

*Terrorism and Transnational Law: Rules of Law Under
Conditions of Globalisation*



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I. INTRODUCTION

Since its first invocation, as a criticism of the French Revolution, the term ‘terrorism’ has been used to refer to threats to legal and political order. The Anglo-Irish political philosopher, Edmund Burke, said the French revolutionaries were ‘Hell-hounds called Terrorists’.¹ The revolutionaries themselves wore the term with honour. Robespierre declared that terror is ‘nothing else than swift, severe, inflexible justice; it is therefore an emanation of virtue’.² These two early uses of the term illustrate its role as a site of conflict about the legitimacy of political violence both by and against state order. And, at least until the end of the twentieth century, political violence – even terrorism – was seen as sometimes capable of justification.

Today it is the pejorative meaning that has won out. The ‘-ist suggests a philosophy – but one which comes down to spilling guts and hacking off heads’ and so to be a terrorist is ‘to be accused of being cleaned out of ideas’.³ This, to an extent, is oxymoronic. Terrorism is the use of violence for political ends.⁴ Thus, to claim that actions are terroristic is to claim that they have a political motivation – not that they are ‘out of ideas’. Nevertheless, descriptors of barbaric, mindless violence resonate with images of atrocities committed in the past decade in Iraq and Syria, and with the brutality of attacks in the US and across Europe. These developments, and many others, have made the term ‘age of terror’ ubiquitous in law, politics, and even art.⁵

There is little analytic value in a conception of terrorism that reduces perpetrators to atavistic nihilists.⁶ To see an organisation as mindless is unhelpful – no matter how immoral its violence may be. ‘Terrorists’ are rarely without political objectives. For example, prior to the 11 September 2001 attacks, Al-Qaida had objectives such as the removal of US military troops from Saudi Arabia. Over time these objectives became more transformative – the establishment of a transnational caliphate.⁷ Terrorism, properly understood, sits on a spectrum of political action that begins with the rule of

¹ E. Burke, *Letters on a Regicide Peace* (1796).

² Robespierre, as quoted in R.T. Bienvenu (ed), *The Ninth of Thermidor: The Fall of Robespierre* (New York, NY, Oxford University Press, 1968), p 38.

³ T. Eagleton, *On Terror* (Oxford, Oxford University Press, 2005), p 1.

⁴ See, for example, the UK Terrorism Act 2000, s1.

⁵ For example, ‘Age of Terror: Art Since 9/11’ was an exhibition at the Imperial War Museum, London, in 2017/2018.

⁶ L. Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York, NY, Random House, 2007), p 13.

⁷ For a discussion see D. Byman, ‘Comparing Al Qaeda and ISIS: Different goals, different targets’ 29 April 2015, available at: <https://www.brookings.edu/testimonies/comparing-al-qaeda-and-isis-different-goals-different-targets/>.

law and oppositional politics and descends into terroristic violence by the state and its opposition.⁸

Unfortunately, much nuance on the subject was lost in the aftermath of the 11 September 2001 attacks. Despite the soothsaying about the year 2000, it was not a computer bug or millennial apocalypse which brought the optimism of the 1990s to an end. Rather, it was the murder of three thousand people in New York, Pennsylvania, and Washington DC, which proved the most significant geopolitical development since the fall of the Berlin Wall.⁹

The global nature of the attacks derived not only from US pre-eminence in world politics. The victims came from all over the world,¹⁰ and, as the attacks took several hours to unfold, they did so before a worldwide television audience. The symbolism of collapsing an icon of US economic power and scarring the headquarters of US military power was always going to make the day ‘unqualifiable’,¹¹ or ‘the mother of all events’.¹² The consequence, for the US, has been over a decade and a half of war, across three administrations.¹³ And, in the course of that war, the very idea of wars has taken on a different shape.¹⁴

The attacks and the response to the attacks have also reshaped relationships between law and politics. After the attacks, US President George W. Bush declared that ‘either you are with us, or you are with the terrorists...’.¹⁵ It would be too easy to suggest that we can understand the attacks on 11 September 2001 as the birth of a new terrorism. But the day does mark a point of rupture. International law, as a discipline, tends to focus on crises.¹⁶ The response to the 11 September 2001 attacks has prompted crises in international law and politics. The military action against Al-Qaeda and the Taleban had broad support in the international community. However, when the US sought to launch subsequent military action against Saddam Hussein in Iraq that support began to fracture. Both the US and its allies continue to face the repercussions of actions taken in pursuit of President Bush’s ‘war on terror’.

This ‘war’, or the ‘wars’, are both products of, and productive of, globalisation. They are products of globalisation because of the transnational nature of the planning and conduct of the attacks. And they are productive of globalisation – of selective globalisation – in the ways in which the response to them facilitates the extension of state apparatuses of control beyond the state’s territory. One consequence has been the rise of transnationalisation of

⁸ A. Schmid and A. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature* (Oxford, North Holland, 1988).

⁹ S. Zizek, *Violence* (New York, NY, Picador, 2008) pp 101-102.

¹⁰ *Le Monde*, ‘Nous sommes tous Americains’, 12 September 2001.

¹¹ See the discussion with Jacques Derrida in G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, University of Chicago Press, 2004).

¹² J. Baudrillard ‘The Spirit of Terrorism’, *Le Monde* 2 November 2001.

¹³ *New York Times*, ‘For Obama, an Unexpected Legacy of Two Full Terms at War’ 14 May 2016.

¹⁴ M. Kaldor, *New and Old Wars: Organised Violence in a Global Era*, 3rd Edition (London, Polity Press, 2012).

¹⁵ Voice of America, *Bush: ‘You are either with us, or with the terrorists’* – 2001-09-21 27 October 2009.

¹⁶ H. Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65(3) *Modern Law Review* 377.

counter-terrorism law. This law entails the closing of the gap between law on international peace and security (e.g. UN Security Council resolutions) and national laws on substantive and procedural criminal law and criminal justice. It also entails, as well as constitutional and administrative law, immigration and asylum law, and other fields.¹⁷ Some measures almost entirely collapse the gap, such as UN Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2015), and 2396 (2017), and the regional and national laws which implement them.¹⁸

Part II of this paper will explore the relationship between states, their law, and terrorism. This relationship is central to an analysis of the modalities of counter-terrorism law and policy. Part III will examine the impact of globalisation on states and the rise of transnational counter-terrorism law. Part IV considers the implications for law and government of the ‘wars on terror’. It examines five aspects: the agenda-setting role of transnational counter-terrorism law, the transgression of legal categories, the displacement of sites of power, the collapse of spatial dimensions, and the reassessment of normative foundations of the law. Part V draws the analysis to a close. It illustrates how the unintended consequences of transnational counter-terrorism law and operations may exacerbate the risk of violence. It highlights efforts to refocus on the ‘root causes’ of terrorism, efforts that may return the narrative to a counter-terrorism law ‘of the everyday’, in which the focus is less on crises.¹⁹

Reflections on transnational counter-terrorism law may be of significance in other policy fields. First, the shift underway in transnational counter-terrorism law and operations, from counter-terrorism to counter-extremism, means a wider range of behaviours will be caught by the apparatus of control.²⁰ Second, the threat of terrorism – understood as a national and international *insecurity* – sits alongside climate insecurity, economic and financial insecurity, and other global insecurities. Trends in transnational counter-terrorism law therefore may form the basis for approaches in other fields. As such, the relationship between terrorism and transnational law is one that has significance not just for the globalisation of counter-terrorism efforts, but for the globalisation of law as a whole.

II. TERRORISM, THE STATE, AND LAW

¹⁷ Few studies use this precise language. See, for example, C.C. Murphy, ‘The Dynamics of Transnational Counter-terrorism Law: Towards a Methodology, Map, and Critique’ in Federico Fabbrini and Vicki Jackson (eds), *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar Publishing, 2015), and Tilmann Altwicker, ‘Explaining the Emergence of Transnational Counter-Terrorism Legislation in International Law-Making’ *Finnish Yearbook of International Law* vol 24 (Oxford, Hart Publishing, 2018).

¹⁸ C.C. Murphy, ‘Transnational Counter-terrorism Law: Law, Power and Legitimacy in the ‘Wars on Terror’’ [2015] 6(1) *Transnational Legal Theory* 31.

¹⁹ Charlesworth, n 16 above, writes of an international law ‘of the everyday’ as an antidote to the focus on crises in international law.

²⁰ Two Security Council resolutions, 2395 (2017) and 2396 (2017), address the use of the internet for terrorist purposes. On 29 May 2018, the Security Council’s Counter-terrorism Committee held an open meeting on countering terrorist narratives. See <https://www.un.org/sc/ctc/news/2018/05/30/open-meeting-counter-terrorism-committee-ctnarratives/>, last accessed 7 July 2018.

It would be trite to rehearse the definitional problems that impair ‘terrorism’ in law and international relations.²¹ The principal problem is that any definition of terrorism likely catches an individual, group, or act, which the definer would rather exclude. If this challenge is set aside, then terrorism in the plainest language, is a form of violence used to communicate a political message. This paper proceeds on the basis that an act of terroristic violence can be carried out by and against state and non-state actors. The immediate targets, as well as the eventual targets of terroristic violence may be states, their populations, or international organisations.

Terrorism against a state is likely to be a violation of that state’s laws. This is especially the case after the September 11 attacks, when a much wider range of states adopted laws that explicitly address terrorism, in part to implement UN Security Council resolutions, than had previously been the case.²² In his book, *Terror and Consent*, Philip Bobbit makes several assertions about the relationship between terrorism and the law:

Modern terrorism thus arises with the birth of the modern state because terrorism is not simply tied to the use of violence to achieve political goals – that is, strategy – but is also linked to law. It is a necessary element in terrorism that it be directed against lawful activities. Modern terrorism is a secondary effect of the State’s monopoly on legitimate violence, a monopoly ratified in law.²³

There are two claims here. The first claim is that terrorism must be ‘directed against lawful activities’.²⁴ This first claim appears, without more, to be incorrect. To take a fictional example, the activities of a vigilante, such as The Batman in the DC Comics, can be understood as terrorism. The Batman commits violent acts to instil fear in Gotham’s criminals. The violence aims to restore order (if perhaps not necessarily lawfulness) to the city. It is violence for a political purpose. The fact that the violence targets criminals does not make it less terroristic.²⁵ Bobbit’s assertion is more persuasive if we understand it as a claim that terrorism stands against the idea not of lawful activities *per se*, but of lawfulness, i.e. of compliance with the rule of law. Terrorism, even terrorism against criminals, is anathema to the rule of law.²⁶ The rule of law pursues certainty in government, and often (dependent on the definition used) other values of government. Terrorism, by definition, seeks to instil fear so as to communicate its message. It tends to involve unpredictable acts of violence, not behaviour that complies with legal or social rules. As such it stands against lawfulness.

Bobbit’s second claim, that terrorism is a ‘secondary effect’ of the state’s monopoly on legitimate violence, requires further exploration. It draws the

²¹ See in general B. Saul, *Defining Terrorism in International Law* (Oxford, Oxford University Press, 2005).

²² See K. Roach, ed, *Comparative Counter-terrorism Law* (Cambridge, Cambridge University Press, 2015).

²³ P. Bobbit, *Terror and Consent: The Wars for the Twenty-First Century* (London, Allen Lane, 2008), p 26.

²⁴ *ibid.*

²⁵ For a diverting read see J. Ip, ‘The Dark Knight’s War on Terrorism’ [2011] *Ohio State Journal of Criminal Law* 209.

²⁶ This is a conclusion also explored by Christopher Nolan’s Dark Knight Trilogy. See Ip, n 25 above, *passim*.

discussion into critical criminology. It is peculiar that the relationship between the state and violence attracts so little attention in the academy – despite its centrality to the disciplines of law, political philosophy, and sociology.²⁷ This part of the paper will explore (A) the state’s claim to a monopoly on legitimate violence; (B) the relationship between that monopoly and the law; and (C) terrorism’s challenges to the state and its rule of law.

A. The State’s Claim to a Monopoly on Legitimate Violence

The state, in sociological terms, is the entity that successfully claims a monopoly on the legitimate use of coercive force within a jurisdiction.²⁸ For many states this monopoly has come about as a result of violence – for example a revolution.²⁹ As Green and Ward note, ‘advanced liberal democracies have been shaped by violent internal upheavals, civil war, revolution, and war between states...’.³⁰ Thus, the establishment of the state often, perhaps always, entails the use of violence for a political purpose. Indeed, for some, the very formation of states can be attributed to the needs of warfare.³¹ Even if we do not go this far, the state will often memorialise the often-violent political acts of its foundation even as it ‘sublimates the terror which originally went into its making’.³²

The capacity for coercion remains key to the state’s endurance. The state’s coercive capacity is primarily deployed within its territory by the executive branch of government, its law enforcement offices, and its regulatory agencies. This enforcement, and habitual obedience to the law by most of the population, is sufficient to ensure that serious breaches of the law are exceptional. As a result, in many states the coercive capacity is ‘no longer directly visible’, and is so significant that it is ‘very seldom’ put to the test.³³ The state may pacify the public sphere through reliance on social institutions (family, church, work, community) as sites of covert control but overt coercion – violence – remains possible. For example, there is violence ‘stored behind the scenes’ of everyday policing.³⁴ In the operation of the criminal justice system ‘most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk’.³⁵ The use of coercive force is a ‘boundary condition’³⁶ that is not part of the ‘everyday workings of the liberal state’.³⁷

²⁷ P. Green and T. Ward, ‘Violence and the State’ in R. Coleman, J. Sim, S. Tombs, D. Whyte (eds), *State Power Crime* (London, Sage Publications, 2009), p. 127.

²⁸ M. Weber, *The Theory of Social and Economic Organisation* Reprint Edition (New York, NY, Simon & Schuster, 1997), p. 194.

²⁹ Bobbit, n 23 above, Chapter 1.

³⁰ Green and Ward, n 27 above, p. 118.

³¹ C. Tilly, *Coercion, Capital, and European States, AD 1990-1992* (Oxford, Blackwell, 1992).

³² Eagleton, n 3 above, p. 58.

³³ N. Elias *The Civilising Process: Sociogenetic and Psychogenetic Investigations* (Oxford, Blackwell, 1994), p. 233.

³⁴ Green and Ward, n 27 above, p. 123.

³⁵ R.M. Cover, ‘The Supreme Court 1982 Term – Foreword: Nomos and Narrative’ (1983-1984) 97 *Harvard Law Review* 4.

³⁶ ‘Who’s Afraid of Jurispathic Courts? Violence and Reason in Nomos and Narrative’ (2005) 17 *Yale Journal of Law & the Humanities* 9. Post notes that Cover’s assessment of violence in the maintenance of the state does not allow for any role for public reason to curb law’s violence.

³⁷ *ibid.*

However, that latent capacity is the guarantor of state order. It renders that order, and rule by the state, hegemonic.

If the analysis shifts from critical criminology to legal and political theory, then the justification for this settlement lies in both the state's efficacy in the provision of public goods, such as security, and in democratic states, in the legitimation of government via public participation in decision-making. Insofar as there is contestation of state power, in constitutional states that contestation is done through law and politics. It is rare for the state to have to face the 'boundary conditions' of its justification.

This is the context in which terrorism challenges state order. Violence by non-state actors necessarily challenges the state's claim to its monopoly. The commission of the act, like the commission of any crime, is a failure of social institutions to maintain order without overt coercion. If the crime has an explicit political motivation then it may constitute a rejection of those institutions and the state they support. And, if this rejection is done by a spectacular act of violence, such as a bombing, it becomes a graphic illustration of the limits of the state's capacity. The state will have failed its obligation to ensure security and the legitimacy of its claim on the means of doing so is put in doubt.

Indeed, an illustration of the state's limits is most potent when done by a group which claims a greater legitimacy or capacity to offer public goods. Clear examples are the operations of ethno-nationalist groups such as the Provisional IRA in Derry during the Troubles in Northern Ireland, ETA in the Basque Country in Spain, and the Tamil Tigers in Sri Lanka.³⁸ As Green and Ward claim, in such circumstances legitimacy of violent politics, whether by state or non-state actors, can come down to a matter of perspective.³⁹ In these cases constitutional theory runs up against the reality of a breakdown in constitutional politics: terrorism forces the state to stare into the abyss of its formation.

B. Terrorism: The Role of Law in the State's Response

The state faces two challenges from terrorism – to its claim of a monopoly on violence and to its claim about the legitimacy of that monopoly. The state needs to reassert its hegemonic power or – in an extreme case such as in Northern Ireland, Spain, and Sri Lanka – face ongoing contestation over its boundary conditions. This can give rise to a dilemma. If the state makes its coercion more overt, so as to counter the challenge to its monopoly, then it may also increase the challenge to the legitimacy of that coercive capacity.

Perhaps because an increase in overt coercion raises a challenge to the state's legitimacy, the state may deploy that coercion against a particular group, which it claims has an association with the challenge to its monopoly. In the UK in the 1980s it was the Irish who bore the brunt of counter-terrorism operations, just as it is Muslims who today face the hard edge of contemporary counter-terrorism powers in the UK, US, and other states.⁴⁰ The use of a

³⁸ See Richardson, n 6 above, p 48.

³⁹ Green and Ward, n 26 above, p. 119.

⁴⁰ P. Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London, Pluto Press, 1993). Note Greer's critique: S. Greer, 'Review of Hillyard, P. (1993), *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain*, London: Pluto Press, with Liberty, 1993' (1994) 34 *British Journal of Criminology* 510. On

minority group as a target may leave the majority free from overt coercive force and helps secure their acquiescence to the use of measures that might be less palatable if they were of general application. This is also in evidence when the US President, Donald Trump, makes a ‘Muslim Ban’ – a prohibition on individuals coming to the US from certain Muslim-majority countries – a centrepiece of his first 100 days in office.⁴¹ These policies rely on, and perpetuate, ‘discursive practices’ to ‘re-establish order and meaning by reinforcing state hegemony’.⁴²

At the forefront of debates about law’s role in the response to those challenges is the extent to which the response ought to remain within the framework of existing laws or to act outside that framework.⁴³ In constitutional democracies, in the twenty-first century, the tendency has been to elide the distinction between these two types of response though the use of exceptional executive powers, emergency legislation, derogations from human rights laws, and other extraordinary powers.⁴⁴ These are possible *within* the existing constitutional system. Nevertheless, practices which are not legal (either because they are done without a basis in law or because they are held to be unlawful by a court), may also form part of the response.

Some typical elements of a state response, and the law’s role in that response, are as follows. First, a state may criminalise behaviour it deems to be ‘terrorism’. The consequences of the specific criminalisation of terrorism, rather than reliance on the laws of murder, damage to property, and so on, are significant. Insofar as the operation of the criminal justice system entails a balance between the state’s interest in prosecution and punishment, and the defendant’s rights to due process, the invocation of terrorism tends to shift that balance, often rather significantly, in favour of the state.⁴⁵ The criminal justice system has safeguards for persons under suspicion and subject to prosecution to ensure that infringements of liberty are not done lightly – or in error. Although criminal laws and procedures differ across legal systems there is, in Europe, a common standard in the European Convention on Human Rights (ECHR).⁴⁶ In international law it is possible to look to the standards of

contemporary counter-terrorism see: C. Pantazis and S. Pemberton, ‘From the ‘Old’ to the ‘New’ Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation’ (2009) 49 *British Journal of Criminology* 646 and also G. Peirce, ‘Was it like this for the Irish?’ (2008) 30(7) *London Review of Books* 3. Greer once again offers a critique: S Greer, ‘Anti-Terrorist Laws and the United Kingdom’s ‘Suspect Muslim Community’: A Reply to Pantazis and Pemberton’ (2010) 50(6) *British Journal of Criminology* 1171. See further the reply: C. Pantazis and S. Pemberton, ‘Restating the case for the ‘suspect community’: A reply to Greer’ (2011) 51(6) *British Journal of Criminology* 1054.

⁴¹ That such a policy has no particular rational connection with – for instance – the countries of origin of the 11 September 2001 attackers may be indicative of its political rather than operational significance.

⁴² D. Roth and S.L. Muzzatti, ‘Enemies Everywhere: Terrorism, Moral Panic, and US Civil Society’ (2004) 12(3) *Critical Criminology* 327, 335.

⁴³ The classic citation is C. Schmitt, *Political Theology: Four Chapters on the Concept of the Political* (Chicago, IL, University of Chicago Press, 2006); See also G. Agamben, *State of Exception*, (Chicago, IL, University of Chicago Press, 2005).

⁴⁴ O. Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1011.

⁴⁵ See L. Zedner, ‘Securing Liberty in the Face of Terror: Reflections from Criminal Justice’ (2005) 32(4) *Journal of Law and Society* 507.

⁴⁶ S.J. Summers, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford, Hart Publishing, 2007).

the International Covenant on Civil and Political Rights (ICCPR).⁴⁷ The standard of protection may be subject to erosion, however, in certain circumstances, including when the state takes extraordinary action to combat terrorism.

Second, to respond to the threat of terrorism, states may arrogate to themselves extraordinary preventive powers. These powers may be thought necessary if there is insufficient (admissible) evidence to secure criminal convictions of those under suspicion or if the potential threat is such that a *post hoc* effort to address the problem is seen as unsatisfactory.⁴⁸ As a result there has been a rise in the use of administrative and civil law measures to address terrorism. The impact of the 11 September 2001 attacks was to prompt governmental shifts that ‘complement already existing shifts in criminal justice policies and ideologies brought about by adjusting to globalisation, economic neo-liberalism and the shift away from the post-war liberal welfare settlement’.⁴⁹ This has taken place not only at the national level (for example in the UK) but also at the supranational level – for example in EU counter-terrorism law and policy.⁵⁰ Terrorism has become subject to management in much the same way as other social ills including the use of illegal narcotics and anti-social behaviour.⁵¹

Third, the state may use *illegalities* to address the behaviour. These illegalities may be state initiatives which are not in compliance with the law – either because they do not have a lawful basis in national or international law or because they do not comply with stipulations as to how state powers are used. A key example is internment without trial (a practice that is sometimes found to be lawful and other times is not) and torture (a practice that is not lawful).⁵² In this century, examples of such practices include internment (in Belmarsh prison in the UK, in the Guantanamo Bay detention facility under US control, and elsewhere), torture (at Abu Ghraib prison and Baghram air base and at CIA ‘black sites’), and mass surveillance such as that exposed by Edward Snowden.

Law can therefore play various roles in the state’s response to terrorism. Law may be constitutive, or facilitative, of state power. Law may also serve as a constraint on that power. If the law is solely facilitative of state power, and ceases to serve as a constraint on that power, it may become *lawfare* – the use of law to wage war.⁵³ This typical response to terrorism exemplifies trends in criminal law and criminal justice during the latter half

⁴⁷ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

⁴⁸ Murphy, n 18 above, p. 34.

⁴⁹ B. McSherry, A. Norrie and S. Bronitt, ‘Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law’ in B. McSherry, A. Norrie and S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009).

⁵⁰ C.C. Murphy, *EU Counter-terrorism Law, Pre-emption and the Rule of Law Expanded* Paperback Edition (Oxford, Hart Publishing, 2015).

⁵¹ For a recent discussion see H. Carvalho, *The Preventive Turn in Criminal Law* (OUP, 2017).

⁵² For examples of these, and other, state transgressions of international law see: P. Sands, *Lawless World: Making and Breaking Global Rules* (London, Penguin, 2006).

⁵³ D. Kennedy, ‘Lawfare and Warfare’ in J. Crawford and M. Koskeniemi, *The Cambridge Companion to International Law* (Cambridge University Press, 2012), p 160: ‘lawfare’ – law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war’.

of the twentieth century. The response has come to be known as a ‘preventative’ or even ‘pre-emptive’ approach.⁵⁴ Identified first in Anglo-American criminal justice, it is now a characteristic of regional and national counter-terrorism in Europe and Asia.⁵⁵ As a result there are challenges to the rule of law as well as other principles of governance.

C. The Challenge to the Rule of Law

The rule of law, as a concept, is as contested as terrorism.⁵⁶ As an aspect of government, the rule of law is a means to render coercion civil – both within the state as a territory (by its requirement that individuals obey the law) and by the state as an actor (through its restraint on state power). It is therefore a value in government and a principle of legal systems. It has a rather Janus-like quality. It faces the population and demands obedience to the law. It faces the state and requires that the law is respectful of political values. The law demonstrates this respect by adherence to various principles in the exercise of power. An effective rule of law may therefore be understood as the outcome of a compromise, or bargain, between the population and the state.

Terrorism poses challenges to the rule of law – in direct and indirect ways. The direct challenges have already been set out – to the state’s claim that it has a legitimate monopoly on coercion. These challenges can be potent in some circumstances but often are not significant. The indirect challenges to the rule of law may be greater. Typical aspects of legalities, and illegalities, in response to terrorism have been set out already. These are all part of a state’s efforts, in response to terrorism to assert its monopoly on legitimate coercion. Such a typical response carries with it rule of law challenges. When the Government seeks to reassert its rule, it may pursue new legislation to provide additional powers to state authorities (such as law enforcement and intelligence agencies). The increase in powers and in operations often relies on greater discretion for the authorities. However, this greater discretion is often given without adequate safeguards or oversight. An example is the use of section 44 Terrorism Act stop and search powers in the UK. The response of the state’s population is also relevant. When the state authorities risk overreach the focus is often on legislatures or judiciaries (or both) to check the executive.⁵⁷ But, ultimately, counter-terrorism law endures because of the acquiescence of the state’s population to that law.

This critique of a typical state response to terrorism is not indifferent to the challenge that the state faces. However, the challenge to *most* constitutional states from a non-state actor is not existential.⁵⁸ It does bring

⁵⁴ For an analysis of pre-emption in US counter-terrorism after September 11 see D. Cole and J. Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York, NY, The New Press, 2009).

⁵⁵ See in relation to Europe: Murphy, n 50 above, and M. de Goede, ‘The Politics of Preemption and the War on Terror in Europe’ (2008) 14 *European Journal of International Relations* 161. Similar trends have been identified in Asia – for example ‘Japan passes pre-emptive anti-terrorism law’, *Financial Times*, 15 June 2017.

⁵⁶ See B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004).

⁵⁷ See F. de Londras and F. Davis, *Critical Debates on Counter-terrorism Judicial Review* (Cambridge University Press, 2014).

⁵⁸ Note here the dictum of Lord Hoffmann in *A v. Secretary of State for the Home Department* [2004] UKHL 56, at para 96: ‘This is a nation which has been tested in adversity, which has

the state's *raison d'être* into doubt: to secure its territory and the population within that territory. Thus, a response is necessary to assure the population that the social contract does and should hold. This may contribute to the seeming necessity to ensure 'the ideological mystification of what constitutes a threat to the social order'.⁵⁹ Nevertheless, the threat from terrorism, in terms of a risk of death in the UK, is low. In 2012, the UK Independent Reviewer of Terrorism Legislation wrote that in this century, 'terrorism has been an insignificant cause of morality in the United Kingdom'.⁶⁰ The Independent Reviewer also notes that the threat is 'sometimes exaggerated for political or commercial purposes'.⁶¹

Ultimately Bobbit's claim, that terrorism rose with the modern state, is correct. The organisation of coercive force, and its legitimation by the state, gave space for a form of violent politics to be put beyond what is deemed acceptable. This is 'terrorism' in the Burkean sense. However, there is an additional resonance, because terrorism as a strategy is also contrary to modes of government that comply with the rule of law. However, the most significant trend in contemporary counter-terrorism is its transnational orientation. The question for the next part of this paper is how we understand this relationship in a world under contemporary conditions of globalisation.

III. GLOBALISATIONS, STATES, TERRORISM & LAW

Contemporary terrorism and counter-terrorism coincide with several trends in global politics and global society: open markets, the flow of labour and capital, advances in telecommunications, and other dynamics. As a result, the state's power has been subject to disaggregation, and to increasing challenges from transnationalisation and privatisation.⁶² The impact of these trends on law is still being understood.⁶³ However, it is clear that there have been significant disruptions to the states, to world politics, and to the international legal order. This part of the paper sets out (A) disruptions to states and world politics before it considers (B) the rise of transnational counter-terrorism law and its particular challenges to the rule of law.

A. Disruptions to States and World Politics

The past century, and in particular the past quarter-century, have seen significant disruptions to states and world politics. First, the number of sovereign states in the world has increased from fewer than 60 at the outset

survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.'

⁵⁹ See P. Hillyard, 'The Exceptional State' in R. Coleman, J. Sim, S. Tombs, D. Whyte (eds), *State Power Crime* (London, Sage Publications, 2009), p. 129.

⁶⁰ D. Anderson Q.C., *Report on the Terrorism Acts in 2011* (TSO, 27 June 2012), [2.29].

⁶¹ *ibid*, [2.30].

⁶² A. Slaughter, *A New World Order* (Princeton University Press, 2005).

⁶³ For a useful essay that draws upon literatures in multiple languages see J.-B. Auby, *Globalisation, Law and the State*, (Hart Publishing, 2017 transl. Rachael Singh), Chapter 1.

of World War I to over 70 in the immediate aftermath of World War II, and approximately 200 today.⁶⁴ Certain of these states have come into being because of violent uprising (e.g. Ireland), others because of decolonisation (e.g. India, South Africa), and others still because of peaceful dissolutions of former states (e.g. Slovakia and the Czech Republic). The recognition of states that have come into being because of violent uprising gave credence, in the twentieth century, to the idea of a terrorist-as-freedom-fighter. The aspiration for such groups was that their ethno-nationalist struggle would find vindication in the recognition, in time, of a new state. Such struggles continue to hamper efforts at a ‘universal’ definition of terrorism in international law because some states consider that a definition of ‘terrorism’ should not encapsulate such actors.⁶⁵

Second, with the fall of the Berlin Wall, and the dissolution of the Soviet Union, the model of global politics as two hemispheres under the domination of a respective superpower has lost salience.⁶⁶ Although, after a period of geopolitical decline, Russia may again be the Western hemisphere’s *bête noir*, China’s geopolitical rise is also notable.⁶⁷ The decrease in salience of the bi-polar model, and the rise of the states known together as BRICS (Brazil, Russia, India, China, South Africa), marks a shift towards multipolarity in international relations. Furthermore, the consequences of proxy wars and state-sponsored terrorism during the Cold War continue to unravel themselves in territories such as Afghanistan – a state which harboured Al-Qaeda prior to the 11 September 2001 attacks.⁶⁸

Third, and after long campaigns in Afghanistan and Iraq, the US faces limitations on its capacity to project military power.⁶⁹ Key examples of these limitations are found in the reluctance to intervene in conflicts in Libya and Syria. UN Security Council resolution 2249, a compromise between the permanent members, does not provide legal authority for the use of force in Syria but it does provide (some) political legitimacy for such use. One reading of the resolution is as a move towards the ‘decentralisation of collective security focused on the Security Council, towards a much looser assertion of force by States...’.⁷⁰ This disruption has implications for legal doctrine – as further explored in Part IV of this paper.

Fourth, shifts in crime and criminal law implicate state policy in different ways. Increasingly, States may be subject to, and beneficiaries of, criminal acts – such as hacking. In addition, the rise of transnational and international criminal law displaces decisions on what behaviour is criminal

⁶⁴ It is not possible to offer a definitive figure without (unnecessarily in the context of this paper) resolution of the state of certain disputed territories.

⁶⁵ On the definition in international law, see B. Saul, *Defining Terrorism in International Law* (Oxford University Press, 2005).

⁶⁶ A locus classicus is F. Fukuyama, ‘The End of History?’ (Summer 1989) *The National Interest* 3. For a recent discussion of the piece in context, see L. Menand ‘Francis Fukuyama Postpones the End of History’ *The New Yorker*, 3 September 2018.

⁶⁷ K. Brown, *China’s World: What Does China Want?* (IB Taurus & Co, 2017).

⁶⁸ For a twentieth century history of the region see R Fisk, *The Great War for Civilisation: The Conquest of the Middle East* (Fourth Estate, 2014).

⁶⁹ Thornberry and Andrew F. Krepinevich Jr., ‘Preserving Primacy: A New Defence Strategy for the New Administration’ *Foreign Affairs* September/October 2016. The US is not alone amongst the former powers in its current limitations – the same can be said of the UK. See ‘Britain confronts limits of its military power’ *Financial Times* 12 December 2017.

⁷⁰ I Scobbie, ‘Strange Angel: Some Reflections on War’ *EJIL: Talk!* 14 December 2015.

and who is culpable for that behaviour. This stresses the authority of the state in relation to crimes.⁷¹ It calls into question a key state function – the maintenance of law and order – and the legitimacy the state derives from that function.

Fifth, the fallout from the global financial crisis includes a resurgence in economic nationalisms. The current fault line within politics in the Global North is not between political Left and Right, but between forms of nationalism and globalism.⁷² These tensions have been apparent for quite some time but have been brought to the forefront of public consciousness with the election of Donald Trump on the basis of a claim to ‘Make America Great Again’ and the vote in the United Kingdom to withdraw from the European Union to ‘take back control’.⁷³ This has led states to attempt to exercise greater control over certain mobilities – in particular the movement of people.

B. Transnational Counter-terrorism Law

Transnational counter-terrorism law has developed in response to the 11 September 2001 attacks – but in the context of the above disruptions of the state and world politics. It is remarkable that terrorism, previously amongst the most divisive subjects in international law, has become exemplary of transnational legal ordering in the twenty-first century.⁷⁴ As in its early use by Robespierre, today’s use of the term ‘terrorism’ relies not on objective classifications, but on judgments about the validity of a particular cause or the morality of particular tactics.⁷⁵ This subjectivity made international counter-terrorism co-operation difficult in the past. Each state’s desire to preserve its prerogative to recognise one violent uprising as legitimate, and yet denounce another, led the international community to an intellectual and political impasse.⁷⁶

Today, despite (or perhaps because of) the contestability of the term and the subjectivity of its use, multi-lateral efforts to combat terrorism tend to deny that subjectivity. It is as if responses to the politics inherent in ‘terrorism’ and ‘counter-terrorism’ ignore that very politics for fear it makes action impossible. The law in this field exists in an ‘indistinct fuzzy middle zone’ from which states attempt to evacuate ‘any antagonistic sense of politics’.⁷⁷ The

⁷¹ R. Cotterrell ‘The Concept of Crime and Transnational Networks of Community’ in V. Mitsilegas, P. Alldridge, and L. Cheliotis, eds, *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative, and Transnational Perspectives* (Hart Publishing, 2015).

⁷² ‘The New Political Divide’, *The Economist*, 30 July 2016.

⁷³ See R.F. Ingehart and P. Norris, ‘Trump, Brexit, and the Rise of Populism: Economic Haves and Cultural Backlash’, Harvard Kennedy School Faculty Research Working Paper, 2016.

⁷⁴ See C.C. Murphy, ‘The Dynamics of Transnational Counter-terrorism Law: Towards a Methodology, Map, and Critique’ in F. Fabbrini and V. Jackson (eds), *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar Publishing, 2015).

⁷⁵ It is not necessary to define terrorism here as the paper’s subject is ‘counter-terrorism’ (ie action by states and international organisations to combat what they consider to be terrorism). For a discussion of the political problems in the definition of terrorism, see N. Chomsky, ‘International Terrorism: Image and Reality’ in A.L. George (ed), *Western State Terrorism* (Polity Press, 1991).

⁷⁶ B. Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006).

⁷⁷ M. Stone, I. Wall, C. Douzinas, ‘Law, Politics, and the Political’ in M. Stone, I. Wall, C. Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press, 2012).

extent to which this is occurring not just in national law, but also transnational law, is the subject of a growing literature.⁷⁸ Comparative law can be a useful tool to identify convergences in national law and policy that may be a consequence of transnationalisation. The most comprehensive monograph on comparative counter-terrorism law, *The 9/11 Effect*, notes ‘the transnational reality of counter-terrorism’.⁷⁹ A leading essay collection on the subject speaks of ‘the complexity of transnational legality’.⁸⁰ The most extensive comparative work thus far, *Comparative Counter-terrorism Law*, examines twenty-two jurisdictions across six continents.⁸¹ It claims that the study of counter-terrorism law across jurisdictions must address the ‘significant drivers towards convergence that at the extreme would only be satisfied by a uniform and homogenous global counter-terrorism law’.⁸²

The principal driver towards such homogeneity has been the UN Security Council. In a series of resolutions from 2001, the Security Council has driven forward its agenda to extend an apparatus of control. Key resolutions, set out above, require states to adopt legislation and pursue policies that would previously have been left to national organs of government to adopt, or not, on the basis of national priorities. This is ‘hegemonic international law’ and, although it may well be *ultra vires* the UN Security Council, in the absence of any body with supervisory jurisdiction it is *de facto* lawful.

The Security Council may perhaps be the most potent actor, and its resolutions the most potent dynamic, for the transnationalisation of counter-terrorism law. But there are also others. One contextual examination of the transnationalisation of counter-terrorism law identifies at least six dynamics: global governance such as the Security Council, regional government, bilateral agreements, legal diffusion, extra-territoriality, and private rule-making and enforcement. The dynamics are rule-making or rule-enforcing processes that contribute to the transnationalisation of law. They entail the generation and application of rules in ways that go ‘beyond the state’: that transcend the jurisdiction-bound rule-making and enforcement processes in a legal system. The list of six dynamics may not be exhaustive and they are not entirely distinct from each other.

One reason for this lack of distinction is the existence of overlapping epistemic communities. The dynamics are at their most potent when they operate together.⁸³ For example, if a network of public and private actors develop a set of principles which are then endorsed by the UN Security Council

⁷⁸ See C.C. Murphy, ‘The Dynamics of Transnational Counter-terrorism Law: Towards a Methodology, Map, and Critique’ in Federico Fabbrini and Vicki Jackson (eds), *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar Publishing, 2015).

⁷⁹ K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011).

⁸⁰ V.V. Ramraj, ‘The impossibility of global anti-terrorism law’ in V.V. Ramraj, M. Hor, K. Roach and G. Williams, *Global Anti-Terrorism Law and Policy* Second Edition (Cambridge University Press, 2012), p. 63.

⁸¹ K. Roach, *Comparative Counter-terrorism Law* (Cambridge University Press, 2015).

⁸² Roach, n 80 above, p 4.

⁸³ These are networks of ‘professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge or issue-area’. See P. Stoeva, *New Norms and Knowledge in World Politics* (Routledge, 2010), p. 16 for a discussion of a definition from P. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, (1992) 46(1) *International Organisation* 3.

into international law, enacted into EU law (and thus the law of its Member States), and then enforced and emulated across the globe, counter-terrorist finance law has indeed become transnational. This is no mere hypothesis – witness the development of Financial Action Task Force Special Recommendations on Counter-Terrorist Finance, their endorsement by the UN Security Council in resolution 1617, their enactment in EU law in the Third Anti-Money Laundering Directive, and their enforcement and emulation by FATF-style bodies around the world.⁸⁴ This inter-relation in practice is a compelling reason to explore them as a whole.⁸⁵

Alongside these dynamics lies the use of *transnational counter-terrorism illegalities*. These have already been encountered above in relation to action by states within their territories. They may also arise as transnational counter-terrorism operations. Roach notes that while US law has had (perhaps surprisingly) little influence on counter-terrorism law, American impact takes a different form. It arises as ‘pressure to co-operate with a range of counter-terrorism programs, such as spying and rendition, which themselves are not specifically authorized in American legislation’.⁸⁶

This transnationalisation of counter-terrorism legalities and illegalities poses certain challenges for legal principles. Chief amongst these is the idea of the *rule of law* as a political value and a legal principle. In particular, resolutions such as Security Council Resolution 2178 (2015) may be used by ‘authoritarian states to have their repression of internal opposition rubber-stamped at the highest level of international law’.⁸⁷ Transnational counter-terrorism may therefore entail a form of ‘control beyond the state’.⁸⁸ This critique echoes social control theories in Anglo-American criminology as well as critical governance theorists.⁸⁹ Imagine a dystopia: that national political agency is circumscribed by discipline through technical assistance, that political contestation diminishes within states and across them, and that transnational counter-terrorism law evolves beyond a prohibition regime into a mode of global governance.⁹⁰ This dystopia may still be precisely that – a nightmarish scenario that remains more cautionary tale than reality. Nevertheless,

⁸⁴ See Murphy, n 2 above, Chapter 4: Counter-Terrorist Finance.

⁸⁵ For an exploration of the operation of FATF standards in Brazil and Argentina, for example, see M. Rocha Machado, ‘Similar in their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina’ in G.C. Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge: Cambridge University Press, 2013). For a study of terrorist financing in an even broader range of jurisdictions see the contributions to Roach, 2015.

⁸⁶ Roach, n 80 above, p 40.

⁸⁷ K. Ambos, ‘Our terrorists, your terrorists? The United Nations Security Council urges states to combat ‘foreign terrorist fighters’, but does not define terrorism’ (*EJIL: Talk!*, 2 October 2014) online: <<http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>>. See also C. Gearty, *Liberty and Security* (Polity Press, 2013).

⁸⁸ This idea combines Jessup’s ‘law beyond the state’ with Garland’s ‘culture of control’. See D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2002).

⁸⁹ The recent trend towards Foucauldian studies of public international law, and of counter-terrorism law, are relevant here. See, for example, I. Roele, ‘Disciplinary Power in the UN Counter-Terrorism Committee’ (2014) 19(1) *Journal of Conflict and Security Law* 49, see also the symposium in (2012) 25 *Leiden Journal of International Law* 603.

⁹⁰ See, for example, the work of Jonathan Simon, on governance through crime: J. Simon, *Governing through Crime: How the War on Crime transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007).

transnational counter-terrorism law and policy, in the contest of states subject to disruption, has significant implications for law and government.

IV. IMPLICATIONS FOR LAW AND GOVERNMENT

The dynamics of globalisation and their interplay with terrorism and counter-terrorism are manifold. A common consequence of globalisation, terrorism, and counter-terrorism, is the state being under stress. If the state is under stress then so too is its rule of law. In this part of the paper the focus is on certain implications in law and government as a result of the stress on the state and the challenges to its rule of law. They are (A) agenda-setting; (B) transgressions and disruptions of legal categories; (C) displacements of power; (D) spatial erosions and collapses; and (E) reassessment of normative foundations.

A. Agenda-Setting

The capacity to set agendas – and not just make decisions – is a dimension of power.⁹¹ The promulgation of transnational law has implications for agendas at both international and national levels. Indeed, transnational counter-terrorism law plays a particularly strong agenda-setting role, because it addresses a threat which purports to be existential to states and international organisations.

The requirements of UN Security Council resolutions that all states adopt legislation and policies against terrorism sets agendas at both international and national levels. Some states, as set out above, may welcome the opportunity to use an international obligation as justification for national objectives. In 2018, President Erdogan of Turkey went one further than President George W. Bush, saying ‘you are either with us or you are terrorists’ in response to political opposition.⁹² Saudi Arabia has been the subject of critical reports for its use of counter-terrorism as an excuse to suppress domestic political opposition. UN Special Rapporteur, Finnoula ní Aoláin, warns of dangers to civil society and human rights defenders of national counter-terrorism laws and policies that are justified by reference to Security Council resolutions.⁹³

For other states, however, the imposition of an agenda by the Security Council may be an unwelcome interference with national public policy prerogatives. The pre-eminence of ‘terrorism’ on the international agenda belies its lesser importance in parts of the world where concerns about food security, public health, climate change, and other global risks are in more pressing need of attention. A Pew Research Centre global survey published on 1 August 2017 found that, whereas in Europe violence by ‘Islamic State’ was seen as the most significant threat, in Asia-Pacific the group were only of marginally more concern than ‘global climate change’. In the Middle East it

⁹¹ See S. Lukes, *Power: A Radical View* Second Edition (London, Palgrave, 2004).

⁹² ‘Erdogan’s Turkey: ‘You are either with us or you are terrorists’, Euractiv, available at: <https://www.euractiv.com/section/global-europe/opinion/erdogans-turkey-you-are-either-with-us-or-you-are-terrorists/> last accessed 10 December 2018.

⁹³ F. ní Aoláin, ‘Counter-terrorism and Crackdowns on Civil Society’, *Just Security*, 5 January 2018.

was the ‘condition of the global economy’ that was of greatest concern, and in Africa and Latin America ‘global climate change’ topped the list.⁹⁴

One consequence of transnational counter-terrorism law is that these other global public goods may either receive less attention from institutions of global governance or, so as to secure that attention, may reframe concerns as ‘counter-terrorism’ or ‘security’ matters. However, even if the pursuit of certain other public goods may help to counter terrorism or, in broader terms, counter extremism, it is not necessarily beneficial for that effort to be so labelled.⁹⁵

B. Transgressions and Disruptions of Legal Categories

The need to respond to terrorism has led to transnational legal measures that are transgressive and disruptive of legal categories – in jurisdictional, institutional, and doctrinal terms. In jurisdictional terms, a central point of international co-operation has long been the principle of *aut dedere aut punier* – extradite or prosecute. States were obliged to either exercise jurisdiction over those suspected of terrorist acts or to allow other states to do so. Nevertheless, past international co-operation also acknowledged the need for certain exemptions from this principle.⁹⁶ Today, the broader scope of Security Council resolutions, as well as the shift from criminal to administrative action, facilitates and even requires transnational exercises of power. States are under obligations to recognise, and give effect to, each other’s choices as to what constitutes ‘terrorism’.

In institutional terms, the response has seen a shift in the site of decision-making in the United Nations from the General Assembly to the Security Council. This shift correlates with the seeming depoliticisation of terrorism as a subject of international law. The diversity of perspectives in the UN General Assembly on the definition of terrorism has prevented the adoption of the Comprehensive Convention on International Terrorism.⁹⁷ The Security Council’s power has, at the same time, been made broader and deeper by virtue of its exercise. It is broader insofar as the Council has adopted several resolutions that target individuals. The power is deeper, in terms of its penetration of national legal systems, as the Council mandates action by states to which previously they had the right to exercise their sovereign consent. The desire for international efforts has led to Security Council empowerment, in part because of the General Assembly stalemate, as in that forum the questions of political contestation are not so easily avoided.

There are also disruptions of legal doctrine. The law on the use of force has long been contestable – as the debate over the intervention in the 1990s in the

⁹⁴ Pew Research Center, ‘Globally, People Point to ISIS and Climate Change as Leading Security Threats’, August, 2017.

⁹⁵ N. Robinson and C.L. Kelly, *Rule of Law Approaches to Countering Violent Extremism* ABA ROLI Rule of Law Issue Paper, May 2017, p 18.

⁹⁶ For example, the Council of Europe Convention on the Suppression of Terrorism, Strasbourg, 27.1.1977, seeks to circumscribe the circumstances in which states could refuse extradition on the ground that an offence was a ‘political offence’. The ability to refuse allows states to acknowledge some criminal offences – for example those undertaken against an oppressive regime – as ‘political’ and perhaps legitimate.

⁹⁷ See ‘Fight against International Terrorism Impeded by Stalemate on Comprehensive Convention, Sixth Committee Hears as Seventy-Third Session Begins’, 3 October 2018, available: <https://www.un.org/press/en/2018/gal3566.doc.htm>.

former Yugoslavia makes clear.⁹⁸ An instructive example in the present context is resolution 2249 (2015) in relation to action against Islamic State in Syria. The resolution is facilitative of the use of force. It has ‘constructive ambiguity’ insofar as the language used suggests that although the Council might welcome the use of force it does not authorise it.⁹⁹ The finding of a ‘threat to international peace and security’, language which links with Article 39 UN Charter, and the exhortation that states take ‘all necessary measures’ is suggestive of an authorization of the use of force.¹⁰⁰ However, the resolution merely ‘calls upon’ states to act, rather than using the terms ‘authorizes’ or ‘decides’. The result is a resolution that legitimizes the use of force but does not provide it with a legal basis. Other disruptions challenge some of the normative foundations of international and national legal order – as this section will later explore.

C. Displacement of Power

Perhaps most notable of the trends has been the displacement of the locus of exercise of power from the public to the private sector. Thus, controls on global mobilities – people, finance, data – are all dependent on co-operation with, or co-option by the state of, the private sector.

The foremost field has been the financial sector. The restriction of the financing of terrorism became an immediate policy priority for the US government in the aftermath of the 11 September 2001 attacks. Efforts to ensure compliance with a strict regime of ‘Know Your Customer’ and ‘suspicious transaction’ rules led to UN Security Council resolutions and the resurgence of the Financial Action Task Force, a body previously used to disseminate best practice in anti-money-laundering.¹⁰¹ The efficacy of much CTF law and policy was questionable from the outset because many violent attacks cost little, because the regulatory burden on the financial sector is significant, and because of a negative impact on individuals and organisations that fall foul of the regime (even if innocent). Today, critics of the regime include Peter Neumann, previously an advisor to the UN Security Council and Director of the International Centre for the Study of Radicalisation and Political Violence.¹⁰²

Analogues can be found in relation to international travel. The US is the leader in the field, with its requirement that ‘Passenger Name Records’ be sent to US authorities in advance of flights to the territory, a policy that has led to conflicts with the EU over the security of personal data.¹⁰³ Despite these conflicts, however, the EU itself has put in place PNR programmes, as have

⁹⁸ See B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1; A. Cassese, ‘*Ex Inuiriā Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *European Journal of International Law* 23.

⁹⁹ D. Akande and M. Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS Resolution’ *EJIL:Talk!* 21 November 2015.

¹⁰⁰ P. Starski, ‘Legitimized Self-Defence’ – Quo Vadis Security Council’ *EJIL:Talk!* 10 December 2015.

¹⁰¹ See Murphy, n 17 above, *passim*. See further M. deGoede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (Minneapolis, University of Minnesota Press, 2012).

¹⁰² P.R. Neumann, ‘Don’t Follow the Money: The Problem With the War on Terrorist Financing’ *Foreign Affairs* July/August 2017.

¹⁰³ See Murphy, n 49 above, pp. 158-168.

Australia, Canada, and other states. In addition to PNR surveillance, states including the US operate more restrictive visa regimes, and ‘no fly’ lists, some of which rest on contestable legal grounds.¹⁰⁴

The most recent focus on these efforts to surveil and restrict mobilities relates to data: public and private communication. Internet communication platforms such as Facebook, Twitter, and WhatsApp, are under increasing pressure to monitor user content for, amongst other transgressions, material that may radicalise other users.¹⁰⁵ There is also fresh grist to the mill of the ‘Crypto-Wars’ – tension between states who seek access to encrypted communications and companies and users that value encryption – in relation to the use of messenger services by those under suspicion of terrorism.

To an extent, the displacement of the public sphere from a physical space that is ‘public’ (or in public ownership) to spaces that are, in effect, ‘private’ (whether airline passenger jets or the socio-techno-legal space of the internet) makes reliance on the private sector for regulation inevitable. However, such reliance presents challenges for the law. First, the private sector’s interests (user experience and, more likely, the generation of revenue) do not necessarily align with those of a particular, or any, state. Second, the reality of global value chains, in particular in the service industry, can leave a particular company subject to multiple regulatory regimes – some of which may be in direct conflict. Imagine, for example, a demand for social media user data by US authorities that is not in compliance with EU law being sent to a company that operates in both jurisdictions. Third, even if a harmonious regulatory regime is developed, there is clear scope for an accountability gap for those subject to the regime (service users). This gap may be institutional (for example human rights norms do not ordinarily have ‘horizontal effect’ – i.e. effect between private parties) or geographic – a consideration to which the discussion next turns.

D. Erosions and Collapses of Spatial Boundaries

Perhaps the most obvious consequence of globalisation has been the erosion and sometimes collapse of spatial boundaries.¹⁰⁶ An increase in global mobilities renders the distinction between a state’s ‘internal’ and ‘external’ security more difficult, if not impossible, to maintain. Furthermore, the relationship between a state’s foreign policy and its internal or homeland security has come to the fore.

The spatial collapses can have a direct impact on policy. In his final report as Independent Reviewer of Terrorism Legislation, David Anderson Q.C. undertook an examination of a policy known as ‘Deportation with

¹⁰⁴ See M deGoede and G Sullivan, ‘The Politics of Security Lists’ (2016) 34(1) *Environment and Planning D: Society and Space* 67.

¹⁰⁵ See, for example, the speech of UK Prime Minister Theresa May at Davos on 25 January 2018: ‘Companies simply cannot stand by while their platforms are used to facilitate child abuse, modern slavery or the spreading of terrorist and extremist content.’ Available: <https://www.weforum.org/agenda/2018/01/theresa-may-davos-address/>

¹⁰⁶ In the classic D. Held and A. McGrew, D Goldblatt and J Perraton, *Global Transformations: Politics, Economics, and Culture* (Stanford, Stanford University Press, 1999), the authors note: ‘globalization reflects a widespread perception that the world is rapidly being moulded into a shared social space by economic and technological forces...’ (at p 1).

Assurances'.¹⁰⁷ This policy sought to remove from the UK those persons who were thought to be a threat to national security. Assurances is required from the states to which they would be sent that they would not face torture. However, the practice is not used as much as it would be in the past, perhaps because 'national security threats to the UK cannot simply be extinguished by removing threats from the jurisdiction'.¹⁰⁸ Thus – expulsion of a potential threat from the territory of the state is no longer as efficacious a means to address the threat as it might once have been.

A further indicator of these spatial collapses is the extension of European human rights law, or at least its enforcement, to spaces in which a European state exercises effective control over territory. Thus, when European military forces operate in other jurisdictions (as militaries tend to do), they may be held to account for human rights abuses as if they were within the jurisdiction.¹⁰⁹ Despite the appeal of accountability for military abuses of human rights there remain difficult questions of effectiveness as well as the interaction between human rights law and humanitarian law.

E. Re-examination of Normative Foundations

The rise of transnational law against terrorism has also caused a re-examination of the normative foundations of national and international legal orders. The focus of legal philosophy on the state, and the question of the construction of legal authority beyond the state, have both been subject to increasing interrogation.¹¹⁰ However, despite the disputation of the state's capacities – such as those set out in previous parts of this paper – there remain good reasons for legal philosophy's focus on the state. For Raz, the state is, and is likely to remain, the 'most comprehensive legally-based social organisation'. By this he claims that the state has 'an extensive responsibility within its domain' and 'freedom from external legal constraints'.¹¹¹ Globalisation's disruption to the state is calling this into question but it has not – yet – led to a replacement.

International law has always had to endure contestation over its existence. For Capps and Olsen, however, it is now 'an uncontentious observation about the very fabric of global society that international law can no longer be reduced to a conjunction of treaty law and diplomatic relations'.¹¹² This statement, which opens their examination of legal authority beyond the state, is profound in its implications. Aspects of legal and political theory as regards states within the international legal order (as distinct from states within national legal orders) must now be understood in a different context to the post-Westphalian settlement. The disruptions to world politics set out earlier in this paper are part of that context – so too are the novel forms of international

¹⁰⁷ David Anderson Q.C., *Deportation with Assurances* Cm 9462 (London, The Stationary Office, 2017).

¹⁰⁸ *ibid.*, para 3.6.

¹⁰⁹ See discussion in S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20(4) *European Journal of International Law* 1223.

¹¹⁰ J. Raz, 'Why the State?' Oxford Legal Studies Research Paper No. 73/2014; and also J. Raz, 'The Future of State Sovereignty' Oxford Legal Studies Research Paper No. 61/2014.

¹¹¹ Raz, 'Why the State?' n 110 above, pp 2-3.

¹¹² P. Capps and H.P. Olsen, 'Introduction' in Capps and Olsen, eds, *Legal Authority Beyond the State* (Cambridge University Press, 2018), p. 1.

law – such as Security Council resolutions that target individuals. Transnational counter-terrorism law may be the pre-eminent example of the development of a normative order by dynamics which transcend legal jurisdictions and reinforce each other. That a principal dynamic is the hegemonic effect of UN Security Council resolutions demonstrates, however, the persistence of hierarchies – those resolutions draw on Article 103 of the UN Charter and the primacy of the Charter in international law.

As a final point, it is notable that challenges to normative foundations exists not only in relation to the rules by which we recognise and legitimise legal authority, but also in substantive legal rules. Certain substantive – indeed foundational – rules of international law, such as the absolute prohibition on torture, were also brought into question in the aftermath of the 11 September 2001 attacks.¹¹³ In light of the attacks, it was no longer thought sufficient in some corners of the academic, policy, and political worlds, to sustain an argument against torture only on the basis of its contrariness to international law. Rather, the normative foundations of those rules of international (and national) law were open to question once more.

Insofar as terrorism and counter-terrorism, in this century, have been disruptive of national and international legal orders, they force lawyers to reassess and reassert the normative foundations of those orders. As they do so they contribute to the development of transnational counter-terrorism law – the normative foundations of which are still being established.

V. UNINTENDED CONSEQUENCES & ROOT CAUSES

All of what has gone before in this paper seeks to demonstrate the close links between the state, its monopoly on the legitimate use of coercive force, challenges to that monopoly through terrorism, and the impact of globalisation on all of these dynamics. As we approach the twentieth anniversary of the 11 September 2001 attacks, there is a growing appreciation of the intrinsic – and causal – links between activities of states and of international organisations to combat terrorism and the risk of further terrorist attacks. In a *Time* magazine interview of 10 September 2001 Colin Powell, the US Secretary of State, declared that Saddam Hussein didn't cause him to lose much sleep at night.¹¹⁴ In 2010, Eliza Manningham-Buller, the former Director of the UK Security Service, identified a link between the US-led invasion of Iraq and the threat of terrorism to the UK.¹¹⁵ In 2016, the UN Secretary General held that the rise of Islamic State 'has been facilitated by the protracted conflicts in Iraq and the Syrian Arab Republic and the resulting political and security instability, as well as by the weakening of State institutions and the inability of the two States to exercise effective control over their territories and

¹¹³ This was particularly the case in the United States. See K.J. Greenburg, *The Torture Debate in America* (New York, Cambridge University Press, 2006). For an analysis from the European perspective see N. Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford, Hart Publishing, 2019).

¹¹⁴ 'The Only Voice I Listen to is the President's', *Time Magazine*, 10 September 2001, in which Powell, when asked about the threat of Saddam Hussein, said 'I do not lose a lot of sleep about him late at night'.

¹¹⁵ 'Iraq Inquiry: Eliza Manningham-Buller's devastating testimony', *The Guardian*, 20 July 2010.

borders'.¹¹⁶ Today, the US National Security Strategy identifies transitional justice – in particular in Iraq and Syria – as part of a 'preventive' counter-terrorism strategy. It states that 'jihadist terrorists and organized crime, often operate freely from fragile states and undermine sovereign governments. Failing states can destabilize entire regions.'¹¹⁷ Such failing states may be a cause of military misadventures – for example by the US in the Middle East – but they can also be a result of them. The recognition that terrorism may be an unintended consequence of state action to prevent terrorism is overdue. However, the implications of that conclusion for law – and not only military action – requires further study. A 2017 study for the American Bar Association (ABA) Rule of Law Initiative concludes that 'the most prominent 'push' factor correlated with terrorism is state curtailment of civil liberties and political rights.'¹¹⁸ Yet these are precisely the elements of governance that come under threat from transnational counter-terrorism law.

New attention to 'root causes' is a step away from terrorism as a 'crisis' in international law and towards a counter-terrorism law 'of the everyday'.¹¹⁹ A focus on factors that lead to radicalization, greater awareness of unintended consequences in foreign policy, and attempts to build 'resilience' in populations as well as in physical and electronic infrastructure may give cause for optimism that the worst excesses of previous counter-terrorism efforts may not shape the future. A challenge that will persist is that once the focus shifts from the immediate concerns of a crisis, the graphic imagery of which can mobilize public opinion and political will, agreement as to what constitutes appropriate action may be more difficult. Efforts to address the root causes of terrorism, for example, in terms of geo-political instability, economic inequality, and other macro trends, will require consensus on contentious subject as different perspectives of global public goods come into conflict. The challenge is all the greater when the initiatives in question are transnational in origin. A further challenge is that the new acts of terrorism may once more lay bare a particular state's 'boundary conditions' and demand a more overt, more coercive response. In doing so the state may engage the dynamics that have led to the proliferation of transnational counter-terrorism law since 11 September 2001 and shift the mode of governance once more towards crisis.

A tension arises, whether in 'crisis' or in the 'everyday', for those who promote rule of law. There can be both skepticism about claims that 'terrorism' is an exceptional phenomenon and resistance to the idea that counter-terrorism measures should cross-pollinate with ordinary law. The more honest position, in both descriptive and normative terms, may be to acknowledge that the foundations upon which both international and national law rest are subject to ongoing disruption and contestation. Globalisation, terrorism, and the response to terrorism, are all disruptors. Their interplay is likely to reshape perceptions of states and their authority for years, perhaps decades,

¹¹⁶ UN Security Council, *Report of the Secretary-General S/2016/92*, para 4.

¹¹⁷ J.D. Wise and A.H. Friend, 'How Transitional Justice Can Help the U.S. Defeat Terrorism', *JustSecurity*, 6 August 2018, available: <https://www.justsecurity.org/60027/transitional-justice-defeat-terrorism/>.

¹¹⁸ N. Robinson and C.L. Kelly, *Rule of Law Approaches to Countering Violent Extremism* ABA ROLI Rule of Law Issue Paper, May 2017, p 6.

¹¹⁹ Charlesworth, n 16 above, p. 391 discusses how such an approach would require 'a methodology to consider the perspectives of non-elite groups'.

to come. The more important question is not which model of counter-terrorism, or which level of governance, is preferable. It is how political and legal orders can maintain, without violence, spaces for contestation over local and global public goods. For it is to this effort that the state, and its rule of law, owe their existence.