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The fragmented international legal response to terrorism

LARISSA VAN DEN HERIK AND NICO SCHRIJVER

1 Introduction

More than any other event in the post-Cold War period, the events of 9/11 generated intensive normative activities at the international level, combined with path-breaking institutional developments. The multiplicity of responses spawned by this unusual *ouverture* of the twenty-first century involved various domains of international law. Reflecting the dynamics of the current international legal system, the normative burgeoning that followed 9/11 unsurprisingly displayed a rather disorganized and uncoordinated proliferation of possible new legal practices, principles, rules and institutions,¹ thereby potentially fragmenting the international legal response to terrorism that international society had to offer.

It is in this context, and with the hindsight of a decade of literature on the topic, that this volume addresses the challenges that combating international terrorism poses to international law. The book is premised on the idea that the main challenge to be met does not primarily pertain to the lack of applicable rules. The main challenge is arguably to ensure the coherence and unity of the application of the principles and rules originating in multiple branches of international law. This is why, instead of focusing on the applicability of rules from one specific branch of international law to the problem of terrorism, this book takes a comprehensive approach and examines the applicability as well as the interrelationship between salient branches of international law in

¹ See on the phenomenon of multilayered global governance more generally, C. Ku, 'Forging a Multilayered System of Global Governance', in R. St. J. MacDonald and D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005), 631–51.

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relation to terrorism and counter-terrorism activities. Some of these questions have already been the object of analysis in the literature. This volume however provides a rare overview of the great variety of legal issues, which arise in connection with terrorism in the twenty-first century. In combination with one another, the chapters in this volume shed light on perspectives that have sometimes been overlooked in the literature.

The collection has a threefold focus. Part I examines questions relating to law enforcement and criminal justice that are unrelated to the context of armed conflict and the need to improve international cooperation in the investigation and prosecution of terrorist acts. Part II studies operations that include the transboundary use of force, and in particular the use of force in self-defence against non-state actors. Inevitably, the use of force simultaneously raises questions regarding the applicability of international humanitarian law, including its relationship to human rights law. Part III accordingly addresses the specific relationship between international humanitarian law and human rights law. The respective parts of this book provide expert perspectives on areas in which greater consensus is needed in order to make the struggle against terrorism more effective. These perspectives are woven together in the *Leiden Policy Recommendations on Counter-Terrorism and International Law* (annexed to this book).

The specific inquiries on selected themes in the respective chapters, when taken together, expose possible instances of fragmentation and incoherence. In addition, this comprehensive study will draw attention to some implications of international counter-terrorism responses for the changing nature of international norms and international lawmaking. In this respect, the phenomenon of terrorism will be considered as particularly illustrative of the increasing pluriformity of actors on the international legal stage, both in terms of subjects of the law and international law-makers.² In a similar vein, the nature of terrorist threats and of counter-terrorism measures may testify to the progressive individualization of international law.³ Or, alternatively, the record of counter-terrorism responses may overall be said to show a shift back to a more statist, power-based and security-oriented focus of international

² K. Annan, *We, the Peoples: The Role of the United Nations in the Twenty-First Century* (UN Doc. A/54/2000 (2000)), para. 315.

³ A. Slaughter and W. Burke-White, 'An International Constitutional Moment' (2003) 43 *Harvard International Law Journal* 1.

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society.⁴ Within such a dialectic, this book examines the mark that 9/11 has effectively left on the international legal system.

This first chapter seeks to set the scene of the general overview constituted by the following chapters. It introduces some of the general issues, which arise in relation to terrorism. After these preliminary remarks, section 2 explores some of the different forms of terrorism and its transformation from a phenomenon of general international concern to one perceived as a direct threat to international peace. Subsequently, section 3 examines institutional developments in response to new terrorist threats and enquires how modern terrorism has affected approaches to international governance, in particular at the Security Council level. Section 4 introduces the fragmented response to counter-terrorism after 9/11. In section 5, an outline of the individual chapters of this volume is presented.

2 Terrorism as an international matter

It is uncontested that the epithet of terrorism has an exceptionally strong emotive value.⁵ This symbolic strength of the terrorism label stands in sharp contrast to the particular weakness of the concept in terms of legal substance. Many international lawyers have already noted the elusiveness of terrorism in the legal sense. In 1974, Baxter regretted the conception of 'terrorism' as a legal term. He wrote, 'the term is imprecise; it is ambiguous; and above all, it serves no legal purpose'.⁶ In 1997, Higgins also qualified terrorism as a 'term of convenience', which has 'no specific

⁴ S. N. MacFarlane, 'Charter Values and the Response to Terrorism', in J. Boulden and T. G. Weiss (eds.), *Terrorism and the UN: Before and after September 11* (Bloomington: Indiana University Press, 2004), 45.

⁵ There are perhaps only two epithets in international law that so directly attach an emotive stigma to a certain act: genocide and terrorism. The word 'genocide' is the linguistic embodiment of the ultimate evil whereas the 'terrorism' label is attached to acts which can under no circumstance be justified. While both terms share a strong expressive function, their significance as legal concepts varies. 'Genocide' as an international law concept is carved in stone and has become immutable as the Rome negotiations for the ICC Statute have shown. This term captures a concrete, rather narrowly defined set of acts. Apart from some legal discussion on interpretational issues and the interdisciplinary debate on the contours of the concept per se, there is general agreement on the relatively well-circumscribed phenomenon of genocide. The situation for terrorism is rather the opposite.

⁶ R. R. Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974) 7 *Akron Law Review* 380, 380.

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legal meaning'.⁷ More recently, in 2006, Saul described the term terrorism as a seductive term that serves a popular expressive function.⁸

The haziness of the concept of terrorism relates not only to its legal dimension and the lack of a clear definition, but also in social terms, the word terrorism is used in relation to a great realm of diverse acts.⁹ The differentiation between domestic terrorism and international terrorism, new terrorism and old terrorism, terrorism in peacetime and terrorism in wartime, and state (-sponsored) terrorism versus terrorism committed by non-state actors, attempts to recognize this diversity. The fact that there is such a wide array of acts which are currently all captured by just one term is certainly partly responsible for the level of fragmentation of the legal response to terrorism. This section introduces the terrorism mosaic that underlies the expansion and diversification of legal responses to the terrorist threat.

2.1 *The transformation and variegation of terrorism*

Even if described as an age-old phenomenon,¹⁰ the linguistic roots of the word 'terrorism' are relatively recent, dating back to the French Revolution and Robespierre's Reign of Terror.¹¹ Being coined through an incidence of state terror neatly illustrates the perplexity of the concept. After all, terrorism has predominantly been understood as a non-state actor phenomenon – perhaps sometimes state sponsored – while

⁷ R. Higgins, 'The General International Law of Terrorism', in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (London: Routledge, 1997) 27.

⁸ B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 4.

⁹ R. Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Oxford: Hart, 2004), 228. Kolb also distinguishes between legal functions that the definitions fulfil, such as the freezing of assets and individual criminal prosecution.

¹⁰ M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism beyond Violent Acts* (Leiden: Martinus Nijhoff, 2010), xxii.

¹¹ See, e.g., G. Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537. As Guillaume explained, the term took on a new meaning in the late nineteenth century when it was used to describe the attacks by the nihilists in Russia and later the anarchists throughout Europe. Terrorism as a term then came to refer to terror against the state. The first international attempt to define terrorism responded to the assassination of King Alexander I of Yugoslavia and Louis Barthou, the president of the Council of the French Republic. The 1937 Convention for the Prevention and Punishment of Terrorism only concerned terrorist acts against a state.

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the question whether it can be directly committed by states has always been one of the main bones of contention.¹² The debate on state terrorism is linked to the freedom-fighter discussion and has, to some extent, also inspired the distinction between terrorism in wartime and in peacetime.¹³ The effects of the disagreements in relation to the character of the author of terrorism have mainly been felt in the context of unsuccessful attempts to arrive at a fully-fledged and general definition.

Another distinction is between domestic and international terrorism. This distinction coincides to a large extent with the traditional versus modern terrorism dichotomy. This second distinction serves a different purpose from that of the variation in the character of the perpetrator. The emergence of modern terrorism can be seen as the main driver behind the diversification of legal responses, since it brought into play new paradigms of counter-terrorism strategies. Given this immediate link to the fragmentation theme, the distinction between traditional and modern terrorism deserves some further exploration.

The concept of 'modern terrorism' has been extensively analysed in the literature and reports, and of course it is disputed by some as being a non-concept. Two key characteristics that are often mentioned as setting modern terrorism apart from traditional terrorism relate to the diffuse political agenda and the fluid organizational structures of modern terrorists.¹⁴ In contrast to the old 'territorial' terrorist groups such as ETA in

¹² The Secretary-General tried to lay this discussion to rest in his report *Larger Freedom*, 'It is time to set aside debates on so-called "State terrorism". The use of force by States is already thoroughly regulated under international law' (para. 91). See for a critique, J.J. Paust, 'Terrorism as an International Crime', in G. Nesi (ed.), *International Cooperation in Counter-Terrorism: the United Nations and Regional Organizations in the Fight against Terrorism* (Hampshire: Ashgate, 2006), 25–32.

¹³ See more elaborately H. Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005), ch. 2. Also see Pejic who criticized the exclusion of terrorist activities carried out by state armed forces, as such an approach would disrupt the balance in international humanitarian law between the parties to a non-international armed conflict ('Armed Conflict and Terrorism: There Is a (Big) Difference', in A.M. Salinas de Friás, K.L.H. Samuel, and N.D. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012)).

¹⁴ These characteristics are enumerated and explained in E. Muller, 'Modern Terrorism and Modern Counter-Terrorism in The Netherlands', in G. Molier, A. Ellian and D. Suurland (eds.), *Terrorism: Ideology, Law and Policy* (Dordrecht: Republic of Letters, 2010), 397–420. His analysis draws on W. Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford: Oxford University Press, 1999) and W. Laqueur, *Voices of Terror: Manifestos, Writings and Manuals of Al Qaeda, Hamas, and other Terrorists from around the World and throughout the Ages* (New York: Reed Press, 2004). Also see Lehto, *Indirect Responsibility for Terrorist Acts*, xxii–xxxii.

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Spain and the IRA in Northern Ireland, which had concrete political and territorial demands, the political agenda of new terrorist groups, with al-Qaeda as the main protagonist, is more nebulous. Even if specific objectives have at times been articulated, such as the withdrawal of US troops from Saudi Arabia, the overall ambition concentrates on more general political desires of re-establishing a worldwide caliphate.

The differences between separatist movements and al-Qaeda-type groups are significant from an operational point of view. Not only are the demands and hence the actions of the traditional terrorist groups geared towards a concrete territorial or political goal, but more importantly the actions of these groups are governed by a quest for legitimacy. The underlying political goals of traditional terrorists require a certain level of popular support, which has a pacifying effect on the nature of their acts. Traditionally, separatist terrorist movements would give warning; they would generally not commit suicide attacks; their attacks were not too gory, and mostly civilians unaffiliated to the state apparatus would be spared as much as possible. In contrast, modern terrorists intend to instil fear globally and to target the greatest number of victims possible without differentiation.¹⁵

The flexibility of network structures and the fluidity of financing are two other intertwined features distinguishing modern and traditional terrorism.¹⁶ In relation to al-Qaeda, it has been observed that the successful incapacitation of the leadership of this quintessential modern terrorist group has rendered this movement particularly incongruent and scattered.¹⁷ Additionally, there is a trend of al-Qaeda inspiring home-grown terrorists that have no or little direct connection to this movement.¹⁸ This trend further decentralizes the already extremely loose cell structure that underlies modern terrorism. This organizational flexibility is mirrored in the ways that modern terrorist groups acquire their required financial means. Other than traditional terrorism that was frequently state sponsored in one way or another, modern terrorist groups more often turn to other forms of organized crime for financial

¹⁵ Muller, 'Modern Terrorism'.

¹⁶ On financing structures, see particularly Chapter 8 in this volume.

¹⁷ E. Rosand, 'The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?' (2007) 11 *Journal of Conflict and Security Law* 399, 401.

¹⁸ *Ibid.*

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resources.¹⁹ Direct relations with states do exist but mostly with fragile states, such as Somalia, Yemen, Afghanistan and perhaps Pakistan. Those relations generally are of a very complex and sometimes even symbiotic nature. There are thus a number of factors differentiating traditional terrorism from modern terrorism.

Some scholars have questioned the propriety or usefulness of the qualitative dimension of the distinction between traditional and modern terrorism.²⁰ They submit that the difference is predominantly quantitative in nature. It is the higher level of violence, also through the potential use of weapons of mass destruction and the increased geographical reach, that justify the term 'global terrorism'. However, according to this view, other than the scale of the threat, the qualitative nature of terrorist threats has not changed significantly.²¹

Lacking clear definitions, the precise boundaries between the two variations of terrorism, traditional/domestic versus modern/international, are hard to draw. Moreover, there are also hybrid situations, which are not easily identifiable as either domestic or international terrorism, but are more a mixture of the two, such as domestic terrorism that is financed through foreign channels. Furthermore, on occasion, the UN Security Council has qualified what appeared to be an act of domestic terrorism as a threat to peace and security,²² and thereafter generally determined that any 'act of terrorism' amounted to such a threat.²³ This may further blur the conceptual differences between the two variations of terrorism. To the extent that the differentiation is accepted, it is important to realize that the two variations coexist rather than that modern terrorism has replaced traditional terrorism.²⁴

Despite the divergence in characterizing the differences in terrorism as quantitative or qualitative in nature, the two schools of thought unite in the position that the mutation warrants a diversification of legal responses. The emergence of 'modern terrorism' as a variation on 'traditional terrorism' has strained the exclusive focus on the criminal law

¹⁹ See, e.g., Outcome Document for the Special Meeting of the Counter-Terrorism Committee Commemorating the Adoption of Security Council Res. 1373 (2001) and the Establishment of the Committee (2011), para. 6.

²⁰ V. Lowe, 'Security Concerns and National Sovereignty in the Age of World-Wide Terrorism', in MacDonald and Johnston, *Towards World Constitutionalism*, 656–9.

²¹ *Ibid.*, 659.

²² UN Doc. S/Res./1465 (2003), regarding the bomb attack in Bogota, Colombia on 7 February 2003.

²³ E.g., UN Doc. S/Res./1516 (2003) or UN Doc. S/Res./1530 (2004).

²⁴ Lehto, *Indirect Responsibility for Terrorist Acts*, xxviii.

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paradigm. Consequently, 9/11, as the critical expression of modern terrorism, has provoked a host of new approaches. The immediate reaction to 9/11 invoked the use of force paradigm and in its wake other coercive measures such as reinvigorated Security Council sanctions.²⁵ After the heat of the moment had passed, softer alternative measures gradually regained more prominence, such as preventive diplomacy, intercultural dialogue, technical assistance and the monitoring of national implementation measures.²⁶

2.2 *Terrorism as a threat*

The phenomenon of terrorism has long featured on the international agenda, but it was gradually upgraded from being predominantly viewed as a matter of general international concern and perturbation²⁷ to being perceived as one of the most serious threats to peace and security.²⁸ This process was given a tremendous boost by 9/11.

The Security Council engaged in a general fashion with the terrorist phenomenon in its first-ever Heads of State meeting in 1992.²⁹ In a Presidential Statement, the Security Council members expressed their concern about acts of terrorism and emphasized the need for the international community to address them effectively.³⁰ More concretely, the Council reacted to terrorist attacks on three occasions prior to 9/11.

²⁵ While the sanctions under Res. 1267 had already been in existence since 1998, they were enhanced and extended to include al-Qaeda and to allow for a more intensive use. See generally, L. J. van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797.

²⁶ Lehto, *Indirect Responsibility for Terrorist Acts*, xx.

²⁷ See, e.g., the first General Assembly Resolution on Measures to Prevent Terrorism, UN Doc. A/Res./3034 (XXVII). In its 1994 Terrorism Declaration, the Assembly proclaimed that 'acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security' (Declaration on Measures to Eliminate International Terrorism, UN Doc. A/Res./49/60 (1994), para. 2). This declaration was followed by Res. 51/210 (1996). Also see the related report of the Secretary-General, UN Doc. A/51/336 (1996).

²⁸ *Threats to Peace and Security Caused by Terrorist Acts* (UN Doc. S/Res./1989 (2011)).

²⁹ The SC had dealt with terrorism sporadically on earlier occasions, e.g., in relation to the murder of Count Bernadotte in Res. 57 of 18 September 1948, and it issued Res. 286 on hijacking, on 9 September 1970. See more generally, J. Boulden, 'The Security Council and Terrorism', in V. Lowe *et al.* (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008), 608–23.

³⁰ UN Doc. S/23500 (1992).

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These were the Lockerbie bombings in 1988, the assassination attempt on Mubarak in Addis Ababa in 1996, and the terrorist attacks in Kenya and Tanzania in 1998. On all these occasions, Chapter VII powers were immediately invoked.³¹ Yet, the threat to peace determination mutated only gradually. Initially, the Council held in preambular paragraphs that acts of international terrorism constituted a threat to peace³² and that the suppression of international terrorism was essential for the maintenance of international peace and security.³³ It only effectively utilized the qualification of a threat to peace in its operative paragraphs in relation to the failure of states to respond to specific requests, such as the extradition of terrorist suspects.³⁴ Resolution 1269 was more articulate in that it unequivocally condemned:

all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivations, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten peace and security.³⁵

Yet 9/11 was the first individual terrorist attack that the Council concretely qualified as a 'threat to peace'.³⁶ In the resolutions addressing 9/11, the Council also made a more generalized statement that *any* act of international terrorism constituted a threat to peace.³⁷ With this determination that a phenomenon rather than a discrete situation constituted a threat to peace, the Security Council assumed a much debated quasi-legislative

³¹ On the SC's response to terrorism, see also Chapter 2 in this volume.

³² UN Doc. S/Res./731 (1992), 2nd preambular para.

³³ UN Doc. S/Res./748 (1992), 4th preambular para.; UN Doc. S/Res./883 (1993), 5th preambular para.; UN Doc. S/Res./1044 (1996), 5th preambular para.; UN Doc. S/Res./1054 (1996), 9th preambular para.; UN Doc. S/Res./1070 (1996), 10th preambular para.; UN Doc. S/Res./1189 (1998), 3rd preambular para.; UN Doc. S/Res./1267 (1999), 5th preambular para.

³⁴ UN Doc. S/Res./748 (1992), 7th preambular para.; UN Doc. S/Res./883 (1993), 6th preambular para.; UN Doc. S/Res./1054 (1996), 10th preambular para.; UN Doc. S/Res./1070 (1996), 11th preambular para.; UN Doc. S/Res./1267 (1999), 8th preambular para.

³⁵ UN Doc. S/Res./1269 (1999), para. 1.

³⁶ UN Doc. S/Res./1368 (2001), para. 1. See also B. Fassbender, 'The UN Security Council and International Terrorism', in Bianchi, *Enforcing International Law Norms against Terrorism*, 87.

³⁷ UN Doc. S/Res./1368 (2001), para. 1.; UN Doc. S/Res./1373 (2001), 2nd preambular para.

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function as it had never exercised before.³⁸ In Resolution 1377, adopted at ministerial level, the Council went even one step further and declared that ‘acts of international terrorism constitute[d] *one of the most serious* threats to international peace and security in the twenty-first century’.³⁹ It further declared that acts of international terrorism were a challenge to all states and to all of humanity.

This perception of terrorism not only as a threat to peace but also as a challenge to all of humanity persisted. According to the High Level Panel in the report entitled *A More Secure World* and the Secretary-General in his subsequent report *In Larger Freedom*, terrorism threatened and attacked:

all that the United Nations stands for: respect for human rights, the rule of law, protection of civilians, tolerance among peoples and nations, and the peaceful resolution of conflict.⁴⁰

Both reports stipulated that the terrorist threat had increased in urgency during the first years of the twenty-first century as a result of two dynamics. These were the global reach of transnational terrorist network groups and their desire to acquire nuclear, chemical and biological weapons.⁴¹

It thus seems, as some scholars have noted, that there was a certain universality in the perception of terrorism as a threat.⁴² This is underscored by numerous declarations of regional organizations qualifying terrorism as a threat to peace.⁴³ Lack of consensus emerged more as regards the priority given to combating terrorism, the focus of responses to the threat, the identification of root causes of terrorism and the propriety of a preventive approach addressing such root causes.⁴⁴

³⁸ The role of the SC as ‘global legislator’ has been extensively discussed in the literature, see e.g., M. Happold, ‘Resolution 1373 and the Constitution of the United Nations’ (2003) 16 *Leiden Journal of International Law* 593; E. Rosand, ‘The Security Council as “Global Legislator”: *Ultra vires* or ultra innovative?’ (2004–5) 28 *Fordham International Law Journal* 542; see also note 54 below for further references.

³⁹ UN Doc. S/Res./1377 (2001), 2nd preambular para. This was repeated in subsequent resolutions, see, e.g., UN Doc. S/Res./1989 (2011), 2nd preambular para. Also see the *World Summit Outcome* (UN Doc. A/Res./60/1 (2005)), para. 81. The emphasis is ours.

⁴⁰ UN Doc. A/59/565 (2004), para. 145; UN Doc. A/59/2005 (2005), para. 87. ⁴¹ *Ibid.*

⁴² Boulden, ‘Security Council and Terrorism’, 608.

⁴³ AU Doc. Assembly/AU/Dec.311(XV) (2010); OAS Doc. AG/RES. 2618 (XLI-O/11) (2011); Astana Declaration for Peace, Cooperation and Development, OIC Doc. OIC/CFM-38/2011/ASTANA DEC/FINAL (28–30 June 2011); SAARC Doc. SAARC/SUMMIT.16/15 (28–9 April 2010).

⁴⁴ On the question of root causes, see more elaborately, T. Björger, *The Root Causes of Terrorism: Myths, Realities and Ways Forward* (Abingdon: Routledge, 2005).