Introduction

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In 2000, terrorism claimed 3329 fatalities; in 2015, 29 376 individuals died at the hands of terrorists.¹ Far from subsiding, terrorism has become an enduring threat to international peace and security, and a permanent feature of people's lives. By indiscriminately affecting large cities, smaller towns, religious leaders, passers-by, men, women, children, war-torn countries, large economies, North, South, East and West, most individuals are now acutely conscious that they, or a loved one, could be the next victim. Al-Qaida – the epitome of terrorism in 2001 – has become a franchise, while new terrorist groups have emerged, together with a novel *modus operandi*. Some of these groups control large swathes of territory, are financially independent, and are involved in full-fledged armed conflicts. Beyond causing immense suffering to the populations that live in territories under their control and beyond, through the commission of atrocities involving serious human rights violations and war crimes, these new terrorist groups are accused of the most appalling international crimes, including genocide, crimes against humanity, and trafficking.

In turn, some of the conflicts in which these groups are involved are national, regional, international, and transnational, due to the ever-larger numbers of foreign terrorist fighters who join them and now pose an acute and growing threat to international security,² but also to the growing numbers of States involved in the conflicts, with varying degrees of involvement. Their consequences are felt the world over, particularly as they have led to the massive displacement of people escaping violence, leading to a 'migration crisis' for countries around the Mediterranean and

¹ Institute for Economics and Peace (IEP) (2015), *Global Terrorism Index 2015* (New York: IEP); IEP (2016), *Global Terrorism Index 2016* (New York: IEP).

² UN Security Council Counter-Terrorism Committee (2015), 'Analysis and recommendations with regard to the global threat from foreign terrorist fighters' (Report prepared by the 1267 Committee), UN Doc. S/2015/358.

beyond. The close links between armed conflict and terrorism also mean that where there was once unity in the Security Council in adopting measures to counter terrorism, the Council has been paralysed over measures to address the situation in Syria, while the civilian population is bearing the brunt of the violence committed by several parties to the conflict in the name of terrorism, or of countering terrorism. These terrorist groups are also involved in transnational acts of terrorism, either directly or by proxy, having called on individuals wherever they are, and with whatever means at their disposal, to carry them out. The phenomenon of radicalization, while far from understood, appears to lead a wide range of individuals to plan and commit acts of terrorism, sometimes without any direct contact with terrorist groups. Acts of terrorism are no longer defined by large-scale planning, or the use of bombs or suicide bombers; they can be small-scale, and include machine guns, knives, or vehicles.

At the same time, since 2001, counter-terrorism measures have been adopted in all corners of the world. With every attack, new measures are considered, to the point that they now permeate nearly every aspect of life, from browsing the web to donating to a good cause, entering a shop or buying a plane ticket. Nearly every area of States' regulations now includes some element of countering terrorism, from immigration and banking to civil society, communications, education and the provision of medical care. Some States have declared a state of emergency to deal with the threat, others have engaged in torture, extraordinary rendition and secret detention, secret mass surveillance activities or targeted killings; and others yet have adopted legislation that gives sweeping powers to the executive through rights-limiting administrative measures, which increases the powers of their intelligence agencies, does away with judicial control when charges are linked to terrorism, or aims to counter violent extremism while seriously impacting on individual rights, often in a discriminatory fashion. More and more human rights are impacted, and all human rights have the potential to be impacted by these measures.

This broad-brush assessment begs the following question: why is it that since the horrific attacks in 2001 on the territory of the US, and despite the number of counter-terrorism measures that have been adopted, the threat of terrorism is greater than it was? There are many ways in which to approach this question. From a legal perspective, however, the role of respect for human rights in any effective counter-terrorism strategy is central.

When asked why it is important to respect human rights while countering terrorism, the answer of the human rights community is often confined to a simple argument of basic principle: namely, that States

must uphold their international law obligations. But dogmatic arguments rooted in international law weigh little with State authorities responsible for protecting their populations from the threat of terrorism. This is particularly true when they are set alongside arguments made by the security community (broadly speaking, the intelligence agencies, the military and the police), which often considers that protecting citizens' security and human rights pull in opposite directions, and force States to choose the former at the expense of the latter. This deep-rooted view has obstructed the full application of the human rights framework in counter-terroring terrorism.

But what if the human rights arguments actually addressed the concerns of governments? What if the human rights answers helped governments to reduce the threat of terrorism more effectively? What if human rights law was seen as a powerful tool in governments' struggle against terrorism, instead of an inconvenient obstacle? This book aims to show how some of the excesses of post-September 2001 counter-terrorism legal and policy choices have been counter-productive, and offer another perspective to States on how respect for human rights can lead to more effective counter-terrorism action.

It is increasingly clear that the strict security approaches that had been adopted in the immediate aftermath of 9/11 have not only been ineffective, but they have also been counter-productive. As stated by the United Nations (UN) High Commissioner in his opening statement to the 35th session of the Human Rights Council:

Counter-terrorism must be prosecuted intelligently: that is, while preserving the human rights of all. Please remember this: for every citizen wrongfully detained under a vague anti-terrorism law, and humiliated, abused, or tortured, it is not simply one individual who then nurses a grievance against the authorities, but most of their family too. Send one innocent person to prison, and you may deliver six or seven family members into the hands of those who oppose the government, with a few who may even go further than that. The cost of a wrongful detention dramatically outweighs whatever benefit it is perceived to accrue. To counter violent extremism, we must stand firm and insist on its opposite: peaceful inclusion.³

Too often, governments have forgotten that the fight against terrorism is in fact a fight for the values of human rights. Where terrorism is fought through means that violate human rights, or that undermine fundamental

³ Opening Statement by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21687>, accessed 22 June 2017.

freedoms, the result is that more individuals are ready and willing to resort to the unacceptable use of terrorist violence. This is unfortunately what the figures given at the beginning of this introduction show. And the price future generations will have to pay if nothing changes will be even greater than the cost that is borne by the present generation.

While providing a substantive legal analysis of the links between human rights and counter-terrorism, this book focuses on the importance of respecting human rights as an essential component of an effective counter-terrorism strategy. The main argument that the book develops is the fact that beyond the perceived dichotomy between human rights and security or, as often put, liberty and security, a State's lack of respect for human rights not only hinders its current fight against terrorism but in fact perpetuates the problem. It will show that, contrary to the conventional wisdom, respect for human rights does not hinder the fight against terrorism; it actually assists it from a moral, legal, judicial and operational perspective. The objective is to go beyond taking stock of what has happened, through an analysis of the legislative changes and the human rights violations that have occurred since 2001. The book aims to contribute to finding an explanation of why what has happened has sometimes not worked and will continue not to do so, and how to 'get it right', through a more paused, principled and longer term vision of the great many challenges of defeating terrorism. Thus, following an overview of the various developments at institutional level, and an analysis of developments since 2001, the book examines how a human rights compliant response to countering terrorism can assist from an operational, legal, judicial and moral standpoint.

Each chapter is written by an expert who has worked on these issues at the international and regional levels in great depth. The experts all have a wide breadth of practical experience of dealing with these challenges first hand: some have had an international or regional mandate given to them by an international body to examine these questions, others have worked on these issues at the international level and have therefore a unique mix of practical and theoretical approach to them. In all cases, it is their work at the international, regional and national level, with governments, non-governmental organizations (NGOs), the judiciary, the police and the victims, which adds value to this publication. Each chapter focuses on a cross-cutting theme, and significant examples from various countries or regions are drawn upon to illustrate the arguments made.

The co-editors have both worked on these issues at the international level. **Manfred Nowak** was the UN Special Rapporteur on torture from 2004 to 2010. Throughout this time, working with governments, inter-governmental and NGOs, victims and witnesses, and through various

means, including fact-finding missions in Georgia (including Abkhazia and South Ossetia), Mongolia, China (including the autonomous regions of Tibet and Qincang), Nepal, Jordan, Paraguay, Togo, Nigeria, Sri Lanka, Indonesia, Denmark (including Greenland), the Republic of Moldova (including Transnistria), Equatorial Guinea, Uruguay, Kazakhstan, Jamaica, Papua New Guinea and Greece), he has gained an invaluable insight into the use of torture in the global fight against terrorism. Together with other Special Procedures mandate holders, he prepared studies on the situation of detainees in the US detention centre at Guantánamo Bay (Cuba) and on the global phenomenon of secret detention in the fight against terrorism. **Anne Charbord** has been working on human rights and counter-terrorism issues mainly for the Office of the UN High Commissioner for Human Rights (OHCHR) since 2006. She has provided assistance to the first two UN Special Rapporteurs on the protection and promotion of human rights while countering terrorism, Martin Scheinin and Ben Emmerson, and she has also worked on these issues for the High Commissioner and within the UN Counter-Terrorism Implementation Task Force, in New York, where she was the first to represent OHCHR within that body, and to lead its Working Group on Human Rights. Together, they wrote **Chapter 1**, entitled **Key trends in the fight against terrorism and key aspects of international human rights law**. The chapter provides a general overview by highlighting key developments and assesses what 9/11 has changed in terms of answers to terrorism at the international and at the national level. Following a short historical approach to the way terrorism has been dealt with by the UN, the chapter identifies some of the key conceptual and legal fractures between pre- and post-2011 responses to terrorism by identifying main trends in the fight against terrorism while contrasting them with international law, such as the use of the war paradigm, the externalization of measures to limit the applicability of human rights law, attempts at circumventing the prohibition of torture, reliance on intelligence and national security doctrines, and the instrumentalization of various branches of law to counter-terrorism. The chapter then recalls critical aspects of international human rights law, notably its ability to respond to the serious threat of terrorism faced by many governments.

Martin Scheinin was appointed as the first UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, a position of trust he held until July 2011. During this time, through a number of country visits to Turkey, Tunisia, Peru, Egypt, Spain, South Africa, the United States of America and Israel, as well as through research and engagement with States, victims, civil society, national human rights institutions and other stakeholders, he

identified the main conceptual issues of concern for the mandate, which have remained as challenges for his successors and the rest of the international community, most notably those posed by overly broad and vague definitions of terrorism. He also contributed to the joint studies prepared by UN Special Procedures on the situation of detainees in the US detention centre at Guantánamo Bay (Cuba) and on the global phenomenon of secret detention in the fight against terrorism, and identified ten areas of best practice in countering terrorism, which remain a staple reference today. Martin Scheinin wrote the second chapter, entitled **Impact of post-9/11 counter-terrorism measures on all human rights**. The chapter highlights how measures that have been adopted in the post-2001 context have undermined the whole gamut of human rights – civil, political, economic, social and cultural. In particular, it explains the key role played by the UN counter-terrorism regime, particularly Security Council resolutions 1373 (2001) and 2178 (2014) and the Al-Qaeda sanctions regime, before looking at key human rights concerns posed by this regime, notably the absence of a definition of terrorism, which has enabled States to adopt wide-ranging measures which have impacted on the rights of many individuals, including women, children, civil society, minorities, human rights defenders, political opponents and individuals in detention and led to increased powers given to the executive, increased surveillance and increased criminalization of preparatory offences.

Ben Emmerson was appointed second UN Special Rapporteur on the promotion and protection of human rights while countering terrorism in 2011. Throughout his six-year tenure, and through country visits in Burkina Faso, Chile, Tunisia, Saudi Arabia and Sri Lanka, he examined the human rights consequences of the change in nature of international terrorism, including the human rights challenges posed by the fight against Islamic State in Iraq and the Levant, and of the new tools States have developed to counter the threat, some of which are highly controversial from a human rights perspective. He focused on the use of drones in counter-terrorism operations, the use of mass digital surveillance for terrorism purposes, the negative impact of measures to counter terrorism on civil society and the rights of migrants. He developed framework principles for securing the accountability of public officials for gross or systematic human rights violations in the course of countering terrorism, and a set of framework principles for securing the human rights of victims of terrorism. He also addressed the human rights impact of measures to prevent and counter violent extremism. In **Chapter 3**, entitled **New counter-terrorism measures: Continuing challenges for human rights**, Ben Emmerson explores the counter-terrorism measures

that have been adopted by States in response to new and emerging terrorist threats and continuing terrorist attacks in the years that followed the immediate post-2001 context. The chapter examines how a number of recent developments in countering terrorism pose particular threats to human rights, including the increased use of remotely piloted aircrafts ('drones') in counter-terrorism operations; mass digital surveillance for counter-terrorism purposes; measures to address the phenomenon of 'foreign terrorist fighters'; measures to counter the financing of terrorism which seriously impact on civil society; measures to counter-terrorism which impact on the human rights of migrants; and measures to address 'violent extremism' which can also adversely impact on a range of human rights. It persuasively concludes that these new measures adopted with little regard for human rights and for which there is little accountability will likely be, like those adopted in the aftermath of 2001, not only ineffective, but also counter-productive, by fuelling the violent actions they are meant to be curtailing.

Fionnuala Ní Aoláin was appointed third UN Special Rapporteur on the promotion and protection of human rights while countering terrorism in 2017. She is a leading expert in the field of human rights, national security and feminist legal theory, having extensively focused her work on emergency powers, conflict regulation, conflict and post-conflict societies, transitional justice and gender issues. She has examined at length counter-terrorism issues, with her initial work on the use of force by State agents during the conflict in Northern Ireland through to a later publication on the use of exceptional courts across numerous jurisdictions, with particular emphasis on post-9/11 developments. She has also focused on the specific issues surrounding the role of women and gender in terrorism and countering-terrorism. In **Chapter 4**, entitled **The complexity and challenges of addressing the conditions conducive to terrorism**, Fionnuala Ní Aoláin seeks to advance a better understanding of the causes of terrorism as defined and understood by States, inter-State agreement, and international institutional definitions. The chapter addresses some of the challenges in defining terrorism, which underscore how difficult it may be to hone in on the core phenomenon without engagement with the wider context of politically motivated individual and collective violence. The chapter sets out in broad scope some of the sketchily agreed-upon conditions conducive to the production of terrorism. The analysis cautions against linear over-reaching on defining what constitutes the causes of terrorism. Ní Aoláin argues that we should not circumvent the inevitable realization that causalities overlap, and that there are intersectional explanations clarifying the phenomena of terrorism. Ní Aoláin thus convincingly notes that identifying broad causes are

a necessary but not sufficient means to explain the resort to terrorist violence in particular cases and geographies. The chapter also addresses individual mobilization to terrorism through the lens of empirical analysis combined with the theoretical lens of masculinities. The chapter brings a welcome focus on gender, which has been largely missing from the discussions of terrorism causes and is a major oversight, and affirms the importance of a gender lens as a means to advance greater empirical sophistication and theoretical attention to understanding the contexts and conditions that produce terrorism.

After working in the International Secretariat of Amnesty International and for the OHCHR, **Lisa Ginsborg** wrote her doctoral thesis on the UN Security Council, counter-terrorism and human rights after 9/11, looking specifically at the implications of the work of the UN Counter-Terrorism Committee and the 1267 Sanctions Committee on international human rights standards. In **Chapter 5, entitled One step forward, two steps back: The Security Council, 'foreign terrorist fighters' and human rights**, Lisa Ginsborg analyses how, through resolution 2178 (2014) the Security Council imposed a number of binding measures to be taken by all UN Member States to counter the threat of 'foreign terrorist fighters'; and terrorism more generally. She notes how the resolution is reflective of both the problems and the 'progress' made in the last decade in the field of counter-terrorism. In its failure to define terrorism while imposing broad counter-terrorist measures, and in its introduction of a legally problematic definition of 'foreign terrorist fighters', it repeats some familiar mistakes of the post 9/11 Security Council action, while also introducing some new human rights risks by entering more forcefully into the regulation of border crossing. However, the resolution also shows some signs that the Security Council may have learnt, at least in part, that the complete disregard of human rights is not always helpful from a security perspective. Further, the resolution is significantly new in its focus on countering violent extremism (CVE) in order to prevent terrorism under the guises of Security Council Chapter VII action. While significant risks remain in its implementation, related to the abuse of the notion of extremism, discriminatory practices in community engagement, civil society repression through CVE engagement, the right to privacy and freedom of expression online, Ginsborg concludes that resolution 2178 reflects the hope that a more preventive long-term approach may also be entering the Security Council agenda, in which human rights promotion and protection are seen as a vehicle to prevent and counter terrorism.

Richard Barrett is a leading expert in security and counter-terrorism. After spending 25 years with the British government working in the

Security Service, the Foreign Office, and the Secret Intelligence Service, including as Director of Global Counter Terrorism Operations both before and after the 9/11 2001 attacks in the US, he led the Monitoring Team that supports the UN Security Council Committee pursuant to resolution 1267 (1999) from 2004 to 2013. He was also a founding member of the UN Counter-Terrorism Implementation Task Force, and chaired its Working Group on terrorist use of the internet and countering the appeal of terrorism. He has since been designated as one of the Global Experts of the Alliance of Civilizations, and is a member of the Soufan Group. **Tom Parker** has over fifteen years of experience in human rights and security issues. He has recently worked for the UN Counter-Terrorism Implementation Task Force and the Office of the High Commissioner for Human Rights, as well as for the UN Counter-Terrorism Centre, where he led a project on the development of national and regional counter-terrorism strategies in Southern and Central Africa, and worked on the development of the UN's Preventing Violent Extremism Plan of Action for the Office of the Secretary-General. Together, Richard Barrett and Tom Parker wrote **Chapter 6**, entitled **Acting ethically in the shadows: Intelligence gathering and human rights**, which sets out to explain the way in which State obligations under human rights law influence the information gathering activities of domestic and foreign intelligence services. The chapter convincingly argues that given the necessary secrecy surrounding their work, and the risk of weak public accountability and oversight mechanisms as a result, it is all the more important that the intelligence services are conversant with and observe the law. It notes that there are clear legal limits on intelligence gathering, whether undertaken directly by an intelligence agency or by someone acting on its behalf, as well as legal limits on the use of illegal techniques such as torture. With specific regard to intelligence related to terrorism, the chapter looks at ethical issues around tasking sources, their activities and the dissemination of their information. It highlights the limits on intelligence gathering, and very persuasively dismisses any justification of ticking bomb scenarios.

Ulrich Garms has extensive experience on human rights and counter-terrorism issues, having worked with the Human Rights Chamber for Bosnia and Herzegovina, the OHCHR and the Special Tribunal for Lebanon, which was the first international tribunal adjudicating terrorism cases. He currently works for the Terrorism Prevention Branch of the UN Office on Drugs and Crime (UNODC), where he provides advice to requesting States on their counter-terrorism legislation, and designs and delivers training on the investigation and prosecution of terrorism cases

to investigators, prosecutors and judges, primarily in countries in Sub-Saharan Africa. He has led the development of several UNODC publications on human rights aspects of criminal justice in terrorism cases. Ulrich Garms wrote **Chapter 7**, entitled **The preventive criminal justice strategy against terrorism and its human rights implications**. The chapter first explains how the preventive criminal justice approach against terrorism is pursued by many States and promoted by the UN, the European Union and the Council of Europe because it promises to marry the prevention of acts of terrorism with the rule of law, due process and the human rights safeguards of the criminal justice system. Yet a preventive criminal justice strategy against terrorism requires, first, laws that criminalize conduct that takes place long before an attempt to commit a violent act has taken place, through ‘advanced criminalization offences’. The chapter explores the criticisms put to these offences, as well as the legal policy questions and practical challenges they raise through an analysis of selected case law and of the debates surrounding the enactment of legislation creating new advanced criminalization offences in several countries. Second, a preventive criminal justice strategy against terrorism requires broad use of so-called ‘special investigation techniques’ and intelligence sources. The chapter discusses their impact on fair trial guarantees, and argues that their use inevitably requires the limitation of some fair trial safeguards. Garms convincingly concludes that the preventive criminal justice strategy against terrorism – inspired by the rule of law and human rights – does not come without side effects that are undesirable from a human rights perspective.

As advisor on human rights and security policies with the UN Office of the High Commissioner for Human Rights in Geneva, **Lisa N. Oldring** has been the principle author of UN reports on human rights and counter-terrorism legislation, policy and practice, global surveillance practices and the right to privacy in the digital age, on the use of force, foreign fighters, and other related issues. She has also been a legal advisor to International Commissions of Inquiry on Darfur, and on Lebanon, as well as the Special Advisor to Mary Robinson in her position as Chair of the GAVI Board, an attaché to the International Committee of the Red Cross; and human rights field officer with the UN field mission in Rwanda. In **Chapter 8**, entitled **Questions of accountability in countering terrorism**, Lisa Oldring examines the overarching questions for human rights violations in the context of countering terrorism, both as a question of moral effectiveness as well as legal duty. She focuses on three main challenges: the definition of terrorism and the legal framework applied by States in terrorism-related cases; the expansion of intelligence agencies’ powers without effective oversight or

safeguards against abuse; and the influence of national security considerations on criminal justice, notably through the expanded use of the state secrets' privilege.