Terrorism and the Security Council

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Terrorism
A Central Role for the Security Council and a Space of Unaccountability

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Abstract
It is generally agreed that terrorism presents a security challenge, but consensus does not extend to how best to address it. This chapter zeroes in on the central role that the Security Council has assumed in tackling terrorism and how this affects the broader global security landscape. The main argument of our chapter is that the expansion of the Security Council's role and its counter-terrorism strategies have gradually contributed to indeterminacy and opened up a space of unaccountability in counter-terrorism. The chapter focuses on (i) the Council's sanctions policies and the creation of a quasi-permanent counter-terrorism sanctions regime under Chapter VII, and (ii) the Council's "legislative" activities including specifically those regarding foreign terrorist fighters and provocation. The chapter exposes the underlying tendencies and ulterior effects of both sets of measures, including the increasing involvement of the private sector and particularly financial institutions in the implementation of counter-terrorism laws and sanctions regimes, and a reflex of overcriminalization through binding Chapter VII legislation. The impact on the full range of human rights, participative democracy and the shrinking space for civil society, humanitarian assistance and peacebuilders, is profound. The underlying thread of the chapter is a story of unaccountable actors in counter-terrorism practices and the adverse effects on security in the long run.

1. Introduction

It is generally agreed that terrorism presents a security challenge, but such consensus does not extend to how we should understand that challenge still less to how best to address it. The traditional way of addressing terrorism in international law was through specialized treaties.[1] After 9/11, this conventional approach was largely replaced by an unprecedented international response model in which the Security Council assumed a central role for itself. For two decades now, the Security Council has been the dynamo of international counter-terrorism policies, generating a proliferation of resolutions containing detailed regulations.

This chapter discusses the Security Council's intense regulatory approach to counter-terrorism and critically engages with its consequences, including the direct and indirect repercussions and implications for affected individuals, and the broader global security landscape. The main argument of our chapter is that the expansion of the Security Council's role and its counter-terrorism strategies have gradually opened up a space of indeterminacy and unaccountability. The chapter focuses on (i) the Council's sanctions policies and the creation of a quasi-permanent counter-terrorism sanctions regime under Chapter VII, and (ii) the Council's ever-expanding "legislative" activities including regarding what it called "foreign terrorist fighters" and incitement or provocation. The chapter exposes the underlying tendencies and ulterior effects of these measures, including their reflex of over-criminalization in respect of undefined or ill-defined phenomena, and the increasing involvement of the private sector including financial institutions in the implementation of counter-terrorism laws and sanctions regimes. The impact on the full range of human rights, participative democracy and the shrinking space for civil society, humanitarian assistance and peacebuilders, is profound. The

[1] As also observed in the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (3 September 2019) UN Doc. A/73/45453, para 9 (hereafter Report on the Promotion of Human Rights).

underlying thread of the chapter is a story of unaccountable actors in counter-terrorism practices and the adverse effects on security in the long run.

2. Terrorism as a General Threat to Peace?

The phenomenon of terrorism has long featured on the international agenda, but it has undergone a meteoric rise from being predominantly viewed as a matter of general 'international concern'[2] to being perceived as one of the most serious threats to peace and security. This perception has solidified, at least at Security Council level. While recognizing that the terrorist threat had become more diffuse, the Council remains steadfast in its view that "terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security."[3] The number of resolutions repetitively condemning terrorism has increased following the rise of the Islamic State in Iraq and the Levant, also qualifying terrorism as a "global and unprecedented threat to international peace and security".[4] However, while there is a certain universality in the perception of terrorism as a threat,[5] consensus does not extend to the definition and scope of terrorism itself. The lack of an internationally accepted definition, and vastly divergent regional and national definitions, is well known.[6] Despite overwhelming expressions of support by states and institutions for defining terrorism and adopting a comprehensive counter-terrorism convention post 9/11, old controversies[7] promptly reemerged and have impeded the adoption of a global convention. Nor does consensus appear to extend to how to respond to the undefined terrorist threat. A striking feature of counter-terrorism practice, including Council resolutions, has been the growing – and understandable - focus on strategies of prevention. However this has evolved along several quite distinct, and at times apparently contradictory, strands.

One strand focuses on a preventive approach to addressing causes of and contributors to terrorism. The attention to what was once called the 'root causes' of terrorism peaked in the post-colonial period, but was marginalized during the 1980s, in part because of the perceived danger of justifying terrorism. The 1994 General Assembly Declaration on Measures to Eliminate International Terrorism was seen as a milestone in condemning terrorism unreservedly as never justifiable in any circumstances.[8] The immediate post-9/11 spirit followed this trend, but aspects of the debate were revisited after the dust settled. The Secretary-General broached the need to consider the link between terrorism and its causes and contributors in his In Larger Freedom report, observing rather neutrally: *While poverty and denial of human rights may not be said to 'cause' civil war, terrorism or organized crime, they all greatly*

[2] See, e.g., the first General Assembly Resolution on Measures to Prevent Terrorism, Res 3034 (18 December 1972) UN Doc. A/RES/3034 (XXVII). See also Declaration on Measures to Eliminate International Terrorism, UN Doc. A/RES/49/60 (1994), para 2: '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'. This declaration was followed by UNGA Res 51/210 (17 December 1996) A/RES/51/210. Also see the related report of the Secretary-General, UN Doc. A/51/336 (1996).

[3] UNSC Res 2178 (24 September 2014) UN Doc. S/RES/2178, first preambular para. Similarly in UNSC Res 2249 (20 November 2015) UN Doc. S/RES/2249; UNSC Res 2253 (17 December 2015) UN Doc. S/RES/2253; UNSC Res 2322 (12 December 2016) UN Doc. S/RES/2322; UNSC Res 2368 (20 July 2017) UN Doc. S/RES/2368; UNSC Res 2395 (21 December 2017) UN Doc. S/RES/2395; UNSC Res 2396 (21 December 2017) UN Doc. S/RES/2396.

[4] UNSC Res 2249 (n 3), 5th preambular para. On the matter of ISIL's unparalleled threat to the international community, Cóman Kenny ('Prosecuting Crimes of International Concern: Islamic State at the ICC?' (2017) 33 *Utrecht Journal of International and European Law* 120, 122) holds that the ICC should be involved in the prosecutions of the terrorists' crimes, which are of such degree that 'piecemeal domestic prosecution is unsuitable'.

[5] Jane Boulden, 'The Security Council and Terrorism' in Vaughan Lowe et al (eds.), *The United Nations Security Council and War* (OUP, 2010), 608.

[6] Helen Duffy, *War on Terror and the Framework of International Law* (CUP 2nd edn 2015), Ch. 2.

[7] *ibid* Ch. 2, 34.

[8] UNGA Res 49/60 (n 2).

increase the risk of instability and violence.[9] More concretely, in his report Uniting against Terrorism, the Secretary-General called for a comprehensive response that addressed the underlying dynamics and a broad range of "conditions conducive to terrorism," including extremist ideologies and dehumanization of victims, violent conflict, poor governance, lack of civil rights and human rights abuse, religious and ethnic discrimination, political exclusion and socio-economic marginalization.[10] This comprehensive approach to addressing prevention through addressing 'conditions conducive' to the spread of terrorism has become widely endorsed on the regional and international levels - reflected for example in the General Assembly's World Summit Outcome,[11] and most critically as a pillar of the UN Global Counter-Terrorism Strategy.[12] The Security Council has subsequently endorsed the need to "to take measures, pursuant to international law, to address all drivers of violent extremism conducive to terrorism, both internal and external, in a balanced manner as set out in the United Nations Global Counter-Terrorism Strategy."[13] In language that is now commonplace, the Council recognizes that and to "*recogniz[e] that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing."*[14]

However, the recognition of human rights, poverty or conflict as conditions conducive to terrorism is not necessarily reflected in the other strand of the Council's preventive approach, in which the emphasis has been on increasingly coercive counter-terrorism measures, overcriminalisation and exceptional administrative measures, mandated by the Council. In fact human rights courts and bodies and civil society actors have frequently critiqued the serious violations that arise from militarization of counter-terrorism approaches, and the use of counter-terrorism laws and policies to stifle and punish dissent, the defence of human rights and peace-building initiatives, and the threats they pose.[15] As the Special Rapporteur on Human Rights and Terrorism has noted: "the Security Council does not serve its own peace and security interests well if it ignores this fundamental connection [between repressive counter-terrorism measures and conditions conducive to terrorism]."[16]

The consensus on perceiving 'terrorism' as a threat andon the relationship between counter-terrorism responses and the protection of peace and security, may well then be more limited in scope than is

[9] UNGA 'Larger Freedom' (n **Error! Bookmark not defined.**), para 16. Concept also visible in UNGA Res 72/284 (2 July 2018) UN DOC A/RES/72/284, 36th & 37th preambular paras.

[10] UNGA 'Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy. Report of the Secretary-General' UN Doc. A/60/825 (2006) (hereafter UNGA 'Uniting against terrorism'), para 20*i,* 21-38.

[11] UNGA Res 60/1 (24 October 2005) UN Doc. A/60/1, para 82. Similarly, the G8 held in its St Petersburg Statement of 16 July 2006 on Strengthening the UN's Counter-Terrorism Program, 'A comprehensive response to the urgent threat of terrorism must be a core focus of the UN. While the Security Council should continue to play its crucial role… other UN organs, organizations and bodies must strengthen their efforts as well, thus, contributing to the broader counter-terrorism effort through capacity building, education, economic development and by addressing the facilitating factors that may breed terrorists… Counter-terrorism should be addressed across the UN system in a coherent and coordinated way'.

[12] UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288, Annex, Section I (''Measures to address the conditions conducive to the spread of terrorism); UNGA Res 72/284 (n 9), paras 10-12.

[13] UNSC Res 2395 & 2396 (n 3).

[14] *See* UNGA 'Uniting against terrorism' (n **Error! Bookmark not defined.**); leading to the United Nations Global Counter-Terrorism Strategy (A/RES/60/288 of 8 September 2008). The preamble notes: *'Recognizing* that development, peace and security, and human rights are interlinked and mutually reinforcing'. *See* pillars 1 and 4.

[15] Press Release, 'Global Group of NGOs Deplore Lack of Attention to Human Rights in Latest Review of UN's Global Counterterrorism Strategy by UN Member States' (FIDH, 11 July 2018) < https://www.fidh.org/en/global-group-of-ngos-deplore-lack-of-attention-to-human-rights-in> accessed 10 February 2019.

[16] Report on the Promotion of Human Rights (n 1), para 44. Fionnuala Ni Aolain, The Complexity and Challenges of Addressing the Conditions Conducive to Terrorism in Human Rights and Counter-Terrorism (eds) Manfred Nowak and Anne Charbord (Edward Elgar) (2018).

sometimes portrayed. What is clear is that pursuant to the Security Council's constant determination that terrorism posed a general threat to peace and security, unprecedented Security Council measures have been adopted, including (i) the design of a quasi-permanent sanctions regime under Chapter VII and (ii) intense legislative activities obliging or calling on states to take myriad criminal, administrative or other measures against a growing range of undefined phenomena. These are discussed in turn in the subsequent sections.

3. A Quasi-permanent Counter Terrorism Sanctions Regime

3. A Quasi-permanent Counter Terrorism Sanctions Regime

One of the Council's counter-terrorism responses concerned a Chapter VII sanctions regime that overtime became quasi-permanent. This section discusses the evolution and transformation of the 1267 UN sanctions regime from its Taliban-origins to its current IS/Daesh-focus and beyond. International lawyers have mostly engaged with this regime through concerns of procedural fairness, testing the institution of the Ombudsperson, which was uniquely created for this specific UN sanctions regime, against the human right to a remedy. These discussions will be briefly recapitulated, also linking them to the broader implications of having a standing Chapter VII counter-terrorism sanctions regime, and thus also engaging in a broader interrogation on how the counter-terrorism sanctions regime that was designed relates to core ideas underpinning the rule of law. Moving beyond the fairness discussions, this section also highlights the role of private actors in the implementation of the Security Council's counter-terrorist sanctions and it discusses ulterior effects of the regime, e.g., on development, humanitarian assistance and peacebuilding. Lastly, the section questions how the use of UN counter-terrorism sanctions as surrogate enforcement and / or accountability measures affects the sanctions domain more broadly both at Security Council level as well domestically.

3.1 The evolution of the 1267 sanctions regime

As is well known, the 1267 sanctions regime was established in 1999 as a regular sanctions regime.[17] It was created as a direct reaction to terrorist attacks in East Africa. Similar to other co-existing sanctions regimes, it imposed sanctions on elite decision-makers exercising *de facto* control in Afghanistan, the Taliban.[18] After 9/11, the 1267 regime – so called after its founding resolution – ceased to be regular. Resolution 1390 reinvigorated the regime and extended it to also address the threat posed by Al Qaeda. Effectively, Resolution 1390, rendered the 1267 regime unique as it severed geographical ties and turned 1267 into a sanctions regime with global reach.[19] This development tapped into the potential created by the Security Council's generic determination of terrorism as a threat to peace.

Within a decade, the combined threat that the Taliban and Al Qaeda posed in 2001 gradually morphed.[20] The distinction between the two groups became more predominant than their mutual connections, which made their grouping in one sanctions regime less obvious. Furthermore, with a view to promoting the comprehensive process in Afghanistan, the Afghan government requested a

[17] UNSC Res 1267 (15 October 1999) UN Doc. S/RES/1267.

[18] For a description of 1267's transformation, also see Lisa Ginsborg, 'UN Sanctions and Counter-terrorism Strategies: Moving Towards Thematic Sanctions Against Individuals?' (hereafter Ginsborg, *Counter-terrorism Strategies)*, in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law* (Elgar, 2017), 73-104 (hereafter Van den Herik, *UN Sanctions Handbook)*.

[19] UNSC Res 1390 (16 January 2002) UN Doc. S/RES/1390.

[20] UNSC 'Eleventh Report of the Analytical Support and Sanctions Implementing Monitoring Team established pursuant to Resolution 1526 (2004) and extended by Resolution 1904 (2009) concerning Al Qaeda and the Taliban and associated individuals and entities' (13 April 2011) UN Doc. S/2011/245, para 16.

more flexible and expedient approach to delisting requests for Taliban members that were engaged in reconciliation processes and who had severed their ties with Al Qaeda.[21] In light of these developments, the Security Council split the 1267 regime up in two separate regimes, one targeting the Taliban as a national movement (the 1988 sanctions regime) and one targeting Al Qaeda as a global actor (the 1989 sanctions regime).[22] Another major turning point for the regime came with Resolution 2253.[23] This resolution expanded the regime yet again in a different direction to also covering IS/Daesh. Through resolution 2253, the Security Council created a clear legal basis for the intention that it had already expressed in Resolution 2170, namely of using the 1267 regime to address the threat posed by IS.[24] The regime was renamed as the 1267/1989/2253 ISIL (Da'esh) and Al Qaeda sanctions regime, and the emphasis came to lie with IS rather than Al Qaeda. The regime thus targeted different terrorist groups that were actually opposed to each other through one and the same sanctions regime, and its targeting loop also included relatively loosely associated groups such as the Organization of Al-Qaida in the Islamic Maghreb and others operating in Mali and the Sahel region.[25]

This trajectory of the regime led to the observation that, "the current 1267 regime has evolved into the realm of the permanent exception."[26] This permanence may be in tune with an enduring reality of an ongoing terrorist threat with expanding geographical reach. It is, however, more difficult to shoehorn it into Chapter VII's exceptional emergency status. For this reason, it has been suggested that the creation of a separate body rather than continuing a Security Council sanctions committee might be more opportune to address this threat.[27]

In the meantime, the Security Council indicated that it considered expanding the regime to including targeted sanctions for individuals and entities involved in trafficking in persons in areas affected by armed conflict and in sexual violence in conflict thus expanding the regime beyond a mere counter-terrorism regime.[28] The Security Council also integrated a stronger accountability dimension through the creation of a Special Adviser who had the mandate to support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq.[29] Through these and other measures, the 1267 regime gradually became more intertwined with other counter-terrorism measures, including those concerning foreign terrorist fighters, which are discussed below in section 4.

3.2 The 1267/1989/2253 regime and its broader legacy on the security landscape

With the situation in Syria evolving, it remains to be seen what will ultimately happen to the 1267 regime. In addition to prescient analyses, it might be worthwhile though to reflect on 1267's legacy and its broader impact on the security landscape through rule of law lenses. 1267's broader legacy, i.e., where the regime highlighted fundamental problems in the sanctions architecture or resulted in changes and transformations that will surpass its own existence, can be situated in three relevant domains that concern 3Ps: Procedure, Practice and Policy.

P1) Procedural fairness: the Ombudsperson as a legacy or a memory?

[21] *ibid*, para 17.
[22] UNSC Res 1988 (17 June 2011) UN Doc. S/RES/1988; UNSC Res 1989 (17 June 2011) UN Doc. S/RES/1989.
[23] UNSC Res 2253 (n 3).
[24] UNSC Res 2170 (15 August 2014) UN Doc. S/RES/2170, paras 7/18.
[25] UNSC Res 2295 (29 June 2016) UN Doc. S/RES/2295.
[26] Sue Eckert, 'The Evolution and Effectiveness of UN Sanctions', in Van den Herik, *UN Sanctions Handbook* (n **Error! Bookmark not defined.**).
[27] *ibid*, 68.
[28] UNSC Res 2368 (n 3), para 15.
[29] UNSC Res 2379 (21 September 2017) UN Doc S/RES/2379, paras 2/3.

For many international lawyers, the 1267 regime is best known for the litigation it generated - with the infamous *Kadi* case at the apex. The judgements rendered by EU courts propelled institutional reform at Security Council level ultimately resulting in the creation of the Ombudsperson. Other procedural improvements concerned listing and review processes. While the latter improvements radiated to other UN sanctions regimes, extension of the mandate of the Ombudsperson to all UN sanctions regime was repeatedly blocked. And when the Taliban and Al Qaeda regime was split in two separate regimes in 2011, the mandate of the Ombudsperson was restricted to the Al Qaeda regime only, whereas for the Taliban regime the Focal Point was reinstated for the delisting process. The political decision of limiting the Ombudsperson mandate to the Al Qaeda counter-terrorism regime was at odds with the idea that any listed individual should have a proper remedy to challenge his listing. While scholars and litigators have challenged the fact that Ombudsperson did not equate to a judicial process,[30] they have as yet largely ignored the restrictions in the Ombudsperson's scope and the fact that this institution is connected with one sanctions regime only. Yet, the weak institutional embedding of the Ombudsperson within the greater UN bureaucracy and the very limited mandate and its focus on one sanctions regime only are fundamentally problematic. After all, once the 1267/1989/2253 ISIL (Da'esh) and Al Qaeda sanctions regime ceases to exist, if ever, the institution of the Ombudsperson will fade with it. In its current set up and through its exclusive linkage to the 1267/1989/2253 regime, the Ombudsperson thus risks at some point becoming a memory rather than an enduring legacy as an inseparable part of any UN sanctions regime.

P2) Practice on the ground: unintended consequences and other implications of terrorist listings

It has been noted that financial institutions play a central role in counter-terrorism, and this was certainly also the case for the 1267/1989/2253 regime where actual implementation depended on their cooperation.[31] The different dynamics that inform private implementation as opposed to State implementation, i.e., de-risking and overcompliance, have produced serious unintended consequences that remain to be addressed.[32] The intense chilling effect of international (terrorist) sanctions and anti money laundering compliance requirements on humanitarian and development assistance and remittances has been flagged by several actors.[33] To avoid such chilling effect, it has been suggested that sanctions regimes should standardly include exemptions for humanitarian actors similar to the Somali sanctions regime.[34] In addition, Article 50 of the UN Charter on effects of Chapter

[30] For counterarguments to judicial review being the best option, see Devika Hovell, *The Power of Process; The Value of Due Process in Security Council Sanctions Decision-Making* (OUP, 2016). Also see Kimberly Prost, 'Security Council Sanctions and Fair Process', in Van den Herik, *UN Sanctions Handbook* (n **Error! Bookmark not defined.**), 213-35.

[31] Oldrich Bures, 'Private Actors in the Fight against Terrorism: Efficiency versus Effectiveness', 35 *Studies in Conflict and Terrorism* 712 (2012).

[32] Ginsborg, *Counter-terrorism Strategies* (n x**Error! Bookmark not defined.**), 99-103.

[33] Katie King, Naz K. Modirzadeh & Dustin A. Lewis, 'Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action' (PILAC, Harvard Law School, 2016), 6 <http://blogs.harvard.edu/pilac/files/2016/04/Understanding_Humanitarian_Exemptions_April_2016.pdf> accessed 10 February 2019; Emanuela-Chiara Gillard, 'Humanitarian action and non-state armed groups; the international legal framework' (Research Paper, Chatham House, 2017); 'At the Intersection of Security and Regulation: Understanding the Drivers of 'De-Risking' and the Impact on Civil Society Organizations' (Human Security Collective & European Center for Not-for-Profit Law, 2018).

[34] UNSC Res 1916 (19 March 2010) UN Doc S/RES/1916, para 5, and most recently reiterated in UNSC Res 2317 (10 November 2016) S/RES/2317, para 28. See further Emanuela-Chiara Gillard, 'Recommendations for Reducing Tensions in the Interaction Between Sanctions, Counterterrorism Measures and Humanitarian Action' (Research Paper, Chatham House, 2017). Also see the recommendation compendium High Level Review of United Nations Sanctions, based on UN Doc A/69/941-S/2015/432 (2015), 55-6. And the 2017 assessment report 'Achievements, challenges and opportunities resulting from the recommendations of the Compendium of the High-level Review of United Nations Sanctions' (23 June 2017) UN Doc. A/71/943-S/2017/534, recommendation 8. Also see

VII measures on third parties could be reconceptualized with a view to extending the spirit of this provision beyond States to the non-State entities that are adversely impacted by counter-terrorism measures such as charities, diaspora organizations, humanitarian agencies and development actors.[35]

The unintended consequences of terrorist designations are by now well-known. A paper by the International Peace Institute on *Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework* maps how post 9/11 policies and regulations prohibiting association with terrorist groups have resulted in a criminalization of health care and humanitarian aid.[36] As also noted by the UN Secretary-General in a report to the Security Council,

> "Some States have even enacted legislation that may criminalize the provision of medical care to members of some non-State armed groups, such as those designated as "terrorist" by the Security Council or under national law. "[37]

Referring to Security Council Resolution 2286 on the protection of civilians in armed conflict which reaffirmed the obligations flowing from international humanitarian law,[38] the paper highlights how, in fact, the counter-terrorism framework largely ignores international humanitarian law or only pays lip service to it.[39]

A very similar effect has been observed in relation to international and local peacebuilders. The report *Building Peace in Permanent War; Terrorist Listing and Conflict Transformation* raises alarm about the shrinking space for peace facilitation, *inter alia* through the possible criminalization of third-party mediation.[40] It even makes the claim that the consequences of sanctions and counter-terrorism measures more broadly on peacebuilding may not even be fully unintended at all, and that terrorist proscription has a profound and transformative impact on conflict resolution resulting in the securitization of peacebuilding.[41]

P3) Policy consequences of intensified use of sanctions

Beyond the unintended or unforeseen practical and legal consequences of the 1267/1989/2253 counter-terrorism sanctions, the Security Council's intensified use of terrorist listings also reflects a greater trend in the international security landscape that requires attention. As pointed out by Marieke de Goede and Gavin Sullivan, the 1267/1989/2253 lists are harbingers of the comeback of "The List" as a governance device in security policies.[42] In their article entitled *The politics of security lists*, they present lists such as the 1267/1989/2253 counter-terrorism lists as "inscription devices".[43] This framing allows for the appreciation of specific material, political and legal effects of the lists. As a seemingly technical instrument that assembles and orders information, the list "flattens complexity"

Financial Action Task Force (FATF) Recommendation 8 <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> accessed 17 April 2019.

[35] Currently, Article 50 of the UN Charter focuses only on States.

[36] A. Debarre, 'Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework' (International Peace Institute, 2018) (hereafter Debarre, 'Safeguarding Medical Care').

[37] UNSC Res 2017 (10 May 2017) UN Doc. S/2017/414, para 43.

[38] UNSC Res 2286 (3 May 2016) UN Doc. S/RES/2286**.**

[39] Debarre, 'Safeguarding Medical Care' (n **Error! Bookmark not defined.**), 1, 10/12.

[40] Louise Boon-Kuo, Ben Hayes, Vicki Sentas & Gavin Sullivan, *Building Peace in Permanent War; Terrorist Listing and Conflict Transformation* (International State Crime Initiative, 2015).

[41] *ibid*.

[42] Marieke de Goede & Gavin Sullivan, 'The Politics of Security Lists', 34 *Environment and Planning D: Society and Space* 1 (2015), 67-88 (hereafter De Goede & Sullivan, 'Security Lists').

[43] *ibid*, 70-3.

and homogenizes what is not homogeneous thereby blurring "collateral realities".[44] Intense political questions whether a certain response is the most appropriate one become reduced to more technical exercises regarding the application of criteria, which are malleable and flexible, to information, which is risk-based rather than evidence-based.[45] The authors also expose the diffusion of agency involved in the formation and operation of lists and they argue that seeing how lists work as "novel forms of transnational legal assemblage" allows for a fundamental rethink of the accountability problems that have arisen.[46]

The procedural fairness debate so far has largely ignored the second life of the 1267/1989/2253 counter-terrorism lists as they get copied and amended by other public and private actors which may continue to use the lists in their risk assessments or otherwise, even after delisting at Security Council level. These dispersed forms of global security governance, also conceptualized in terms of liquid postnational authority,[47] require new ideas on how to ensure proper remedies and protection for affected individuals.[48] Absent thereof, the intensified use of listings leaves designated individuals in the "shadow site" of the current security system.[49] The use of sanctions as surrogate accountability measures thus impacts on the nature of the international legal order in a truly fundamental manner.

3.3 Other international legal consequences of the 1267/1989/2253 regime

Notwithstanding these serious concerns and adverse impacts on human rights law, international humanitarian law, development assistance and humanitarian action as well as on the nature of the international legal order as such, the end of the terrorist listings is not in sight. On the contrary, lists are proliferating. The US Magnitsky Act has extended the use of lists to other perceived security threats and foreign policy concerns, and other states, possibly including the EU, are copying these initiatives.[50] Moreover, the 1267/1989/2253 listings are taken by some as hard core facts about the nature of certain groups as being terrorist without any further need for scrutiny or care. For instance, in the context of arguments regarding legality of the use of force upon invitation, one school of thought maintains that consented use of force in civil conflict is legal if the purpose is to fight terrorist groups.[51] In relation to the question how to determine whether a certain group is indeed a terrorist group, the Security Council listings are referred to as benchmarks. Hence, Theodore Christakis writes,

> In the case of Mali there was no doubt that at least two of the three Islamist groups against whom France was intervening were 'terrorist groups'. Both AQIM and, more recently, the MUJAO had been placed by the UN Security Council and individual states on the al Qaeda sanctions list established and maintained by the Committee pursuant to Resolutions 1267 (1999) and 1989 (2011). Things were initially more complicated concerning the third Islamist group, Ansar al-Dine, which was not, at the time of the beginning of Operation Serval, on the UN terrorist lists.[52]

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[44] *ibid*, 70.
[45] *ibid*, 73-6.
[46] *ibid*, 73.
[47] Nico Krisch, 'Authority, Solid and Liquid, in Postnational Governance', in Roger Cotterrell & Maksymilian Del Mar (eds.) *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Elgar, 2016).
[48] De Goede & Sullivan, 'Security Lists' (n **Error! Bookmark not defined.**), 73.
[49] *ibid*, p. 84.
[50] Ewelina U. Ochab, 'The Magnitsky Law is Taking Over the European Union' *Forbes* (10 December 2018).
[51] This view departs from the implications of the Nicaragua judgement that States have overall authority to request military assistance. Rather it views military interference, even on the side of the State, in civil strife is prohibited, with an exception to this based on on legitimate purpose, such as the combating of terrorism. See e.g., Bannelier and Christakis as cited in fn 61.
[52] Karine Bannelier & Theodore Christakis, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, 26 *Leiden Journal of International Law* 855 (2013), 866 (footnotes omitted).

This reliance on Security Council designations as indisputable facts neatly illustrates how the legal implications of terrorist designations extend far beyond the concrete context of a specific sanctions regime. Combined with the previous analysis of practical consequences, unintended or not, it is clear then that, over the last decades, the Security Council's terrorist sanctions regimes have profoundly shaped and transformed the international security landscape, and will continue to do so for time to come.

4. The Lack of Definition, Broadening of Obligations on States and Implications

Security Council Resolution 1373,[53] adopted in the aftermath of 9/11 under Chapter VII powers, famously mandated states to take a host of action against terrorism. This was promptly described as the Council adopting an 'unprecedented', 'quasi legislative'[54] role. On the basis of the 'threat to international peace and security' that 'any act of international terrorism' was deemed to present,[55] States were obliged to, *inter alia*, limit movement, freeze assets, deny asylum, withhold any forms of services to persons engaged in or facilitating terrorism and punish with suitably severe penalties.[56]

The Council's failure to define the terrorism towards which this torrent of coercive measures was directed attracted stern criticism from many sources, for 'opening the universal hunting season on terrorism without defining it.'[57] The lack of an agreed definition of 'terrorism' in international law provided a gap into which states' own definitions of terrorism and associated threats to the state have readily poured. A wave of legislative, policy and practical change ensued, in which broad and diverse definitions of terrorism and associated activity were incorporated into domestic law. Exceptional laws, polices and practice were adopted, directed against this exceptional, but ill-defined, threat. The consequences for human rights were dire.[58]

Since Resolution 1373, the Council's detailed regulation of counter-terrorism has gathered pace.[59] Some things have changed positively in Security Council practice, some have stayed the same, and others have got distinctly worse. Positive change can be seen in the language of resolutions. One feature of Resolution 1373 that had come under particular fire was the lack of reference to human rights, humanitarian and refugee law.[60] The expressive impact of the ignoring human rights, in the post 9/11 political climate, was powerful. It was therefore important that this changed,[61] and it gradually became commonplace in Council resolutions,[62] like those of the General Assembly and other

[53] UNSC Res 1373 (n 3).

[54] Paul C. Szasz, **'**The Security Council Starts Legislating', 96 AJIL 901 (2001); José E. Alvarez, 'Hegemonic International Law Revisited', 97 AJIL 873, 874 (2003); S. Talmon, 'The Security Council as World Legislator', 99 AJIL 175 (2005); UNSC Res 1373 (n 3).

[55] UNSC Res 1373 (n 3), third preambular paragraph.

[56] ibid paras 1(c), 2(a), 2(c), 2(g).

[57] Helen Duffy and Kate Pitcher, 'Inciting Terrorism? Crimes of Expression and the Limits of the Law' Grotius Centre Working Paper Series No 2018/076-HRL (*forthcoming in B Goold and L Lazarus, Security and Human Rights (Hart Bloomsbury Publishing 2019)*, 5.

[58] See below 3.1 on the Council's role and shifting approach to human rights standards. The Counter-Terrorism Committee (CTC) was established by Security Council Resolution 1373 (2001).

[59] There was a record number of resolutions in 2017; F. Ní Aoláin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, Annual Report 2018 UN Doc A/HRC/37/52 (2018 report).

[60] Human rights are mentioned only once in the specific context of asylum seekers.

[61] *See, e.g.*, UNSC Res 1456 of 20 January 2003.

[62] *See, e.g.*, UNSC Res 1963 (2010), fourth preambular paragraph and resolutions cited below: 1624, 2178, 2396, 2462.

organisations,[63] to cite the need for any measures taken to combat terrorism to comply with states' obligations under international law including international human rights, refugee and humanitarian law.[64] The shift has also been criticised as insufficient, lacking in the specificity (compared to detailed mandates in respect of counter-terrorism measures) and the meaningful oversight necessary to give laudable exhortations real effect.[65]

A key feature of Council resolutions that did *not* change after 1373 was the definitional deficit. In response to strident criticism of the effect of amorphous definitions of terrorism in legislation implementing Resolution 1373, the Security Council in Resolution 1566 of 2006 adopted 'guidance' on the core elements of a definition of terrorism.[66] This was backed up by work of the former Special Rapporteur who delineated core elements of 'genuinely terrorist' conduct (involving serious acts of violence for particular purpose) to which counter-terrorism laws should be directed. However, it is noteworthy that in subsequent binding resolutions the Council continued to impose new obligations to act against terrorism and associated activity, without even referring to its own or other 'guidance' defining or limiting how the target should, and should not, be understood.

Far from curtailing the unruly reach and impact of 'counter-terrorism' measures, the Council's subsequent practice has compounded the problem. A series of resolutions governing incitement and provocation, 'foreign terrorist fighters' and financing of terrorism, have vastly expanded the coercive measures mandated by the Security Council, including under Chapter VII, as well as the scope of behaviour covered by them. Directed towards various forms of activity *associated* with, or deemed *supportive*, *sustaining* or *facilitating* of the undefined 'terrorist threat,' these resolutions add multiple layers of indeterminacy to an already murky field.

The result is steadily increasing obligations on states to take an ever-wider range of coercive measures against an ever-broader and less well defined phenomenon.

4.1 Incitement or Provocation: *UNSC Resolution 1624 (2005)* [67]

Promoted by the UK in the aftermath of the '7/7' London bombings, Security Council Resolution 1624 refers to 'all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security', and urges states to take 'all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts.'[68] The Resolution's preamble goes further, expressing grave concern at the serious and growing danger posed by 'incitement of terrorist acts motivated by extremism and intolerance' and 'repudiating … attempts at the justification or

[63] Eg. UN Global Counter-terrorism Strategy, or the EU Directive discussed later in this section.
[64] *See* UNGA 'Uniting against terrorism' (n **Error! Bookmark not defined.**); leading to the United Nations Global Counter-Terrorism Strategy (A/RES/60/288 of 8 September 2008). The preamble notes: *'Recognizing* that development, peace and security, and human rights are interlinked and mutually reinforcing'. *See* pillars 1 and 4.
[65] Statement by Ms. Fionnuala Ní Aoláin, Special Rapporteur on teh promotion and protection of human rights and fundamental freedoms while countering terrorism (17 October 2018) 73rd session of the General Assembly, Third Committee, Item 74 (a-d), 7.
[66] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 (2004).
[67] Duffy and Pitcher (n 57).
[68] UN Security Council Resolution 1624 (2005), UN Doc. S/43S/1624 (2005) para 3; para 1 on 'prohibiting by law' incitement to terrorism.

glorification (*apologie*) of terrorist acts'. [69] However, neither 'terrorist acts,' nor 'incitement', 'extremism,' 'justification,' 'glorification', or 'apologie' are defined in the resolution.[70]

The UN Secretary-General, in his 2008 report on Human Rights and Terrorism sought to limit the scope of the 'incitement' in Resolution 1624, offering an approach compatible with human rights law. His report defines incitement as a '*direct call to engage in terrorism … with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'*.[71] Importantly the report draws a bright line between such direct *incitement* to violence on the one hand, and glorification or *apologie* of past acts on the other, stating unequivocally that while 'the first may be legally prohibited, the second *may not*'.[72] However, tThe Secretary General's report appears to have done little to curb the effect of the Security Council's far-reaching resolution.

In practice, Resolution 1624 has triggered a plethora of regional standards, national laws and prosecutorial practices directed against myriad forms of expression deemed to constitute direct or 'indirect' incitement.[73] Refering back to the Resolution 1624, far-reaching 'crimes of expression' are enshrined in EU responses,[74] in particular the EU *Directive on Combating Terrorism (2017/541)* [75] In the Directive, which European states were obliged to transpose into domestic law by September 2018, states must criminalise listed terrorist offences, as well as *threats to commit such offences, and preparatory acts, aiding and abetting, inciting or attempting to commit such acts.*[76] Incitement and provocation explicitly cover '*inter alia, the glorification and justification of terrorism or the dissemination of messages or images … including those related to the victims of terrorism, as a way to gather support for terrorist causes or to seriously intimidate the population*'.[77] While stricter in some respects than the Security Council resolution or its COE predecessor, this latest transnational iteration has unparalleled breadth in others.[78] It broadens out the Council's approach to include anyone who 'makes available' in any way (re-posting, lending, distributing) a message or images which *might* prove dangerous, even without any proven impact.[79] The ambiguous offences of advocating or making available 'dangerous messages' are a far cry from the direct incitement of violent acts of terrorism in the Secretary General's report.

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[69] *ibid,* Preamble.
[70] As noted, there was no reference to the SC's own 'guidance' on a possible definition drawn up some years before in response to criticism - UNSC Res 1566 (8 October 2004).
[71] UN General Assembly, 'The protection of human rights and fundamental freedoms while countering terrorism: Report of the Secretary General', UN Doc. A/63/337 28 August 2008, para 61 (UN Secretary General's report).
[72] *ibid* para 61.
[73] Duffy and Pitcher (n 57).
[74] European Union Council Framework Decision on combating terrorism 2008/919/JHA of 28 November 2008 (2008) Official Journal of the European Union L330/22 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0919&from=en> accessed 12 April 2019, para 8.
[75] Council and Parliament Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6 (EU Directive).
[76] Article 3.
[77] *ibid* para 10.
[78] *ibid* para 10, para 40.
[79] EU Directive Art 5.

Most troubling is practice on the national level. Around the globe, under the shadow of Security Council mandate, states have incorporated new forms of "indirect incitement" into hastily passed legislation, while others have subjected pre-existing laws to expansive interpretations. [80] The result is a broad spectrum of offences, and prosecutions, based on diverse forms of 'dangerous' expression, such as encouragement,[81] glorification,[82] justification,[83] apology,[84] possession,[85] dissemination or making available prohibited information or materials,[86] or professing to be a member of or associated with prohibited organisations.[87]

The human rights and rule of law implications are multi-dimensional. Criminal law is intended to be used exceptionally (ultimo ratio). Its force, and legitimacy, depends on respect for the basic principles of criminal law and human rights. Legality, and particularly stringent (and non-derogable) requirements of *nullum crimen sine lege* in criminal law, are undermined by concepts such as encouragement and glorification which – as human rights courts and tribunals have frequently noted - are inherently vague, malleable and susceptible to abuse. The principle of individual culpability, is also at stake. The harm principle and principle of remoteness require a personal proximate link – through conduct and intent – between an individual and harm to a value protected by criminal law. Proportionality requirements ensure that individuals are punished commensurate with their own contribution to that harm. The requirement of restrictive interpretation of the law, where in doubt in favour of the accused, applies (lex stricta). Each of these are jeopardised in a context in which in some cases there is no need for the conduct to have created any harm at all, or even to have caused a risk of such harm, and the individual need not have intended to do so,[88] yet 'dissuasive' sanctions apply.[89]

Security Council Resolution 1924 and its national offshoots have also taken a heavy toll on freedom of expression. In line with human rights law, criminalising expression of opinion is permitted only exceptionally: where provided for in clear, accessible law, and strictly necessary and proportionate to a legitimate aim it, and absent less onerous alternatives.[90] While expression cannot be prohibited on the basis that it is offensive, direct and public incitement to future violence can. However, in practice, broad offences of aiding and assisting provocation have delinked the role of the individual from any act of violence or even from the creation of a real risk of such violence. As such, the bright line between legitimate limitations on speech that incites violence, and 'thought crimes' risks being gradually erased.

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[80] Duffy and Pitcher (n 57) 3.

[81] See e.g. 'Encouragement of Terrorism' – Terrorism Act 2006 (UK) <https://www.legislation.gov.uk/ukpga/2006/11/contents> accessed 17 April 2019, s 1.

[82] *ibid;* Duffy and Pitcher (n 57) 5.

[83] Russian Federal Law No. 35-Fz of March 6, 2006 on Counteracting Terrorism criminalises "justification of terrorism" and "popularisation of terrorist ideas".

[84] See e.g. French Code pénal (Criminal Code) (FR) art 421-2-5 (created by Loi N˚2014-1353 du 13 novembre 2014), or reforms in the Honduran penal code, (see eg Joint press release by the Inter-American Commission on Human Rights and the Office of the UNHCHR from 23 February 2017 <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1054&lID=1>).

[85] 'Possessing things connected with terrorist acts' and 'Collecting or making documents likely to facilitate terrorist acts' – Criminal Code Act 1995 (AU) Schedule, ss 101.4-101.5.

[86] See e.g. Wetboek van Strafrecht (Criminal Code) (NL) art 132 (as translated in *Prosecutor v Imane B et al*, Judgment of 10 December 2015, Case Nos. 09/842489-14, 09/767038-14, 09/767313-14, 09/767174-13, 09/765004-15, 09/767146-14, 09/767256-14, 09/767238-14, 09/827053-15, 09/767237-14, 09/765002-15, and 09/767077-14 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102> (Context Case) accessed 17 April 2019, para 11.12.

[87] Strafgesetzbuch (Criminal Code) (DE) ss 129 and 129a.

[88] Examples in Duffy/Pictcher n X.

[89] See eg SC Res 2462 (2019)

[90] As discussed more fully in Duffy/Pitcher n.X.

As growing evidence of artists, rappers, lawyers, journalists, bloggers, political dissenters, human rights organisers, protesters, environmental activists, indigenous women's groups and peace activists and others being labelled 'propagandists' and terrorists continues to stream into light, the broader longer term implications for democracy become clear.[91]

Resolution 1624 does not mandate or authorise states to enact broad reaching crimes of expression or to prosecute political dissent, and responsibility lies with implementing states. As recent practice indicates, it also lie also with cooperating states to ensure they do not contribute to arbitrary prosecutions that fail to meet international standards.[92] It was not unforeseeable, however, in light of experience with prior resolutions that Security Council resolution 1624 might contributed to the normative toolkit of repressive states. It would later be followed by more powerful tools in response to the threats posed by 'foreign terrorist fighters'.

4.2 Foreign terrorist fighters: SC Resolutions 2178, 2396 & 2462…

In Resolution 2178 (2014), the Council obliged states to take extremely wide-reaching measures to prevent, disrupt, prosecute and suppress the travel and return of "foreign terrorist fighters" (FTFs). The resolution embraces, *inter alia*, the recruitment, organization, transportation, training, financing, and various other forms of facilitation or support for the FTF phenomenon. It also called on states to promote tolerance, rehabilitation and the prevention of "radicalization to terrorism [and] violent extremism."

Alarm ensued that we were 'back to [the] post 9/11 chaos' of SC Res 1373, with grave rights implications.[93] But this did not apparently chasten the Council. In subsequent Security Council Resolution 2396 (2017) it went further, broadening states' obligations in relation to criminal justice, border security and cooperation, calling for the creation of "watch lists or databases" of suspect persons and information sharing between states.[94] In Resolution 2462 (2019) it reached further, deciding that States must criminalise "*the willful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act…*". This broad range of activity must be accompanied by with "dissuasive criminal sanctions."[95]

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[91] Turkey presents a striking example of eroding democracy through expansive use of such counter-terror laws; see eg Nils Muižnieks, Council of Europe Commissioner for Human Rights, 'Memorandum on freedom of expression and media freedom in Turkey' Doc CommDH(2017)5 15 February 2017. For many other examples see Duffy and Pitcher nX.

[92] See eg the prosecution in Spain of rapper Valtonyc for abusive rap lyrics deemed apologetic of terrorism, in respect of whom an extradition request before Belgian courts and on referral to European Court of Justice.

[93] Martin Scheinin, 'Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters', *Just Security*, 23 September 2014 <www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/ > accessed 17 April 2019. For an assessment of the human rights issues arising see, OSCE, 'Guidelines for Addressing the Treats and Challenges of "Foreign Terrorist Fighters"' (2018) <https://www.osce.org/odihr/393503?download=true> accessed 17 April 2019 (hereinafter OSCE Report) 16-17.

[94] UNSC Resolution 2396 (2017), adopted on 21 December 2017, UN Doc. S/RES/2396. See e.g. F. Ní Aoláin (current UN Special Rapporteur on counter-terrorism), "The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law", *Just Security*, 17 January 2018, <www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/> accessed 17 April 2019

[95] For an assessment of the human rights issues arising from practice see, OSCE Report n. 104, and Duffy, Meeting the Challenges of "Foreign Terrorist Fighters," Vol 29 Justice and Security Monitor (2019) [HD TO UPDATE REF).

Security Council activity on FTFs since Resolution 2178 has opened the gates to a normative global flood. States have changed legislation, developed policy and introduced a diverse array of measures aimed at preventing and punishing foreign travel and associated threats.[96] Key among them is burgeoning resort to 'administrative' measures – by their nature adopted by the executive without normal political and often judicial oversight – such as citizenship stripping, blocking entry into or transit through states including one's own state, removal of travel documents, house arrest, control orders and freezing of assets. [97] This is supported by increased use of surveillance, special investigative techniques, watch lists and databases, monitoring and blocking of websites for example.[98]

Another striking feature of the FTF landscape is, once again, expansive criminal law. Criminal conduct may consists of travel or attempts to travel, "facilitation" or "justification" of such travel to prohibited areas with a 'terrorist purpose', irrespective of what the individual intends to do or actually does there. Broad approaches to what constitutes recruitment,[99] training, or 'self indoctrination,' all raise forementioned questions as to the contribution of individuals to criminal harm. Provision of small amounts of funds to children abroad as FTF financing raise doubts as to criminal culpability, and on the proper use of the criminal law *ultima ratio*.[100] The web of criminality has spun out of control, embracing activity that arguably goes far beyond - and has limited meaningful individual connection to - the violent activity at the heart of international terrorism. The explicit delinking of FTF from any 'specific terrorist act' in Resolution 2462 (2019) may further contribute to this trend.

While resolutions explicitly acknowledge that states are obliged to adopt such measures consistently with other obligations[101] a now familiar gap emerges between theory and practice. Problems associated with the lack of clarity and guidance surrounding "terrorism",[102] is significantly compounded in by an accumulation of additional ambiguous concepts in this context. The novel term "foreign terrorist fighters" raises particular challenges in terms of legality, specificity and foreseeability in respect of *each* of its elements.[103] It is unclear how "terrorist organizations" and entities should be identified, as they are not apparently limited even to those designated or listed on UN or regional terror lists.[104] Or what constitutes a "foreigner", given ambiguity as regards dual nationals or persons with important personal, social or family links to states beyond formal residence or nationality.[105] The reference to "fighters" is also misleading, as the scope of those covered by the provisions goes far beyond those in fighting roles or in any way 'participating in hostilities'.

The conflation and confusion of "terrorism" and armed conflict runs through Resolution 2178, with potentially insidious implications for IHL. Travel to participate in armed conflict is treated as terrorist fighting, irrespective of whether for example the individual is fighting against terrorist organisations,

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[96] See eg. For an overview of measures applied in selected countries, see eg,: "Returning foreign terrorist fighters in Europe: A comparative analysis", October 2017, http://mastereurope.eu/wp-content/uploads/2017/10/Returning-foreign-terrorist-fighters-in-Europe-.pdf.

[97] See OSCE report section 3.4

[98] Ibid.

[99] Eg Durective article

[100] OSCE report (n 93), 19, 35, 38.

[101] Unlike eg UNSC Res 1373 post 9/11, it must be recognized that the FTF resolutions are explicit in this respect.

[102] No reference was made to the UN's own guidance UNSC Resolution 1566 para. 3. UN Special Rapporteur on counter-terrorism, *Report to the UN Commission on Human Rights*, UN Doc. E/CN.4/2006/98, 28 December 2005, para. 42.

[103] E.g. Article 15 ICCPR; Article 7 of the European Convention on Human Rights (ECHR).

[104] See however below on relevance of sanctions to private actors; see also UNCTED 2016 Report, Implementation of Security Council resolution 2178 (2014), para. 158(b).

[105] UNSC Resolution 2178 (2014) para. 6; see S. Krähenmann, 'The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination' in FFILB (2016), 235.

within the limits of IHL, or the opposite. The need to carefully distinguish entirely absent resolutions, but increasingly noted in international and domestic practice.[106] It has been well noted that otherwise *"if participants in an armed conflict fight in the knowledge that they will in any case be subject to prosecution under common criminal law or under terrorism legislation, there is no incentive to comply with (at least) international humanitarian law."*[107] There may also be less incentive to terminate conflicts if IHL's provision for amnesties for participation (as opposed to war crimes) are effectively removed.[108] Perhaps it should be no surprise that FTF resolutions have also raised concerns as to the ability of humanitarian workers, including medical personnel, to provide care in conflict and gaining access to areas to provide relief to civilian populations, compounding problems highlighted above in relation to the impact of sanctions regimes.

Finally, Security Council resolutions have contributed to greater private actor engagement with the FTF threat in a range of contexts, with uncertain implications. The unwillingness of donors and financial institutions to provide essential funds and services, particularly in situations of armed conflict, has added to concerns that essential humanitarian work is practically impossible.[109] The emphasis placed on criminalizing offences related to financing and support of FTFs,[110] including through the internet and social media,[111] has led to stringent requirements of prompt removal of online content.[112] In September 2018, the President of the European Commission proposed new rules 'to get terrorist content off the web within one hour'.[113] As regards the identification of the amorphous scope and definition of the 'terrorist content' that must be removed from the internet, it is noteworthy that the EU Commission cites back to the broad-reaching offences contained in Directive (EU) 2017/541 and domestic laws, and to information as to terrorist groups identified as such by the European Union or the United Nations.[114] Microsoft accordingly uses the Security Council sanctions list to guide an interpretation of 'terrorist content' that should be removed from its online services,[115] while Google and Facebook both use national US sanctions lists for this purpose.[116] This has given rise to 'exceptional concern'[117] as to the chilling impact in practice on private actors, and broad-reaching implications for

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[106] E.g. Belgian courts have ruled that individuals participating in an armed conflict cannot be prosecuted as terrorists but must be judged by the standards of IHL.

[107] Decision of Case 939/2019, Ghent Court of Appeal, 8 March 2019, p. 26/27 (on file with author).

[108] OSCE report, p. 24-28.

[109] OSCE report (n 93), 27. See also above section 3.2, under P2.

[110] Directive (EU) 2017/541 on Combatting Terrorism (n 75), para 5.

[111] *ibid* para 6.

[112] *ibid* Article 21(1).

[113] European Commission, Press release State of the Union 2018 <http://europa.eu/rapid/press-release_IP-18-5561_en.htm> accessed 12 April 2019. Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (12 September 2018) 2018/0331 (COD) < https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf > accessed 12 April 2019, 4.

[114] Recommendation (C(2018)1177 final) of 1 March 2018 on measures to effectively tackle illegal content online <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online> accessed 12 April 2019, 11.

[115] 'Microsoft's approach to terrorist content' (Microsoft Corporate Blogs 20 May 2016) <https://blogs.microsoft.com/on-the-issues/2016/05/20/microsofts-approach-terrorist-content-online/#sm.00008cf0g1gyufreset139jj0nsg1> accessed 12 April 2019; UNCTED-ICT4Peace Foundation Private Sector Engagement in Responding to the Use of the Internet and ICT for Terrorist Purposes Zurich Workshop Summary Report (25 August 2016) <https://ict4peace.org/wp-content/uploads/2016/10/Summary-Report-Zurich-Workshop-FINAL.pdf> accessed 12 April 2019, 8.

[116] UNCTED-ICT4Peace Foundation Private Sector Engagement in Responding to the Use of the Internet and ICT for Terrorist Purposes Zurich Workshop Summary Report (25 August 2016) <https://ict4peace.org/wp-content/uploads/2016/10/Summary-Report-Zurich-Workshop-FINAL.pdf> accessed 12 April 2019, 8.

[117] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the right to privacy and Special Rapporteur on the promotion and protection of human rights and

free speech in light of 'a growing trend […] of self-regulation efforts among by industry actors in response to online terrorist content and activity.'[118]

5. Conclusion

This chapter has explored a landscape of uncertain threats and unaccountable actors. There can be no dispute that systematic serious acts of violence by terrorist groups has posed a range of threats - to the most basic rights of their victims, to the intensity of conflicts, to international peace and security. Quite a different proposition is whether all acts of terrorist violence, constitute such a threat. More doubtful still is whether the vastly disparate array of conduct labeled as "terrorism" or associated offences around the world, delinked from acts of violence, can conceivably be considered a threat to international peace and security. The loose and ever more expansive approach to exceptional terrorist threats, absent definitions of relevant concepts, has brought within the reach of exceptional counter-terrorist measures conduct that should not properly fall within a definition of 'terrorism' at all, still less be subject to onerous sanctions.

Perceptions of unprecedented threats have, however, given rise to exceptional measures of response. Exceptional responses to the terrorist threat have in turn spread to less and less exceptional circumstances, and gradually become embedded as the new normal. A significant contributor has been the "shift in counterterrorism regulation and process" by the Security Council, the full implications of which deserve greater reflection than has been afforded to date.[119]

Sanctions regimes that are by nature supposed to be temporary have now become quasi-permanent. Extensions of the criminal law reach further back into pre-crime era, and further out to embrace an ever broader range of 'neutral' activity that may been deemed supportive of terrorism, gradually delinking criminal responsibility from terrorist acts of violence. The predominance of 'administrative measures' broaden the net, sometimes with comparably serious implications for the rights of those affected but less due process of law. This chapter has illustrated how gradually, under the cover of Security Council mandate, counter-terrorism practice stretches to embrace a vast array of legitimate activity, from political dissent to artistic expression, journalism and/or other human rights defenders.

Fundamental questions inevitably follow as to the threats posed by these responses. So far as counter-terrorism resolutions and implementing measures impede the work of journalists, lawyers, civil society organizers, educators and environmental activists, and others, they pose a risk to the human rights, democracy, and rule of law. So far as sanctions and restrictions on travel and financing interfere with the work of humanitarian organizations, they run counter to the cause of peace and stability. So far as measures undermine IHL properly applicable in conflict, they have potential to disincentivize peace processes.

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fundamental freedoms while countering terrorism Communication of 7 December 2018 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24234> accessed 12 April 2019, 6.

[118] 'Private Sector Engagement in Responding to the Use of the Internet and ICT for Terrorist Purposes' ICT for Peace Foundation and the UN Counter-Terrorism Committee Executive Directorate <www.un.org/sc/ctc/wp-content/uploads/2016/12/Private-Sector-Engagement-in-Responding-to-the-Use-of-the-Internet-and-ICT-for-Terrorist-Purposes.pdf> accessed 12 April 2019, 4. See also Joint Statement of EU Ministers for Justice and Home Affairs and representatives of EU institutions on the terrorist attacks in Brussels on 22 March 2016 (24 March 2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/24/statement-on-terrorist-attacks-in-brussels-on-22-march/> accessed 12 April 2019.

[119] Na Aoilain suggests the issue "has gone largely unremarked by policymakers and scholars;" 2018 report.

This complex reality of terrorism, threats, counter-terrorism and counter-threats has been exposed and acknowledged increasingly. Its importance is reflected now long-standing recognition at UN level of the centrality of addressing "conditions conducive to the spread of terrorism". But not necessarily reflected in the Council's approach to counter-terrorism in practice, or accompanied by the necessary evaluation of the effectiveness of the Council's role in addressing and contributing to 'threats and challenges'.

Problematic features of counter terrorist practice highlighted in this chapter – indefinition, exceptionalism and its spreading reach, and a lack of accountability - are hardly unique to the Security Council's role.[120] But they are seriously compounded by the exercise of the Council's unique powers. The contribution of the Council to multiple dimensions of unaccountability deserves particular attention. Within the Council, political accountability in the process of adoption of resolutions with far-reaching effects has been marginalised by at times hasty processes, precluding debate, stakeholder consultation and engagement and the opportunity for the much-needed reflection on implications and effectiveness. This has led to calls for a "a form of a priori human rights review for Security Council resolutions in the counterterrorism domain that have a quasi-legislative character, and mandate criminal law regulation at the domestic level."[121]

In turn, the limits of *legal* or judicial oversight of Council action are well rehearsed in academic commentary and judicial practice. The question whether the Council's role in mandating sanctions put their implementation beyond the normally applicable legal safeguards and procedures of oversight and review, provoked a flood of judicial intervention and analysis. When this forced at least a measure of accountability with the introduction of the Ombudsperson position, it is significant that this was not rolled out to other sanctions regimes and that institutional embedding remained weak. Likewise, the Council's inclusion of the need to implement resolutions consistently with human rights obligations, forward and an apparent response to criticism, as was its adoption of 'guidance' on a definition in SC Res 1566. But its failure to put meat on the bones of those obligations, to even refer to its own definition, and to engage in any meaningful review of the human rights and rule of law implications of implementation, suggest a failure to take seriously and follow through on aspects of their own standards.[122]

The implications for the accountability of other actors also deserve reflection. States bear the obligations to implement consistently with human rights and humanitarian and refugee law, yet arguably they too have become less accountable for doing so under the shadow of Council mandate. Political oversight has again at times been limited by expedited legislative processes in capitals around the globe. In substance, particularly through the exercise of Capter VII powers, the Council has provided international legal cover, and a veneer of legitimacy, to measures that violate basic human rights and rule of law principles. Where overwhelming evidence has emerged of the serious human rights implications of the wide-reaching measures adopted by states, the Council has not meaningfully engaged to hold then account for their implementation of all of the resolution (including its rights and rule of law dimensions). Human rights courts and bodies have sometimes stepped into breach, but are under-resourced, slow and are poorly placed to act in a timely manner to prevent legislation and policies having effect. The fact that so many states are inevitably involved in implementing Council resolutions, and many have replicated problematic laws and practices, inevitably mutes the ability of other states to exercise pressure on violators.

[120] Duffy Ch. 12 exploring on characteristics of 'war on terror' practice, which have been excercerbated in recent years through the Council's role.
[121] Spec rapp calls in 2018 report :
[122] 2018 report.

Security Council measures have also had implications for the role of private actors in counter-terrorism, which itself has accountability implications. Financial institutions, internet providers and others have been required to take a host of measures linked to the implementation of resolutions, in a manner that suggests serious implications for the careful balancing of human rights issues at stake, and that require a fundamental rethink of how to organise and structure accountability mechanisms.

However, perhaps the most striking indicator of the accountability deficit in this field, reflected across this chapter, is the resistance to learning lessons and correcting course in the counter-terrorism context. In light of the profound and wide-reaching implications of Security Council activism in this field, and criticism from a range of judicial human rights courts and authorities, it is pertinent to ask whether this will influence Council practice in the future. Will it grapple with the complexity of threats and challenges arising, from terrorism and its own responses to it? Or will it continue on the trajectory towards increasingly coercive approaches, towards an expanding range of uncertain threats, in the dubious name of advancing peace and security?