Preface

The old problem of terrorism has long tested international law, at least since European states grappled with requests to extradite political offenders from the mid-nineteenth century. For much of the twentieth century, international law took a low-key approach to terrorism, refraining from according it legal significance or developing a specialised regime to counter it.¹ Instead, general international law was applied, even if implementation was often inadequate. The only special norms developed were the many, but modest, transnational criminal cooperation treaties adopted from the 1960s. Terrorism was chiefly regarded as a domestic law enforcement problem, not a form of warfare or a challenge to global security.

The dramatic terrorist attacks on the United States of 11 September 2001 ('9/11') signalled an escalation in the intensity and reach of contemporary religious terrorism. It provoked a rapid, albeit haphazard, rethink of the traditionally cautious international legal approach. At the multilateral level this manifested in new, universal obligations imposed on states by the United Nations Security Council, to counter terrorist financing, strengthen criminal repression, and constrain the mobility and support networks of terrorists. Individual states also pushed the boundaries of their rights and obligations under the existing law, including in areas such as self-defence, torture, detention, rendition, military trials, and targeted killings. These developments provoked much controversy and resistance, especially on human rights grounds, from international, regional, domestic and non-state actors. The predominant resort to a war paradigm also tended to erase or obscure the causes of terrorism.²

This book attempts to make sense of these developments and to assess how international law has responded to terrorism, at a distance of more than 12 years from 9/11, but also in the light of developments prior to 9/11. It aims to present a reasonably comprehensive picture of the key norms and institutions across the whole field of terrorism and counter-terrorism.

¹ Rosalyn Higgins, 'The General International Law of Terrorism', in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (Routledge, London, 1997), 13; Gilbert Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537.

² Georges Abi-Saab, 'The Proper Role of International Law in Combating Terrorism' (2002) 1 *Chinese Journal of International Law* 305, 312.

Each chapter aims to survey the ‘black letter’ law of the topic in question, explore the main doctrinal or policy-oriented controversies, criticise laws which are ineffective (from a counter-terrorism standpoint) or otherwise problematic (from a human rights, legal, or policy-oriented perspective) and, where relevant, to weigh in on those debates by making arguments or recommendations for reform.

As the chapters reveal, the problem of terrorism engages a very broad spectrum of specialised branches of law: transnational and international criminal law; the law on the use of force; state responsibility; international humanitarian law; human rights law; refugee law; international financial law; the law on development and humanitarian assistance; and the law of the United Nations and international organisations. How international law confronts terrorism cannot be understood in isolation from related developments in other legal regimes, which are also explored in this book: the law of regional organisations; the varied domestic implementation of, or resistance to, international rules; the role of judiciaries in supervising counter-terrorism; and the development of private modes of transnational governance.

In taking stock of the law after 9/11, I previously argued that terrorism is now dealt with by a combination of international legal techniques:³ (1) the ordinary application of general norms; (2) particularised interpretations of general norms to special problems presented by aspects of terrorism; (3) the application of wholly ‘new’ law emanating from sources or institutions of varying quality (some of it good, some of it bad⁴); and (4) the crystallisation of a few customary norms. I stand by that assessment, acknowledging the flux on some issues. But I also concluded that it was too soon to speak of a specialised regime of ‘international counter-terrorism law’, in the same way that one confidently speaks of the law of the sea or world trade law. The task of assembling this book has challenged that conclusion, given the critical mass of terrorism laws and practices documented by the authors in their chapters.

The existence of a specialised regime is a matter of methodology and appreciation, but also of degree. I now think it is no longer unreasonable to speak of a discernible body of ‘international counter-terrorism law’, even if such regime may not be as unified, centralised or coherent as some

³ Ben Saul, ‘The Emerging International Law of Terrorism’ in Ben Saul (ed), *Terrorism: Documents in International Law* (Hart, Oxford, 2012), lxvii, lxxxvi–lxxxvii.

⁴ Ben Saul, ‘Legislating from a radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’ (2011) 24 *Leiden Journal of International Law* 677.

others. The chapters in this book reveal a solid and irrepressible accretion of international norms and practices on terrorism, parented or serviced by competent institutions, and *recognised as a regime* by relevant actors in the system (including UN bodies, national institutions, NGOs, practitioners, and scholars). To be sure, the regime is open-textured, fragmented, and constantly changing shape. Its relationships with other specialised regimes remain messy and are still being worked out; and the meaningful legal consequences of identifying such a regime are not necessarily obvious.

Even so, international counter-terrorism law is distinctively normative (not a purely political project), systemic, and institutionalised. It is also not simply a flash in the pan after 9/11, but here to stay – for better or for worse – and builds on much older experiences of terrorism in international law. The ongoing challenge is to ensure that the regime is not let loose to run roughshod over more entrenched – but nonetheless fragile – international norms and values, whether sovereignty and non-interference, development and economic rights, or human rights and civilian protection.

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