

# Counter Terrorism and Social Cohesion



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Edited by

Alperhan Babacan and Hussein Tahiri

**CAMBRIDGE**  
**SCHOLARS**

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P U B L I S H I N G

Counter Terrorism and Social Cohesion,  
Edited by Alperhan Babacan and Hussein Tahiri

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## CHAPTER ONE

# MAPPING THE LINK BETWEEN COUNTER TERRORISM AND SOCIAL COHESION

ALPERHAN BABACAN AND HUSSEIN TAHIRI

Around the globe, the “war on terror” has been depicted as one that constitutes a “new threat”, a war with unseen enemies, justifying the implementation of some exceptional measures to counter the “new threat” (Zedner 2005). In Australia, the advent of “globalised terrorism” in the wake of September 11 has resulted in the adoption of a so-called preventative approach to counter terrorism through the introduction of a raft of new counter-terrorism laws (Pickering, McCulloch and Wright-Neville 2007; Lynch and Williams 2006; Syrota 2008). These laws have created new criminal offences and provided extensive investigative, detention and questioning powers to security agencies and the police (Pickering and McCulloch 2010). The new legislative provisions are unprecedented in Australia’s legal history and have led to claims that they infringe upon rights and liberties which are embedded in the Australian legal system and enshrined in international human rights law (Bronniti 2004, 2010). This book critically examines Australia’s counter terrorism measures by looking at Australia’s legislative framework, the Australian Government’s justifications for the war on terrorism and sociological theories relating to “risk society” as a way to explain Australia’s counter terrorism policies and the impact of the war on terror on social cohesion in Australia.

Formulating and implementing counter-terrorism laws is usually regarded as a national responsibility. However, sitting behind the majority of national counter-terror laws is an international framework of norms and institutions that are more comprehensive than is generally understood. Dr Feaver’s chapter broadly describes this international institutional framework and identifies the principle norms relating to the global regulation of counter terrorism. Dr Feaver explains how international initiatives to regulate counter terrorism are unique in several respects. The

chapter explains how, in response to the events of September 11, a significant development in international rule-making by the United Nations occurred. Dr Feather also discusses how specialist UN agencies such as the UN Office of Drugs and Crimes (UNODC) and its Terrorism Prevention Branch (TPB) play an important norm harmonisation and monitoring role. Finally, he explains how the substantive character of international counter-terrorism norms represent a significant departure from the traditional conceptualisations of the functions of international law.

Dr Babacan's chapter critically examines the Australian Government's justifications for the war on terror and in particular its suspension of human rights and due process protections with respect to terrorism-related offences. After providing an overview of Australia's justification for the war on terror and Australia's counter terrorism regime, Dr Babacan argues that although the threat of terrorism is legitimate, the Australian Government has failed to publicly justify the exact nature and in particular the extent of the threat of terrorist attacks. It is argued that the legislative response to terrorism in Australia has been influenced by international pressure and with a disregard for its potential human rights implications rather than an actuarial examination of the cost-benefit balance normally involved in the legislation-making process. Dr Babacan argues that the net effect of Australia's counter-terrorism measures is profound and adversely impacts on human rights, civil liberties and notions of belonging. He advocates the reinstatement of key due processes and human rights protections.

While the risk of terrorism is real, the concept of security is a political construct (Beck 2006; Angamben 2005). The changes brought about by September 11 may be understood as part of the large-scale changes in the social control of societies which have emerged as a result of the growth of the "risk society" (Beck 2006; Ericson and Haggerty 1997; Goldsmith 2008). In Chapter 4, Dr Sahin critically examines the growing application of the concept of "emergencies" to the global politics of (in)security and its reflections on the conception of security in Australia. Drawing upon Beck's analysis of "world risk society" and Agamben's formulation of Schmitt's theory of "the state of exception as a dominant paradigm of governance", she examines the limits and contradictions of the contemporary policies and practices of the governance of security. Dr Sahin argues that the contemporary politics of "emergencies" not only tend to perpetuate the dynamics of political intervention as a form of government through the construction of fear of the enemy but also provide a powerful discursive escape from responsibility for the policies and practices that are themselves likely to create new "emergencies".

The war on terror has changed the social relations between mainstream Australians and Muslims. An important driver in the justification of the war on terror both internationally and on the home front has been the emphasis placed upon making a distinction between friends and enemies. Domestic issues relating to minorities, social cohesion and belonging have been reconfigured to justify Australia's commitment to the war on terror abroad and its commitment to curbing terrorism and terrorist-related activities. The discourses surrounding the justification for the war on terror and the counter-terrorism measures in Australia have resulted in the negative portrayal of Muslims and have adversely impacted on their sense of belonging in Australia and on social cohesion and community harmony (Poynting and Noble). In turn, discourses relating to the war on terror have legitimised a fear of difference, both the differences of some people living among us and the differences of some people who are entering the country, such as asylum seekers (Babacan, Gopalkrishnan and Babacan 2009; Williams 2003).

Chapters 5, 6 and 7 look at the adverse impacts of the war on terror on Muslims in Australia and their sense of belonging in a multicultural society, and analyse these developments from a sociological perspective.

Dr Rashid critically examines the impact of the war on terror on Muslims in Australia. She argues that the debates and legislation since 2001 around the themes of "counter terrorism", "war against terrorism" and "war on terrorism" in Australia have generated complex scenarios leading to fear and the creation of Otherness – "us versus them". Mainstream debates on counter terrorism have created fear of Muslims as the threat in mainstream society, and fear of the state among Muslims. Muslim communities have felt criminalised through legislation which overtly doubts their allegiance to Australia and suspects criminal intent. Public discourses have given an impression to Muslim communities that Muslims have the sole responsibility for countering terrorism in Australia and must provide information on potential suspects and suspicious activities in their communities. Muslims, especially of Middle Eastern origin, have become a "fifth column". Pakistani and Indian Muslims were also eventually labelled as terrorists – in dire need of scrutiny by all. Some of these negative discourses and legislative measures have created an atmosphere of "guilty by association", justifying curtailing civil liberties in the name of countering terrorism. Civil liberties advocates have criticised these measures as potential tools for victimisation on a number of political grounds. Muslim communities have of course experienced victimisation since these discourses entered public debate. Irrespective of the reality of these fears, Muslims are feeling the impact on their sense of belonging and

their Australian identity because of being labelled as potential terrorists, guilty by association, un-Australian, Other, citizens with suspect allegiance and guilty until proven innocent. Muslim women at the same time have to confront an additional factor of negative perception if they choose to wear headscarves.

The chapters by Dr Cameron and Professor Babacan examine the effects of the war on terror on social cohesion through the shaping of social stereotypes and group identity. Dr Cameron argues that the war on terror – whether at home or abroad – invokes stark contrasts between friend and enemy, which both corresponds with and reinforces particular domestic social stereotypes. Dr Cameron argues that these stereotypes are complex in that they are not drawn solely from a domestic context but are also informed by Australia's participation in the global war on terror. The conflation of international conflicts and foreign threat into local community relations exacerbates existing social divisions as certain identities become associated with threats to national security.

In Chapter 7, Professor Babacan argues that the recent public discourses in Australia about social inclusion have taken place without regard to social exclusion based on ethnicity, religion and "race". Major events in recent Australian history that have been a cause for concern include racially motivated violence against Muslim communities, the Cronulla riots, attacks on international students, the vilification of asylum seekers and refugees, and other acts of racism. Professor Babacan argues in this chapter that social exclusion in Australia is articulated without denouncing democratic principles and through transformation into more palatable concerns. Coded societal messages are perpetuated through public discourses on the war on terror, immigration, multiculturalism, refugees and citizenship. The chapter concludes with an exploration of how social cohesion can be achieved – namely, through reclaiming critical multiculturalism and participation, and engendering a sense of equal valued status.

In Chapter 8, Dr Tahiri discusses countering terrorism through a community engagement strategy. Dr Tahiri argues that because the underlying causes of terrorism are multi-faceted and complex, a range of strategies needs to be employed in reducing the threat of terrorism. He argues that the state's resort to coercive powers has proven to be unsuccessful in combating terrorism and that the root causes of terrorism and the processes of radicalisation need to be addressed through community engagement. Discussing developments in Australia and particularly in the state of Victoria, Dr Tahiri provides a framework for engaging communities in the fight against terrorism and advocates for a

comprehensive community engagement strategy that involves not only Muslim communities but also the community at large.

The final chapter draws broad conclusions about the war on terror, Australia's policies and their impact on Muslims in Australia, and the way forward in combating terrorism. It is argued that forcefully combating terrorism does not inhibit states from adhering to due process protections and the rule of law. Counter terrorism measures need to respect civil liberties and due process protections, and contemporary socio-cultural anxieties need to be addressed constructively. Counter terrorism measures need to address radicalism, stereotypes and the loss of social inclusion brought about by the war on terror. Terrorism arises from complex and multifaceted factors and counter strategies need to address such factors. The traditional "top-down", "paramilitary" and "coercive" approaches to tackling terrorism are not effective to combat radicalisation and extremism. A community engagement approach which encompasses all sectors of the community and government clearly is the way forward to combat terrorism and extremism. Such an approach will also in turn enhance social inclusion, participation, trust and respect. It is only through valuing cultural difference, inclusion and fostering a sense of belonging that social inclusion will be strengthened.

## References

- Agamben, G. 2005. *The state of exception*, trans. Kevin Attell. Chicago, London: The University of Chicago Press.
- Babacan H., N. Gopalkrishnan and A. Babacan. 2009. *Situating racism: The local, national, and the global*. Cambridge: Cambridge Scholars Press.
- Beck U. 2006. Living in the world risk society. *Economy and Society* 35 (3): 329–345.
- Bronitt, S. 2004. Australia's legal response to terrorism: Neither novel nor extraordinary. In *Human rights 2003: The year in review*, ed. T. Davis. Clayton: Monash University.
- . 2010. Preface. In *Dealing with uncertainties in policing serious crime*, ed. G. Bammer. Canberra: ANU E Press.
- Ericson, R. and K. Haggerty. 1997. *Policing the risk*. Oxford: Clarendon.
- Goldsmith, A. 2008. The governance of terror: Precautionary logic and counter-terrorist law reform after September 11. *Law and Policy* 30 (2): 142–167.
- Lynch, A. and G. Williams. 2006. What price security? Taking stock of Australia's anti-terror laws. Sydney: UNSW Press.

- Pickering, S. and J. McCulloch. 2010. The Haneef case and counter terrorism policing in Australia. *Policing and Society* 20 (1): 21–38.
- Pickering, S., D. Wright-Neville, J. McCulloch and P. Lentini. 2007. *Counter-terrorism policing and culturally diverse communities: Final report*. Clayton: Monash University.
- Poynting, S and G. Noble. 2004. Living with racism: The experience and reporting by Arab and Muslim Australians of discrimination, abuse and violence since September 2001. Report to the Human Rights and Equal Opportunity Commission, 19 April 2004, [www.hreoc.gov.au/racial\\_discrimination/isma/research/index.html](http://www.hreoc.gov.au/racial_discrimination/isma/research/index.html) (accessed 10 November 2010).
- Syrotta, G. 2008. Australia's counter terrorism offences: A critical study. *University of Western Australia Law Review* 34: 103–144.
- Williams, M. C. 2003. Words, images, enemies: Securitization and international politics. *International Studies Quarterly* 47 (4): 511–531.
- Zedner, L. 2005. Securing liberty in the face of terror: Reflections from criminal justice. *Journal of Law and Society* 32 (4): 507–533.

# CHAPTER TWO

## THE INTERNATIONAL REGULATION OF TRANSNATIONAL CRIMINAL LAW

DONALD FEAVER

### **Abstract**

The attacks of 11 September 2001 were the catalyst for a re-examination of the conceptualisation and classification of several aspects of international law. Rather than being just a jargonistic term to denote some form of extra-national dimension, in much the same way the term “globalisation” has come to be used, the term “transnational law” has gradually taken on a specific legal meaning in recent years. Not only does transnational law have a technical significance but a growing number of scholars argue that transnational law is gradually emerging as a sub-branch of international law in its own right. This paper examines several questions related to the classification of international law. To answer the question whether “suppression crimes” are being correctly labelled as “transnational”, we must first ask: what is transnational law? Is the term simply a convenient label denoting some form of legal globalisation, or does it have a legitimate jurisprudential foundation and function as an emerging sub-branch of international law? Assuming that it does have legitimate significance, a second question is: as a specific sub-branch of international criminal law having its own unique substantive character and administrative processes, does “transnational criminal law” qualify as a specialised system of law having the characteristics of a transnational regulatory regime?

### **1. Introduction**

It is difficult to imagine how anything constructive could possibly emerge from the terrorist attacks of 11 September 2001. Nevertheless, the

attacks became something of a catalyst leading to an examination of a number of issues surrounding the conceptualisation and classification of several aspects of international law. The need for this exercise was identified in late 2001 by Antonio Cassese who commented that in addition to the human and psychological impacts, the attacks had “shattering consequences for international law... subverting some important legal categories, thereby imposing the need to re-think them” (Cassese 2001). Cassese’s comments were primarily directed towards the pressing need to clarify the status of terrorism as an international crime (Cassese, 2006). However, the process of clarifying the status of terrorism indirectly raised a range of questions relating to the status of the sub-branch of international criminal law known as “suppression crimes” within the broader context of international law as a whole.

It is probable that Neil Boister neither realised nor intended to engage in either of these challenges when he published an important article in 2003 advocating the need to re-classify “suppression crimes” as a specific body of international criminal law to be known as “transnational criminal law”. In that article, he states that “transnational crime can be constructed by recasting an existing sub-category of international criminal law as transnational criminal law”. Although the term was then “unknown to international lawyers”, Boister explains that his reason for choosing “transnational criminal law” was that the term “transnational crime” is “commonly used by criminologists, criminal justice officials and policymakers” (Boister 2003).

What he did not mention, however, is that his choice may also be particularly appropriate for a number of jurisprudential reasons in addition to its complementary associations with criminology. Rather than being just a jargonistic term to denote some form of extra-national dimension (Berman 2005; id. 2007), much in the same way the term “globalisation” has come to be used (Feaver 2009), the term “transnational law” has gradually taken on a specific legal meaning in recent years. Not only does transnational law have a technical significance but a growing number of scholars argue that transnational law is gradually emerging as a sub-branch of international law in its own right.<sup>1</sup>

The discourse surrounding the re-classification of that sub-branch of “suppression crimes” provides a unique opportunity to broaden the discussion. Accordingly, it is within the context of international criminal

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<sup>1</sup> For a discussion of the meaning of “transnational” in the context of this article, see Cata Backer, Larry. 2007. Principles of transnational law: The foundations of an emerging field. *Law at the End of the Day*, 9 March 2007, <http://lcbackerblog.blogspot.com>.

law that this chapter examines two questions related to the classification of international law. To answer the question whether “suppression crimes” are being correctly labeled as “transnational”, we must first determine what transnational law is. Is the term simply a convenient label denoting some form of legal globalisation, or does it have a legitimate jurisprudential foundation and function as an emerging sub-branch of international law? Assuming that it does have legitimate significance, a second question is: as a specific sub-branch of international criminal law having its own unique substantive character and administrative processes, does “transnational criminal law” qualify as a specialised system of law with the characteristics of a transnational regulatory regime? This question is relevant within the context of recent International Law Commission efforts to better understand the role and position of specialised bodies of law within the broader context of international law.

The chapter is structured as follows. In Section 2, the term “transnational law” is defined and examined using several competing analytical approaches for classifying international law. This is followed by an examination in Section 3 as to whether “suppression crimes” qualify as transnational within the context of these approaches. In Section 4, the question whether, or the extent to which, these suppression crimes qualify as a “transnational regulatory regime” is considered. A summary and conclusions are presented in the final section.

## **2. Background and Context: Conceptualising Transnational Law**

Although the notion that transnational law could qualify as a sub-branch of international law is novel, the concept of “transnational” is not new to international law. The term is said to have been coined by Philip Jessup who first used it in a series of lectures and essays in 1956 (Jessup 1956). The subject of the lectures concerned certain developments occurring within the international legal order that were becoming more pronounced, especially in the aftermath World War II.<sup>2</sup> In his essays, Jessup describes the emergence of a species of law in respect of which:

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<sup>2</sup> Although the term “transnational law” was also being used in a much narrower context by international legal scholars such as Percy Corbett and Arthur Nussbaum around the same time as the Storrs Lectures, Jessup was the first to develop and popularise a more comprehensive conceptualisation of international law including non-state actors. For example, see: Nussbaum, Arthur. 1954. *A concise history of the law of nations*, 2nd rev. edn, xi–xiii, 144–185, 291–306. New York: Macmillan; Corbett, Percy E. 1955. *The study of international law*, p. 50. Garden City, NY:

I shall use, instead of “international law”, the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories (Jessup 1956: 2).

Admittedly, the definition is sweeping. However, Jessup may have intended a slightly narrower meaning than that which appears upon first reading. As noted by Scott, this slightly narrower meaning is directed towards all “law” involved in regulation – what is called with increasing frequency, the “governance” – of the *transnational* (“actions or events that transcend national frontiers”, whether involving state or non-state actors) (Scott 2009). Of particular significance is the inclusion of “non-state” actors in this definition, as is discussed in further detail below.

What led Jessup and another of his contemporaries, Wilfred Jenks, to ponder the issue was that both scholars had identified numerous examples of international norms that did “not wholly fit into [the] standard categories of public international or private international law”. Public international law had, for the better part of a century, been conceptualised and defined by legal positivists as “the law of nations” (Kelson 1952; Lauterpacht 1958). That is to say, international law is a body of rules that regulates the relations between sovereign nation states (Shaw 2008). Because human beings and other sub-national entities such as non-governmental organisations and companies do not fall within the scope of this definition, they are not regarded as “subjects” of international law (Janus 1984).<sup>3</sup>

## 2.1 Subject-based Approach to Classifying International Law

The origin of this approach to classifying international law can be traced to the creator of the term, Jeremy Bentham, who in 1780 sought to categorise laws “on the basis of the persons whose conduct is the object of the law” (Janus 1984). Stated another way, Bentham was the originator of the “subject-based” approach to categorising law on the “basis of the subjects to be governed” (Bentham 1789). Since Bentham (erroneously, it will be argued below) concluded that international law only had sovereign

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Doubleday;

Tietje, C., A. Brouder and K. Nowrot, eds. 2006. Philip C. Jessup’s transnational law revisited: On the occasion of the 50<sup>th</sup> anniversary of its publication. *Essays in Transnational Economic Law* 50.

<sup>3</sup> This section draws heavily upon Janis, M. 1984. Individuals as subjects of international law. *Cornell International Law Journal* 17: 61.

nation states as its subjects, the subject of international law was “mutual transactions between sovereigns as such” (Bentham 1789). Although he did not create the term “private international law”, a distinction left to Justice Story several decades later, Bentham did state that “as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals” of individual sovereign states (Janus 1984: 364).

The definition of international private law was later “crafted” by Story to parallel Bentham’s definition of public international law, thereby reinforcing “the notion that the individual was not a proper subject of international law”. Widely credited as being the creator of modern conflict of laws with the publication of his treatise in 1834, Story sought to develop rules and methods to determine the appropriate choice of law and forum to apply in the event of a dispute between parties from different jurisdictions. According to legal positivists, because the subject of private international law is individuals, who are in turn the subjects that fall under the control of sovereign nations, private international law is “law” but not really “international”. As a consequence, with few exceptions, the subject-based approach of positivist legal theories of international law are fashioned on the basis that “individuals are not proper subjects of public international law” (Jenks 1953).

Because the notion that “individuals are not proper subjects of public international law” had become so entrenched as orthodoxy by the mid-20th century, it was only natural that international lawyers such as Jessup and Jenks should identify and struggle with the definition’s many anomalies. Rather than attempting to re-formulate the definition, it may have seemed to Jessup that creating a new, more expansive term may have been the easier alternative. Since then, however, the term “transnational law” has come to be more closely associated with the emergence of a new category or sub-branch of international law, seen as occupying that space between public international law on the one hand and private international law on the other.

## **2.2 Source-based Approach to Classifying International Law**

An alternative approach to determining whether law is public international, private or transnational which is favoured by those investigating “transnationalism” is a source-based approach. This approach originated in a time preceding Bentham when Blackstone “distinguished his law of nations from other sorts of law not on the basis of its subjects but because of its sources”. Therefore, the key distinguishing feature using

a source-based approach is not whether its subject is “states” or “non-states”; it is whether the source of the norms is “international, national or private” in origin. In applying such an approach, Blackstone recognised that the affairs of commerce were regulated by a law of their own called the “law merchant” (*lex mercatoria*) (Kasirer 1999):

which all nations agree in and take notice of and it is particularly held to be part of the law of England which justifies the causes of merchants and the general rules which obtain in all commercial countries (Blackstone 1789).

In 1759, Lord Mansfield stated that “Mercantile law is not the law of a particular country but the law of all nations”.<sup>4</sup> In any case, *lex mercatoria* is often cited as a non-state law system that falls into that class of international norms that Jessup identifies as “rules which do not wholly fit into such standard categories” (Jessup 1956: 2).

Since the end of World War II, as Jessop and Jenks identified, much diversity in the sources and types of international norm have emerged. More importantly, these norm-creation mechanisms blur the previously clear public law/private law divide. In acknowledging that the “global arena is populated by a multitude of norm makers and rule producers” (Zambanssen 2006) both public and private, involved in the creation of both “hard and soft” norms, the subjects and sources of international law are now more complex than ever (Abbott and Snidal 2000). The acceleration and deepening of the globalisation process has resulted in the intensification of cross-border activity. Globalisation has resulted in increasing capital and information flows and human mobility (including criminal activity) as well as the mounting number of global issues such as the spread of disease, diminishing bio-diversity and human-induced climate change. The demand for international norm creation is out-pacing the supply ability of traditional methods of international public law creation. As a result, there has been an increase in non-state norm creation activity in a broad range of areas including corporate social responsibility initiatives, international commercial standard creation and the governance of technologies such as the internet.

### 2.3 A Hybrid Approach

The positivist approach, which regards the individual as not being a proper subject of international law, applies this principle at a systemic level. It is a principle that nation states, acting as gatekeepers, use to

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<sup>4</sup> *Luke v. Clyde* [1759] 2 Burr 882 p. 887.

control individuals' access to international courts and tribunals. As Higgins notes, "states are such influential participants in the international system, they have until now been able to block the access of individuals to certain arenas, including notably the International Court" (Higgins 1994). However, she goes on to state:

It has been suggested by one learned author [Carl Aage Norgaard] that the weakness of the positivist view on the place of individuals is that it fails to distinguish between the possession of rights and duties and the procedural capacity to sue or be sued on them. Norgaard contends that co-terminosity is not a prerequisite to acknowledgement as a subject of international law. He points to the dictum of the permanent Court of International Justice in 1932 that "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself".

The argument that there is no bar to individuals being the subject of rights and duties under international law paves the way for a further approach to be posited (Tucker 1965). This alternative "hybrid" approach conceives of "international law" as combining elements of both the traditional "subject-based" and the "source-based" approaches. The hybrid approach requires that the positivist state-centric view of international law be set aside in favour of a competing vision of international law and the legal system. As such, if the international legal system is regarded as a normative system comprised of numerous different sources of norms, both public and private, which accepts individuals as the normative subject of law, a different conceptualisation of international law emerges.

In order for this different conceptualisation to emerge, it must first be recognised that the positivist principle that only states are the subject of international law is a systemic-level assumption. Accordingly, if the focus of analysis is shifted from the level of system to the level of the norm, irrespective of whether it is "hard or soft, public or private", there are countless examples in international law where individuals are regulated by means of norms that specifically identify the individual as both the "subject and object" of the regulation (Manner 1952). The presence of this positivist systemic constraint does not diminish the reality that norms derived from public international law sources (as with non-state law sources) do directly regulate individuals as both the "subject and object" of the norm. For example, Article 2 of the *Optional Protocol to the ICCPR* provides that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available

domestic remedies may submit a written communication to the Committee for consideration”.<sup>5</sup>

If viewed as a normative system, the international system is capable of producing: (1) norms derived from a range of different sources including public and private non-state law systems and (2) different types of norms, i.e., hard and soft, which have (3) different subjects i.e., states and individuals and (4) different objects, e.g., states, individuals, space, oceans, plants and animals can all be the objects of regulation. A matrix of the range of different permutations and combinations of norms is provided in Table 1 below.

**Table 1**

<b>Source</b>	<b>Subject</b>	<b>Object</b>	<b>Type</b>	<b>Classification</b>
International Public	State	State	Hard/soft	Public International Law
	State	Individual	Hard/soft	Public International Law
	Individual	Individual	Hard/soft	Transnational Law
International Non-State	Individual	Individual	Soft	Transnational Law
National	State	State	Hard	Public International Law
	Individual	Individual	Hard	Private International Law

Of particular significance for the purposes of this chapter is the possibility of classifying international law derived from a public international source and with individuals as the subject and object of a norm (which may have the status of being hard or soft law) as transnational law. The justification for classifying it as such can be traced to Jessup’s original definition in which he refers to “public and private international law... [and] other rules which do not wholly fit into such standard categories... whether involving state or non-state actors” (Jessup 1956). This justification for the classification resolves a range of potential conflicts that arise in classifying a diverse range of norms such as the *Unidroit General Principles* (transnational soft law) or a hybrid regulatory regime such as the public/private inter-relationship between the International Civil

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<sup>5</sup> Article 2, Optional protocol to the ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force 23 March 1976).

Aviation Organization (ICAO)(public international hard law) and the International Air Transport Association (IATA)(a private non-state law system).

### 3. Defining “Suppression Crimes” as Transnational Law

As mentioned in the introduction, in his 2003 article, Neil Boister suggested that a specific body of international criminal law be re-classified as “transnational criminal law” (Boister 2003). The justification for choosing “transnational”, Boister noted, was that the term was already widely in use among criminologists and practitioners. However, the question considered in this section is whether this body of international norms might qualify as transnational for strong jurisprudential reasons as well. Accordingly, the purpose of this section is to reconsider Boister’s choice of the term “transnational criminal law” by examining the sources and substantive normative characteristics of this sub-branch of international criminal law in light of the preceding discussion.

International crime has long occupied a specific place within the broader landscape of international law. The traditional notion of international crime includes a collection of offences that originate from customary norms<sup>6</sup> that address criminal acts that “shock the conscience of humanity” and involve some form of violation of human rights (Nagle 2010). Although human beings are both perpetrators and victims of these crimes (hence being both the subject and object of norms prohibiting such actions), this body of international criminal law has long been considered as “public international law”. Avoidance of the issue of non-state actor involvement has occurred in two ways. First, these offences require that the crime be committed by a state or by a non-state actor *acting in a public or official capacity* (i.e., a representative of a state)<sup>7</sup> Second, rather than focusing on any injury to the victims of these crimes, international law has tended to treat the injury as one to the international community (Nagle 2010). Hence, the crime is an official act of state or that of an official of a state acting in a public capacity.

The body of international criminal law that is the subject of this examination falls into a different category of international crimes. While

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<sup>6</sup> Now codified under the Treaty of Rome, the International Criminal Court has universal jurisdiction to prosecute these crimes (i.e., to prosecute offences to which international criminal liability attaches) on the basis that these offences constitute a “crime against humanity”.

<sup>7</sup> A contrasting view is put forward by Marks and Clapham that state-actor involvement is not a necessary pre-condition.

most of the attention surrounding the international law concerning crime has been directed towards traditional offences such as war crimes, aggression, crimes against humanity, genocide and torture,<sup>8</sup> a very different category of international criminal law covering areas of activity such as terrorism, trafficking of drugs, people and arms, and money laundering, has been developing in the background since the early 1960s. One of the reasons that this more obscure category of international law has not attracted the attention of international public law scholars is that it defies many of the traditional conceptualisations and classifications of the international legal order.

Transnational criminal offences, by contrast, are offences that are neither committed by public officials nor crimes that “injure the international community”. Boister defines the “suppression conventions” that form the main source of transnational criminal law as:

crime control treaties concluded with the purpose of suppressing harmful behaviour by non-state actors ranging from counterfeiting to corruption, drug prohibition to the financing of terrorism, can already, it is submitted, be said to establish a system of [transnational criminal law]. These conventions provide, through a range of complex provisions for the criminalization by state parties in their domestic law of certain offences, for severe penalties, for extra-territorial jurisdiction, and for a variety of procedural measures (Boister 2003).

The transnational element in a non-legalistic sense is that the crime is committed in more than one state or the effect is felt in another state. This is particularly relevant in the case of terrorism where terrorist groups, for example, establish cells that operate across borders and the financial and human resources used to commission the act of terrorism are derived from a number of places (DFAT 2004). The indirect suppression of a transnational crime by international law can only ever be indirect because international law has no jurisdiction to enforce the rules against private individuals who are non-state actors. This is because the theory posits that international law cannot impose obligations or give rights directly to

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<sup>8</sup> An international crime derived from customary international law can be defined as “an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances”. *US v. List et al.*, 19 February 1948, Trials of War Criminals before the Nuernberg Tribunals under Control Council Law No. 10. Washington, DC: US Government Printing Office, 1950 Vol IX: 1230, 1241.

individuals because the individual is not a subject but an object of international law (Jessup 1956).

The subject and type of norms derived from two different sources associated with this sub-branch of international criminal law are considered below.

### 3.1 International Legislation: Security Council Resolution 1373

An extraordinary form of international law emerged as a consequence of the September 11 attacks. This form of law has since become widely referred to as “international legislation”.<sup>9</sup> Although the term “international legislation” has been widely used in the past to refer to all manner of international law creating activity, the nature of the obligations created by the United Nation’s Security Council through its adoption of Resolution 1373 is unique in several respects. These obligations have several dimensions with transnational implications which are discussed below.

Resolution 1373 was adopted unanimously by the Council on 28 September 2001. In it, the Council proscribed a range of measures *all* states would be required to pursue to combat terrorism. In Resolution 1373 the Security Council stated that all states would be required to undertake several actions to prevent the financing of terrorist attacks. Those actions, *inter alia*, required all states to prevent and suppress the financing of terrorism through the criminalisation of the collection of funds for terrorism purposes, to freeze the funds and assets of terrorists and persons associated with terrorism and to prohibit nationals from obtaining funds or resources to be used for terrorism directly or indirectly.<sup>10</sup> The Angolan representative stated in the Council debate on 22 April 2004 that “by adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism” (Talmon 2005). These comments highlight the first distinguishing characteristic of Resolution 1373 in that it created “legislation binding on all States” (Schrijver 2004). Stated another way, Resolution 1373 was the first resolution adopted that imposed obligations of a *general and abstract character*.

As an instrument of a general and abstract character, the question arises whether such legislation can only be made through negotiation

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<sup>9</sup> The term “international legislation” has been widely used in the past to mean a range of different types of law-making activity including international law making by treaty and customary law. However, it must be noted that the term has always been used loosely.

<sup>10</sup> UN Security Council Resolution 1373 (2001) of 28 September 2001.

among nation states in the form of an international agreement. In the sense that Resolution 1373 is general and abstract, as Talmon notes, “these may well be triggered by a particular situation, conflict, or event, but they are not restricted to it. Rather, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time” (Talmon 2005). The basic characteristic of this new type of legislative or generic resolution is, as the Colombian delegate to the Security Council stated, that it “does not name a single country, society or group of people” (Talmon 2005). It can, therefore, be distinguished from the more conventional form of Security Council resolution targeted to a specific set of circumstances. It should be noted, however, that the Security Council has been criticised for its opportunistic approach to Resolution 1373 in that it has been argued that the Security Council acted outside its scope and if challenged before the International Court, it may well be found to be an *ultra vires* act (Rosand 2003).

The second aspect of Resolution 1373 has a more direct bearing on the issue of transnational law. In reference to the different types or forms of transnational law mentioned in Section 2.1, Resolution 1373 contains several examples of international law that make private individuals or entities both the subject and the object of international obligations. For example, Paragraph 2 states that “all States shall... [f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”. The question that arises is whether, within the context of the matrix of international law norms set out in Section 2.2, Resolution 1373 qualifies for being classified as transnational law.

As noted in the matrix, to qualify, the norm in question must be derived from an international source and both the subject and the object of the norm must be directed towards regulating individuals. In the case of Resolution 1373, it is clear that the object of the norm is “individuals” being “persons who commit, or attempt to commit, terrorist acts”. It is also equally clear that the obligation being imposed, being the “freezing without delay funds and other financial assets or economic resources”, is one that is imposed on states. Therefore, Resolution 1373 can be characterised as international public law in that it is primarily directed towards regulating state action.

### 3.2 International Treaty Obligations

In addition to Resolution 1373, the broad range of criminal acts that fall within the scope of transnational criminal law are known as “treaty crimes” (UN 2010). The earlier conventions create offences for issues such as hijacking of aircraft,<sup>11</sup> civil aviation matters<sup>12</sup> and hostage taking.<sup>13</sup> The later conventions deal with the issues of direct attacks using bombing and nuclear materials and also the financing of terrorism.<sup>14</sup> In addition to being distinguishable from traditional international crimes in that they are not derived from customary international law (mentioned in Section 2.2), treaty crimes also differ in that they do not give rise to international criminal responsibility. Instead, treaty crimes are a specific type of international obligation that, rather than giving rise to international jurisdiction under international law, merely subject nation states to proscribe certain types of acts as criminal offences under national law as well as to cooperate with other states in respect of their investigation and punishment. As such, from this “it does not necessarily follow that such crimes entail international criminal liability”. Hence, when viewed broadly, it suggests that the primary subject and object of these obligations is the nation state rather than non-state actors.

In shifting the focus from a systemic to a normative level of analysis, all of the conventions directly criminalise the actions of a person involved with the offence. For example, the first suppression treaty, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention) discusses the restraint of a person who may be reasonably believed to be about to or to have committed an

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<sup>11</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention), opened for signature 14 September 1963, 704 UNTS 219 art 3 (entered into force 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (The Hague Convention), opened for signature 16 December 1970, 860 UNTS 105 art 1 (a) (b) (entered into force 14 October 1971).

<sup>12</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 23 January 1973).

<sup>13</sup> Hostages Convention, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

<sup>14</sup> Terrorist Bombings Convention, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 8 February 1987); Terrorism Financing Convention, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002); Convention for the Suppression of Acts of Nuclear Terrorism, opened for signature 13 April 2005, 2245 UNTS 89 (entered into force 7 July 2007).

offence by the aircraft commander until disembarking from the aircraft where the person can be delivered to the authorities to be prosecuted under the appropriate state's law.<sup>15</sup> The 1970 Convention for Suppression of Unlawful Seizure of an Aircraft makes it an offence for a person to unlawfully seize control or attempt to unlawfully seize control of an aircraft.<sup>16</sup>

An example of a norm having the characteristics illustrative of many falling within this sub-branch of criminal law is found in Article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism. Article 2:1 provides that: "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

- (a) Possesses radioactive material or makes or possesses a device:
  - (i) with the intent to cause death or serious bodily injury; or
  - (ii) with the intent to cause substantial damage to property or to the environment".<sup>17</sup>

An analysis of the source, subject and object of this provision indicates that even though it is derived from a public international law source, both the subject and the object of the provision clearly are "individuals". Therefore, this class of international norm falls outside the scope of the traditional definition of what constitutes public international law. Accordingly, it can be argued that the normative character of much of this body of law would qualify as "transnational law", thereby reinforcing Boister's choice of the term.

#### **4. The International Regulation of Transnational Crime**

The second question considered in this chapter is whether, or to what extent, the regulation of transnational criminal law also qualifies as forming a transnational regulatory regime. The basis for and relevance of this question stem from a recent International Law Commission enquiry into the "fragmented" appearance of international law owing to a

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<sup>15</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention), opened for signature 14 September 1963, 704 UNTS 219 art 3 (entered into force 4 December 1969).

<sup>16</sup> Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (The Hague Convention), opened for signature 16 December 1970, 860 UNTS 105 art 1 (a) (b) (entered into force 14 October 1971).

<sup>17</sup> UN General Assembly, International Convention for the Suppression of Acts of Nuclear Terrorism, opened for signature 13 April 2005, A/59/766.

proliferation of self-contained or specialised law systems that have come to cover the international legal landscape (Koskenniemi 2006).

The term “regulation” has many different meanings. In an abstract sense, a regulation is a rule or norm that is designed to influence a change in an actor’s behaviour. More technically, a regulation is often defined as a form of subordinate legislation. However, more recently, regulation has become synonymous with a phenomenon known as the delegation of governance powers to specialised institutional bodies, both within and beyond the nation state, that administer specialised bodies of rules. In this chapter, the term “regulation” is used to describe a discrete “system of law” (Feaver 2006). Several criteria define what constitutes a specialised law system with regulatory characteristics. These criteria include:

- a specific or specialised body of substantive and procedural rules;
- an organisational framework and construct that is given the responsibility and delegated governance powers to administer those rules;
- some form of in-built mechanism to compel compliance with the rules;
- provision for enforcement and penalty in the case of non-compliance.

Given that the first criterion is satisfied in light of the discussion in Section 3, it is clear that transnational criminal law is comprised of an identifiable body of norms that fall within a specific subject matter area, namely, crimes that have a transnational dimension causing them to be “crimes of international concern”. Although the 13 treaties and three protocols that comprise this body of norms cover different types of crimes, all 16 bodies of norms conform to the same general formula in terms of the character and composition of the norms.

The second criterion referred to above requires that the specialised body of law be overseen and administered by an organisational construct (i.e., an identifiable regulatory or administrative body) that is responsible for the administration of the rules. In this context, three United Nations bodies are the focus of this discussion. The first administrative body that is responsible for the oversight and administration of transnational criminal law is also a product of Security Council Resolution 1373. Resolution 1373 created a body called the Counter Terrorism Committee (CTC) to monitor the implementation of the obligations contained in Resolution 1373. The CTC works closely with another UN agency, the Counter Terrorism Executive Directorate (CTED), to implement the policies of the CTC and to assess member states’ terrorism legislation and assists member states with technical assistance in support of legislative reform and other counter-terrorism initiatives. The CTC also works alongside the UN Office of Drugs and Crime (UNODC) Terrorism Prevention Branch (TPB) to

ensure compliance. The UNODC TPB also provides support for CTC and CTED policy and facilitation programs which provide technical assistance to member states.<sup>18</sup>

Whether a body is a regulatory or administrative body is determined on the basis of the nature of the governance powers delegated to the body. Delegated governance powers can be one or a combination of: (1) rule-making powers, (2) executive/administrative/enforcement powers, and/or (3) adjudicative powers. The source of these governance powers is either a conferral of powers by nation states (usually in the form of an international treaty or agreement that constitutes the body [a constituent treaty]) or in the case of UN agencies, powers derived from a sub-delegation (Saaroshi 2007). A sub-delegation of powers arises where a superior body is empowered to create sub-bodies under its own constituent agreement. It can then confer powers that it is able to lawfully exercise under its constituent agreement to a properly constituted sub-body. It cannot, however, delegate governance powers that it does not possess. In the case of the UN bodies responsible for the administration of transnational criminal law, none of these bodies is vested with either rule-making or adjudicative powers. To the extent that these bodies are delegated executive/administrative powers, the scope and depth of those powers can be described as weak. The CTC has a weak policy-making power and the UN ODC and its TPB possess only basic administrative powers in the form of oversight and monitoring functions.

In regard to the third criterion, none of the treaties or protocols contains compliance mechanisms or enforcement provisions that are internal to the treaties. The extent to which an international regulatory regime is “self-contained” was examined by the International Court of Justice in the Tehran Hostages case. In Tehran Hostages, the Court identified how the Vienna Convention on Diplomatic Relations comprised a special and self-contained system of rules, distinct from the customary

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<sup>18</sup> UNODC. 2010. *Working closely with the Security Council's CTC and CTED* [www.unodc.org/unodc/en/terrorism/working-closely-with-ctc-of-the-security-council-and-cted.html?ref=menu](http://www.unodc.org/unodc/en/terrorism/working-closely-with-ctc-of-the-security-council-and-cted.html?ref=menu) (accessed 11 October 2010);

UNODC. 2010. *UNODC's role in terrorism prevention* [www.unodc.org/unodc/en/terrorism/the-role-of-unodc-in-terrorism-prevention.html?ref=menu](http://www.unodc.org/unodc/en/terrorism/the-role-of-unodc-in-terrorism-prevention.html?ref=menu) (accessed 16 October 2010).

“Technical assistance” is defined as the role of the UNODC TPB's branch experience at the operational level in dealing with other transnational crimes which lends itself to expert assistance in dealing with counter terrorism. As the TPB works with member states, it is able to report to the CTC any deficiencies in the counter terrorism programs.

international law of state responsibility.<sup>19</sup> In the event of any violations of the Vienna Convention, the ICJ determined that treaty signatories could not resort to remedies afforded by general international law. This was because the rules contained in the Vienna Convention “constitute a self-contained regime which... specifies the means at the disposal of the receiving State to counter any such abuse”.<sup>20</sup> Although the Court, for the first time, mentioned the words “self-contained *regime*”, it made a much more important structural observation. It recognised that the Vienna Convention contained its own “internal” mechanism for addressing and remedying breaches of the convention (Koskenniemi 2006).

In this regard, the regime established to oversee and administer transnational criminal law does not contain any special “internal” mechanisms for addressing and remedying breaches of the conventions. That is not to say, however, that general principles of international law are not applicable as conventional means of compelling compliance and providing remedies in the event of breach. Because the individuals who commit terrorist-related offences are not brought to account by the body that administers the rules, then it does not satisfy the final element required to be considered a fully developed transnational regulatory regime.

## 5. Conclusions

The questions this chapter has investigated relate to the classification of international law. Specifically, it seeks to answer the question whether “suppression crimes” are being correctly labeled as “transnational” by some international lawyers as well as criminologists and international law enforcement officials. In seeking to answer this question, we must first ask: what is transnational law? Is the term simply a convenient label denoting some form of legal globalisation, or does it have a legitimate jurisprudential foundation and function as an emerging sub-branch of international law? Assuming that it does have legitimate significance, a second question is: as a specific sub-branch of international criminal law with its own unique substantive character and administrative processes, does “transnational criminal law” qualify as a specialised system of law with the characteristics of a transnational regulatory regime?

The outcome of these investigations is that traditional approaches to classifying international law are now clearly redundant. The manner in

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<sup>19</sup> Vienna Convention on Diplomatic Relations, opened for signature 24 April 1964, 500 UNTS 95 (entered into force 23 June 1961).

<sup>20</sup> Tehran hostages case, *ibid*, p. 48.

which the international legal space has evolved since World War II with the expansion in different sources, subjects and types of norms has meant that Philip Jessup's observation that new methods of international law classification are required is entirely justified. In a sense, Antonio Cassese's observation in 2001 that classifications relating to international criminal law require re-thinking is merely an extension of Jessup's earlier observations.

In focusing specifically upon crimes of international concern as a specialised sub-branch of international criminal law, it is found that Neil Boister's assertion that it should be re-classified as "transnational criminal law" is entirely justified for sound jurisprudential reasons. The norms that comprise transnational criminal law exhibit characteristics in terms of their subject and object that indicate that they fall within that category of international law which Jessup classified transnational. A further finding of this chapter is that while transnational criminal law does form a specialised body of law that is administered by dedicated organisational constructs, it does not yet satisfy the requirements to be classified as a fully developed transnational regulatory regime. The reason for this is that the regime lacks credible "internal" compliance and enforcement mechanisms.

## References

- Abbott, K.W. and D. Snidal. 2000. Hard and soft law in international governance. *International Organization* 54: 421–456.
- Bentham, J. 1879. An introduction to the principles of morals and legislation. Oxford: Clarendon Press.
- Berman, P. 2005. From international law to law and globalization. *Columbia Journal of Transnational Law* 43: 485.
- . 2007. Global legal pluralism. *Southern California Law Review* 80:1155.
- Boister, N. 2003. Transnational criminal law? *European Journal of International Law* 14: 953, 954.
- Cassese, A. 2001. Terrorism is also disrupting some crucial legal categories of international law. *European Journal of International Law* 12 (5): 993–1001.
- . 2006. The multifaceted criminal notion of terrorism in international law. *Journal of International Criminal Justice* 4: 933.
- Department of Foreign Affairs and Trade. 2004. *Transnational terrorism: Paper 2004*. Canberra: DFAT.