

Foreword

Contemporary Issues in Counter-Terrorism

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The Editors of the *Minnesota Journal of International Law* chose to focus their 2019 Symposium on exploring contemporary challenges raised in the context of preventing and countering terrorism at the domestic and international levels.

Their choice could not have been more topical: terrorist incidents have for years been regular occurrences in a number of countries, many of which ravaged by armed conflict and other types of violence, including Afghanistan, Iraq, Nigeria or Syria.¹ It is also a phenomenon that shapes the perceptions of security by the public and, consequently, State laws and policies, even in jurisdictions where the threat of terrorist attacks is comparatively low.

As such, terrorism has consistently figured high on domestic security agendas, especially in the aftermath of the 9/11 attacks on the World Trade Center. United States authorities have defined countering the threat of terrorism as a high-ranking national security priority² both with respect to countering any domestic threats and working with relevant partners abroad with the aim of furthering the elimination of terrorism worldwide. Terrorism in its different manifestations (whether international, domestic, or cyberterrorism) has figured prominently—and consistently—among the drivers of fear and

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1. See *Global Terrorism Index 2019: Measuring the Impact of Terrorism*, INST. FOR ECON. & PEACE (2019), <http://visionofhumanity.org/app/uploads/2019/11/GTI-2019web.pdf> at 10.

2. National Strategy for Counterterrorism of the United States of America, WHITE HOUSE (Oct. 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/10/NSCT.pdf>.

anxiety affecting the U.S. public.³ This perception persists notwithstanding that, despite the threat of terrorism being real, those living in the Global North are at a comparatively lower risk of being affected by terrorist activities than by a series of other threats and phenomena. Causing the public to be disproportionately preoccupied with potential occurrences that are statistically unlikely to materialize is, after all, integral to the insidious power of terrorism. At the same time, critics of broad-brushed counter-terrorism approaches prevailing in some jurisdictions may argue that the public's reaction is markedly influenced by the approach of policy-makers and may reflect the under- or (more frequently) over-reactive *modus operandi* demonstrated by these stakeholders.

Without venturing too far into 'contested territory,' it is safe to suggest that counter-terrorism considerations have long influenced agenda-setting at all levels of governance: domestic, regional and international.

There are 19 international treaty instruments adopted under the aegis of the United Nations that address challenges stemming from terrorism, the majority negotiated and adopted prior to 2001.⁴ These instruments regulate a broad range of issues, from countering the financing of terrorism, the safety of civil aviation and maritime navigation to the threat posed by explosives and weapons of mass destruction, such as nuclear weapons. Despite the proliferation of diverse terrorism-related international instruments, a comprehensive, multilaterally agreed and binding definition of terrorism has long eluded the international community.⁵ As a result, States have developed their own, highly varied, definitions of terrorism and terrorism-related offences raising concerns that overbroad approaches taken in some jurisdictions resulted in domestic frameworks

3. *Terrorism*, GALLUP, <https://news.gallup.com/poll/4909/terrorism-united-states.aspx> (last visited June 04, 2020).

4. *International Legal Instruments*, SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE, <https://www.un.org/sc/ctc/resources/international-legal-instruments/> (last visited June 04, 2020).

5. The draft comprehensive convention on international terrorism has been under negotiation at the United Nations General Assembly since 1996. See, for example, Fionnuala Ní Aoláin (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/73/361 (Sept. 03. 2018) [hereinafter A/73/361], ¶ 9; Mahmoud Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, 4 J. OF INT'L CRIM. JUST. 1031 (2006).

that lack compliance with international human rights and international humanitarian law norms and standards and that risk undermining the protective frameworks set up under these bodies of international law.⁶

The 9/11 attacks represented a watershed moment in counter-terrorism regulation, resulting in the United Nations Security Council declaring the phenomenon of terrorism to constitute, in all its manifestations, a “threat to international peace and security.”⁷ The Council, as the United Nations organ with primary responsibility for the maintenance of peace and security, has taken up an augmented role leading to the adoption of increasingly expansive quasi-legislative measures⁸ aimed at addressing relevant regulatory gaps at the level of the United Nations and individual states. Other United Nations organs have likewise not been idle in this space. Crucially, the United Nations General Assembly adopted a Global Counter-Terrorism Strategy⁹ in 2006, aimed to guide counter-terrorism efforts by Member States and U.N. entities.

All this comes against the incremental development of a massive United Nations counter-terrorism architecture, built in the past two decades, and organized, since 2018, under the umbrella of the Global Counter-Terrorism Coordination Compact. The Compact currently counts 43 members and observers and carries out activities through eight working groups.¹⁰ This architecture underpins a myriad capacity-building and technical assistance initiatives aimed at supporting Member States in their efforts to prevent and counter terrorism and violent extremism and to further compliance with international standards, including obligations imposed under Security Council resolutions that are, at times, onerous and

6. A/73/361; Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/28/28 (Dec. 19, 2014); International humanitarian law and the challenges of contemporary armed conflicts, INT’L COMMITTEE OF THE RED CROSS, 32IC/15/11 (2015).

7. S.C. Res. 1368 (Sept. 12, 2001).

8. A/73/361; Paul C. Szasz, *The Security Council Starts Legislating*, 96 AMERICAN J. OF INT’L L. 901 (2002).

9. G.A. Res. 60/288. The Strategy is subject to biennial review by the General Assembly.

10. See generally UN Global Counter-Terrorism Coordination Compact, UNITED NATIONS: OFF. OF COUNTER-TERRORISM, <https://www.un.org/counterterrorism/global-ct-compact> (last visited June 04, 2020).

require resource-intensive steps on the part of Member States.¹¹

The U.N. architecture further engages with a series of other stakeholders active in the global counter-terrorism arena, such as the Global Counter-Terrorism Forum, the Financial Action Task Force or the Global Internet Forum to Counter Terrorism, to name a few. The global counter-terrorism arena has seen the proliferation of new institutions, most of which have emerged or have taken up counter-terrorism related tasks in the past two decades.¹² These fora provide for flexible and expeditious platforms for standard-setting and policy-making by groups of like-minded States and other stakeholders.¹³

Those familiar with the global counter-terrorism space will have observed an exceptionally prolific two-way dynamic between institutions with formal legal status under international law and more informal fora. However, as human rights stakeholders, most notably the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, have emphasized, this dynamic feeds into the “human rights-lite” character of the counter-terrorism space as it allows for standard-setting that sidesteps inclusive and transparent processes that duly incorporate human rights benchmarking.¹⁴

The cross-fertilization of counter-terrorism agendas extends to the interplay between international and domestic policy- and law-making. In this connection, two major legislative waves can be discerned in the past two decades. The first was triggered by the reverberating effects of the 9/11 attacks,¹⁵ while the second

11. Relevant obligations include establishing passenger name record (PNR) data and advance passenger information (API) systems, systems to collect biometric data and developing watch lists or databases of known and suspected terrorists. See S.C. Res. 2396 (Dec. 21, 2017). The onerous nature of the obligation contained in Resolution 2396 was noted by some members of the Security Council, such as Egypt and Uruguay at the time of adoption. See U.N. SCOR, 72nd Sess., 8148th mtg., U.N. Doc. S/PV.8148 (Dec. 21, 2017).

12. See Krisztina Huszti-Orban and Fionnuala Ní Aoláin, *The Impact of “Soft Law” and Informal Standard-Setting in the Area of Counter-Terrorism on Civil Society and Civic Space*, HUM. RTS. CENTER AT THE U. OF MINN. L. SCH. (2020), <https://www.law.umn.edu/sites/law.umn.edu/files/hrcimpactofsoftlaw.pdf>.

13. *Id.*; see also Fionnuala Ní Aoláin (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/74/335 (Aug. 29. 2019) [hereinafter A/74/335].

14. *Id.*

15. A/73/361; Human Rights Council, Impact of measures to address

was prompted by the rise of the Islamic State in Iraq and the Levant (ISIL) and the flow of so-called “foreign terrorist fighters” traveling to Iraq and Syria to join the group and other armed non-state actors.¹⁶ Consequently, measures aimed at preventing and countering terrorism have now seeped into almost every aspect of domestic, regional or international policies and regulation, including education, banking and finances, immigration and asylum, Internet and communication technologies, the functioning of civil society, charitable and humanitarian organizations, and the list could go on. The omnipresence of counter-terrorism responses has enormous implications on societies worldwide, not least on people’s enjoyment of their human rights and civil liberties.

Against this background, the Symposium embarked on exploring contemporary issues of counter-terrorism, with a distinct focus on developments triggered by more recent events, such as challenges posed by the “foreign fighters” phenomenon and returning “foreign fighters”¹⁷ in particular.

Fionnuala Ní Aoláin, in her keynote entitled *The Limits of Equality and Gender Discourses in Counter Terrorism: The Case of Women and Children in Syria and Iraq* explores the human rights and humanitarian challenges related to the situation of women and children held in detention camps in the Northern Syrian Arab Republic or detained pending trial in Iraq, whose deprivation of liberty is connected to their actual or perceived association with terrorist groups. She takes the lens of feminism to examine the gendered aspects of radicalization to violence and of recruitment by terrorist groups, and highlights the gendered realities faced by women in this context, in particular while living under the “Caliphate” declared by ISIL. Notably, she underscores the complexities of the distinction between victims and perpetrators in this context, with women, and even children, frequently being victims of terrorism, trafficking, sexual or

terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, U.N. Doc. A/HRC/40/52 (Mar. 01, 2019); see also Lana Baydas & Shannon N. Green, *Counterterrorism Measures and Civil Society: Changing the Will, Finding the Way*, CENTER FOR STRATEGIC & INT’L STUD. (Mar. 22, 2018), <https://www.csis.org/analysis/counterterrorism-measures-and-civil-society>.

16. A/73/361; Letta Tayler, *Overreach: How New Global Counterterrorism Measures Jeopardize Rights*, HUM. RTS. WATCH (2017), https://www.hrw.org/sites/default/files/counterterrorism_pdf.pdf.

17. For a definition of “foreign terrorist fighters”, see S.C. Res. 2178, ¶ 5 (Sept. 24, 2004).

gender-based violence and perpetrators of criminal offences at the same time. She further draws on her experience as the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, engaging with States and other relevant stakeholders with a view of ensuring repatriation of women and children and argues that repatriation to countries of origin or nationality is the only response that is in consonance with States' and the international community's long-term security interests and in line with obligations under international law.

An array of intertwined issues was further developed by panels exploring policies and practices related to the screening, prosecution, rehabilitation and reintegration of returning "foreign terrorist fighters", including international cooperation in this respect.

The Symposium also tackled diverse human rights and civil liberties implications of measures to prevent and counter violent extremism and terrorism, including in the online space. Panelists explored conditions conducive to violent extremism and radicalization to violence, including poor governance, broken down rule of law institutions, violation of human rights, discrimination and marginalization¹⁸ and emphasized the value of a human rights approach to the increasingly globalized deployment of standardized policies in this space.

The Symposium brought together an international group of experts of diverse backgrounds and perspectives, representing academia, civil society and international organizations, providing for a unique opportunity for thoughtful exchanges on the challenges of law- and policy-making in one of the most contested areas of international law.

18. U.N. Secretary-General, *Plan of Action to Prevent Violent Extremism*, U.N. Doc. A/70/674 (Dec. 24, 2015).