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 specialized regime to counter it.[1] Instead, general international law was applied, including the interrelated obligations on all states (1) not to intervene or use force against other states, including indirectly by acting through, or assisting, private actors; (2) to refrain from tolerating or acquiescing in private activities in their territory which direct violence at other states (whether such violence takes place in the host state or the victim state); and (3) to diligently suppress private activities in their territory which direct violence at other states.[2]

The only special norms developed were the many, but modest, transnational criminal cooperation treaties adopted from the 1960s, which required states to criminalize certain commonly used methods and cooperate in the investigation and prosecution or extradition of suspects. Terrorism was chiefly regarded as a domestic law enforcement problem, not a form of warfare or a challenge to global security. Only rarely did the UN Security Council address terrorism as a threat to international peace and security, as when it compelled Libya to surrender the suspects in the bombing of a civilian airline over Lockerbie, Scotland, in 1988; demanded that Sudan surrender Osama Bin Laden in 1995; and later demanded the same of the Taliban in Afghanistan from 1998 onwards.

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. This quasi-legislative approach signalled a more coercive approach than the earlier sectoral treaties, which involved states consenting to be bound, after freely participating on treaty negotiations on an equal footing.

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, espe-

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

2 See e.g. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to UNGA resolution 2625 (XXV) (24 October 1970), principle of non-intervention [2], principle of non-use of force [7–8]; Declaration on Measures to Eliminate International Terrorism, annexed to UN General Assembly resolution 49/60 (9 December 1994), [5(a)]; UN Global Counter-Terrorism Strategy, annexed to UN General Assembly resolution 60/288 (20 September 2006), Pillar II [1]; UN Security Council resolution 1373 (28 September 2001), [2(a)–(g)]. See generally Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Vol 1: Peace* (9th edn, Pearson, 1996), 393–403 and 549–54.

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cially on human rights grounds, from international, regional, domestic and non-state actors. The predominant resort to law enforcement and war paradigms also tended to erase or obscure the causes of terrorism.[3]

This book attempts to make sense of these developments and to assess how international law has responded to terrorism, at a distance of almost two decades 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.

Each chapter aims to survey the 'black letter' law of the topic in question, explore the main doctrinal or policy-oriented controversies, criticize 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 specialized 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 organizations. 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 organizations; 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:[4] (1) the ordinary application of general norms; (2) particularized 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 bad[5]); and (4) the crystallization 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 specialized 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 specialized 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, centralized or coherent as some 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 *recognized 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 specialized regimes

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[3] Georges Abi-Saab, 'The proper role of international law in combating terrorism' (2002) 1 *Chinese Journal of International Law* 305, 312.

[4] Ben Saul, 'The emerging international law of terrorism', in Ben Saul (ed.), *Terrorism: Documents in International Law* (Hart, Oxford, 2012), lxvii, lxxxvi–lxxxvii.

[5] 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.

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remain messy and are still being worked out; and the meaningful legal consequences of identifying such a regime are not always obvious. Even so, international counter-terrorism law is distinctively normative (not a purely political project), systemic, and institutionalized.

Since the first edition of this book (in 2014), that process has continued to solidify and indeed accelerate, following the dramatic territorial victories of Islamic State in Iraq and Syria in 2015. In response to contemporary developments, in addition to updates to all chapters, this book contains new chapters on contemporary challenges and developments, including foreign terrorist fighters; the conditions conducive to terrorism and the prevention of violent extremism (PVE) (including by social media companies); and the nexus between terrorism and organized crime.

Significant reforms to UN counter-terrorism architecture are also addressed. These include the establishment of the UN Office of Counter-Terrorism (UNOCT) in 2017, headed by an Under-Secretary-General; the adoption of the UN Global Counter-Terrorism Coordination Compact in 2018, which seeks to improve the coordination and coherence of UN counter-terrorism efforts; and the creation of the UN Global Counter-Terrorism Compact Task Force (GCTCTF), also in 2018, comprising 38 UN and other entities engaged in counter-terrorism.

International counter-terrorism law now sprawls across numerous substantive fields of law, engages a plethora of actors (from humanitarians to development professionals to law enforcement), and diffuses through a diverse array of mechanisms, procedures and institutions. 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, especially human rights, humanitarian action and civilian protection, and the rule of law.

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