Introduction

Terrorism, and the need to find effective ways to counter it, is indeed one issue which truly brings together the entire international community.

UN Secretary-General, Antonio Guterres, 2018

Counter-terrorism regulation is increasingly emerging as a hyperexceptional legal regime, with devastating consequences for individuals.

UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Prof. Fionnuala Ní Aoláin, 2020

The world has a problem with counter-terrorism.

Since 2001, a transnational counter-terrorism order has emerged of such scale, scope, reach, and significance that the Secretary-General of the United Nations could describe it as ‘a comprehensive, multilateral counter-terrorism architecture at the global, regional and national levels’. This architecture is now firmly established as a seemingly immovable part of the global governance landscape, characterised by an institutional and normative sprawl that embeds it across a remarkable range of transnational activities.

The attacks of 11 September 2001 acted as an accelerant for the development, institutionalisation, and hardening of transnational counter-terrorism in formal and informal international institutions. With a focus on norm setting, norm settlement, capacity building, and sanctions regimes, this transnational activity has had concrete domestic effects. In the seventeen years after 2001, 140 states adopted new counter-terrorism

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3 Report of the Secretary-General, above n. 1, p. 6.

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legislation,\(^5\) marking this as a period of legislative hyperactivity that is manifestly connected to the development of transnational counter-terrorism\(^6\) and, particularly, to the central role of the United Nations (UN) within it.

Over the last twenty years, counter-terrorism has increasingly become part of the core business of the UN.\(^7\) This was not always clearly reflected in the institutional structure of the organisation. Jane Boulden has written that 'terrorism appeared to be both simultaneously everywhere and nowhere at the UN\(^8\) until the inauguration in 2017 of a new institutional arrangement specifically to co-ordinate UN counter-terrorism.\(^9\) The everywhereness of which Boulden writes reflects the fact that, in pursuit of the 'voracious ideal'\(^10\) of security, questions of terrorism increasingly dominate the UN and all of its agencies. Transnational counter-terrorism is developed at and beyond the UN through laws, programmes, institutions, capacity-building activities, inter-institutional engagements, and normative sprawl. The law and practice of transnational counter-terrorism that emanate from this shape domestic law and policy,\(^11\) and at both national and international levels marginalise rights protection,\(^12\) close out spaces for disagreement and dissensus,\(^13\) undermine other bodies of law that more effectively restrain state action,\(^14\) and either ignore or co-opt


\(^7\) This is arguably somewhat more so in respect of the business conducted primarily from the United Nations’ headquarters in New York, where the Security Council sits and from which much of the organisation’s counter-terrorism emanates. Importantly, the human rights bodies are primarily based in the United Nations’ Geneva offices. So there is a spatial as well as an institutional division between security and rights, which makes it even more difficult for the civil society and advocacy expertise that built up in Geneva to penetrate the security spaces in New York.


\(^9\) This is discussed in Chapter 1.


\(^11\) Discussed further in Chapter 4.

\(^12\) This aligns with the view of the current UNSRCT, Fionnuala Ní Aoláin, who wrote that the development of counter-terrorism in and beyond the UN has had ‘a distinctly negative effect on the overall advancement of meaningful protection for human rights within the counter-terrorism sphere. Moreover, the Special Rapporteur articulates her grave concern that the well-entrenched constitutional and domestic protections for human rights embedded in national legal systems in many countries are being rendered irrelevant or powerless in the new regulatory landscape.’ UNSRCT (Ní Aoláin) Report on Security Council resolutions concerning terrorism on the promotion and protection of human rights since 9/11(2018), UN Doc. A/73/56, para. 10. See also Fiona de Londras, ‘The Transnational Counter-Terrorism: A Problématique’ (2019) 72 Current Legal Problems 203.


\(^14\) This is particularly so for international human rights law (which I address throughout this book) and international humanitarian law (on which I say much less). On the impact of transnational counter-terrorism on international humanitarian law, see UNSRCT Report, above n. 2.
civil society as a ‘partner’ but not a critical friend of the counter-terrorism juggernaut. At the same time, transnational counter-terrorism gives the UN a new relevance. As Isobel Roele has remarked, ‘[i]n advocating for cooperation and inclusivity [in counter-terrorism], the UN simultaneously made the case for its own indispensability as a convening power’. If anyone worried about whether the international counter-terrorism co-operation that emerged in the immediate aftermath of 9/11 could be sustained, those worries have surely been quenched in the twenty years that have followed.

In this book I seek to both document and problematise the development of transnational counter-terrorism, showing the institutional and normative sprawl of counter-terrorism in transnational spaces, its domestic effects, and its marginalisation of human rights and participation. In doing so, I want to illustrate the determined construction of a vast institutional architecture of transnational counter-terrorism, through which the law and practice of transnational counter-terrorism develop, diffuse, and embed, often without formality, transparency, or accountability. I will show that, in this transnational counter-terrorism order, human rights are frequently invoked to justify countering terrorism and identified as key to effective counter-terrorism, but are rarely regarded as limits on its reach or ambition. That reach is extensive, driven by practices of institutional interlinkage, normative sprawl, and the voracious enterprise of preventing and/or countering violent extremism (P/CVE), which allows for counter-terrorism to seep into a vast array of activity. These activities have real and material effects at individual and national levels, fomenting a counter-terrorism atmosphere in which states can and do pursue repressive agendas, legitimated by recourse to transnational counter-terrorism, which in turn they seek to influence through entrepreneurial norm-shaping activities. And all of this with limited, if any, accountability.

If there are solutions to this, time is rapidly running out for us to identify and implement them.

THE POST-9/11 TRANSNATIONAL COUNTER-TERRORISM ORDER

Although the international community had addressed terrorism prior to the autumn of 2001, its efforts had primarily been focused on event-specific Security Council

15 See Center for Strategic and International Studies, above n. 5.
17 See, for example, Eric Rosand, “The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?” (2006) 11 Journal of Conflict and Security Law 399, p. 403: ‘The overarching challenge in the next few years will be to maintain the broad-based international co-operation in the fight against terrorism that has existed since 11 September 2001 and is essential to address the threat effectively.’
18 Terrorism was first mentioned in UN documents in 1948, when the Security Council condemned the ‘criminal group of terrorists’ that assassinated Folke Bernadotte, then acting as a UN mediator in Palestine. Security Council Resolution 57 (1948).
resolutions,19 futile attempts to define terrorism as an international phenomenon and/or crime, and the creation of specific treaty and sanctions regimes to address (directly or indirectly) particular elements of terrorist activity.20 The success of pre-2001 counter-terrorism efforts at the United Nations had been limited: only two states (the United Kingdom and Botswana) had ratified all of the UN conventions in place at the time of the September 11 attacks;21 the Terrorism Prevention Branch was only very slightly resourced;22 and countering terrorism hardly featured in the Office of Legal Affairs’ ‘Strategy for an Era of Application of International Law’.23 Certainly, terrorism and counter-terrorism formed part of many states’ foreign policy, there were some well-established patterns of transnational police24 and security25 cooperation, and some regional organisations had also engaged in at least some degree of counter-terrorism co-ordination.26 However, as a general matter, sovereign control over terrorism and counter-terrorism was a jealously guarded principle; counter-terrorism was, broadly speaking, a matter of domestic concern, law, policy, and governance.27 All of this changed with the 11 September 2001 attacks.

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24 See, for example, Mathieu Deflem, Policing World Society: Historical Foundations of International Police Cooperation (2002; Oxford University Press).
26 See, for example, the Final Act of the Conference on Security and Cooperation in Europe 1975 (the Helsinki Final Act), Art. VI; the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism 1987, esp. Art. VIII.
27 This is not to suggest that domestic concern with countering terrorism did not translate into foreign policy actions by some states. See, for example, the compelling account of US counter-terrorism in Somalia predating 9/11, with which Princeton N. Lyman starts ‘The War on Terrorism in Africa’, in John Harbeson and Donald Rothchild (eds.), Africa in World Politics: Reforming Political Order (2008; Westview Press).
That change is reflected in the immediate attention paid to these attacks by the international community, not only through expressions of solidarity and empathy with the United States, but also in the form of law, policy, and operational arrangements that firmly established counter-terrorism as a matter of transnational, as well as national, governance. Indeed, what can be seen in the immediate aftermath of the 9/11 attacks is the rapid reclassification of counter-terrorism as a matter of international peace and security, enabling its elevation ‘to an unhealthy hegemonic category [that] comes to mean the unreflective, parochial and anxious cleaving to a security-driven conception of a risk-free society’. As will become clear throughout this book, that elevation has been strongly supported by different states, in different guises, and at different times across the last two decades.

States are, of course, critical to the larger story of transnational counter-terrorism, as they in large part initiate programmes or the act of drawing certain issues into the broader sphere of counter-terrorism. It was also states – and especially the five permanent members of the Security Council – that so forcefully shaped the expanding counter-terrorism agenda at the UN in the aftermath of the 9/11 attacks. By framing these attacks as threats to international peace and security, the UN Security Council did not merely reflect, but rather constituted, reality; it turned terrorism into a matter of international security. Wæver explains that ‘[b]y uttering “security,” a state-representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it’. Along similar lines, by deeming terrorism a matter of international peace and security, the Security Council engaged in a globalising securitising speech act, shifting the scale from national to transnational in a manner that would have profound consequences. By framing terrorism in this way, the Security Council opened the door, not only to military action by states acting individually or alone, but also to its own unprecedented ‘legislative’ activity as the institution with responsibility for international peace and security. As will become clear throughout this

28 See, for example, the immediate expressions of solidarity from NATO (Statement by the North Atlantic Council, 11 September 2001) and the EU (Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001), as well as Security Council Resolution 1368 (2001).


32 This recalls Vuori’s argument that one of the four possible goals of securitisation is to acquire greater control in order to ‘get the audience to do the acts required by the actor or to forbid them from doing certain acts’. A. Juha Vuori, ‘Illocutionary Logic and Strands of Securitisation: Applying the Theory of Securitisation to the Study of Non-Democratic Political Orders’ (2008) 14 European Journal of International Relations 65, p. 88. The Security Council’s ‘legislative’ activity is considered in Chapter 2.
book, the far-reaching, pervasive, and persistent transnational counter-terrorism order that has developed in the last twenty years can be traced directly back to that scale-shifting, globalising speech act, and to Security Council Resolution 1373 (2001) – the remarkably productive instrument that emerged from it.

Since then, counter-terrorism seems to have become the thing ‘that relates, organises, and possibly subsumes a host of other middle-level securitisations’ on a transnational scale. As we will see, transnational counter-terrorism encapsulates, shapes, and in large part enables the securitisation of financial systems, borders, data, transnational organised crime, peacekeeping, humanitarian action, internet regulation, and states’ duties towards citizens abroad. A host of securitising actors, including states and counter-terrorism institutions that have emerged since 2001, are ‘bound together positively’ by their shared identification of ‘international terrorism’ as a threat to be countered transnationally, thus ensuring transnational counter-terrorism’s durability. That durability emerges also from the shared commitment to the transnational counter-terrorist order among the permanent members of the Security Council, which often (although not always) reach consensus in the Security Council on counter-terrorism resolutions even when they cannot do so on other matters. As a result of their effective control of the Security Council, these five states enjoy disproportionate influence on the development, content, and diffusion of transnational counter-terrorism. While some other states seek out their own influence in this field (through funding UN counter-terrorism work, founding security-oriented regional organisations, or developing close working connections with counter-terrorism institutions), most states are ‘recipients’ of this order which is transmitted through hard and soft law, capacity building, and ‘technical assistance’, largely shaped and directed by Global North security hegemons.

In spite of this imbalance, the transnational counter-terrorism order has a striking stability. This is at least partly connected to the fact that it speaks to elites across multiple locations – elites that share not only a sense that terrorism is a physical threat that must be resisted, but also a vision of security that constructs the state as the legitimate locus of coercive power and permitted violence and seeks to maintain the existing order. This consensus has manifested in the transformation of transnational counter-terrorism from something pursued ad hoc to an institutionalised set of activities and actors resting on a set of hard and hardening norms developed by public, private, and hybrid actors on national, regional, and international scales.

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54 These are considered in Chapter 1.
55 Buzan and Wæver, above n. 53, p. 256.
56 In a foundational text Buzan et al. anticipate this, writing that ‘[i]f a given type of threat is persistent or recurrent, it is no surprise to find that the response and sense of urgency become institutionalized’. Barry Buzan, Ole Wæver, and Jasp de Wilde, Security: A New Framework for Analysis (1998; Lynne Rienner), p. 27.
57 I discuss this institutional infrastructure in Chapter 1.
This stability and institutionalisation confound characterisations of transnational counter-terrorism as constituting an emergency response to 9/11. While it is certainly the case that, at least in the earlier days of the contemporary phase of transnational counter-terrorism, there was recourse to what might be understood as exceptional action from a legal perspective (states of emergency, derogation from human rights treaties, extensive empowerment of executive actions, and rapid reaction by the Security Council), transnational counter-terrorism has developed to destabilise notions of emergency, at least as a clear legal category. Some, but not all, of transnational counter-terrorism relies on military action, sometimes but arguably not always reaching the threshold of armed conflict (and consequently muddying the waters of whether, when, and with what results international humanitarian law applies\textsuperscript{38}). Some, but not all, of transnational counter-terrorism applies responsive sanctions and other repercussions to persons or entities deemed, through extraordinary processes, to be involved in or associated with terrorism, but it does so through a permanent and irregular quasi-judicial structure (raising questions of how, in what way, and to what extent those subject to it are entitled to due process).\textsuperscript{39} Much of transnational counter-terrorism relies on permanent legal, structural, and institutional change to how states pursue security, including through legislative change and the mandated creation of resource-intensive technologies of security, raising questions of whether, how, and to what extent transnational counter-terrorism undermines, overrides, or depoliticises domestic law-making and state sovereignty. The international institutional landscape has been transformed by the emergence and seeming permanence of formal and informal institutions dedicated to pursuing the objectives and ‘supporting’ implementation of norms developed within transnational counter-terrorism, raising questions about the distinction between law and soft law, the processes of law-making, and the legitimacy of contemporary modes of transnational regulation and governance. Transnational counter-terrorism is, in short, legible as part of what Didier Bigo terms the ‘governmentality of unease’;\textsuperscript{40} it spans the space ‘between exceptional measures and the immediacy of action on the one hand and the ordinary administrative, police or insurance measures on the other’.\textsuperscript{41}

The creation of an extensive normative and institutional infrastructure around transnational counter-terrorism has meant that the ‘security’ that is sought is not reliant on transient and opportunistic alliances, but rather pursued through

\textsuperscript{38} For an example of how this has occurred and its implications in a concrete setting, see Tal Mimran, ‘From Apology to Functionalism: A Retrospective Look at the Military Campaign against the Self-Declared Islamic State’ (2020) 53 Israel Law Review 355.


\textsuperscript{40} Didier Bigo, ‘Globalized In-Security: The Field and the Ban-Opticon’ in Naoki Sakai and Jon Solomon (eds.), Translation, Biopolitics, Colonial Difference (2005; Hong Kong University Press).

a structure that has the potential for permanence and through which a whole host of other securitisations can be funnelled and, in turn, concretised as order. By inserting law into this equation, compulsion is introduced so that security is less dependent on the will of security actors and can rely instead on coercion through legal obligation and associated architectures of compliance and enforcement. By locating much of the norm-generating activity of transnational counter-terrorism in exclusionary forums such as the Security Council, the immediate audience is reduced to a smaller number of willing states with the capacity (if it is needed) to enforce agreement from other states through norm generation. Through all of these machinations and more, transnational counter-terrorism has been removed from the realm of politicisation, and developed into an order of great scale, depth, influence, and opacity – a powerful framework that is remarkably resistant to being dislodged as a pillar of global governance.

THE PERSISTENT PROBLEM OF DEFINITION

Importantly, this has occurred without the long-standing deadlock on defining terrorism having been resolved. The Sixth Committee of the General Assembly still has not finalised the Comprehensive Convention on International Terrorism – a task on which it has been engaged for decades. In spite of introducing a substantial number of resolutions relating to counter-terrorism (which I consider in Chapter 2), the Security Council has not formulated a binding definition of terrorism in any of them. Neither have its institutions, such as the Counter-Terrorism Committee, developed clear definitions to bound their work. Instead, these institutions seem to have stepped back from the definitional task to focus on acting instead, creating the impression that ideological disagreements over the definition of terrorism have quietened. By doing so, they of course leave the critical task of defining terrorism – and thus the scope of counter-terrorism law and powers – largely to domestic governments and/or international institutions, many of which have taken the

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44 At best, it gestures towards something resembling a definition in Security Council Resolution 1566 (2004), which I consider below.
opportunity to pursue worryingly expansive approaches, including labelling campaigns pursuing self-determination as ‘terrorist’.46

The lack of an international definition is not an accident of transnational counter-terrorism; it is a facilitator of it. The failure to grapple with the definition of terrorism as soon as the Security Council began its concerted counter-terrorism work in September 2001 enabled the development of a doctrine of deference to State counter-terrorism practices47 that no doubt greased the wheels of state compliance and engagement. No wonder, then, that some consider its avoiding ‘the divisive issue of defining terrorism’ to be one of the reasons why the UN’s Counter-Terrorism Committee (CTC) quickly gained support from member states.48 If, as Messmer and Yordan argue, the counter-terrorism ‘system’ established by the Security Council is ‘not solely a state-centered effort, nor solely a Security Council-centered one’ but ‘a de-centralized combination of both approaches, establishing a division of labor between the Security Council’s development of strategic global counterterrorism interest, and the states’ role in the execution of these’,49 then the Council’s persistent failure to define terrorism and practice of imposing expansive and coercive obligations on states produced a situation where states are empowered by the transnational counter-terrorism order, but hardly restrained by it at all. In other words, it may well be that a legally binding definition of terrorism has proved elusive, not only because of differences in approach and motivation across states,50 but also because of the latitude states acquire from the combination of an increasingly ‘hard’ transnational counter-terrorism order and a persistently absent definitional limit on its application.

This lack of definition remains, notwithstanding over a decade of special rapporteurs calling critical attention to the need for terrorism to be narrowly defined in both national and transnational spaces,51 as well as the decades of inconclusive

46 See, for example, the account of Niger delta militia in Isaac Terwase Sampson, ‘The Dilemmas of Counter-Boko Haramism: Debating State Responses to Boko Haram Terrorism in Northern Nigeria’ (2016) 29 Security Journal 122.
47 UNSRCT Report, above n. 12, para. 34.
51 The first UNSRCT, Martin Scheinin, focused on the need for a sufficiently precise definition of terrorism in his very first report to the Commission on Human Rights, in 2005: UN Doc. E/CN.4/ 2006/68. Since then, this issue has been raised by every holder of the mandate.
action by the Sixth Committee of the UN General Assembly, already mentioned. It also remains the case, in spite of a clause in Security Council Resolution 1566 (2004) – a Chapter VII resolution – which might be read as offering something akin to a definition, but which is non-binding,52 ‘imperfect’,53 and missing the limiting features of a definition.54 In Resolution 1566 (2004) the Security Council:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.55

Although this Security Council resolution does not refer to General Assembly Resolution 49/60 (1994), it does have echoes of it. In that resolution, the General Assembly stated that ‘[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them’.56 Neither of these provisions provide the kind of limiting force we might consider to be central to a definition should we be seeking legal certainty and precision. They do, however, communicate to state actors a permissive approach from which it might be inferred that the imprimatur of transnational counter-terrorism can be applied to state action provided it is pursued under the guise of counter-terrorism. Indeed, as we will see further in Chapter 4, states seem to have interpreted the lack of a limiting definition as licence, justifying expansive and repressive domestic laws and operations by express reference to Security Council resolutions or the Global Counter-Terrorism Strategy.57 In other words, while Sebastian von Einsiedel may argue that UN-led counter-terrorism

52 Sampson, above n. 46, p. 125.
54 Ibid., p. 97.
55 Security Council Resolution 1566 (2004), operative para. 3. It is not entirely clear what this resolution ‘recalls’, bringing to mind Werner’s observation that ‘[a]cts such as repeating or recalling offer the opportunity to begin a story by suggesting it has already begun’. Wouter Werner, ‘Recall It Again, Sam: Practices of Repetition in the Security Council’ (2017) 86 Nordic Journal of International Law 151, p. 161.
56 General Assembly Resolution 49/60 (1994), UN Doc. A/RES/49/60, para. 3.
57 See, for example, ‘The Arab Republic of Egypt National Counter-Terrorism Report 2020: Egypt’s Efforts and Its Comprehensive Approach to Counter Terrorism and Extremist Ideology Conducive to Terrorism’ (2020), which I discuss in Chapter 3.