction Israeli counterterrorism measures against Palestinian terrorist groups (Ibid: 2006, 41). One observer does caution however that it would be an exaggeration to claim that the Council functioned "in a permanent state of paralysis in the field of international peace and security…" (Mansuama: 2006, 2). It is nevertheless accurate to observe that in the midst of the Cold War, terrorism was not a pressing concern for the major powers of the Security Council (Boulden: 2008, 609). Yet, the increase in terrorist violence at the beginning of the 1980s, progressively increasingly afflicting the permanent members of the Council (e.g. United States), elevated terrorism onto the agenda of the body.

[89] See introduction for an overview of the composition of the Security Council and its powers in respect to the maintenance of international peace and security.
[90] This was the case for resolutions 1945, 1954 and 1955.

The first mention of 'terrorism' in the Council came in 1948. Following the murder of the UN mediator in Palestine, Count Bernadotte, the Council adopted resolution 57 condemning the attacks. In 1970, the Security Council managed to adopt resolution 286 in which it expressed concern over the threat posed by international hijacking of aircraft, making a generic appeal on all parties to release hostages being held, and urging states to take all possible legal steps to prevent hijackings in the future (UNSC res. 286: 1970). Following the hostage crisis at the Munich Olympics in 1972, the United States introduced a draft resolution condemning the attacks and called on states to stop providing a safe haven to terrorist organisations (Romaniuk: 2010, 37). Yet, Council members were unable to forge agreement and the American resolution was dropped (UN Repertoire 1972-1974, 120-121).[91] Significantly, a European compromise draft of a resolution in response to Munich was vetoed by both China and the Soviet Union. And as a draft resolution introduced by the Non-Aligned Movement failed to mention terrorism and made no reference to the Munich attacks, it drew a veto from the United States (Luck: 2006, 96). The previous chapters have shown that many countries perceived terrorism as a legitimate strategy for national liberation, and that the use of terrorism against Israeli targets was not necessarily condemned. This sentiment was also seen in the Security Council.

Two developments in particular are worth exploring in further detail. As Luck summarises, "[i]n some cases [referring to terrorist incidents], allies or client states of the Soviet Union were suspected of aiding or abetting some of the shadowy groups that employed terrorist tactics" and thus the USSR "had little interest in seeing the Security Council take up these matters…" (Luck: 2006, 95). As regularly alluded to in the previous and current chapter, the newly independent countries from Asia and Africa shifted the political orientation of the United Nations from condemning violence in all circumstances to making exception when seeking self-determination. For many of the newly independent countries, the use of violence in the course of fighting for independence was not considered terrorism (Messmer & Yordan: 2010, 175). As Stiles notes: "[t]he Soviet Union and China were fully committed to the support of Palestine sovereignty, for example, while the USA consistently endorsed Israel counterterrorism measures (Stiles: 2006, 41). Also, the competition for influence in the Third World prompted the Soviet Union (and the United States as well) to tread lightly on matters relating to counterterrorism (Elisabeth: 2013). Given what Luck terms 'unfavourable politics', the Security Council was unable to make use of its Chapter VII powers as the threat of a veto from one of the permanent members rendered any attempts difficult. The inability to adopt a resolution following the Munich attacks, and the focused attention on Israeli and American counterterrorism measures testify to this effect. For example, in 1973 the Security Council condemned the Israeli interception of a Lebanese aircraft,[92] identifying the incident as a violation of the

[91] See United Nations Repertoire 1972-1974 for further reading on the draft introduced by the United States and the discussions and amendments that followed, as well as the other drafts (e.g. by Somalia) that were introduced.

[92] After the vote, the US representative to the United Nations noted that its affirmative vote cannot be seen as change in his government's policy towards Israel and the problem in the Middle East, but should be

Charter of the United Nations and in response to Israel successful rescue operation in Entebbe in 1976, the Council was divided on whether to condemn the actions taken by the terrorists or whether to focus on Israel's violation of Uganda's territorial sovereignty. Furthermore, the incident in Entebbe is also an interesting example as it demonstrates how terrorism can play a role in endangering the peaceful relations among states, which very much relates to the original purpose of the Security Council to maintain international peace and security. Equally telling, was the condemnation of Israel's raid on the PLO in 1985 in Tunis, which was declared a 'flagrant violation of the Charter' and member states were called on to prevent Israel from committing any further violations of sovereignty in resolution 573 (Tams: 2009, 367).

A number of high-profile terrorist incidents, including *Achille Lauro*[93] and the attacks at the airports in Rome and Vienna in 1985, marked a shift in the Security Council's counterterrorism endeavours by 1985. A presidential statement adopted in the aftermath of *Achille Lauro* condemned terrorism in general terms, and resolution 579 made reference to the convention against the Taking of Hostages adopted in 1979. Further, the resolution "unequivocally [condemned] all acts of hostage-taking and abduction," affirming states' obligation to take "all appropriate measures to secure their [hostages] safe release and to prevent the commission of acts of hostage-taking and abduction in the future" (UNSC res. 579: 1985, op. 1 & 3). Additionally, resolution 579 urged states to develop co-operation mechanisms for the prevention, prosecution and punishment of such activities (Ibid: 1985, op. 5). Notably, the resolution restricted its focus on the act of hostage-taking while the Council remained silent on other forms of terrorism. In response to the airport bombings in Rome and Vienna in 1985 the Council condemned the attacks yet fell short of adopting any meaningful action.[94]

Whereas the Council was unable to muster sufficient support to react to the Munich attacks in 1972, by 1985 it was gradually taking a more consistent position against terrorism, albeit predominant focus was placed on hostage-taking and abductions. The newfound collaborative spirit in the Security Council, in many ways as a result of the gradually disintegration of the Soviet Union and the more cooperative spirit under then-leader Mikhail Gorbachev, also allowed for the adoption of more general and legally repressive responses to terrorism (Hageboutros: 2016, 10). In 1989 the Council adopted resolution 635 and widened its focus beyond hostage-taking and abductions. Indeed, while resolution 579 limited its purview to addressing hostage-taking only, resolution 635 noted the implication of terrorism for international security (preambular para. 1) and "[c]alls upon all States to co-operate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives" (UNSC res. 635: 1989, op. para. 2). While the Council's response to terrorism in the mid-1980s was certainly not far-reaching, these resolutions "laid the groundwork for the Security Council's future work on terrorism" (Kramer & Yetic: 2007,

understood in the broader context of safeguarding international civil aviation. See *New York Times* article 'U.N. condemns Israel for forcing Down Arab Plane' for further background information.

[93] An Italian cruise ship was hijacked off the coast of Egypt *en route* to Israel, resulting in the murder of one wheelchair bound American Jew by terrorists belonging to the PLO.

[94] See UN Document S/17702 (1985) for further information on the Council's condemnation of the events in Rome and Vienna.

413).[95] The increased attention given to terrorism by the Security Council should also be understood in light of the increase in the number of American casualties per attack; the frequency with which American facilities and citizens were subject to attacks; as well as the growing understanding that terrorists may draw on chemical, biological and nuclear material as weapons (Oudraat: 2004, 30).

The Security Council also took a more assertive response to terrorism by imposing sanctions on three separate occasions. These included against Libya in 1992, the Sudan in 1996 and the Taliban-regime in Afghanistan in 1999.[96] From the outset it is important to understand that, short of war, the use of sanctions is an intrusive and repressive tool of countering terrorist activities. Indeed, "it is important to recognise that sanctions are extreme measures that can have effects in some cases equal to or more severe than those of war. The perception of sanctions as a peaceful, or "soft," tool of persuasion does not reflect the harsh reality of the economic and social devastation that can result … The fact is that sanctions represent a forceful measure of coercive pressure … they are three-quarters of the way toward the use of force … (Cortright & Lopez: 2000, 7). In the context of countering terrorism, the legally-repressive and coercive nature of sanctions is intended to dismay a state from engaging in terrorism, or in its support. The deterrent effect of sanctions does however not need to be limited to the specific state in question. In fact, the imposition of sanctions against one country can certainly dissuade another country from harbouring or supporting terrorism, thus best characterised a punitive and pre-emptive. Conversely, the sanctions-regimes placed on Libya and later against the Taliban-regime, amongst other freezing and seizing assets, represent a novelty insofar that they are the first time the Council took a more assertive and repressive response to terrorism.

## Security Council responds to Libyan terrorism

In December of 1988, Pan Am Flight 103 was heading from London to New York when it exploded in mid-air over Lockerbie, Scotland. 270 people perished, including 243 passengers, 16 crew members and 11 people on the ground. The ensuing investigations led American and Scottish investigators to Adbelbaset Ali Mohmed Al Megrahi, a high-level Libyan intelligence official, and Al Amin Khalifa Fhimah, a former manager of the Libyan Arab Airlines. "Libya's involvement with a forensic scientist's discovery of a tiny microchip of the bomb's trigger mechanism" was confirmed (Plachta: 2001, 126).

[95] The counterterrorism work of the Security Council also included addressing the marking of plastic or sheet explosives for the purpose of detection and a number of declarations reacting to specific events (e.g. attack on a Jewish religious centre in Argentina – S/PRST/1994/40). See Dedring's "The United Nations Security Council in the 1990s" (2008).

[96] The sanctions imposed against the Sudan in 1996, although certainly acknowledged, will be excluded from the scope of the ensuing analysis. In contrast to the sanctions imposed against Libya, the Sudanese sanction-regime remained diplomatic in nature[96] and the far-reaching sanctions (e.g. travel sanctions) adopted in resolution 1070 were never implemented due to humanitarian concerns (Cortright & Lopez: 2000, 121). Suffice it to say however, the goal of the sanctions was to extradite terrorists suspected for the attempted assassination of Egyptian President Hosni Mubarak in Addis Abba, Ethiopia and to stop the harbouring of terrorists. By May of 1996, Osama Bin Laden was expelled from the Sudan and the country made visible gestures dissociating itself from terrorism.

Also, a private diary entry from Fhimah further implicated the two Libyan nationals. The investigations confirmed that the two individuals were acting on behalf of the Libyan government (Comras: 2010, 31). Consequently, a grand jury in Washington D.C indicted the two suspects in November of 1991, and shortly afterwards an indictment by the United Kingdom followed (Ibid: 2010, 31). A considerable challenge however remained. There was no bilateral extradition agreement between the two Western nations and Libya. If the Libyan government was indeed involved in the explosion they would likely refuse to grant any extradition requests. The American and British governments were stern in their demand on Libya; the country was called upon to surrender the suspects for trial, cooperate in the disclosure of any information Libya may possess in relation to the crime (including full access to witnesses and documents), accept responsibility for actions of its agents and pay appropriate compensation (Plachta: 2001, 126).[97] What followed was a back and forth between the Libyan Government and its counterpart in the United Kingdom and the United States. Amongst other initiatives, Libya began criminal proceedings of their own and offered to admit UK and US observers to the trial (Plachta: 2001, 127). Significantly, Libya referred to Article 5(2) of the 1971 Montreal Convention exercising jurisdiction over the offence (Ibid: 2001, 127). Libya denied any of the charges and refused to surrender the suspects. Articles 5(2) and 7 of the 1971 Montreal Convention obliges states to exercise jurisdiction (see chapter 5) and codified the *aut dedere aut judicare* principle. Therefore, in accordance with the Montreal Convention the culprits were arrested and a Libyan investigation into the crimes took its course. Persistent in their demands, the United Kingdom and the United States insisted on the surrender of the suspects. Two observations can be made: First, considering the involvement of the Libya state it is plausible to conclude that the two Western countries were sceptical in believing that the Libyans would conduct thorough investigations and that the alleged suspects would face severe penalties if found guilty. Second, the involvement of the families of the victims (e.g. see meeting in Tripoli with Libyan officials) indicate the importance attributed to the outcome by the public (NYT: 1990). As a matter of fact, the victims' family members "became a visible and influential interest group, demanding that the suspects be brought to justice" (Cortright & Lopez: 2000, 111). Therefore, the perseverance by the UK and the US governments to try the suspects in their own courts ought also to be seen within a domestic political context.

In September 1989, a French airliner (UTA 772) exploded in mid-air over Niger killing 170 people. An investigation launched by the French government likewise determined that this was the work of the Libyan government (Comras: 2010, 31). Most damning to Libyan innocence was the confession obtained "from a Congolese opposition figure [in which he indicated] that he helped the Libyan defendants arrange to get the suspicious suitcase placed on board the flight" (Ibid: 2010, 31). Contrary to the approach taken by the authorities in the Lockerbie bombing, the French court sentenced a number of

[97] See Plachta's "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut dedere aut judicare" for a detailed account on the discussions between Libya and the two Western governments.

individuals to lengthy sentences in absentia.[98] Nevertheless, the French government joined the United Kingdom and the United States in their appeal to bring the matter to the Security Council. France submitted a request to the Council in which it demanded "Libyan authorities cooperate immediately, effectively and by all means with French justice in order to help establish responsibility for this [UTA bombing] terrorist attack." (S/1999/726: 1999, para. 15). Significantly, France did not demand the surrender of the suspects but rather expected Libya to uphold the life sentences that it handed down (Ibid: 1999, para. 18).

While the Pan Am Flight 103 and the UTA Flight 772 incidents certainly triggered Security Council action, not the least because the three permanent members of the Council were the targets of Libyan terrorism, Libyan sponsored terrorism was not new by then. In fact, "[i]n 1981, 1982, and 1986 Washington imposed progressively stronger unilateral sanctions against Libya" (Cortright & Lopez: 2010, 110). And, in response to the West Berlin discotheque bombing in 1986, President Reagan ordered retaliatory strikes against Tripoli and Benghazi (Glass: 1986). Libyan involvement in international terrorism was not born overnight and by the later 1980s and it was therefore increasingly becoming a central concern to the international community (Wardlaw: 1987).

The Montreal Convention provides that a country can either extradite an offender or submit the case to its competent authorities for the purpose of prosecution (Article 7) and it was conversely paramount that France, the USA and the UK convince the Security Council that the bombings were indeed the direct result of state-supported terrorism (Comras: 2010, 33). Although Libya continued to argue that the alleged offences fell within the scope of the Montreal Convention, and should thus be prosecuted locally, the Security Council moved to adopt resolution 731 in January 1992, albeit without yet taking assertive action. The resolution urged "the Libyan Government immediately to provide a full and effective response to those requests [made by the three afflicted countries] so as to contribute to the elimination of international terrorism" (UNSC res. 731: 1992, op. para. 3).

When it became evident that Libya would not comply with the request in resolution 731, the Security Council again addressed the matter in March 1992.[99] During the debate in the Security Council, the Libyan representative (Mr. Elhouderi) highlighted his country's exemplary dealing of the case, maintaining that the moment his country "received the documents of indictment its competent judicial authorities began to act.

[98] A French court sentenced, amongst others, Addallah Senoussi (Gaddaffi's brother in-law) to life in prison. See Henley's "France finds six Libyan guilty of 1989 airliner bombing" for further reading.

[99] At the same time, Libya initiated legal proceedings before the International Court of Justice, seeking confirmation that the Montreal Convention would find application and that the case would be tried locally. It later turned out that the Court sided with the Western states, determining that parties had an "obligation to accept and carry out the decision of the Security Council in accordance with Article 25 of the Charter…" and that the obligations placed on states by the Security Council supersede the obligations of international agreements, including the Montreal Convention (In Comras: 2010, 33). See also ICJ Judgment of February 27th 1988 on the Question of Interpretation and Application of the 1971 Montreal Convention (Libya vs. United States).

Two judges were appointed and began work immediately; they undertook an initial investigation and an order was issued to hold the two accused in initial custody" (UN Doc. S/PV.3063: 1992, 5). China, although condemning terrorism in all its forms, was sceptical of potential sanctions against Libya. Mr. Li Daoyu remarked that the imposition of sanctions against Libya would "not help settle the question but will rather complicate the issue further, aggravate regional tensions and have serious economic consequences for the countries concerned in the region" (Ibid: 1992, 61). Most significantly, however, China concluded by confirming that it will abstain from voting on the draft resolution imposing sanctions on Libya (Ibid: 1992, 61). Russia, another permanent member of the Security Council, observed that despite the efforts made, "the Security Council had no alternative but to adopt another resolution providing for enforcement action to ensure compliance with the resolution it had previously adopted [Resolution 731]" (Ibid: 1992, 79-80). It was indeed important that China would abstain from the vote and Russia supported the adoption of coercive measures, paving the way for the adoption of resolution 748. Soviet influence during the Cold War extended across the Middle East (e.g. Freedman: 1987), including in Syria, Yemen, Algeria and notably also in Libya (Dakheel: 2014, 16). By providing military and economic aid (e.g. Aswan High Dam in Egypt) the Soviet Union undertook efforts to weaken Western influence in the Middle East (Freedman: 1987, 177). In the 1980s, the Soviet Union "has also sought to solidify its influence through the conclusion of long-term Friendship and Cooperation treaties", including with Egypt in 1971, Afghanistan in 1978 and Syria in 1980 (Ibid: 1987, 177). Consequently, the sanctions against the government of Muhammad Al-Gaddafi are thus to be entertained with this acknowledgement in mind. The Soviet Union's willingness to not draw on the veto to undermine sanctions against Libya is indicative of the newfound sense of cooperation in the Council on matters relating to terrorism.

For the first time since its inception, member states of the United Nations found themselves able to adopt legally restrictive measures against a state sponsor of terrorism. During the Cold War years, this development was certainly a distant thought. So, acting pursuant to Chapter VII of the UN Charter, the Security Council decided that Libya must comply with the requests made by France, the UK, and the US and that the country must cease all forms of terrorist activities and commit itself to suspending any support for terrorist organisations. Subsequent operative paragraphs laid out a comprehensive sanctions-framework, imposing an arms embargo and aviation, travel, and diplomatic sanctions. The Council moreover required states to "deny permission to any aircraft to take off from, land in, or overfly their territory if it was destined to land in or had taken off from the territory of Libya…prohibit the supply any aircraft or aircraft components to Libya…the provision of aircraft engineering or servicing…or airworthiness certification…to Libyan aircraft" (Farall: 2008, 299). Paragraph 6(c) placed an obligation on states to take steps to deny entry and or expel Libyan nationals "who have been denied entry to or expelled from other States because of their involvement in terrorist activities" (UNSC res. 748: 1992, op. para. 6(c)). In consequence, the sanctions were not only directed against the

Libyan government as such but also against individuals identified as involved in terrorist activities.[100]

When the Security Council reviewed Libyan progress and determined that the core obligations of resolution 748 remained unheeded, the Council tightened the aviation ban and restricted the import of oil-related equipment by adopting resolution 883 in November 1993. Again acting under UN Chapter VII, the Council decided that countries should freeze any funds and other resources of the Libyan government and its public authorities (UNSC res. 883, op. para. 3). The sanctions imposed by way of resolution 883 further prohibited the export to Libya of goods used in the course of the refinement and export of oil (e.g. furnaces) and states were obliged to close all Libya Arab Airline offices within their jurisdiction (even prohibiting the endorsement of any ticketing by Libyan Arab Airlines) and furthermore prohibited material supply intended to administer, *inter alia*, Libyan airfields (Ibid: 1993, op. para. 6). The United States also propagated the imposition of an oil boycott. Despite Europe's eagerness to contribute to deterring Libyan sponsorship of terrorism, the Europeans "resisted because they depended heavily on imports of Libyan oil, consuming 90 percent of Libya's oil exports" (Cortright & Lopez: 2000, 112).

Following the adoption of resolution 883, the conflicting parties descended into deadlock until 1998. Despite the general support for the use of sanctions, a number of countries voiced concern of the growing economic and humanitarian costs (Cortright & Lopez: 2000, 118). As such, the OAU announced that it would side-step the sanction-regime in June 1998 if an agreement was not reached within a few months (Romaniuk: 2010, 51). Consequently, it was suggested that Libya would hand over the suspects to be prosecuted in the Netherlands under Scottish Law. The details of the deal were laid out in resolution 1192, in which sanctions would be lifted once the two suspects appeared for trial (UNSC res. 1192, op. para. 8). On April 5th 1999 the suspects were delivered to The Hague and two days later sanctions were suspended. Secretary-General Kofi Annan confirmed that he will be "submitting a report to the president of the Security Council, confirming that the two have arrived in the Netherlands … and the Council will act to suspend the sanctions immediately" (Press Release SG/SM/6944: 1999). It was however not until the adoption of resolution 1506 in 2003 that the sanctions imposed on Libya were formally lifted (Press Release SC/7868: 2003).

While it is difficult to assess the extent to which the sanctions had an economic impact,[101] it does follow that the sanction-regime was successful in leading to the extradition of the alleged offenders. As Kofi Annan noted "…apart from living with the sanctions for seven years, no country likes to be treated as an outcast and outside the society of nations…And I think Libya wanted to get back to the international

[100] A number of exceptions were made on the grounds of humanitarian and emergency needs. To ensure the implementation of the sanctions, member states established the 748 Sanctions Committee. See the Global Policy Forum's "Libya Sanctions Committee" for more details.

[101] See Cortright & Lopez's "The Sanctions Decade: Assessing UN Strategies in the 1990s" pages 113-115 for further analysis on the impacts of the sanction-regime on Libya's economy.

community… [and] wanted to be able to deal freely with its neighbours and with the rest of the world" (Press Release SG/SM/6944: 1999).

## The Taliban and the Security Council

The sanction-regime that has attracted the most attention in the pre-9/11 era has been the one imposed against the Taliban in Afghanistan in October 1999. The 1267-regime, adopted unanimously, remains in place at the time of writing (although in amended form) and demonstrates the Council's assertive response to terrorism even before 9/11. With the Soviet withdrawal in 1989, Afghanistan fell into a civil war with various fractions gunning for power, becoming a futile ground for terrorist organisations. By 1996 the Taliban rose to power in Afghanistan,[102] increasingly garnering support during the civil war (Laub: 2014). The Taliban imposed a strict interpretation of tribal codes and sharia law in the territory it controlled until it was overthrown by US and allied forces after 9/11. Although Afghanistan was a concern to the United Nations for its ill-treatment of women and its harsh rules (see UNSC res. 1076), it was the movement's support for Osama bin Laden and his al-Qaeda organisation that ultimately led to Security Council action against the regime in 1999. Already in 1996 the Security Council showed itself increasingly worried, highlighting "that the continuation of the conflict in Afghanistan provides a fertile ground for terrorism and drug trafficking which destabilise the region and beyond" (UNSC res. 1076, op. para. 5).

The early 1990s were a busy time for al-Qaeda. "During this period more than a thousand new al Qaeda foot soldiers were recruited, trained, and pledged to carry out al Qaeda's bidding." (Comras: 2010, 42).The organisation was rapidly evolving into an international jihadist movement, with many local organisations pledging allegiance to the group. Bin Laden was able to enlist "groups from Saudi Arabia, Egypt, Jordan, Lebanon, Iraq, Oman, Algeria, Libya, Tunisia, Morocco, Somalia, and Eritrea" (The 9/11 Commission Report: 2004, 58) One of the conflicts that al-Qaeda got involved in was the support of Muslim fighters in Chechnya. Russia had been fighting for control of the northern Caucasus for centuries and a US State Department review from 1998 moreover suggested that "that insurgents led by a Chechen guerrilla commander of Jordanian origin, who goes by the name Khattab, is receiving equipment and training assistance from Islamic guerrillas from throughout the Middle East and South Asia" (Katzman: 1999, 2). The 1998 Patterns of Global Terrorism report provides further evidence that not only did Khattab have a direct link to bin Laden but also that al-Qaeda provided the Chechnyan rebels with individuals to support their training efforts (Patterns of Global Terrorism: 1998, 28). "To the Islamists, Chechnya offered an opportunity to create an Islamic republic in the Caucasus from which they could wage a jihad throughout Central Asia" (Wright: 2006, 283). This acknowledgment would prove pivotal in garnering Russian support for action against the Taliban and their

[102] See Ahmed Rashid's insightful work "Taliban The Story of the Afghan Warlords" for a detailed reading on the origins of the Taliban and their rise to power.

endeavours at harbouring bin Laden. During a meeting prior to the adoption of resolution 1267 (see below) in 1999 Gennady Gatilov, speaking on behalf of Russia, acknowledged the negative consequence of the export of al-Qaeda support across the globe. He noted, "… Afghanistan has acquired a firm reputation as an international exporters of terrorism and narcotics. The negative consequences of this are already being felt far beyond the borders of that country, including in some regions of Russia and in the States of Central Asia" (Gatilov in UN Doc. SPV/4039, 9). India likewise raised concern over Afghanistan's status as fertile ground for terrorist organisations because "of the training camps in our immediate neighbourhood, in Pakistan-occupied Kashmir and Afghanistan" (UN Doc. S/PV.3921, 7). Al-Qaeda was thus a problem to all countries alike, and in the case of India and Pakistan played into broader geopolitical disputes. One also not lest forget that many of the Islamic countries that provided support to al-Qaeda in its early stages now became its target (Comras: 2010, 35).[103]

Famously, bin Laden and the Taliban's Mulla Omar forged a firm alliance. While "Al Qaeda enjoyed full freedom of activity and movement, and an open door policy to bring in, indoctrinate, and train new jihad volunteers (and its members) could travel freely (Comras: 2010, 51) the Taliban in return received access to al-Qaeda contacts and funding channels, and at times al-Qaeda operatives fought alongside Taliban fighters. The 9/11 Commission Report puts it well when it concludes, "[b]in Laden appeared to have in Afghanistan a freedom of movement that he had lacked in Sudan. Al Qaeda members could travel freely within the country, enter and exit it without visas or any immigration procedures…used the Afghan state-owned Arian Airlines to courier money into the country" (9/11 Commission Report: 2004, 66). Al-Qaeda was increasingly become a bigger problem and given its involvement (or planned involvement) in conflicts that afflicted a broad spectrum of countries, including Saudi Arabia and Russia, many countries had a vested interest in curtailing the organisation's ability to execute terrorist offences. Two incidents in particular compelled the Security Council to take action. In August 1998, al-Qaeda attacked two US embassies, one in Nairobi, Kenya and the other in Dar es Salaam, Tanzania. Over 200 hundred people died, including 12 Americans and many more were injured (Mitchell & Talbot: 2018). The attacks in the East African cities were well coordinated and showed the world that al-Qaeda had emerged into a dangerous threat that could no longer be ignored. Only a few days later, on August 13th 1998, the Security Council unanimously adopted resolution 1189. After condemning the attacks in Kenya and Tanzania, the Council proceeded to call on "States to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators" (UNSC res. 1189, op. para. 5). The resolution addressed state actors but did not direct its appeal towards non-state actors like al-Qaeda. On August 28th, two

[103] For example, when bin Laden returned to Saudi Arabia prior to the Gulf War he proposed to the king that he can gather sufficient volunteers to fend off any attack from expansionist Iraq. The king declined and turned to the United States which ended up providing troops on the ground. In effect, bin Laden grew increasingly critical of the kingdom and included Saudi Arabia on its list of infidels against whom a jihad is to be waged. See Lawrence Wright's "The Looming Tower: Al Qaeda's road to 9/11" for further reading on this subject.

weeks later, the Council convened again and adopted resolution 1193. Member states expressed their concern over the recent escalation of violence in Afghanistan, in which Afghan forces caused serious human suffering when they took control of Mazar-e-Sharif mostly inhabited by Shi'a Muslims (UNSC res. 1193, para. 10). The Afghan crisis was of great concern to the Council and its members understood that the warring parties were lending support to terrorist organisations. As such, the Security Council demanded that the Afghan factions "refrain from harbouring and training terrorist and their organisation and to halt illegal drug activities" (UNSC res. 1193, op. para. 15). Both resolutions remained rather unspectacular and it was not until the adoption of resolution 1267 (see below) that any significant action was taken.

In the meantime, the United States launched cruise missiles at selected targets in Afghanistan and at a pharmaceutical factory in the Sudan. The United States, as stipulated in the UN Charter, notified the Security Council of its bombings and justified the use of force by its right to self-defence pursuant to Article 51 of the UN Charter. International reaction to the unilateral strike were mixed and many countries condemned the use of unilateral force (Lietzau: 2004, 419). "Most U.S. allies, including Britain, Germany … supported the attacks. France and Italy issued tepid statements of support. Russian President Boris Yeltsin condemned the attacks, as did Pakistan and several Arab countries. China, although equivocal at first, later openly criticized the U.S. action" (Lobel: 1999, 538). At the Council meeting on August 28th following the attacks, Pakistan, although condemning terrorism and the loss of innocent lives, showed itself frustrated by the recent American airstrikes. On behalf of Pakistan, Mr. Akbar explained that the strikes in Afghanistan "caused deep indignation, irrespective of the motives behind the air strikes…(and that) the violation of the sovereignty and territorial integrity of Afghanistan cannot but be a matter of grave concern" (UN Doc. S/PV. 3921: 1998, 5). Iraq went as far as to characterise the strikes as an act of "'American arrogance' and Iran also condemned the bombings" (*Irish Times*: 1998, 1).[104] As the record suggests, some member states in the Security Council, both permanent and non-permanent members, were not willing to accept the unilateral use of force in counterterrorism.[105]

It rapidly became evident that the Taliban would not heed the demands made by the Security Council in resolutions 1189 and 1193. It also appeared as if the Taliban-regime and al-Qaeda found a common enemy in the West around which it could rally its fundamentalist doctrine (Comras: 2010, 57). In October of 1999, the United States introduced a draft Security Council resolution in which it proposed the adoption of sanctions against the Taliban for its unwillingness to cease its support for terrorist organisations and for its failure to turn over bin Laden to a country where he has been indicted (UNSC res. 1267). Acting under Chapter VII, thus placing a legal obligation on all states, the Security Council specifically targeted the Taliban (Dedring: 2008, 97).

[104] See Lietzau's "Old Law, New Wars: Jus ad Bellum in an Age of Terrorism" and Williamson's "Terrorism, War and International Law: The Legality of the Use of Force" for further reading.
[105] Also, one should not forget the rescue missions conducted by Israel in 1976 in response in Entebbe Uganda. This too, was not greeted with support in the Security Council by many states. See Chapter five for further reading.

Yet, they also demanded the extradition of bin Laden as the person responsible for the attacks. Specifically, operative paragraph 2 demanded that the "Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted … where he will be arrested and effectively brought to justice" (Ibid: 1999, op. para. 2). In essence the Council froze all oversea assets of the Taliban and banned the use of resources that would benefit the Taliban-regime (Cortright & Lopez: 2000, 127). In addition, states were to take steps to cooperate in preventing and suppressing terrorist acts, and to bring to justice the perpetrators of the attacks (Dedring: 2008, 100) and to report to a newly established sanctions committee. Resolution 1267 did not impose broad economic sanctions but rather mandated the establishment of a special committee – the 1267 Committee – which would set out to identify and designate entities against whom sanctions should be imposed (UNSC res. 1267: 1999, op. para. 6(e)). The committee was also instructed to submit periodic reports on the state of implementation, any violations and the impact (e.g. humanitarian) in connection with the sanctions-regime. With the adoption of the sanctions against the Taliban, the Council sent a direct message to Osama bin Laden underscoring that "You can run, you can hide, but you will be brought to justice" (Sodenberg in Comras: 2010, 65). In operative paragraph 4, resolution 1267 decided that all states shall freeze funds and other financial resources and ground Afghan-related air travel (UNSC res. 1267, op. para. 4).

The sanctions imposed on the Taliban had little consequence and would not hinder Taliban support for al-Qaeda. Yet, the Taliban showed itself willing to resolve the issue and suggested the convening of a panel of Islamic clerics that would decide on what to do with the terrorist leader, but it did not demonstrate any willingness to comply with the demands made in resolution 1267. Additionally, "[m]ajor states were unwilling to take the extensive measures that would be required to reduce arms trafficking along the Afghan-Pakistani border. The military coup in Pakistan in October 1999 made the challenge of cutting off Pakistani support for the Taliban even more difficult" (Cortright & Lopez: 2000, 129). While the overthrown government was distancing itself from Taliban rule in Afghanistan, the new military regime was more favourable to the Taliban (Ibid: 2000, 129). Also, the sanctions committee was slow to identify and designate entities and individuals to be listed. In fact, the first list of Taliban assets to be frozen was not introduced until April of 2000. Additionally, resolution 1267 included a thirty-day embargo on the sanctions, giving individuals who anticipated to be subject to the sanctions sufficient time to transfer assets out of the reach of the Sanctions Committee. Conversely, "this process only actually began well after the date set for sanctions to enter in force had passed" (Comras: 2010, 66). What is more, the Taliban operated outside of the traditional and mainstream economic system. It took another dramatic attack, in this case it was the destruction of a US Naval vessel (USS Cole) in October 2000 in Yemen by al-Qaeda, for the Security Council to take further concrete action.

In December 2000 the Security Council moved to adopt resolution 1333. The passing of it was a major development as it extended the "the scope of the asset freeze to include those controlled by Usama bin Laden, Al-Qaida and affiliates of both"

(Gutherie: 2005, 494). Member states also extended the sanctions to include an arms embargo (Holtom: 2007, 7), extending the flight ban to any aircraft from taking off or landing in Taliban controlled areas and also decided that states shall prevent the supply or transfer of the chemical acetic anhydride "to any person in the territory of Afghanistan under Taliban control" (UNSC res. 1333: 2000, op. para. 10). This was an attempt to curtail the regime's illicit drug trade and thus one of their strongest revenue streams. It was however the extension of the sanctions list administered by the 1267-Committee to include individuals associated with bin Laden and al-Qaeda that was most significant (UNSC res. 1333: 2000, op. para. 8(c)).[106] It was the first time the UN was directly targeting individuals and commercial and non-governmental entities in relation to al-Qaeda and the Taliban (Comras: 2010, 70). This was indeed a deviation from the practise established by the Council in resolution 1267. Although resolution 1267 made passing reference to bin Laden and his associates, it was done in the context of condemning the Taliban for providing a fertile ground on which they can operate. It thus did not include any sanctions against al-Qaeda, a non-state actor. A noticeable similarity however was that both 1267 and 1333 were adopted with a geographic context (Afghanistan) in mind and did not have a global reach (Luck: 2006, 99).

The Security Council was able to muster sufficient support for the imposition of sanctions as a counterterrorism instrument. Indeed, acting under Chapter VII, the Council adopted sanction-regimes against Libya in 1992, the Sudan in 1996 and against the Taliban-regime in 1999 (and later against al-Qaeda). While Libyan sanctions were largely in response to a specific terrorist incident[107] (e.g. Pan Am 103) and applied to the whole of Libya, the 1267 Taliban sanction-regime was limited to the territory controlled by the Taliban and was not in response to a particular terrorist incident but rather as a result of a threat that manifested itself over time. What is more, the latter sanctions were also novel as they not only imposed the usual aviation sanctions but additionally froze Taliban assets. Resolution 1333 imposed a mandatory arms embargo and more importantly, extended the regime to include sanctions against al-Qaeda, a non-state actor. On a general level, the response by the Security Council was unparalleled in its assertiveness and laid the foundation for SC action post-9/11.

[106] Resolution 1333 also included a number of institutional amendments. It established a new committee of the experts to make recommendations of "how the arms embargo and the closure of terrorist training camps demanded in paragraphs 3 and 5 above can be monitored." The first report issued by the expert group indicated that implementation would fall short if bordering countries did not comply (Source). In July 2001 the Security Council adopted resolution 1363, in which the Secretary-General was tasked with establishing a monitoring mechanism to a. monitor implementation of measured imposed by previous resolutions, b. offer assistance to bordering states of Afghanistan to increase capacity c. to report any violations of the measures imposed by resolutions 1267 and 1333. The monitoring mechanism included a monitoring group set up in New York and a sanctions enforcement support team. See resolution 1363 for a detailed overview on the institutional changes.

[107] Although one has to acknowledge that Libyan support for terrorism greatly occupied the United States. Yet, Security Council action remained absent until 1992, after investigations into Pan Am flight 103 and UTA flight 772 implicated the Libyan government.

## Chapter conclusion

A lot had transpired in terms of counterterrorism at the United Nations in the 1990s. The General Assembly gradually moved towards unequivocally condemning all acts and practises of terrorism (see UNGA res. 40/61). Although the Assembly initially continued to pay tribute to the inalienable right of independence from colonial and racist rule and no measure was to jeopardise these people's legitimate struggle (see UNGA res. 46/51) this practise came to a halt when member states adopted resolution 49/60 in 1994. In the annex to the resolution the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism and asserted that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" (Res. 49/60: 1994, Annex, Art. 3). Resolution 51/210 (1996) built on this framework and extended the UN's focus on the preventative element by highlighting the urgency to curtail terrorist financing activities. Certainly, the UNGA gradually established terrorism as a crime no matter the circumstances or how noble the cause.

The General Assembly likewise initiated further deliberations on a comprehensive framework against terrorism. Yet, with the familiar differences of opinion as regards definition and scope, these efforts remained unsuccessful. The draft working document proposed by India does nevertheless allow for the conclusion that a similar schemata to the sectoral conventions was favoured. Provisions included, *inter alia*, the extradition or prosecution of alleged terrorists and the upholding of their rights. In 1997 and 1999 member states set out to adopt two further sectoral conventions. The 1997 Bombing Convention dedicated itself towards the particular terrorist activity involving the use of bombs, whereas as the 1999 Terrorist Financing Agreement, for the first time, addressed the phenomenon as a whole. Unlike the predecessor conventions (Diplomats and Hostages conventions), these two conventions left little doubt that they were adopted for the purpose of suppressing terrorism. The adoption of the 1997 and 1999 conventions is also indicative of the UN's increasing tendency to treat terrorism as a special crime in the need of a special response.

It is also worth noting that a military approach to tackling terrorism was neither endorsed nor mandated by the United Nations. The contrary seems very true. Countries showed themselves sceptical of the US unilateral strikes against Afghanistan and the Sudan. In fact, the American strikes in 1998 were condemned by members of the Security Council and were perceived as counterproductive to the overall peace process in Afghanistan (see statement made by Pakistan above). The Security Council, however, imposed three sanctions-regimes, two of which were previously discussed. Sanctions are restrictive and repressive counterterrorism instruments. Initially, the Council predominantly targeted state-actors but with the adoption of resolution 1333 following the USS Cole bombing, the body extended its reach to not state-actors, albeit within a specific territorial context (Afghanistan).

There is no doubt that September 11 marked a radical shift in global affairs. In part, the attacks triggered immense public spending on security and readjusted political alliances. In his speech to Congress on September 20th, 2001, then President Bush called on every nation to make a decision, "[e]ither you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime" (President Bush in his address to Congress: 2001). The world would now follow a new dichotomy in which countries are either classified as good or evil on the basis of their contribution to 'the war on terrorism'. The global dimension of al-Qaeda and international terrorism in general brought a new kind of challenge to the United Nations. Chapter five will therefore explore how the organisation responded to international terrorism after the tragic attacks in 2001(and the overall shift in the nature of terrorism) and amidst the changing geopolitical realities.

# CHAPTER FIVE – THE UN AND TERRORISM AFTER 9/11

The United Nations have struggled to formulate a response to terrorism since it first formally placed the item on its agenda in 1972. This conclusion has become visible through the assessments in chapters three and four. Since the four coordinated attacks on the United States in 2001, terrorism has emerged as a central concern to the international community. Concurrently, the General Assembly and the Security Council have significantly increased their counterterrorism output, both in terms of quantity and complexity. This chapter intends to address how the UN's response to terrorism has changed since 9/11 until 2019. In an attempt to provide consistent comparison across timeframes, the focus of this chapter will rest on the General Assembly's resolutions adopted under the 'measures to eliminate international terrorism' stream, the body's problem-specific response (e.g. conventions) and on the attempts to adopt a comprehensive convention to suppress terrorism. As regards the Security Council, chapter five will place specific focus on the emerging regulatory regime of UNSC resolutions, the extension of the 1267 sanctions-regime, and the evolution of the use of force as a counterterrorism instrument. Although already a feature of earlier UN work, specialised agencies have increasingly taken on a counterterrorism mandate in the post-9/11 era. Due to space restraints, these will not be dealt with here.[108]

## The General Assembly after September 11th

There is little doubt that the attacks on September 11th were a watershed event for international affairs. The events not only exposed Western vulnerability to terrorism at home but moreover led to a number of interventions around the globe as well as a newfound focus on terrorism. The Ad Hoc Committee on International Terrorism had yet to complete its negotiations on a comprehensive agreement and although regional tensions (e.g. Israel/Palestine and India/Pakistan) continued to impact the global community, the agenda item 'measures to eliminate international terrorism' remained an annual fixture at the United Nations.[109] After 9/11, the Security Council has taken on a more active role in counterterrorism, and academic interest in the work of the Council has experienced significant growth, at times at the expense of the General Assembly. Surely one can concede that the General Assembly has been entrusted with a broad range of mandates (see Article 10 of the UN Charter); however, "the General

[108] For further reading see for example Bowen et al.'s "Multilateral cooperation and the prevention of nuclear terrorism; pragmatism over idealism" or the OSCE'S "IMO Maritime Security Measures-Background" as well as MacKenzie's "a History of the Civil Aviation Organisation".

[109] In 2005, world leaders convened for a World Summit where the issue of international terrorism was a primary concern. Based on the 2004 commissioned report by the High-Level Panel on "Threats, Challenges and Changes" the idea of a counterterrorism strategy to be adopted by the General Assembly surfaced, which was adopted with resolution 60/288. Annex to the resolution was a plan of action that highlighted commitments governments ought to take in relation to addressing the conditions conducive to the spread of terrorism, to the prevention and combating of terrorism, capacity-building and human rights and the rule of law in counterterrorism. These developments cannot be considered in further detail here. See Comras' "Flawed Diplomacy" pages 184-188 for a more thorough account.

Assembly's powers are of recommendations only, and when contrasted to the binding power of the Security Council, they suggest an actor that is limited in its ability to generate or affect international law" (Boulden: 2014, 555). In contrast to the work of the Security Council, unanimity and consensus remain central in the Assembly. Only when sufficient support among member states is attracted can decisions be implemented. In some cases, decisions are watered down to the least-common-denominator and one is left to wonder whether "the diplomatic energies expended" (Peterson: 2004, 174) were worth the outcome. Indeed, the activities of the Assembly have been more moderate with regards to terrorism and the body suffers from numerous procedural short-comings that certainly contribute to the rather low academic interest in the UN body on this subject. However, despite its inability to command governments to take or refrain from certain actions, the UNGA nevertheless functions as a moral compass and as a normative power. If nothing else, the General Assembly operates on a one-state, one-vote policy and consequently holds considerable legitimacy in a wide array of subjects. Due to the global membership of the Assembly, it also reflects a more diverse set of opinions and experiences than the Security Council, arguably making it the most legitimate UN body better suited to discussing matters of grave concerns, such as terrorism. It is this legitimacy that allows the General Assembly to set global standards in counterterrorism. Therefore, despite its shortcomings it is worth to reflect on the counterterrorism response of the General Assembly post-9/11.

In response to the attacks on September 11th, the General Assembly greatly diversified its response to terrorism, with other committees (e.g. Fifth Committee) also addressing terrorism.[110] As a matter of record, the body has adopted a multitude of resolutions focusing on specific terrorism-related matters, including human rights and terrorism, and terrorism and weapons of mass destruction.[111] While these resolutions and other efforts adopted by the General Assembly after 9/11 are certainly worth considering, this thesis has chosen to exclude them from analysis for two reasons. For one, previous timeframes discussed have addressed the sectoral response, the attempts at a comprehensive convention, and the resolutions adopted under the 'measures to eliminate' strand. Therefore, for the purpose of consistent comparison, focus should remain on these elements in this chapter as well. Second, the limited nature of this research project does not allow for an all-encompassing analysis of the Assembly's work. The resolutions adopted by the Assembly are useful indicators in assessing in what way the United Nations has positioned itself on the issue of terrorism after September 11th and if any significant shifts can be identified. Equally important

[110] See the following link for a more detailed overview of the General Assembly's work since 2001: https://www.un.org/counterterrorism/ctitf/en/about-task-force

[111] Indeed, the General Assembly greatly expanded its work program to issue areas such as human rights, fundamental freedoms and terrorism. Although the Sixth Committee has remained a pertinent actor in the UNGA's counterterrorism efforts, other committees (e.g. Third and Fifth Committee), have increasingly taken on a more active role. See Romaniuk's "Multilateral Counter-Terrorism", pages 80-83 and Rosenow's "United we fight?" for a more insightful overview. A full list of the General Assembly's increasingly diverse resolutions can be found here https://research.un.org/en/docs/ga/quick/regular/57

are the negotiations in the Sixth Committee (and the Ad Hoc Committee and the respective Working Group) on a Comprehensive Convention as they tellingly demonstrate if and how member states – and by extension the UN – have changed their position on terrorism and what progress has been made. Admittedly, in light of the far-reaching Security Council resolutions adopted after 9/11, which have incorporated some of the draft elements of the Comprehensive Convention, commentators have questioned the redundancy of the convention as a whole (e.g. Stiles: 2006). As noted, however, a review on the progress of a general convention against terrorism remains nevertheless important, as it is necessary to gain a better understanding of where the organisation stands on terrorism and how close countries are to an agreement. To the extent the subject allows, this section will underscore that the global body remains divided. The ongoing failure to define terrorism, to agree on the scope of the convention and the revival of efforts by the Organisation of the Islamic Conference to "demand for inclusion of language that would distinguish between terrorist acts and the activities of national liberation movements and 'peoples struggling against foreign occupation'" (Rosand: 2007, 407) continues to complicate the adoption of such an comprehensive instrument.

At the 56th session of the UNGA, immediately following the September 11th attacks, then Secretary-General Kofi Annan acknowledged the work that has been done by the Assembly to date, specifically noting, "[w]e must now go further. All nations of the world must be united in their solidarity with the victims of terrorism, and in their determination to take actions" (UNGA Press Release: 2001, 9903). On behalf of the African Group, Dumisani Kumalo, the South African representative, highlighted that the challenge the United Nations "confronts is to intensify our collective efforts to live up to the preamble of the United Nations Charter" (Ibid: 2001, 9903). Countries thus condemned the attacks and adopted resolution 56/1 on Condemnation of Terrorist Attacks in the United States of America without a vote.

Inevitably, the UNGA's work on terrorism was granted new impetus in light of the events on 9/11. The resolutions adopted by the world body have been the subject of scholarly work early on (e.g. Peterson: 2004, Romaniuk: 2010 and Boulden: 2014), with many observers concluding that post-9/11 resolutions mirror pre-9/11 practise (e.g. Romaniuk: 2010, 78). The ensuing section will make evident that, while the resolutions adopted by the UNGA in the post-9/11 era represent a significant body of work, major changes remain absent in 2018. This serves as a reminder that although the organisation continues to seek an important role for the Assembly in matters relating to counterterrorism, the inherent disagreement prevents member states from moving beyond what has now become a well-established least common-denominator. In consideration of the lack of meaningful advances in respect to its resolutions under the 'measures to eliminate' agenda item, the General Assembly is stagnating.

Despite the reluctance of member states to break new ground on this specific agenda item, there are a number of observations that are worth reflecting upon further. In this respect, both the preambulatory clauses and the operative portion of the resolutions offer useful insights. The preambles – that is, the introductory remarks of a resolution

– help discern the true intention of the paragraphs that follow and facilitate one's understanding of how the issue of terrorism is viewed and understood. In the absence of precision, the preambles are intended to guide member states' interpretation of the operative portions. First, the observation can be made that although the resolutions passed are not in response to any specific event, they include references to certain terrorist incidents. This is likely the result of a consensus that certain acts constitute a clear form of terrorism while others do not. This can certainly be considered as a reflection of the UNGA's approach to "terrorism as a criminal activity requiring a long-term, law-based approach" (Boulden: 2014, 567). Furthermore, the UNGA has tended to concede the role of more immediate intervenor to the Security Council (Peterson: 2004, 175). Yet the past discussions in the respective committees (e.g. Sixth Committee, see previous chapters) also allow for the conclusion that this is also the result of the Assembly's inability to agree on what constitutes terrorism. In this respect, it is worth highlighting member states' willingness to condemn the attacks on September 11$^{th}$ as well as the Bali and Moscow bombings in 2002. In 2003, the General Assembly also widened its scope to include a reference to the bombings of the United Nations Headquarters in Iraq (see UNGA res. 58/81). Moreover, in 2008, although upholding its strong condemnation of the aforementioned incidents, the Assembly widened its scope yet again and showed itself deeply "disturbed by the persistence of terrorist acts, which have been carried out worldwide" (UNGA res. 62/71: 2007, para. 9), albeit without providing an understanding of what a terrorist act is. And in 2012 it reaffirmed its condemnation of attacks aimed against the United Nations around the globe (UNGA res. 66/105, para. 11). The General Assembly has to this day remained consistent in its practice of only rarely condemning specific acts of terrorism, certainly also as a result of its long-term strategic ambitions but equally importantly as a consequence of the politicised nature of the phenomenon in the General Assembly.

Second, and as already indicated above, many of the provisions contained in the resolutions remained similar to pre-9/11 practice, including the strong condemnation of all acts, methods, and practises of terrorism no matter the consideration or cause, although terrorism is never defined. Third, and perhaps most important, although countries excluded any reference to the principle of self-determination and the rights of "peoples under colonial and racist regimes and other forms of alien domination and foreign occupation" (UNGA res. 46/51: 1991, para. 14) since 1994, the resolutions adopted under the 'measures to eliminate' strand indicate that member states continue to remain unwilling to condemn politically motivated violence in any and all circumstances. This is best evidenced by specific reference to the final outcome document of the conference of the NAM in the preambular paragraphs of numerous resolutions (see below) and in the discussions that have taken place in the Sixth Committee during the drafting and adoption of the respective resolutions.

The resolutions adopted under the 'measures to eliminate' stream have remained government-centred and have created a normative structure that continues to emphasise the treatment of terrorism as a crime that necessitates suppression through seeking criminal repercussions (e.g. bringing terrorist to justice). Moreover, governments have highlighted the need for closer international cooperation between

countries and have encouraged specialised agencies and regional arrangements afflicted by terrorism to address the issue within their fora. In this context it is particularly useful to recall that over the past 18 years the General Assembly has repeatedly stressed "the need to strengthen further international cooperation among States and among international organisations and agencies, regional organisations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism, in all its forms and manifestations, wherever and by whomever committed" (for example UNGA res. 60/43, 12).[112] In its later resolutions (starting in 2004), the UNGA moreover included a provision in its operative paragraphs calling "upon all States to cooperate to prevent and suppress terrorist acts" (UNGA res. 59/46: 2004, op. para. 13).[113] It is also remarkable how consistent the Assembly has been with the operative portions of its resolutions. More simply put, the UNGA solidified its condemnation of all "acts, methods and practises of terrorism in all its forms and manifestations as criminal and unjustifiable, wherever and by whomever committed" (UNGA res. 61/40: 2006, op. para. 1), and in all of its resolutions (as early as 1994) the Assembly rejected any notion that terrorism can be justified, no matter how noble the cause may perceived to be (e.g. UNGA res. 73/211: 2018, op. para. 4). Despite a general condemnation of terrorism, these references only remain partially helpful as it is still unclear what the Assembly considers to be a terrorist act. Yet, one ought to be aware that formal condemnation of terrorism – whatever the consideration – was a considerable step forward in comparison to the resolutions adopted in the 1970s. Indeed, earlier resolutions condemned acts of "international terrorism which endanger or take human lives" only to recognise that "in order to contribute to the elimination of the causes and the problem of international terrorism [member states] should pay special attention to all situations, including, inter alia, colonialism racism and situations involving alien occupation" (UNGA res. 34/145: 1979, para. 3 & 13).

A more novel feature of post-9/11 UNGA resolutions is the more explicit emphasis placed on a criminal justice response. It was however not until the adoption of resolution 59/46 in 2004 that the global body explicitly urged governments to ensure that their nationals or individuals in their territories who have provided support to the commissioning of a terrorist act "are punished by penalties consistent with the grave nature of such acts" (UNGA res. 59/46: 2004, op. para. 7). Furthermore, member states have since been reminded of their obligation to "ensure that perpetrators of terrorist acts are brought to justice" (UNGA res. 62/71:2007, op. para. 9). This concept is however not entirely new. In the problem-specific UN agreements addressed elsewhere (see chapters three and four), the importance attributed to bringing terrorists to justice has come to build a core element of the UN's response (see for example Art. 9 of the Terrorist Bombing Convention), yet it was not until 2004 that member states included such a provisions in this particular stream of resolutions.[114] The inclusion of such a reference can arguably thus be considered a reminder to those

[112] Such a provision was included in all General Assembly resolutions over the past 18 years, although not new considering that pre-9/11 resolutions likewise contained such a provision.
[113] Such a provision continued to remain a core element of the GA's resolutions in some form or another to date (until 2018).
[114] This trend has continued to this day. See UNGA res. 73/211 operative paragraphs 11 and 12.

member states that have not done so to live up to their obligations placed on them by the respective conventions. The adherence imposed – despite not being of a binding nature – on countries to bring terrorists to justice is certainly aimed at eliminating safe havens for terrorists. This is a significant development considering that sectoral conventions only explicitly oblige states to prosecute terrorists for certain crimes (e.g. bombings or attacks against diplomatic agents), with the Terrorist Financing Convention perhaps representing somewhat of an exception. In doing so, the UNGA urges governments to ensure that terrorists are brought to justice and member states are – in theory – closing a normative loophole which intends to bring all terrorists to justice, no matter what form (e.g. hostage-taking or attack on diplomats) of crime was committed.

A review of the resolutions over the past 18 years has also demonstrated that the Assembly has chosen to accentuate the need to respect international human rights as well as refugee and humanitarian law when countering terrorism. Despite initial efforts to tie terrorism to human rights as early as 1993, it was not until the 59th Session (2004-2005) that member states decided to affirm a state's obligation to respect human rights in countering terrorism (UNGA res. 59/46: 2004, para. 10).

As early as 1973, with the adoption of the Diplomats Convention and accompanying resolutions, the UNGA adopted crime-specific measures against terrorism. In its resolution 40/61 in 1985 the General Assembly called on member states to prevent attacks against civil aviation (see UNGA res. 40/61 operative paragraph 11). After 2001 the General Assembly became more comfortable with raising concern over the rise of specific kinds of terrorism (e.g. kidnapping and foreign terrorist fighters). At its 69th Session in 2014 the General Assembly similarly expressed grave concern for the growing threat posed by foreign terrorist fighters. This inclusion was no coincidence considering that the issue received considerable global attention, particularly in light of the then-recent attacks involving returned foreign fighters (e.g. Jewish Museum in Brussels in 2014).[115] The UNGA's more long-term and general response to terrorism through its resolutions remains characteristic. That said, the body's willingness to bring to attention certain forms of terrorist activities allows for the argument to be made that the General Assembly is establishing a normative structure intended to guide member states' understanding of what constitutes an act of terrorism. This is an important acknowledgment considering that, while there are crime-specific agreements outlawing hostage-taking and terrorist bombing, other forms of terrorist violence such as knifing have not yet been the subject of a treaty. Arguably, the Assembly is progressively establishing a normative framework of non-acceptable forms of violence in conjunction with terrorism. Although UNGA resolutions are exclusively of a recommendation nature, the UNGA can regulate, through its moral power, the extent to which member states can support certain forms of political violence, thereby circumventing, yet not replacing, a lengthy and tedious treaty-making progress.

[115] See also the 2015 published European Parliament Briefing "Foreign fighters- Member State responses and EU action" and Merz's analysis "Switzerland and Jihadist Foreign Fighters for further reading.

## Lasting ambiguities in the UN's resolution-regime

At the 46th session (1991-1992) of the UNGA, member states insisted on the inclusion of a reference to the principle of self-determination and the support for the independence of all peoples under colonial or racist regimes in the preambular, as it had done in most resolutions leading up to 1991. This was a considerable concession to supporters of the Third World bloc. By 1994 such a reference was however no longer made and member states took an unprecedented stern and formal position on terrorism, rejecting the use of the tactic as unjustifiable. It is perhaps worth reflecting on where the General Assembly, as the only global body, stands on this issue today.

A closer review of the resolutions adopted from the 53rd session (1998-1999) onwards (until the 73rd session in 2018-2019) validates the notion that there remains a certain ambiguity and paradox in the relationship between national liberation (or self-determination) movements and terrorism at the United Nations. With the conflicts in the Middle East, South Asia and other parts of the world still very much prevalent, it is necessary to reflect further on this abstruseness. The old maxim "one man's terrorist, is another man's freedom fighter" holds true today as it did in the 1970s when the United Nations General Assembly first took up the issue. By way of illustration, the remainder of this section intends to highlight that much of the contemporary discussion on terrorism, even until today, remains similar at its core.[116] The resolutions adopted by the UNGA in this respect include preambular references that bring further confusion. The general statements made by national governments in the Sixth Committee, as well as the corresponding reports, provide useful contextual evidence that helps one's understanding on why the General Assembly has responded through its resolutions the way that it has and why the contentious debate on what constitutes terrorism is far from over.

In 2004, the General Assembly continued a trend that reaches as far back as the 53rd session (1998-1999) insofar that resolution 59/46 contained a reference to the final outcome of the Conference of Heads of State or government of Non-Aligned Countries. Specifically, the Assembly took "note of the Final Document of the Thirteenth Conference….which reiterated the collective position of the Movement of Non-Aligned countries on terrorism" (59/46: 2004, para. 18). In 2010, 2015, and 2018, to name three specific incidents, the General Assembly upheld this practise by reiterating the collective position of the movement.[117] Although not part of the operative portion of the respective resolutions, such a reference is nevertheless puzzling. For instance, at the 13th Summit of the Movement in Kuala Lumpur for example, members conceded that criminal acts intended to provoke a state of terror are to be rejected in any circumstance as unjustifiable, no matter the consideration or any other underlying justification (Final Document Conf. NAM: 2003, 30). Yet, members further "rejected recent attempts to equate the legitimate struggle of peoples under colonial or alien domination and foreign occupation, for self-determination and national liberation

[116] This analysis has been limited to the time period after 2008 onwards. The reasons being, that much of the electronic resources available, including streaming footage, is not as readily available before 2008. And, equally important, the word restraints afforded to this section prevent a more comprehensive analysis.
[117] See resolutions 64/118, 70/120 and 73/211 for exact reading.

with terrorism in order to prolong occupation and oppression of the innocent people with impunity" (Ibid: 2003, 30). The summits recalled in UNGA resolutions in 2010 (64/118), 2015 (70/120), and 2018 (73/211) contain similar positions. The NAM Conference in 2016, hosted by Venezuela, reiterated their familiar position outlined above, and furthermore agreed to "[o]ppose attempts to equate the legitimate struggle of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation with terrorism…" (Final Document Conf. NAM: 2016, 83).[118] The United Nations decided to remove any explicit references to national liberation movements and exceptions to terrorism even in response to colonial subjugation by 1994. Conversely, the allusion to such a conference in the preambular portion of UNGA resolutions even after 9/11 lends further credence to the fact that member states continue to foster fundamentally different understandings of what constitutes terrorism. The statements and consultations in the Sixth Committee, discussed in further detail below, certainly also confirm this conclusion.

The Sixth Committee is the primary forum in which the issue of terrorism has been discussed since the early 1970s. The committee is an indication of where member states position themselves on the issue of terrorism, and the statements made provide evidence for the divisiveness among countries. For example, in 2013 the representative from Iran, on behalf of the NAM, reiterated its members' unequivocal condemnation of all forms and manifestations of terrorism, "including those in which States are directly or indirectly involved" (Iran on behalf of the NAM: 2013, 1). However, the statement also emphasised that "[t]errorism should not be equated with the legitimate struggle of peoples under colonial or alien domination…[and the] brutalisation of peoples remaining under foreign occupation should continue to be denounced as the gravest form of terrorism, and the use of State power for the suppression and violence against peoples struggling against foreign occupation in exercising their inalienable right to self-determination should continue to be condemned" (Ibid: 2013, 3). At the 69th session of the UNGA, the NAM made similar remarks and furthermore aligned its position in "accordance with General Assembly resolution 46/51 of 9 December 1991…" (Iran on behalf of NAM: 2014, 2).[119] Resolution 46/51 was the last of a series of resolutions that reaffirmed the right to self-determination and independence of all people under colonial rule or foreign occupation (UNGA res. 46/51: 1991, para. 13), a reference that was excluded from resolutions adopted from 1994 onwards. The statement should be seen as an overt attempt to strike at the use of 'terrorism' by the Israeli state against violence perpetrated by Palestinians, who are 'struggling against

[118] Countries at the 15th summit of the Movement of Non-Aligned countries made similar remarks in 2009, emphasising that "brutalisation of people remaining under foreign occupation should not continue to be denounced as the gravest form of terrorism, and that the use of State power [e.g. Israel] for the suppression and violence against peoples struggling against foreign occupation in exercising their inalienable right to self-determination should continue to be condemned" (Final Document Conf. NAM: 2009, 49).

[119] The NAM made similar remarks at the 70th session of the UNGA and continued to do so at the most recent session in 2018. Qatar moreover emphasised the need to look at the root causes of the problem and urged countries to put an end to foreign occupation and to recognise the right to self-determination (Qatar Sixth Committee, 2nd Meeting, 70th session: 2015, min. 22:21). Likewise, Libya, insisted on a distinction between a terrorist act and a legitimate struggle to self-determination (Libya Sixth Committee, 2nd Meeting, 70th session: 2015, min. 41:16).

foreign occupation in exercising their inalienable right to self-determination.' At the 68th session, the Organisation for Islamic Cooperation (OIC) Group adopted a similar position and urged countries to "address the root causes of terrorism including unlawful use of force, aggression, foreign occupation…denial of the right of peoples living under foreign occupation to self-determination…" (Egypt on behalf of OIC: 2013, 1). This approach is not new at the United Nations; ever since the organisation addressed the issue of terrorism, foreign occupation and the curtailing of rights to self-determine have been identified as main causes of terrorism (see chapter four). The OIC further noted that it would like to "stress that this distinction [between terrorism and the exercise of legitimate right of peoples to resist foreign occupation] is duly observed in International Law, International Humanitarian Law, Article 51 of the Charter of the United Nations, and the General Assembly resolution 46/51 which also endorses this position" (Ibid: 2013, 2).[120]

The Sixth Committee has also been privy to both India and Pakistan charging each other with terrorism. India, while condemning all forms of terrorism, especially accentuated terrorist activities "in which States are directly and indirectly involved, including the State-sponsored cross-border terrorism" (India: 2013, 2).[121] In 2001, one academic put it as follows: "Pakistan also glorifies the terrorists [in Jammu and Kashmir] by calling them "the Kashmiris freedom fighters" and their terrorist operation as "liberation movement in Kashmir." The objective is to legitimise their criminal activities under the shield of liberation movements, which are sanctified under customary international law, and to obtain support and sympathy of the world community" (Saini: 2001, 80). At the time of writing, the conflict remains prominent and is an increasingly dominant topic of discussion in the corridors of the United Nations[122] and by default in the Sixth Committee. In fact, in September 2017 Pakistan labelled India the 'mother of terrorism' and accused it of sponsoring violence in Pakistan during a speech at the UN (Jha: 2017, 1). In response, India accused Pakistan of creating groups such as the Lashkar-e-Taiba, whose stated objective is to free Muslims from Indian rule in Kashmir (Tankel: 2010).

The consultations on this agenda item at the 73rd session of the UNGA are the most recent reminder that terrorism remains a contentious and politically laden topic of discussion. Iran –while emphasising the global threat posed by terrorism – emphasised that a "longstanding issue to examine [in respect to terrorism] is the endemic and age-old problem of foreign invasion and occupation and what it has brought in its wake. The seventy-year state of occupation of Palestine is the most pressing" (Iran: 2018, 2). In 2018 the OIC Group, represented by Saudi Arabia, also reiterated its position that

[120] The OIC Group continued to make such references at subsequent session. For example, Saudi Arabia, on behalf of the Group, reiterated that a comprehensive approach much tackle the root causes of which foreign occupation remains an important part (Saudi Arabia on behalf of the OIC: 2017, 1).

[121] India continued to highlight the state-supported terrorism, although it has been reluctant to formally name Pakistan.

[122] In August of 2019, the Security Council discussed the conflict over Kashmir, with particular emphasis on India's recent move to revoke the special constitutional status of Kashmir, placing the region under the direct rule of India. It is thus against this backdrop that one must understand the discussions in the Sixth Committee and the resolutions adopted therein.

there needs to be a distinction between terrorism and the right of people to resist foreign occupation, a distinction which "is duly observed in International Law…and the General Assembly resolution 46/51 which also endorses this position" (Saudi Arabia on behalf of the OIC: 2018, 2).[123] This position is not shared by Western countries, who have been consistent in their condemnation of "terrorism in all its forms and manifestations and believes that those responsible for terrorist acts must be held accountable" (EU: 2018, 2).

The discussions in the Sixth Committee affirm the continued disagreement among member states on the subject of terrorism. The developments in the committee are important as they facilitate our understanding of why UNGA resolutions are drafted in the manner that they are. Labelling an incident as terrorism not only has moral ramifications but in many countries also carries legal repercussions. If nothing else, the absence of a definition on terrorism can serve as a ploy for governments to prosecute political opponents and can likewise assist in legitimising political violence if it serves in the (foreign policy) interest of governments.[124] A too-narrow definition will risk undermining the right of minorities while a too-broad conceptualisation will run the risk of letting terrorist organisations get away with violence. As Coffin noted in 2014, [t]hus far international law has been woefully inadequate in separating the legally acceptable forms of resistance – national liberation movements or NLM – from legally unacceptable forms of resistance terrorism" (Coffin: 2014, 32). Since the very inception of the debate, the distinction between these two concepts is finite and remains unresolved, a fact that is well-reflected in the discussions on terrorism at the United Nations. This holds true today as it did in 1973 and certainly also during the multilateral efforts against anarchism in the 19th century and in the 1930s within the League of Nations.

Since 9/11 the General Assembly has continued to treat terrorism as a crime, urging governments to suppress the threat through criminal justice methods (e.g. policing) and not through armed force. The UN wants to fight terrorism with norms, not with arms. Over the course of the past 18 years the Assembly has indeed continued to set norms that do not involve the use of armed force in response to terrorism. The resolutions have also revealed that the General Assembly has developed new practises, including provisions that urge greater adherence to bringing terrorists to justice and levying appropriate penalties. Although the General Assembly has made attempts at

[123] This position is also taken by the members of the NAM in 2018. See papersmart from the 73rd session of the UNGA for a detailed account. Algeria likewise urged member states to "avoid any confusion between acts of terrorism and the legitimate struggle of peoples under colonial or foreign occupation for self-determination and national liberation" (Algeria (Ambassador Sabri Boukadoum: 2018, 3).

[124] See Oeter's "Terrorism and "Wars of National Liberation" from a Law of War Perspective" and Cofin's "Self-Determination and Terrorism: Creating a New Paradigm of Differentiation" for a more thorough account. Also, the analysis of Sarvananthan in "'Terrorism' or 'Liberation'? Towards a distinction: A Case study of the Armed Struggle of the Liberation Tigers of Tamil Eelam (LLTE) and Saini's "Self-Determination, Terrorism and Kashmir" for descriptive case studies. History has demonstrated that the principle of self-determination has played a considerable role in the decolonization and independence of many countries following the Second World War. Indeed, the principles found their place in UNGA res. 1514 & 1541, yet there remains no agreement on when such violence, if at all, is warranted and what entity decides when it is acceptable.

trying to bring clarity to where it stands on the use of politically motivated violence, the confusion remains. It is also possible to conclude that since 1999, the General Assembly, and in extension its member states, have not yet agreed to condemn political violence in all circumstances and there is thus no common understanding of what constitutes terrorism, which is not a new development at the United Nations in respect to terrorism. This has been best evidenced by the continued reference to the outcome document of conference of the NAM and the discussions and statements made in the Sixth Committee. It hence seems that the UNGA can only deal with terrorism by side-stepping the contentious details, resulting in vague commitments.

## Comprehensive Convention: Chasing a 50-year-long ghost

The Comprehensive Convention on Terrorism was intended to complement the UN's existing sectoral convention regime and although there was a general sense of urgency that a comprehensive response to terrorism would be useful, not all countries favoured this approach. As Diaz-Paniagua reflects in his assessment of the negotiating dynamics, it had already become clear by the end of the 1990s that countries were sceptical of where the process would lead. As a matter of record, developing countries favoured a comprehensive approach with the objective of distinguishing terrorism from the legitimate exercise of the right to self-determination (Diaz-Paniagua: 2008, 516). In contrast, for many countries from continental and Northern Europe the prospects of such a convention remained a distant thought. Norway and Sweden, for instance, expressed a desire to focus on a sectoral approach as they "feared that negotiating a comprehensive convention would be extremely difficult" (Ibid: 2008, 518). The European Union was only reluctant to agree to negotiations, even as late as 1999. It would only agree "under the condition that it would not contain any exceptions or justification based on the motives that promoted the recourse to violence" (Ibid: 2008, 521). At the 35$^{th}$ meeting of the Sixth Committee in 1999, the American delegate made a similar argument, cautioning against the inevitable failure that the negotiations are likely to bring. Specifically, Rosenstock argued "that the Sixth Committee had focused on drafting international instruments to combat specific manifestations of terrorism it was therefore not necessary to produce a definition of that phenomenon which would, moreover, be extremely difficult to achieve in view of the differences in opinion in that regard" (USA in A.6/54/SR.35: 1999, 3). Despite considerable objections from a number of delegations, particularly from the developed world, the UNGA finally commenced negotiations on a comprehensive agreement in September 2000. The basis of the negotiations was the Indian draft introduced earlier and followed the pattern established by the Terrorist Bombing and Terrorist Financing conventions.

If adopted, a Comprehensive Convention has the opportunity to close existing gaps as it would criminalise all forms of terrorism and would provide the international community with the ability to respond to evolving threats without adopting a sectoral convention as new threats emerge. Also, such a convention would dissipate the political power of the Assembly as well as generate a legitimate counter-weight to the

work of the Security Council. Indeed, it was due to the UNGA's long-standing inability to adopt such a comprehensive convention that prompted the Security Council to side-step the traditional law-making process in the General Assembly and to take action in the form of resolution 1373 (Diaz-Paniagua: 2008, 537). The activism of the Security Council after 2001, starting with the adoption of resolution 1373 (see below), placed considerable pressure on the Assembly to take meaningful action. Conversely, the Comprehensive Convention would create a "counter-balance to the Council's action" (Hmoud: 2006, 1035). The General Assembly saw it "risked becoming utterly irrelevant if it did not produce results quickly" (Stiles: 2006, 49).

Following the attacks on September 11th, the so-called 'friends of the Chairman' prepared the text of articles 3-17 and 19-23 based on the already submitted draft. However, as Hafner recalls, the text could not be agreed as the definition of scope and the other aforementioned obstacles remained unsolved (Hafner: 2003, 156). Although there is a general consensus that a comprehensive agreement is necessary, countries have fallen short of submitting a draft text to the General Assembly for adoption. The drafting process has been a tedious, time-consuming, and certainly for many countries frustrating endeavour. It would thus be a redundant exercise to trace, in detail, the trajectory of the organisation's drafting process. This is also not entirely necessary considering that the consultations have developed into "mere formalities and delegations kept repeating their positions" (Hmoud: 2006, 1041).[125] Indeed, as the review below will make evident, member states have stood firm in their positions over the past 18 years (even longer) and have only made minor concessions. The subsequent section intends to emphasise that notwithstanding considerable agreement on the bulk of the draft text, the main issues of concerns remain unresolved to this day.

Some of the challenges faced by the organisation are technical or legal in nature and others are purely political. The main difficulties faced by the Ad Hoc Committee and the corresponding Working Group of the Sixth Committee, to varying degrees, are the definition of the crime, the scope of the convention (e.g. exclusion of self-determination movements), and whether the convention should apply to state terrorism.[126] A further point of contention is the relationship between the comprehensive agreement and sectoral conventions; in essence, which convention would apply if the offence is covered by both the new convention and by a previously adopted one. While this is certainly a legal dilemma, it is political at its very core. Earlier conventions contained political offence exceptions (e.g. Tokyo Convention Art.

[125] Such an exercise is also not necessary considering that a detail account has been provided elsewhere. See Hmoud's "Negotiating the Draft Comprehensive Convention on International Terrorism" and Hafner's "Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly" for a more detailed reading.

[126] See above for literature on this specific problem. Due to space restrains it can only be considered in passing. Suffice it to say, a number of countries (mostly members of the OIC) insisted on including a country's armed force within the scope of the Convention. This was target against countries like Israel and the United States whose military had been accused of terrorism. For example, Syria argued "Foreign occupation is indeed one of the most appalling forms of terrorism", whereas Yemen urged countries to consider state terrorism "which is practise by Israel against the Palestinians" (Diaz-Paniagua: 2008, 582). See also the section above on the resolutions adopted by the General Assembly on similar argumentation in respect to the India-Pakistan conflict.

2), whereas the more recent Bombing Convention Article 11, for example, excluded such omissions. Similarly, the Hostages Convention Article 12 excluded self-determination movements from the scope of the agreement, whereas the Financing Convention made no such reference and is understood to include such movements under its scope (see chapter five). Irrespective of the legal discussion on this *sujet* it is the political and interlinked nature of the debate that remains a central point of concern.[127] Again, countries can be divided into two competing camps: Those that want to secure what had already been agreed in earlier conventions and those "who want to gain more than they have got[ten] from the sectoral conventions" (Hmoud: 2006, 1034).

Compounding the circumstances further was the nature of the work of the General Assembly. In particular, the unspoken custom of seeking a consensus significantly complicated matters. Granted, a consensus would reduce the risk of non-implementation, considering the lack of enforcement and operative powers of the Assembly; however, the task of finding a consensus on the outstanding controversies continues to present a burden too far to overcome. Moreover, US representatives are concerned that breaking from the norm of consensus would create an unwelcome precedent for other countries. The rule of consensus, in other words, "is as much a truce between rivals as an agreement to cooperate" (Stiles: 2006, 50). It is thus against this backdrop that governments, as recent as the 73rd session of the UNGA, set out to negotiate the terms of a comprehensive package against terrorism. The patterns of work of the United Nations on the convention have been annual Ad Hoc Committee meetings held for an extended period of time (one or two weeks), and efforts have been complemented by a working group of the Sixth Committee. The Ad Hoc Committee however did not meet in 2012, 2014, 2015, 2016,[128] and 2017 and there is currently no scheduled meeting. The intersessional work is to continue within the more informal setting of the Working Group of the Sixth Committee, likely until an agreement is attained. Despite a heightened sense of urgency to complete a convention-text immediately following 9/11, the reality of the matter remains that country positions became even more entrenched. Indeed, the questions of state terrorism and self-determination thus produce ongoing controversy (e.g. see UN Doc. A/56/PV.19: 2001, 6).

On the definition of terrorism, the now all too familiar cleavages emerged again. While Islamic countries insisted on the need for a definition of the phenomenon western countries continued to recommend the use of an operational and technical enumeration of the offence. The most pertinent challenge faced by member states was however the matter of scope (Galicki: 2005, 747) and hence the matter of freedom fighters remain a contested issue. Irrespective of where the discussion on scope will lead to, Hafner underscores the impact the outcome could have. It is not a question of

[127] This specific issue cannot be considered in detail due to space restrains. Hafner's "Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly", pages 159-161 provides a more thorough reading.
[128] A description of the current mandate for the adoption of a comprehensive convention is available at: http://legal.un.org/committees/terrorism/

when states have an obligation to prosecute acts under their territorial jurisdiction, but rather "how far states may serve as a safe havens or shelters for activities that were committed in other states and considered by the latter to be terrorist acts" (Hafner: 2003, 158). Although a number of proposals were made, such as India's proposal to include a preambular reference to the principle of self-determination (see for e.g. UN Doc. A/59/894: 2005, 6), a solution continues to remain absent. Indeed, while the proposal was not entirely rejected by OIC members, it was insisted that such a reference should be included in the operative portion of the text, as it had no legal effect in the preamble (Hmoud: 2006, 1041). Delegations from the West likewise opposed the text as it gave the impression that the right to struggle for self-determination justifies acts of violence, even if included in the preambular. The United States in particular showed itself adverse to a similar approach taken in the Hostages Convention (see chapter three) considering that the "formulation of the Hostages Convention…was based on the first 1977 Protocol to the Geneva Convention, which it had rejected" (Dian-Paniagua: 2008, 586).

In the years that followed, the Ad Hoc Committee established in 1996 and the Working Group of the Sixth Committee met without any real progress.[129] During this time, the main issues of concern remained the well-known problems of those of self-determination and the exception for armed resistance. As negotiations continued in 2003 and 2004, countries' positions remained unchanged and no real progress could be made.[130] In 2005, however, the General Assembly found new momentum in light of the adoption of UNSC resolution 1566 (discussed further below) and the Report of the United Nations High-level panel on Threats, Challenges and Change. UNSC resolution 1566 introduced a working 'definition' of terrorism by recalling the main characteristics of this criminal act, including "the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act…" (UNSC resolution 1566: 2004, op. para. 3). Although this was not an explicit definition, as was foreseen in the Comprehensive Convention, the Security Council's adoption of such a working definition put the General Assembly under pressure. Switzerland, although welcoming the Council's efforts, noted, "…when taking long-term legislative measures that affected the entire international community, all States must have an opportunity to participate in the drafting of such measures" (Quoted in Diaz-Paniagua: 2008, 633). Of greater concern to member states was however the report published by the Panel on Threats and Challenges. The report, *inter alia*, concluded that terrorism is never an acceptable tactic, no matter the cause, and that a lack of definition has considerably restricted the effectiveness of the organisation (Comras: 2011, 194). More importantly, the report found that "the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling" (Report UN Doc.

[129] See the list of reports of the Ad Hoc Committee and special committees (Working Group) for detailed reading: http://legal.un.org/committees/terrorism/reports.shtml
[130] This is well indicated in the Ad Hoc Committee Reports UN Doc. A/58/37 and A/59/37

A/59/565: 2004, para. 160). The panel further curtailed the arguments put forward by the OIC so far by remarking, "…there is *nothing* [emphasis added] in the fact of occupation that justifies the targeting and killing of civilians" (Ibid: 2004, para. 160). The Non-Aligned Movement and the African Group were sceptical of the findings. While the former dismissed the findings "as flawed, incomplete, technically inaccurate," the latter noted that the "legal definition of terrorism should be the subject of a treaty concluded by the General Assembly and it is not a matter to be determined and imposed by other organs of the UN" (Quoted in Diaz-Paniagua: 2008, 638). Therefore, despite the formal commitments made to negotiate, the underlying positions remained the same. The consultations have however continued in the Working Group of the Sixth Committee,[131] despite little progress being made.[132] Ten years after 9/11, "several delegations reiterated that the convention should contain a definition of terrorism that would provide a clear distinction between acts of terrorism covered by the convention and the legitimate struggle of peoples in the exercise of their right to self-determination or under foreign occupation" (UN Doc. A/66/37: 2011, 7).[133] The most recently available report, from the 72nd session (2017) of the UNGA, moreover supports the conclusion that any real progress continues to elude the organisation. In fact, the "coordinator had observed that it would not be useful in the current negotiations to reopen for definition terms such as "armed forces", as used in the draft comprehensive convention…" (UN Doc. A/C.6/72/SR.28: 2017, 4).

The Comprehensive Convention on Terrorism is perhaps the most difficult counterterrorism endeavour the United Nations has attempted to undertake. The discussion above has made it painstakingly apparent that even 18 years after 9/11, member states remain unable to overcome the problem of definition and convention-scope. The cleavages that have prevented agreement over the past 23 years (or 46 if one were to consider early efforts in 1973) have remained unaltered at their core. The arguments and statements put forward by member states have stayed remarkably similar, if not identical. The 74th session of the General Assembly opened on 17th September 2019 and terrorism was yet again on the agenda of the United Nations (see 111. Measures to eliminate international terrorism). With the lasting difficulties in the Working Group it is however rather unlikely that an agreement will be reached. On the contrary, considering the current developments in the Indian-Pakistani skirmish (Biswas: 2019) as well as in the Israel-Palestine conflict (Freedland: 2019), it will certainly remain difficult to find solutions to the outstanding issues, not the least due to the fact that these issues are tied to the aforementioned conflicts. To conclude, it is probable that the United Nations will continue to chase the ghost of a comprehensive convention in the years to come, or negotiating parties will water down the convention-text in a manner that will render the convention meaningless.

[131] A full list of reports is available at: http://legal.un.org/committees/terrorism/reports.shtml#

[132] Over the course of the past 12 odd years there have been a number of amendments made. For example, in 2007 the Bureau prepared a compromise to the preambular text, articles 1,2 and 4 to 27 of the draft comprehensive convention. See UN Doc. A/68/37. Nevertheless, these proposals have been unable to bridge the divide and have left the question of the right to self-determination and the exception of armed forces unresolved.

[133] Similar arguments were made in 2014. See UN Doc. A/C.6/69/SR.28: 2014 for a more detailed overview.

# The Security Council post 9/11

A vast majority of the United Nations' most consequential counterterrorism output originates in the Security Council, not the least due to its broad authority under Article 39 and its ability restore international peace and security through both non-violent means (Article 41) and the use of force (Article 42). For close to five decades, the Security Council remained a rather unambitious actor – albeit involuntary- in the United Nation's attempt to counter terrorist activities. This, as discussed at great length throughout this thesis, was a result of geopolitics (e.g. the Cold War), leading to stalemates, and its members' engagement, among other reasons, in proxy warfare across the Middle East. Luck concludes the challenges faced by the Council by highlighting that "[t]he divisive politics of the Middle East cast a shadow over the Council's infrequent attempts to address terrorism. Throughout the Cold War years, the Council seemed more concerned about the alleged excesses of Israeli and American counter-terrorism measures than about the terrorist acts that preceded them" (Luck: 2006b, 95).

The Council's record on terrorism remained rather lacklustre in the 1980s. In reaction to the *Achille Lauro* incident the Council deplored the death of the passenger and condemned terrorism "in all its forms, wherever and by whomever committed" (UN Doc. S/17554: 1985). Yet a resolution on the subject was never adopted. By way of UNSC resolution 579, the Security Council however agreed on a general condemnation of hostage-taking and abduction (operative para. 1) and confirmed a state's obligation to secure the safe release of the hostages (operative para. 3) and accede to existing international instruments (operative para. 4), and in the preambular expressed its concern over the recent and enduring hostage-takings across the globe. It is important to recall that although resolution 579 condemns hostage-taking in more general terms, it was adopted only one month after the Abu Nidal group abducted EgyptAir Flight 648 *en route* from Athens to Cairo, thus arguably providing the impetus for the adoption of the resolution. Towards the end of the 1980s the Council again reacted to terrorism through a problem-specific lens. In light of the murder of an American citizen participating in peacekeeping efforts in Lebanon by Hezbollah, the Council adopted resolution 618 in 1988. The Council condemned the abduction of Lieutenant-Colonel Higgins and demanded his immediate release (UNSC res. 618, operative para. 1 & 2). Furthermore, in reaction to the destruction of Pan Am flight 103 over Lockerbie in 1988 the Council adopted resolution 635 in which it not only condemned violent acts against civil aviation (operative para. 1) but more so urged states to take steps towards preventing the use of explosives as a weapon of terrorism (operative para. 2). It is important to highlight that the Council merely demonstrated its consciousness of terrorism for international security, yet it was not determined in asserting that terrorism is a threat to international peace and security. This is indeed significant considering that before the Security Council can adopt enforcement measures it must first establish the existence of a threat to peace and security (see UNC Ch.VII). In July

1989 the Council once more condemned the acts of hostage-takings and abductions and called on states to use their influence to secure the safe release of the hostages (UNSC res. 638, para. 2 and operative para. 3). Before the turn of the new century, members of the Security Council unanimously adopted resolution 1269, in which it confirmed its stern condemnation of international terrorism (operative para. 1)[134] in broad terms, irrespective of motive (!). This was indeed remarkable as it was unusual for the Council to approach terrorism in such a general manner.

Since the 1990s, the Council had specifically focused on terrorism on a case-by-case basis, yet the body was reluctant to explicitly label such incidents as a threat to international peace and security. Granted, the Council came close with resolution 635 when it expressed its consciousness "of the implications of acts of terrorism for international security," yet the Council did not consider the terrorist act *per se* as such a threat but rather the conduct of states in connection with the attack (e.g. failure to extradite suspects) (Santori: 2006, 90). In this context it is thus worth nothing that "the Council classified terrorist acts as a threat to the peace only when such acts were attributable to a 'State' either for omissions (failed prevention or repression), or for individuals or groups' conducts that were directly attributable to that 'State' as they originated from its apparatus" (Ibid: 2006, 91). In the 1990s sanctions were the initial instruments used to respond to terrorism. The sanctions imposed against Libya, the Sudan, and the Taliban regime in Afghanistan (and later on Bin Laden and his associates) served not only to reach the specific objective at hand (e.g. handing over terrorists for trial) but moreover sent a clear signal delegitimising a state's support for terrorism. While the sanctions imposed on Libya and Sudan were somewhat successful, the sanctions against the Taliban regime and al-Qaeda in Afghanistan missed their mark. This outcome was largely owed to the fact that both the Taliban and al-Qaeda operated outside the norms of the international system and were able to reap considerable funds through illicit drug trade across the globe, an acknowledgement that would greatly influence member states' post-9/11 thinking. Concludingly, one must appreciate that the Security Council was moving towards associating terrorism with a threat to international peace and security (see resolution 1269). It was however not willing to constitute the terrorist act itself as a threat but rather the failed response by states, thus falling short of adopting enforcement measures (see UNC Art. 41 & 42). Hence, the Security Council has dealt with terrorism on a country basis, yet, "[i]n moving to deal with terrorism as a general phenomenon the Council begins [already in 1999] to parallel, if not overstep, the General Assembly's role" (Boulden: 2008, 611).

After almost two decades elapsed since 9/11, the persuasive engagement by the Council across the terrorism issue has allowed it to become the locus of action of the United

[134] In this context however it is important to take note that the familiar issues surrounding the definition of terrorism remained a concern. For example, at its 4053rd meeting, the Council heard from then two rotating members (Malaysia and Bahrain) in which they recalled the right to self-determination. Malaysia reminded governments that terrorism "must be differentiated from the legitimated struggle of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation" (Malaysia in UN Doc. S/PV. 4053, 10). Bahrain made similar remarks (See pages 12 &. 13 UN Doc. S/PV.4053).

Nations' counterterrorism endeavours. It is then rather evident that the Council has been the subject of extensive scholarly discussion. In consideration of this wealth of academic and practitioner-based interest it would be illusionary to attempt to provide an all-encompassing account of the Council's response to terrorism post-9/11. Consequently, the ensuing section will set out to provide a more general overview of the body's response to terrorism and will place specific focus on the major changes *vis-à-vis* pre-9/11. Some of the actions taken by the Council after 2001 build on previously adopted initiatives taken in both the General Assembly and in the Security Council, while others are considerable innovations and represent noteworthy novelties. Setting out from this observation, the remainder of this chapter will focus on the resolutions adopted by the Council under the rubric "threats to international peace and security caused by terrorist acts," the sanctions-regime imposed on al-Qaeda and later against the Islamic State of Iraq and the Levant (ISIL) (Da'esh), and the legitimisation of the use of force as a counterterrorism instrument. Specifically, attention will be drawn to the general and generic nature of UNSC resolutions post-9/11, although not all provisions and concepts are entirely novel, as well as the continued practise of condemning specific terrorist incidents, or at least more frequently than the General Assembly has done. This is an important acknowledgment from the outset as it demonstrates the Security Council's ability to respond to emerging threats. The ensuing paragraphs will moreover emphasise how the UN sanction regime against non-state actors (al-Qaeda and its associates) has evolved so as to place a more prominent focus on individuals since its inception with resolution 1267 in 1999. This focus on non-state actors extends the reach of the sanction regimes to become truly global and brings with it a more complex enforcement and administrative structure. Finally, attention will also be placed on how the use of the right to self-defence pursuant to Article 51 of the UNC has become an accepted tool to fight terrorism, or at least far less contested. The chapter will close by discussing the ways in which the Council's post-9/11 response is innovative and in what way these represent the well-established pattern and trends established in previous United Nations action.

## The Security Council's layer of resolutions

The Security Council's immediate response to the attacks on September 11$^{th}$ came in the form of UNSC resolutions 1368 and 1373, both of which were adopted unanimously. It was the latter resolution that would chart the way forward for the organisation's fight against terrorism. Indeed, there remains little disagreement that resolution 1373 was the Council's most innovative response to 9/11, imposing legally-binding obligations on all states as well as establishing an institutional sub-structure – the counter-terrorism committee (CTC) – to facilitate member state implementation. In an initial response however, the Council adopted resolution 1368 and called on all states to collaborate their efforts in bringing those responsible for the attacks to justice and to increase international cooperation (Rostow: 2002, 481). Yet, resolution 1368 likewise broke new ground inasmuch by, for the first time, "[r]ecognising the inherent

right of individual or collective self-defence in accordance with the Charter" (UNSC 1368: 2001, para. 3) in response to a terrorist attack. The use of force as a legitimate instrument to counter terrorist activity will be discussed in greater detail below; however, suffice it to say here, it is generally accepted that it was resolution 1368, and its wording along the lines of Article 51 of the UNC, which "provided a blanket authorisation for such a response [use of force] against those who sheltered Osama bin Laden and his Al-Qaeda operatives" (Luck: 2006a, 342). More so, despite 1368 having been adopted one day after 9/11, the instrument foreshadowed the Council's more assertive approach to terrorism 2001 onwards.

The maintenance of peace and security has been the essence for why the United Nations was established in 1945. What the UN however determines to be a threat to international peace and security has evolved over time and has developed in directions only few could have predicted (Mingst et al.: 2017, 115). With resolutions 1368 and 1373 (and in many others thereon) the Council established that acts of international terrorism constituted a threat to international peace and security (Bianchi: 2007, 890). The Council grew increasingly comfortable with determining that the terrorist acts *per se* were a threat to global peace and security. Operative paragraph 1 of resolution 1368 goes a step further in recognizing that the classification of a "threat to international peace and security" extends beyond the immediacy of 9/11, noting that the Council "regards such acts, like any act of international terrorism, as a threat to international peace and security" (UNSC res. 1368, 2001, operative para. 1). This was indeed novel as it was not the conduct of the state in response to the terrorist attack (e.g. refusing to extradite suspects) that constituted this threat but rather the terrorist act itself. This phrasing signalled that the Council was willing to respond to 9/11 using its powers established under Article 39 (and those after) and that it would enact measures that were aimed beyond the microcosm of 9/11, addressing the threat posed by terrorism in more general terms.[135]

Shortly after the adoption of 1368, the Council once again voted unanimously to adopt resolution 1373 on September 28th in what would become the organisation's cornerstone instrument against terrorism. From its experiences with terrorism in the 1990s, the Council understood the importance of having all UN member states become part of a global effort to thwart terrorism (Messmer & Yordan: 2010, 175). The provisions entailed in resolution 1373 have been discussed at great length elsewhere,[136] and so these are only discussed to the extent that they are relevant to the findings of this study. Resolution 1373 is the most comprehensive, far-reaching and certainly most intrusive resolution adopted by the Security Council in the aftermath of 9/11. Indeed, the Security Council circumvented the traditional treaty-making process and imposed legally-binding obligations on all states (Rostow: 2002, 482). In turn, it "goes beyond the existing counter-terrorism treaties, which bind only those who have voluntarily

[135] This approach was not limited to resolutions 1368 and 1373 but was mimicked in resolutions 1438, 1440 and 1450, each responding to a specific act of terrorism yet classified the threat in more general terms.
[136] See Sossai's "UN SC Res. 1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism? and Okeke's "The United Nations Security Council resolution 1373: An appraisal of lawfare in the fight against terrorism"

become parties to them by creating uniform global obligations" (Rosand: 2007, 409). Resolution 1373, unlike the sanctions-regime adopted in 1999 and amended in 2002 (and 2011 and 2015), does not target individual terrorists but rather remains state-catered (Rosand: 2003, 334). Acting under Chapter VII of the charter, member states were tasked with the obligation to "(a) prevent and suppress the financing of terrorist acts; [and with] (b) criminalising the wilful provision or collection, by any means….of funds…with the intention that the funds should be used, or in knowledge that they are to be used, in order to carry our terrorist acts" (UNSC res. 1373: 2001, operative para. 1 (a) & (b)). Additionally, governments were to freeze the assets of individuals who commit or attempt to commit terrorist acts (operative para. 1 (c)), as well as refrain from supporting any entities involved in terrorist acts (operative para. 2 (a)) and to deny safe havens to terrorists (Ibid. 2 (c)). It is important to understand that the resolution did not include a definition of terrorist acts, granting member states the prerogative to define in their respective national legislation.

Drawing on the importance of bringing terrorists to justice, a principle enshrined into numerous sectoral conventions adopted by the General Assembly, governments were moreover to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts" (Ibid: 2001, operative para. 2 (e)). Significantly, it was decided that governments undertake efforts to establish effective border controls (operative para. 2 (g)), share information (operative para. 3 (a)) and to become parties to the then 12 existing international conventions (the Nuclear Terrorism Convention was not adopted until 2005) and protocols (operative para. 3 (d)). Equally important, the Council decided to establish a committee – later referred to as the Counter-Terrorism Committee (CTC) – to monitor the implementation of 1373, a practise that the Council usually only undertook in respect to the imposition of sanctions (Rostow: 2002, 482). Absent of any further instructions, it was left to the CTC and its 15 members to carve out its *modus operandi* and scope of work (Ibid: 2001, operative para. 7). In this respect, the Council has chosen not to confine itself to responding to 9/11 but has decided to place obligations on countries that reach beyond an immediate response. In fact, the general character of resolution 1373 "has caused many to characterise it as a form of 'legislation' on the part of the SC" (Bianchi: 2007, 883). By ceasing to draft a definition of 'terrorism' the Council shied away from addressing this bone of contention and has essentially left it to member states to do so in their domestic legislation. Member states "were left free to decide for themselves which groups should be called terrorists, and which were to be hailed as "freedom fighters." Saudi Arabi used this distinction, for example, to justify its continuing funding of Hamas, while Iran and Syria used it to provide funds and support to Hezbollah" (Comras: 2010, 83).

The lack of a globally accepted definition is not only a normative and moral dilemma but moreover bears great risks to human rights. The Council's failure to provide a

definition was certainly no coincidence. With the experiences made in the General Assembly on this subject, it was perhaps this ambiguity that allowed the Council to adopt swift and far-reaching action against terrorism in the immediate aftermath of September 11th. However, this strategic ambiguity also begs the question of what help resolution 1373 has been in quelling terrorist violence. Arguably, it gave states a good basis for repressive action against political opponents and terrorists alike.

One must however be cautious of overstating the unprecedented nature of resolution 1373 (and subsequent resolutions as well). As Romaniuk notes in his 2016 assessment, "the operational paragraphs of 1373 give strong emphasis to measures against terrorist financing, reflecting the [then] recently concluded Terrorist Financing Convention" (Romaniuk: 2016, 284). In particular, Article 2(1) asserts that any person who "directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (b) Any other act intended to cause death or seriously bodily injury to a civilian… when the purpose of such an act…is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act" (Terrorist Financing Convention: 1999, Art. 2(1)(b)). Mirroring much of the language, resolution 1373 sets out to "[c]riminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts" (UNSC res. 1373, operative para. 1(b)). On a more general note, one can conclude that both the convention and the resolution criminalise the support for terrorism, intend for the prosecution of terrorists and address the matter of international cooperation (e.g. in sharing evidence in the course of criminal investigations) (Collier: 2003, 724). Making the provisions of the convention binding in 1373 obliged member states to include measures in their domestic legislation that had not yet entered into force, evidently circumventing traditional treaty-making processes. As described at great length in previous chapters, counterterrorism treaty-making has been a cumbersome process, and ratification has certainly also taken its time. Therefore, circumventing this process allows for the adoption of far-reaching measures without lengthy debate and member states are required to implement these provisions without relying on a delay in the course of drawing the process in the course of ratification.

The Counter-Terrorism Committee (CTC) established by the Council in resolution 1373 has evolved into a core element in the United Nations' counterterrorism architecture. Over the years, it has been amended and its mandate broadened. In many ways, the CTC placed pressure on "States and organisations to pay more attention to combating terrorism, whether through the adoption of new or the improvement of existing legislation, the ratification of treaties, or the development and implementation of action plans" (Rosand: 2006, 82). Moreover, the committee has functioned as a capacity-building instrument, bringing countries together to exchange knowledge and best-practise, as well as facilitating member state implementation of the resolution's provisions (Ibid: 2006, 82). Composed of all 15 Council members, the CTC takes decision by consensus, in the absence of which the matter is referred to the

Council (Murthy: 2007, 4). When the CTC was first established,[137] it initiated a multi-layered approach, in which the first stage was focused on the review of existing legislation, whereas the second and third stages focused on institutional mechanisms and the implementation of the resolution with the objective of bringing terrorists to justice (Oudraat: 2004, 162 and Rosand: 2003, 336).

Immediately following the September 11th attacks, the CTC enjoyed wide support (Luck: 2006a, 343). This fact is largely owed to the dramatic nature of 9/11 as well as the acknowledgment that the first chairman (Sir Jeremy Greendstock of the United Kingdom) of the CTC was a permanent member of the Council (Dhanapala: 2005, 19). In combination, these factors have allowed the CTC to rapidly evolve into a go-to platform that would, *inter alia*, bring countries together and facilitate between potential donor countries and those seeking assistance in capacity-building. This administrative role taken on by the CTC after 2001, and in extension by the Council, is important as it demonstrated the usefulness of non-military instruments in countering terrorism (Rosand: 2007, 410). As Luck likewise reflects in this context, "the reporting and monitoring process helped spur a marked acceleration in the number of states signing and/or ratifying the then dozen global counter-terrorism conventions" (Luck: 2006a, 343).[138] It is also worth pointing out that the CTC has adopted a non-confrontational management approach. To this end, the CTC has sought to convince states of the "usefulness of its counter-terrorism and counter-proliferation approach. It frequently highlighted its intention to engage states in constructive dialogue and socialize them into new norms and rules [and when a conflict or debate emerged] it was crucial not to overrule objections but rather bring up convincing arguments and reach a consensus" (Heupel: 2008, 17-18).[139] Although resolution 1373 gives way to uniform and mandatory requirements, the committee is not a sanctions committee and does not have a mandate to prosecute or condemn countries (Rosand: 2003, 335).

In 2004, member states undertook an important step towards further institutionalising and extending the Council's administrative response to terrorism. With the adoption of resolution 1535, member states created the Counter-Terrorism Committee Executive Directorate (CTED) with the objective of supplementing the work done by the CTC and to facilitate the monitoring and implementation of resolution 1373 (UNSC res. 1535: 2004, operative para. 2). One of the most operative activities of the CTED has been the practice of country-visits,[140] where specific emphasis was on the legislative, judicial or administrative need of the respective country (Luck 2006b, 106). In the time between 2005 and 2015, the CTED conducted

[137] See Rosand's "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism" for a more thorough treatment of the CTC, its work method and the challenges it faced in its early years.
[138] Initially the CTC received an impressive amount of support. Yet, as time lapsed the Committee faced a number of difficulties. See Marschik's Chapter 5 "The Security Council's Role: Problems and Prospects in the Fight Against Terrorism" for an overview of some of the challenges faced by the CTC.
[139] See Heupel's "Combining Hierarchical and Soft Modes of Governance" for further reading on enforcement-based implementations strategies of the CTC and the 1540 Committee.
[140] The first round of country visits were undertaken Albania, Kenya, Morocco and Thailand. See Chapter 7 "Terrorism and weapons of mass destruction" in Luck's "UN Security Council: Practise and Promise" for a more detailed reading.

66 country visits, providing the Council with a unique ability to enhance member states' counterterrorism capabilities, as well as strengthening technical and bureaucratic structures necessary for implementation (Mingst: 2017, 177).[141] On a more institutional level, it is observed as early as 2007 that the CTED was intended to "bring forward 'a more systematic', consistent and comprehensive' implementation of resolution 1373, develop further relevant best practises and strengthen the role of the CTC as facilitator of technical assistance" (Bianchi: 2007, 901).

By 2004, there was also mounting concern over terrorists' intention of acquiring biological, chemical, or nuclear weapons to conduct terrorist attacks. As Salama & Hansell conclude in 2005, "[t]here is evidence that al-Qaeda remains committed to acquiring CBRN agents and has actively pursued the materials required to weaponize such agents" (Salama & Hansell: 2005, 618). It was however not the first time that the United Nations addressed this particular threat, which is best illustrated by the General Assembly's efforts to adopt a nuclear terrorist convention as early as 1996. This fear, however, re-surfaced when investigations revealed that a global network, headed by Pakistani nuclear scientist A. Q. Khan, provided nuclear material and technology to rogue states, like North Korea and Libya, potentially providing such material to non-state actors (Comras: 2010, 160). Concurrently, the Security Council adopted resolution 1540 and again invoked its enforceable powers under Chapter VII. Similar to resolution 1373, countries were required to adopt legislative and regulatory measures to prevent weapons of mass destruction (WMDs), and the means of delivery, from falling into the hands of terrorists. The resolution obliged states to adopt effective laws to prevent non-state actors from, *inter alia*, acquiring, producing, transporting chemical or biological weapons, or to provide any assistance to such efforts (UNSC 1540: 2002, operative para. 2). Analogous to the Council's previous resolutions, 1540 again established a new subsidiary committee mandated with tracking member state progress and acting as a clearing-house for the transfer of knowledge (Boulden: 2008, 617).[142] On a more practical level, the 1540 committee was also tasked with identifying assistance needs and sharing information and know-how with other international agencies (e.g. IAEA) (Luck: 2006a, 344).

The Council thus gradually established regulatory requirements and a corresponding institutional structure that laid out how countries were expected to prevent terrorists from acquiring WMDs. On a final note, it is also worth noting that the continuous 'legislative role' adopted by the Council in the post-9/11 era has been the subject of considerable reservations. After the adoption of resolution 1540, for example, the representative from Nepal raised concern over the Council's attempt to "establish

[141] Space restraints do not allow for a more detailed assessment of the work, and the successes and failures, of the CTC and the CTED. On a brief note, some of the challenges faced include the lack of adequate financing, absence of an agreed definition with which the CTC can work, the integration of human rights concerns and maintaining support for the committee's work. The website of the Security Council is a worthwhile source of information in this regard. More so, Murthy's 2007 published "The U.N. Counter-Terrorism Committee: An Institutional Analysis" is likewise a helpful guide on this topic. Rosand's 2003 published work on the resolution and the CTC further outlines the challenges faced (see pages 338-341).

[142] The mandate of the 1540 committee has been amended and extended on numerous occasions, including UNSC resolutions 1673 (2006), 1810 (2008), 1977 (2011) and 2325 (2016).

something tantamount to a treaty by its fiat. This is likely to undermine the intergovernmental treaty-making process and implementation mechanisms" (Nepal in Comras: 2010, 162). The representative further cautioned that the Council should "resist the temptation of acting as a world legislature, a world administration and a world court rolled into one" (Ibid: 2010, 163).[143]

A further instrument adopted by the Security Council in 2004 was resolution 1566. Attracting unanimous support, the resolution was sponsored by the Russian Federation, as well as China, France, Germany, the United Kingdom, and the United States and thus signalled support across geographic regions. The broad show of support by arguably the most powerful countries demonstrated that terrorism continues to pose a concern to countries the world over. It was also no coincidence that the resolution was adopted shortly after Islamic terrorists occupied the Beslan School in the autonomous Russian republic of the Northern Caucasus, killing over 300 men, women, and children (Banovac & Dillon et al.: 2007). This is further evidence to suggest the reactive rather than pre-emptive nature of the Council's response to terrorism. Unlike 1540 – likewise adopted in 2004 – 1566 adopted a more general response and represented the strongest condemnation made by the Council on the use of violence against civilians (Rosand: 2007, 414). The instrument intended to provide a working definition of terrorism and tasked a working group "to consider and submit recommendations to the Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaeda and Taliban sanctions Committee, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition…" (UN Doc. S/2010/683: 2010, 2). The Working Group was also tasked with considering the possibility of establishing an international fund for the compensation of victims of terrorism. Differences between members of the 1566 Working Group have however prevented any tangible outcome. The most recent report published in 2010 serves as telling evidence that the Working Group has been unable to make concrete recommendations on how to expand the sanctions list beyond al-Qaeda (UN Doc. S/2010/683: 2010, 3). This shortcoming prevents the Council from adopting measures against individuals or groups involved in terrorist activities that are not already part of the al-Qaeda and Taliban sanctions.[144]

[143] This sentiment was shared by a number of other countries (e.g. Egypt and South Africa). See Comras' "Flawed Diplomacy" pages. 162-164 for a more detailed reading.

[144] In response to the attacks on London's public transportation, the Council unanimously adopted resolution 1624, although the Council did not act under Chapter VII. The most novel addition to the Council's regulatory framework was that states were to "(a) prohibit by law incitement to commit a terrorist act or acts…[and to] (c) [d]eny safe havens to any persons with respect to whom there is credible and relevant information giving serious reason for considering that they have been guilty of such conduct" (UNSC res. 1624: 2005, operative para. 1(a) & (b)). Space restraints prevent any further discussion at this point.

*Foreign Terrorist Fighters (FTFs)*

It is estimated that al-Qaeda, ISIL, and "associated groups have attracted over 30,000 FTFs from over 100 Member States" (UNSC CTC Foreign terrorist fighters: 2019). It is also believed that around 20,000 FTFs are still present in Iraq and Syria and as such many countries are concerned with the "steady trickle of returning foreign terrorist fighters" (CTED Factsheet: 2018, 1) returning to their countries of origin.

In response to the threat posed by FTFs, the Council took an unprecedented step and unanimously adopted resolution 2178 in 2014, attempting to prevent travel to conflict zones. In the Council's more recent efforts (2017), it was not the departing of FTFs that occupied countries the most but rather the returning ones. In 2017, there were "at least 5,600 citizens or residents from 33 countries who have returned home. Added to unknown numbers from other countries" (Barrett: 2017, 5). Consequently, the Security Council adopted resolution 2396, creating greater focus on measures that address the returning of foreign terrorist fighters, again requiring states to strengthen border security and the criminal justice system. Both resolutions require states to "prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers…" (UNSC 2178: 2014, operative para. 2).

More intrusively, the Council urged member states to require airlines operating in their respective territories to provide passenger information so that the departure (or entry) of an individual that fits the offence laid out in the resolution can be detected ahead of time (Ibid: 2014, operative para. 9). This requirement was made mandatory with the adoption of resolution 2396 as states were, as of 2017, obligated (and no longer called upon) to require airlines to provide advance passenger information (UNSC 2396: 2017, operative para. 11). Indeed, countries were urged to strengthen not only their border control and information-sharing mechanisms, but the focus was likewise drawn on the criminal prosecution of fighters returning home. Significantly, the resolution called for the accountability of those who committed acts of terrorism (operative para. 19) and highlighted a member state's obligation to prosecute and penalise individuals who have travelled abroad for terrorist purposes (operative para. 17). Resolution 2396 (as did resolution 2178) confirmed that FTFs can be placed on the Sanctions List discussed at length below. Specifically, a foreign terrorist fighter can be placed on the ISIL (Da'esh) and Al-Qaeda Sanctions List if there is sufficient evidence to confirm the individual's involvement in the financing, planning, facilitation, and preparation of terrorist acts in connection with al-Qaeda, ISIL or any affiliate cell (UNSC 2396, operative para. 42). The use of sanctions against terrorists, albeit initially focused on states, has been a primary counterterrorism instrument drawn on by the Security Council. The decision to place FTFs on the Sanctions List would significantly broaden the Council's non-state sanctioning practise.

*Terrorist Financing*

In one of its more recent attempts to further develop a legally-binding regulatory counterterrorism framework, the Council adopted resolution 2462 on terrorist financing in March 2019. Again acting under Chapter VII, member states have endeavoured to specifically turn their focus to the financing of terrorism, placing legally binding obligations on all member states. At an Arria formula meeting [145] at the beginning of 2019, member states made note of the considerable progress that has been made over the past years. In particular, countries highlighted recent efforts to criminalise the funding of FTFs (2195- see above) or the efforts taken to curtail ISIL funding from the trade with cultural artefacts in resolution 2347. However, [w]hile some progress has been achieved…terrorist groups and individuals continuously adapt their methods and look for new sources of funding. With the rise of homegrown terrorism, we have also seen terrorist attacks committed with very limited financial resources" (Concept Note Arria formula Meeting: 2017, 1). In his statement to the Council, Financial Action Task Force (FATF) president, Marschall Billingslea, noted that resolution 2462 thus "includes an important focus on the adequate criminalisation and effective prosecution of terrorist financing" (Billingslea in statement to Council: 2019). Rather matter-of-factly, the president also noted that "less than 20 percent of countries have criminalised terrorist financing and two thirds do not effectively prosecute it" (Billingslea in Charity & Security Network: 2019). Conversely, member states were prompted to unanimously adopt resolution 2462.[146] The Council *"[e]mphasize[d]* its decision in resolution 1373 that all Member States shall criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; and its decision in resolution 2178 that all Member States shall establish serious criminal offences regarding the travel, recruitment, and financing of foreign terrorist fighters; [and] [h]*ighlight*[ed] that the obligation regarding the prohibition in paragraph 1 (d) of resolution 1373 applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organisations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, *even in the absence of a link to a specific terrorist act* [emphasis added]" UNSC res. 2462: 2019, operative para. 2 & 3). It turn, one can conclude, that the Security Council not only adopted to changing realities

[145] An opportunity for member states and other stakeholders to exchange views in a more informal manner.

[146] While space restrains do not allow for the consideration of the more general views of terrorism of the respective countries, it is nevertheless interesting to note that the Non-Aligned Movement has used the UNSC sessions to reiterate: "[e]xperience shows us that terrorist groups are fuelled by, among other things, hopelessness, injustice, frustration, the lack of opportunity and the denial of human rights and fundamental freedoms in order to promote their criminal agenda based on hatred, intolerance, sectarianism and extremism. Poverty, social and economic inequalities; political, ethnic and religious intolerance, as well as the imposition of unilateral coercive measures, colonial and foreign domination and foreign occupation, as well as violations of the sovereignty and territorial integrity of States, among others factors, are also part of the fabric of so-called determining drivers of terrorism" (UN Doc. S/PV.8496, 47).

(e.g. innovation in terrorist financing methods) but moreover underscored its criminal justice commitment by obliging member states to ensure that their national legislation establishes 'terrorist financing' as a serious crime and provides competent authorities with the basis to prosecute and penalise in a manner that reflects the gravity of the crime (Ibid: 2019, operative para. 5). In response to the changing and innovative methods of terrorists in the course of their funding activities, the Security Council moreover called on countries to "intensify and accelerate the timely exchange of relevant operational information and financial intelligence regarding actions or movements, and patters of movements of terrorists or terrorist networks, including Foreign Terrorist Fighters" (Ibid: 2019, operative para. 19). Significantly, member states are to do so by considering the "risks associated with virtual assets…new financial instruments, including but not limited to crowd-funding platforms" (Ibid: 2019, operative para. 19 (d)).

*UN Security Council resolutions: A new way forward or previously established practice?*

Since 2001, the Security Council responded to terrorism in a stern and determined manner. Despite drawing on pre-2001 initiatives (Rosenow: 2011, 21) these measures represent a deviation insofar as they address the phenomenon of terrorism in both a legally-binding and generic manner. The general nature of UNSC resolutions was however not entirely new. Already with resolution 635 (1989) and 1269 (1999) the Council was comfortable with condemning all acts of terrorism, irrespective of the impetus for the act (e.g. UNSC resolution 1269 (1999) para. 2 and operative para. 1). Certainly, one of the most prominent traits of the Council's resolution-regime has been the generic character and the legally binding, and thus mandatory, nature of Council resolutions. Such assertiveness is usually reserved for international treaties, which are only binding on those states that sign and ratify the respective agreement. What has also become strikingly evident is that the Security Council has gone to great lengths to provide a relatively thorough description of how member states are expected to respond to terrorism. Although member states have continued to condemn specific attacks, the Council has been much more occupied with detailing with how states are expected to fight terrorism. Its response has thus been more assertive and comprehensive than in previous periods discussed, and has, although borrowing from other instruments, broken new ground.

While commentators characterise the pre-9/11 period as event-driven (Kramer & Yetiv: 2007, 420), the evidence presented above nevertheless also allows for the conclusion that the Security Council has continued to rely on the impetus provided by terrorist attacks, or the emergence of new threats (e.g. ISIL) to take action. This is certainly best illustrated by the adoption of resolutions 1368 and 1373 in the immediate aftermath of September 11$^{th}$. But this trend has also continued with the adoption of resolution 1540 in response to the revelations in connection with the A.Q. Khan network in 2004; resolution 1566 in response to the Beslan hostage-taking; as well as resolution 1624 following the attacks in London in 2005. More recently, resolutions 2178 (2014) and 2396 (2017) were adopted as a result of the emerging threat posed by foreign terrorist

fighters departing to conflicts and subsequently returning home. Finally, resolution 2465 on the financing of terrorism is a further example of how the Council is reactive in its response to terrorism rather than pre-emptive. It is perhaps worth noting that while there are certainly limits to reactive law-making, the conclusion can be made that it also demonstrates the Council's ability to react with relative swiftness to developing circumstances, although this certainly also depends on the political support by the permanent members of the Council.[147]

It is also fair to say that the layer of UNSC resolutions have built on pre-9/11 practice insofar that states have been obliged to criminalise certain offences, including the general offence of terrorism (1373), the proliferation of nuclear weapons of non-state actors (1540), engaging in acts of terrorism abroad (2178), or supporting terrorism through funding (2462). Although the Council has called on states to bring to justice perpetrators who have engaged in terrorist acts before 2001 (e.g. resolution 1269 in 1999), the body has become more assertive and comprehensive in its demands. Most obviously, it has made such demands legally binding under Chapter VII in respect to any person engaging in the "planning, preparation or perpetration of terrorist acts or in supporting terrorist acts" (UNSC 1373: 2001, operative para. 2(e)).

Finally, the Security Council has established an unprecedented institutional architecture to administer the resolutions and to help member states fulfil their obligations. Putting in place institutional structures to facilitate implementation of the various obligations was however not entirely new. Already with the adoption of resolution 1267 in 1999 did the Security Council understand the need to properly administer its decisions. The technical and comprehensive nature of the Council's sub-structures is however unparalleled. The extent to which this is a novelty, and how the sub-structures compare to one another (e.g. CTC vs. 1267-Sanctions Committee) will be discussed in the concluding remarks to this chapter.

The adoption of a number of resolutions in response to specific acts of terrorism, including 1438 (Bali in 2002), 1440 (Moscow in 2002), 1450 (Kenya in 2002), 1465 (Bogota in 2002), 1515 (Istanbul in 2003), and 1611 (London in 2005) gives way to the conclusion that the Security Council has become more ready to condemn specific acts of terrorism. Before 9/11 the Council was more selective in what terrorist attacks it would condemn and address (Kramer & Yetiv: 2007, 420). Specifically, the Council referred to terrorism conducted by agents of the Libyan state (resolution 731), the assassination attempt against the Egyptian president in Ethiopia in 1996 (resolution 1044) and the attacks in Kenya and Tanzania in 1998 (resolution 1189). These resolutions are however not legally binding and remain political statements (Rosand: 2004, 745).[148]

[147] This should not be a foregone conclusion and only applies to the cases discussed throughout this section. Subsequently work must assess the Council's ability to act independently.

[148] The Council has upheld the practise of condemning specific acts of terrorism well after 2005. For example, in resolution 2249 adopted in 2015, the Council condemned "the horrifying terrorist attacks perpetrated by ISIL…which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinaï, on 12 November 2015 in Beirut and on 13 November 2015 in Paris" (UNSC res. 2249: 2015, operative para. 1).

## Expanding the United Nations' sanctions-regime

The forthcoming discussion gives way to the conclusion that the Security Council used powers granted under Article 39 – that is, determining a threat to international peace and security. Tellingly, the previous chapter has also determined that the UNSC has responded to such threats by imposing sanctions against Libya, the Sudan, and the Taliban regime in Afghanistan, and later against bin Laden and al-Qaeda. Indeed, resolution 1333 (2000) obliged member states to freeze the financial assets of bin Laden and those associated with him as well as entities designated by the 1267 Sanctions Committee (UNSC res. 1333: 2000, operative para. 8(c)). Member states were also tasked with preventing any funds or financial resources from being made available to bin Laden and his associates and the Sanctions Committee was moreover mandated with maintaining an updated list, based on information provided by states and regional organisations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the al-Qaeda organisation (UNSC res. 1333: 2000, operative para. 8(c)).

In 2002 the Security Council found itself frustrated by the continued threat to international peace and security posed by al-Qaeda, the Taliban, and their associates. Consequently, the Council adopted resolution 1390 in 2002, reinforcing its financial sanctions, expanding the arms embargo on the Taliban, and imposing travel restrictions. By enacting resolution 1390, states were required to freeze the funds and other financial resources of individuals placed on a regularly updated sanctions list (maintained by the 1267 Committee) (operative para. 2) and prevent such persons from entering or transiting through their respective territory (operative para. 3). Resolution 1390 was however unique as member states "did not have [a] connection to a certain territory. It did not relate to a certain state or regime and had no factual or temporal limitation" (Birkhäuser: 2005, 5-6). Hence, "the scope of the sanctions were made global in their effect since they involved financial, arms, and travel embargoes on the Taliban, Al Qaeda and all those in association with that organisation *wherever they may be located*" [emphasis added] (Foot: 2007, 493). These provisions were indeed a novelty considering that the previous resolutions, particularly 1267 and 1333, were adopted with a specific territory in mind and they only urged states to take steps to "restrict the entry into or transit through their territory of all senior officials of the rank of Deputy Minister or higher in the Taliban" (UNSC res. 1333: 2000, operative para. 14).[149] In resolution 1390 adopted after 9/11 (2002) the Security Council thus extended the reach of its sanctions globally and to any member or associate of al-Qaeda wherever they may be (Cameron: 2005, 183). A further novelty of resolution 1390 was operative paragraph 3, which stipulated a review of the sanctions in 12 months, at the end of which the "Council would either allow these measures to continue or decide to improve them" (UNSC res. 1390: 2002, operative para. 3). In contrast, the pre-9/11 sanctions adopted in the course of resolution 1333 had a sunset clause of one year

[149] In reaction to growing concerns over devastating human impact (e.g. financial hardship) that the sanction may incur, the Council allowed for exemptions, including the "payment of foodstuffs, rent or mortgage, medicines and medical treatment, taxes" (UNSC res. 1452: 2002, operative para. 1(a)), as well as other necessary payments (e.g. such as those required under existing contracts).

(Gutherie: 2005, 494). Resolution 1390 however remained rather vague as regards the listing practice of the committee. In theory, names submitted to the 1267 sanctions committee lacked personal information and justification for the inclusion. In practice, this resulted in the implementation of measures against individuals that may not necessarily have had a connection to al-Qaeda or the Taliban. For instance, in late 2001 the United States included the names of three Somali-born Swedish nationals on the sanctions list for their apparent link to an international financing network linked to al-Qaeda (Rosand: 2004, 749). When investigations however revealed that the activities of the three individuals did not warrant any criminal charges, the Swedish government undertook efforts at the UN to have the Somali-born citizens delisted. Although the efforts were successful, albeit cumbersome, this incident revealed a larger problem with the sanction committee's work method. Specifically, concerns over the extent to which the committee was complying with human rights and due process principles became increasingly relevant.[150] As a result, the committee adopted the 1267 Committee Guidelines in 2002 (most recently updated in September 2018), which provided that submissions ought to include a basis for the designation, as well as an identification of a link between the individuals listed (see 1267 Committee Guidelines). The Council further addressed concerns in resolution 1526 (2004) "strongly encourag[ing] all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them" (UNSC res. 1526: 2004, operative para. 18). In order to provide assistance to the Sanctions Committee, the Council furthermore decided to established the Analytical Support and Sanctions Monitoring Team, [151] tasked with assessing and monitoring the implementation of the measures set out in the sanctions-regime (Annex to res. 1526), analyse reports submitted by member states (as required by res. 1455, operative para. 6), to coordinate efforts with the CTC and other responsibilities as provided by the sanctions committee (Annex to res. 1526). The Analytical Support and Sanctions Monitoring Team replaced the existing Monitoring Group established by resolution 1363 prior to 9/11.[152]

Early practices established by member states in the Sanctions Committee indicated that "governments initially viewed the Consolidated List as an opportunity to squelch their own local insurgencies, or to otherwise taint opposition groups, providing name that had nothing to do with the Taliban or al Qaeda" (Comras: 2010, 95) and hence it became necessary to provide criteria for classifying an association with al-Qaeda or the Taliban. Amidst such concerns, member states decided to adopt resolution 1612 in 2005. In doing so, the Council determined that an individual or group is associated with al-Qaeda (or bin Laden) and the Taliban if such entities participate in the financing, planning or preparation of "acts or activities by, in conjunction with, under

[150] See also Boer's "The Al Qaeda Sanctions Committee and Due Process: The Security Council's Obligation Under International Law", Hudson's "Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights" and Genser & Barth's "When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform" for further reading.
[151] A five-person Monitoring Team was however already established in resolution 1363 in 2001 (Foot: 2007, 493).
[152] See Rosand's "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions" for a more comprehensive treatment of the short-comings and challenges faced by the Monitoring Group.

the name of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of" (UNSC res. 1612: 2005, operative para. 2). Resolution 1612 furthermore extended the scope of the Monitoring Team's mandate and reinforced its role in constantly updating the listing and de-listing process (UNSC res. 1612: 2005, Annex para. c.). Only one year later the Council continued its efforts to address the human rights concerns of its sanctioning endeavours (Rosenow: 2011, 24). Despite the request made in previous resolutions (e.g. 1612) on states to inform individuals and others affected by sanctions, it was resolution 1735, adopted in 2006, that provided countries with more assertive instructions on the process. In particular, member states were obliged to provide sufficient information to demonstrate that the listing fulfils the association criteria laid out above and should provide "(iii) supporting information or documents that can be provided [and] States should include details of any connection between the proposed designee and any currently listed individual or entity" (UNSC res. 1735: 2006, operative para. 5). This requirement was further strengthened with resolution 1882 in 2009, demanding states to provide a summary of the reasons for the listing on the committee's website (operative para. 13) and to conduct a review of the Consolidated List every three years (Rosenow: 2011, 24).

In 2009, certainly also in response to the judgement by the European Court of Justice in respect to the lack of judicial due process of the sanction-regime,[153] the Security Council established the position of the Ombudsperson to assist in the consideration of any delisting requests. Since, the mandate of the office of the Ombudsperson has been renewed and updated.[154] Indeed, individuals and other entities listed on the consolidated list, which as of August 2019 contained 262 individuals and 84 entities, can make a delisting to the ombudsperson (UNSC Ombudsperson: 2019).[155] However, the most notable amendment to the powers of the Ombudsperson came in 2011, on the basis of resolution 1989. If the request for delisting is not explicitly denied within 60 days it will be removed thereafter (Rosenow: 2011, 25). The original sanction-regime first established in 1999 and later amended in the aftermath of 9/11 was gradually being revised so as to accommodate human rights concerns. The perhaps most ground-breaking reform of the 1267-sanction regime since 2002 was the split of the Taliban and al-Qaeda and Associates List (Sanctions List) in 2011. In resolution 1988 the Council recognised the continuing conflict in Afghanistan and reiterated its support of a peaceful political solution. In an unprecedented step, the Council removed individuals and groups (and entities) associated with the Taliban (UNSC res. 1988: 2011, op. para. 2). That said, the Council established a separate committee (the 1988 Committee) to maintain a list of Taliban entities that pose a threat to the peace and security in Afghanistan (UNSC Summary of listing Criteria: 2019, website). In parallel,

[153] In its Kadi decision, the European Court of Justice decided that the regulation that gave effect to the UN Sanctions was invalid and that any obligation placed on member states of the European Union has to be in conformity with constitutional principles, including principles such as due process and the rule of law. Amidst the short-comings of the 1267 sanctions these were not sufficiently respected.

[154] The Council adopted resolutions 1989 in 2011, 2083 in 2012, 2161 in 2014, 2253 in 2015 and most recently resolution 2253 in 2017.

[155] See resolution 2253 for a detailed reading on the mandate of the ombudsperson.

the previously consolidated Sanctions List would be limited to the al-Qaeda and its associates (UNSC res. 1989: 2001, operative para. 2).

The rise of ISIL did not happen overnight. Rather, the group's origins are rooted in political Islam and broader global trends[156] "that stress the tensions between religiosity and modernity, compounded by an increase in Islamic militancy" (Oosterveld et al.: 2017, 5).[157] It was however not until 2014 that ISIL truly made it onto the radar of the international community. Led by al-Baghdadi, the group seized the city of Mosul in Iraq and thus expanded its territorial reach beyond its base in Syria (Gurule: 2015, 1). Consequently, in February 2015 the Security Council took steps to curtail ISIL's ability to finance its terrorist activities by adopting resolution 2199. Although the resolution does take a general approach to the issue of financing[158] its specific focus rests on ISIL's ability to acquire funds through oil trade as well as through the destruction and plundering of cultural heritage sites and kidnapping for ransom. More concretely, and acting under Chapter VII, the Council reaffirmed states' obligation to "freeze without delay the funds and other financial assets or economic resources of ISIL, ANF, and other individuals, groups, undertakings and entities associated with Al-Qaeda, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction" (UNSC res. 2199: 2015, operative para. 3). The resolution also reaffirms that member states are obligated to bring to justice not only those directly involved in terrorist attacks, but also those that support such activities, further remarking "that such support may be provided through trade in oil and refined oil products, modular refineries and related material with ISIL" (Ibid: 2015, operative para. 11).

Resolution 2253 likewise adopted in 2015 (December) again takes seriously the threat posed by ISIL to international peace and security. Granted, resolution 2199 already set out to curtail the organisation's ability to finance their terrorist endeavours; however, resolution 2253 is nevertheless noteworthy for a number of reasons. First, and again acting under Chapter VII, the Council formally changed the name of the "Al-Qaeda Sanctions List to the "ISIL (Da'esh) and Al-Qaeda Sanctions List", formally acknowledging the need to not only impose financial sanctions but to also enact more stringent efforts, such as a travel ban (operative para. 2 (b)) and an arms embargo (operative para. 2(c)). Importantly, resolution 2253 expands[159] listing criteria to include individuals or entities associated with ISIL (operative para. 3).[160] The Security Council

[156] The origins have to also be understood in the context of the Iraq invasion in 2003 as well as in the sectarian conflicts between Sunni and Shite fractions across the Middle East

[157] See the publication "The Rise and Fall of ISIS: From Evitability to Inevitability" by The Hague Centre for Strategic Studies, particularly pages 5-8.

[158] Indeed, the resolution reaffirms a country's obligation to "ensure that their nationals and those in their territory not make assets or economic resources, directly or indirectly, available to ISIL" (UNSC res. 2199: 2015, operative para. 2)

[159] Resolution 1989 adopted in 2011 also included a more detailed listing criteria for the Al-Qaeda sanctions list, it was thus extended to include non al-Qaeda (or associates).

[160] The resolution furthermore contains other provisions, inter alia, including on the topic of implementation and non-compliance (operative para. 11-36), on the Committee (operative para. 37-42), and the Monitoring Team (e.g. mandate extensions) (operative para. 89-96), the importance of listing names and entities (operative para. 43), delisting procedures (operative para. 54-74) and reporting (operative para. 97)

reaffirmed it resolve to combat terrorism through sanctions by adopting resolution 2368 in 2017 and thus demonstrated its ability to respond to emerging threats.[161]

The 1267 sanctions-regime initially adopted in 1999 has evolved into one of the most central and assertive components of the international community's efforts to counter terrorist activities. Over the course of the past 18 years, the Security Council has progressively amended its sanctions-regime, reflecting the challenges and criticism raised by both member states (e.g. Swedish government) and non-governmental entities (e.g. Human Rights Watch report: 2012), and has built a supporting institutional structure (e.g. 1267-Committee and Monitoring Team) that remains unprecedented in the United Nations' trajectory, in both scope and complexity. It is perhaps for this reason, that the sanctions framework imposed against al-Qaeda, ISIL and formally also against the Taliban, has become one of the most comprehensive and continuously evolving instrument in the organisation's fight against terrorism. Yet, sanctions have not been the only assertive tool against terrorism following 2001. Indeed, with the adoption of resolution 1368, highlighting the right to individual or collective self-defence, the Council acknowledged the use of force as a legitimate response to terrorism.

## The use of force as a legitimate reaction to terrorism(?)

The Security Council responses to terrorism after 9/11 came in a number of different forms; it has condemned specific acts of terrorism and has adopted a layer of resolutions that bind states to take action in a wide range of issue areas (e.g. foreign terrorist fighters). Since 1999 the Security Council has moreover established a sanctions-regime against al-Qaeda, ISIL and its affiliates and in consequence shifted its focus to non-state terrorist actors. One of the most noticeable responses taken by the Council has however been the acknowledgement of the right to individual or collective self-defence, in principle legitimising the use of force in the course of countering terrorism. The basis of this acknowledgement have been resolutions 1368 (2001), 1373 (2001) and arguably more recently 2249 (2015).[162] The UN Charter is explicit in its prohibition of the use of force, except when such force is authorised by the Council or undertaken in the pursuit of self-defence. Specifically, Article 2(4) of the Charter reminds member states of their obligation to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any States" (UNC: 1945, Article 2(3)). Nevertheless, the UNC recognises two exceptions in regard to "forcible enforcement measures within the framework of the organisation's collective security system, and the right to self-defence against armed attacks" (Tams: 2009, 360), enshrined in Articles 42 and 51,

[161] The Council moreover noted its concern over the increasing lack of implementation.

[162] Although the use force in self-defence has been recognised in the course of counterterrorism (see resolution 1368), it is not clear to what extent this norm applies to other scenarios not involving groups like al-Qaeda and ISIS (Da'esh). In this respect it is worth noting the condemnation of Israel's use of force against Hezbollah and Hamas targeting the country from its bases in Lebanon and Gaza. See Mingst et al. Chapter 4 on maintaining international peace and security in "The United Nations in the 21st Century".

respectively. The right of individual or collective self-defence has attracted extensive debate, especially among international jurists and the legal community as a whole. Of particular contention has been the parameters that provide justification for the use of force (e.g. definition of armed attack, the issue of pre-emptive strikes and state attribution). In fact, one of the most contentious debates surrounds the definition and scope of "armed attack", which entitles a country to respond with force in self-defence (Dalton: 2006, 525) and who can be the perpetrator of such an attack (state vs. non-state actor). While interesting, these legal justifications and ramifications will not be of relevance to us here.[163] As Byers objects, the law on self-defence is an "area of international law that is particularly contentious and difficult to analyse" (Byers: 2003, 405).

*Use of force prior to 9/11*

The use of force to respond to terrorism has been a *sujet* whose origins predate the 9/11 attacks. In 1976 when members of the PFLP and the German Revolutionary Cells hijacked an Air France flight, diverting the aircraft to Entebbe, the use of force by one state in foreign territory in the name of counterterrorism became a reality. Less than 10 days into the hostage-taking, Israeli commandos "landed without authorisation in Entebbe, overwhelmed the Ugandan forces and terrorists, and freed the hostages" (Blumenau: 2014a, 68). The commandos not only killed terrorists but moreover killed 20 Ugandan soldiers in the course of the operation. Despite the successful outcome of the operation, the Organisation of the African Union (OAU) asked the president of the Council to call a session of the Security Council. On July 9th the Council convened a session of the whole hearing the complaint of the OAU on the act of aggression perpetrated by Israel. Indeed, while Western countries showed their support for Israel's successful operation a number of Arab and African nations highlighted the breach of national sovereignty. Libya, for example, strongly condemned the operation and noted;

> "[t]he Israeli representative tries to avoid addressing the main issue, which is that his Government planned and executed an act of aggression against a sovereign, independent country, a Member of the United Nations. Should the Council tolerate such aggression, it would give the green light, it would give permission to every country in the world to take the law into its own hands and invade other countries under any pretext it chooses. We believe the Council should apply the provisions of the Charter, which everybody is interested in applying. The Council should condemn in the sharpest terms this contemptuous, wanton Israeli aggression" (UN Doc. S/PV.1939: 1976, 25).

When the discussions on the operation came to an end, as Blumenau reflects, "the SC did not pass a resolution on Entebbe. Both the anti-Israeli draft by the African

[163] See O'Connell's "Lawful Self-Defence to Terrorism", Starski's "Right to Self-Defence, Attribution and the Non-State Actor" and Värk's "Terrorism and the use of force: From defensive reaction to pre-emptive action?" for a more detailed treatment of the legality debate.

countries as well as a more balanced one submitted by Great Britain failed to achieve a majority" (Blumenau: 2014a, 72). Although the debate yielded no concrete outcome, it became clear that the use of force against terrorists would not be considered a legitimate tool, although Israel does represent a special case considering the hostility it faced in respect to its policy towards Palestine at the time. Furthermore, in 1985, "Israel's raid on the PLO Headquarters outside Tunis was 'condemn[ed] vigorously' by the Security Council, which declared it an 'act of armed aggression…in flagrant violation of the Charter of the United Nations' and urged other states 'to take measures to dissuade Israel from resorting to such acts against sovereignty and territorial integrity of all States'" (Tams: 2009, 367).

The American missile attack on selected sites in Afghanistan and the Sudan in 1998 in response to the bombings of American embassies in Kenya and Tanzania is a further illustrative case in point. The Clinton administration informed the Security Council that the attack had taken place in conformity with its right to self-defence, as prescribed under Article 51 of the United Nations Charter. The attack had targeted training facilities in Afghanistan and a pharmaceutical plant in Khartoum believed to be producing chemical weapons, both of which could be linked to al-Qaeda (Lobel: 1999, 537). Although most allies supported the attacks, a number of countries voiced their condemnation and took issue with the unilateral use of force. Governments of Iran, Iraq, Pakistan, and Russia condemned the use of force by the United States (Murphy: 1999, 164). And "[t]he Secretariat of the League of Arab States condemned the attack on Sudan as a violation of international law, but was silent as to the attack on Afghanistan…Other states, however, expressed support, or at least understanding, for the attacks, including Australia, France, Germany, Japan, Spain, and the United Kingdom. In conducting the missile strikes, U.S. defence officials stated that the United States did not request overflight permission from Egypt, Eritrea, or Pakistan. In a letter to the Security Council, Pakistan asserted that the United States' action "entailed a violation of the airspace of Pakistan" and that there should have been prior consultations by the United States with Pakistan (Murphy: 1999, 165). Efforts by the Group of African States, the Arab League, and the Group of Islamic States to request a special meeting of the Council on the attacks failed, and although resolution 1193 enacted on the subject of Afghanistan made note of the issue of terrorism in the country, it did not mention the US missile strike (Ibid: 1999, 165). Attempts at establishing a fact-finding mission investigating the apparent wrongful targeting of the factory in Sudan were successfully blocked by the United States and the matter was dropped altogether soon thereafter (Lobel: 1999, 538 & 556). This is an important development because it highlights that although a number of member states and political groups did not support forceful means against terrorists, the veto prerogative of a permanent member of the Council prevented any action that might have led to the condemnation of the attack on the factory in Sudan.

Since the inception of the United Nations in 1945, member states have used force in connection with terrorism on numerous occasions. In 1986 President Ronald Reagan ordered military strikes against Libya in response to the bombing of a West Berlin disco frequented by US servicemen, and against Afghanistan and the Sudan in 1998 in

reaction to the bombing of the US embassies in Kenya and Tanzania. Even before, in 1976, Israel used force and violated Ugandan sovereignty in the course of a rescue attempt at the Entebbe airport. On most occasions, such strikes led to condemnation and "diverging and often critical opinions about the legality of military strikes in response to terrorist acts" (Oudraat: 2004, 160). In fact, the 1986 bombing of Tripoli in response to the Berlin nightclub explosion, justified by the right to self-defence, "was widely rejected, with many States expressing doubt as to whether the attack on Libya was necessary and proportionate" (Byers: 2003, 407). There was thus no support for the use of force against terrorists amongst members of the international community.

*Terrorism and the use of force after 9/11*

The remainder of this chapter will suggest that the attacks on September 11th 2001 provided sufficient impetus for the Council to become a legitimiser of the use of force in responding to terrorism. Although it is certainly not evident that there is a broad consensus that military means in the pursuit of counterterrorism is always warranted and accepted across countries, Security Council resolutions 1368, 1373 and the more recently enacted 2249 demonstrate that the international community's reluctance to endorse the use of force as a counterterrorism instrument has diminished after 9/11. In this respect, Condoleezza Rice's[164] remark "an earthquake of the magnitude of 9/11 can shift the tectonic plates of international politics" (Rice address at John Hopkins: 2002) holds considerable weight.

The dramatic images of the attacks in September of 2001 lent support to the Bush Administration's more force-oriented counterterrorism endeavours. "The Bush administration noted support from NATO, the EU, the U.N., the G8, the Organisation of the Islamic Conference, and numerous other groups" (Collier: 2005, 716). NATO took an unprecedented step in invoking Article 5, identifying the attacks against the United States an attack against all. Collier further observes that although this is more of a political development, certainly in an attempt to demonstrate solidarity with the Americans, the organisation "definitively acknowledged its willingness to act if necessary" (Collier: 2003, 724). Likewise, the Organisation of American States invoked Article 3(1) of the Rio Treaty, equally considering 9/11 an attack against all (Dalton: 2006, 526). It was indeed owed to the unprecedented solidarity, that the United Nations found itself able to adopt resolutions 1368 and 1373 in the short span of time following the attacks. The first course of action, as already alluded to above, was the unanimous adoption of resolution 1368 and the international community showed itself determined to combat threats posed by international terrorism. The resolution called on states to cooperate in bringing the perpetrators to justice (operative para. 3) and to redouble their efforts to prevent such attacks from occurring in the future (operative para. 4). It was, however, the resolution's reference to the inherent right of individual and collective self-defence in accordance with the UN Charter that proved to be the most ground-breaking change in the organisation's handling of terrorism. Specifically,

[164] The former National Security Adviser to the Bush administration.

the Council recognised "the inherent right of individual or collective self-defence in accordance with the Charter" (UNSC res. 1368: 2001, para. 3). It was the first time that the Council acknowledged self-defence (e.g. use of force) as a legitimate tool against terrorism (Kramer & Yetic: 2007, 413) and it demonstrates the Council's willingness to treat terrorism as a heinous crime of international proportion that requires a more forceful response. It is also important to note that, while 1368 expressed "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism" (operative para. 5) it did not authorise the use of force (Byers: 2003, 342). Resolution 1373 adopted shortly after likewise acknowledged the inherent right of individual or collective self-defence, arguably providing member states with a broad authorisation to use force.[165]

One month after the attacks, on October 7th, the American representative to the United Nations, John D. Negroponte, informed the United Nations that in accordance with Article 51, the United States and a coalition of other states "initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001" (UN Doc. S/2001/946: 2001, 1), further accusing the Taliban of providing al-Qaeda an operational basis and identifying specific targets (e.g. training camps.). Indeed, the Taliban, as the *de facto* government in Afghanistan, refused to hand over bin Laden and "were alleged to have directly facilitated and endorsed his acts" (Byers: 2003, 408). Equally important, Negroponte emphasised that American inquiry into the attacks were still in their early stages and that the United States "may find that our self-defence requires further actions with respect to other organisations and other States" (UN Doc. S/2001/946: 2001, 1). Operation Enduring Freedom was made necessary by the Taliban government's willingness to allow its territory to be used by al-Qaeda. It was also of no less importance that the Americans emphasised the indirect involvement of the Taliban, as state attribution would justify the case for an invasion. Indeed, "it was the first time that such a claim was met with wide support from the international community, with the European Union declaring 'its wholehearted support for the action that is being take in in self-defence in conformity with the UN Charter'" (Cenic: 2007, 2008). As a matter of record, once Operation Enduring Freedom was underway, expressions of support were noted from all over the world, and support was provided from a number of countries (e.g. airspace from Pakistan) (Schmitt: 2002, 10). This was indeed novel considering that previous forms of unilateral (or multilateral) uses of force were largely condemned as violations of international law (see reaction to strikes on Afghanistan and Sudan addressed above).

Since 2001, resolutions 1368 and 1373 have served as a justification for the use of force against terrorism (Voeten: 2005, 530). Yet, it is important to note that the Security Council, while legitimising the use of force in counterterrorism (e.g. Afghanistan in

[165] There has been a wide variety of cases in which the right of self-defence was drawn on to justify the use of force. Some examples beyond the obvious example against al-Qaeda and the Taliban in October 2001 include: Israel bombing of Palestinian camps in north of Damascus in 2003, the incursion of Turkish troops into northern Iraq to fight the Kurdish PKK, Russian use of force against Chechen rebels in 2004 and 2007 and the military incursion against revolutionary armed forces by Colombian forces. These incidents incurred varying reactions.

the early 2000s) did not authorise the use of multilateral force. To appreciate this distinction further, it is helpful to draw on Tams' remarks, when he ascertains that in "SC Resolutions 1368 and 1373, the Council expressly noted that the attacks of 9/11 had triggered a right of self-defence…but this amounted to a multilateral endorsement of a claim to use force unilaterally, rather than a multilateral enforcement action in the sense of Article 42" (Tams: 2009, 377). And while countries have certainly not all favoured military means, or at the very least have recognised that military measures in and of themselves are not sufficient in dealing with the threat, "the fight against terrorism is increasingly regarded as a legitimate cause which warrant a 'military approach'" (Tams: 2009, 374).[166] A word of caution is however necessary. A more comprehensive review of the use of force since 9/11[167] and the responses by the international community does not suggest that there is always broad support for the use of force in response to terrorism. For instance, although the United States drew on the right to self-defence in the case of Afghanistan, it showed itself critical of Russia's similar claims when it launched strikes against Chechen rebels in Georgia (Terry: 2016, 51). Indeed, when Russia bombed rebel bases in Georgia claiming 'self-defence,' the United States disapproved of the strikes as a breach of Georgian sovereignty (White House Press Release: 2002). Likewise, Israel's military action against Syria in 2003 and against Hezbollah in Lebanon in 2006 was met with rather strong condemnation (Ibid: 2016, 51 & 52). The international community was particularly divided on whether to lend support to or condemn the attacks on Hezbollah in Lebanon. The Non-Aligned Movement "expressed strong condemnation of the relentless Israeli aggression launch against Lebanon and the serious violations…of the Lebanese territorial integrity and sovereignty" (14$^{TH}$ Summit Outcome Doc. NAM: para. 142). These cases make evident that political realities – that is the Middle Eastern conflict and broader geopolitical considerations (e.g. relationship between Russia and the United States) – play a pivotal role in ascertaining whether the use of force is a legitimate tool in countering terrorism and that it is by no means evident that the use of force has garnered consensus among all countries.

### *Resolution 2249: fighting ISIL in Iraq and Syria*

The rise of ISIL and its brutal campaign in Syria, later expanding into Iraq, has occupied the international community a great deal. By 2014 ISIL had established its base in the captured Syrian town of Raqqah, prompting it to change its name from the Islamic State of Iraq to the Islamic State of Iraq and Syria (Scharf: 2016, 6). Shortly after, the city of Mosul in Iraq also fell to ISIL, significantly expanding the group's territorial repository. Notwithstanding Russia's veto of any initiative in the Security

[166] See for example Norway's comments in 2002, stating that "[w]e must employ all means at our disposal: political and legal, military and financial" (UN Doc. S/PV.4413: 2001, 10). Other countries have however also cautioned that international efforts "must not, I repeat, be confined to military options only" (UN Doc. S/PV.4618: 2002, 13). See also the Council's statement in 2011, stressing "that no cause or grievance can justify the murder of innocent people and that terrorism will not be defeated by military force, law enforcement measures and intelligence operations alone" (UN Doc. S/PV.6526: 2011, 2).

[167] See Terry's "Germany Joins the Campaign Against ISIS in Syria", pages 46-55 for a more review of international reaction to the respective changes.

Council authorising the use of force in Syrian territory, certainly as a result of its close affiliation to the Assad regime, the US commenced conducting military strikes against ISIL targets on Syrian territory as early as 2014 (Scharf: 2016, 9).

When ISIL however bombed a Russian aircraft over the Sinai desert, leading to the death of 224 passengers, and conducted a series of attacks in Paris in November, both in 2015, Security Council action became necessary. Accordingly, in November 2015, the Security Council reaffirmed that terrorism represents one of the most significant threats to international peace and security and that "any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed" (UNSC res. 2249, para. 4). Resolution 2249 also singled out ISIL as constituting a "global and unprecedented threat to international peace and security" (preambular para. 5), a label not yet afforded to any other terrorist organisation. More specifically, the Council condemned the attacks perpetrated by ISIL in Sousse (2015), Ankara (2015), Sinai (2015), Beirut (2015), and in Paris (2015) (operative para. 1). The more prevalent provision for the purpose of this thesis was, however, the Council's call "upon Member States that have the capacity to do so *to take all necessary measures* [emphasis added], in compliance with international law, in particular with the United Nations Charter….on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq" (UNSC res. 2249: 2015, op. para. 5). The adoption of the resolution is interesting for a number of reasons. First, unlike resolutions 1368 and 1373, although enacted in the immediate aftermath of 9/11, resolution 2249 specifically targets ISIL (only to a lesser extent al-Qaeda and al-Nusra Front). Second, member states are called upon to take 'all necessary measures' on the territory controlled by ISIL in both Syria and Iraq, which was likely a compromise to secure Russian (and Syrian) support as this would prevent any infringement on Syrian territorial integrity. "Unlike Iraq, Syria has not consented to use of force against ISIS by foreign countries (other than Russia) in Syrian territory" (Scharf: 2016, 8). This was indeed novel considering that in 2001 it was rather evident that the Taliban regime in Afghanistan was at the very least harbouring al-Qaeda, providing it with an operational basis. *A propos* Syria, Terry also reflects, "[n]obody is claiming that Syria is tolerating or actively supporting ISIS. In fact, it is uncontroversial that the Syrian Government is itself, with Russian support, attempting to fight the ISIS terrorists" (Terry: 2016, 32).

The most important question that still needs to be answered is whether resolution 2249 gives way to the use of force against terrorists. Given the vagueness of the wording of the resolution it is not easy to make a clear determination.[168] It is evident, however, that member states have not tasked the UN with an enforcement mandate, whereby member states would contribute troops to a multilateral mission on the basis of Article 42 of the UNC. Unlike resolutions 1368 and 1373, resolution 2249 also does not explicitly mention the right to self-defence (Hilpold: 2016, 544), nor does it endorse any other legal theory to justify military action. Despite these textual ambiguities, the

[168] This indeed a protracted and contested debate that would reach beyond the scope of this thesis. For more a more comprehensive treatment see Hilpold's "The fight against terrorism and SC Resolution 2249: towards a more Hobbesian or a more Kantian International Society", Milanovic's "How the Ambiguity of Resolution 2249 Does Its Work".

resolution "does show Council support for States, in accordance with their own domestic legislation, taking further military steps to eradicate Islamic States" (Elgebeily: 2016). For instance, labelling ISIL a threat to peace and security implicitly invokes Article 39 of the UN Charter, even when no clear reference is made to Chapter VII (Akande & Milanovic: 2015, para. 3). The resolution is thus constructed in a way "that it can be used to provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal authority from the Council itself" (Ibid: 2016, para. 9). In fact, the resolution has provided the political basis for military action against ISIL in the territory they control in Iraq and Syria.

The French representative following the adoption of the resolution, for instance, asserted, "[o]n the basis of this historical resolution of the Security Council, France will pursue and strengthen its efforts to mobilize the entire international community to defeat our common enemy. France will play its full part in this effort. Militarily, the President of the Republic announced an intensification of air strikes against strategic Daesh targets in Syria" (UN Doc. S/PV.7565: 2015, 2). It is also interesting to note that when the British prime minister addressed the House of Commons seeking approval for the deployment of armed forces against ISIL in Syrian territory, he drew on the resolution for support. He specifically noted, that

> "the document I have published today shows in some detail the clear legal basis for military action against ISIL in Syria. It is founded on the right of self-defence as recognised in Article 51 of the UN Charter. The right of self-defence may be exercised individually where it is necessary to the UK's own defence…and of course collectively in the defence of our friends and allies. Mr Speaker, the main basis of the global coalition's actions against ISIL in Syria is the collective self-defence of Iraq. Iraq has a legitimate government, one that we support and help. There is a solid basis of evidence on which to conclude, firstly, that there is a direct link between the presence and activities of ISIL in Syria, and their ongoing attack in Iraq…and, secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq – or indeed attacks on us. It is also clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack' such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL.
>
> And this is further underscored by the unanimous adoption of UN Security Council resolution 2249. We should be clear about what this resolution means and what it says. The whole world came together – including all 5 members of the Security Council – to agree this resolution unanimously…" (Prime Minister Statement to the House of Commons: 2015).

Despite general acknowledgements that the resolution would provide a helpful basis in fighting ISIL (Nigeria in UN Doc. SC/12132), a number of countries again highlighted the importance of addressing the root causes of terrorism, in many cases making no mention of Article 51 or the use of force. Liu Jieyi, the Chinese representative, emphasised the need to bring terrorists to justice and in the same vein noted that counterterrorism measures "must address both the symptoms and the root causes of

the problem, and refrain from adopting double standards" (China in SC/12132: 2015, 3), not directly endorsing the use of force on the basis of Article 51. Russia further noted, "[i]n our view, the French resolution is a political appeal, rather than a change to the legal principles underlying the fight against terrorism. We consider it a step in creating a broad anti-terrorism front by marshalling comprehensive cooperation…to end all manifestations of terrorism and eradicate its root causes" (Russia in Ibid: 2015, 5).

By enacting resolution 2249 member states were urged to take 'all necessary measures,' including the use of force, to prevent and suppress terrorist acts, and to eradicate safe havens established in Iraq and Syria. Similar to resolutions 1368 and 1373, the 2015 resolution does not authorise the use of multilateral force on the basis of Article 42 but it does provide political legitimacy to member states to use such force (Cirkovic: 2017, 9). Although the shortened description above certainly does not replace more in-depth academic scrutiny, one can also conclude that the use of force is "now permissible against non-state actors where the territorial state [Syria] is unable to suppress the threat that they pose" (Scharf: 2016, 53). Resolution 2249 marked the first time since 2001 that the Security Council not only determined a terrorist group to be a grave threat to international peace and security but that the use of force may be a legitimate tool to counter the threat.[169] The impact of the resolution is best reflected in the military action taken after the adoption of the resolution as well as in the statements made by (permanent) members of the Council (e.g. France and the United Kingdom).[170] It is also worth concluding that resolution 2249 is different to the previously adopted resolutions in 2001 as its provisions are geographically limited, namely to ISIL-controlled territory in Syria and Iraq, and it does not provide the necessary legal theory (e.g. self-defence) upon which member states can base their military action.

## Chapter conclusion

The resolutions of the General Assembly adopted under the 'measures to eliminate' stream have continued to treat terrorism as a crime requiring a criminal-justice response (e.g. bringing perpetrators to justice) and it has thus been reluctant to endorse a military approach to counterterrorism. Although the Assembly has continuously reiterated its condemnation of terrorism no matter how noble the cause, a closer review of the resolutions gives way to the conclusion that there remains a certain degree of ambiguity in the General Assembly's condemnation of political violence. This is best illustrated by its continued reference to a final outcome document of the Non-Aligned Movement and the unaltered discussions in the Sixth Committee. The General Assembly has sustained its efforts at adopting a

[169] In 2018 the UNSC adopted resolution 2449 in which it expressed "its grave concern that areas remain under their control and about the negative impact of their presence…*calling* for the full implementation of Security Council" resolution 2249 (UNSC res. 2449: 2018, para. 6).

[170] The German government has taken a similar position (self-defence). As recently as October 2019, the German government has continued to "invoke collective self-defence on behalf and on the request of Iraq against attacks from ISIL "in connection with" Security Council resolution 2240 (2015)" (Nussberger: 2019).

comprehensive convention against terrorism. This convention would close existing loopholes and would go a long way in providing the international community with some sort of common understanding of what terrorism is, or at least it is intended to do so in theory. The evidence reviewed above, however, at a minimum allows for the conclusion that the international community remains entrenched in its positions, some of which have not changed since it first took up the task in 1973.

There should be little doubt that the Security Council has evolved into an important global counterterrorism actor, certainly also as a result of the challenges faced by the General Assembly. It has also been demonstrated that the Council has adopted a legally-binding resolution-framework and has established a number of sub-structures to oversee implementation and assist in capacity-building. In doing so, it has made measures previously only contained in international treaties – depending upon ratification– mandatory and subject to Council scrutiny. The discussion has also demonstrated that the Council has been willing and able, or at least to the extent possible given its mandate and political division, to respond to emerging threats and changes to these threats. As time elapsed and new forms of the threat emerged (e.g. foreign fighters), the Council understood that changes to its counterterrorism response were necessary, adding one layer after another to its counterterrorism architecture.

With the historical adoption of resolution 1373 the Council adopted its first quasi-legislative resolution, obliging every country to adopt (or amend) national legislation so as to criminalise terrorism and to bring to justice those engaging in such activities. The sanctions-regime in contrast has the function of addressing a problem-specific activity and will cease to exist when (if ever) the threat of al-Qaeda and ISIL is no longer present. Although resolution 1566 provided a working definition, a formal and accepted definition of terrorism remains elusive. Yet, the absence of a definition has not prevented the Council from taking assertive action. Conversely, despite challenges (e.g. human rights concerns or reporting fatigue) the institutional architecture put in place is unprecedented in scope and reach. Indeed, while the 1267 sanctions-regime predates 9/11, the comprehensive institutionalisation of the CTC, the 1540 Committee and the ISIL and al-Qaeda Sanctions Committee has predominantly taken place after 9/11. The committees established to administer the implementation of the respective resolutions and sanctions have demonstrated the Council's intention to enhance the body's ability to monitor member state compliance, although forceful non-compliance has remained absent.

A noticeable difference between the aforementioned sub-committees is that while the CTC attempts to set global standards in the fight against terrorism, the 1540 Committee only attempts to do so for a specific terrorism-related issue: The proliferation of nuclear terrorism. To that extent, the 1267 Sanctions Committee is also dissimilar as its main focus is on the imposition of constraint on specific individuals, and has thus been granted unprecedented (continuous) power to determine who is to face sanctions. Gutherie in this respect observes, "[t]he authority given to the 1267 Committee to make determinations regarding an individual's connect to Al-Qaeda is

similar to that of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ITRY) [considering that both bodies were] created under the Chapter VII authority of the Security Council and vested with power to make judgments concerning an individual's involvement in activities condemned by the international community" (Gutherie: 2005, 496). One ought to however concede that the 1267-Committee is temporally limited insofar that when the threat posed by ISIL or al-Qaeda ceases to exist, so will it. In contrast, the CTC established by 1373 is indefinite and deals with the terrorism threat in more general terms, not limited to any specific group.

With the adoption of sanctions in resolution 1390 in 2002, the Council once more determined that terrorism is a threat to global peace and security. Prior to the events of 2001, it was the inadequate response by a state (e.g. failing to extradite) that represented a threat to international peace, not the act in and of itself. It was not until after 9/11 that the body found that the terrorist act *per se*, irrespective of a group's link to a state or whether they acted under the authority of a respective state, constituted a threat to peace and security. The body's determination to make this identification in connection with resolution 1390 indicates that member states have understood that non-state actors have become the "core cause of situations of emergency for international peace and security" (Santori: 2006, 96). Yet, even before 9/11, in adopting resolution 1333, the practise of targeting individuals (bin Laden) in specific territories (Taliban-controlled areas in Afghanistan) found its origins. However, it was resolution 1390 that specifically and overwhelmingly set out to target bin Laden, al-Qaeda members, and associated entities globally (Stromseth: 2003, 41). And although the Taliban continued to remain subject to the sanctions-regime, they were no longer treated as a government but as a terrorist organisation (Comras: 2010, 87). This however partially changed again in 2011 when the sanctions-regime was split amidst peace efforts with the Taliban in Afghanistan. On a more general note, it has also become evident that the Council underwent a learning process, becoming less ad hoc in the imposition of counterterrorism sanctions. In doing so, it has established an administered institutional approach, with ongoing listings and delistings. As related above, the current sanctions on al-Qaeda and ISIL (Da'esh) will only end when the groups no longer pose a threat. In contrast, the sanctions imposed on Libya and the Sudan had been in response to specific acts of terrorism and were terminated in 2003 and 2001, respectively, once the countries complied with the specific demands made by the Council.

The Security Council has also not shown reticence to treat terrorism as a crime of international proportion requiring military responses. In this respect, the body has recognised the right to self-defence (e.g. 1368 and 1373) and more recently called on member states to take "all necessary measures" – including the use of violence – to prevent and suppress ISIL in Syria and Iraq (resolution 2249). This was new as previous Security Council resolutions gave a more general mandate (in response to 9/11), whereas resolution 2249 specifically targets ISIL (although mention is made of ANF and al-Qaeda) and the scope of application is geographically restricted to occupied territory in Syria and Iraq. Worth noting is also that the Council legitimised such force

on Syrian territory despite the country neither supporting ISIL nor asking the broader international community for help. Prior to 9/11 the Council was paralysed by the East-West conflict and unilateral use of force, "whether based on self-defence or some legal construction," was never accepted (Tams: 2009, 373). To be sure, the Council has still not authorised the use of multilateral force pursuant to Article 42; it has only endorsed unilateral use of force and has thus transferred responsibility to the respective member state (or coalition of states). Although there is by no means a consensus on military enforcement against terrorists, Tams however usefully observes that "many different states have asserted a right to use force against terrorists, and their conduct has been viewed rather favourably by the international community" (Tams: 2009, 378).[171]

To be sure, of any international organisation the Security Council has taken the most assertive response to terrorism since 2001. With the Council's use of its Chapter VII powers, making the provisions legally-binding, the General Assembly was replaced as the organisation's primary counterterrorism body (Murthy: 2007, 4). The Council, although lacking in operational capabilities has "played a key role in the establishment of international norms and law…it has also facilitated enhancement of the capacities of weaker states to counter the threat of terrorism [with tools such as the CTC and the CTED] (Mingst et al.: 2017, 178). It can however also been drawn, that the Security Council and the General Assembly share one specific commonality, namely their inability to adopt a definition of terrorism. Perhaps the Council has moved a step further with the adoption of resolution 1566, which provides a working definition. Nevertheless, the absence of such a definition leaves considerable room for abuse, giving significant leeway to governments in defining terrorism in ways that best suit their own political (domestic) interests.

[171] One has to however consider the context in which military measures occur. Political rivalries and lasting conflicts in the Middle East and other parts of the globe certainly play a role in whether the use of force against terrorists is condemned or condoned.

# CHAPTER SIX- CONCLUSIONS: BETWEEN INNOVATION AND CONTINUITY

"Individual states may defend themselves, by striking back at terrorist groups and at the countries that harbour or support them. But only concerted vigilance and cooperation among all states, with constant, systematic exchange of information, offers any real hope of denying the terrorists their opportunities."

- UN Secretary General Kofi Annan (2002)

This thesis has set out to gain a better understanding of the ways in which the United Nations' response to terrorism has changed since 1972. A review of this nature has become necessary because, as alluded to in introductory chapters and demonstrated throughout, terrorism has taken on a strong international character. With the United Nations being the only truly global organisation in both scope and reach, the organisation's response to terrorism is critical to the overall international efforts to quell terrorist activity. There has been a wealth of academic interest in the United Nations and terrorism, although this is concentrated to the period after 9/11; and there is a lack of scholarship which has taken an in-depth historical and comparative approach to this subject area. This research fills this void, and in doing so it is now possible to better understand not only how the United Nations has dealt with terrorism but, equally importantly, how the organisation's response has changed over time. With the previous discussion in mind, one is able to draw conclusions on what that means for the UN's counterterrorism endeavours and the international community as a whole. Many new developments have transpired at the organisation in terms of terrorism over the past four decades but there have also been numerous continuities. Indeed, the General Assembly has continued to struggle to find common ground on what constitutes terrorism and has relied on the adoption of crime-specific counterterrorism-related conventions to respond to terrorism. The Security Council has taken a more repressive and assertive response, placing sanctions on countries and individuals associated with terrorism, and, as one might argue, legitimised the use of force as a counterterrorism tool. The attacks on September 11$^{th}$ 2001 had an obvious and radical impact on how the organisation responded to terrorism but so too did the rise of new threats such as ISIL. There is nevertheless also sufficient evidence to suggest that the UN's response has at times remained strikingly similar in a number of ways. The findings moreover expose a number of lines for future inquiries that would yield significant analytical benefits.

## The General Assembly

When the United Nations set out to tackle terrorism in a general manner in 1972, it quickly became apparent that such plans would yield little success. Chapter three has chronicled the early struggles to place terrorism on the agenda of the United Nations in 1972. It was an increasing number of (dramatic) acts of terrorism, evidenced for example by the Lod Airport attack and the Munich Massacre of Israeli athletes in 1972, that compelled then-Secretary-General Kurt Waldheim to urge the General Assembly to deal with terrorism. Consequently, the Sixth (legal) Committee was tasked with forging a collective response to terrorism. This endeavour proved greatly controversial and divisive from the very beginning. Nevertheless, the General Assembly formally took up the issue of terrorism in resolution 3034 in 1972. With 76 countries voting in favour, 35 against, and 17 abstaining, it was foreshadowed that a consensus on the matter would evade the organisation for years to come. The competing country blocs – where Third World countries and their allies pulled to the one side and countries from the West to the other – emerged and with them different views on what terrorism is and what to do against it. In fact, discussions in the UNGA were redirected by Third World countries (with the help of the Soviet Bloc) towards affirming the right of national liberation movements to draw on violence when confronting repressive regimes. In essence, individuals resisting colonial rule and foreign occupation (e.g. Palestinians) should not be classified as terrorists even in cases where they use violence as a tactic for their struggle. At the same time, the elimination of the roots of the problem, such as colonialism and repressive regimes, were considered the best way to put an end to terrorism.

The United Nations' position on terrorism has changed significantly since it first turned to the issue in the early 1970s, only gradually condemning terrorism under all and any circumstances. From the very outset, it was plainly obvious that considerable differences between countries exist. Indeed, the very title of the agenda item drew significant criticism and was later amended from "measures to prevent terrorism and others forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms" to include "and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes" (UNGA res. 3034: 1972). Initially, the General Assembly was reluctant to condemn terrorism and instead underlined the right to self-determination. Yet, with the Cold War entering a new phase in 1985, dynamics at the UN were gradually shifting. Add to this the fact that countries that formerly supported terrorist organisations were more frequently becoming targets of terrorism and hence started to see terrorism as a threat to their own power. With the end of the Cold War, came an opportunity to cross old division lines on terrorism and attempt new initiatives. This shift in UNGA practice could be seen in 1985, in response to the *Achille Lauro* incident, when the UNGA adopted resolution 40/61 and for the first time *"[u]nequivocally condemn[ed]*, as criminal, all acts, methods and practises of terrorism wherever and by whomever committed, including those which jeopardize friendly

relations among States and their security" (UNGA 40/61: 1985, operative para. 1). In 1991, the General Assembly went a step further and for the first time shortened the title of the agenda to 'measures to eliminate international terrorism.' This new title reflected a wider consensus that the root causes of terrorism did not justify acts of terrorism (see UNGA resolution 46/51). However, until 1994 all resolutions continued to include a reference to the right to self-determination against colonial and racist regimes (Halberstam: 2003, 575). The most radical change to the organisation's position on terrorism came with the adoption of resolution 49/60 and the attached Declaration in 1994. Possibly the most significant provisions of the Declaration was its complete condemnation "of all acts, methods and practises of terrorism as criminal and unjustifiable, wherever and by whomever committed" (UNGA 49/60: 1994, op. para. 1) and the General Assembly's emphasis that criminal "acts intended or calculated to provoke a state of terror in the general public…are in any circumstance unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" (UNGA res. 49/60: 1994, op. para. 3). With it, the General Assembly established a novel standard in respect to terrorism and was becoming more comprehensive in its condemnation of terrorism. This change was only possible because of "…a series of terrorist attacks carried out by radical Islamic groups against Middle East and other Muslim and non-Muslim third world countries [that] had begun to change many NAM countries' perception of the risks posed by international terrorism" (Comras: 2010, 175). The Declaration signifies a break with a long-term position held by the General Assembly (e.g. the acceptance of political violence in some cases) and "represents as close to a comprehensive ban on terrorism as the UN has come" (Boulden: 2014, 568). At the same time the General Assembly stopped making direct references to the inalienable right to self-determination. The General Assembly, including after 9/11, has continued to strengthen and expand on the provisions contained in the 1994 Declaration (e.g. see the amendment made in 1996) and has solidified its formal condemnation of terrorism no matter how noble the cause. The Assembly thus transitioned from a body that made provisions for terrorism when committed in the course of national liberation to one that condemned terrorism under all and any circumstances irrespective of the origins or motives of the perpetrator. The support for the shift of position by member states could however only be won, by remaining vague on the very definition of what constitutes an act of terrorism.

After 9/11, the General Assembly's position on terrorism is marked by a significant degree of continuity. As this thesis has shown, the organisation, or at the very least the majority in the General Assembly, is still, today, not clear on where it stands on the use of political violence. Since the 53rd session (1998-1999) the General Assembly engaged in a practise of ambiguity when it comes to the body's position on terrorism. As chapter five has discussed at some length, the General Assembly has enacted numerous resolutions from 1998 until 2019 which made reference to a final document adopted by the Conference of the Heads of State or Government of Non-Aligned Countries. From a brief review of some of the final documents, it becomes clear that members of the NAM "[o]ppose attempts to equate the legitimate struggle of peoples under colonial or alien domination and foreign occupation for self-determination and

national liberation with terrorism…" (Final Document Conf. NAM: 2016, 83). The reference is not included in the operative portions of the resolutions; yet, when governments interpret the respective resolution, also in respect to the spirit in which it was adopted, it is likely that these references will inform member states' understanding of the terrorism issue. This matters because UNGA resolutions may consequently validate the use of political violence in some circumstances (e.g. foreign occupation), albeit only indirectly. So far, one continuity in the UN's stance on terrorism over the past 50 years has been that a common understanding of what constitutes terrorism continues to elude the United Nations. And, given the unresolved conflicts which influence this stance, namely the conflict in the Middle East and the stand-off between India and Pakistan, this strategy is going to continue.

The United Nations' record on terrorism is, however, not all bleak. Over the course of the past four decades the General Assembly adopted an impressive series of international treaties with counterterrorism application, indicating the seriousness that counties have attached to the threat of terrorism since the early 1970s. They were also willing to adopt concrete measures: The Diplomats Convention was a substantial step forward and is a prime example that when an issue of common interest – the orderly conduct of diplomatic relations – is at stake, governments are able to take swift action. The Hostages Convention adopted six years later (1979) serves as further evidence that although disagreement over the exact nature of terrorism – and how it differs from national liberation movements – still persists, compromise is possible. As already alluded to, plans for a comprehensive convention quickly revealed that a very general approach had no chances for a successful outcome and instead, a crime-specific approach would yield the highest probability of success. While there is generally a consensus that the conventions were indeed a great accomplishment - even if only on a purely symbolic level as expressions of the UN's intention to combat terrorism - one also has to be aware of their short-comings. For instance, when the Diplomats Convention was adopted it was done in conjunction with resolution 3166. Resolution 3166 stipulated "that the provisions of the annexed Convention [Diplomats Convention] could not in any way prejudice the exercise of the legitimate right to self-determination" (UNGA res. 3166, para. 4). Paragraph 6 further noted that the resolution and the convention should always be published together. Consequently, if a state considered the condition of the resolution to be met, it could refuse to extradite the accused (Green: 1974, 727). The 1979 Hostages Convention was not adopted with such a resolution; it however also contains an important qualification: in the preamble of the convention (para. 3) member states reaffirmed the principle of self-determination suggesting that the use of political violence can be justified. Arguably, this again may be mistaken for a validation of the use of political violence if the circumstances so warrant. The Hostages Convention moreover introduced a caveat that allows governments to refuse extradition if a party has 'substantial grounds' to believe that an extradition request is made for the purpose of prosecuting or punishing someone based on race, religion, and most notably, a political opinion (Hostages Convention: 1979, Art. 9). This was a significant development because, although the motivation of the perpetrator was removed from the equation, governments would have a loophole under which they could refuse extradition. And despite still having to

submit the case to their competent authorities for prosecution (Article 8) there is a gap as proper prosecution of a culprit might be prevented due to sympathetic sentiments with the cause, in turn not removing safe havens. Notwithstanding these short-comings, both conventions signalled that the international community was growing increasingly serious about tackling terrorism. Although resolution 51/210 in 1996 provided a new mandate for the Ad Hoc Committee on Terrorism to address the task of a comprehensive convention, familiar difficulties quickly re-emerged and no results materialised. It was thus no accident that member states decided to follow a piecemeal strategy again in the 1990s. Willing to tighten the international community's framework against terrorism, member states adopted the Terrorist Bombing Convention and the Terrorist Financing Convention in 1997 and 1999, respectively. In many ways, these conventions are a continuation of previous patterns as they again focus on specific aspects of terrorism and also enshrine again an obligation to extradite or try a suspect. In contrast to previous conventions, however, the Terrorist Bombing Convention explicitly recognises that the offence of terrorist bombing is not a political offence nor one that is politically motivated and thus a request for extradition cannot be rejected due to the political nature of the crime (Bombing Convention: 1997, Art. 11).

While this convention still abided by old patterns, the Terrorist Financing Convention was a considerable novelty, as the UN addressed the phenomenon in more general - and also pre-emptive – terms for the first time by criminalising the funding of terrorism. The General Assembly was thus, by 1999, willing to move towards targeting the means that make terrorism possible and hence trying to stop terrorism before it could even emerge. The more recent conventions (Terrorist Bombing and Terrorist Financing), while not entirely new in principle, have become more explicit in excluding political offence exceptions as a reason to not extradite. It is thus also a step forward to explicitly exclude the political offence exception, as both the Bombing Convention (Art. 11) and the Terrorist Financing Convention (Art. 14) have done; however, member states have simultaneously left a gap by allowing governments to refuse extradition if the request is made in an attempt to punish someone based on his race, religion, or political views. Now it might be argued that such provisions were perhaps included in an attempt to safeguard human rights. Indeed, Article 15 of the Terrorist Financing Convention ensures a government's right to refuse extradition if there are grounds to believe that the request is made on the basis of race, religion, or on the political views of the individual. This is problematic as an offender might commit a crime in one country and escape to a country favourable to his or her cause and extradition may consequently be rejected under the guise of the protective elements laid out in Article 15 of the Terrorist Financing Convention. Granted, legally, parties are still obliged to submit the case to its authorities for the purpose of prosecution, as Article 10 of the Terrorist Financing Convention stipulates for example, but the provision only means that prosecution will be sought, but not that punishment will be guaranteed. Thus, in cases where a government might be favourable to a specific cause, the UN-convention system falls short and does not provide a mechanism to enforce the provisions of the convention. In essence, the implementation of the *aut dedere aut judicare* principle, to a considerable extent,

depends on the willingness of member states. Indeed, governments must rely on one another for the convention-regime to take full effect. Given all the ambiguities that continue to persist, as demonstrated throughout, it remains questionable whether the convention-regime is implemented in the manner its drafters had intended. This is however not just a problem for international terrorism legislation but remains a difficulty faced in the implementation of international law more generally.

The General Assembly has seen both changes and continuities in its efforts to curb terrorist violence. The problems that have prevented swift action in the early 1970s have remained consistent and are unlikely to yield any concrete solutions in the near future (e.g. defining terrorism). However, the piecemeal approach taken by the organisation has urged governments to take stern and public stances on some aspects related to terrorist violence (e.g. Hostage-taking) while allowing governments to take more demanding and public positions elsewhere (e.g. the Sixth Committee). Therefore, counterterrorism cooperation is possible at the UN (e.g. on the Hostages or Bombing conventions), but it is best done when it is away from the political limelight.

## The Security Council

The United Nations Security Council is arguably the most powerful of the UN organs. This is partly due to its role as 'concert' assembling the most powerful states. Moreover, Chapter VII of the Charter of the United Nations grants the Council powers to determine what constitutes a threat to international peace and security (Article 39) and to take measures short of the use of force (Article 41), such as sanctions, as well as measures involving the use of force (Article 42). Provisions adopted under Chapter VII have a direct implication for member states as these are binding on all countries. As the permanent members of the Council yield most influence, they can also obstruct the Council through the use of their veto powers, as has happened on numerous occasions throughout the Cold War and beyond. During the forty-yearlong Cold War, it was difficult for the Security Council to take assertive action against terrorism. When the Council turned to the aftermath of the Lod Airport assault in 1972, for instance, it was only able to agree on a meagre statement (Romaniuk: 2016, 279). And as already discussed, in response to the Munich Olympic hostage-taking in the same year, a draft resolution condemning the attacks and calling for action against terrorism (introduced by the United States) did not attract much support and a compromise draft introduced by European powers provoked the veto of China and the Soviet Union. Likewise, a draft by the Non-Aligned Movement, which made no mention of terrorism nor the incident in Munich, was vetoed by the United States. As chapters four and five have outlined in more detail, the Security Council was also not spared from political quarrels. Therefore, the issue of terrorism fell victim to geopolitical considerations in the Council: for instance, the Soviet Union and China supported Palestine in its quest for independence and the Soviet Union was keen on building a strong relationship and influence with the Third World. As a result of a number of high-profile terrorist attacks (e.g. *Achille Lauro*) and the coming to the end of Cold War politics, however, the

Council was gradually turning to terrorism in a more constructive and assertive manner.

In the 1970s and in the 1980s, a number of countries, mostly from the Middle East and North Africa, were involved in supporting terrorist organisations (Heupel: 2007, 480). As a result, the SC, acting under Chapter VII of the UN Charter, imposed sanctions on Libya in 1992, against the Sudan in 1996, and against the Taliban regime in Afghanistan in 1999. Breaking with earlier policies, the SC now applied sanctions as an intrusive and repressive tool to dissuade states from engaging in terrorism, or in its support. The results were mixed. In the case of Libya, the sanctions were successful and only lifted when the suspected terrorists were delivered to The Hague to face trial. Contrariwise, documentation suggest that the sanctions placed on the Taliban regime in Afghanistan had little effect. Indeed, it became clear that the 1267 sanction-regime did little in dissuading the Taliban from providing support to bin Laden and his al-Qaeda organisation. Consequently, the Council moved to adopt resolution 1333, the passing of which represented a major development in the UN's efforts to curb quasi state-supported terrorist activity. This was an important milestone as the UNSC was realising that its previous measures would not be successful and it was thus adapting its approach, targeting individual people and their assets. Indeed, the sanctions-regime proceeded to target assets of bin Laden and his associates. The most pertinent development, however, was the extension of the sanctions to include members of al-Qaeda. This was the first time that the SC was directly targeting individuals rather than governments, and their commercial interests (Comras: 2010, 70). As noted, this was a deviation from the Council's established practise previously insofar that resolution 1267 only made passing reference to bin Laden and his associates. It is however important to recall that a noticeable similarity was that both resolutions 1267 and 1333 were adopted with a geographic context (Afghanistan) in mind and did not have a global reach (Luck: 2006, 99). While Libyan sanctions were largely in response to a specific terrorist incident[172] (e.g. Pan Am 103) and applied to the whole of Libya, the 1267 Taliban sanction-regime was limited to the territory controlled by the Taliban and not in response to one particular act of terrorism. In fact, as chapter four and five have submitted, the 1267 sanction-regime remains in place today and has significantly been expanded. On that score, it is thus worth concluding that the response taken by the Council in the 1990s was not only unparalleled in its assertiveness but moreover laid the foundation for the Security Council's response following the attacks on September 11th 2001 and against ISIL in 2015.

Chapter five focused on the Security Council's response to terrorism following the attacks on September 11th and has traced the body's major developments on this subject until 2019. After almost two decades since 9/11, the Security Council has arguably emerged as the most assertive counterterrorism actor in the UN system. It has filled that role by continuing practices from before 9/11 but also by developing new approaches. Since 2001, the Council has adopted an impressive series of resolutions

[172] Although one has to acknowledge that Libyan support for terrorism greatly occupied the United States. Yet, Security Council action remained absent until 1992, after investigations into Pan Am flight 103 and UTA flight 772 implicated the Libyan government.

that have come to build a regulatory counterterrorism framework. Above all, the Council has grown increasingly comfortable in labelling terrorism *per se* as a threat to international peace (see Art. 39 of UNC). Previously, the SC held that only the conduct of a state (e.g. Libya's refusal to extradite terrorist suspects) constituted a threat to peace. Now the actions of individuals as well could trigger the Security Council to make full use of its powers granted by the UNC, including both forceful and non-forceful means. The resolutions adopted by the Council represent a considerable deviation from pre-9/11 practise as resolutions 1368 and 1373 moved to not only address terrorism in a general manner but moreover imposed far-reaching and legally-binding obligations on all member states. Granted, earlier resolutions (e.g. resolution 635 (1989) and resolution 1269 (1999)) condemned terrorism in general but did not place binding obligations on member states to respond to terrorism. The SC did not develop its approach out of the blue. In fact, earlier work done by the UN served as a basis for the new resolutions regime as the obligations imposed on member states with resolution 1373 in many ways reflect the provisions of the 1999 Terrorist Financing Convention. Yet while the convention was negotiated involving all UN members through the GA, resolution 1373 places binding obligations on all countries, many of which had no say in the details of the resolution. This is indeed noteworthy as the Council clearly side-stepped the General Assembly and made provisions only applicable to parties of the Terrorist Financing Convention legally binding on all, irrespective of whether they ratified the convention.

Continuing a pattern from the past, the Security Council counterterrorism resolutions adopted in post-9/11 also continue to be designed in response to new threats. In that sense, the Security Council continues its old practice to take a reactive, rather than proactive, response to terrorism.[173] While this practise is certainly not new, it is not necessarily a point of criticism of the SC approach. In fact, it demonstrates that the Council is able to take swift, assertive, and forceful action if the political interests of the (permanent) members of the Council are aligned.

As noted above, in little under two decades, the Security Council significantly expanded the United Nations' sanctions-regime. The most significant change to the UN sanctions-regime however came in the form of resolution 1390 in 2002. The United Nations, for the first-time imposed sanctions without any specific geographic context in mind, in turn extending the sanctions globally (Birkhäuser: 2005, 5-6). In the meantime, the evolving peace process in Afghanistan made it politically opportune for the Council to split the sanctions-regime, removing members of the Taliban and its associates from the Consolidated List, as they were now allies in developing a post-war Afghanistan. What was formally the Taliban and Al Qaeda Sanctions List was now reconstructed to only include members and associates of al-Qaida (see UNSC res. 1989). The Security Council thus moved from a state-focused sanctions approach (e.g.

[173] Resolutions 1368 and 1373 were adopted in the aftermath of 9/11 and it was the revelations of the A.Q. Khan network in 2004 that compelled member states to adopt resolution 1540. These practises continued well into the 2000s when the Council adopted resolution 1566 as a result of the Beslan hostage-taking, resolution 1624 in response to the attacks in London in 2005 and resolutions 2178 and 2396 amidst the threat posed by foreign terrorist fighters in 2014 and 2017, respectively.

Libya) to a more nuanced one, focusing on the actual actors of terrorism (e.g. al-Qaeda).

The rise of ISIL introduced an unprecedented threat to the world, one that would place countries under significant pressure to take action. Yet ISIL was a new sort of actor too. While terrorists in design, it also exerted control of specific territories and had state-like features (e.g. tax collection and a health system). ISIL's brutal and very public campaign in Iraq and Syria was gradually spilling over to Europe, compelling governments to extend the UN sanctions-regime to include ISIL. Thus, with resolution 2253, adopted in 2015, the al-Qaeda sanctions list, became the "ISIL (Da'esh) and Al-Qaeda Sanctions List." This development shows, though, that the 1267 sanctions-regime first put in place in 1999 in response to the Taliban regime and its support for al-Qaeda remains a central component in the Security Council's counterterrorism repository. It is maintained in essence and adapted to the changing circumstances. The past decades have also demonstrated that the Council is willing to correct the regime in response to criticism. And while the Consolidated Sanctions List and the listing and delisting process continue to be criticised on human rights and due process grounds, chapter five has shown that the Security Council is willing to take criticism on board when revisiting the scheme. As Comras concluded in 2010, governments initially viewed the Consolidated List as an opportunity to squelch their own local insurgencies, or to otherwise taint opposition groups, providing name that had nothing to do with the Taliban or al Qaeda" (Comras: 2010, 95). Consequently, Security Council amended some of the regime's short-comings. In 2005, for instance, the Council adopted resolution 1612 and established a set of criteria which outline what is considered an affiliation or membership with al-Qaeda (operative para. 2); and in 2006 the Council obliged member states to provide more information on the reason for listing a designee (UNSC res. 1735: 2006, operative para. 5). It has hence become apparent that the Security Council's response to terrorism is not static but that the body is able to build on existing instruments as new circumstances emerge and to respond to criticism. The Council's response is thus shaped by ongoing developments.

Looking at it from a long-term perspective, the response taken by the Council has developed in a number of ways. Since 2001, the UNSC has established a legally-binding and quasi legislative framework through which member states are expected to respond to terrorism, although it falls short of properly defining what constitutes terrorism. Also, the findings suggest that the UNSC has used its considerable powers, traditionally not designed to deal with terrorism, to respond to the threat. The perhaps most notable point of contention in this context is the Council's acknowledgment of the right to use force as a legitimate counterterrorism instrument by member states. This debate on this development is nowhere near over and there remains considerable debate on its permissibility, especially in the legal community. With that in mind, however, this thesis argues that prior to 9/11 the use of force as a counterterrorism instrument was widely rejected, see for instance when the US attacked Libya in 1986. Back then, the notion that governments were acting in self-defence to terrorism, and would therefore be allowed to use force was rejected (Byers: 2003, 407). This changed with the attacks on 9/11. Indeed, it was not until after 2001 that the right to self-defence

in countering terrorism gained traction. Especially resolutions 1368 and 1373 have served as the basis for the use of force against terrorism and were important instruments in legitimizing the use of unilateral force to respond to terrorism. This, however, does not imply that there is a general consensus on the use of force against terrorists in any and all circumstances (see US reaction to Russian strikes on Georgia) but a military approach on terrorism is gaining traction. Evidence for this claim can be found in the Security Council's forceful action against ISIL. When ISIL bombed a Russian plane over the Sinai desert and engaged in a series of brutal terrorist attacks in France in 2015, the Council was ready to declare the organisation a threat of unprecedented nature. The resulting resolution 2249 called upon member states to take *all necessary measures* against ISIL in the territories controlled by the organisation in Syria and Iraq. In spite of not explicitly mentioning the right to self-defence, the adoption of the resolution demonstrates the Council's support for countries to engage in military action against the terrorist group. At the very least it lends political support for countries to take unilateral (or collective) action (see statement by British Prime Minister in chapter five). Of particular relevance is however to note that the Council transferred the responsibility away from the UN and towards member states, although the Council retains control on defining what terrorist organisation is a legitimate target (e.g. ISIL). The record reflects that the Council was not willing to mandate a multilateral enforcement operation in the sense of Article 42 but phrased the mandate as broad as possible ('take all necessary measures'), albeit within the defined territory in Syria and in Iraq. Yet there is as of yet no clear trend in UNSC practice on this matter of the 'military approach'. For instance, while resolutions 1368 and 1373 make explicit reference to the right to self-defence, resolution 2249 does not.[174] The adoption of resolution 2249 further suggests that the Council was only willing to recognise the right to self-defence against non-state terrorist actors when another state is unable or unwilling to counter a certain terrorist threat in its territory (e.g. Syria). This was indeed a break with previous practise, as the right to self-defence, on the basis of resolutions 1368 and 1373, was predominantly invoked against the Taliban – a quasi-state. The implications of resolution 2249 remain to be determined, but one might suggest that the resolution sets – a somewhat dangerous precedent - insofar as that it allows any state to use force against non-state actors present in another state if that latter state is unable or 'unwilling' to suppress the threat. More generally, the UNSC might shift towards a military approach in responding to terrorism, one that could potentially serve as a *carte blanche* for some states to intervene in other countries. Consequently, fears that counterterrorism might be used as a justification for foreign intervention may become reality.

The Security Council, as demonstrated, has evolved into a considerable and assertive counterterrorism actor. The Council has on numerous occasions shown its ability to adjust its practises to changing environments. It is, however, important to remember that the composition of the Security Council raises questions of legitimacy. It is only composed of 15 members, 5 of which are the permanent members (mirroring the

[174] Although some scholars argue it does indirectly support such an approach as suggested by Akande & Milanovic in "The Constructive Ambiguity of the Security Council's ISIS Resolution".

power situation of 1945) and the remaining 10 are elected on a two-year basis without a right to veto. These 5 +10 countries can make far-reaching decisions with immediate repercussions on states and individuals. Equally importantly, while the Council has adopted far-reaching and legally-binding counterterrorism instruments, and established a permanent institutional structure (Counter-Terrorism Committee) to administer monitoring, it has continued to leave significant leeway in interpretation and implementation. Although UNSC resolution 1566 provided a working definition of terrorism, a formal definition remains absent, giving countries a broad mandate to pursue terrorists with their own experiences and understandings in mind. In light of a shift towards a more military approach, one that gives significant leeway to states to interpret the nature of a terrorist threat, this is indeed a development that warrants careful and critical examination.

There is, hence, no simple answer to the research questions that underpin this PhD project, as developments have been both vast and complex. The United Nations' response to terrorism since 1972 has been marked by changes and continuities. The General Assembly gradually came to terms with condemning terrorism no matter how noble the cause, yet, as noted earlier, some ambiguities remain. This makes it difficult to characterise the UNGA's position on terrorism, even today. The sectoral approach taken by the Assembly remained a consistency throughout the UN's history in dealing with the issue of terrorism, whereas the Terrorist Financing Convention represents a noteworthy novelty considering its general treatment of the issue. The Security Council moved from a state-focused approach to a more nuanced focus on non-state actors of terrorism and has hence demonstrated its ability to respond to emerging developments. Following the attacks on September 11$^{th}$, the Security Council moreover lent political support for countries to engage militarily against terrorists. The Council reaffirmed this approach more recently by adopting resolution 2249, although limiting the scope to ISIL in territories in Iraq and parts of Syria.

The evidence presented in this thesis allows for a number of wider considerations. To begin with, while the world is certainly better off with the United Nations than without it, counterterrorism at the United Nations remains a cumbersome and at times a frustrating policy field. The perhaps biggest short-coming of the UN in dealing with terrorism is the General Assembly's inability to adopt a comprehensive convention against terrorism. It is, however, of particular importance to note here, that the failure to agree on a general way forward against terrorism has evaded the organisation since 1973 and is thus not a recent recurrence. Although 9/11 certainly provided new impetus for the negotiations, the political quarrels and the contrasting opinions of what constitutes terrorism have remained similar at their core over the past 50 years and have prevented the adoption of such an instrument, although countries can agree on the necessity of such a convention. Notwithstanding the absence of success in these negotiations, remarkably, member states have not dismissed the idea of such a convention. Nor should they. The adoption of such an instrument would demonstrate that the international community stands united in its response to terrorism; and it would provide much needed clarity to the UN's counterterrorism architecture as a common definition is still missing, leaving countries with significant leeway in

implementing UN measures. The adoption of such a convention would also augment the UN's credibility in its efforts to quell terrorist violence. Despite the absence of a comprehensive convention, a counterterrorism-regime has nevertheless been developed by sectoral conventions. The UN conventions facilitate the process of criminalising terrorism step-by- step and by providing the basis for apprehending and extraditing or prosecuting suspects even if the crime was not committed on that state's territory. Despite the sectoral response taken by the UN, the rise of suicide terrorism puts into question whether the prosecution and extradition approach taken over the past four decades remains effective. Focus, as Blumenau has already noted in 2014, should thus increasingly be placed on prevention rather than punishment. So the UN should shift its focus to prevent terrorism from even materialising. The Terrorist Financing Convention does exactly that but it is an exception that proves the rule. All other conventions only criminalise a certain set of crimes and the drafting of conventions has mostly been in reaction to the rise of new threats. The process has thus been reactive and post-factum. This certainly does not diminish their value; nevertheless, a comprehensive convention would add a pre-emptive element to the organisation's response to terrorism. It appears progressively clear that governments cannot afford to continue down the path of a problem-specific response without defining terrorism by means of a comprehensive convention, nor can they solely rely on the Security Council to take meaningful action. Governments would always remain one step behind as terrorist develop new methods, forcing countries to respond after threats emerge. At the same time, though, member states should not water down the provisions of a potential comprehensive convention to the extent that it becomes utterly meaningless, in an attempt to accommodate as broad a consensus as possible. The findings of this thesis however suggest that if countries can reach compromise on a comprehensive convention, the instrument will likely be nothing more than a symbolic endeavour.

The definition of terrorism has plagued academics, practitioners, law-makers, and the layman alike. It is not merely an academic exercise but, as pointed out frequently, has real-life implications. Both the General Assembly and the Security Council have come close to a definition. Indeed, the UNGA included one in the 1999 Terrorist Financing Convention when it defined the act of terrorist financing as the unlawful or wilful provisions of funds "in order to carry out (b) [a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act" (Terrorist Financing Convention: 1999, Article 2(b)). The Security Council assumed a similar working definition in 2004 when it adopted resolution 1566 (see chapter five). Nevertheless, both attempts did not produce a formal definition that is applied throughout the UN and consequently a global definition of terrorism is still overdue. As long as member states fail to agree on a global definition of terrorism, there is a risk that counterterrorism measures might be abused by states.

Over the course of the past half-decade, the United Nations has faced a plethora of obstacles when responding to terrorism and drew a lot of criticism of its approach. Yet, an examination of the UN's response to terrorism also gives rise to a sense of optimism. The international realities (e.g. Cold War and decolonisation) that have made fighting terrorism a contentious endeavour have not prevented the UN from keeping it on its agenda nevertheless. The organisation has taken significant steps in countering terrorist activities, including the adoption of a crime-specific convention-regime, sanctions against members and affiliates of al-Qaida and ISIL, as well as a legally-binding and quasi-legislative resolution framework. Moreover, as Blumenau (2014) has also shown, the General Assembly has served as a useful forum through which member states can voice their positions on terrorism very publicly to please domestic audiences while making concessions behind closed doors (Blumenau 2014b, 104). One also must not forget that the UN is comprised of 193 member states that not only have different political and legal systems but that moreover harbour very different historical experiences with terrorism; with some countries even coming into existence through some acts that could be considered terroristic. In sum, the United Nations, within the limitations it has to operate in, contributes to the global efforts to quell terrorist violence. Realistically, commentators must assess their expectations against the limitations placed on the organisation by its members. Indeed, the UN is only as strong as its members allow it to be. Hence, bearing this acknowledgment in mind, member states must make an honest assessment of the extent to which they have provided the UN with the necessary conditions (not just in respect to mandate) to respond to terrorism in a cohesive and clear manner. And member states can only claim to be doing so when they finally manage to adopt a comprehensive convention against terrorism and agree a consensus definition.

This leads us to a bigger question: Is the UN actually the most pertinent organisation to deal with terrorism? Over the past fifty years, the international nature of terrorism has intensified and has conversely made multilateral responses through international fora even more important. The findings previously discussed have highlighted a number of avenues for further research and the limitations addressed at the beginning of this thesis leave open a number of worthy research endeavours. First and foremost, this thesis has been limited in scope and therefore a number of responses taken by the United Nations have not received the attention that they merit. To name one example, in 2006 the General Assembly adopted the UN Global Counter-Terrorism Strategy. This initiative has not been discussed as it is not a concrete measure but rather an overarching strategic endeavour and it thus remains to be shown how this has had an impact on the response of the organisation. Furthermore, since 2001 (some even before) most international organisations have realized that terrorism touches upon their own fields of work and that they can no longer afford to ignore the threat. Despite the growing importance of multilateral counterterrorism, academics have not dedicated sufficient efforts to examining the response taken by international organisations to terrorism, especially from a historical perspective. This is surprising as a thorough and systematic assessment would yield many insights into how future counterterrorism efforts should look like and what is a likely response that would achieve support from countries. Indeed, one of the main conclusions that should be taken from this thesis

is that terrorism has different meanings that are informed by country-specific experiences, which in turn make multilateral counterterrorism cooperation very difficult. International organisations will certainly remain essential in any response to terrorism, yet academics (and governments) must also consider successes and failures of less comprehensive organisations, organisations that are technical and regional in nature. In simpler terms, academics ought to explore if other forums are more suited to dealing with terrorism than the United Nations. In particular: In what ways have other international organisations (regional, technical) responded to terrorism? What efforts have been successful and which ones have been controversial? And does the nature of the organisation (global vs. regional vs. technical) have an impact on the response and the extent to which it has been successful? Focus should rest on the extent to which, if at all, regional and technical bodies are more suited to designing counterterrorism efforts and if implementation is more successful given that members of regional organisations are more alike and technical bodies can ideally circumvent political and ideologically motivated obstacles. This research project has above all also demonstrated that a historical analysis is vital in gaining a complete picture. Conversely, future research should examine and assess the response taken by international organisations over time.

On a second note, future research needs to pay special attention to implementation processes and should address the degree to which countries have implemented the obligations coming from international organisations. In this respect, it is also necessary to see how organisations deal with non-compliance and countries' failure to live up to their obligations. Moreover, as has been shown, in the post-9/11 era, the Security Council has taken a more assertive and mandatory approach when responding to terrorism. Yet there is no legal definition of terrorism leaving member states considerable leeway in implementation of SC measures. Future research ought to examine the extent to which this poses a problem to the coherent implementation of Council resolutions and the extent to which member states have a common understanding of the threat that they are trying to curtail. As such, a country analysis has become necessary.

Finally, two further research areas have emerged and would yield great insights. This thesis, as have previous works, has established that tackling terrorism within the General Assembly is burdensome and takes time. It has also been demonstrated that the Security Council has evolved into a critical counterterrorism actor that is able to take swift and decisive action (e.g. resolution 1373). This is certainly, *inter alia*, also the result of the Council's powers and procedures granted to it by the UN Charter. In 2006 Stiles focused on the place of procedure in international organisations, in essence, trying to understand to what extent rules have an impact on policy outcomes. In fact, it was found that the United States turned to the Security Council after 9/11 because it was this body that would allow for quick and decisive action (Stiles: 2006, 39). And while a number of insights have been created, future research should try to understand the impact of rules and procedure more recently, particularly in the UN's response to ISIL and the extent to which other forums might be – from a procedural point of view – better suited to address terrorism. Finally, any international organisation is

composed of states. And states are guided by their own interests. National interests have been a major aspect of academic studies of international organisations for some time but it is still important for academics to understand the role of national interest in negotiating counterterrorism outcomes at the UN (and other organisations). Therefore, future inquiries ought to consider archival research to better understand how national interests and country-specific positions have shaped the United Nations efforts to curb terrorist violence.

If history is any indication, terrorism is here to stay and it is likely to retain its international character. Kofi Annan's remarks to the General Assembly in 2002 on the importance of international counterterrorism cooperation (see quote beginning of chapter six) hold as true today as they did then; states can certainly take unilateral action against terrorists but it is the collective action taken by states that will deny terrorists the ability to strike. The issues that the UN faces must be taken seriously and it is doubtful that the organisation and its members will be able to solve century-old feuds quickly, but the UN was after all created to maintain international peace and security and to foster global cooperation. It has been the hope of this thesis to underscore that the global struggle against terrorism has been bumpy to say the least but that the alternative – that is, having no global response to terrorism at all – is not a scenario that anyone should desire. The United Nations remains the best chance we have to deal with terrorism globally.

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