

Nationals, Residents, Terrorism Abroad and State Responsibility

Iraq as a Case Study

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1. Introduction

The issue of foreign terrorist fighters is one of the most pressing issues in this decade. In Syria and Iraq alone, there are more than 45,000 foreign fighters,¹ many of whom joined terrorist organisations such as *Daesh*.² Could these fighters have been able to join the conflict had governments done enough to stop them?³ In other words, what does international law require states to do especially when they have a large number of nationals/residents involved in terrorism abroad? Why are states, despite their sophisticated security and border controls, failing to control the flow of foreign fighters travelling to join the fight in Iraq/Syria?⁴ Worryingly, some states may knowingly allow residents and nationals to travel to war zones and subsequently be involved in terrorism. This might be encouraged by the incentive to dispose of ‘homegrown terrorists’.⁵

1 DUNFORD REAFFIRMS U.S. COMMITMENT TO NATO | REUTERS.COM, <http://www.reuters.com/video/2017/02/23/dunford-reaffirms-us-commitment-to-nato?videoid=371179963&videoChannel=1&channelName=Top+News> (last visited Feb 24, 2017)

2 Also known as ISIL (Islamic State of Iraq and Levant). Later it was also called IS (Islamic State).

3 Many reports confirmed that states, including the USA, were not doing enough to stop nationals joining such groups. U.S. FAILS TO STOP FLOW OF FOREIGN FIGHTERS TO ISLAMIC STATE: STUDY REUTERS, <http://www.reuters.com/article/us-mideast-crisis-congress-fighters-idUSKCN0RT1VZ20150929> (last visited Apr 17, 2016)

4 FINAL REPORT OF THE TASK FORCE ON COMBATING TERRORISTS AND FOREIGN FIGHTERS TRAVEL 23, <https://homeland.house.gov/wp-content/uploads/2015/09/TaskForceFinalReport.pdf> (last visited Apr 28, 2016)

See also U.S. VETERAN: GOING TO SYRIA TO FIGHT “LIKE BOOKING FLIGHT TO MIAMI BEACH” THE WASHINGTON TIMES, <http://m.washingtontimes.com/news/2015/jan/2/us-veteran-going-to-syria-to-fight-like-booking-fl/> (last visited Apr 28, 2016)

5 EXTREMISTS ALLOWED TO LEAVE UK TO EASE HOME TERROR THREAT, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/12050779/Extremists-allowed-to-leave-UK-to-ease-home-terror-threat.html> (last visited Dec 15, 2015) See also EXTREMISTS “ARE ALLOWED TO LEAVE UK SO THEY DON’T CARRY OUT ATTACKS HERE”: COUNTER-TERRORISM OFFICIAL CLAIMS POLICE FACE DILEMMA OVER WHETHER TERRORISTS ARE MORE DANGEROUS “HOME OR AWAY” MAIL ONLINE, <http://www.dailymail.co.uk/news/article-3359631/We-soldiers-streets-London-contain-Paris-style-terror-attack-multiple-gunmen-says-police-chief.html> (last visited Dec 15, 2015)

There seems to be a lot of confusion about what is required of a state when some of its nationals or residents are involved in terrorism abroad. States are either unaware of the recent legal developments in relation to their responsibility in such cases, or are benefiting from the vagueness and the lack of clarity about such developments. For example, in Tunisia - which has a high number of nationals with *Daesh* who fear a potential defeat in Iraq - there is a heated debate between country leaders on whether or not they should allow these nationals to return home after they have been involved in terrorism abroad!⁶

Nevertheless, while some states seem to be confused about what should be done, some states have been responding to the phenomenon differently. For example, some states considered the withdrawal of nationality and/or cancelling passports,⁷ especially from dual nationality terror suspects abroad.⁸ For example, an Australian teenager was ‘stranded in Syria after his passport was cancelled while organising his return, his lawyer says.’⁹ Nevertheless, such an action could result in preventing the terror suspect from abandoning terrorism. Moreover, when the state taking such action is party to the Rome Statute of the International Criminal Court (ICC) – as well as other conventions requiring the prosecution of such persons – this might prevent the state from carrying out its duty to ensure that such a person is prosecuted for terrorism.

In this article, we shall explore state responsibility in relation to foreign terrorist fighters as far as its nationals/residents involved in terrorism abroad are concerned. For the purpose of illustration, we chose Iraq as a case study.¹⁰ To this, we shall first discuss state responsibility in relation to individuals. Subsequently, we shall analyse the contemporary legal regime governing state responsibility in relation to nationals/residents committing terrorism abroad. Finally, the conclusion should provide a synopsis of the study’s outcome.

2. State Responsibility and Individuals

Article 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) states that ‘[e]lements of an internationally wrongful act of a State’ require the following for a state responsibility to arise:

‘[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

⁶ *Terrorists returning home to Tunisia*, THE ECONOMIST, Jan. 21, 2017, <http://www.economist.com/news/middle-east-and-africa/21715033-unwelcome-homecoming-terrorists-returning-home-tunisia> (last visited Feb 1, 2017)

⁷ HOME SECRETARY STRIPS MAN OF UK CITIZENSHIP - FOR THE SECOND TIME THE BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/2013/12/02/home-secretary-strips-man-of-uk-citizenship-for-the-second-time/> (last visited Apr 17, 2016) See also, AUSTRALIAN TEEN OLIVER BRIDGEMAN WHO CLAIMED HE TRAVELLED TO SYRIA TO DO “AID WORK” IS STRANDED AFTER GOVERNMENT CANCELS HIS PASSPORT MAIL ONLINE, <http://www.dailymail.co.uk/news/article-3465611/Australian-teen-Oliver-Bridgeman-stranded-Syria-passport-cancelled.html> (last visited Feb 29, 2016) Other countries including the UK are considering such measures. *Stripping criminals of their UK passports – even terrorists and sex abusers – is dangerous*, THE GUARDIAN, Mar. 1, 2016, <http://www.theguardian.com/commentisfree/2016/mar/01/stripping-criminals-uk-citizenship-racisrt-sex-abusers-terrorists-two-classes-citizens> (last visited Apr 17, 2016) See also NATIONS TRYING TO STOP THEIR CITIZENS FROM GOING TO MIDDLE EAST TO FIGHT FOR ISIS THE NEW YORK TIMES, http://www.nytimes.com/2014/09/13/world/middleeast/isis-recruits-prompt-laws-against-foreign-fighters.html?_r=0

⁸ Sengupta See also, FACT CHECK: HOW DOES AUSTRALIA’S PLAN TO STRIP FOREIGN FIGHTERS OF CITIZENSHIP COMPARE TO OTHER NATIONS? ABC NEWS, <http://www.abc.net.au/news/2015-06-11/foreign-fighters-citizenship-around-the-world/6498920> (last visited Apr 17, 2016)

⁹ Mail Online

¹⁰ This is because there is clear international unanimity that the group (*Daesh*) fighting the Iraqi army is regarded as a terrorist group.

(b) constitutes a breach of an international obligation of the State.’¹¹

To begin with, negligence of the state can be considered as failure in its duty to take reasonable care to avoid breaching its international obligations. This is because it could be considered as an unlawful conduct, which gives rise to international responsibility.¹² Thus, both acts and omissions can be the source of international responsibility if they were in breach of an international obligation.¹³ This responsibility continues as long as negligence continues in breach of the rules of international law.¹⁴

Furthermore, state responsibility for acts of private individuals is already established. For example, if an individual attacks an embassy, even if the act cannot be attributed to the state, the state can still be held responsible for such an act.¹⁵

Nevertheless, even when there is an attempt to discuss terrorism within the parameters of the above article, it will still be limited to the prevalent incomplete scope, which repeatedly fails to see that states could be held responsible for a wrongful act abroad through omission. This study will discuss such omissions of the state in detail. Firstly, we shall highlight the contemporary discussion in relation to acts of individuals who can be described as agents of the state. Subsequently, we shall focus on the possibility of considering the state responsible for acts committed abroad by individuals who are not agents of the state.

2.1 Individuals as Agents of the State

If the individual committing terrorism is an agent of the state, the state can be held responsible, as would the individual for the terrorist acts. In this respect, Trapp concluded that ‘when a state actively participates in an act of terrorism, ... the one act of terrorism may give rise to both individual criminal and state responsibility.’¹⁶

In such cases, the state responsibility is clear and many scholars would agree with Trapp that both acts and omissions of agents that give rise to terrorism are sources of state responsibility.

2.2 Individuals Un-commissioned by the State

When an individual cannot be described as an agent of the state (i.e. un-commissioned by the state) in any capacity, there are two scenarios; that either the wrongful act has a link to the territory of the state or not.

11 ILC, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES 34 (2001),

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

12 Art. 2 & art. 15 ILC

13 Article 2 of the ILC and many commentaries establish this fact. See for example, Crawford in his commentary works does. THE INTERNATIONAL LAW

COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 82 (United Nations & Crawford ed., Cambridge University Press) (2002)

14 Art. 2, 15 & 39 ILC See also KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 4 (Oxford University Press) (2011)

15 para 4 ILC at 39

16 Trapp (n 16) 9–10.

2.2.1. Un-commissioned Individuals Committing Acts Interrelated with the Territory of the State.

A state could be held responsible for acts of non-agent persons (private parties) if there is a certain link to its territory. This is the case when dealing with wrongful acts committed within the state's controlled territory. As Crawford puts it:

There is no need for state agents to be the direct perpetrators of the unlawful act. In *Corfu Channel*, Albania was held responsible for the consequences of mine-laying in her territorial waters by reason of the Albanian authorities' knowledge and failure to warn of the presence of the mines. In fact (though the court did not say this), the mines were laid by Yugoslavia. Similarly, a neutral state may be responsible for allowing armed expeditions to be fitted out within its jurisdiction, which subsequently carry out belligerent operations against another state... Depending on the obligation in question, failure to ensure compliance may be attributed to the state even when the conduct was that of private entities.¹⁷

Furthermore, in relation to the *Corfu Channel* case, Crawford explains that it 'involved a finding that Albania was, by reason of its failure to warn of the danger, liable for the consequences of mine-laying in its territorial waters even though it had not laid the mines.'¹⁸ The ICJ stressed that:

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania. The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred... and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.¹⁹

It is noticeable here that this ICJ ruling leaves no doubt that states can be held responsible for omissions.

In the same line, a WTO Appellate Body report in the *Canada-Dairy* (21.5 II), stressed that:

Irrespective of the role of private parties... the obligations... remain obligations imposed on Canada. It is Canada, and not private parties, which is responsible for ensuring that it respects... commitments under the covered agreements... The question is not whether one or more individual milk producers, efficient or not, are selling CEM at a price above or below their individual costs of production. The issue is whether Canada, on a national basis, has respected its WTO obligations.²⁰

States have numerous obligations enshrined in international law requiring them to act to counter terrorism while controlling their respective territories. Thus, if a state fails to fulfil these obligations and as a result of its failure an individual commits terrorism, then this state is

17 JAMES CRAWFORD & IAN BROWNIE, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 543 (Oxford University Press Eighth edition) (2012)

18 *Id.* at 541

19 *Corfu Channel Case (UK v Albania)*, at 23

20 *Canada-Dairy* (21.5 II), WTO Doc WT/DS113/AB/RW2, 20 December 2002, para 95 p 26.

undoubtedly responsible. This is the case even if this individual was not acting as an agent of the state in any capacity.²¹

2.2.2. Un-commissioned Individuals Committing Wrongful Acts Unrelated to the Territory of the State.

Clearly, it is established that as far as omissions, which represent breaches of international obligations, are concerned states could be held responsible for wrongdoings of individuals. However, it is hard to find a comprehensive study where wrongful acts of non-agent individuals can be attributed to the state due to omissions of the latter wherever the planning, preparation and the execution of such crimes happened. Authors would normally either attribute an act (directly or indirectly) to the state, or to find a link between the act and the territory of the state for it to be responsible. For example, De Frouville, in his “Catalysis” of international State responsibility for conduct of private persons’, discussed the juristic as well as the judicial backing for the idea that a state may be responsible for acts of individuals because of breaching its own obligations under international law.²² However, he did not discuss this in relation to terrorism. Moreover, De Frouville limited his discussion to examples of state responsibility within its territory as he discussed the responsibility for attacking foreigners by private individuals within the state’s controlled territories. Moreover, he thinks that such attribution of responsibility was not included in the ILC articles on state responsibility.²³

Similarly, Crawford thinks that there is no need to rely on the ILC articles (e.g art. 8) to establish state responsibility for terrorism committed by individuals who are not commissioned by the state. He thinks that relying on the law of treaty as well as Security Council (UNSC) determinations to prove state responsibility for terrorism committed by individuals would suffice.²⁴ Yet, his discussion was fruitful only as far as proving that harbouring or supporting terrorism by a state would instigate international responsibility for independent acts of terror groups.²⁵

Nevertheless, the ILC Articles are not useless when it comes to proving state responsibility for acts of individuals. For that in the commentary of Chapter II, for example, it is clearly established that:

4) ...the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it... In this respect there is often a close

21 TRAPP at 64 *citing* the ‘Report of the International Law Commission on the work of its twenty-fourth session, UN Doc. A/8710/Rev.1 (1972), 317.’ and ‘Corfu Channel (UK v. Albania), Merits, 22. See also the ILC’s survey of international law in relation to its work of codification, UN Doc. A/CN.4/1/Rev.1 (1949), 56, para 97, referring to ‘failures to prevent the use of national territory as a base for acts noxious to the legitimate interests of neighbouring States’ as one of the central problems of state responsibility calling for elucidation.’

22 De Frouville in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 275–280 (J. Crawford et al. ed., Oxford University Press) (2010)

23 De Frouville in *Id.* at 107

24 JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 157–161 (Cambridge University Press) (2013)

25 *Id.* at 156–161

link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.²⁶

Such determination is what many scholars and jurists failed to link to international acts of terrorism. As the previous ILC Articles commentary explains, the state could be held responsible for breaching its own obligations in relation to an act of private individuals. There is no reason why this should not cover acts of private individuals abroad. This speculation is triggered by the recent developments in relation to counter-terrorism state responsibilities. Many counter-terrorism conventions and binding UNSC resolutions have emerged after the ILC articles. Thus, it could not be rolled out that many of these international obligations, such as those under the law of treaty, could provide the basis for state responsibility for wrongful acts of individuals abroad.

Next, we shall provide a list of relevant state obligations in relation to counter-terrorism responsibilities. In the meantime, we shall highlight the delicate line between failing due diligence and fulfilling duties in this regard. The main sources of legal obligations in this field are the law of treaties and UNSC resolutions.

3. The law of Treaties:

To combat the phenomena of terrorism, which represents a threat to international peace and security, many conventions were convened. In this article, such conventions will be referred to as Counter Terrorism Conventions (CTC). The CTC have been spreading both at international and regional levels as follows.

3.1 International Conventions:

Among the international CTCs are the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (CPPCIPP)²⁷ and the 1979 International Convention against Taking Hostages (ICTH).²⁸ In addition, as a genuine attempt to counter international terrorism, three important international conventions were concluded for this specific purpose:

- 1997 International Convention for the Suppression of Terrorist Bombings (ICSTB)²⁹
- 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT)³⁰
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).³¹

²⁶ para 4 ILC at 39

²⁷ Annexed to General Assembly resolution 3166 (XVIII) of 14 December 1973.

Entered into force on 20 February 1977. United Nations, *Treaty Series*, vol. 1035, p. 167

²⁸ International Convention against the Taking of Hostages (New York, 17 December 1979)

²⁹ The Convention was adopted by resolution A/RES/52/164 of the General Assembly on 15 December 1997. *United Nations, Treaty Series*, vol. 2178, p. 197; *Resolution A/RES/54/109* <https://treaties.un.org/doc/db/Terrorism/english-18-9.pdf> accessed 19/04/2016.

³⁰ Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. All state members of the UN have ratified this treaty a part from Burundi & Somalia. <http://www.un.org/law/cod/finterr.htm> accessed 25/06/2015. 197 / 39 ILM 270 (2000) / [2002] ATS 23.

³¹ United Nations, *Treaty Series*, vol. 2445, p. 89; A/RES/59/290. <http://www.un.org/en/UNSC/ctc/docs/conventions/Conv13.pdf> accessed 25/06/2015.

Along with many other international agreements, these three conventions have introduced a body of obligations binding upon states in relation to terrorism. This body of obligations is expanding as treaties and conventions continue to expand in number while introducing new obligations emerging upon states in relation to terrorism. They all oblige states to take all possible measures to prevent, suppress, and punish acts of terrorism. Almost every member of the UN ratifies many of these conventions. For example, all member states of the UN have ratified the ICSFT apart from two (Burundi & Somalia). Thus, the body of obligations established by these agreements is undoubtedly an indicator of what international law requires states to do in the face of terrorism.

3.2 Regional Conventions

Many important regional arrangements emerged concerning the fight against terrorism. Examples are the 1998 Arab Convention on the Suppression of Terrorism (ACST);³² the 1971 OAS Convention to Prevent and Punish Acts of Terrorism (CPPAT);³³ the 1977 European Convention on the Suppression of Terrorism (ECST);³⁴ and the 1999 OAU Convention on the Prevention and Combating of Terrorism (CPCT).³⁵

It is noteworthy that in most cases the obligations found in regional conventions are similar to those found in international conventions.³⁶

There is judicial and jurisprudential agreement that a state is liable if it breaches obligations under ratified conventions to which it is a party.³⁷

State obligations stemming from conventions can be a requirement either to act or omit. Thus, acts as well as omissions could constitute a breach of international obligation under the law of treaties. Furthermore, in the *Factory at Chorzów (Jurisdiction)*, The Permanent Court of Justice (PCIJ), held that:

[i]t is a principle of international law that the breach of an engagement involves an obligation to make reoperation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.³⁸

In the same case (*Indemnity*), the court reiterated that:

[i]t is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.³⁹

32 League of Arab States, *Arab Convention on the Suppression of Terrorism*, 22 April 1998, available at: <http://www.refworld.org/docid/3de5e4984.html> [accessed 23 April 2015]

33 CONVENTION TO PREVENT AND PUNISH ACTS OF TERRORISM TAKING THE FORM OF CRIMES AGAINST PERSONS AND RELATED EXTORTION THAT ARE OF INTERNATIONAL SIGNIFICANCE, <https://treaties.un.org/doc/db/Terrorism/Conv16-english.pdf> (last visited Apr 20, 2016)

34 EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM, <https://treaties.un.org/doc/db/Terrorism/Conv15-english.pdf> (last visited Apr 20, 2016)

35 OAU CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM,

http://www.au.int/en/sites/default/files/OAU_CONVENTION_PREVENTION_COMBATING_TERRORISM.pdf (last visited Jul 30, 2015)

36 In many cases, even the wordings are identical. For example, the OAU Convention on the Prevention and Combating of Terrorism, 1999 and the Arab Convention on the Suppression of Terrorism, 22 April 1998 have very similar provisions and in many cases they have the same wording.

37 CRAWFORD & BROWNLIE at 540–56 See also: I. A Shearer, *Strake's International Law*, 11th ed. (Delhi: OUP, 2009), 269–73. and Malcolm N. Shaw, *International Law*, Seventh edition (Cambridge, United Kingdom: Cambridge University Press, 2014), 566–612.

38 Permanent Court of International Justice, *Chorzow Factory Case*, 13 September 1928, (Series A, No. 9, p. 21).

39 Permanent Court of International Justice, *Chorzow Factory Case*, 13 September 1928, (Series A, No. 17, p. 29)

Thus, it is hard to argue that states cannot be held responsible due to acts of nationals/residents, if these acts occur because of the failure of such states to fulfil their contractual obligations. With this in mind, next, we shall explain how to establish the responsibility of the state for acts of private individuals who are un-commissioned by the state and beyond its territorial control. To do this, we shall highlight the main related obligations of the state.

4. Contractual State Counter-Terrorism Obligations under the Law of Treaties

The vast majority of states are parties to most CTC that require them to adopt measures to counter terrorism. These obligations include but are not limited to the following:

4.1. General Requirements

The objectives of ICSTB,⁴⁰ ICSFT,⁴¹ and ICSANT⁴² conventions were uniquely identical as they all stressed the need ‘to enhance international cooperation among States in devising and adopting effective and practical measures for the prevention of the acts of terrorism, and for the prosecution and punishment of their perpetrators.’ The general objectives in these and in most other related conventions are:

- A- To ‘enhance international cooperation among States in devising and adopting effective and practical measures for the prevention of the acts of terrorism’; and
- B- To ensure the prosecution and punishment of perpetrators of terrorism.

In A above, states have to take a pro-active approach in countering terrorism and cooperating with others states (more so affected ones) in every conceivable way to prevent terrorism. There is no specific limitation to these requirements. None of the limitations identified by scholars, which might prevent responsibility to arise, applies when negligence, omission or lack of cooperation on the part of a state party allowed a terrorist act to take place.

Similar provisions are found in other regional conventions. However, some limited their objective to that found in point B above. For example, the SAARC Regional Convention on Suppression of Terrorism (RCST) took the following as its main aim, which is to: ‘take effective measures to ensure that perpetrators of terroristic acts do not escape prosecution and punishment by providing for their extradition or prosecution, and to this end.’⁴³ Meanwhile, the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (TCSMCIUNSCT) took cooperation, found in point A above, as its main objective.⁴⁴

40 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS, UNITED NATIONS, TREATY SERIES , VOL. 2178, P. 197; RESOLUTION A/RES/54/109, <https://treaties.un.org/doc/db/Terrorism/english-18-9.pdf> (last visited Apr 19, 2016)

41 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, 2178 UNTS 197 / 39 ILM 270 (2000) / [2002] ATS 23. 2, <https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf> (last visited Apr 19, 2016)

42 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM. UNITED NATIONS, TREATY SERIES, VOL. 2445, P. 89; A/RES/59/290. 2, <https://treaties.un.org/doc/db/Terrorism/english-18-15.pdf> (last visited Apr 19, 2016)

43 SAARC REGIONAL CONVENTION ON SUPPRESSION OF TERRORISM, 1, <https://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf> (last visited Apr 21, 2016)

44 TREATY ON COOPERATION AMONG THE STATES MEMBERS OF THE COMMONWEALTH OF INDEPENDENT STATES IN COMBATING TERRORISM 1, <https://treaties.un.org/doc/db/Terrorism/csi-english.pdf> (last visited Apr 22, 2016)

4.2. Obligation to prevent a state's territories from being used for terrorism against others

Almost all CTC included some provisions requiring states to prevent the usage of their respective territories for the purpose of terrorism in any capacity, e.g. Article 7 of the ICSANT.⁴⁵ In fact, in its article 18 the ICSFT⁴⁶ convention went further to require states parties to:

...cooperate in the prevention of the offences... by taking all practicable measures, *inter alia*, by adapting their domestic legislation... to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth...;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i)... Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable...;

...(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose...;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.⁴⁷

From the above, and as far as the case study is concerned, it is clear that, states are under obligation to prevent their respective territories from being used to support terrorism in Iraq in any way. This includes to duty to monitor all financial transactions in relation to Iraq. This should also be the case in relation to nationals and residents who travel to countries that are used by foreign fighters to travel to Iraq. Thus, transactions of nationals/residents who travel to related hot zone areas (such as Turkey)⁴⁸ for long periods are supposed to be closely monitored. A state would be in breach of its treaty obligation if it fails to monitor transactions in relation to hot zones. In fact, it may be a breach of conventional obligation if the state learns about suspicious transactions and fails to inform the affected state (Iraq in this case). It would also be the case if the state of nationality/residency failed to learn about such suspicious transactions while it was supposed to know about them in light of its conventional obligations. The state of nationality/residency cannot avoid responsibility by merely claiming that it had not known about such transactions. It ought to prove that it had been monitoring suspicious

45 at 5

46 at 10

47 *Id.* at 10–11

48 Turkey is said to have been a main destination for foreign fighters intending to join armed groups in Iraq or Syria. JOE BIDEN APOLOGISED OVER IS REMARKS, BUT WAS HE RIGHT? BBC NEWS, <http://www.bbc.co.uk/news/world-us-canada-29528482> (last visited May 6, 2016)

transactions in accordance with its international obligations.⁴⁹ This includes, as mentioned in the articles above, using state of the art technological advancements to monitor suspicious or unusual transactions.

Regional agreements have also obliged states to take all measures necessary to prevent their respective territories from being used for terrorism in any way. For example, The Arab counter-terrorism agreement ACST in article 3(I) demands that states must take measures to:

...prevent the use of their territories as a base for planning, organizing, executing, attempting or taking part in terrorist crime in any manner whatsoever. This includes the prevention of terrorists; infiltration into, or residence in their territories either as individuals or groups, receiving or giving refuge to them, training, arming, financing, or providing any facilitation to them.⁵⁰

4.3. Obligation to detect, prevent and suppress terrorism

Some scholars' discussing the duty to prevent terrorism have recognised that there were some recent changes to the previous point (preventing territories from being used for terrorism). However, there is a lack of clear articulation of the recent developments in international law in relation to the general requirement of prevention. For example, Trapp stresses that: 'there have been changes to the way in which compliance with terrorism prevention obligations is measured in the post-9/11 era.'⁵¹ However, Trapp was still reluctant to forfeit the territorial component requirement completely. In the sense that even if there was no link to the state's territory, it may still be held responsible. In fact, some might think that Trapp has gone beyond this when he said:

'...[a]ttributing a breach of counter-terrorism obligations, whether in the form of a failure to diligently prevent, or a failure to extradite or submit to prosecution in good faith, raises no particular difficulties. Prevention and *aut dedere aut judicare* obligations, by their nature, call for action on the part of the state organs.'⁵²

Although Trapp discussed state responsibility for acts of private individuals in light of this comment, he was still limited to cases where the private individual is used by the state organs such as intelligence services. Contrary to what some might believe, Trapp's theory is limited to cases when the state uses private individuals to conduct terrorism activities in order to avoid responsibility. Trapp, as did other international lawyers talking about the topic, failed to consider failures of state in relation to acts of terrorism committed by private individuals abroad.

Nevertheless, states have a duty to be active in trying to detect, prevent and suppress terrorism. For example, article 18 of the ICSFT⁵³ requires all state parties to take numerous effective measures to prevent all attempts to support terrorism financially. On the regional level where

49 The purpose of this paper is to highlight the existence of the obligation, which does not require greater depth of analysis for technical subjects like this.

50 ARAB CONVENTION ON THE SUPPRESSION OF TERRORISM 3, <http://www.refworld.org/docid/3de5e4984.html> (last visited Jul 30, 2015)

51 Trapp, "Terrorism and the International Law of State Responsibility" in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 44 (B. Saul ed., Edward Elgar) (2014)

52 Trapp, "Terrorism and the International Law of State Responsibility" in *Id.* at 47

53 at 10

many counter-terrorism conventions and agreements are established, states are also bound to do everything possible to prevent and suppress terrorism. For example, the OAS CPPAT convention required all parties to do everything possible to prevent terrorism. Article 1 of the convention clearly states that: ‘contracting states undertake to cooperate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism...’⁵⁴

In fact, according to many CTC states are required to be proactive and prevent all activities that can lead to terrorism including encouraging or instigating terrorism.⁵⁵

Meanwhile, article 3 of ACST convention prescribes the following requirements that must be fulfilled by the Arab states parties:⁵⁶

3. To develop and strengthen systems for the detection of the movement, importation, exportation, stockpiling and use of weapons, munitions and explosives and of other means of aggression, murder and destruction as well as procedures for monitoring their passage through customs and across borders in order to prevent their transfer from one Contracting State to another or to third-party States other than for lawful purposes...⁵⁷

Article 4 of the same convention stresses that: ‘[c]ontracting States shall cooperate for the prevention and suppression of terrorist offences...’⁵⁸

Furthermore, Article 6 of the Gulf Cooperation Council Counter-Terrorism Agreement (GCCCTA),⁵⁹ requires all state parties to, *inter alia*, prevent the recruitment of nationals for terrorism purposes. The contracting states must ‘work towards the prevention of any chance of enticing any of its nationals to join any unlawful groups, or involvement in any terror activities under any pretext...’⁶⁰ This is a self-imposed obligation by the state parties to prevent their citizens from being recruited by criminal groups, and/or from participating in any terror activities, under any pretext.

Meanwhile, the President of the Iraqi Parliament, Saleem Aljuburi, speaking before the parliament about the 2015 events in Anbar in his comments on the events of Anbar on 18th April 2015 said:

...we will not allow the expulsion of *Daesh*. Instead, we will destroy it so that it will not be a virus that moves into our neighbours’, for that we care about the security of the

54 OAS at 195

55 See for example, Art 18 (a) at 11

56 League of Arab States

57 *Id.* at 3–4

58 League of Arab States, ‘Arab Convention on the Suppression of Terrorism’ 5 <<http://www.refworld.org/docid/3de5e4984.html>> accessed 30 July 2015.

59 THE GULF COOPERATION COUNCIL COUNTER-TERRORISM AGREEMENT, ISSUED IN KUWAIT BY DECREE NO. 27, <http://www.almeezan.qa/AgreementsPage.aspx?id=1231&language=ar> (last visited Apr 25, 2016)

60 Art. 6

brothers as we do for the security of Iraq. Thus, they should lend similar support both direct and indirect...⁶¹

This determination bears some important connotations, among which that Iraq is vowing to fulfil its obligations under international law to prevent and suppress terrorism. Prevention here includes preventing terrorists from fleeing into other states, which would endanger their security. As the President of the Parliament said, one would expect that other states would also do their part to prevent and suppress terrorism in order to help Iraq.

The test is whether the state of nationality/residence of the individual fighting in Iraq has fulfilled all of its requirements under international law in detecting, preventing and suppressing terrorism. These requirements are related to terrorism committed by any individual wherever that maybe. Thus, if a state has many residents/nationals committing terrorism in Iraq, it could be queried whether it had fulfilled its duties under international law to detect, prevent, or suppress terrorism committed by such persons. There is no doubt that this duty is not confined to state of nationality/residency. However, it is given that the state of nationality/residency is practically the most relevant state when it comes to detecting and preventing individuals from travelling to join terrorist groups. There is no doubt that the state of nationality/residency is in a better position to do so. Thus, failing to exhibit that it has done everything possible to fulfil its duties in this regard could give rise to its responsibility under international law for failing to detect, prevent and suppress certain terrorist acts.

4.4. Obligation to improve domestic legislations and establish jurisdiction over terrorist acts

Part of the counter-terrorism measures that states must take is to amend domestic legislations to establish jurisdiction over terrorist acts. For example, article 5 of the ICSANT⁶² provides that each state party is required to:

- ‘(a)...establish as criminal offences under its national law the offences set forth in article 2;
- (b)...make those offences punishable by appropriate penalties which take into account the grave nature of these offences.’⁶³

Equally, article 4 of the ICSFT⁶⁴ and article 4 of the ICSTB⁶⁵ both provide similar provisions.⁶⁶

Articles 7 of the ICSFT⁶⁷, 6 of the ICSTB⁶⁸ and 9 of the ICSANT, consistently provide that each state party shall:

61 Parliament Website, President of Iraqi Parliament’s Media Office, 18 April 2015. Accessed in 23 Jun 2015.

<http://www.parliament.iq/details.aspx?id=39710&AlwType=Pre>

62 at 5

63 *Id.* at 5

64 at 4

65 at 4

66 In fact, even the wordings of these articles are almost identical. The only difference was that in the 2005 convention the word ‘domestic law’ was replaced by ‘national law’.

67 at 5

68 at 5–6

1. ...take such measures as may be necessary to establish its jurisdiction over the offences set forth ...when:
 - (c) The offence is committed by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State.⁶⁹

These two points clearly establish an obligation upon the state to take the burden of prosecuting terrorists, partly, because they are nationals or residents of that state. Even if the terrorist act was not committed on its territory nor linked to it at any stage of preparation, the state of nationality/residency is still responsible for establishing jurisdiction over such individuals.

The state's responsibility to ensure prosecutability of terrorists went even beyond the cases where the offender is a national or a resident to include those present on its territory after the offence was committed in some cases. In fact, Article 9(4) of the ICSANT⁷⁰ convention requires states 'to establish its jurisdiction over the offences... in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance...'⁷¹ Thus, it is the responsibility of the state to ensure that terrorist acts are prosecutable even if the person present on its territory was not classified as a resident or a national before committing the offence.

Similar, and sometimes identical, provisions are also found in regional CTC. For example, the EU ECST convention, in its article 6⁷² requires each state party to take all measures necessary including introducing new legislations, to ensure that terrorist offenders are either extradited or immediately prosecuted whenever they are present on its territory. Correspondingly, the article 6 of 1999 African convention CPCT binds states with similar obligations.⁷³

The above provisions clearly ascertain that the duty of the state party to establish its jurisdiction over terrorist acts committed by its nationals/residents (sometimes even by visitors) abroad is an international obligation. Therefore, not establishing such jurisdiction would constitute a breach of an international legal obligation on the part of the state party in question. An affected state may claim that fulfilling such obligations would have prevented the nationals of the failing state from joining a terrorist group to start with. It could argue that fulfilling such obligations would have deterred some, as they would know that they would face prosecution as soon as they return.

In addition, some conventions have obliged states parties to recognise a list of acts as terrorist acts. This also obliges states parties to consider them as part of the crimes included in their domestic law as soon as the convention is signed. SAARC's RCST convention, for example,

⁶⁹ at 6

⁷⁰ *Id.* at 7

⁷¹ *Id.* at 7

⁷² EU at 95

⁷³ Art. 6 OAU

dictates that ‘...conduct constituting any of the following offences, according to the law of the Contracting State, shall be regarded as terroristic...’⁷⁴

Furthermore, the Commonwealth of Independent States in article 4(1) of their CTC agreed that ‘[i]n cooperating in combating acts of terrorism, including in relation to the extradition of persons committing them, the Parties shall not regard the acts involved as other than criminal.’⁷⁵

Therefore, in principle, if Iraq is to submit a claim against any of the states from which nationals or residents have joined *Daesh* claiming that this state has not established jurisdiction over the related crimes, this would be a way of holding that state responsible to a certain extent. This is especially so if such persons return to that state and it took no measures to prosecute them for the crimes they committed in Iraq claiming that it has no jurisdiction over such crimes.

4.5. Obligation to investigate, arrest, prosecute or extradite terrorist suspects.

Related conventions seem to have a tradition of requiring all states parties to ensure that perpetrators of terrorist acts are arrested, prosecuted or extradited as appropriate. Even when the state is not willing to extradite such persons, it is under obligation to prosecute them immediately and ensure that they receive severe punishments proportionate to the gravity of the crime they committed. This applies whether the offender is a national, resident or even a visitor to that state. For example, article 10(2) of the ICSANT⁷⁶ requires the state in which a perpetrator of a terrorist act is present to either prosecute or extradite him/her without any delay.

Moreover, article 7(1-2) of the ICSTB convention⁷⁷ and article 7(4) of the ICSFT convention⁷⁸ agree with article 11(1) of the ICSANT convention which provides that:

[t]he State Party in the territory of which the alleged offender is present shall..., if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.⁷⁹

Furthermore, states are under obligation to aid each other and fully cooperate at all stages leading to the prosecution of terrorists including exchange of information in relation to investigation, arrest, extradition and prosecution. There is no doubt that when at these various

74 SAARC, “SAARC Regional Convention on Suppression of Terrorism,” 1.

75 Committee of the Commonwealth of Independent States at 3

76 at 7

77 at 6

78 at 5-6

79 at 8

stages (investigation, arrest, extradition or prosecution) the support of the state of nationality/residency cannot be underestimated.

Lack of cooperation on behalf of the state of residence/nationality is in breach of most CTC. For example, similar to article 10(1) of the ICSTB⁸⁰ and article 12(1) of ICSFT,⁸¹ article 14(1) of the ICSANT convention dictates that:

States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.⁸²

Regional treaties have also included similar provisions. For example, article 7 of the ECST convention⁸³ requires the state in which a perpetrator is present to take all necessary measures to either extradite or prosecute the offender immediately. Similar provisions are also found in the Arab ACST convention in its article 3(II:1)⁸⁴ and in article 4(2) (h) of the CPCT convention.⁸⁵

There is no doubt that the state of nationality/residency is in a strong position (both legally and practically) to cooperate. Legally because of the established authority and legal relationship with the individual as a national or a resident; and practically because such a state would be in a stronger position than other states to provide useful information and intelligence with regards to the investigation, arrest, prosecution or extradition operations.

As we have seen above, in some cases states are required to extradite the person whether or not s/he has a citizenship or residential status in that state. Thus, states cannot claim that they can no longer be held responsible if the national or resident changed nationality or residency status. All states on whose territory there is a terrorist returning from Iraq are under obligation to either extradite or prosecute them for the terrorist crimes they committed whilst in Iraq.

4.6. Obligation to improve security methods and establish strong databases on terrorism

Most recent CTC emphasise the need for establishing intelligence databases on terrorism. States are required to use the advancement of technology to the best possible level to gather information related to terrorism and share this information effectively. Such provisions are described in some detail in some CTC. For example, article 3 of the Arab convention ACST clearly expects states:

80 at 9

81 at 8

82 at 9

83 EU at 95–96

84 League of Arab States at 4

85 OAU at 210–11

4. To develop and strengthen systems concerned with surveillance procedures and the securing of borders and points of entry overland and by air in order to prevent illicit entry thereby...
7. To reinforce security-related information activities and to coordinate them with those of each State ...
8. To establish, in each Contracting State, a database for the accumulation and analysis of information relating to terrorist elements, groups, movements and organizations and for the monitoring of developments with respect to the terrorist phenomenon and of successful experiences in counter terrorism, and to keep such information up to date and make it available to the competent authorities of Contracting States...⁸⁶

In the same line, article 9 of the GCCCTA requires each member of the Gulf Council to establish an advanced anti-terror database for terror-related information and cooperation between relevant security bodies.⁸⁷ This treaty gained prominence when it required states to invest in the advancement of technology to monitor, conduct surveillance and track terror groups and their activities. It requires all state parties to build a database to collect information and gather data on terror suspects, terror groups and their members as well as monitoring terror activities and tactics and studying the best ways to counter-terrorism. The state parties are required to keep track of up-to-date information and pass them to the relevant authorities in other state parties for effective control and prevention operations.

Sometimes conventions went into some details, which are very useful, but at the same time increase the burden on states. For example, article 3 (II) of the Arab ACST convention requires states to:

...establish effective cooperation between the relevant agencies and the public in countering terrorism by, inter alia, establishing appropriate guarantees and incentives to encourage the reporting of terrorist acts, the provision of information to assist in their investigation, and cooperation in the arrest of perpetrators.⁸⁸

Similar provisions are found in other regional conventions, e.g. article 4 (2) (i) of the CPCT convention.⁸⁹ Just as useful as other measures identified in this article, engaging the public can be very helpful in detecting and preventing terrorism and in investigating and prosecuting terrorism offences. In fact, some might argue that this is one of the most effective tools against terrorism. State parties, who fail to do so, should find it hard to claim that they did all that is required to prevent their nationals from - eventually - committing acts of terrorism abroad. If Iraq was to submit a claim against the state of nationality/residence of a terrorist operating on its territory, it could claim that the relevant state had taken no measure to engage the public to cooperate. Such an engagement may have been able to warn about the act of terrorism the individual in question committed in Iraq pre-emptively. This is especially true as it is undeniable that engaging the public has led in many cases to learning about terrorist activities. As a counterterrorism intelligence source puts it: [a]bout 70–80 percent of our intelligence

⁸⁶ League of Arab States at 4

⁸⁷ Art. 9(6) GCC

⁸⁸ League of Arab States at 5

⁸⁹ OAU at 210–11

comes from open sources – those open to the public – such as the newspaper, media, internet, public, and community.’⁹⁰

Clearly, it is not enough for a state to claim that it had not known about a large number of nationals/residents who travelled to Iraq and joined terrorist groups. The state of nationality/residence has to prove that it was using all available technological advancements and that it was proactively attempting to gather such information. It would also need to prove that it was not able to communicate the available information it had in relation to terrorist acts committed by nationals/residents abroad.

Some might argue that the technological advancement available to one state is not the same for another. While this might be true, the fair measurement would be to assess the technologies the same state uses for its own security and see if it failed to use the same for the security of others. For the purpose of illustration, in 2015 the UK traced three of its nationals in Syria and claimed that it had known about their plans to launch terrorist attacks in the UK.⁹¹ Thus, for example, if a claim is to be launched by Iraq against the UK, the latter will have to prove that it had used the same level of technology and intelligence it used in this incident to track nationals/residents fighting in Iraq and communicate such information to Iraq. Claiming that it had not been able to track any would be hard to prove, against the fact that it had been able to do so for its own security.

4.7. Obligation to cooperate, exchange information and coordinate action.

Most CTC include provisions requiring states parties to effectively and promptly communicate all available information that can be useful in detecting, preventing, suppressing or prosecuting terrorism. For example, article 18 of the ICSFT⁹² necessitates that state parties must fully cooperate by exchanging relevant information that could help prevent offences outlined in the convention. Likewise, article 7 of the ICSANT provides that each state party is required to cooperate by:

(b) Exchanging accurate and verified information..., and coordinating administrative and other measures taken...to detect, prevent, suppress and investigate the offences set forth in article 2.... In particular, a State Party shall take appropriate measures in order to inform without delay the other States ...in respect of the commission of the offences set forth in article 2 as well as preparations to commit such offences about which it has learned.⁹³

States are therefore clearly required to be proactive in informing other states about possible terrorist activities. To start with, not attempting to gather such information would be in violation of this article. States must be alert and take the initiative to use intelligence and every possible technological advancement to gather the information and then communicate it in an immediate manner to states that could benefit from it in preventing, suppressing or prosecuting terrorism.

90 STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM 41 (K. J. Riley & Rand Corporation ed., RAND Corporation) (2005)

91 ISLAMIC STATE CONFLICT: TWO BRITONS KILLED IN RAF SYRIA STRIKE BBC NEWS, <http://www.bbc.co.uk/news/uk-34178998>

92 at 11

93 at 5

This is because it is in the best position both legally and practically to do so. Clearly, it would be in breach of this obligation if, for example, the state claimed that it had not known about nationals or residents who were preparing for a terrorist attack abroad, when it should have known about such cases. More so, the breach of obligation would be obvious if the state had known and did not notify the affected state about it in a timely manner.

The only limitation to the requirement of this article is that explained in paragraph (3) where it provides: ‘States Parties shall not be required by this Convention to provide any information which they are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.’⁹⁴ Yet, in many cases, it would be difficult for the state of nationality/residency to claim that this exception applies. For example, when a certain state is aware of a citizen who travelled to Iraq for suspicious reasons months ago and is aware of his/her location in Iraq through intercepting some of the phone calls he/she made to family and friends, this state must inform Iraq about all available information. For example, if such a person is found to be staying in an area controlled by terrorist groups,⁹⁵ this makes it hard for the state to claim that there was no link between his/her travel and terrorism, thus making it hard for the state to avoid responsibility if it does not pass all relevant information to Iraq.

Regionally, many CTC have expressly required states parties to cooperate and offer all available information to the affected state in order to help the latter to suppress terrorism. For example, article 8 of the SAARC RCST convention stipulates that:

1. Contracting States shall, ...afford one another the greatest measure of mutual assistance in connection with proceedings brought in respect of the offences referred to in Article I ...including the supply of all evidence at their disposal necessary for the proceedings.
2. Contracting States shall cooperate among themselves...through consultations between appropriate agencies, exchange of information, intelligence and expertise and such other cooperative measures ...with a view to prevention of terroristic activities through precautionary measures.⁹⁶

Article 3(2) of the Arab CTC ACST included similar provisions requiring states parties to:⁹⁷ ‘...cooperate and coordinate action among Contracting States, particularly neighbouring countries suffering from similar or common terrorist offences.’⁹⁸ Meanwhile, article 4 (I:4) requires state parties to communicate all information that may:

- a. Assist in the arrest of a person or persons accused of committing a terrorist offence against the interests of that State or of being implicated in such an offence whether by aiding and abetting, collusion or incitement;

⁹⁴ *Id.* at 6

⁹⁵ Some states describe such areas in details and publish them so that citizens and nationals avoid travelling to them. For example, Australia describes such areas as ‘Declared area offence’ and makes them available for the public. Australian Government, ‘Declared Area Offence’ (*Australian National Security*) <<https://www.nationalsecurity.gov.au/WhatAustraliaIsDoing/Pages/DeclaredAreaOffence.aspx>> accessed 6 June 2016.

⁹⁶ SAARC at 3

⁹⁷ League of Arab States

⁹⁸ *Id.* at 3

b. Lead to the seizure of any weapons, munitions or explosives or any devices or funds used or intended for use to commit a terrorist offence.⁹⁹

It should be noted here that similar provisions are also found in article 5 (1) and (2) of the 1999 CPCT African Union's CTC.¹⁰⁰

Nevertheless, the provisions in the previous Arab Convention article can be relied upon in establishing that every state party has a responsibility to warn the state on which territory a terrorist act is about to be carried out by nationals or residents of the former. The affected state must be warned about such dangers before those nationals or residents enter its territory if possible. As Iraq is party to this convention, all other Arab states bear the responsibility to warn Iraq and cooperate with it as soon as they could possibly do so. States from where foreign terrorists fighting in Iraq have come are under international legal obligation to warn Iraq in advance so that it can take necessary steps to prevent terrorist crimes when possible. If any state party fails to do so, it could be held responsible for breaching its obligations. We can see that paragraph 3 of article 4(I) clearly requires:

Contracting States shall undertake to cooperate with each other in the exchange of information for the suppression of terrorist offences and promptly to notify other Contracting States of all the information or data in their possession that may prevent the occurrence of terrorist offences in their territory, against their nationals or residents or against their interests.¹⁰¹

Thus, the ACST clearly establishes that the international responsibility of the state in relation to its residents, and more pressingly its responsibility in relation to terrorist activities by its citizens (nationals) whether residents or living abroad, is inherent. The same articles also mentioned a number of obligations upon state parties related to facilitating counter-terrorism mechanisms. This can clearly be seen in the provisions of article 3 of the ACST.¹⁰² The exchange of information is required both before and after the commission of the terror offence. The provisions of article 4 of this ACST dictate that:¹⁰³

2. Each Contracting State shall undertake to notify any other Contracting State in an expeditious manner of the information it has concerning any terrorist offence that takes place in its territory and is intended to harm the interests of that State or of its nationals and to include in such notification statements concerning the circumstances surrounding the offence, those who committed it, its victims, the losses occasioned by it and the devices and methods used in its

⁹⁹ *Id.* at 5

¹⁰⁰ OAU at 210

¹⁰¹ League of Arab States (n 48) 5.

¹⁰² Art. 3 (I) ACST League of Arab States

¹⁰³ League of Arab States, 'Arab Convention on the Suppression of Terrorism' 5 <<http://www.refworld.org/docid/3de5e4984.html>> accessed 30 July 2015.

perpetration, to the extent compatible with the requirements of the investigation and inquiry.¹⁰⁴

Furthermore, article 9 of the GCCCTA clarifies that for the sake of fulfilling the aim of this agreement, state-parties are obliged to exchange information and details relating to threats, risks, probabilities and anticipations related to terror crimes. Furthermore, states have the obligation to report about members of terror groups or persons suspected to have been in contact with such members. The article also requires the exchange of information in an immediate manner about any terror activities directed against a state-party whether inside their territories or beyond, and all investigation results as well as the identity of the suspects must be communicated. Immediate exchange of all information related to tactics and tools used by terrorists and methods used to counter them as well as all information and expertise used in counter-terrorism should be exchanged.¹⁰⁵

There is no doubt that states parties to the above conventions must have both established a database and have been collecting information, and that they have been cooperating consistently in the manner prescribed in these documents. Therefore, the state party whose citizens or residents have been fighting in Iraq for the months and years is assumed to have gathered (at least) some information in relation to these citizens. The minimum requirement (as per the other conventions above) is for these states to communicate with Iraq and pass all available information to the Iraqi authorities so that counter-terror operations can benefit from such information. For example, Saudi Arabia is said to have a large percentage of *Daesh* fighters as its citizens.¹⁰⁶ Therefore, it is incumbent upon it to cooperate with Iraq by exchanging all information that can help Iraq in counter-terrorism operations.

The treaties studied above clearly identify the responsibility of the state party in relation to its nationals and residents when they are involved in terror activities in another state's territory. The related provisions of these treaties must be understood in light of the fact that today's technology advancement made it easy for states to keep track of nationals and residents wherever they move and whenever they are involved in suspicious criminal activities.

Breaching any of the obligations above would give rise to state responsibility due to a breach of contractual obligation. Under international law, this is enough of a source of obligation and such breaches are enough of a source of state responsibility towards those affected. There is no need for further proof, yet the United Nations Security Council (UNSC) acting under Chapter VII produced many binding resolutions reinforcing the above obligations, as we shall see next.

104 It should be noted here that similar provisions are found in art. 4(1,2) and art. 5 of the 1999 African Union's Counter Terrorism Treaty. OAU Convention on the Prevention and combating of Terrorism. Available on:

http://www.au.int/en/sites/default/files/OAU_CONVENTION_PREVENTION_COMBATING_TERRORISM.pdf accessed on 27-06-2015.

105 Art. 9 GCC (n 116).

106 IRAQ AND SYRIA: HOW MANY FOREIGN FIGHTERS ARE FIGHTING FOR ISIL? THE TELEGRAPH, <http://www.telegraph.co.uk/news/2016/03/29/iraq-and-syria-how-many-foreign-fighters-are-fighting-for-isil/>

5. Security Council Resolutions:

The UNSC treated terrorism as a major threat to world peace and security.¹⁰⁷ Thus, and as the problem of terrorism is not shrinking, the UNSC continues to produce various solutions on this matter. The UNSC resolutions are vital as they reinforce established state obligations and create new obligations incumbent upon all states to counter terrorism at the same time. While the law of treaties in most cases binds states parties only, the UNSC resolutions in relation to terrorism are usually issued under Chapter VII of the UN Charter. Therefore, all UN member states are bound by such resolutions.

The UNSC produced vital decisions such as Res 1371 (26th Sep 2001)¹⁰⁸ and Res 1566 (2004).¹⁰⁹ Noticeably, some recent resolutions have focused on the phenomenon of foreign fighters. For example, in Res 1373 the UNSC required all states to:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure 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;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) 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 and travel documents;¹¹⁰

In all clarity, the UNSC in this resolution reinforces the counter-terrorism state obligations enshrined in the law of treaty, as demonstrated above. In addition, this resolution emphasizes a specific duty to prevent foreign fighters from travelling for terrorism purposes.

Clearly, the said resolution requires states to carry out a two-stage operation of prevention and deterrence. For example, states whose nationals/residents are fighting in Iraq have the duty to use every possible method to track, trace and gather information about their subjects and to communicate such

107 RES 2178 (24 SEPTEMBER 2014) UN Doc S/RES/2178 1

108 RES 1371 (26 SEPTEMBER 2001) UN Doc S/RES/1371

109 RES 1566 (8 OCTOBER 2004) UN Doc S/RES/1566

110 RES 1373 (28 SEPTEMBER 2001) UN Doc S/RES/1373 2

information to the affected state(s), Iraq in this case. In fact, the state of nationality/residency should prevent the travel of suspected terrorists to prevent them from joining terrorist groups. Fortunately, some states have already started to do so.¹¹¹ The state should do everything possible to know the intention of such people and prevent them before travelling. In cases where the prevention was not possible, the national/residence state should help Iraq to bring those who have been fighting there alongside terrorist groups to justice. If such persons return to their state of nationality/residence, the latter is under obligation to either prosecute these criminals or extradite them to the affected states so that they can face justice.

Interestingly, the 1373 Res also required all states to ‘[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999’.¹¹² The UNSC also held this view in its 1624 Res (2005) in which it was:

Stressing its call upon all States to become party, as a matter of urgency, to the international counter-terrorism Conventions and Protocols whether or not they are party to regional Conventions on the matter, and to consider signing the International Convention for the Suppression of Nuclear Terrorism adopted by the General Assembly on 13 April 2005.¹¹³

It is unusual to say the least for the UNSC to require states to become party (as a matter of urgency) to such conventions.¹¹⁴

These UNSC’s binding resolutions require all states to prevent terrorist activities whether committed by nationals or foreigners regardless of whether committed on national territories or abroad. This requirement could lead to establishing state responsibility for all terrorist activities planned/carried out by nationals or residents at home and abroad. States should not be able/allowed to easily rely on simple claims such as lack of knowledge, lack of fellowship/connection or lack of causation to escape the responsibility for acts of terrorism carried out by nationals abroad, so long as these nationals still hold its nationality whilst committing the terrorist activity. This is because the international responsibility of the state is determined at the time of carrying out the action not after or before it.¹¹⁵ Therefore, claiming that the nationality of a terrorist has been dropped should not allow the state to escape the responsibility. In such case, this state would have failed its responsibility twice, firstly because of its failure to fulfil its due diligence duty to prevent terror acts committed by this national, and secondly because of its failure to cooperate internationally among the state of origin, state of transit and the state of destination, a requirement under UNSC Res 2178 (2014).¹¹⁶ Acting under chapter VII, the UNSC in this resolution requires all states to:

111 Recently states started to behave more responsibly in this regard. For example, Australia is said to have been actively trying to prevent persons who are likely to join terrorist group from travelling. AUSTRALIAN COUNTER-TERROR POLICE “STOPPING 400 PER DAY” BBC NEWS, <http://www.bbc.co.uk/news/world-australia-31900876> (last visited Jun 6, 2016)

112 UNSC at 3(d)

113 RES 1624 (14 SEPTEMBER 2005) UN DOC S/RES/1624

114 In fact, this is quite strange. Joining conventions is done by sovereign states through their own will and conventions or treaties sign against their will might legally speaking be null and void.

115 In fact, some counter terrorism treaties such as the CTC of the Commonwealth Independent States organisation in article 4(2) provided that: ‘[t]he nationality of a person accused of an act of terrorism shall be deemed to be his nationality at the time of commission of the act.’ Committee of the Commonwealth of Independent States at 3

116 UNSC

11. ...improve international, regional, and sub regional cooperation...to prevent the travel of foreign terrorist fighters from or through their territories, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts...¹¹⁷

Furthermore, Res 1373 required all states to launch an up-to-the-level-of-threat campaign to improve its capabilities in legal and security fields to counter terrorism. Among the steps required by the resolution is the freezing of funds of all persons involved in terror activities.¹¹⁸

Thus, the UNSC clearly engages all Members States and requires them to act swiftly, cooperatively and sturdily to prevent the travel of foreign terrorist fighters. This said, it is evident that states are primarily responsible for the travel of nationals and residents as they have the best legal and practical capabilities to fulfil the said duty in comparison to other states. The state is naturally more capable of learning about the intentions of nationals/residents travelling to join terrorism than any other state. In fact, acting under Chapter VII as well, the UNSC bluntly mentioned residency and nationality states as key stakeholders who must cooperate in order to prevent the movement of foreign terrorist fighters. The UNSC in Res 2178 (13) clearly affirms that it:

3. Urges Member States...to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality...¹¹⁹

The positive cooperation duty required from states by the latter resolution, clearly necessitates proper control of borders to check on 'foreign fighters' (as described by UNSC resolutions) to check their identities and travel documents and prevent and suppress recruiting, organising, training or transporting persons who travel to countries other than those whom they are nationals of or residents in to, organise, prepare for, finance or carry out terror activities. The resolution also reiterated the need for all member states to ensure that their legislations are capable of holding terrorists accountable, and that states are required to have effective judicial systems in place to ensure that terrorists are held accountable.

In light of the body of rules clearly embodied in many UNSC resolutions issued under chapter VII, it is hard to say that any state can merely claim that terror activities carried out by nationals or residents abroad are nothing to do with it. In fact, only when the state had done everything possible and fulfilled its responsibilities under international law to cooperate and do everything possible to prevent, suppress and punish terrorism, it can then claim that it cannot be claimed against.

6. Conclusion

There is no doubt of the fact that breaching international obligations by a state would give rise to state responsibility. It is also given that breaching obligations under conventions ratified by a state will give rise to such responsibility. The same applies to breaches of obligations stemming from Chapter VII based UNSC Resolutions. Consequently, as it has been explained in this article, states are under obligation to do everything possible to detect, prevent, suppress and prosecute terrorism regardless of

¹¹⁷ *Id.* at 6

¹¹⁸ UNSC at 2

¹¹⁹ UNSC emphases added

who, where and when. We have explained that under contemporary international law states have specific obligations in fighting terrorism. For example, states have obligations to establish a strong database and to communicate relevant information with relevant states effectively and promptly to ensure that terrorism is detected, prevented, suppressed or prosecuted whenever it is possible to do so. We have also highlighted the fact that in fulfilling its duty the state has to be pro-active and use the best available methods, techniques and technologies to counter terrorism. These state obligations are required in the face of all terrorism regardless of who commits it. However, as we have demonstrated, it is more pressing for states of nationality and residency to carry out such duties as they are in better legal and practical positions. Therefore, failing to fulfil any of the counter-terrorism obligations under international law, could give rise to state responsibility for acts of terrorism committed by nationals and residents abroad. This is true, even if they were not agents of the state in any capacity and even if the act has no connection whatsoever to the territory of the state of nationality/residence.

All obligations mentioned in this work apply to all states, even to the few that might not have joined the conventions above. This is because the UNSC has indeed reinforced every single law of treaties obligation in this regard. This was done while acting under Chapter VII which makes it incumbent upon all UN member states to abide by.

As for the case study, it is clear that Iraq could request clarifications from the states who have nationals or residents fighting terror wars on its territory. The states of nationality/residence would then have to prove that they have done everything possible to cooperate and to fulfil their obligations under international law to be relieved from responsibility. The test involved is that of due diligence and proving that all possible efforts have been made to cooperate with Iraq. Otherwise, the states of nationality/residence of foreign terrorist fighters could find themselves in a position where they would have to deal with the consequences of their intentional or unintentional negligence towards Iraq, for which they could be held responsible under contemporary international law.

It could be argued that there are many cases in which it would be difficult to determine whether the state should be held responsible even if it fails to fulfil its duties under the law of treaties, e.g. if the country is being controlled by powerful militias who disallow the state from carrying out its duties in preventing terrorism. Nevertheless, the purpose of this article is to prove that it is possible to hold states responsible for such failure. More research will need to be done to counterpart this work once it has been published.